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Harmonizing Human Rights in Europe through the Charter of Fundamental Rights of the European Union

Master Thesis

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LIST OF ABBREVIATIONS

AG	Advocate General
CDDH	Council of Europe's Steering Committee for Human Rights
CFR	Charter of Fundamental Rights of the European Union
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
EurCommHR	European Commission of Human Rights
IGC	Intergovernmental Conference
OEEC	Organization of European Economic Cooperation
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

Human rights in Europe are regulated by two different regimes; the "Strasbourg regime" and the "Luxembourg regime". Although in principle autonomous the two regimes are in fact interconnected. Already in the beginning of the 70s the European Court of Justice for the first time held that in searching for the common constitutional standards it will look to treaties and conventions entered into by the Member States, especially to the European Convention on Human Rights.[1] From that point on both courts started to interpret the Convention without any hierarchical relationship between them and without any formal mechanisms which logically increased the risk of overlapping judgments.

This Master thesis argues that in most cases the two European constitutional courts did however apply the same interpretation, by developing some kind of conflict-avoidance strategies, fostering the harmonization of human rights standards in Europe. The entry into force of the Lisbon Treaty reinforces the protection of fundamental rights in the European Union by indicating the accession of the EU to the ECHR and granting the Charter of Fundamental Rights of the EU binding force.[2] It is going to be argued that these developments contribute towards further harmonization and approximation of human rights standards between the two separate regimes.

Contrary to extensive analysis of the relationship between the two European courts from the perspective of the ECJ, less if even any attention has been raised as regards the reliance of the Strasbourg court on the system of fundamental rights in the EU. In Master thesis I am going to focus exactly on this aspect. I will argue that the adoption of the Charter introduces a new element in the trans-national judicial conversation and that despite concerns of weakening the process of harmonization the Charter in fact fosters mutual reliance.

I will prove my hypothesis by first using a comparative method in order to designate the different approaches of the protection of human rights in the Council of Europe and in the EU. In Chapter 2 I will thus especially focus on the overlap of jurisdiction and the strategies

[1] Case 4/73 *Nold* [1974] ECR 491, para. 13 and Case 36/75 *Rutili* [1975] ECR 1219, para. 32.
[2] See Article 6 TEU.

and methods the Courts use to overcome the interface between both regimes. With that I will demonstrate the process of harmonizing human rights standards in Europe. Next, in Chapter 3, I will focus on the meaning of the Charter for the Strasbourg regime. After presenting the importance of this new Bill of Rights document, I will focus on its relationship with the ECHR. The core of the thesis will affirm that the binding nature of the EU Charter will provide for harmonization of human rights standards at an even higher level. I am going to prove this point by analysing the latest jurisprudence of the ECtHR on the usage of the EU Charter. The results will then be presented in Chapter 4 which will offer some prediction as to whether this mutual reliance will lead to a common standard of human rights protection in Europe or whether the dual regime will be maintained.

My arguments, in particularly in the first two chapters, are going to be based on legal literature, legislation of the Council of Europe and the EU as well as on case law of both respective Courts. In the later chapters I will base my opinion mainly on the analysis of the jurisprudence of the ECtHR and provide some estimation as to the future developments of judicial dialogue.

2. THE INTERFACE BETWEEN THE "STRASBOURG REGIME" AND "LUXEMBOURG REGIME"

This present chapter will provide with an historic overview of primarily judicial based relationship between the system of human rights under the auspices of the Council of Europe and the system of protection of fundamental rights under the aegis of the EU. By doing that I will demonstrate that despite initial autonomy the two systems are mutually connected. The fear that this simultaneous coexistence without any institutional or normative relationship will cause uncertainty as to the level of human rights standards in Europe is to some extend misplaced. The two regimes in fact started to approximate human rights by creating interpretative and conflict-avoidance mechanisms.

For the purpose of this thesis, the harmonization[3] of human rights should be understood as a process of establishing common European standards wherein individuals are provided with the same level of protection of their human rights regardless of the human rights document used or the court rendering the final decision. This can only be achieved through both regimes applying the same normative standards of human rights protection and exercising comity towards each other.[4] Such process of standardization of common human rights protection promotes the notion of universality of human rights, which would otherwise be undermined by the existence of two different standards of protection in Europe.[5]

2.1. From the Viewpoint of the "Strasbourg Regime"

2.1.1. Protection of Human Rights under the Council of Europe

This present section is meant to briefly delineate the main characteristics of the Strasbourg human rights regime, especially emphasizing the dynamic nature of the Convention and the innovative enforcement regime.

[3] The terms harmonization, approximation and standardization are going to be used interchangeably.
[4] Y. SHANY, The Competing Jurisdictions of International Courts and Tribunals, Oxford University Press, 2003, New York, pp. 278-280.
[5] P. MAHONEY, The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention, 23(8-12) (2002) HRLJ, p. 301.

The Council of Europe was founded to protect values such as human rights, pluralist democracy and the rule of law. The organization seeks to develop common and democratic principles throughout Europe based on the European Convention for the Protection of Human Rights and Fundamental Freedoms. The latter was signed in Rome on 5 November 1950 and entered into force on 3 September 1953. The Convention is essentially unique as it is provided with an enforcement mechanism of last resort[6] for any individuals and organizations who feel that their human rights have been violated by a High Contracting Party to the Convention and a less frequently used system of accusations of violations made between states. This means that all individuals in Europe are able to invoke the rights therein before the judiciary, either domestically or before the supra-national European Court of Human Rights which started to operate in 1959. Until the introduction of Protocol No. 11[7] individual complaints were filed to the European Commission of Human Rights which could forward the case to the ECtHR or to the Committee of Ministers. The Protocol however simplified the system by releasing the EurCommHR and making the individual petition compulsory.

Despite the unique enforcement system of the Convention there are some deficiencies as regards its effectiveness. The introduction of Protocol No. 11 resulted in generating an overload of cases for the Court. Moreover, problems with implementation of judgments occurred. Firstly, Article 41 ECHR authorizes the ECtHR to grant, if necessary, just satisfaction to the successful applicant; however the Court can only make a declaratory judgment and cannot annul contested national legislation. Secondly, the ECHR, contrary to primary EU legislation, possesses different legal statuses in Contracting Parties. The Convention does not necessarily take primacy over national constitutional orders and the direct effect of its provisions is dependent on each individual legal system. Thirdly, whilst the Contracting Parties are under the obligation to ensure that the rights in the ECHR are respected, they are left free to decide on the form and manner.[8] Moreover, the Committee of Ministers which is responsible for the execution of judgments by monitoring the solutions taken by the States can only use political sanctions which till now proved to be ineffective since many States repeat the same violations.

[6] The applicants must first exhaust all domestic remedies and only then they can bring the complaint within the next six months. See Article 35(1) ECHR.
[7] Protocol 11 to the ECHR on 1 November 1998.
[8] T. C. HARTLEY, European Union Law in a Global Context: Text, Cases and Materials, Cambridge University Press, 2004, Cambridge, p. 283.

Because of developments in the legal systems of the Contracting Parties and progressive evolution of the society the once innovative Convention text was soon threatened with becoming old-fashioned and the rights enshrined irrelevant and illusionary. In order to maintain an effective protection of human rights the Strasbourg court started to interpret the Convention in the light of present-day conditions currently prevailing in democratic States and thus started to analyse it as a "living instrument".[9] This dynamic approach is most evident when looking at the interpretation of economic and social rights. Contrary to the Universal Declaration of Human Rights from 1948, the ECHR is a legally binding instrument encompassing mostly civil and political rights. At the time of drafting the opinion was that social and economic rights should be included in a separate European Social Charter[10] which was, contrary to its "sister treaty", not provided with any enforcement mechanism. Since the ESC was ineffective in providing for a sufficient level of protection of economic and social rights, the Strasbourg court started to interpret the ECHR in a dynamic sense.[11] In this way the ECtHR established that the protection of human rights requires State parties to undertake positive actions in further areas of governmental responsibility, relating mainly to insurance of economic and social rights.[12] In fact, there is also no clear distinction of rights in both documents which helped the Court to interpret that some ECHR provisions have direct implications in the field of social matters.

Although the ECHR is a living instrument there are limits to such evaluative interpretation. No judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by Convention provisions.[13] The unbeatable limits to the dynamic interpretation were mitigated by way of additional optional Protocols which are mostly intended to grant additional new rights and come into force between ratifying Contracting Parties. Sadly, no comprehensive system of protection, especially in the field of economic and social rights, can until now be detected.[14]

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[9] Case of *Tyrer v. the United Kingdom*, Application No. 5856/72, para. 31.
[10] The European Social Charter was drafted by the Council of Europe, amended by 1988 Additional Protocol and revised in 1996.
[11] See Case of *Airey v. Ireland*, Application No. 6289/73, para. 26.
[12] E. PALMER, Judicial Review, Socio-Economic Rights and the Human Rights Act, Hart Publishing, 2007, Oxford, Portland, pp. 50-51.
[13] Case of *Johnston and Others v. Ireland*, Application No. 9697/82, para. 53.
[14] See R. St. J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), The European System for the Protection of Human Rights, Kluwer Academic Publishers, 1993, Dorderecht, pp. 866-871.

2.1.2. Reliance of the European Court of Human Rights on the EU Legal Order

The Strasbourg jurisdiction interrelates with the EU legal order on two levels: the ECtHR is either confronted with the ECJ jurisprudence on fundamental rights issues or it is called to decide cases involving breaches by EU Member States when implementing or acting under the EU law. In both cases the two human rights regimes interrelate. Whereas the first option mainly promotes the harmonization of human rights as the Strasbourg court, by matter of choice, refers to the Luxembourg case law, the second issue triggers the problematic overlap of jurisdiction and establishes a potential hierarchical relationship between them.

2.1.2.1. References to Case Law of the European Court of Justice

With regards to references to the ECJ jurisprudence, it is important to notice that the mutual reliance and jurisdiction overlap between autonomous international courts is normally a rarity. However, the only exception are human rights cases where courts tend to assist themselves more by citing each other jurisprudence in order to provide for the maximum standard of human rights protection of individuals. The ECtHR is not an exception in that sense as it only seldom refers to decisions of national courts or other international courts, including the ECJ.

Nevertheless with the emergence of fundamental rights protection in the EU the Strasbourg court started to look at the jurisprudence of Luxembourg court more thoroughly. Douglas-Scott estimates that in most cases the Court did so approvingly.[15] For instance in *Goodwin v. UK* the ECtHR made a brief reference to the ECJ case *P v. S* about the position of transsexuals in the United Kingdom, in *Marckx v. Belgium*, it referred to the famous case *Defrenne v. Sabena* and in *Pellegrin v. France* the ECtHR specifically relied on the ECJ's definition of the concept of public service.[16] Still, there are some cases of diverging jurisprudence, the most famous being *Niemietz v. Germany* and *Colas Est v. France* where the

[15] S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev., p. 644.
[16] See Case of *Goodwin v. UK*, Application No. 28957/95, Case of *Marckx v. Belgium*, Application No. 6833/74 and Case of *Pellegrin v. France*, Application No. 28541/95 ECtHR.

right to privacy of business premises under Article 8 ECHR has a wider meaning as in the case law of the ECJ.[17]

It can be concluded that whenever the Court is confronted with case law of the ECJ it tends to follow and respect the latter's interpretation of human rights. The only exception is when it knowingly departs in order to establish a higher level of protection. Thus, the ECtHR by trying to avoid diverging judgements promotes the harmonization of human rights.

2.1.2.2. Jurisdiction over Actions Involving the EU Legal Order

This interaction between both regimes emerged when the Strasbourg court started to decide cases involving the violations of the ECHR by EU Member States with EU law as a component. Two possible situations can be distinguished: the so called collective applications directed against the EU and its Member States, or the application against a particular High Contracting Parties which implemented EU law in a way that violated human rights.[18]

With regard to the first, such applications have always been declared inadmissible since the EU is not a Contracting Party to the Convention. These cases, like *CFDT v. EC and Member States*,[19] fall outside the jurisdiction *ratione personae* of the EurCommHR and the ECtHR.

The second situation occurs when an application is brought against a Contracting Party when applying EU law. Although initially declaring requests against the EC inadmissible the EurCommHR already in the 50s held that the Convention does not prohibit State Parties to subsequently transfer their powers to international organizations.[20] In *X & X v. Germany* the Commission decided that despite of the transfer of power such EU acts do not exclude the Constricting Party's responsibility for an infringement of the ECHR.[21]

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[17] See Case of *Niemietz v. Germany*, Application No. 13710/88 and Case of *Colas Est v. France*, Application No. 37971/97. S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev., pp. 640-644.

[18] W. PEUKERT, The Importance of the European Convention on Human Rights for the European Union, in Protecting Human Rights: The European Perspective (eds. P. MAHONEY, F. MATSCHER, H. PETZOLD, L. WILDHABER), Carl Heymanns Verlag KG, 2000, Köln, p. 1111.

[19] See Case of *CFDT v. EC and Member States*, Application No 8030/77.

[20] Case of *X & X v. Germany*, Application No. 342/57.

[21] *Idem*. For a more in depth analysis see I. CANOR, *Primus Inter Pares*: Who is the Ultimate Guardian of Fundamental Rights in Europe?, 25(1) (2000) ELRev, pp. 10-11.

Because such a system proved to be unfair upon States, the Strasbourg court started to examine whether complaints are well-founded or not, applying the so-called "equivalent protection doctrine".[22] In *M & Co. v. FRG*[23] the EurCommHR held that since the EU system not only secures but also controls fundamental rights, there is a presumption of equivalent-protection of fundamental rights.

The case law of the ECtHR gradually went further and in *Cantoni v. France* case[24] the Court established an indirect external control of EU acts as it examined if the French law which verbatim implemented an EU directive infringed the ECHR.[25] The ECtHR however clearly made a distinction whether an EU act left the State with some kind of discretionary power. When the State is merely complying with its obligation to implement EU law such applications were initially declared inadmissible. Secondly, if the individual state is left with some leeway as to the implementation of Union law it could be held responsible for potential violations of the Convention. In the breakthrough *Matthews v. the United Kingdom*[26] case a complaint was made about the applicant's inability to vote in the elections for the European Parliament. Contrary to the decision of the EurCommHR, the ECtHR decided that there is no distinction between domestic or European obligations of individual States as long as it has an effective control over them. This case triggered a lively discussion on the hierarchical relationship and potential overlap between the courts as the ECtHR for the first time judged on the compatibility of primary EU law with the ECHR and condemned the Member State.[27]

In another overlapping case the ECtHR had the opportunity to define the review of Union acts more systematically. *Bosphorus*[28] was concerned with an EC Regulation based on a UN Resolution. The Court stressed that an "equivalent protection" is a rebuttable presumption

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[22] W. PEUKERT, The Importance of the European Convention on Human Rights for the European Union, in Protecting Human Rights: The European Perspective (eds. P. MAHONEY, F. MATSCHER, H. PETZOLD, L. WILDHABER), pp. 1113-1115 and G DI FEDERICO, Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty, in The EU Charter of Fundamental Rights: From Declaration to Binding Instrument (ed. G. DI FEDERICO), Springer, 2011, Dordrecht, p. 27.
[23] See Case of *M & Co. v. FRG*, Application No 13258/87.
[24] Case of *Cantoni v. France*, Application No. 17862/91.
[25] See, to that issue, K. KUHNERT, Bosphorus – Double Standards in European Human Rights Protection?, 2(2) (2006) Utrecht Law Review, pp. 180-181 and S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev., p. 637.
[26] Case of *Matthews v the United Kingdom*, Application No 24833/94.
[27] See also S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev., p. 637.
[28] Case of *Bosphorus v. Ireland*, Application No. 45036/98.

where the protection in the concrete case would be manifestly deficient.[29] With that the ECtHR expanded its jurisdiction to also EU acts that leave the Member States with no discretion; however, it therefore applied a higher presumption of compliance with the ECHR, looking only if substantive and procedural violations are potentially "manifestly deficient".

Whilst the ECtHR tried to remain cautious, when establishing its jurisdiction over actions involving EU elements by creating mechanisms such as the "equivalent protection" doctrine and the "manifest deficiency" standard and reviewing only national implementation measures, it did indirectly rule also on EU law.[30] Several problems in this relationship consequently arose. Firstly, the definition of "manifestly deficient" is indeterminate and thus likely to result in inconsistency and lack of legal certainty as to the standard of human rights protection in Europe.[31] Secondly, the introduced system of jurisdiction causes some practical problems: the Member States were in practice held responsible for violations of human rights instead of the EU and since the latter was not a Contracting Party to the Convention it lacked legal standing and was not able to defend its own legislation in front of the ECtHR.[32] Thirdly, the shared jurisdiction over national measures increases the chances of diverging opinions and thus poses a threat to the process of approximation of the human rights standards. Many believed that these problems could only be solved through the accession of the EU to the ECHR.

2.1.3. New Challenges for the Relationship between Regimes

2.1.3.1. Protocol No. 14 to the European Convention on Human Rights

The latest additional Protocol provides for the possibility for the EU to join the ECHR and consequently extends the jurisdiction of the ECtHR to decide also on the conformity of EU law with human rights standards and to also hold the EU responsible for violations of human

[29] *Ibidem*, para. 156.
[30] Some scholars are thus of the opinion that the EU has *de facto* already acceded to the ECHR. See A. VERSTICHEL, European Union Accession to the European Convention on Human Rights, in Protocol No. 14 and the Reform of the European Court of Human Rights (eds. P. LEMMENS and W. VANDENHOLE), Intersentia, 2005, Antwerpen, Oxford, p. 130 and also P. DRZEMCZEWSKI, The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights, 22(1-4) (2001) HRLJ, p. 29.
[31] K. KUHNERT, Bosphorus – Double Standards in European Human Rights Protection?, 2(2) (2006) Utrecht Law Review, p. 185.
[32] *Ibidem*, p. 186.

rights. It is believed that such system will make a further step in diminishing the divergent interpretation of both European courts and thus further harmonize human rights standards.

At first legal obstacles in the Convention text prevented the EU to become a party to the ECHR. Article 59(1) ECHR namely states that the Convention is opened for signature only to the members of the Council of Europe. Since the EU is not a supranational state, changes to existing system were needed in order to provide the legal base for a future accession.

This aim was addressed through the new Article 59(2) which was added to the Convention by Article 17 of Protocol No. 14 and which allows for the accession of the EU to the Convention. Because the EU at that time still lacked legal competence to join the ECHR no further provisions about the relationship between the EU and the ECHR could be put in Protocol. Open legal and technical issues were thus discussed in the studies of the Council of Europe's Steering Committee for Human Rights.[33] Hence, the question about the form and matter of future accession was left open for a possible future protocol or an accession treaty.[34]

2.1.3.2. The Lisbon Treaty

The adoption of the Lisbon Treaty finally provided the EU with the legal competence to join the ECHR stating that: *"The Union shall accede to the [ECHR]."*[35] Furthermore, it made the Charter of Fundamental Rights legally binding, subsequently causing two further potential problems: the risk of two parallel and diverging supranational documents of human rights and concerns that the ECJ will establish itself as the last instance of appeal for human rights issues in the EU. More than at any time before, the accession of the EU to the ECHR became crucial to oversee the potential diverging systems.

In the absence of actual accession of the EU to the Convention the ECtHR invented a new interpretative and conflict-avoidance mechanism. The Strasbourg court started to rely on the EU Charter with a tendency to mitigate the differences between both regimes and to foster

[33] See, *inter alia,* Study of Technical and Legal Issues of a Possible EC/EU Accession to the. European Convention on Human Rights, DG II(2002)006, Strasbourg, 28 June 2002.
[34] A. VERSTICHEL, European Union Accession to the European Convention on Human Rights, in Protocol No. 14 and the Reform of the European Court of Human Rights (eds. P. LEMMENS and W. VANDENHOLE), p. 135.
[35] Article 6(2) TEU.

further harmonization. This new development in the Courts' interface is going to be discussed in the core Chapter 3.3 of this thesis.

2.2. From the Viewpoint of the "Luxembourg Regime"

The following chapter is going to represent the attitude of the EU legal order towards the Convention regime. After looking at the history of fundamental rights regime in the EU I will further focus on the reliance of the ECJ to the Strasbourg regime. The last part of this section is going to discuss in depths new elements introduced by the Lisbon Treaty which provide for a new interpretative and also institutional relationship between both systems and thus further foster the Courts' dialogue.

2.2.1. From Economic Objectives to Promotion of Fundamental Rights

The protection of fundamental rights was initially an exclusive competence of national constitutional orders of the Member States and guaranteed by instruments such as the ECHR.

The development of a fundamental rights commitment was pioneered by the influential ECJ. It was in the *Stauder*[36] case where the ECJ for the first time stated that it is bound to protect fundamental rights enshrined in the general principles of EU law. However, fundamental rights were still secondary as they were not granted an organic status.[37] With the establishment of the principle of supremacy of EU law and the doctrine of direct effect national constitutional provisions became insufficient to safeguard fundamental rights. Consequently, fears of lowering the level of protection were raised in sceptical judgements of German and Italian Constitutional Courts.[38] The next two landmark decisions of the ECJ, *Internationale Handelsgesellschaft*[39] and *Nold*,[40] were a reaction on these expressed concerns. The Court held that respect for fundamental rights forms an integral part of the general

[36] Case 29/69 *Stauder* [1969] ECR 419.
[37] D. CHALMERS, G. DAVIES and G. MONTI, European Union Law: Text and Materials, 2nd edition, Cambridge University Press, 2010, Cambridge, New York p. 233.
[38] See judgment of the German Constitutional Court, also known as Solange I, BVerfG, 29.05.1974 - 2 BvL 52/71. This challenge to the supremacy of EU law was supported by the Italian Constitutional Court in a judgment *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372.
[39] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
[40] Case 4/73 *Nold* [1974] ECR 491.

principles of law, drawing inspiration from the constitutional traditions common to the Member States and international human rights treaties, respectively. In case of *Rutili*[41] the ECJ emphasized that in that respect the ECHR has a particular status.

Later development of the case law logically expanded the obligation to protect fundamental rights from EU institutions to also Member States. The ECJ exercises fundamental rights review over national measures which are implementing Union acts,[42] as well as when Member States are deviating from the free movement rules.[43] However, in recent cases like *Schmidberger*[44] and *Omega*,[45] the ECJ realized that there are some constitutional differences between Member States which can justify the restriction on fundamental freedoms. Recently the ECJ even broadened the protection as it decided that citizenship of EU alone triggers the constitutional protection of EU fundamental rights also to third country nationals who are parents of an EU citizen.[46]

As a result of the judicial activism in the area of fundamental rights the ECJ was accused of expanding the influence of EU law into areas of core national sovereignty and interfering into the role of the ECtHR. Critics also pointed out that there was no precise catalogue which would list the fundamental rights the ECJ is able to consider. This legal vacuum was proposed to be filled either by a human rights agenda or an EU Bill of Rights document.[47] With no agreement on the Charter status being reached, the latter was merely solemnly proclaimed by the Union institutions in Nice.[48] Despite its declaratory effect, the importance of the Charter lies especially in its drafting process which was extraordinarily open, transparent, based on broader democratic participation and ran by an *ad hoc* body called Convention.[49] Moreover,

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[41] Case 36/75 *Rutili* [1975] ECR 1219. This reference corresponds to the time when Convention has been ratified by all EC Member States. See P. DRZEMCZEWSKI, The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights, 22(1-4) (2001) HRLJ, p. 13.
[42] Case 5/88 *Wachauf* [1989] ECR 2609.
[43] See especially Case C-260/89 *ERT* [1991] ECR I-2925 and Explanatory notes of the Charter, CHARTER 4487/00 CONVENT 50, Brussels, 11.10.2000, CHARTE 4473/00, CONVENT 49, p. 46.
[44] Case C-113/00 *Schmidberger* [2003] E.C.R. I-565.
[45] Case C-36/02 *Omega Spielhallen* [2004] E.C.R. 9609.
[46] See Case C-34/09 *Ruiz Zambrano*, 8 March 2011 and extensive Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano*.
[47] C. MCCRUDDEN, The Future of the EU Charter of Fundamental Rights, Jean Monnet Working Paper No. 10/01, pages 4-5. See also D. CHALMERS, European Union Law, p. 237.
[48] European Council in Nice, 7 December 2000, OJ No C 364, 18 December 2000, p. 1.
[49] For more on the importance of the drafting process see G. DE BÚRCA, The drafting of the European Union Charter of Fundamental Rights, 26(2) (2001) ELRev, p. 126.

the Council of Europe was provided with a consultative status and had three Observers. The latter were quite independent which helped them to participate very actively in the drafting process especially denoting the issues of compatibility of two human rights systems.[50]

2.2.2. Reliance of the European Court of Justice on the "Strasbourg Regime"

Likewise the Strasbourg court, which refers to case law of the ECJ and now also uses the EU Charter, also the Luxembourg court relies on the jurisprudence of the ECtHR and uses the Convention to develop its own fundamental rights standards. As a result, both Courts interpret the Convention without any hierarchical relationship between them or any mechanisms which increases the risk of overlapping judgments. Moreover, due to the special nature of the ECHR as a living document and because the terms used in the Convention are mostly general the chances of diverging standards of human rights are even higher. Van den Berghe assesses that in most cases the Courts applied the same interpretation as they developed some kind of conflict-avoidance strategies and mechanisms.[51]

At first the ECJ was reluctant to accept the power to interpret the ECHR. In *Cinéthèque*[52] the Court said it had no power to examine whether French legislation complies with the ECHR as the area was within the jurisdiction of the national legislator. Further, in *Demirel*[53] the ECJ was already more willing to interpret the Convention but at the end decided that it had no power to rule upon reliance of the national legislation with the ECHR which lies outside the scope of Union law. In the famous *ERT* case the ECJ expanded the amount of national measures which it can review for the compliance with fundamental rights standards to all rules that fall within the scope of EU law.[54]

This possible jurisdictional gap was addressed when the ECJ also started to rely on Strasbourg jurisprudence. Douglas-Scott assesses that the Luxemburg court mostly used the

[50] On the Observers role see P. DRZEMCZEWSKI, The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights, 22(1-4) (2001) HRLJ, p. 21-26.
[51] F. VAN DEN BERGHE, The EU Issues of Human Rights Protection: Same Solutions to More Acute Problems?, 16(2) (2010) ELJ, pp. 112-157.
[52] Joined Cases 60 and 61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605.
[53] Case 12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719.
[54] Case C-260/89 *ERT* [1991] ECR I-2925, para. 42.

Strasbourg case law to the benefit of the applicants.[55] In the beginning the references to the Strasbourg regime were confined and mainly general. The first, still very brief, reference to a Strasbourg judgment was made in case *P v. S.*[56] The shift from general to specific references came about only in later case law where the ECJ started to quote Strasbourg case law more often and sometimes also conducted a detailed analysis. However, Advocates General were the ones who extensively analysed the ECtHR's jurisprudence and even touched upon the status of Strasbourg jurisprudence in the EU legal order.[57]

The main problem for the divergent opinions is the lack of legal obligation for the ECJ to respect the jurisprudence of the ECtHR on the interpretation of Convention rights as it only "draws inspiration" from the guidelines provided in the ECHR.[58] For that reason the ECJ does not feel obligated to follow the Convention rights or the case law of the ECtHR completely and has only applied it "by analogy". This jurisdictional and normative overlap is especially apparent in diverging judgments on the right to privacy; the right against self-incrimination and the right not to give evidence against oneself in connection to competition cases; and the right to a fair hearing as regards the position of Advocates General.[59] Van den Berghe points out that most discrepancies appeared in the field of competition law as this is the area where EU institutions have the most far-reaching powers.[60] Such divergent jurisprudence does not just prejudice the individuals and the standard of protection of their human rights but is also particularly problematic for national courts and judges which are left with two divergent standards of human rights protection.

[55] S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev, pp. 644-648.
[56] The case was concerned with transsexual rights and the ECJ borrowed the definition of transsexuals from the ECtHR jurisprudence. Case C-13/94 *P v. S* [1996] ECR I-2143.
[57] S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev, pp. 647-648.
[58] See in particular Case C-260/89 *ERT* [1991] ECR I-2925, para. 41.
[59] T. TRIDIMAS, The General Principles of EU Law, 2nd edition, Oxford University Press, 2006, Oxford, New York pp. 237-240.
[60] F. VAN DEN BERGHE, The EU Issues of Human Rights Protection: Same Solutions to More Acute Problems?, 16(2) (2010) ELJ, pp. 120-122.

2.2.3. Influence of the Lisbon Treaty on the Relationship between Regimes

2.2.3.1. New System of Protection of Fundamental Rights

The Lisbon Treaty escalates the principles of respect for human dignity, freedom, equality and human rights into the values on which the EU is founded.[61] Contrary to the Nice Treaty, Article 6(3) TEU introduces a new "three pillars" structure of fundamental rights protection in the EU; the Charter, the ECHR and national constitutions[62] mirroring the multi-layered European constitutional development based on EU citizens, peoples and nation states.[63] Weiβ even argues that the Lisbon Treaty, by granting the ECHR the status of source of EU law, partially materially incorporated the ECHR into Union primary law by virtue of Article 52 CFR and Article 6(1).[64] Even more, he suggests that with the incorporation of the core ECHR rules, the relevant case law of the ECtHR will also become legally binding.[65] Similarly Harpaz sees the Lisbon Treaty as an important step towards comprehensive and advanced fundamental rights protection, as the protection of them with the construct of general principles was insufficient.[66]

Moreover, the entry into force of the Lisbon Treaty introduces two important innovations which provide for a normative-institutional-interpretative bridge between both regimes. These are the accession of the EU to the ECHR and the binding legal force of the EU Charter of Fundamental Rights which has by virtue of Article 6(1) TEU the same legal value as the Treaties.[67] In the words of Shuibhne the Lisbon Treaty thus opens new bilateral relationships between the EU and the Charter and between the EU and the ECtHR. Also some new indirect

[61] Article 2 TEU.
[62] See also I. PERNICE, The Treaty of Lisbon: Multilevel Constitutionalism in Action, 15 (2009) Columbia J Eur Law, pp. 401-402.
[63] W. WEIß, Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon, 7 (2011) Eur Consititut Law Rev, p. 68.
[64] However this applies only when the rights in both documents correspond. See W. WEIß, Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon, 7 (2011) Eur Consititut Law Rev, pp. 64-65 and 69-72.
[65] *Ibidem*, pp. 80-81.
[66] See G. HARPAZ, The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy, 46(1) (2009) CML Rev, p. 139.
[67] Dougan emphasizes that the reason why the Charter is not incorporated into the Treaties by text is to avoid the constitutional inclinations of the Lisbon Treaty. See M. DOUGAN, The Treaty of Lisbon 2007: Winning Minds, not Hearts, 45(3) (2008) CML Rev, p. 662.

bilateral pathways have appeared such as the influence of the Charter on the ECtHR which will be discussed in Chapter 3.3.[68]

2.2.3.2. The Binding Nature of the EU Charter of Fundamental Rights

Despite its unclear legal nature, the Charter was already legally relevant in acts adopted by the European institutions and used as an interpretative tool in the form of a high status of soft law for national and European Courts.[69] This is clearly visible as it was used as "additional authority" and even as a source of fundamental rights by Advocates General[70] and also in the jurisprudence of the General Court.[71] However, the ECJ only made reference to the Charter following the failure of the Constitutional Treaty referring to it as one of the, although not binding, sources of fundamental rights.[72]

With the entry into force of the Lisbon Treaty on 1 December 2009 the Charter became legally binding, marking an end to the lively debates on its status.[73] In the IGC in 2007 the Member States agreed that the Charter is going to be once again solemnly proclaimed and made legally binding by a cross-reference in Article 6(1) TEU and published together with its Explanatory notes.[74] The latter provide explanations of the Charter's sources and thus serve to

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[68] N. N. SHUIBHNE, Margin of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, 34(2) (2009) ELRev, pp. 245-246.

[69] This probably happened because the Charter was drafted with the intention to be legally binding at some later point. See S. DOUGLAS-SCOTT, The Charter of Fundamental Rights as a Constitutional Document, 9 (1) (2004) Eur Hum Rights Law Rev, p. 40.

[70] See A. J. MENÉNDEZ, in The Chartering of Europe (eds. ERIKSEN, FOSSUM, MENÉNDEZ), Nomos Verlagsgesellschaft, 2003, Baden-Baden, pp. 42-45; A. J. MENÉNDEZ, Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union, 40(3) (2002) JCMS, pp. 474-476; and P. EECKHOUT, The EU Charter of Fundamental Rights and the Federal Question, 39(5) (2002) Common Market Law Review, pp. 948-952.

[71] See, for instance, Case T-177/01 *Jégo-Quéré* [2002] ECR II-2365 where the General Court extended the individual access to the Courts in cases where the legality of EU acts is contested.

[72] *Inter alia*, Case C-540/03 *EP v. Council* [2006] ECR I-5769, Case C-432/05 *Unibet* [2007] ECR I-2271.

[73] See, *inter alia*, P. EECKHOUT, The Proposed EU Charter: Some Reflections on Its Effects in the Legal Systems of the EU and of its Member States, in An EU Charter of Fundamental Rights (ed. K. FEUS), The Federal Trust, 2000, London, pp. 101-105; G. SACERDOTI, The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe, 8 (2002) Columbia J Eur Law, pp. 49-50; V. BAZZOCCHI, The European Charter of Fundamental Rights and the Courts, in The EU Charter of Fundamental Rights: From Declaration to Binding Instrument (ed. G. DI FEDERICO), pp. 55-68; and A. H. MENÉNDEZ, 'Rights to Solidarity', Balancing Solidarity and Economic Freedoms, in The Chartering of Europe (eds. ERIKSEN, FOSSUM, MENÉNDEZ), p. 192.

[74] Explanatory notes of the Charter, CHARTER 4487/00 CONVENT 50, Brussels, 11.10.2000, CHARTE 4473/00, CONVENT 49.

clarify its provisions.[75] Soon the Charter rights had been excessively claimed by individuals and the ECJ began using the Charter on a daily basis. It clearly follows from the recent case law that the Charter is a dynamic instrument which has truly become the first and preferential point of reference for the protection of fundamental rights in the jurisprudence of the ECJ[76] thus diminishing the role of the ECHR in the case law of the ECJ. The Charter is now the primary departing point not just when assessing EU measures[77] but also when the validity of national law is questioned.[78]

However, as it is going to be argued in Chapter 3, the incorporation of the Charter in the EU legal order promotes the harmonization of human rights standards as it proclaims the legally binding commitment to respect the ECtHR's jurisprudence and regulates the relationship towards ECHR. Moreover, the reliance of both two European courts on the Charter rights reduces the possibility of diverging standards of protection.

2.2.3.3. Accession of the EU to the European Convention on Human Rights

The issue of the accession to the ECHR was first considered as far ago as in the mid-70s but was terminated by the ECJ in its well-known Opinion 2/94.[79] The launching of the Charter for some scholars adds a new urgency to the debate of accession as the latter brings only more confusion by creating two parallel jurisdictions resulting in undermining the importance of the ECHR.[80] Despite the divided opinions as to the impact of the Charter the general believe is that the future accession to the Convention is a vastly preferable way to proceed in eliminating the divergent systems.[81] This solution namely avoids the multiplication of human rights systems and with that provides for a common standard for both EU and Non-EU countries. All legal acts which affect individuals' lives will thus be subjected to the same human rights standard – that of the Convention - and open to the same remedies.

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[75] The Explanatory notes serve also as a source of inspiration since the chapter provisions shall be interpreted with "due regard to the explanations". See Article 6(1) TEU.
[76] See Joint communication from Presidents Costa and Skouris, European Court of Human Rights, Strasbourg, 27 January 2011.
[77] Joined Cases C-92/09 and C-93/09 *Schecke*, 9 November 2010, paras. 45-46.
[78] See to that effect Case C-279/09 *DEB*, 22 December 2010.
[79] Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I-1759.
[80] LORD RUSSELL-JOHNSTON, Contribution to the Federal Trust publication on the EU Charter of Fundamental Rights, in An EU Charter of Fundamental Rights (ed. K. FEUS), p. 53; R. A. GARCIA, The General Provisions of the Charter of Fundamental Rights of the European Union, 8(4) (2002) ELJ, p. 508.
[81] J. H. H. WEILER, Editorial: Does the European Union Truly Need a Charter of Rights?, 6(2) (2000) ELJ, p. 95-97.

The new Article 6(2) TEU finally provides for the accession of the EU to the ECHR, which would establish an external accountability and the presence of a higher law of human rights in the EU legal order.[82] Moreover, Protocol (No. 8) further elaborates that the specific characteristics of the EU and Union law should be preserved; the competences of the Union institutions must not be affected; the relationship between Member States and the ECHR should be maintained; and the actions between the Union and its Member States would have to be excluded. Further, Declaration No. 2 fosters the regular dialogue between the European courts.

However, there are some open technical and legal difficulties which require further negotiations between the two organisations. It is contested that whereas technical obstacles could easily be overpassed with a proper political will; there are the legal objections that provide for the key complications.

[82] D. CHALMERS, European Union Law, p.232. The authoritative language of the Article puts the accession as an obligation of the EU. See T. LOCK, EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg, 35(6) (2010) ELRev, p. 777.

3. THE RELATIONSHIP BETWEEN THE CHARTER OF FUNDAMENTAL RIGHTS AND THE "STRASBOURG REGIME"

After looking at the historic interface between both two constitutional regimes with an emphasis on the tendency of mitigating the differences, this present chapter is going to investigate a new development in this relationship. The proclamation of the Charter had a greater effect than merely enhancing fundamental rights protection in European Union and its legitimacy. It also provided the Strasbourg court with a new international source of human rights. In fact, it was the latter court and not the Luxembourg court that for the first time referred to the Charter in its judgments. After carefully examining the EU Charter of Fundamental Rights I will further focus on its relationship to another human rights document, namely the ECHR. The core of this chapter will explore the reliance of the ECtHR on Charter rights.

3.1. The Charter of Fundamental Rights of the European Union

3.1.1. Charter as a Modern Bill of Rights Document

The Charter is in any regard a remarkable and innovative instrument which codifies existing European human rights *acquis* and the case law of both ECJ and ECtHR which was before spread around in numerous human rights documents. The CFR was initially not intended to confer new rights, thus the rights enshrined in the Charter are merely a restatement of rights. The aim of such a consolidating process was to make fundamental rights more visible to the citizens. However, in reality the consolidation of previous rights is broader since new rights, especially within the realm of social and economic rights[83] but also third generation rights, have been asserted in the Charter. The scope of fundamental rights has thus been extended to correspond to the current time and place of their historic nature. Piris distinguishes three categories of rights in the Charter: the fundamental rights as derived from the ECHR and constitutional traditions common to the Member States; fundamental rights especially

[83] D. ASHIAGBOR, Economic and Social Rights in the European Charter of Fundamental Rights, 1 (2004) Eur Hum Rights Law Rev, p. 63 and M. P. MADURO, The Double Constitutional Life of the Charter of Fundamental Rights of the European Union, in Economic and Social Rights under the EU Charter of Fundamental Rights (eds. T. K. HERVEY and J. KENNER), p. 277.

afforded to Union's citizens; and economic and social rights as contained in the European Social Charter and in the Community Charter of the Fundamental Social Rights of Workers.[84]

The text of the Charter is divided into six substantial chapters where rights are not listed according to traditional groups of human rights but rather unconventionally grouped and arranged in chapters according to their abstract concept. Apart from substantive rights, the last chapter also expresses "interpretative horizontal provisions" where it regulates the complex relationship between the multiple sources[85] and with that tries to secure the uniform standard of protection in EU law.[86] The four guiding principles provide for a prohibition of undermining the level of protection,[87] an obligation for the courts to consult the Explanatory notes for interpretation purposes,[88] an obligation to interpret fundamental rights in harmony with national constitutional traditions[89] and the relationship towards the ECHR.[90]

The Charter clearly marks that the EU is not just an intergovernmental economical union but a political entity built upon individuals. It indisputably promotes clarity, legal certainty and democratic legitimacy of a not always clear and persuasive[91] EU fundamental rights system. Undeniably, the CFR is a modern up-to-date Bill of Rights document which constitutes an important point in the further constitutionalization of the EU.[92]

3.1.2. Downfalls of the EU Charter of Fundamental Rights

The downfalls of the Charter reflect some of the compromises that were necessary to reconcile the pluralism of human rights in Europe. The success of the promising human rights

[84] J.-C. PIRIS, The Lisbon Treaty – A Legal and Political Analysis, Cambridge University Press, 2010, Cambridge, New York, p. 152.
[85] N. N. SHUIBHNE, Margin of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, 34(2) (2009) ELRev, p. 239.
[86] D. CHALMERS, European Union Law, p. 242.
[87] Article 53 CFR.
[88] Article 52(7) CFR.
[89] Article 52(4) CFR.
[90] Article 52(3) CFR.
[91] In that respect especially the judgment in Case C-144/04 *Mangold* [2005] ECR I-9981, where the ECJ established a general principle of non-discrimination against age, is criticized.
[92] See E. O. ERIKSEN, Why a Constitutionalised Bill of Rights, in The Chartering of Europe (eds. ERIKSEN, FOSSUM, MENÉNDEZ), pp.56-60. Douglas-Scott argues that the CFR forms an EU Constitution. S. DOUGLAS-SCOTT, The Charter of Fundamental Rights as a Constitutional Document, 9 (1) (2004) Eur Hum Rights Law Rev, pp. 37-50.

document is to some extent deteriorated especially because of the uncertainty of its scope and justiciability of the norms enshrined in it.

When considering the justiciability, the Charter introduces a distinction between rights and principles,[93] the latter only being judicially cognisable in cases where institutions are implementing them.[94] Many scholars, like Lord Goldsmith, argue that economic and social rights in the Charter are merely principles and thus only enforceable and justiciable to the extent that they are implemented by national law or in the areas of Union competence.[95] On the contrary, there has been a suggestion that economic and social rights may nevertheless impose enforceable obligations, such as an obligation not to retract form level of protection once provided by Article 53 CFR.[96] Furthermore, since many economic and social rights originate from the EU social legislation or the ESC and have already been shown to be judicially applicable, this horizontal clause would not make them completely non-justiciable.[97] Because neither the Charter nor the Explanations provide with any guidance as to when we are dealing with a right or a principle or merely with a policy it is for the ECJ to decide which provisions in the Charter are fully enforceable rights.

Further ambiguity follows from the problem of the scope of Charter's obligations as they do not have a general application. The Charter is concerned only with issues in the context of the EU law thus providing Member States with a dual system. Moreover, as it stems from Article 51(1) CFR the Charter provisions are addressed to *"the institutions and bodies of the Union […] and to the Member States only when they are implementing Union law"*.[98] The unclear scope of application of the Charter for the Member States has been resolved in the Explanations, where requirement to respect fundamental rights is binding on States when they act in the context of EU law and the reference to well-established case law of the ECJ was

[93] Also the wording of some provisions more than on rights resembles only on entitlements. One of such examples is Article 34 CFR on social security. See D. ASHIAGBOR, Economic and Social Rights in the European Charter of Fundamental Rights, 1 (2004) Eur Hum Rights Law Rev, p. 69.
[94] Article 52(5) CFR.
[95] LORD GOLDSMITH, A Charter of Rights Freedoms and Principles, 38 (2000) CML Rev, p. 1212.
[96] T. K. HERVEY and J. KENNER (eds.), Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective, Hart Publishing, 2003, Oxford, Portland, pp. vii-viii.
[97] D. ASHIAGBOR, Economic and Social Rights in the European Charter of Fundamental Rights, 1 (2004) Eur Hum Rights Law Rev, p. 71.
[98] For a drafting history see P. EECKHOUT, The EU Charter of Fundamental Rights and the Federal Question, 39(5) (2002) Common Market Law Review, pp. 954-956.

made.[99] The Czech Republic even went so far to express its concerns in Declaration 53 that the Charter will only apply when Member States are implementing EU law. Considering the non-binding character of declarations such statement is probably not compulsory for the ECJ.

Other problems, specifically for the enforcement of economic and social rights are the abolition of some key rights in the field of social rights such as the right to nationality, the right to choose one's occupation, the right to decent pay or to fair remuneration, the right to work, the right to housing, the right to protection against poverty and social exclusion and the right to life-long learning.[100] Surprisingly the Charter does not provide with a specific chapter on minority rights, although these are one of the prerequisites to join the EU.[101] Also the Charter is insufficient as it fails to specify protection of competition and a stable currency into fundamental rights.[102] Palmer emphasizes that this casts doubts and creates scepticism among labour lawyers whether economic and social rights are really afforded equal standing.[103] Furthermore some other rights are only recognised in accordance with the rules laid down by national or EU law, which means national laws are to determine the content of these rights.[104] Thus, the rights in the Charter are subject to the limits of EU competence and are more or less still a primary matter of the Member States.[105] This institutional sensitivity is illustrated in Article 6(1) TEU which states that the Charter shall not extend in any way the competences of the Union.

The above discussed deficiencies and the fear that the Charter will advance the constitutionalization of the EU resulted in opt-outs from the Charter for two Member

[99] Explanations among others refer to the *ERT* case where the ECJ broadened the application of the respect for fundamental rights to Member States also when deviating from fundamental freedoms. For a more in-depth analysis of this provision see G. DE BÚRCA, The drafting of the European Union Charter of Fundamental Rights, 26(2) (2001) ELRev, pp. 136-137.
[100] D. CHALMERS, European Union Law, pp. 239-240 and G. ALHADEFF and S. SUMNER, A Clarion Voice for Human Rights, in An EU Charter of Fundamental Rights (ed. K. FEUS), p. 183.
[101] See J. GOWER, The Charter of Fundamental Rights and EU Enlargement: Consolidating Democracy or Imposing New Hurdles?, in An EU Charter of Fundamental Rights (ed. K. FEUS), pp. 232-234.
[102] See G. SACERDOTI, The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe, 8 (2002) Columbia J Eur Law, pp. 46-47.
[103] E. PALMER, Judicial Review, Socio-Economic Rights and the Human Rights Act, p. 93.
[104] D. CHALMERS, European Union Law, p. 240. Strangely economic rights such as the freedom to conduct business are free from such subsidiarity clause. See G. ALHADEFF and S. SUMNER, A Clarion Voice for Human Rights, in An EU Charter of Fundamental Rights (ed. K. FEUS), p. 183.
[105] D. ASHIAGBOR, Economic and Social Rights in the European Charter of Fundamental Rights, 1 (2004) Eur Hum Rights Law Rev, p. 69.

States.[106] However, it is doubtful to what point the Protocol even is an opt-out of the Charter or whether it is just limiting the justiciability of it. Decisions from the ECJ and national courts on this point are still awaited, but a simple interpretative twist could be used to apply the Charter unanimously since it is clear from the Preamble of the Protocol that it merely codifies already existing rights. Thus, the ECJ could derive the equal obligation for Poland and the United Kingdom using general principles[107] or even Article 2 TEU.[108]

3.1.3. The "New" Rights in the Charter

The objective of the present chapter is to discuss in depth the added value of the new Bill of Rights document towards the level of human rights protection under the Strasbourg Regime. The outcomes of the analysis are thus a necessary prerequisite to further argue that the usage of the Charter is possible to foster harmonization of human rights at a higher level.

The EU Charter of Fundamental Rights undoubtedly took the opportunity to advance and develop the human rights standard; however, because of the tense political reality it did so only cautiously. Thus, there are a notable number of rights which have been reproduced and modernized and also some new rights which are drawn from existing international documents and provide for progression of human rights standard in the ECHR. However, because the extension of Charter rights substantially depends on the development of courts' case law it is sometimes extremely difficult to determine whether we are dealing with a new or with a just rephrased right. Consequently, the introduced distinction will not always reflect the reality.

The modernized rights are those which the Charter derived from already existing case law of the two European courts, acknowledging technological and sociological developments within society. Such codified rights are for instance the right to human dignity in Article 1 CFR and

[106] Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom. Protocol will be extended to Czech Republic with the next accession treaty.
[107] See, *inter alia*, M. DOUGAN, The Treaty of Lisbon 2007: Winning Minds, not Hearts, 45(3) (2008) CML Rev, pp. 667-668; N. N. SHUIBHNE, Margin of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, 34(2) (2009) ELRev, p. 239; and J.-C. PIRIS, The Lisbon Treaty – A Legal and Political Analysis, pp. 160-163.
[108] G. DI FEDERICO, Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty, in The EU Charter of Fundamental Rights: From Declaration to Binding Instrument (ed. G. DI FEDERICO), p. 44.

the freedom and pluralism of media which was made more visible by Article 11 CFR. Similarly, Article 3 CFR deals with the right to integrity of the person which is not explicitly written in the ECHR but corresponds to the ECtHR's case law on the notion of private life.[109] Moreover, the Charter derives this right from the Convention on Human Rights and Biomedicine,[110] thus updating an already existing right to correspond to the latest scientific developments in the field of cloning. Further, Article 18 CFR pronounces the right to asylum and Article 19 CFR refers to protection in the event of removal, expulsion or extradition which will advance the protection of individuals who face the death penalty abroad.[111] Nevertheless, in essence are these right inspired and correspond to the case law of the Strasbourg court relating to Article 3 and Article 4 of Protocol No. 4 ECHR.[112] The most visible contribution to the modernization of fundamental rights protection is certainty the proclamation of social and economic rights. These rights, embodied in chapters on Freedoms, Equality and Solidarity, are based on several international documents and the case law of both European courts and Union legislation.[113] For instance, the freedom of the arts and sciences is newly formalized right but can be nevertheless deduced from the right to freedom of expression in Article 10 ECHR and the relevant case law of the ECtHR.

As mentioned, some of the rights could be seen as new rights, meaning that they advance and provide for an extension of the protection of individuals in Europe in order to correspond with the current historic development and with the evolution of society. For instance, Article 5(3) CFR which prohibits trafficking in human beings does not have its counterpart in the Convention. Moreover, the rights listed in Title II CFR, like Article 8 CFR which increases the protection of personal data, are not explicitly guaranteed in the Convention or its Protocols. Lemmens argues that there is no corresponding provision in the ECHR and moreover that the case law of the Strasbourg court has until now been limited, referring to

[109] P. LEMMENS, The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects, 8(1) (2001) MJ, p. 56.
[110] See Convent 49, p. 5.
[111] J. COOPER and R. PILLAY, Through the Looking Glass: Making Visible Rights Real, in An EU Charter of Fundamental Rights (ed. K. FEUS), p. 24.
[112] See Convent 49, p. 49.
[113] When the protection offered by the right extends the standards guaranteed by the ECtHR, I will refer to such right in the next paragraph.

only some aspects of the right within Article 8 ECHR.[114] Further, Article 9 CFR expands the scope of the corresponding Article 12 ECHR as it is made clear from the Explanations that: "*The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family*."[115] In that regard the Charter extends the right to found a family. In addition, it provides with a looser formulation as it abolishes the Convention formulation that the right to marry is only granted to "*men and women of marriageable age*".[116] The Charter also provides with a right to conscientious objection which does not have any matching Convention right, even more, protection of such a right has been until now denied.[117] The Explanations make only a brief reference that this provision "*corresponds to national constitutional traditions and to the development of national legislation on this issue*".[118] The unclear reference to political parties in Article 12(2) CFR is also new. Furthermore, as Lemmens points out Article 14(2) CFR which guarantees the possibility to receive free compulsory education also establishes a new right.[119] Moreover, he believes Article 17 CFR provides a new aspect of the right to property as it explicitly requires that expropriations should be subject to fair compensation.[120] Various rights in Title IV on Solidarity such as the right to health, protection of the environment and consumers are now for the first time proclaimed in a written human rights document. Also without any specific equivalent, are provisions such as rights of the child, rights of the elderly and rights of persons with disabilities.[121] Article 41 CFR establishes a new right to good administration which is partially based on the Luxembourg case law on the principle of good administration but until now had not been upgraded into a self-standing fundamental right. The Explanations to Article 47 CFR elaborate by reference to the ECJ case law that the Charter is more beneficial as it incorporates the right to an effective remedy before a court and extends the right to a fair hearing.[122] With that, Article 47(2) CFR also extended the scope of Article 6

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[114] P. LEMMENS, The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects, 8(1) (2001) MJ, pp. 57-58.
[115] See Convent 49, p. 12. The expression "modernize" is to some extent misleading since the wording of Article 9 CFR in fact provides for a new right which has not been protected in the Strasbourg Regime until now.
[116] Article 12 ECHR.
[117] P. LEMMENS, The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects, 8(1) (2001) MJ, p. 58.
[118] See Convent 49, p. 13.
[119] P. LEMMENS, The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects, 8(1) (2001) MJ, p. 60.
[120] *Ibidem*, p. 61.
[121] Articles 24-26 CFR.
[122] See Convent 49, p. 41.

ECHR to administrative acts. Without any respective counterpart, Article 49(1) CFR provides for an exception to the prohibition of retroactive application of criminal law[123] and Article 49(3) CFR establishes the principle of proportionality with regard to the severity of criminal penalties.

Moreover, some newly drafted Charter rights provide for broader protection than their counterparts in the ECHR due to the nature of the EU and the characteristics of its internal market where EU citizens are entrusted with fundamental freedoms. These are particularly the numerous workers' rights and the right to professional freedom embodied in Article 15 and 16 CFR. A good example is also Article 50 CFR, which proclaims the principle of *ne bis in idem* with its special characteristic in Union law where such a principle is wider as it applies to all Member States and not just within one State.[124]

3.2. The Interface between the EU Charter of Fundamental Rights and the European Convention on Human Rights

The Charter of Fundamental Rights has not affected just the EU level of protection of human rights but also has a huge impact on fundamental rights discourse outside the EU, namely in the context of the Council of Europe. The main concern is that the Charter will become a threat or a competitor to the ECHR and with that diminish its role. Moreover, the idea of two different human rights catalogues with different human rights standards could draw new dividing lines and diminish the process of construction of uniform standards of human rights protection. These fears were already expressed by the Council of Europe Observers which participated in the process of drafting the Charter. Their role was mainly to ensure that the standards in the CFR do not fall under the level of protection guaranteed by the Convention and to minimise the risk of two separate regimes.[125] Similar concerns were also enunciated by

[123] *Ibidem*, p. 43.
[124] See Convent 49, p. 45.
[125] P. DRZEMCZEWSKI, The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights, 22(1-4) (2001) HRLJ, p. 22.

the judges of the two Courts which emphasized that the proclamation of the CFR calls for a closer collaboration and co-operation between them.[126]

3.2.1. The Main Differences between Documents

The above described considerations are particularly well grounded if we look at the difference between substantial provisions of both human rights documents. As Drzemczewski points out, the ECHR and the Charter have different purposes. The latter is concerned with internal checks on Union's institutions whereas the former provides for external control on Union activities.[127] Moreover, although the Charter is modelled on the ECHR, the enforcement, application, scope, wording, and the language of otherwise similar articles on numerous places differ.

With regard to the applicability, the ECHR is binding to all its Contracting Parties while the CFR is primarily applicable to the EU institutions and only secondary and restrictively to its Member States. Furthermore, whilst the EU fundamental rights system applies only in cross-border cases, the Convention system is broadly applicable to also cover purely internal situations. The consequence is that it will be hard to even distinguish and assert which of the two documents is applicable in a particular case. It is argued that even if the decision on the applicability will be unambiguous there are still going to be cases where the application of both two documents will overlap and thus result in the risk of conflicting jurisprudence.

The documents can also be distinguished in the way they approach the rights. Whilst the mature ECHR includes precise and clear terms, the CFR presents rights in a more modern way and with a simpler language.[128] The concerns about the scope of rights are also especially prominent as the Charter, apart from civil and political rights, progressively promotes the

[126] Relations between the Council of Europe and the European Union, Report by the Secretary General for the period August-December 2000, SG/Inf (2001) 10-21 March 2001.
[127] P. DRZEMCZEWSKI, The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights, 22(1-4) (2001) HRLJ, p. 31.
[128] P. MAHONEY, The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention, 23(8-12) (2002) HRLJ, p. 301.

protection of economic and social rights and also embodies citizens' rights.[129] Surprisingly, even the formulation of civil and political rights differ as the drafting objective was to make rights more visible thus deliberately departing from the wording of the ECHR.[130]

3.2.2. Interpretative Horizontal Charter Provisions

The relationship between the two documents is addressed in the last chapter of the CFR which provides for horizontal provisions. These general provisions in Articles 51-54 CFR are meant to settle issues of interpretation with regards to all rights and questions of relationship between the CFR and other human rights documents. In particular Article 52(3) and Article 53 CFR aim to prevent any deviations from the ECHR and imply that the drafters saw the Charter as an element of continuity.[131] It is important to note that the unclear distinction between these two provisions results from a complex drafting process.[132]

Article 52 CFR is concerned with the scope of individual rights. Its first paragraph provides for only one general limitation clause reflecting the ECJ case law on mandatory requirements.[133] The Convention contrary to the Charter provides with specific limiting clauses which are narrowly interpreted. This means that the exceptions to human rights are governed with respect to every right and thus providing for some kind of gradation of restrictions.[134] The main concern is that this dual approach will establish diverging standards of protection when the Convention rights are being applied.[135] Such system brings also the

[129] Drzemczewski raises the problem of the drafting of citizens' rights which are contrary to the universality principle of human rights afforded only to EU citizens. P. DRZEMCZEWSKI, The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights, 22(1-4) (2001) HRLJ, p. 24.
[130]. *Ibidem*, p. 22.
[131] For that reasons Article 51 CFR which is concerned with the delimitation of competences between the EU and its Member States and Article 54 CFR which prevents abuse of rights are not going to be further discussed.
[132] J. B. LIISBERG, Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?, 38(5) (2001) CML Rev., pp. 1172-1178.
[133] Tulkens highlights that such general clause does not contain any limitations as to what legitimate interests are and could thus be used to even lower the protection of human rights. F. TULKENS, Towards a Greater Normative Coherence in Europe/The Implication of the Draft Charter of Fundamental Rights of the European Union, 21(8) (2000) HRLJ, pp. 330-331.
[134] *Idem.*
[135] R. A. GARCIA, The General Provisions of the Charter of Fundamental Rights of the European Union, 8(4) (2002) European Law Journal, pp. 497-498.

fear of different proportionality tests[136] as the ECJ could decide to prioritize a right over another taking into account the specificities of the EU legal order.

Particularly because of this tension Articles 53(2)-(4) CFR provide for harmony between the CFR and other sources of fundamental rights and enhance legal certainty. In that regard Article 52(3) states that where the Charter rights correspond to the Convention rights the meaning and scope of those rights shall be the same. As implied by the Explanatory notes this phrase also includes the limitations.[137] As a consequence, the ECJ would need to apply stricter Convention limitations when the rights in the Charter will correspond to the Convention rights.[138] The downfall is that the Charter rights are subjected to different regimes of limitations depending on whether the right has a counterpart in the ECHR or if the Charter offers a more extensive protection.[139]

This article has also a broader importance as it addresses the issues of harmonization of rights and tries to mitigate divergent interpretations between corresponding rights in the Charter and in the Convention. The primary objective of Article 52(3) CFR is to ensure that the protection offered by the CFR corresponds to the one established by the ECHR. For that purpose, the Explanatory notes provide for a list of corresponding rights in the Convention which are interpretational guidelines.[140] Despite the tendency towards unification, a divergent interpretation is exceptionally allowed where EU law provides more protection. The CFR thus clearly provides for a more beneficial protection of individual rights based on minimum rights derived from the ECHR.

There are however some ambiguities in connection to the ECHR. Although the ECHR is evolutionarily interpreted by the ECtHR, the Charter surprisingly does not mention the

[136] M. P. MADURO, The Double Constitutional Life of the Charter of Fundamental Rights of the European Union, in Economic and Social Rights under the EU Charter of Fundamental Rights (eds. T. K. HERVEY and J. KENNER), pp. 279-280.
[137] See Convent 49, pp. 49-50.
[138] See W. WEIß, Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon, 7 (2011) Eur Consititut Law Rev, pp. 82-84. The same also P. LEMMENS, The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects, 8(1) (2001) MJ, p. 53.
[139] Mahoney points out that it will be hard to distinguish which limitation clause should apply in practice. P. MAHONEY, The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention, 23(8-12) (2002) HRLJ, p. 302.
[140] Convent 49, p. 48.

jurisprudence of the ECtHR.[141] The discussion on the insertion of the reference resulted in a political solution where the relationship towards the case law of the ECtHR was only established in the Explanations to Article 52(3)[142] and in paragraph 5 of the Charter's Preamble.

The second article that has a special importance for the harmonization of human rights standards is Article 53 CFR[143] which addresses the relationship towards the ECHR, including a clause on the minimum standard of protection, providing that nothing in the CFR could undermine the level of protection guaranteed by the ECHR. The wording of this Article in particular resembles Article 53 ECHR and also correlates to Article 32 ESC.[144] Moreover, Tulkens asserts that this Article proves that the Charter was designed to complement and modernize the Convention.[145] A problem could however potentially arise if the ECtHR would at some point interpret the Convention rights more extensively than its counterpart the ECJ, blurring the dividing line of a minimum standard guaranteed in the ECHR. For that reason the Explanations provide for a shield, explaining that the level of protection in the EU could never be inferior regardless of the wording of the Charter.[146] This provision consequently grants the CFR a characteristic of a living document.

Despite the fact that Articles 52(3) and 53 CFR provide for necessary continuity with regards to Convention rights it is argued that the horizontal provisions failed to create a formal connection between the ECJ and the ECHR so that conflicts of jurisdiction are still possible.[147] The real threat of diverging interpretations and a dual standard is thus going to be dependent on the jurisprudential consistency of both Courts and their willingness to diminish the inconsistencies in the interpretation of the same rights.

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[141] C. MCCRUDDEN, The Future of the EU Charter of Fundamental Rights, Jean Monnet Working Paper No. 10/01, pp. 9-11.
[142] Convent 49, p. 48.
[143] For a drafting history on this provision see J. B. LIISBERG, Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?, 38(5) (2001) CML Rev., p. 1172.
[144] For comparison to other similar provisions in international documents see J. B. LIISBERG, Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?, 38(5) (2001) CML Rev., pp. 1182-1189.
[145] F. TULKENS, Towards a Greater Normative Coherence in Europe/The Implication of the Draft Charter of Fundamental Rights of the European Union, 21(8) (2000) HRLJ, p. 330.
[146] See Convent 49, p. 50.
[147] G. SACERDOTI, The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe, 8 (2002) Columbia J Eur Law, p. 50.

3.3. Influence of the Charter on the Jurisprudence of the European Court of Human Rights

As already mentioned it was in fact the ECtHR and not the ECJ that for the first time referred to the EU Charter of Fundamental Rights in its case law.[148] Although at that point the Charter was not legally binding, the applicants tried to find support for their entitlements in its text. They referred to the Charter to support their arguments and with that they indirectly obliged the Court to discuss the rights enshrined therein. The Strasbourg court consequently started to address the Charter as one of the sources of international human rights instruments using it to confirm and to support the existence of the rights already contained in the ECHR or in the EU Treaties, normally in favour of the applicants. Thus, in some judgements the rights and principles in the Charter became the substantive point of reference. However, I am further going to argue that the ECtHR has also started to use the Charter as an inspiration to extend and develop the rights enshrined in the ECHR. This latter aspect is especially important for the establishment of common standard of human rights protection at an even higher level.

3.3.1. Usage of the Charter in Separate Opinions

This present subchapter is going to consider, in chronological order, the briefest references made to the EU Charter of Fundamental Rights by investigating the Charter's usage outside the main text of the judgements, thus looking at the separate opinions of the judges and vague references in their footnotes.

Before reference to the Charter was made in the text of the judgement, three judges referred to the Charter provisions in a partial dissenting opinion in *Fretté v. France*[149] which was decided in February 2002. Dissenting judges pointed out that the rejection of the application based solely on the grounds of the applicant's sexual orientation amounted to a breach of Article 14 ECHR. Since the latter provision does not explicitly provide for prohibition of discrimination

[148] Case of *I. v. The United Kingdom*, Application No. 25680/94and Case of *Goodwin v. UK*, Application No. 28957/95.
[149] Case of *Fretté v. France*, Application No. 36515/97.

on grounds of sexual orientation, they used Article 21 CFR on non-discrimination to support their opinion that a European consensus in this area is emerging.[150]

One year later, the Charter rights were invoked by dissenting judges in *Hatton and Others v. United Kingdom*.[151] Attention was raised particularly towards Article 37 CFR which provides for a high level of environmental protection and the improvement of the quality of the environment. The judges deduced that the Charter, although not legally binding, proves that the EU Member States want a high level of environmental protection.[152]

An interesting reference to the EU Charter was made in the 2004 decision of *VO v. France.*[153] This case was concerned with a doctor's negligence which caused an involuntary termination of pregnancy because of a case of mistaken personality as regarded the pregnant mother. Contrary to the majority of judges, who decided that Article 2 ECHR was not violated in connection to the foetus but nevertheless declared the application as admissible; Judge Ress was of the opinion that the right to life was not just applicable but had also been violated. He supported his belief with a rather vague and ill-founded reference to the Charter, stating that Article 3(2) CFR supported his idea that the protection of life extends to the initial phase of human life without providing any further explanations as to why these provisions of the Charter are even interrelated.[154] Despite that, he used the Charter in order to protect the applicant's claim.

The Charter was also invoked in a separate opinion in the 2006 case of *Martinie v. France.*[155] In this judgement the Court reconsidered its previous case law on exclusion of safeguards in Article 6(1) ECHR for public servants. It adopted a more restrictive interpretation of exceptions in order to also cover cases where the nature of the applicant's post is not connected to an exercise of powers conferred by public law. Three judges pointed out the

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[150] Joint partly dissenting opinion of Judge Sir Nicolas Bratza and Judges Fuhrmann and Tulkens in the Case of *Fretté v. France*, Application No. 36515/97.
[151] Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in the Case of *Hatton and Others v. United Kingdom*, Application No. 36022/97.
[152] *Ibidem*, para. 1.
[153] Case of *VO v. France,* Application No. 53924/00.
[154] Dissenting opinion of Judge Ress in the Case of *Vo. v. France,* Application No. 53924/00, para. 5.
[155] Joined concurring opinion of Judges Tulkens, Maruste and Fura-Sandström in the Case of *Martinie v. France*, Application No. 58675/00.

inconsistency in the application of Article 6(1) ECHR and advocated for a reconsideration of the Court's case law in the light of Article 47 CFR in order to expand the Convention right to a fair trial to all categories of public servants.[156]

Very brief reference to the EU Charter together with the case law of the ECJ was made one year after in one of the footnotes of the dissenting opinion in *Vereinigung Bildender Künstler v. Austria*.[157] The latter was an association of artists of an independent gallery which was forbidden by the Austrian courts to exhibit the disputed painting and thus relied on its right to artistic freedom enshrined in the freedom of expression as secured by Article 10(1) ECHR. With a very tight result the Chamber of seven judges decided, using its strong language of protecting the freedom of expression, that the applicant's rights were violated. However, through the use of a balancing test, the dissenting judges came to the opposite opinion wherein the right to dignity prevailed. Their decision was supported through a reference to Article 1 of the Charter of Fundamental Rights, which enunciates this right in a human rights document for the first time.[158]

There are two interesting aspects of this case: the Charter was surprisingly not used to the benefit of the applicants; and the text of the judgement does not refer to the self-standing right of artistic freedom in Article 13 CFR which would in my belief give the judgement a more persuasive standing.

In the 2008 case of *Saadi v. The United Kingdom* six dissenting judges emphasized that this was the first case where the Strasbourg court has been called upon to provide an interpretation of the first part of Article 5(1)(f) ECHR on the exception to the right to liberty when a person is lawfully detained in order to prevent his effecting an unauthorised entry into the country.[159] The case was concerned with an Iraqi Kurd who was, without being given any reasons, detained for seven days in a special facility for asylum seekers. The Court unanimously found that the delay of 76 hours in providing reasons for detention breached Article 5(2) ECHR.

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[156] *Ibidem*, para. 2.
[157] Joined dissenting opinion of Judges Spielmann and Jebens in the Case of *Vereinigung Bildender Künstler v. Austria*, Application No. 683545/01, para. 8, fn. 5.
[158] *Idem.* See also Chapter 3.1.3. of this thesis.
[159] Joined partly dissenting opinion in the Case of *Saadi v. The United Kingdom*, Application No. 13229/03.

The dissenting judges particularly criticised the Court's decision not to find violation of Article 5(1) ECHR. In their view there should be a distinction between asylum seekers, which are lawfully present within the territory of a State, and illegal immigrants.[160] They substantiated their opinion, that asylum seekers should be excluded from Article 5(1)(f), ECHR also by a brief mention of the Charter as one of the relevant European Union documents which in Article 18 CFR reaffirms the importance of the Geneva Refugee Convention stating that *"the right to asylum shall be guaranteed with due respect to the rules of the [Refugee Convention]"*.[161]

Again a very brief reference to the Charter was made in a footnote of a dissenting opinion in in the 2009 decision *Bayatyan v. Armenia*.[162] Despite such a vague reference the case at stake in my opinion deserves a more prominent examination; especially, because it is concerned with a new right to conscientious objection provided in the CFR and is still pending before the Grand Chamber. The facts of the case show that the applicant, because of his genuine religious convictions, refused to perform military service but that he was prepared to perform alternative civilian duties instead. Since at the material time the right to conscientious objection was not recognized in Armenia he was subjected to criminal proceedings and sentenced to two and a half years in prison. The ECtHR confirmed its previous case law stating that the right of conscientious objection is not guaranteed by Article 9 ECHR and that by reason of Article 4(3)(b) the choice is left for the High Contracting Parties.[163]

However, the applicant as well as the dissenting judge Power submitted that Article 9 ECHR should be interpreted in the light of present-day conditions encompassing the right of conscientious objection since the majority of States had recognised it and also that Armenia in 2000, before becoming a member, had committed to complying with European standards.[164] Judge Power stressed that the right has been almost universally accepted which is also underscored by the recent EU Charter.[165] As proposed by the separate opinion of Judge Fura

[160] *Idem*.
[161] *Idem*. The Charter was also listed under the title on the relevant international law documents in the first part of the judgement. See Case of *Saadi v. The United Kingdom*, Application No. 13229/03, para. 39.
[162] Dissenting opinion of Judge Power, para. 4, fn. 5 in the Case of *Bayatyan v. Armenia*, Application No. 23459/03.
[163] Case of *Bayatyan v. Armenia*, Application No. 23459/03, paras. 55-60.
[164] *Ibidem*, para. 51 and Dissenting opinion of Judge Power, paras. 2-4.
[165] Dissenting opinion of Judge Power, para. 4.

the Grand Chamber will have to re-examine its case law.[166] It thus remains to be seen if the Strasbourg court will use this opportunity to foster the harmonization of European human rights standard by following the more extended Charter provision and to dynamically interpret the Convention in order to guarantee a new right to conscientious objection.

The above analysis reveals that the first references to the Charter were made in separate opinions. In the majority of cases, the Charter was mentioned in a dissenting opinion in order to support an innovative and progressive explanation. In this way, the Charter was used as an indicator of a possible future development of a common European standard at a more advanced level. In fact, the reasoning in the progressive separate opinion in the 2006 case *Martinie v. France*[167] was recognized a year later in V*ilho Eskelinen.*[168] Furthermore, from the small number of cases where the Charter has been mentioned in separate opinions, all of them were decided before the Charter was granted a legally binding status. Thus, one can easily deduce that the binding nature of the CFR resulted in the willingness of the Strasbourg court to take Charter rights seriously and afford them a more prominent place in their decisions.

3.3.2. The Charter as a Relevant International Document

This present section will investigate the initial references to the Charter in the actual text of the judgements. In the following cases the Strasbourg court has addressed the Charter as one of the relevant and most recent international or European sources of human rights which is applicable in respect of the precise subject matter of the case concerned.

The Charter was used in such a manner in 2007 when the Strasbourg court needed to adjudge the complaint of an American company producing Budweiser beer claiming that it had been deprived of its right to a peaceful enjoyment of its possessions under Article 1 Protocol No. 1.[169] The Court initially needed to establish whether this Article is even applicable to intellectual property and more specifically to the case at stake. In doing so, it also referred to

[166] Concurring opinion of Judge Fura in the Case of *Bayatyan v. Armenia*, Application No. 23459/03, para. 6.
[167] Joined concurring opinion of Judges Tulkens, Maruste and Fura-Sandström in the Case of *Martinie v. France*, Application No. 58675/00.
[168] Case of *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00, paras. 29-30.
[169] Case of *Anheuser-Busch inc. v. Portugal*, Application No 73049/01.

EU law which provides a right to a Union trade mark and more precisely it asserted that Article 17(2) CFR guarantees the right to intellectual property.[170] Since the Court held that there was no violation the Charter usage remained unexplained and the only conclusion which one can derive is that the Court quoted it as a relevant text of EU law.

In *Salduz v. Turkey*, decided a year later, the connection to Article 48 CFR was made solely in the operational part of the judgement, listing this provision as having the same scope as the equivalent right guaranteed by the Convention providing for the right of access to a lawyer during police custody.[171]

Likewise, the Charter provision on the right of defence in Article 48(2) CFR was merely listed under the section on the facts of the judgement in the 2009 case *Pishchalnikov v. Russia*.[172] Further, the horizontal provision in Article 52(3) CFR providing for an interpretative bridge to the corresponding Convention right in Article 6(1) was mentioned. These extremely brief remarks can be explained by the fact that the Charter provisions in that sense correspond to Convention rights and that both relevant Contracting Parties are not EU Member States and hence not subjected to the rights in the EU Charter. However, by relating also to the CFR one can conclude that the severity of alleged violations of Convention right in these two cases was even more emphasized.

In the recent judgement of *M.S.S. v. Belgium and Greece*,[173] the Strasbourg court was concerned with an expulsion of an Afghani asylum seeker to Greece by the Belgian authorities in application of the EU Dublin II Regulation. A detailed discussion on this landmark decision, which triggered numerous reactions from legal analysts and commentators,[174] would go beyond the scope of this section. It suffices to say that the ECtHR, by making references to numerous reports on the degrading nature of asylum proceedings in Greece, ruled that the treatment as well as the mere extradition of an asylum seeker made by

[170] *Ibidem*, para. 38.
[171] Case of *Salduz v. Turkey*, Application No. 36391/02, para. 44.
[172] Case of *Pishchalnikov v. Russia*, Application No. 7025/04, para. 42.
[173] Case of *M.S.S. v. Belgium and Greece*, Application No. 30696/09.
[174] See, among others, T. SYRING, European Court of Human Rights' Judgment on Expulsion of Asylum Seekers: M.S.S. v. Belgium & Greece, 15(5) (2011) American Society of International Law Insight; ECRE Press Release on the ruling of the European Court of Human Rights in the "MSS case", European Council on Refugees and Exiles; and *M.S.S. v. Belgium and Greece* – Case Note, Joint Council for the Welfare of Immigrants.

Belgium amounted to violations of Article 3 and 13 ECHR. The reference to the Charter was made in order to prove that fundamental rights as guaranteed by the ECHR are part of the European Union legal order and that Article 18 CFR also contains an express provision guaranteeing the right to asylum.[175] Hence, the newly formulated right to asylum was recognized by the Strasbourg court and used to substantiate the authority of already existing Convention rights.

In two cases the Court made only an indirect allusion to the CFR. In the 2008 case *Vajnai v. Hungary* the Court only vaguely and almost coincidentally mentioned the provisions in the Charter when summarising the facts of the case. Since the circumstances of the case also included preliminary ruling proceedings before the ECJ an indirect note to the Charter was made referring to that judgement of the ECJ.[176]

Even briefer was the reference in last year's case of *A, B and C v. Ireland*[177] where the Court was concerned with a complaint by three women against the Irish restrictions on abortion. Among other documents reference was made to a Decision of the Heads of State or Governments of the Member States which provides that the legal status of the Charter will in no way affect the scope and applicability of the protection of the right to life in the Constitution of the Republic of Ireland.[178] Such ambiguous citation and the lack of reference to any Charter articles could imply that the ECtHR accepted the Irish derogation from the Charter provisions.

Looking at the cases discussed above it is clear that Charter rights are sometimes cited without dwelling on their scope and value and with no further specification. It is thus *prima facie* impossible to establish what the intention of noting these various Charter articles in the operative part of the judgements is and what the meaning of the rights therein for the harmonization of human rights in Europe is. Moreover, these cases are concerned with different rights, apply to different Contracting Parties and do not chronologically follow the initial references to the Charter in the ECtHR's judgements as they appear also in recent

[175] Case of *M.S.S. v. Belgium and Greece*, Application No. 30696/09, paras. 57-61.
[176] Case of *Vajnai v. Hungary*, Application No. 33629/06, para. 12.
[177] Case of *A, B and C v. Ireland*, Application No. 25579/05.
[178] *Ibidem*, para. 102.

cases. Hence, the only conclusion one can derive is that the Charter possesses a clarifying function acknowledging existing rights. It is also important to note that although the Charter rights are not further discussed in the argumentation that does not inevitably imply that they have not become an important departure point for the discussions between the judges.

3.3.3. Charter Rights as an Interpretative Tool

The Strasbourg court has never considered the provisions in the Convention as the sole reference for the interpretation as the rights therein would thus be rendered purely theoretical and illusory with time. In order to provide effective human rights which correspond to the current standards of society the Court has also started to look at rules and principles of the EU law, in particularly the Charter of Fundamental Rights.

On 11 July 2002 the Grand Chamber delivered two judgements considering the legal status of transsexuals in the United Kingdom, particularly with regard to the birth registration system and their treatment in the sphere of employment, social security, pensions and marriage.[179] The main question in both of the cases was whether the Contracting Party had failed to comply with a positive obligation to ensure the rights of the applicants to respect for their private life, particularly through the legal recognition of their gender re-assignment.

In these landmark decisions the Court for the first time referred to the proclaimed CFR listing it as the only relevant international document in the field of human rights protection despite the fact that the parties did not make any reference to the document.[180] However, the Court did not only mention the Charter in the operational part of the decision but also in its factual part. In both cases the Grand Chamber unanimously decided that the United Kingdom had violated Articles 8 (right to respect for private and family life) and 12 (right to marry). With regard to the latter the Court, by using a dynamic and evolutionary approach to interpreting the ECHR, overruled its previous decisions as it assessed that major social changes and developments in science and medicine in the field of transsexuality affirm that a test of

[179] Case of *I. v. The United Kingdom*, Application No. 25680/94 and Case of *Goodwin v. UK*, Application No. 28957/95. These cases were appointed to the same Third Section of the Court and latter to the same Grand Chamber composed of 17 judges which held a joined hearing in spring 2002.
[180] Case of *I. v. The United Kingdom*, para. 41 and Case of *Goodwin v. UK*, para 58.

congruent biological factors can no longer be the only decisive criteria to establish the sex of an individual.[181] Moreover it substantiated its reasoning that the right to marry had gained a wider social meaning by explicitly referring to more favourable Article 9 CFR[182] which deliberately departs from the wording of the Convention by removing the reference that the right to marry is only entrusted to people of opposite sex.[183]

In these pioneering cases the Court addressed the Charter not only to confer and support the existence of rights but also to substantiate developments in society and to give additional reasons for its own departure from well-established case law. The fact that the Court did not list other corresponding Charter rights when discussing the violation of Article 8 ECHR makes it evident that it uses the Charter at its own discretion and as an authoritative source of human rights to back up its arguments when needed.

The case of *Bosphorus v. Ireland*[184] was concerned with the provisions of EU regulation based on a UN Sanction Resolution. The Court made reference to the Charter in its list of evolutionarily relevant Treaty provisions concerning human rights. It explicitly referred to the Charter's Preamble and Article 52(3) CFR to establish the connection to the ECHR. This was also the first time when the Court touched upon the question of the Charter's legal status, emphasizing that it was not yet legally binding, but assuming that its incorporation into primary law through the Constitutional Treaty would lead to a binding nature.[185] In the factual part of the judgement the Court further relied on the CFR to substantiate its believe that the evolution of human rights in the EU is now equivalent to the ECHR. It emphasized that the Charter rights derive substantially from Convention rights and recognized them as minimum human rights standards.[186] Judge Ress also stressed that once the Charter was binding it would make it clear when the protection in the EU is really equivalent.[187]

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[181] Case of *I. v. The United Kingdom*, para. 80 and Case of *Goodwin v. UK*, para 100.
[182] *Idem.*
[183] See, to that issue, Chapter 3.1.3. of this thesis.
[184] The case was already consulted in earlier Chapter 2.1.2., when investigating the position of EU legal order in the ambit of the Council of Europe. Case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Application No. 45036/98.
[185] *Ibidem*, paras. 80-81.
[186] *Ibidem*, para. 159. The importance of this safeguard clause was also emphasized in Joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelskty and Garlicki, para. 4
[187] Concurring opinion of Judge Ress in the Case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, para. 2

The 2006 decision *Sørensen and Rasmussen v. Denmark* is another example where the Court referred to the CFR to substantially support its reasoning. It held that there is little support for the maintenance of closed shop agreements and that Article 12 CFR reaffirms by virtue of Article 53 CFR the freedom to join or not to join trade union as stated in Community Charter of the Fundamental Social Rights of Workers.[188] The Court consequently ruled that Denmark violated the applicants' negative right to trade union freedom by allowing the existence of pre-entry closed-shop agreements between employers and particular trade unions.

Despite the fact that the Charter was not yet legally binding the ECtHR took it into account in defining the meaning of the terms and notions in the text of the Convention. Moreover, it even relied on the Charter for interpretative means in a case against a Non-EU Member State.[189] In *Demir and Baykara v. Turkey* the Court used the Charter to demonstrate that the open approach in Article 12(1) CFR supported its argument that public servants are also able to rely on the right to form and join trade union and that the case law should be reconsidered so that the right to negotiate and conclude collective agreements would become an essential element of Article 11 ECHR.[190] Judge Zagrebelsky emphasized that the Charter proclamation appears to be the only new evolutionary fact on which the Court reversed its precedent and thus extended the scope of the Convention.[191]

Next, Article 50 CFR protecting *ne bis in idem* principle was listed as a comparative international law provision in the 2009 case *Sergey Zolotukhin v. Russia*[192] where applicant complained against Russian Federation that he had been tried twice for the same disorderly conduct. After demonstrating that both sanctions were of a criminal nature, the Court examined the meaning of the right not to be tried or punished twice. As to whether the offences were the same, the Court noted that it had adopted a variety of approaches in the past and that the demand for legal certainty called for a harmonized interpretation.[193] Looking at

[188] Case of *Sørensen and Rasmussen v. Denmark*, Applications No. 52562/99, paras. 37 and 74.
[189] The Court numerous times stressed that in searching for common grounds among the norms of international law it has never distinguished whether the source has been ratified specifically by the respondent State.
[190] Case of *Demir and Baykara v. Turkey*, Application No. 34503/97, paras. 47, 51, 105 and 150.
[191] See separate opinion of Judge Zagrebelsky in the Case of *Demir and Baykara v. Turkey*, para. 2.
[192] Case of *Sergey Zolotukhin v. Russia*, Application No.14939/03, para. 33.
[193] *Ibidem*, paras. 70-78.

relevant and comparative international texts the Court deduced that the approach used should be based strictly on the identity of the material acts and not on specific legal classification.[194] Thus the term "same offence" from the Charter article was used to validate a new interpretation of Article 4 of Protocol No. 7 ECHR which now prohibits the prosecution or trial for a second offence in so far as it arose from identical facts or facts that were "substantially" the same as those underlying the first offence.

This decision was confirmed already in the same year by *Maresti v. Croatia*.[195] This case was likewise concerned with an application alleging a violation of the *ne bis in idem principle* as the applicant was tried and finally convicted twice for the same conduct. In the merits of the case concerning the *idem* element the Court set out the relevant passages of *Sergey Zolotukhin v. Russia* and with that also indirectly referred to the Article 50 CFR.[196]

The Charter and its Explanatory notes were also extensively discussed in the recent 2010 decision *Schalk and Kopf v. Austria*[197] where the Court was asked for the first time to examine whether two persons of the same sex can claim the right to marry from Article 12 ECHR. In the operational part of the judgement the Strasbourg court referred to EU law, listing Article 9 CFR and the corresponding text of the Explanations.[198] In order to answer the complaint the Court needed to solve two issues: the relationship of the case to its previous case law on the right of post-operative transsexuals to marry and the interface between the Convention right and a broadly formulated Charter right. It reaffirmed that the Charter provision is broader in scope as it intentionally omits the notion of man and women. It thus stated that: *"Regard being had to Article 9 Charter […] the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex."*[199]

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[194] *Ididem*, para. 79
[195] Case of *Maresti v. Croatia*, Application No. 55759/07.
[196] *Ibidem*, para. 62.
[197] Case of *Schalk and Kopf v. Austria*, Application No. 30141/04.
[198] *Ibidem*, paras. 24-25. The Strasbourg court used the expression Commentary instead of Explanations.
[199] *Ibidem*, para. 61. In separate opinion judge Malinverni especially criticized this paragraph since in his opinion no inferences can be drawn from Charter provision as regards the interpretation of Article 12 ECHR. See concurring opinion of Judge Malinverni joined by Judge Kovler in the Case of *Schalk and Kopf v. Austria*, Application No. 30141/04, para. 2.

With this statement the Court explicitly used the Charter provision to interpret Article 12 ECHR and extend it so that it is now applicable also to same sex marriages. Ultimately the ECtHR decided that the question at the present stage of development should be left for the Contracting Parties to decide, also supporting this argument with its own interpretation of the Charter Explanations.[200] Despite the fact that the Court did not use the Charter to the benefit of the applicants the case is nevertheless extremely important as the Strasbourg court provided its own interpretation of the EU texts and even concluded on their legal status. There are more possible answers as to why the Court undertook such a deep analysis of the Charter provisions. Firstly, the parties, in their oral submissions, had already commented on the Charter provisions and secondly, the Charter and also its Explanations were now legally binding as the Court also explicitly noted.[201]

Consequently, the Strasbourg court started to use the Charter, which was in the beginning not even legally binding, as an example of one of the most recent human rights documents and an indicator for the common practice of European States. The rights enshrined in the EU Charter provide for a supplementary authority and a decisive support of the Court's arguments affecting the whole of Europe. The CFR now serves as a substantive point of reference and is used at the discretion of the ECtHR. On the one hand the Court uses the Charter merely as a tool to recognize and support existing rights without any legal force; on the other hand, the Charter enables the judiciary to further develop its case law by broadening the scope of Convention rights.[202]

3.3.4. Charter Rights as a Source of Newly Derived Rights

This present sub-chapter is going to examine the usage of the progressive and liberal characteristics of the Charter to gradually extend and raise the level of protection of human rights standards in the Convention regime. Whilst in the interests of legal certainty, foreseeability and equality before the law the ECtHR should not depart from its previous precedents so often, the legitimate demands of improvement together with dynamic nature of

[200] Case of *Schalk and Kopf v. Austria*, Application No. 30141/04, paras. 60-61.
[201] *Ibidem*, paras. 24 and 60.
[202] Inasmuch as in these latter cases the Charter is not the only or decisive reason to depart from well-established Court's case law, or where there was no violation of the Convention, these cases do not yet fall under the next category.

the Convention sometimes prevail. In the cases presented beneath, the Grand Chamber of the Strasbourg court further developed its jurisprudence by relying on the EU Charter of Fundamental Rights. Consequently, the scope of protection of certain human rights is widened and harmonized on the level which is afforded by the EU human rights document.
The 2007 case V*ilho Eskelinen*[203] was concerned with eight applicants among whom the majority were police officers. Upon transfer to a remote part of Finland they were, after more than seven years of proceedings, denied the right to monthly individual wage supplements. For that reason the applicants among others alleged violation of Article 6(1) ECHR[204] on account of denial of an oral hearing and the excessive length of the proceedings. The central issue was the question of the applicability of Article 6 ECHR since recent case law of the Court had excluded the protection for disputes raised by civil servants.

The Strasbourg court first reflected on its previous case law, especially the *Pellegrin* case where it introduced a new functional criterion based on the nature of the employee's duties and responsibilities and thus limited the inapplicability of Article 6(1).[205] Whilst certain categories, like police and army forces, were still automatically excluded from the protection.[206] It was particularly Article 47 CFR which provided for the inspiration and authoritative argument to further establish that the right to an effective remedy and a fair trial premises should apply to everyone and to any kind of proceedings. The ECtHR also took into consideration the Explanations annexed to the document, stating that they constitute a "*valuable tool of interpretation intended to clarify the provisions of the Charter*". The Court concluded that in the context of EU law Article 6 ECHR is not only confined to civil and criminal matters and that the Charter provides for a codification of the wider approach taken by the ECJ in its case law.[207] Thus it established a new presumption of the applicability of Article 6 ECHR for public law disputes and decided in the favour of applicants' claim on account of the length of the proceedings.[208] Five of the judges nevertheless disagreed stressing that the case law of the ECJ cannot be seen as an argument to overturn well-

[203] Case of *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00.
[204] They also alleged violation of Article 13 and Article 1 of Protocol No. 1, in conjunction with Article 14 of the Convention. Only the former violation was found.
[205] Case of *Pellegrin v. France*, Application No. 28541/95, para. 64.
[206] Such a system created anomalous results and should thus be further developed. Case of *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00, paras. 50-56.
[207] *Ibidem*, paras. 29-30.
[208] *Ibidem*, para. 62.

established Strasbourg case law.[209] In my opinion the dissenting judges failed to see the real theoretical argument to abandon the *Pellegrin* case law, namely the Charter provisions which they did not consider in their opinion.[210]

The second case where Charter rights were used to progress Convention rights was the 2009 case *Scoppola v. Italy (No.2)*[211] where the applicant had been under new Italian law sentenced to life imprisonment prolonging his original sentence to thirty years. After exhausting all domestic remedies the applicant appealed to the ECtHR on grounds of Articles 3, 6 and 7 ECHR.[212] He particularly emphasized that Article 7 ECHR protects not just against the non-retrospective application of the criminal law but also ensures that the most favourable law should be applied. He based his opinion on provisions of numerous international documents, especially Article 49 CFR. The latter explicitly enshrines the *lex mitior* principle stating that: "*If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.*"[213]

This argument was also accepted by the majority of judges which, after referring to the Court's precedent in *X v. Germany*[214] where the more lenient penalty principle was excluded from Article 7 ECHR, advocated for the need to adjust the case law in accordance with international developments and a newly-emerged consensus in Europe and elsewhere. Although it is not surprising that the Court opted for a dynamic interpretation of the Convention and departed from its more than seventy years old precedent, it can still be argued that the recently proclaimed Charter had been of decisive importance.[215] Even if the Charter is not the only international document which has enshrined this principle it is still the only source that substantiated the Court's argument that there is a European consensus that Article 7 ECHR should also include principle of the retrospective application of more lenient criminal law, thus harmonizing it with its counterpart Article 49 CFR.

[209] Joined dissenting opinion of Judges Costa, Wildhaber, Türmen, Boreggo and Jočienė, paras., 6-7.
[210] However, at the time of the decision the Charter was not yet legally binding.
[211] Case of *Scoppola v. Italy (No.2),* Application No. 10249/03.
[212] *Ibidem*, para. 25.
[213] Article 49(1) CFR.
[214] Case of *X v. Germany*, Application No. 7900/77.
[215] Case of *Scoppola v. Italy (No.2),* Application No. 10249/03, para. 105.

Next, in *Micallef v. Malta*, decided just before the entry into force of the Lisbon Treaty, a brief note was made of Article 47 CFR under the section Comparative and EU law and practice.[216] The wider meaning of this Article as compared to Article 6 ECHR was emphasized but no further mentioning of the Charter followed. Nevertheless, it can be argued that the broader scope of the Charter provision which does not confine the right to a fair trial only to civil rights and obligations or to criminal charges but also to any rights and freedoms was decisive and essential for the new approach taken by the Court. After explaining why there is a need to develop its jurisprudence, the ECtHR extended the application of guarantees in Article 6 ECHR to include interim measures and injunction proceedings.[217]

In some respects this judgement correlates to V*ilho Eskelinen*[218] case as the Grand Chamber again extended the applicability of Article 6 ECHR,[219] yet with a more cautious reasoning. Without any specific reference to the Charter in the operative part of the judgement, the Court only stated that there is a widespread consensus amongst European States and that the same guarantees have already been provided in the jurisprudence of the ECJ. Since the latter was incorporated in the Charter it can be argued that it was precisely this EU document that was one of the crucial reasons to advance the level of human rights protection. Moreover, no other reference to international human rights documents was made.

The most recent case where the Strasbourg court used the Charter rights to extend the protection afforded by the Convention was in *Neulinger and Shuruk v. Switzerland*,[220] which was decided after the Charter had become legally binding. This case was concerned with the question whether the decision of the Swiss Federal Court, that the unauthorized removal of the child from Israel to Switzerland was wrongful within the meaning of Article 3 of the Hague Convention on Child Abduction,[221] violated Article 8 ECHR. Despite the fact that until recently the Court had chosen to disregard the best interests of the child when considering the

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[216] Case of *Micallef v. Malta*, Application No. 17056/06, para. 32.
[217] The Court however did not extend the scope of Article 6 ECHR to interim measures unconditionally but set further conditions that the right at stake in both (main and injunction) proceeding should be civil and that the effect of the interim measure should be scrutinised on a case by case basis. *Ibidem*, paras. 78-86.
[218] Case of *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00.
[219] This was emphasized by four dissenting judges. See joint dissenting opinion of Judges Costa, Jungwiert, Kovler and Fura, para. 4.
[220] Case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07.
[221] Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

system under the Child Abduction Convention,[222] in the case at stake it found a violation. The Court preliminarily noted that there is a broad consensus as to the utmost importance of the child's best interests[223] although the latter are not explicitly protected under the Convention. In that respect it referred in particular to the EU Charter which indeed does provide the rights of the child and explicitly stipulates that the right to maintain personal relationships and direct contact with parents can be restricted with the aim of protecting the interests of the child.[224] The ECtHR, relying exclusively on the Charter provision, expanded the meaning of Article 8 ECHR to guarantee that the return under the Hague Convention must be carried out with due regard to the child's best interests.[225] In that sense the Court decided that the enforcement of such national decision will restrict the rights of the child and thus would amount to a conditional violation of Article 8 ECHR.

It is exactly in these four judgements where the reliance of the Strasbourg court on the new and advanced Charter rights is of paramount importance for the further harmonization of European human rights. Of course the ECtHR is initially still referring to its own human rights document. Nevertheless, especially when there is a gap in human rights protection under the Convention system or the latter is insufficient to provide for as an effective protection as would correspond to the current evolution of society, the Court tends to use the broader Charter provisions and with that harmonizes human rights in Europe at a higher level.

[222] See Case of *Maumousseau and Washington v. France*, Application No. 39388/05. Dissenting judge Zupančič pointed out that the reasoning in the Case of *Neulinger* shows that the decision in the Case of *Maumousseau*, although the case was even more severe, was wrongly decided and that the Court despite finding only a violation of hypothetical nature made a correct decision. See, to that issue, dissenting opinion of Judge Zupančič, para. 21.
[223] Case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, para. 135.
[224] See Article 24(3) CFR and Case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, paras. 56 and 135.
[225] Case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, para. 138.

4. TOWARDS A COMMON STANDARD OF HUMAN RIGHTS PROTECTION IN EUROPE?

Already the bare existence of two human rights documents which are interpreted by two courts is likely to produce the situation of diverging application of human rights law:

> "*A situation where the same law can be applied or interpreted differently, depending on whether the ECHR or the EU Charter is taken as a yardstick, inevitably generates different standards of protection, and is thus contrary to one of the key features of fundamental rights – universality*."[226]

Thus the future accession of the EU to the ECHR is being pursued as the only feasible way to unify human rights. In the absence of the actual accession the latest references and usage of the Charter by the Strasbourg court has started to serve the same objective, pursuing further harmonization of the human rights standards in the European sphere and sometimes even raising the level of protection of human rights. Moreover this new element proves that the relationship between regimes is still mostly judicial-based. In this present chapter I will examine the meaning of this unique aspect of harmonization, addressing the question of whether it will mitigate the relationship of "Kafkian complexity".[227]

4.1. Divergent Standards of Human Rights Protection

Before discussing the impact of this reliance on normative harmonization, the divergent standards of human rights protection in Europe before the Charter became legally binding should be recalled. In Sub-chapter 2.2.2., where reliance of the ECJ on the Strasbourg regime was presented, some of the inconsistencies such as the right against self-incrimination, the right not to give evidence against oneself and the right to a fair hearing, particularly in the field of competition law, were mentioned. Further, in Sub-chapter 2.1.2.1., the right to privacy of business premises was mentioned as an example of a divergent standard of protection. These divergent standards mostly reflect the special nature of the EU and its legal order and

[226] H. C. KRÜGER and J. POLAKIEWICZ, Proposal for a Coherent Human Rights Protection System in Europe/The European Convention on Human Rights and the EU Charter of Fundamental Rights, 22(1-4) (2001) HRLJ, p. 6.
[227] S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev., p. 639.

result in a lower standard of protection under the Luxembourg system. It is thus incumbent on the ECJ to reconcile these human rights paradigms with the corresponding level of protection guaranteed by the Convention system. It is submitted that the ECJ should achieve such common standards by relying more explicitly, coherently and comprehensively on the jurisprudence of the ECtHR.[228] Also, the entry into force of the EU Charter of Fundamental Rights could provide for a further authority for the ECJ to develop human rights.

It has been further argued that the Charter has not only provided the EU with a codified Bill of Rights document but has also contributed to an innovative legal solution for common European problems by introducing many new human rights. The parallels between these new rights and the Convention standards were drawn in Chapter 3.1.3. with an emphasis on the higher standards afforded by the Charter. It is precisely these new Charter rights which have been taken over by the ECtHR and applied in its case law, fostering the harmonization of human rights standards in the European legal sphere.

From the analysis in Chapter 3.3.1. it can be deduced that the references to Charter rights by the ECtHR were at first still very marginal. Before the Charter was legally binding, its rights were invoked in separate opinions and with that they indicated the possible direction of future developments in the case law of the ECtHR. Although the rights invoked provided for progression of the human rights, no common standard in Europe emerged. Similar is true for brief and vague references to the Charter in the operative part of the judgements, discussed in Chapter 3.3.2. In all these cases Charter articles were invoked only as an example of corresponding international legal provisions to the rights already secured under the Convention articles or in the case law of the ECtHR. Since common standards already exist, no harmonization has occurred. For instance, in *Anheuser-Busch inc. v. Portugal*[229] the Court held that the right to intellectual property, which is explicitly formulated in Article 17(2) CFR, is already protected under Article 1 Protocol No. 1 according to well-established case law.[230]

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[228] G. HARPAZ, The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy, 46(1) (2009) CML Rev, p. 115.
[229] Case of *Anheuser-Busch inc. v. Portugal*, Application No 73049/01.
[230] Until now the ECJ consistently held that whilst the right to property forms part of the general principles of EU law, it is not an absolute right and must be viewed in relation to its social function. See for example Case C-491/01 *British American Tobacco Investments and Imperial Tobacco* [2002] ECR I-11453, para. 149. Since the

4.2. Harmonization of Human Rights Standards

The emergence of common human rights standards can be best observed in cases where the Strasbourg court cited the Charter in the argumentation part of the judgement. These references were logically made on account of Charter articles which encompass newly derived rights which are also capable of harmonizing human rights on a more beneficial level.

In *I. v. The United Kingdom* and *Goodwin v. UK* the Strasbourg court, referring to the new formulation of the right to marry in Article 9 CFR, also secured this right to post-operative transsexuals.[231] Such extended interpretation of the Charter article was also accepted two years later by the ECJ in the case *K.B.* where the Court emphasized that the contested legislation which prevented a couple from fulfilling the marriage requirement did not only breach ECHR but also Article 141 TEC (now Article 157 TFEU).[232] With that the jurisdictions of both courts were harmonized. Article 9 CFR was mentioned also in *Schalk*[233] where the Strasbourg court, giving its own interpretation of the Charter and Explanatory notes, concluded that the right to marry is no longer limited to marriage between persons of opposite sex. Despite the lack of jurisprudence from the ECJ it can be concluded that the deliberate omission of the explicit mentioning of man and women in Article 9 allows for a more progressive interpretation. The emergence of a harmonized human rights standard thus lies particularly in the fact that both European systems now provide for a more beneficial possibility to conclude a marriage if such a right is secured in the domestic legal order.[234]

A new European human rights standard has emerged due to the usage of Article 12 CFR, on the freedom of assembly and association, and Article 28 CFR, on the right of collective bargaining and action, in the jurisprudence of the ECtHR. In *Demir and Baykara v. Turkey*[235] the Court adopted the same open approach as the Charter, deciding that the right to organize

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ECtHR merely stated that Article 1 Protocol No. 1 is applicable to the intellectual property as such but did not find interference with the applicant's rights to the peaceful enjoyment of its possessions, it is not yet possible to assess if the ECJ will now started to use the right to property more profoundly and apply it in cases involving EU institutions. It seems that the Courts only agree on the existence but not yet on substance of this right.

[231] Case of *I. v. The United Kingdom*, Application No. 25680/94 and Case of *Goodwin v. UK*, Application No. 28957/95.

[232] Case C 117/01 *K.B.*, 7 January 2004, para. 34.

[233] See Case of *Schalk and Kopf v. Austria*, Application No. 30141/04.

[234] *Ibidem*, para. 61, Article 9 CFR and Convent 49, p. 12.

[235] Case of *Demir and Baykara v. Turkey*, Application No. 34503/97.

is assured to everyone, thus also to public servants; and that the right to collectively bargaining with the employer has become one of the essential elements of Article 11 ECHR.[236] These two rights have also been interpreted by the ECJ in its recent judgements *Laval* and *Viking*[237] in which the Court decided that the social right to take collective action is not absolute and can thus be restricted.[238] It further established that the right provides for a restriction of economic freedoms and that such restriction can be justified by an overriding reason of public interest, if it is proportionate. Despite the common human rights standards which emerged with regard to the substance of these two rights, no harmonized system of restriction of rights is visible. Whereas ECHR provides for specific limitation clause, the ECJ did not even follow the general limitation clause in the Charter but rather balanced social rights against economic rights applying its mandatory requirement doctrine.

On account of the acceptance of a broader right to an effective remedy and to a fair trial in the case law of the ECtHR another harmonized human rights standard appeared. In *Vilho Eskelinen*[239] and *Micallef*[240] the Court expanded the protection under Article 6 ECHR to also cover administrative cases and interim measures proceedings, respectively. By doing that the ECtHR applied a wider approach in favour of judicial control which is enshrined in Article 47 CFR and also complied with landmark decisions of the ECJ on the principle of effective legal protection in judgements *Johnston*[241] and *Bernard Denilauler*.[242]

Moreover, in *Scoppola v. Italy (No.2)*[243] the Strasbourg court accepted the more beneficial principle of the retrospective application of more lenient criminal law, which is embodied in Article 49 CFR and also forms a part of the general principles of EU law as decided by the

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[236] Ibidem, paras. 107 and 154.
[237] See Case C-341/05 *Laval un Partneri* [2007] ECR I-11767 and Case C-438/05 *Viking Line* [2007] ECR I-10779. In line with these two cases is also Case C-346/06 *Rüffert*, 3 April 2008, which is concerned with The Posted Workers Directive.
[238] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, para. 91.
[239] Case of *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00.
[240] Case of *Micallef v. Malta*, Application No. 17056/06.
[241] In this case the ECJ decided that a person's status as a holder of public power does not render the requirements of judicial control inapplicable. See Case 222/84 *Johnston* [1986] ECR 1651.
[242] The ECJ held that judicial decisions authorizing provisional or protective measures which are delivered without the party, against which they are directed, having been summoned to appear and which are intended to be enforced without prior service cannot be recognized according to its case-law. This implies that the same safeguards should also apply outside the context of final decision, thus in interim proceedings. See Case 125/79 *Bernard Denilauler v SNC Couchet Frèresand* [1980] ECR 1553.
[243] Case of *Scoppola v. Italy (No.2)*, Application No. 10249/03.

ECJ in case *Berlusconi and Others*.[244] Thus, the reliance of the Strasbourg court on Charter rights has resulted in emergence of another common European standard of human rights protection.

In *Neulinger*[245] the ECtHR cited the Charter's provision on the rights of the child enshrined in Article 24 CFR which provided that the child should have the right to maintain a personal relationship and contact with both parents, unless this would be contrary to his or her interests. The Court further deduced that child's best interests should also be protected under Article 8 when the Hague Convention on Child Abduction is applicable. Thus, Swiss courts were *de facto* prohibited from returning the child to Israel. Only half a year later the ECJ needed to adjudge a similar case of the wrongful retention of a child. In the *Zarraga* case[246] the German court asked the ECJ whether it had to enforce the Spanish judgment and return the child into the custody of the father even though in proceedings before Spanish courts the child had never been given the opportunity to express her views as established by Regulation No 2201/2003[247] and as also required by Article 24(1) CFR. The ECJ decided that it is for the courts of the Member State of origin to determine whether the judgment is vitiated by an infringement of the child's right to be heard, leaving the German court with no power to refuse to enforce the Spanish certified judgment.[248]

Despite the different decisions between both Constitutional courts the ECJ in *Zarraga* primarily decided which national court has jurisdiction to decide whether Article 24 CFR was respected. As with the Strasbourg court, the Luxemburg court also stressed the importance of the child's best interests when it held that hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) CFR.[249] Also, the provisions of the Regulation cannot be interpreted in such a way that they disregard the fundamental rights of the child, the respect for which undeniably merges into the best interests of the child.[250]

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[244] Joined cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others*, 3 May 2005.
[245] Case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07.
[246] Case C-491/10 PPU *Zarraga v.Simone Pelz*, 22 December 2010.
[247] Also know as Brussels II regulation which replaces the existing Hague Convention on the Civil Aspects of International Child Abduction between EU countries.
[248] Case C-491/10 PPU *Zarraga v.Simone Pelz*, 22 December 2010, paras. 50, 69, 73.
[249] *Ibidem*, paras. 63-67.
[250] Case C-403/09 PPU *Detiček*, 23 December 2009, paras. 53-55.

Moreover, in *J. McB.* the ECJ held that Article 7 CFR must be read in a way which respects the obligation to take into consideration the child's best interests.[251] Thus, it is now a common standard that in cases of child abduction a child's best interests should be secured under the right to respect for private and family life.

4.3. Final Observations

Summa summarum, the reliance of the Strasbourg court on Charter rights has resulted in harmonization of some human rights standards. In all these cases the level of protection in Europe is now higher. Moreover, the ECtHR has also applied the Charter more extensively than the ECJ since it has used the Charter to solve common legal problems in Non-EU Member States.[252] Similarly, it has extended the Charter's application to cover situations where Member States were not acting in the ambit of the EU legal order,[253] and thus expanding its scope to cover purely internal situations. This expansion has ultimately resulted in a more coherent protection of human rights in the EU legal system.

Despite that the incorporation of the Charter in the jurisprudence of the ECtHR is still very unpredictable and only sometimes results in a progressive innovation of common standards. Both European courts also lack a comparative law methodology in their jurisprudence,[254] thus it is extremely difficult to assess how far the new element has contributed to a greater reconciliation of the sometimes diverging jurisdictions. Moreover, no chronological pattern can be found since references were made to Charter rights before and also after the establishment of the binding nature of the Charter. It remains to be seen whether and to what extend the legally binding Charter will truly serve as a means to harmonize human rights in Europe.

[251] Case C-400/10 PPU *J. McB. v. L. E.*, 5 October 2010, para. 60.
[252] For instance Case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07.
[253] See Case of *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00.
[254] S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) CML Rev., pp. 657-660.

5. CONCLUSION

This thesis provided an insight into the historic relationship between the Luxembourg and Strasbourg system of human rights protection, mainly looking at the judicial dialogue of the European courts. It has been argued that the two jurisdictions are mostly in a relationship of co-operation and not one of the confrontation and asymmetry.[255]

With the introduction of the EU Charter of Fundamental Rights the ECHR, a traditional *primus inter pares* among the sources of human rights law in Europe, got a competitor. In contrast to the (at some points) out-dated wording of the Convention, the Charter introduces a more modern and innovative approach and is especially capable of promoting a higher standard of protection of human rights. For that reason the CFR has developed a life of its own, diminishing the role of the ECHR in the EU legal system[256] and increasing its role within the system of the Strasbourg court.[257]

The Strasbourg court has thus started to rely on Charter rights which has provided for a new element in the interplay between both regimes. Such reliance promotes the normative harmonization of human rights standards in Europe which was presented in Chapter 4. Furthermore, it strives to formalize and strengthen the interface between both European courts and improves trust and cooperation between them by avoiding conflicting judgements. In other words, it works to the benefit of both systems. While the ECtHR has found another authority to support its evolutionary and dynamic interpretation of Convention provisions – thus expanding human rights protection beyond the text of the ECHR, the Luxembourg system has received an affirmation of its attempts to engage more profoundly in the global sphere of human rights protection.

So far the pluralistic system of two jurisdictions and two human rights documents will still draw the lines of the European human rights regime. The latest aspect of the mutual reliance on Charter rights, which was investigated in this thesis, does not yet establish comprehensive

[255] This question was posed by Tridimas. See T. TRIDIMAS, The General Principles of EU Law, 2nd ed., Oxford University Press, 2006, Oxford, New York, p. 240.
[256] See Sub-Chapter 2.2.3.2.
[257] See Chapter 3.3.

human rights standards in Europe. It presents just another step in an on-going dialogue of the European integration project aimed at providing unified solutions to common human rights problems.

Despite this fact, it is nevertheless interesting to observe that the ECtHR has started to use the Charter, and even more interesting that by doing so, the harmonization of European standards has also started to occur. The future developments of this friendly interplay between regimes will depend on further judicial dialogue and the way in which the Courts will interpret both documents and respect each other's jurisprudence.

6. LIST OF LITERATURE

6.1. Referred and Consulted Books

L. BETTEN and N. GRIEF, EU Law and Human Rights, Addison Wesley Longman Limited, 1998, London, New York.

D. CHALMERS, G. DAVIES and G. MONTI, European Union Law: Text and Materials, 2nd edition, Cambridge University Press, 2010, Cambridge, New York.

E. O. ERIKSEN, J. E. FOSSUM and A. M. MENÉNDEZ (eds.), The Chartering of Europe, Nomos Verlagsgesellschaft, 2003, Baden-Baden.

G. DI FEDERICO (ed.), The EU Charter of Fundamental Rights: From Declaration to Binding Instrument, Springer, 2011, Dordrecht.

K. FEUS (ed.), An EU Charter of Fundamental Rights, The Federal Trust, 2000, London.

S. GRILLER and J. ZILLER (eds.), The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?, Springer, 2008, Wien, New York.

T. C. HARTLEY, European Union Law in a Global Context: Text, Cases and Materials, Cambridge University Press, 2004, Cambridge.

T. K. HERVEY and J. KENNER (eds.), Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective, Hart Publishing, 2003, Oxford, Portland.

P. LEMMENS and W. VANDENHOLE (eds.), Protocol No. 14 and the Reform of the European Court of Human Rights, Intersentia, 2005, Antwerpen, Oxford.

R. St. J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), The European System for the Protection of Human Rights, Kluwer Academic Publishers, 1993, Dorderecht.

P. MAHONEY, F. MATSCHER, H. PETZOLD and L. WILDHABER (eds.), Protecting Human Rights: The European Perspective, Carl Heymanns Verlag KG, 2000, Köln.

E. PALMER, Judicial Review, Socio-Economic Rights and the Human Rights Act, Hart Publishing, 2007, Oxford, Portland.

S. PEERS and A. WARD (eds.), The European Union Charter of Fundamental Rights, Hart Publishing, 2004, Oxford, Portland.

J.-C. PIRIS, The Lisbon Treaty – A Legal and Political Analysis, Cambridge University Press, 2010, Cambridge, New York.

Y. SHANY, The Competing Jurisdictions of International Courts and Tribunals, Oxford University Press, 2003, New York.

T. TRIDIMAS, The General Principles of EU Law, 2nd edition, Oxford University Press, 2006, Oxford, New York.

6.2. Referred and Consulted Articles

D. ASHIAGBOR, Economic and Social Rights in the European Charter of Fundamental Rights, 1 (2004) European Human Rights Law Review, pp. 62- 72.

R. BARENTS, The Court of Justice after the Treaty of Lisbon, 47(3) (2010) Common Market Law Review, pp. 709-728.

F. VAN DEN BERGHE, The EU Issues of Human Rights Protection: Same Solutions to More Acute Problems?, 16(2) (2010) European Law Journal, pp. 112-157.

G. DE BÚRCA, The drafting of the European Union Charter of Fundamental Rights, 26(2) (2001) European Law Review, pp. 126-138.

G. DE BÚRCA and J. B. ASCHENBRENNER, The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights, 9 (2002-2003) Columbia Journal of European Law, pp. 355-382.

I. CANOR, *Primus Inter Pares*: Who is the Ultimate Guardian of Fundamental Rights in Europe?, 25(1) (2000) European Law Review, pp. 3-21.

P. CRAIG, The Treaty of Lisbon, Process, Architecture and Substance, 33(2) (2008) European Law Review, pp. 137-166.

M. DOUGAN, The Treaty of Lisbon 2007: Winning Minds, not Hearts, 45(3) (2008) Common Market Law Review, pp. 617-703.

S. DOUGLAS-SCOTT, The Charter of Fundamental Rights as a Constitutional Document, 9 (1) (2004) European Human Rights Law Review, pp. 37-50.

S. DOUGLAS-SCOTT, A Tale of two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*, 43(3) (2006) Common Market Law Review, pp. 629-665.

P. DRZEMCZEWSKI, The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights, 22(1-4) (2001) Human Rights Law Journal, pp. 14-32.

P. EECKHOUT, The EU Charter of Fundamental Rights and the Federal Question, 39(5) (2002) Common Market Law Review, pp. 945-994.

R. A. GARCIA, The General Provisions of the Charter of Fundamental Rights of the European Union, 8(4) (2002) European Law Journal, pp. 492-514.

LORD GOLDSMITH, A Charter of Rights Freedoms and Principles, 38(5) (2001) Common Market Law Review, p. 1201-1216.

G. HARPAZ, The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy, 46(1) (2009) Common Market Law Review, pp. 105–141.

F. G. JACOBS, Human rights in the European Union: The Role of the Court of Justice, 26(4) (2001) European Law Review, pp. 331-341.

H. C. KRÜGER and J. POLAKIEWICZ, Proposal for a Coherent Human Rights Protection System in Europe/The European Convention on Human Rights and the EU Charter of Fundamental Rights, 22(1-4) (2001) Human Rights Law Journal, pp. 1-13.

K. KUHNERT, Bosphorus – Double Standards in European Human Rights Protection?, 2(2) (2006) Utrecht Law Review, pp. 177-189.

B. KUNOY and A DAWES, Plate Tectonics in Luxembourg*:* The *Ménage à Trois* Between EC Law, International Law and the European Convention on Human Rights Following the UN Sanction Cases, 46 (2009) Common Market Law Review, pp. 73-104.

E. C. LANDAU, A New Regime of Human Rights in the EU?, 10(4) (2008) European Journal of Law Reform, pp. 557-575.

P. LEMMENS, The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects, 8(1) (2001) Maastricht Journal, pp. 49-67.

J. B. LIISBERG, Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?, 38(5) (2001) Common Market Law Review, pp. 1171-1199.

T. LOCK, EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg, 35(6) (2010) European Law Review, pp. 777-798.

P. MAHONEY, The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention, 23(8-12) (2002) Human Rights Law Journal, pp. 300-303.

C. MCCRUDDEN, The Future of the EU Charter of Fundamental Rights, Jean Monnet Working Paper No. 10/01.

A. J. MENÉNDEZ, Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union, 40(3) (2002) Journal of Common Market Studies, pp. 471-490.

I. PERNICE, The Treaty of Lisbon: Multilevel Constitutionalism in Action, 15 (2009) Columbia Journal of European Law, pp. 349-407.

G. SACERDOTI, The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe, 8 (2002) Columbian Journal of European Law, pp. 37-52.

N. N. SHUIBHNE, Margin of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, 34(2) (2009) European Law Review, pp. 230-256.

T. SYRING, European Court of Human Rights' Judgment on Expulsion of Asylum Seekers: M.S.S. v. Belgium & Greece, 15(5) (2011) American Society of International Law Insight, retrieved from: http://www.asil.org/pdfs/insights/insight110224.pdf (Accessed on 18.06.2011).

F. TULKENS, Towards a Greater Normative Coherence in Europe/The Implication of the Draft Charter of Fundamental Rights of the European Union, 21(8) (2000) Human Rights Law Journal, pp. 329-332.

J. H. H. WEILER, Editorial: Does the European Union Truly Need a Charter of Rights?, 6(2) (2000) European Law Journal, pp. 95-97.

W. WEIß, Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon, 7 (2011) European Constitutional Law Review, pp. 64-95.

C. A. WHITE, A New Human Rights Instrument, 26 (2001) European Law Review, pp. 1-2.

6.3. European Union Legislation

Charter of Fundamental Rights of the European Union, OJEU No C 83 (2010), p. 389.

Community Charter of the Fundamental Social Rights of Workers, 9 December 1989.

Consolidated text of the Treaty on European Union, OJ No C 325 (2002).

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJEU No C 83 (2010), p. 1.

European Council in Nice, 7 December 2000, OJ No C 364, 18 December 2000, p. 1.

Explanatory notes of the Charter, CHARTER 4487/00 CONVENT 50, Brussels, 11.10.2000, CHARTE 4473/00, CONVENT 49.

6.4. Council of Europe Documents

The Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome 4.XI.1950.

European Social Charter as amended by 1988 Additional Protocol and revised in 1996, Turin, 18.X.1961.

Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No. 194, Madrid, 12.V.2009.

Relations between the Council of Europe and the European Union, Report by the Secretary General for the period August-December 2000, SG/Inf (2001) 10-21 March 2001.

Study of Technical and Legal Issues of a Possible EC/EU Accession to the. European Convention on Human Rights, DG II(2002)006, Strasbourg, 28 June 2002.

6.5. Cases and Opinions from the Court of Justice of the European Union

Case 29/69 *Stauder* [1969] ECR 419.

Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

Case 4/73 *Nold* [1974] ECR 491.

Case 36/75 *Rutili* [1975] ECR 1219.

Case 43/75 *Defrenne v SABENA* [1976] ECR 455.

Case 125/79 *Bernard Denilauler v SNC Couchet Frèresand* [1980] ECR 1553.

Joined Cases 60 and 61/84 *Cinéthèque v. Fédération Nationale des Cinémas Français* [1985] ECR 2605.

Case 222/84 *Johnston* [1986] ECR 1651.

Case 12/86 *Demirel v. Stadt Schwabisch Gmund* [1987] ECR 3719.

Case 5/88 *Wachauf* [1989] ECR 2609.

Case C-260/89 *ERT* [1991] ECR I-2925.

Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I-1759.

Case C-13/94 *P v. S* [1996] ECR I-2143.

Case C-113/00 *Schmidberger* [2003] E.C.R. I-565.

Case C 117/01 *K.B.*, 7 January 2004 (not yet reported).

Case T-177/01 Jégo-Quéré [2002] ECR II-2365.

Case C-491/01 *British American Tobacco Investments and Imperial Tobacc*o [2002] ECR I-11453.

Case C-36/02 *Omega Spielhallen* [2004] E.C.R. 9609.

Joined cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others*, 3 May 2005 (not yet reported).

Case C-540/03 *European Parliament v. Council* [2006] ECR I-5769.

Case C-144/04 *Mangold* [2005] ECR I-9981.

Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

Case C-432/05 *Unibet* [2007] ECR I-2271.

Case C-438/05 *Viking Line* [2007] ECR I-10779.

Case C-34/09 *Ruiz Zambrano*, 8 March 2011 (not yet reported).

Case C-346/06 *Rüffert*, 3 April 2008 (not yet reported).

Joined Cases C-92/09 and C-93/09 *Schecke*, 9 November 2010 (not yet reported).

Case C-279/09 *Deutsche Energiehandels- und Beratungsgesellschaft mbH*, 22 December 2010 (not yet reported).

Case C-403/09 PPU *Detiček*, 23 December 2009 (not yet reported).

Case C-400/10 PPU *J. McB. v. L. E.*, 5 October 2010 (not yet reported).

Case C-491/10 PPU *Zarraga v.Simone Pelz*, 22 December 2010 (not yet reported).

6.6. Opinions of the Advocates General

Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano* (not yet reported).

6.7. Cases from the European Commission of Human Rights and European Court of Human Rights

Case of *X & X v. Germany*, Application No. 342/57, 4 September 1958 (unreported).

Case of *Tyrer v. the United Kingdom*, Application No. 5856/72, 25 April 1978, A26.

Case of *Airey v. Ireland*, Application No. 6289/73, 9 October 1979, A32.

Case of *Marckx v. Belgium*, Application No. 6833/74, 13 June 1979, [1979] 2 EHRR 330.

Case of *X v. Germany*, Application No. 7900/77, 6 March 1978, [1978] 13 DR 70-72.

Case of *CFDT v. EC and Member States*, Application No. 8030/77, 10 July 1978, [1978] 13 DR 231.

Case of *Johnston and Others v. Ireland*, Application No. 9697/82, 18 December 1986, A112.

Case of *M & Co. v. FRG*, Application No. 13258/87, 9 February 1990, [1990] 64 D 138.

Case of *Niemietz v. Germany*, Application No. 13710/88, 16 December 1992, [1992] 16 EHRR 97.

Case of *Cantoni v. France*, Application No. 17862/91, 15 November 1996, [1996] Reports 1996-V.

Case of *Matthews v the United Kingdom*, Application No. 24833/94, 18 February 1999, [1999] 28 EHRR 361.

Case of *I. v. The United Kingdom*, Application No. 25680/94, 11 July 2002 (not yet reported).

Case of *Pellegrin v. France*, Application No. 28541/95, 8 December 1999, [2001] 31 EHRR 651.

Case of *Goodwin v. UK*, Application No. 28957/95, 11 July 2002, [2002] 35 EHRR 447.

Case of *Demir and Baykara v. Turkey*, Application No. 34503/97, 12 November 2008 (not yet reported).

Case of *Hatton and Others v. United Kingdom*, Application No. 36022/97, 8 July 2003, Reports 2003-VIII.

Case of *Fretté v. France*, Application No. 36515/97, 26 February 2002, Reports 2002-I.

Case of *Colas Est v. France*, Application No. 37971/97, [2004] 39 EHRR 17.

Case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Application No. 45036/98, 30 June 2005, [2006] 42 EHRR 1.

Case of *Sørensen and Rasmussen v. Denmark*, Applications No. 52562/99, 11 January 2006, Reports 2006-I.

Case of *VO v. France*, Application No. 53924/00, 8 July 2004, Reports 2004-VIII.

Case of *Martinie v. France*, Application No. 58675/00, 12 April 2006, Reports 2006-VI.

Case of *Vilho Eskelinen and Others v. Finland*, Application No. 63235/00, 19 April 2007 (not yet reported).

Case of *Vereinigung Bildender Künstler v. Austria*, Application No. 683545/01, 25 January 2007 (not yet reported).

Case of *Anheuser-Busch Inc. v. Portugal*, Application No. 73049/01, 11 January 2007 (not yet reported).

Case of *Salduz v. Turkey*, Application No. 36391/02, 27 November 2008, (not yet reported).

Case of *Scoppola v. Italy (No.2)*, Application No. 10249/03, 17 September 2009 (not yet reported).

Case of *Saadi v. The United Kingdom*, Application No. 13229/03, 29 January 2008 (not yet reported).

Case of *Sergey Zolotukhin v. Russia*, Application No.14939/03, 10 February 2009 (not yet reported).

Case of *Bayatyan v. Armenia*, Application No. 23459/03, 27 October 2009(not yet reported).

Case of *Pishchalnikov v. Russia*, Application No. 7025/04, 24 September 2009 (not yet reported).

Case of *Schalk and Kopf v. Austria*, Application No. 30141/04, 24 June 2010 (not yet reported).

Case of *A, B and C v. Ireland*, Application No. 25579/05, 16 December 2010 (not yet reported).

Case of *Maumousseau and Washington v. France*, Application No. 39388/05, 6 December 2007 (not yet reported).

Case of *Micallef v. Malta*, Application No.17056/06, 15 October 2009 (not yet reported).

Case of *Vajnai v. Hungary*, Application No. 33629/06, 8 July 2008 (not yet reported).

Case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, 6 July 2010 (not yet reported).

Case of *Maresti v. Croatia*, Application No. 55759/07, 25 June 2009 (not yet reported).

Case of *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011 (not yet reported).

6.8. Cases from the National Courts

German Constitutional Court, BVerfG, 29.05.1974 - 2 BvL 52/71 (*Solange I*).

Italian Constitutional Court, *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372.

6.9. Other Material

ECRE Press Release on the ruling of the European Court of Human Rights in the "MSS case", European Council on Refugees and Exiles http://www.ecre.org/files/2011_01_21%20ECHR%20MSS%20case%20_ECRE_final-1-1.pdf (Accessed on 18.06.2011).

Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

Joint communication from Presidents Costa and Skouris, European Court of Human Rights, Strasbourg, 27 January 2011 (not published), http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf (Accessed on 23.04.2011).

M.S.S. v. Belgium and Greece – Case Note, Joint Council for the Welfare of Immigrants, http://jcwi.wordpress.com/2011/01/28/m-s-s-v-belgium-greece-case-note/ (Accessed on 18.06.2011).

Web page of the Council of Europe, http://www.coe.int/lportal/web/coe-portal (Accessed on 05.06.2011).

Web page of the European Union, http://europa.eu/index_en.htm (Accessed on 05.06.2011).

Web page of the SIM Documentation Site of the Netherlands Institute of Human Rights, http://sim.law.uu.nl/SIM/Dochome.nsf?Open (Accessed on 05.06.2011).