



Bachelor's Degree in Politics: Philosophy and Economics

Chair of European Union Law

**The relationship between the European Union and the
European Convention on Human Rights: historical
evolution and future accession of the EU to the ECHR**

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TABLE OF CONTENTS

INTRODUCTION.....	3
Chapter 1: Historical origins and development of the Council of Europe and the European Union.....	6
1.1 The common historical conditions and background for the birth of the Council of Europe and the European Union	6
1.2 The genesis of the Council of Europe and the path towards the European Convention on Human Rights.....	9
1.3 From the three European Communities to the creation of the European Union..	13
Chapter 2: The European Union’s fundamental rights protection and its relationship to the Council of Europe and the ECHR legal system.....	17
2.1 The commitment to human rights of the European Union	18
2.2 Bodies and agencies of the European Union for human rights protection	23
2.3 The Charter of Fundamental Rights of the European Union	27
2.4 The European Union’s approach to human rights protection in relation to the CoE and the ECHR legal system	32
Chapter 3: The Council of Europe’s human rights protection legal system and its relationship to the European Union.....	36
3.1 The Council of Europe’s mission to protect human rights: the European Convention on Human Rights and the European Court of Human Rights	37
3.2 The approach of the ECtHR towards ECHR violations by the EU	42
3.2.1 The equivalent protection doctrine.....	44
3.2.2 The <i>Bosphorus</i> case	46
Chapter 4: The road to accession of the European Union to the European Convention on Human Rights	52
4.1 First efforts and legal developments	52
4.2 Key legal milestones	56
4.2.1 The 2013 Draft Accession Agreement (DAA)	56
4.2.2 Opinion 2/13 of the European Court of Justice	62
4.3 The 2023 new Draft Accession Agreement.....	65
CONCLUSION	73
BIBLIOGRAPHY	77

INTRODUCTION

Ever since the end of the Second World War, the development of human rights regimes has been a goal of primary importance, both from a global and regional perspective. In particular, Europe has historically been one of the pivotal development centres for instruments and systems for the protection of fundamental rights, having also been one of the greatest battlefields of the two World Wars and the place where the most serious violations of human rights had been perpetrated during the Second World War. The project of European integration has developed through different paths, but the main objective has always been, and always will be, the maintenance of democracy, peace and the rule of law, along with the prevention of new wars and atrocities. In this context, the establishment of human rights protection systems serves as the main basis for the achievement of the aforementioned objectives, thanks to the increasing efforts of the two major regional organisations on the matter: the Council of Europe (CoE) and the European Union (EU). Chronologically, the Council of Europe was created first, through the Treaty of London in 1949; while the European Union was originally born as the European Coal and Steel Community in 1951 with the Treaty of Paris. The creation of the two organisations reflected a different approach and response to the same issue: in the aftermath of two devastating wars, there was the need to ensure that threats to democracy and atrocious conflicts, as well as serious violations of human rights, would not occur anymore under any circumstance. To enact such plan, the creators of the CoE established this organisation creating a set of common values that could also foster a common European identity. Most importantly, the consequent step was the creation of instruments ensuring the allocation of responsibility and accountability for violations of human rights: the European Convention on Human Rights (ECHR), as a catalogue where human rights and fundamental freedoms are enshrined, providing for the creation of a specific court, the European Court of Human Rights (ECtHR), where alleged breaches of ECHR rights could be directly brought either by individuals or by states. The approach of the founders of the European Union was different, initially focusing on an economic, and rather strategic, cooperation. Six countries, Italy, France, the Netherlands, Belgium, Luxembourg and West Germany, decided to put the production and sale of coal and steel under a common intergovernmental organisation: the European Coal and Steel Community (ECSC). The idea behind this was not only to foster economic cooperation

and integration, but also to hinder the possibility of a war among those countries, by communalising the production and use of the main materials used in war times, notably coal and steel.

On the one hand, the Council of Europe had the precise objective of protecting democracy and human rights from its very conception, so it is narrower in objective, but at the same time it is broader in composition encompassing a total of (now) 46 High Contracting Parties (HCPs). On the other hand, the European Union took some time to shift part of its focus and efforts on the establishment of an institutional human rights approach, since it is thematically broader dealing with many different policy areas, but also narrower in composition comprising 27 Member States (MS), all of which are also HCPs of the ECHR.

The relationship between the two organisations has always been one of recognition, through frequent references to the two institution's Courts, and cooperation, through regular exchange of views between each other's representatives, and establishment of specific doctrines by the ECtHR in the review of EU acts. Still, one of the most important features of such relationship is the fact that the European Union is not itself part of the ECHR, while all its MS are also HCPs. This is problematic because it leaves a gap open in the European continent's system of human rights protection, in that it does not enable the ECtHR to directly review EU acts and hold the organisation accountable if such acts breach human rights.

In this regard, since 2009 the new formulation of Article 6 of the Treaty on European Union (TEU) establishes the obligation for the EU to accede the ECHR. Accordingly, negotiations for accession have been conducted leading to the creation of a Draft Accession Agreement (DAA) in 2013, initially seemingly successful, having been promoted by the major EU institutions. However, the European Court of Justice's (ECJ) Opinion 2/13 surprisingly put a halt to this advancement, on the main grounds that the DAA did not respect the autonomy and the specific features of the EU's legal order. New negotiations restarted in 2019 and were concluded in 2023 with the adoption of a new DAA, whose aim is to respond to the issues raised by the ECJ attempting to finally enable accession. Its future depends now on an internal review within the EU institutions, and

finally on a new opinion of the ECJ on the compatibility of the DAA with the legal framework of the EU.

The objective of the present thesis is precisely to give a comprehensive overview of the human rights protection regimes in Europe through an historical descriptive perspective and through the comparison of the creation and the development of the approaches of the CoE and the EU, finally focusing on the issue of EU accession to the ECHR.

Specifically, the first chapter will describe the genesis of the CoE and the EU starting from the common historical conditions and then delving into a separate analysis of the development of the two institutions. The second chapter will focus specifically on the European Union and its growing efforts to commit to human rights protection, through the creation of specific bodies and agencies, and the establishment of the Charter of Fundamental Rights (CFR) as a specific bill of rights of the Union. The relationship with the CoE, and specifically with the ECHR will be analysed as well, with particular reference to Article 6 TEU providing for the obligation of accession. The Council of Europe's approach to human rights will be the subject of the third chapter, primarily dealing with the structure and functioning of the ECHR and the ECtHR and the development of the equivalent protection doctrine, with special importance afforded to the *Bosphorus* case, to be applied in cases involving acts of the EU. Finally, the fourth chapter will once again consider the two institutions together, in the context of the negotiations of the EU accession to the ECHR. After a discourse over the historical declarations on the importance of such accession and the consequent attempts, emphasis will be put on the 2013 DAA, the main features and mechanisms established therein, and on the paramount Opinion 2/13 of the ECJ, declaring an incompatibility of the DAA with the autonomy of EU law. As a last step, the latest 2023 DAA will be analysed in the light of the responses given to the issues raised by the ECJ. The final question left open regards a future opinion of the ECJ, upon which the destiny of the accession rests.

Chapter 1: Historical origins and development of the Council of Europe and the European Union

The purpose of this first chapter is to provide a historical overview of the development of the Council of Europe and the European Union. Firstly, the chapter will bring to light the historical, social, political and economic features of the period right after the two World Wars and during the Cold War, the combination of which create the common conditions for the need to develop a European common framework for cooperation and prevention of war, leading to the creation of the Council of Europe, the three European Communities and thus eventually the European Union. The chapter will then proceed to focus separately on the two institutions, in order to dissect their historical and institutional development firstly with a paragraph about the Council of Europe and secondly with one on the European Union.

1.1 The common historical conditions and background for the birth of the Council of Europe and the European Union

The development of a system for the protection of human rights in Europe results from the interaction of different factors specific to the historical, social and political context.¹ During the 1940s-50s, Europe was one of the epicentres for the unfolding of new political, social, legal and economic global processes leading to further internationalisation, liberalisation and democratisation.

Nonetheless, Europe had lived through different totalitarian regimes systematically violating human rights, being the setting of the horrors of the two World Wars and the Holocaust. In fact, the end of the Second World War bolstered the process for the creation and institutionalisation of the protection of human rights because everyone was striving to answer the question of how to avoid another devastating war.

Furthermore, Europe was one of the major battlefields of the ideological conflict that lied at the heart of the Cold War². The emblem of the role of Europe in that moment was the division of Germany in influence areas, initially the French, British, American and Soviet

¹ Steven Greer, Janneke Gerards, and Rose Slowe. "Historical and Conceptual Background." Chapter. In "Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges", 1–57. Cambridge Studies in European Law and Policy. Cambridge: Cambridge University Press, 2018. <https://doi.org/10.1017/9781139179041.004>

² Ibid.

areas. Two of those areas (notably the French and British) merged and were incorporated into the American area, creating the division that characterised the Cold War all along: the US influence stabilised in West Germany, cultivating the ideals of capitalism and liberalism, while the USSR set in East Germany perpetrating its communist agenda and state interventionism. In this context, the destiny of European states and the development of a pan-European human rights regime was not exclusively in the hands of the states and their governments, because it also depended on the approaches deriving from the aforementioned ideologies of the US and the USSR. For instance, the US was pushing for a more integrated Europe able to counter the expansion of the Soviet Union and the consequent spread of communism³.

The efforts caused by the necessity of fostering peace, cooperation and stability as a response to the combination of the abovementioned conditions thus set the base for the development of human rights both from a wider international perspective (since also the US had been involved, leading to the creation of the UN⁴ and the UDHR⁵), but more specifically from an integrated more 'European' perspective. The latter operates through different and overlapping dimensions: the individual European states, the Council of Europe and the European Union, all aiming at institutionalising constitutional democracy, human rights, the rule of law and the systematisation of their protection⁶.

There were conflicting views on how to achieve this integration⁷, namely between federalists, arguing for a full economic integration supervised by supranational institutions to which states had to give up part of their national sovereignty, and supporters of intergovernmentalism, advocating in favour of keeping cooperation restricted to specific spheres of action and of preserving the independence and sovereignty of the states, relying on intergovernmental institutions.

One of the first to advocate for European integration as a prevention to the atrocities of war and a guarantee for peace was Winston Churchill with his *Speech to the academic*

³ See note 1.

⁴ UN, the United Nations. An International Organisation founded in 1945 to keep international peace and security and develop cooperation among nations.

⁵ UDHR, Universal Declaration of Human Rights. It is a document proclaimed by the United Nations General Assembly in 1948, to set out fundamental human rights to be protected universally.

⁶ See note 1.

⁷ See note 1.

youth at the University of Zurich in 1946 where he famously spoke of “a kind of United States of Europe”⁸.

Another important statement was a speech by the British Foreign Secretary Ernest Bevin to the House of Commons where he stated that a western European “spiritual union”⁹ founded on the respect for human rights was the paramount goal of British Foreign policy. This vision was translated into reality in three steps: firstly, in March 1948 the UK, France, Belgium, the Netherlands and Luxembourg signed the Brussels Treaty for Economic, Social and Cultural Collaboration and Collective Self-Defence, to which the respect for human rights became a condition for membership; secondly, in 1949 NATO was established to create a wider military alliance including the US and Canada, which could provide sufficient protection for Western Europe from the Soviet Union; finally, it was decided that other European countries, including West Germany, would eventually sign the Brussels Treaty the moment they were in the position to comply with the membership requirement of respect for human rights.

The process of European integration, specifically from a human rights point of view, was being promoted also by other events, among which the Congress of Europe in May 1948. It was sponsored by the international Committee of the Movements for European Unity and attended by more than 600 delegates in the Hague¹⁰. Winston Churchill was the Honorary President, further arguing that the new process of European unification should start from the creation of a European Charter of Human Rights¹¹. Some delegates, approving of the idea proposed further steps, such as the creation of a European Parliamentary Assembly with members decided by national parliaments, and an individual petition process for the judicial enforcement of such Charter. Still there were some disagreements, such as the fact that the British Labour government at the time opposed this proposal on the account that it would provide space for communist ideas and that it would create a human rights court unwelcomingly superior to any British tribunal.

⁸ https://european-union.europa.eu/system/files/2021-06/eu-pioneers-winston-churchill_en.pdf

⁹ See note 1.

¹⁰ Simpson A. W. Brain. “From the Brussels Treaty to the Council of Europe.” Chapter. In “Human Rights and the End of Empire: Britain and the Genesis of the European Convention”, 597–648. Oxford, 2004; online edn, Oxford Academic, 1 Jan. 2010. <https://doi.org/10.1093/acprof:oso/9780199267897.003.0012>

¹¹ See note 8.

Different actors promoting European integration were merged into a single permanent organisation in October 1948: the European Movement, comprising six founder organisations, adherent or associated organisations, national councils for (at the time) fifteen European countries, and national committees representing other countries. This organisation is still today the largest pan-European network of national and pan-European organisations seeking to promote peace, democracy, integration, cooperation, the respect for human rights and the rule of law¹².

1.2 The genesis of the Council of Europe and the path towards the European Convention on Human Rights

Drawing from the ideas of Churchill and Bevin on intergovernmentalism, at the end of 1948, the United Kingdom, France, Belgium, Luxembourg and the Netherlands decided to create a Council of Europe. The negotiations were also joined by Ireland, Italy, Denmark and Sweden. The CoE was formally established by the Treaty of London on 5 May 1949, and it had four main goals to respond to the issues Europe was experiencing at the time: firstly, it was to contribute to the prevention of another war. Secondly, it had to construct a set of common values against those of communism. Thirdly, it had to bolster a feeling of common ‘European’ identity and finally, it had to create a system according to which any deviation from democracy and constitutionalism into an authoritarian regime could be signalled by other states and addressed by an independent transnational judicial tribunal¹³.

The association of the organisation with the protection of human rights was created by its Statute, in which the drafters stated that the CoE is based on three core principles: human rights, democracy and the rule of law¹⁴. They further specified that the CoE works to set standards, monitor and cooperate within those three fields. The unique role of this institution does not lie in the fact that it was the only organisation to have human rights and the rule of law as its core values and consequently membership requirements, but in the fact that it was the first and the only trying to identify and systematize human rights

¹² <https://europeanmovement.eu/>

¹³ See note 1.

¹⁴ Steven Greer, Janneke Gerards, and Rose Slowe. “The Council of Europe.” Chapter. In “Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges”, 58–128. Cambridge Studies in European Law and Policy. Cambridge: Cambridge University Press, 2018. <https://doi.org/10.1017/9781139179041.005>

in a specific treaty (what would then be the European Convention on Human Rights), and to provide means for their protection and enforcement¹⁵.

The negotiations were complicated, and the parties needed to agree on some compromises regarding different aspects¹⁶. For instance, to respect Bevin's inputs at the detriment of the hopes and expectations of those rooting for European integration, especially Jean Monnet, the Council of Europe was designed in such way not to hinder upon state sovereignty. The decision to meet UK's requests was translated in the exclusion of any type of action in the field of defence and in the functioning of the CoE's organs, that were designed to not have any type of legislative binding powers among each other or the Member States.

A part of the provisions of the Statute, in fact, establish from the beginning the CoE's principal organs¹⁷: the Committee of Ministers (CM), the Secretariat and the Parliamentary Assembly of the Council of Europe (PACE).

The CM is made of the foreign ministers of each Member State meeting in Strasbourg, and it is the main policy-making and executive body of the CoE. Among its functions, it deals with admission, suspension and expulsion of Member States, discussion with the other organs of problems on a European level (except for defence as it was agreed among the parties) and eventual drafting of treaties. It monitors state compliance with membership requirements and treaty obligations and has other elective and budgetary powers. Most importantly and controversially however, it has the function of issuing non-binding recommendations and declarations to Member States.

The PACE is composed of 324 members, appointed or elected by national parliaments from their own members. It debates any issue within the CoE's remit (again except for defence) and it can propose policy. However, it has no legislative power, and its decisions are not binding on other organs of the CoE or Member States.

¹⁵ Ibid.

¹⁶ See note 10.

¹⁷ See note 14.

The Secretariat of the CoE is the administrative and bureaucratic body. The Secretary General and Deputy Secretary General are appointed by the PACE on recommendation of the CM, thus entailing that they are accountable to the CM.

Even if its role and usefulness was still being questioned, within 10 years of its existence, the CoE managed to enter into (mostly informal) relations with some international organisations, among which importantly the UN and the European Communities¹⁸. One of the primary objectives of the CoE was to promote human rights (along with democracy and the rule of law), and in October 1949 the conclusion was made that this objective needed to be translated into a European human rights convention. The fact that the positive outcome of this first project of the CoE was extremely important to show that the institution could be impactful, posed a lot of pressure on the processes of negotiation.

The negotiations within the Council of Europe that brought to life the European Convention on Human Rights did not take a too extended period of time (from August 1949 to September 1950), but they were characterised by different proposals, contrasting views and hostile reactions. In particular, the European Movement along with those states championing for the Convention (namely, France, Belgium, Ireland and Italy), had overestimated the disposition and commitment of the governments of the other Member States, among which the UK, the Scandinavian States, the Netherlands, Greece, and Turkey to create a mechanism for human rights protection that could hinder their sovereignty¹⁹. However, the latter states could not totally oppose to the ECHR because the political and historical situation of Europe called for the creation of a human rights Convention, that had to be drafted one way or another.

At this point, the Committee of Ministers decided to thoroughly examine the question of the Convention through the creation of a Committee of Legal Experts²⁰ sent as spokespersons of their governments. This committee was entrusted with the responsibility to produce the first drafts of the Convention that had to “serve as the basis for future

¹⁸ See note 1.

¹⁹ Ed Bates, “The Drafting of the Convention by the Governments of the Council of Europe (February–November 1950)”. Chapter. In “The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights”, 77-107. Oxford, 2010; online edn, Oxford Academic, 22 Sept. 2011. <https://doi.org/10.1093/acprof:oso/9780199207992.003.0004>

²⁰ Ibid.

discussions”²¹ of the Committee of Ministers in March 1950. This document provided four different compositions combining two political questions that the Legal Experts did not feel empowered to answer: firstly, how precisely should the rights included in the Convention be defined, and secondly, whether a European Court of Human Rights should be established. The core of the contrast was mainly about the potential power of the future international institutions to develop a human rights law and caselaw. The UK opposed this view fearing a potential transfer of powers to a Court and thus favoured a preventive clear definition of rights, supported by Greece, Norway, the Netherlands, Denmark and Sweden; while Belgium, France and Italy endorsed the creation of the Court²². Nevertheless, one of the two draft versions of the Convention did have a provision providing for the Court and supported the creation of a European Commission of Human Rights with an individual right of petition, that was incredibly significant and revolutionary in that it allowed individuals to bring claim against sovereign States.

After these significant even though limited steps, a special committee of Senior Officials was gathered by the Committee of Ministers in Strasbourg in June 1950 to find a solution to the abovementioned issues and to enable Ministers to easily make those political decisions in their next meeting. One of the possibilities envisioned at this stage entailed the establishment of an optional court, and in the event in which there was no Court, it was visualised that the Committee of Ministers could become the final decision-maker²³ (according to what would then become Article 32 of the Convention). It then fell to a Sub-Committee on Human Rights to amend the draft and conclude the final text to be approved by the Committee of Ministers. Such approval came on 7 August 1950, and the Convention was presented to the Consultative Assembly on 11 August 1950. The Assembly proposed many amendments, however, on one of the meetings of the Committee of Ministers, on 4 November 1950 in Rome²⁴, the governments decided to sign the European Convention on Human Rights and leave additional amendments for later.

²¹ See note 19.

²² See note 19.

²³ See note 19.

²⁴ The European Convention on Human Rights was signed in Rome on 4 November 1950 by the 12 Member States of the CoE and entered into force 3 September 1953.

Ultimately, when the Convention was firstly concluded and signed in 1950 there was still some ambivalence since the governments of the Member States “had agreed to disagree”²⁵ on prominent points such as the establishment of a Court and the right to individual petition. In fact, in this first form, the Court and individual petition were optional, and the Convention could only be called upon in inter-state cases. Thus, at the beginning the Convention aligned more with the British vision of a precise text, that could be referred to as a ‘European Bill of Rights’ establishing human rights and democratic legal obligations without a specific focus on their international enforcement.

1.3 From the three European Communities to the creation of the European Union

In its first years of life, the CoE did not represent a decisive step forward towards the achievement of the goals of the European states in the aftermath of the Second World War and in the midst of the Cold War, namely the reconstruction of the nations, economic regeneration and the prevention of another war²⁶. The CoE was indeed not a strong and decisive enough institution at the time, to the disappointment of the European integrationists that believed that a possible international conflict could be prevented also through economic transformation and regeneration.

According to this latter approach, on the one hand the Organisation for European Economic Co-operation was created by the Marshall Plan, through which the US distributed financial aid to European states on the condition that they were part of such organisation. On the other hand, a more exclusively ‘European’ initiative was undertaken: in 1950 Robert Schuman, the French Foreign minister, devised by Jean Monnet, designed the Schuman Plan. The idea behind it was to establish a cooperation between western European states, starting from placing their coal and steel sectors under the control of a supranational authority, the European Coal and Steel Community created by the Treaty of Paris in 1951 signed by France, Germany, Italy, Luxembourg, the Netherlands and Belgium. Being part of the ECSC implied that crucial decisions such as pricing, imports, exports and production of all national coal and steel were placed in the hands of a supranational authority²⁷, the ECSC High Authority (the forerunner of the European Commission), supervised by an Assembly (precursor of the European Parliament) and

²⁵ See note 19.

²⁶ See note 1.

²⁷ See note 1.

with a Court of Justice ensuring that the founding treaty was respected. Putting coal and steel, that are the materials used in war times, under these kinds of restrictions was believed to be an effective way of hindering the potential advent of another catastrophic war.

The six countries of the ECSC started to experience an exceptionally high growth rate and economic improvement. They thus understood that the system of economic integration functioned effectively and wanted to further this process by expanding cooperation from the narrow sector of coal and steel to the economy as a whole. So, after the failure in the creation of the European Defence Community, entailing a political and military union and the requirement of human rights, due to France's refusal to give up more of its sovereignty and its fear of a potential rearmament of Germany, in 1957 the Treaty of Rome created the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) to coexist with the ECSC.

EURATOM's goal was the coordination of the development and research of nuclear energy in the Member States, while the EEC was to be an intergovernmental organisation. In this regard, the Treaty of Rome implied the creation of a customs union, with the abolishment of tariff barriers among the Member States and the adoption of a common tariff towards non-Members of the community, as well as the establishment of a common market, where all users have the same opportunities to sell and buy goods. All of this was to be achieved and maintained through a series of some supranational institutions, paralleling the roles of the ECSC's institutions, such as the EEC's Commission and Council, while the ECSC's Assembly and Court of Justice became common to all three European Communities. Later on, in 1965 the Merger Treaty combined all the executives of the Communities into a single Council and Commission, so the three Communities shared the same institutions but remained legally distinct.

The goal of the Communities in the 1980s-90s was to further the project of the single market by freeing it from national constraints and enforcing the free competition entailed by the common market. The process of development from the European Communities into the European Union started with the Single European Act in 1986 that committed the EEC to create the single market by the end of 1992. The end of the Cold War accelerated this process of change because fifteen new Members eventually joined the Communities.

This is the moment when the President of the Commission Delors, the French President Mitterrand and the German President Kohl started strongly championing for an expansion of the activities further than the economic field²⁸. Other changes were thus introduced by the Treaty of Maastricht in 1992, among which the renaming of the EEC as the European Community, and the amendment of the founding treaty creating three pillars: firstly, the three European Communities²⁹, the Common Foreign and Security Policy (CFSP) and Police and Judicial Cooperation in Criminal Matters.

The next major development of the institution was the 2009 Treaty of Lisbon changed the structure and established only the European Union, abolishing the European Community as a formal entity and preserving its powers under the TFEU³⁰. The now European Union thus acquired a consolidated legal identity without the three-pillar system because the Lisbon Treaty united the first and third pillars, leaving only the CFSP outside of the structure and placing it into the TEU³¹.

The European Union as we know it today is composed of different institutions and organs³², among which the most known are: the European Council, the highest intergovernmental institution made of the heads of State or government of the Member States, the President of the Commission and the High Representative, whose most important duty is to establish and set the policy agenda of the EU. The Council of the European Union, on the other hand, is the main decision-making body with different configurations, made of the ministers responsible for the topic addressed from every Member State. The European Parliament, instead, is the legislative body of the European Union representing the EU citizens' interests at European level. The European Commission is a supranational institution independent from the Member States, and it represents the general interest of the EU as a whole acting as EU's external representative,

²⁸ See note 1.

²⁹ The three European Communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Community (EURATOM).

³⁰ TFEU, the Treaty on the Functioning of the European Union: it sets the detailed basis of EU law by defining the principles and objectives of the EU and the scope for action in its policy areas.

³¹ TEU, the Treaty on the European Union: sets the basis of EU law by setting out the EU's purpose and its central institutions.

³² Steven Greer, Janneke Gerards, and Rose Slowe. "The European Union." Chapter. In "Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges, 209–92. Cambridge Studies in European Law and Policy. Cambridge: Cambridge University Press, 2018. <https://doi.org/10.1017/9781139179041.007>

executive body and having the power of legislative initiative. Finally, there is the European Court of Justice (actually consisting of three distinct Courts) that is the EU's judicial authority, whose action within the field of human rights will be further discussed in the next chapters.

Chapter 2: The European Union's fundamental rights protection and its relationship to the Council of Europe and the ECHR legal system

Nowadays, the protection of fundamental rights is one of the defining features of the European Union's legal framework. While the Council of Europe had the objective of human rights protection from the outset, the EU has developed such aspect over time following different paths but always basing its efforts on the principles of freedom, democracy, equality, the rule of law and human dignity. The progressive mentions of fundamental rights in sources of primary, secondary and soft law, the establishment of specialised agencies and bodies and the creation of the Charter on Fundamental Rights are some of the milestones within the European Union's efforts to create a system to safeguard fundamental rights. Article 6 TEU is extremely relevant in this regard, setting down in writing the main sources of fundamental rights in the European Union legal order: the first paragraph refers to Charter of Fundamental Rights proclaimed in 2000, the second clearly establishes an obligation for the EU to accede to ECHR and finally, the third paragraph mentions the ECHR and the constitutional traditions common to the Member States as general principles of EU law¹.

The ECHR occupies a central role in Europe and the relationship between the EU and the CoE, and consequently the ECHR and the ECtHR, constitutes an enduring and ongoing debate in the field. In fact, the bodies interact and cooperate, referencing each other's work; however, as Article 6 TEU establishes, the EU *shall* accede to the ECHR.

The present chapter will specifically explore the evolution of the European Union's commitment and action within the sphere of fundamental rights protection, firstly from an historical point of view, referencing the development of legal sources dealing with fundamental rights and secondly focusing on specialised agencies established by the EU. The third paragraph will investigate the origins and the impact of the Charter of Fundamental Rights as a 'written bill of rights'². To conclude the chapter, an analysis of the relationship between the aforementioned instruments developed by the European Union and the Council of Europe, the ECHR and ECtHR will be conducted.

¹ Art. 6 TEU.

² Robert Schutze, *European Union Law*. (S.L.: Oxford Univ Press, 2021).

2.1 The commitment to human rights of the European Union

At the moment of the creation of the three European Communities as separate entities, human rights were not envisaged as primary objectives, and they were consequently not mentioned in the Treaties. In fact, the Communities were initially principally concerned with economic integration and the establishment of a common market among the Member States. Moreover, the institutions of the Communities worked under the presumption that the CoE and the ECHR were already able to provide an adequate protection of human rights, as it was a practice of the ECJ to interpret its law in accordance with the ECHR. Nonetheless, ever since the 1960s, the national constitutional courts of the Member States started to fear that national constitutional rights could be compromised by the absence of a Community engagement to fundamental rights. This led to a shift in the consideration of human rights within the EU legal framework.

In fact, in 1969, the ECJ recognized this absence of references to human rights and consequently retrospectively found fundamental rights to be enshrined in the general principles of EU law, indirectly resulting from the constitutional traditions common to the Member States and the international agreements to which Member States are parties³. In 1973, the Heads of State and Government (that were still not formally gathered under the name of European Council) published the Copenhagen Declaration on European Identity⁴ promoting, similarly to what the ECJ had previously done, the existence of common shared values in the Member States, among which respect for fundamental rights exceptionally stood out. Two years later, it was the Commission to openly speak about the centrality of common fundamental rights as general principles for a potential enlargement of the Union, as it further asked the Community's political institutions to fully endorse this commitment. In 1977, the European Parliament, the Council and the Commission adopted a Joint Declaration⁵ recognising, emphasising and committing to the paramount importance of fundamental rights, as general principles derived from the

³ Steven Greer, Janneke Gerards, and Rose Slowe, *Human Rights in the Council of Europe and the European Union* (Cambridge University Press, 2018), 209–92. <https://doi.org/10.1017/9781139179041>

⁴ Meeting of the Heads of State or Government (Copenhagen, 14–15 December 1973), Communiqué of the European Community “Summit” Meeting and Annexes, European Community Background Information No. 29/1973, Annex II, ‘Declaration on European Identity’.

⁵ Joint Declaration by the European Parliament, the Council and the Commission concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, (Official Journal of the European Communities 1977, C 103/1, 5.4.1977).

Member States' constitutions as established by the ECJ, and also as enshrined in the ECHR, having been signed by all Member States of the EU. In 1978 the European Council endorsed the abovementioned Joint Declaration, reaffirming its pledge to the protection of fundamental rights and raised the latter to be an essential element for membership to the Communities. However, one of the first explicit references to fundamental rights can be found in the preamble of the Single European Act of 1986, where the Heads of State and Government affirmed their responsibility to act with consistency and solidarity in order to adequately protect the principles of democracy, compliance with the law and human rights. That historical moment strongly called for a written bill of rights for the Community, and two paths were available to achieve this objective: either the realization of a Community charter specific to the European Union, or the accession of the EU to the already existing ECHR. A first attempt to solve the question was made in 1989, when the European Parliament (EP) adopted a Declaration on a List of Fundamental Rights⁶ listing Community specific fundamental civil, political and socio-economic rights, that was however not recognised as legally binding. Subsequently a Resolution⁷ led to the adoption of the Community Charter of Fundamental Social Rights⁸, as a legal non-enforceable political Declaration by all Member States except the UK.

The 1992 Maastricht Treaty was pivotal since it established the European Union and the EU citizenship bolstering political integration. However, it was extremely important also specifically in the human rights sphere because it enshrined in the TEU the protection of fundamental rights, drawing inspiration from the ECHR and the constitutional traditions common to the Member States (as already stated by the ECJ jurisprudence), elevating them to a treaty obligation. As the Maastricht Treaty enlarged the Union's competences in areas where the possibility to breach fundamental rights was higher, it rendered the necessity for a written list of rights for the community even more pressing⁹. The commitment to fundamental rights was then reaffirmed more strongly and firmly with the 1997 Treaty of Amsterdam, that added a new provision:

⁶ European Parliament Resolution adopting the Declaration of Fundamental Rights and Freedoms of 12 April 1989 ('De Gucht Report') (OJ C 120/51, Doc. A2-3/89, 16.5.1989).

⁷ European Parliament Resolution on the Community Charter of Fundamental Social Rights of 22.11.1989 (OJ, C 323/44, 27.12.1989).

⁸ Community Charter of Fundamental Social Rights – Draft (COM [89] 471 final, 2.10.1989).

⁹ See note 3, page 241.

“the Union is founded on the principles of liberty, democracy, *respect for human rights and fundamental freedoms*, and the rule of law, principles which are common to the member states”¹⁰.

This Treaty further provided legal bases for the EU to adopt legislation explicitly addressing human rights and made internal fundamental rights policy applicable not only to EU institutions, but also to the Member States by establishing a mechanism to sanction the latter in case of a breach of human rights, through Article 7, that will be dealt with in more detail later in the paragraph.

A paramount decision was taken in 1999 by the Cologne European Council: the creation of a Charter of Fundamental Rights (CFR), in order to create a single coherent document listing all the rights that could be found as general principles of EU law and common to the constitutional traditions of the Member States, to make those rights more visible and clear and their protection easier¹¹. The process of drafting and the impact of the subsequent CFR will be thoroughly further discussed in the third paragraph.

The Treaty of Lisbon, entering into force in 2009, constituted another landmark moment for the development of the EU’s activities into the human rights protection field. In fact, it made the CFR legally binding by elevating it to the same legal value as the Treaties; furthermore, by recognising the EU as a single independent legal entity, it gave it the capability of entering international organisations and conventions, also in the area of human rights¹². Most importantly, the new Article 6(2) TEU explicitly commits the EU to accede the ECHR with its new wording:

“The Union *shall* accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.”¹³

Since accession must not affect the European Union as it is described in the Treaties, the process of negotiation of the draft agreements has proved to be difficult, and it will be looked into in the last chapter of the present thesis.

¹⁰ Treaty of Amsterdam 1997.

¹¹ Presidential Conclusions, Cologne European Council meeting 3–4 June 1999, Annex IV ‘European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union’.

¹² Article 216 TFEU.

¹³ See note 1.

The abovementioned steps towards a more extensive human rights protection mainly focused on the Treaties, and thus on primary sources of ‘hard’ EU law. However, the development of fundamental rights’ safeguarding instruments also implied the use of EU secondary legislation and soft law instruments.

On the one hand, secondary legislation derives from the principles and objectives of the Treaties. Article 288 TEU states that there are three binding legal instruments, namely regulations, directives and decisions; and two non-binding ones, notably opinions and recommendations. These instruments are important because they are sometimes used to make sure that fundamental rights established in the CFR are respected¹⁴. One example of the use of secondary legislation is gender equality, set as a fundamental right in Article 23 of the CFR, that is also protected through the 1975 Equal Pay Directive¹⁵ and the successive Equal Treatment Directive¹⁶. This prohibition of discrimination in employment was further extended to cover other types of discrimination other than that based on sex through the Employment Equality Directive¹⁷ and the Race Directive¹⁸. Another prominent example of secondary legislation regarding fundamental rights is data protection, originally protected through the 1995 Data Protection Directive¹⁹ and then guaranteed under Article 8 CFR. It was then further elaborated with the General Data Protection Regulation²⁰ and the Data Protection Directive²¹ for police and criminal justice authorities replacing the existing legislation from 2018.

¹⁴ See note 3, page 255.

¹⁵ Council Directive 75/11/EEC of 10 February 1975 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women (OJ L 045, 19.02.75) (repealed by the Recast Directive 2006/54).

¹⁶ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ L 039, 14.02.76) (amended by Directive 2002/73, repealed by the Recast Directive 2006/54).

¹⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a legal framework for equal treatment in employment and occupation (OJ L 303/16, 2.12.2000).

¹⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180/22, 19.7.2000).

¹⁹ Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L281/31, 1995).

²⁰ European Parliament and Council Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119 4.5.2016).

²¹ European Parliament and Council Directive 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119 4.5.2016).

On the other hand, soft law refers to quasi-legal instruments, that have normative contents and generate practical effects even if they are not legally binding. These include codes of conduct, guidelines, notices, recommendations or communications and have as their objective the insurance of the effective realization of fundamental rights already set by EU primary law. One instance is the prohibition of slavery and forced labour enshrined in Article 5 CFR that is also established in other secondary pieces of legislation such as the Human Trafficking Directive²², but that is further brought forward through soft law instruments among which the Commission's EU Strategy towards the Eradication of Trafficking in Human Beings 2012-16²³ proposing some concrete steps that can be undertaken by the EU and the Member States.

To make sure that Member States act in conformity with the Treaties, and in particular with fundamental rights, the 1997 Treaty of Amsterdam introduced a new sanctioning mechanism in Article 7 TEU, establishing the possible suspension of the rights attached to membership after a Member States' breach of the principles of liberty, democracy, respect for human rights and fundamental principles, and the rule of law²⁴. However, the first version of the provision only established a sanctioning mechanism reacting to a "serious and persistent breach" of the values contained in Article 2 TEU, which meant that the article could actually practically be used in very specific and rare instances where a quick firm reaction was needed²⁵. This was changed by the Treaty of Nice that inserted a preventive mechanism into Article 7(1), referring more generally to "a clear risk of a serious breach". Such procedure can be initiated by 1/3 of the Members States, the European Parliament and the Commission, but rather than being sanctioning in nature, it provides the EU institutions with an instrument to keep Member States accountable by engaging in dialogue, when a breach of values is occurring, before it gets to become a "serious and persistent breach" and thus before triggering Article 7(2), whereby the existence of the abovementioned breach can be declared by unanimity in the European

²² European Parliament Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1, 15.4.2011).

²³ Commission Communication on the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 (COM [2012] 286 final, Brussels, 19.6.2012).

²⁴ Article 7 1997 TEU.

²⁵ Dimitry Kochenov, "Article 7 TEU". Chapter. In Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), "The EU Treaties and the Charter of Fundamental Rights: A Commentary" (New York, 2019; online edn, Oxford Academic). <https://doi.org/10.1093/oso/9780198759393.003.10>

Council and with the consent of the European Parliament if the Member State fails to comply to the notices of the institutions, and 7(3), establishing the consequently applicable sanctioning mechanism²⁶.

2.2 Bodies and agencies of the European Union for human rights protection

All the main European Union institutions play a role in the protection of human rights, but some institutions and agencies have been established within the EU framework to deal more specifically with fundamental EU citizen's and human rights. Among those, this paragraph will address in particular the European Ombudsman, the European Union Agency for Fundamental Rights, the European Institute for Gender Equality and Expert Networks.

The European Ombudsman was created with the 1992 Maastricht Treaty alongside the EU citizenship as an intermediate channel connecting European citizens with the institutions. Its duty is to improve the protection of EU citizens and natural and legal persons residing or having registered office in a Member State ensuring good administration at EU level, by acting as a reactive investigatory office to complaints of maladministration. Even if the Ombudsman was not established exactly with this function in mind, it is nonetheless relevant in our discourse on fundamental rights protection in the EU, because maladministration is characterised as a failure by the institutions to respect *fundamental rights*, legal rules or principles and the principle of good administration²⁷. In fact, in addition to Articles 20, 24 and 228 of the TFEU, the post of the Ombudsman also finds its legal basis in Article 43 of the CFR²⁸:

“Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.”

²⁶ Article 7, 2003 TEU.

²⁷ European Ombudsman, *The European Ombudsman's Guide to Complaints: A Publication for Staff of the EU Institutions, Bodies, Offices, and Agencies* (European Union, 2011).

²⁸ <https://www.europarl.europa.eu/factsheets/en/sheet/18/the-european-ombudsman>

This provision builds on the right to good administration enshrined in Article 41 CFR. The Ombudsman must be impartial and independent, as stated in Article 228 TFEU and in the Ombudsman Statute, however being appointed and financed by the European Parliament it is also accountable to the latter, that can in fact request, at any time in the five-year mandate, the ECJ to dismiss the Ombudsman for serious misconduct or failure to fulfil the requirements. It conducts inquiries after receiving complaints from EU citizens, or any natural or legal person residing or having registered office in a Member State either directly or through a Member of the EP, but it can also act on its own initiative. The Ombudsman subsequently has the power to request information from institutions and bodies, officials and staff of the institutions and Member States' authorities, all of which are required to comply to the Ombudsman's request. The European Ombudsman usually acts together with the institution or body concerned to find a satisfactory solution, and when it finds that there has in fact been maladministration, it refers its recommendations to the institution or body in question, that has to report back its views within three months. If the institution does not agree, the Ombudsman may draft a special report informing the European Parliament. Finally, the European Ombudsman informs the complainant of the results of the inquiry, its opinion and report.

The European Union Agency for Fundamental Rights (FRA) is an EU independent specialised decentralised agency established in 2007 to provide evidence-based advice to EU and national institutions and bodies to help them handle fundamental rights more effectively²⁹. Its origins trace back to 1996, when the European Council established the European Monitoring Centre for Racism and Xenophobia (EUMC), reinforcing its commitment to fight racism and xenophobia from a supranational level³⁰. Its prerogative was to issue annual reports and thematic studies as a way to provide both the EU and Member States with data to correctly act within their field of action. To do so, the EUMC has always been in contact and in collaboration with the Council of Europe. However, the European Council came to acknowledge the need to expand the activities of data collection and analysis and established a European Union Agency for Fundamental

²⁹ See note 3, page 230.

³⁰ Council Regulation (EC) No. 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ C 171, 5.6.1998.

Rights³¹, replacing its predecessor body the EUMC and taking over its work. The FRA's functions are to: supply objective and reliable data to EU institutions and Member States on fundamental rights by carrying out, collaborating or encouraging research, develop research methods and standards to improve the quality of such data, publish reports on specific human rights topics also highlighting examples of best practice, but also promoting discourse and awareness in the public on fundamental rights through a well-designed communication strategy.

As for its predecessor, to perform its functions competently, the FRA must communicate and collaborate with international organisations such as the Council of Europe, the United Nations and the Organization for Security and Co-operation in Europe (OSCE), with EU institutions, with other EU Agencies such as Frontex, with the Member States' governments, with equality bodies such as the EU Institute for Gender Equality, but also with EU candidate countries since they must preserve and protect human rights in order to accede to the EU. With respect to its composition, the FRA is made up of a Management Board consisting of independent experts, among which one appointed by each Member State, two European Commission representatives and one independent expert appointed by the Council of Europe. Its function is to define the agency's work agenda, approving its budget and monitoring its work. Then there is the Executive Board that prepares the Management Board's decisions and advises the Director, whose office has to make sure that the objectives and tasks of the FRA are effectively carried out. Furthermore, the FRA is divided in specific thematic units, namely: Justice, Digital and Migration; Equality, Roma and Social Rights; Communications and Awareness Raising; Institutional Cooperation and EU Charter; Administration³².

Even if the FRA is not empowered to act as an enforcement body or as an individual-complaint mechanism since it is prohibited from monitoring Member States' compliance to fundamental rights, the impact of its work should not be underestimated. In fact, in addition to thematic reports, the FRA is in charge of publishing, both on its own initiative or at the request of the Council, the Commission or the EP, conclusions or opinions on

³¹ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1, 22.2.2007 ('FRA Regulation').

³² <https://fra.europa.eu/el/about-fra/structure>

specific topics. This can potentially be very powerful because when an institution requests for the FRA's input during the legislative process, it means that the information and data gathered by the FRA could be influential in decision and policy making.

Another relevant autonomous specialised decentralised fundamental rights agency is the European Institute for Gender Equality (EIGE), with a narrower, more specific focus. It was established in 2006 on a proposal of the EP and with the approval of the European Council³³. Its functions are to research the best practice options to promote gender equality and eliminate gender-based discrimination and share them with the EU institutions and Member States helping them to take well-informed and evidence-based decisions. More generally, EIGE's aim is also to provide information on gender equality for organisations, scholars, international organisations and EU citizens³⁴. Its approach is similar to that of the FRA because also the EIGE focuses on research methods, statistics and data collection for the purpose of providing evidence and support to EU institutions, Member States, IOs, NGOs and the media. In addition to the publication of thematic reports, the EIGE has created some extremely effective instruments such as the Gender Equality Index³⁵: a tool to measure the progress of gender equality in the EU assigning to the EU and the Member States a score from 1 to 100 where 100 would mean that a country had reached full and complete gender equality, thus giving visibility to areas in need of improvement and supporting policy makers to design effective gender equality measures.

Finally, the Commission has historically established a number of independent expert networks, also in the field of human rights. One instance was the Network of Independent Experts on Fundamental Rights (CFR-CDF)³⁶, whose mandate expired in 2006, but that during its time of activity, before the creation of the FRA, would monitor and report on the situation of human rights in the Member States referring to the CFR. It published annual reports, and it could be called upon the Commission to issue non-binding opinions on fundamental rights protection ensuring that the institution would better take into

³³ European Parliament and Council Regulation (EC) No. 1922/2006 of 20 December 2006 establishing a European Institute for Gender Equality, OJ 2006 L 403/9, 30.12.2006, ('EIGE Regulation').

³⁴ https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-institute-gender-equality-eige_en

³⁵ <https://eige.europa.eu/gender-equality-index/about>

³⁶ European Parliament Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000/2231(INI), 5.7.2000).

account this perspective. However, contrary to the FRA, it could make judgements about state compliance with legal obligations and also contribute to the Article 7 preventive sanctioning procedures. The Commission also set up the High Level Group on Non-Discrimination, Equality and Diversity (Expert Group) in 2015, entrusted with the function of discussing common concerns and experiences on the topic of discrimination elimination and equality. In 2014 the Commission established the European Network of Legal Experts in Gender Equality and Non-Discrimination (Equality Network) whose function is to provide the Commission with independent advice, data and information in the fields of gender equality and non-discrimination. It also addresses national transposition and compliance with EU Directives, national initiatives and domestic jurisprudence, the impact of the ECJ and the ECtHR judgements on national law and EU policy developments. It thus publishes a biannual European Equality Law Review about the key legal developments in its area of competence at the EU and Member State level and produces thematic reports³⁷.

2.3 The Charter of Fundamental Rights of the European Union

In 1999 at the Cologne European Council the Heads of State or Government decided to set up a body entrusted with the specific task of drafting a Charter of Fundamental Rights. Annex IV was submitted to the European Council as one of the sources establishing the main elements and features of the future Charter³⁸. Firstly, it reiterated fundamental rights protection as one of the founding principles of the Union, upon which its legitimacy is built, and confirmed its mandatory nature through the ECJ caselaw. The agreement to create this Charter was also built on the desire to make fundamental rights increasingly clear and visible to both the institutions and the EU citizens. The Charter was to take into account different sources: it should incorporate the fundamental rights and freedoms along with the procedural rights enshrined in the ECHR and derived from the constitutional traditions common to the Member States, as general principles of EU law along with rights specific to citizens of the Union, as well as the economic and social rights enclosed in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers. These decisions were reiterated in the Tampere

³⁷ See note 3, pages 236-238.

³⁸ Elisabeth Kardos-Kaponyi "The Charter of Fundamental Rights of the European Union" *Társadalom És Gazdaság Közép- És Kelet-Európában / Society and Economy in Central and Eastern Europe* 23, no. 1/2 (2001): 137–70. <http://www.jstor.org/stable/41468504>.

European Council, that settled the way the Charter should be drafted more precisely. The need to protect the common values of the Union, also considering the future development of integration and enlargement, was emphasized and a final concrete decision was reached about the body entrusted with the duty of drafting the Charter. Therefore, an ad-hoc expert committee called the Convention was established and started working in November 1999. The Convention was composed of 15 representatives of the Heads of State and Government, 30 representatives of the national parliaments, 16 representatives of the European Parliament and 1 representative of the Commission and it was chaired by Mr Roman Herzog, former President of the Federal Republic of Germany and of the German Constitutional Court. The Court of Justice, the Committee of the Regions, the Economic and Social Committee, the Ombudsman and the Council of Europe were also to participate as observers³⁹. Importantly, the proceedings of the drafting were open and transparent, in fact, the EP organised public hearings and numerous NGOs encompassing all segments of civil society were able to present their personal perspectives on the draft. After having taken into account the points of view of all the participants and observers to the meetings, and having conciliated the contrasting views of the Member States, embracing the idea of a politically binding declaratory text, and of the European Institutions, championing for a more significant, stronger document, the Convention was able to reach a consensus on a compromise draft Charter, within the deadline set by the European Council, that unanimously approved the text and content of the Charter in Biarritz on 13 and 14 October 1999. At this first stage after approval, the Charter was not incorporated into the Treaties, as it was solemnly proclaimed by the European Parliament, the Council of Ministers, the European Commission, but not by the Member States. So, while the Convention members had decided to draft the Charter taking into account the possibility of judicial enforcement, debates about the legal status of the Charter were still ongoing⁴⁰. This created much disappointment in the European Trade Union Confederation, the representatives of the NGOs, the European Commission, the European Parliament, the Economic and Social Committee and the Committee of the Regions, who expressed the importance of the legally binding incorporation of the EU Charter in the

³⁹ https://www.europarl.europa.eu/charter/composition_en.htm

⁴⁰ David Anderson QC and Cian C Murphy, "The Charter of Fundamental Rights," Chapter. In Andrea Biondi, Piet Eeckhout, and Stefanie Ripley (eds), "EU Law after Lisbon" (Oxford, 2012; online edn, Oxford Academic, 24 May 2012)155–79. <https://doi.org/10.1093/acprof:oso/9780199644322.003.0007>.

EU Treaty. In particular, on 11 October, the Commission issued a Communication⁴¹ affirming that the Charter should be incorporated into the TEU either under a specific “Fundamental Rights” title, or in an annexed protocol. A first attempt of incorporation of the Charter in the constitutional architecture of the EU was thus made through the 2004 Constitutional Treaty, that however failed to be ratified. Finally, with the entry into force of the Treaty of Lisbon, on 1 December 2009, the CFR acquired the status of primary EU law, being elevated to the same legal level as the Treaties, ten years after having been approved and proclaimed by the EU institutions. The CFR was in fact inserted as a cross reference in Article 6(1) of the revised EU Treaty, that recites:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”⁴²

After this important step, Protocol 30 dealing with the application of the Charter to the UK and Poland⁴³, for which the legal value of the Charter remained a sensitive issue, was added; and another Protocol was proposed, addressing the application of the Charter in the Czech Republic.

As for the structure of the Charter, the rights contained in Article 1-50 of the Charter are organised in 6 Titles: I Dignity, II Freedoms, III Equality, IV Solidarity, V Citizen’s rights, VI Justice, while Title VII deals with General Provisions establishing four legal principles on the interpretation and application of the Charter⁴⁴. The sources of these provisions are

⁴¹ Communication from the Commission on the Legal Nature of the Charter Fundamental Rights of the European Union, Brussels, 11.10.2000, COM(2000) final.

⁴² See note 1.

⁴³ Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the UK.

⁴⁴ See note 40, page 160.

stated in the Explanations section and include the ECHR, the EC and EU Treaties, the European Social Charter and the Community Charter on the Fundamental Social Rights of the Workers, as well as international treaties, such as the Geneva Convention on Refugees or the New York Convention on the Rights of the Child and judgements of the ECJ along with the constitutional traditions of the Member States.

The four principles referred to in the General Provisions governing the interpretation and application of the Charter are extremely important in order to fully grasp its impact on the protection of fundamental rights in Europe. First, the Charter is addressed to the European Union, and only exceptionally applies to Member States. Second, not all the Charter's provisions are rights. Third, Union legislation can, within limits, restrict Charter rights. Fourth, the Charter attempts to create harmonious relationships with the European Treaties, the ECHR and the constitutional traditions of the Member States.⁴⁵

The first principle of the General Provisions deals with the scope of application of the Charter, and it is further expressed in Article 51(1) CFR:

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

This provision establishes that the Charter is addressed to the European Union's institutions, bodies, offices and agencies, and it only exceptionally applies to Member States when they are implementing EU law. This wording seems to be problematic because it does not explain whether the provision has to be read narrowly, or more broadly also encompassing instances where Member States are derogating from EU law. However, the reading of the ECJ has preferred a broader interpretation of the word “implementing” as referring to any action within the scope of Union law, thereby including also the derogation situation⁴⁶.

The second paragraph of Article 51 recites:

⁴⁵ See note 2, page 465.

⁴⁶ See note 2, page 484.

“This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”

It further explains that the Charter is not a distinct legal basis providing for different new competences and tasks not provided for by the Treaties. It thus has to be used as help for the interpretation of the Treaties and all the measures adopted in observance of the latter, as well as a standard for judging the validity of such measures.

As the second principle expressed, the Charter does not only contain rights because the Charter also recognizes the existence of principles. The difference between the two is that rights are clear, specific provisions having direct effect, as they can be invoked in front of a court; while principles are broader and usually referred to as guiding values as they need further legislative concretization before they can become actually effective. This can be problematic because the Charter does not list a precise catalogue differentiating between rights and principles, making this distinction ambiguous as sometimes even the wording of the provision can remain unclear about its nature⁴⁷.

As mentioned above, the third principle contained in the General Provisions section allows for the limitation of some rights (for the protection of the general interest). While in many instances these limitations are provided for through specific provisions, the Charter also inserted a general provision setting rules for limitations to all fundamental rights in Article 52(1):

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

This paragraph establishes three principles that limitations on rights must respect in order to be allowed: first, limitations must be provided for by law. Second, limitations must respect the right's essence and third, restrictions must respect the principle of

⁴⁷ See note 45.

proportionality, entailing that there must be a balance between the right in question and public interest⁴⁸.

Finally, the fourth principle, specifically in regard to the Charter's relationship to the European Treaties, is governed by Article 52(2):

“Rights recognised by this Charter for which provision is made in Treaties shall be exercised under the conditions and within the limits defined by those Treaties.”

It entails that when the Charter lays down fundamental rights from the EU Treaties, the latter have precedence and thus the ECJ could only analyse those provisions from the Treaties⁴⁹, without further looking for those rights in the Charter.

2.4 The European Union's approach to human rights in relation to the CoE and the ECHR legal system

As for the specialised agencies, the work of the FRA is extremely relevant to the present thesis because it is one of the emblematic expressions of the cooperation established between the European Union and the Council of Europe within human rights protection. This is true for two main reasons. To begin with, the Council of Europe appoints one independent member of the FRA's Management and Executive Boards. This is particularly significant because it ensures the representation of broader standards for human rights through the additional perspective of the CoE and promotes a deeper coordination between the two bodies, allowing easier communication. This appointment can also be seen as a way to maintain and enhance the FRA's objectivity, independence and credibility, since the CoE's focus is less political and more human rights-focused than that of the European Union. The presence of a member of the CoE guarantees consistency between the FRA's work not only with the CFR, but also with the ECHR. Moreover, a representative of the CoE Secretariat is present with observer status at Management Board meetings, enabling for full information to flow between the two bodies. The Founding Regulation of the FRA also prescribes consultations between the FRA and the CoE during the drafting of the Agency's Annual Work Programmes and annual report on fundamental rights issues ensuring proper consideration for CoE's priorities, activities and information

⁴⁸ See note 2, page 467-469.

⁴⁹ See note 2, page 470.

in the redaction of FRA documents. In addition, the FRA and the CoE are also linked through a Cooperation Agreement adopted in 2008⁵⁰. This agreement established a cooperation framework, with the aim of avoiding duplication and secure consistency and complementarity between the work of the two bodies. The cooperation has significantly evolved during its time of existence towards more intense coordinated activities involving the FRA and many institutions of the CoE, including the CoE Secretariat, the Parliamentary Assembly, the ECtHR and the Commissioner for Human Rights. In fact, it is not only prescribed for the CoE to be involved with the FRA's Management and Executive Boards, but this also has to happen in the opposite direction meaning that also the FRA has observer status in a number of CoE bodies and services, intergovernmental committees and expert groups, for instance the Steering Committee on Anti-Discrimination, Diversity and Inclusion or the Steering Committee for the Rights of the Child. The coordinated work focuses on multiple points such as: the development of joint projects in areas of common interest, multilateral dialogue to improve respect for human rights in Europe, the coordination of communication strategies in order to efficiently raise awareness on fundamental rights, but most importantly the two organisations are bound to exchange information and data about their activities and to consult each other at operational level. To allow all of this to efficiently happen, Article 3 of the Agreement prescribes that each body has to appoint a contact person that has the specific task of ensuring such cooperation. Both the FRA and the CoE reference each other's work when performing their activities. In fact, as stated above, the FRA relies on CoE's standards, ECtHR judgements, reports and activities of other bodies of the CoE in its work but also the CoE benefits from this collaboration as the ECtHR caselaw cites Agency's reports, data and findings as support for their judgements and other bodies of the organisation use such data and findings to redact their reports on specific human rights issues and themes⁵¹.

Besides its natural relevance within the EU institutional and legal framework, the Charter of Fundamental Rights is also taken into account in the work and the jurisprudence of the

⁵⁰ Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe (Official Journal of the European Union, L 186/7, 15.7.2008) ('CE Cooperation Agreement').

⁵¹ European Union Agency for Fundamental Rights, "Overview of the Cooperation between the European Union Agency for Fundamental Rights and the Council of Europe 2023 Report" https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-cooperation-report-2023_en.pdf.

European Court of Human Rights since its inception even before it became legally binding in the European Union. In fact, the first reference to the CFR was made in 2001 in the case *Hatton and Others v. UK*, where the judge referred to Article 37 of the Charter about Environmental Protection⁵². Since then, the ECtHR has continued to make references to many articles of the CFR and has always kept the Charter's legal status' evolution into consideration, using it when deemed appropriate. It is clear that the Charter has a peculiar position with respect to the ECHR as only 27 members of the CoE are also members of the EU and thus bound, as signatories of the Lisbon Treaty, to the Charter. However, the work of the ECtHR has shown its willingness to consider the ECHR and its human rights protection also in the context of the CFR⁵³.

Article 52(3) of the Charter is extremely insightful as to the relationship between the rights contained in the CFR and those contained in the ECHR, as well as their protection and aims at ensuring consistency between the two⁵⁴:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

This provision establishes that where the rights contained in the Charter correspond to those guaranteed by the ECHR, the meaning, scope and also authorised limitations enshrined in the latter will be applied without affecting the autonomy of the ECJ and of Union law. However, the last sentence of the provision makes it clear that the Charter, and thus the EU, can diverge from the standards set by the ECHR only if they provide higher fundamental rights protection; in no case are they allowed to go below the level of protection already guaranteed by the ECHR. Finally, the most appropriate interpretation of this provision is that ECHR rights set a minimum standard for Charter rights; the Charter standard can never be lower than the ECHR standard but may be higher⁵⁵.

⁵² *Hatton & Others v United Kingdom* (2002) 34 EHRR 1.

⁵³ See note 40, page 175-178.

⁵⁴ Tobias Lock, “Article 52 CFR”, in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019; online edn, Oxford Academic) <https://doi.org/10.1093/oso/9780198759393.003.577>.

⁵⁵ See note 2, page 471.

To make this correspondence clearer, the Explanations to the Charter⁵⁶ contain an extensive list of articles of the Charter where both the meaning and the scope correspond to those of the ECHR. Some examples can be Article 2 CFR establishing the right to life corresponding to Article 2 of the ECHR, Article 4 CFR establishing the prohibition of torture and inhuman or degrading treatment or punishment corresponding to Article 3 of the ECHR, Article 5(1) and (2) CFR establishing the prohibition of slavery and forced labour corresponding to Article 4 of the ECHR.

However, there is also another set of rights that have the same meaning in both documents but that have a wider scope in the Charter, such as: Article 9 CFR, establishing right to marry and found a family that covers the same field as Article 12 of the ECHR, but whose scope could be extended to other forms of marriage if established by national legislation, or Article 12 (1) CFR establishing freedom of assembly and association that corresponds to Article 11 of the ECHR, but whose scope is extended to EU level.

As the ECtHR has been referring to the CFR in many of its judgements, the same can be said to be true also for the ECJ in regard to the ECHR. However, the approach of the two courts is slightly different. The ECJ in fact, rather than being reluctant in referencing the ECHR, has historically used it usually after having determined the Charter provisions to apply in their judgement, to make sure that the level of protection guaranteed by the Charter was not lower than that afforded by the Convention. So, even if the ECJ has always paid attention to the ECHR, and will continue to do so, it also has always reiterated the fact that the ECHR is not formally incorporated into EU law, as long as the EU has not yet acceded to it. This reference to the autonomy of EU law, is exactly one of the many reasons behind the ECJ's Opinion 2/13 on the Draft Accession Agreement⁵⁷.

⁵⁶ https://www.cvce.eu/content/publication/2010/6/9/11b81cf7-22fc-4463-873f-1db65a733a8c/publishable_en.pdf

⁵⁷ Allan Rosas, "The Court of Justice of the European Union: A Human Rights Institution?," *Journal of Human Rights Practice* 14, no. 1 (2022): 204–14, <https://doi.org/10.1093/jhuman/huac020>.

Chapter 3: The Council of Europe's human rights protection legal system and its relationship to the European Union

The Council of Europe is the oldest European international organisation, established on 5 May 1949 in London. Its mission has been from the outset to champion democracy, the rule of law and human rights across Europe, with the aim of promoting cooperation among its Member States and avoid the occurrence of another disastrous war in the continent. A testimony of its fruitful work is the fact that all European states, and thus the 700 million people living there, now live in a death penalty-free zone, something that would have seemed unachievable during war times. The CoE has adopted more than 200 legally binding international treaties such as the European Social Charter, the Convention on Action against trafficking in human beings, the Istanbul Convention Action against violence against women and domestic violence¹. Out of all of them, the most known and important is the European Convention on Human Rights, that, among its achievements, also revolutionarily created a control mechanism to supervise the respect for the Convention: the European Court of Human Rights (that will also be referred to as the Court or the Strasbourg Court), as we know it today. The legal system for human rights protection put into place by the CoE through the establishment of the ECHR and the ECtHR has proven to be rather successful over the years as well because for the first time, a judicial mechanism on human rights violations could be directly accessible by the individuals. One issue, however, arises when we look at the relationship between the ECHR and the European Union. In fact, the latter has not yet acceded to the Convention, even if such accession is set as an obligation in Article 6 TEU. Still, all Member States of the European Union are effectively also members of the CoE and consequently signatories to the ECHR. This has always been a source of problems in all those cases where the Strasbourg Court has been faced with applications claiming violations by EU law measures.

This chapter will look into the human rights' protection mission of the CoE, specifically investigating on the nature and functioning of the main human rights instruments of the organisation, namely the ECHR and the ECtHR. Importantly, the chapter will then

¹ Steven Greer, Janneke Gerards, and Rose Slowe, *Human Rights in the Council of Europe and the European Union* (Cambridge University Press, 2018), page 58.
<https://doi.org/10.1017/9781139179041>.

proceed to focus on the approach the ECtHR has historically adopted when dealing with complaints of violations of human rights protected under the Convention, perpetrated by EU measures.

3.1 The Council of Europe's mission to protect human rights: the European Convention on Human Rights and the European Court of Human Rights

As explained in the first chapter, the ECHR (also referred to as the Convention) was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953, with the objective of protecting human rights, encourage pluralist democracy and the respect for the rule of law. Today, it is made of 46 High Contracting Parties, a number corresponding to the number of Member States of the Council of Europe². This is so because the Convention is not open: only members of the CoE can sign it and, since the respect for the principles of the rule of law, for human rights and fundamental freedoms are paramount criteria for membership to the CoE³, it follows that all the members of the CoE will be willing and must comply with the signature of the ECHR, that sets such human rights standards. Thus, from the moment states enter the CoE, they have an obligation to sign and ratify the Convention as an indication and confirmation of their effort and commitment to human protection, elements required for CoE membership.

The Convention contains 59 Articles divided in two sections: “Rights and freedoms” and “European Court of Human Rights”, with additional protocols providing for other rights⁴. Article 1 establishes the obligation for the High Contracting Parties to ensure that everyone within their jurisdiction can enjoy the rights enshrined in the Convention. Articles from 2 to 14 provide different rights such as the right to life⁵, the prohibition of torture and inhuman or degrading treatment⁶, or the respect for private and family life⁷. Articles 15 to 18, instead, explain how some of those rights can be limited, and which ones cannot be subject to any limitation whatsoever, in any kind of circumstance. The remaining part of the Articles instead deals with the structure and the functioning of the

² Court's Public Relations Unit, “The European Convention on Human Rights a Living Instrument,” September 2022, https://www.echr.coe.int/documents/d/echr/Convention_Instrument_ENG.

³ Article 3 Statute of the Council of Europe.

⁴ See note 1, page 91.

⁵ Article 2 European Convention on Human Rights (ECHR).

⁶ Article 3 ECHR.

⁷ Article 8 ECHR.

ECtHR. The Convention has 16 Protocols that amend its framework adding rights that were not included in the original text, for instance Protocol No. 1 including the right to private property and to education.

The Convention, its application, interpretation and supervision by the Court, whose composition and function will be further analysed later in the paragraph, are guided by some important principles. Firstly, the Convention must be interpreted in light of its objectives and thus it has an autonomous meaning: the Convention's meaning does not depend on the states' national interpretation of it, they cannot use their own national legislation to avoid the protection of human rights as guaranteed by the Convention⁸. Secondly, the interpretation of the Convention must be an evolutive one, as to be able to use the ECHR to understand and judge on cases dealing with new notions and concepts that were not envisaged, or did not exist, when the Convention was drafted and thus respond to the continuous societal, political, cultural and technological developments⁹. Thirdly, and very importantly, the principle of effectiveness is both referred to in the Preamble, but also further highlighted by the Court in various instances as one of the main factors guiding its interpretation of the Convention and its consequent judgements. Such principle also serves as a basis for the development and recognition of some positive obligations of the states in the protection of fundamental rights enshrined in the Convention. In fact, in many cases the Court has used the principle of effectiveness to rule that not only states are under a negative obligation to not interfere with the rights of individuals in order to not breach them, but they must also positively and actively take adequate legal and practical measures to ensure that individuals can effectively enjoy those rights¹⁰. Furthermore, the Court found another principle to be relevant to have a complete understanding of the Convention: the principle of subsidiarity. It originally did not find a place in the actual text, and it thus has only later been introduced with Protocol No. 15 ECHR. The principle states that the primary responsibility for the effective protection of the Convention rights lies with the national authorities of the states that have to make sure that everyone within their jurisdiction enjoys the rights emanating from the Convention, and subsequently the Court has the subsidiary task of checking the

⁸ Janneke Gerards, "Principles of the European Convention on Human Rights" (Cambridge University Press, 2023), 127-129.

⁹ Ibid., page 107.

¹⁰ Ibid., pages 5-7.

compliance of national authorities with such Convention obligations¹¹. Finally, the principle of margin appreciation appears to be linked to that of subsidiarity. According to the latter, states should have some leeway to regulate and restrict the exercise of Convention rights in complicated cases, where the Court recognises that the national authorities are better suited to understand national sensitivities and needs. Still, it is important to keep in mind that this margin of appreciation is well away from giving the national authorities full discretion on the application of the Convention¹².

For the drafters it was important to make the rights enshrined in the Convention enforceable and thus, after long and complicated negotiations, it was originally decided to create two institutions under Article 19 of the ECHR: the European Commission on Human Rights and the European Court of Human Rights, set in Strasbourg in 1959. The two bodies coexisted up until 1998 with the aim of ensuring that the HCPs respect the commitments on human rights protection stemming from the Convention. In 1998, Protocol No. 11 to the ECHR came into force, reforming this human rights protection mechanism. From that moment, the Commission, that initially had a filtering capacity to decide which cases were admissible to be judged by the Court, and the Court were merged into a single permanent Court performing both functions, which we today know as the European Court of Human Rights. However, ever since the fall of the Berlin Wall, the Court had been largely overwhelmed by the great number of applications allocated, up until 2004 when Protocol No. 14 was adopted further reforming the mechanism.

The Court as we know it today consists of 46 full-time judges, one for each High Contracting Party to the Convention, elected by majority vote in the Parliamentary Assembly of the CoE from among three candidates nominated by each signatory state¹³. Importantly, their mandate lasts 9 years and is non-renewable in order to ensure their independence from their own national governments. The Court has four judicial formations: single judge dealing with clearly inadmissible cases through a final decision of inadmissibility, committee of three judges deciding on the admissibility and the merits

¹¹ Ibid., pages 7-11.

¹² Ibid., pages 241.

¹³ Angelika Nussberger, "The European Court of Human Rights", Oxford University Press EBooks (Oxford University Press, 2020), 40-44.
<https://doi.org/10.1093/law/9780198849643.001.0001>.

of cases on the basis of well-established case law, thus being able to issue both decisions and/or judgements, chamber of 7 judges giving decisions and judgements about more relevant and difficult cases that cannot be judged only based on well-established case law and finally the grand chamber of 17 judges to which particularly complicated cases may be referred to either by the parties of the litigation, or by the chamber of 7 judges if the case at hand raises a serious question regarding the interpretation of the Convention or if the solution to the case could be in contradiction with previous judgements¹⁴.

The Court has compulsory jurisdiction over the states signatories of the Convention: once the High Contracting Parties have signed the Convention, the Court will hear a litigation in which they are involved without needing any more proof of consent from the states, that are consequently obliged to appear in front of the Court.

The Convention provides for the possibility of both inter-State complaints and individual complaints. According to the inter-State procedure, any contracting state to the ECHR can bring another contracting state in front of the Court for an alleged violation of the Convention, although this type of case is usually rare in practice¹⁵. Individual complaints, on the other hand, constitute the majority of the cases pending before the Court and they are also extremely noteworthy in that they allow for the first time any person, non-governmental organisation or group of individuals to lodge an application against contracting states, alleging that such states have breached their rights protected under the ECHR¹⁶.

To be admitted for a judgement of the Court, claims and complaints lodged by the applicants must fulfil some admissibility criteria, set in the Convention¹⁷. First of all, applicants must have exhausted all available legal domestic remedies before bringing the case before the ECtHR, within a time limit of 6 months. An application could be declared inadmissible if an abuse of the right of application was found, for instance in cases of falsification of documents or of failure on the part of the applicant to inform the Court of any developments relevant to the examination of the case, or if the applicant has already

¹⁴ Ibid., pages 57-61.

¹⁵ Article 33 ECHR.

¹⁶ Article 34 ECHR.

¹⁷ Article 35 ECHR.

submitted the same case on the same facts to the Court. Thirdly, the applicant bringing the case in front of the Court must be a victim, either direct, indirect or also potential and the violation the victim is complaining about must have been committed by the respondent state or attributable to it. In fact, if an individual brings an application directly against an international organisation, for instance the European Union that has not yet acceded the Convention, the Court could declare the application inadmissible. However, if the applicant's complaint is directed towards a Member State of the EU in the implementation of EU law, it could be declared admissible and could be subject to a judgement of the Court. The approach the Strasbourg Court has taken in these instances will be the more specific focus of the next paragraph of the chapter. There is also the requirement of territorial and temporal jurisdiction for the admissibility of complaints: the violation of complaint must have occurred within territorial jurisdiction or in a territory effectively controlled by the Member State concerned and such acts of complaint must have occurred after the date of entry into force of the Convention in the state in question, with the only exception of those situations where there is an ongoing violation that has started before the signature of the Convention but that continues also after its entry into force. To be found admissible, the application must of course invoke a right that is protected under the Convention or one of its Protocols, but it could still be declared inadmissible if the Court believes that the applicant suffered no significant disadvantage. Finally, the application may be declared inadmissible also if it is found to be manifestly ill-founded, in cases where the applicant fails to provide sufficient evidence to support the facts and legal arguments that have been raised, for instance if the applicant fails to demonstrate the reasons and ways in which the Convention right claimed has been allegedly breached¹⁸.

When a case is found to be inadmissible, it will result in a decision that is final and does not allow for appeals. On the other hand, when a case is admitted and the Court thus then proceeds to examine the facts and the merits of such case, it will result in a judgement, that is more extensively reasoned than a decision. Even if the Court's judgements are final, and as such they cannot be appealed, they are also declaratory in nature, meaning that they simply declare whether a violation of the Convention has been perpetrated or

¹⁸ Council of Europe/European Court of Human Rights, The admissibility of an application, 2015.

not. In this regard, the function of supervising and ensuring the correct execution of such judgements is entrusted to the Committee of Ministers.

3.2 The approach of the ECtHR towards ECHR violations by the EU

The relationship between the ECtHR and the European Union is a complicated, ever evolving one. On the one hand, the Strasbourg Court cannot directly place the responsibility upon the ECJ (also referred to as the Luxembourg Court) since the EU is not party to the ECHR, and on the other hand the Luxembourg Court is not inclined to obey a ruling of Strasbourg without an international obligation binding it to do so¹⁹. The ECJ wishes to protect the autonomy of the EU legal order, a desire expressed in *Hauer v. Land Rheinland-Pfalz*, where it stated that possible infringements of fundamental rights by a Community measure could only be judged in light of Community law thus excluding the possibility of external review from other bodies²⁰. Instead, the ECtHR seeks to preserve its centrality in the protection of human rights in Europe. These different needs and wishes, along with the two institutions' desire to not create any deadlocks in their independent separate legitimacy, have usually allowed them to find ways of not infringing with their own spheres of action. In fact, it would be extremely counterproductive for the ECJ to disregard the authority of the ECtHR, and for the ECtHR to see its rulings be overlooked by ECJ.

This has led to the establishment of a rather peculiar relationship between the two legal regimes for human rights protection of the ECHR and the EU. In its approach to the EU, the ECtHR has had to be careful and to reserve for the Union and its acts a different treatment than that used towards actual High Contracting Parties to the Convention. The Court's attitude towards the EU has evolved with the establishment and development of specific principles and doctrines to deal with those more complicated cases involving EU measures²¹.

¹⁹ Paul De Hert and Fisnik Korenica, "The Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights," German Law Journal 13, no. 7 (July 2012): 874–95.
<https://doi.org/10.1017/s2071832200020794>.

²⁰ Ibid., page 880.

²¹ Guillermo Arranz Sánchez, "A Tale of Two Courts: The Relationship between the Court of Justice of the European Union and the European Court of Human Rights - EST," EST - European Student Think Tank, March 18, 2025.

The issue lies in the evident fact that the EU is not part of the ECHR, and consequently the ECtHR is not entitled to review the EU acts' compliance with the Convention. This becomes especially problematic in cases where EU Member States allegedly violate rights protected under the ECHR in the framework of implementation and enforcement of EU law.

At its birth, the EU was not explicitly committed to human rights, privileging the economic integration and cooperation focus at the basis of the ECSC of the time. Since the ECSC had no action within the field of human rights, there could be no conflict between the ECSC and the CoE human rights protection regime. This gradually changed overtime due to the expansion of the EU's activities over other fields and the growing number of policies in which it would be more likely for the EU to deal with human rights, up until the moment in which also the EU was able to generate laws regarding human rights. Thus, the continuous and gradual transfer of powers from the Member States to EU institutions was met also by the expansion of the EU action within human rights sphere and a growing body of law in this subject. Still, EU Member States were the ones liable for human rights performance as signatories to the ECHR, not the EU, which meant that the EU human rights law was not subject to the control of the Strasbourg Court even if it was increasing its action in the human rights area. Accordingly, at these early stages, the ECtHR would refuse to admit cases that would have entailed judicial review of acts of the EU²².

However, there was a growing number of applications in front of the ECtHR concerning cases where the applicants claimed to have lost in front of the Luxembourg Court due to rulings falling short of the ECHR standards. The Strasbourg Court would continue to declare such appeals *ratione personae*²³ inadmissible, on the basis that since the EU is not a party to the ECHR, the rulings of the ECJ could not be appealed to the Strasbourg Court and could thus not be subject to its review. This approach was not greatly appreciated, and the ECtHR was pressured to find a way to hold the EU accountable for possible violations of the ECHR standards for human rights protection.

<https://esthinktank.com/2025/03/19/a-tale-of-two-courts-the-relationship-between-the-court-of-justice-of-the-european-union-and-the-european-court-of-human-rights/>.

²² See note 19, pages 876-877.

²³ See note 18, page 4 and Article 35 paragraph 3 ECHR.

A number of landmark judgements have historically ignited a change in this approach of the Court.

To begin with, in 1958, the European Commission for Human Rights (before it became the ECtHR) rendered a pivotal judgement, for the first time addressing the responsibility of violations appearing at EU level: *X. v. The Federal Republic of Germany*. Here, the Commission held that if a state signs a Treaty and subsequently signs another one preventing the state from respecting the obligations stemming from the former, such state will be held responsible for any breach of the first Treaty resulting from such situation²⁴. This meant that the Strasbourg Court would lay the responsibility of EU's violations of the ECHR on the Member States, as signatories both of the ECHR and of the founding Treaties of the EU, even if, and also because, the EU is not party to the Convention. The importance of such judgement does not only lay in the fact that for the first time the ECtHR was willing to assign the responsibility for EU actions violating the ECHR, but also in the fact that it opened the possibility for a possible review of certain EU legal acts as to their conformity with the ECHR. In this way the ECtHR showed its intention to keep the transfer of powers from the Member States to the EU under control, specifically in the human rights protection area, by calling on EU Member States to take responsibility for eventual violations of the ECHR by the EU²⁵.

3.2.1 The equivalent protection doctrine

The 1980s were a period rich in innovation and change within the EU integration process in many fields, and the human rights area was no exception.

Consequently, the 1990 *M & Co.* case was central for the ECtHR to produce another historic judgement, inspired by the approach of the German Federal Constitutional Court in the *Solange II* case of 1986 regarding the direct effect of EU law: while the German Court accepted the direct effect and primacy of EU law over German law, it still retained some sovereign responsibility to defer from it if the level of rights protection was considered to be lower than that provided by the national Constitution. In the *M & Co.* case, the ECtHR established the equivalent protection doctrine, by highlighting that it is possible for Member States signatories to the ECHR to transfer their powers to

²⁴ *X v Federal Republic of Germany* (1958), ECHR.

²⁵ See note 19, page 878.

international organisations, as long as that organisation provides for a protection of human rights that is equivalent, in the sense of comparable, to that provided by the ECHR²⁶. The Court goes on to specifically state that the EC legal system does secure equivalent human rights protection because it provides normative grounds for such protection, and because it also provides for a control of the observance of human rights through a specialised body: the ECJ²⁷. The doctrine's aim is to balance the state's responsibility for all their actions under Article 1 ECHR in light of the obligations established by the Convention, with the states' duty to also obey to other international, in this case specifically EU, obligations. This judgement thus frees the EU human rights regime from the ECtHR control in that it states that EU Member States' obligations stemming from the ECHR will not be breached if they transfer powers to the EU, as long as the EU offers an equivalent protection of human rights as that provided by the ECHR system.

Another change in this approach of the Court was brought in 1999 with the Court's judgement on the case *Matthews*. This was particularly significant because it was the first time in which the Strasbourg Court explicitly reviewed a piece of legislation of the EC. The act in question was the Act Concerning the Election of the Representatives of the European Parliament by Direct European Suffrage, based on the EC Treaty, with a status similar to that of primary law, since the measure had been ratified by all EC Member States at the time. Importantly, this was the first time in which the ECtHR held a Member State, specifically the UK, responsible for the violation that the Act of the European Union embodied, also consequently to the enhancement of the European Parliament's powers enacted by the Maastricht Treaty²⁸. All the parties to the Treaty, among which in this case in particular the UK, were considered responsible *ratione materiae*²⁹. The reason the Court found was that the UK, and the other parties to the Treaty, had control over the matter since they freely decided to enter the EC Treaty and undertake all its obligations, consequently the Member States' responsibility to secure the respect the Convention continues even if and after the state decided to transfer powers to an international

²⁶ Cathryn Costello, "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe," Human Rights Law Review 6, no. 1 (February 16, 2006): 87–130. <https://doi.org/10.1093/hrlr/ngi038>.

²⁷ See note 19, page 880.

²⁸ See note 26, page 92.

²⁹ See Article 1 and 35 paragraph 3 ECHR.

organisation. The most relevant feature of the Act concerned in this case, is that it could be directly found in primary legislation, meaning that it could not be challenged before the judiciary mechanism of the EU, the ECJ, thereby not being able to trigger the equivalent protection doctrine³⁰.

3.2.2 The *Bosphorus* case

The 2005 *Bosphorus* case is probably the most vital judgement of the ECtHR as regards the clarification of the relationship between the human rights regimes of the EU and the ECHR, in particular in the context of Member State responsibility for actions and omissions flowing from the application of EU secondary law. It introduced the *Bosphorus* presumption and thus set a precedent influencing the ECtHR approach to cases involving the EU and its Member States, refining and intensifying the interplay between the two human rights regimes.

The case dealt with the impounding of an aircraft by Ireland, following an obligation stemming from an EC Regulation, in turn based on a Resolution of the UN Security Council³¹. The facts took place a long time before they were finally submitted to the judgement of the ECtHR. In fact, the first seizure by the Irish Government of the aircraft owned by Yugoslav airlines and leased to the Turkish company Bosphorus Airways, happened in 1993. As said above, such action was based on an EC Regulation, in turn giving effect to UN Security Council Resolutions imposing sanctions on the Federal Republic of Yugoslavia. The first judgement on the matter came in 1994 from the High Court of Ireland, that quashed the seizure; however, two months later, the Irish government proceeded to detain the aircraft for a second time. Once again, such seizure was quashed by the High Court and in the meantime the first judgement of the High Court was appealed to the Supreme Court of Ireland that made a reference to the ECJ in 1995. Contrary to the High Court of Ireland, the ECJ found the seizure of the aircraft, causing an interference with Bosphorus' property rights, to be justified. Hence, this ECJ judgement and thus the detention of the aircraft was then confirmed by the Irish Supreme Court.

³⁰ Tobias Lock, "Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights," Human Rights Law Review 6, no. 1 (February 25, 2010): 529–45. <https://doi.org/10.1093/hrlr/ngq022>

³¹ *Bosphorus Hava Yollari Turizm v. Ireland*, Application no. 45036/98 ECtHR 30 June 2005.

The application to the European Court of Human Rights was lodged in 1997 by the Bosphorus company and was directed against the Irish Government. Two claims were raised by the applicant: firstly, the respondent state responsibility under the ECHR and secondly, its alleged breach of the applicant's rights under Article 1 of Protocol No. 1 caused by the seizure of the leased aircraft³².

As concerns the first claim, the action of the Irish authorities had taken place in Irish territory. Consequently, the ECtHR had no issue in assigning the responsibility of the impounding and any violation arising from such action to Ireland according to Article 1 of the Convention regarding jurisdiction. The Court further observed that the EC Regulation 990/93 had been directly applicable and binding in its entirety to all Member States of the EC, meaning that none of them could lawfully depart from any of its provisions. In fact, the Regulation had become effectively part of Irish domestic law, without needing any further implementing legislation, since the moment it was published on the Official Journal, a date prior to that of the impoundment of the aircraft. Thus, the Court judged that the Irish authorities rightly considered themselves obliged to impound the aircraft to which they felt Article 8 of the EC Regulation applied. Furthermore, such consideration was upheld by the judgement of the ECJ. The ECtHR went along with the Irish Government and the European Commission, permitted to intervene as a third party to support Ireland's claims, on the idea that the Supreme Court of Ireland had no margin of discretion in the confirmation of the seizure firstly because the action flowed from the application of an EC Regulation and then because the action was also confirmed by the referral of the ECJ. As a consequence, the alleged interference was not the result of the exercise of free discretion on the part of the Irish authorities, but it was the outcome of the Irish State's compliance to its legal obligations stemming from Article 8 of the EC Regulation 990/93. Three main factors gave substance to such consideration: the Regulation obliged Ireland to act in the way it did, according to Article 10 EC Treaty Ireland was obliged to appeal the High Court's ruling to the Supreme Court as it did and finally, according to Article 234 EC Treaty the Supreme Court of Ireland was obliged to refer the case to the ECJ and to apply with no discretion the resultant ECJ ruling³³.

³² See Registry Legal Summary of the Bosphorus case.
<https://hudoc.echr.coe.int/eng?i=002-3835>

³³ See note 26, pages 99-101.

The finding that Ireland was indeed required to act in that specific way under the EC law was identified by the Court as a legitimate interest adequate to justify the impoundment, on the basis of the importance of international cooperation amplified by the more specifically supranational nature of the EC. The Court then analysed the case in light of the equivalent protection doctrine in the process of balancing on the one hand the legitimate general interest, in this case of respecting international obligations fostering international cooperation, and on other the assurance that High Contracting Parties do respect obligations flowing from the ECHR. In this case, the Court considered the protection of fundamental rights provided by the EC law to be equivalent to that provided by the Convention system. This led to the establishment of the presumption that Ireland had not departed from the requirements of the Convention in the implementation of the legal obligations attached to its membership to the EC, since the EC was presumed to provide the aforementioned equivalent protection³⁴. The doctrine, as it was further formulated in the *Bosphorus* case, does not absolve states from their responsibility, but it can have a two-fold function. It can act as a conditional immunity when its applicability depends on an assessment of the organisation's (the EU in this case) fundamental rights compliance and protection. This was the way in which the equivalent protection doctrine was applied in the *M & Co* case, in which the Court stated that state action was justified as long as the relevant organisation guarantee of fundamental rights was at least equivalent, in the sense of comparable³⁵, to that of the Convention. However, the doctrine can also act as a justification for breaches of ECHR guarantees, only in the case in which the presumption, the *Bosphorus* presumption of equivalent protection, is rebuttable. The only instance in which the presumption can be rebutted is if it is manifestly deficient: once equivalent protection as in its first function of conditional immunity is called upon, the presumption that the state's actions are justified arises, at this point such presumption can be refused if it is found that the protection of Convention rights, provided by the organisation in question, was manifestly deficient³⁶. This was not considered to be the case in *Bosphorus*. In fact, the Court unanimously found no violation of Article 1 of

³⁴ Ibid.

³⁵ *Bosphorus*, paragraph 155.

³⁶ See note 26, pages 101-104.

Protocol No. 1 to have taken place³⁷. The precise wording of the judgement of the Court was:

“The Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community.”³⁸

This paragraph sets three features of the new kind of relationship between the human rights regimes of the ECHR and the EU. Firstly, the Court is here determined to deal with cases that implicitly claim EU law measures to violate the ECHR, signalling the power Strasbourg claims in dealing with acts of organisations that are not party to the ECHR, specifically the EC. Secondly, it establishes a standard where the EU human rights regime is considered to be equivalent, in the sense of comparable, to that of the ECHR. Here, the Court refers to the double check of systemic equivalence as seen in the *M & Co.* case, where it looked at the equivalence of the substantive guarantees provided by EU law, in *Bosphorus* the Court specifically referred to the CFR, and then it investigated over the equivalence of the mechanisms supervising the application of human rights legal protection in the EU framework, namely of the ECJ. Thirdly, *Bosphorus* does immunise the EU human rights law from being challenged before the ECtHR, but it does the same with EU Member States’ acts merely implementing EU law where they enjoy no discretion on the matter³⁹.

In fact, very importantly, the Strasbourg Court stressed that a state will be considered responsible under the Convention for acts that fall outside its strict international legal obligations, for which it enjoys discretion. Conversely, the equivalent protection doctrine only applies when the state simply implements the legal obligations stemming from its membership of an international organisation⁴⁰.

³⁷ See note 32.

³⁸ See note 31.

³⁹ See note 19, pages 881-882.

⁴⁰ Ibid.

We previously saw how the application of the *Bosphorus* presumption depends on an assessment of the level of fundamental rights protection provided by the EU in comparison to that of the ECHR. Such assessment is general because the ECtHR, in the *Bosphorus* case, looked at the EC judicial system and at the way in which the ECHR was generally taken into consideration by the EC case-law as a whole. It is still rather relevant that, in contrast to other cases such as *M & Co* where the simple existence of the ECJ as a judicial mechanism overseeing the protection of fundamental rights was sufficient to establish equivalent protection, from the *Bosphorus* case, a more in-depth, even if still general in nature, inquiry must take place on part of the ECtHR⁴¹.

The *Bosphorus* case finalised and clarified the applicability of the Doctrine of Equivalent Protection: an applicant must claim either that there is no equivalent protection of the Convention rights by a certain EU measure or prove that the protection taken in consideration in the case in question was manifestly deficient. As regards manifest deficiency, the *Bosphorus* case refers to three standards that the case must fulfil in order to pass the threshold⁴²: firstly, it must have gone through some review mechanism of the EU, even if not strictly on the individual specific case but also on a broader issue that can serve as the basis for the judgement of the individual case. Secondly, national bodies of a Member State must have implemented and complied with the aforementioned rulings of the Luxembourg court dealing either specifically or abstractly with the case in question. Thirdly, *Bosphorus* sets the condition that eventual limits on rights made by a mechanism of the EU must be in accordance with the general interest, for its human rights protection to not be considered manifestly deficient.

Still, the scope of the equivalent protection doctrine as developed in *Bosphorus* is limited: in fact, since the human rights protection of the EU is presumed to be equivalent to that of the ECHR because of the existence of the ECJ, for an act to enjoy this ‘immunisation’, it must have been, or there must have been the possibility, for the judicial mechanism to review it. If the judicial mechanisms did not have the right to observe the act’s conformity with EU human rights law, the act would not be considered suitable to immunisation. It follows that the doctrine of equivalent protection is a presumption that immunises only

⁴¹ See note 26, page 103.

⁴² See note 19, pages 887-888.

those EU legal acts that are, or can be, observed and reviewed by the EU judicial mechanism. In this regard, it is important to remember that EU primary law, thus the Treaties, cannot be reviewed by the ECJ as regards their compliance with human rights standards because the EU judicial mechanism has no power in invalidating any provision of EU primary law. Recalling the ECtHR judgement in *Matthews*, it can be said that EU primary law is not within the scope of application of the Doctrine of Equivalent Protection as the states have freely decided to enter those international treaties. This means that the doctrine only immunises EU secondary law and that an establishing treaty of the EU will be normally reviewed as to its conformity with the ECHR⁴³.

What the Court has been able to do with the *Bosphorus* doctrine was to create a sort of limited indirect review for EU rights with a lower standard, since the EU is presumed to have an equivalent protection to that provided by the ECHR⁴⁴. This can be perceived as a compromise between the need of the ECtHR to hold some control over EU actions, while also respecting its independence and granting it a fairly high level of autonomy within the human rights protection regime. The condition for this lower standard of review is whether Member States of the EU enjoyed discretion when implementing the EU law measure or not. In this regard, when Member States are implementing compulsory non-discretionary Union acts, they would benefit from the *Bosphorus* presumption, and this is the case of European secondary law that is fully determined by the EU, when such acts do not involve discretionary implementation measures by the MS. Conversely, for all primary law acts, that are discretionary in that they allow Member States to choose how to implement EU primary law at national level, the full traditional review applies.

⁴³ See note 19, pages 882-883.

⁴⁴ Robert Schutze, *European Union Law*. (S.L.: Oxford Univ Press, 2021), page 473.

Chapter 4: The road to accession of the European Union to the European Convention on Human Rights

After having analysed the EU and ECHR human rights protection systems firstly individually, and then in relationship to each other, it is important to now trace the history of the legal developments regarding a greatly debated issue: the accession of EU to the ECHR, rendered an obligation by Article 6 TEU. As will be seen in the first paragraph, the discussions on the matter have started early on in the activities of both the EU and the CoE but any kind of development has been halted by the ECJ in its first opinion on the issue. Nonetheless, the second paragraph will show how the debate was not defeated and how, after important negotiations, a first Draft Accession Agreement providing for newly established mechanisms was formulated and approved by the major EU institutions and the Member States in 2013. However, once again the ECJ ruled in its opinion about the incompatibility of such agreement with the autonomy of the EU legal order. Finally, the third paragraph will deal with the renewed negotiations held between 2020 and 2023, creating a new DAA that tries to address all the issues raised by the ECJ in its Opinion 2/13. Once gone through an internal EU procedure, the new DAA will be subject to another opinion of the ECJ. The future of the EU accession to the ECHR thus depends on whether the Luxembourg Court deems the DAA to have met all its requests and requirements to respect the specific and unique characteristics of the European Union.

4.1 First efforts and legal developments

There have always been discussions over the accession of the EU to the ECHR. In fact, in particular starting from the 70s, it became rather clear that, even if the EU at the time had no clear goal or competence in the human rights protection field, the expansion of its actions would inherently imply more interference with fundamental rights.

The first formal proposal in this regard came from the European Commission in 1979, who sought to be allowed by the Council to negotiate the accession with the Council of Europe¹. The reasons behind such impulse were twofold: in the first place, accession to the ECHR by the EC and the consequent submission of the Community institutions to the

¹ Commission of the European Communities, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms (02.05.1979).

jurisdiction of the ECtHR would avoid the existence of a divided human rights jurisprudence in Europe, instead giving life to a more uniform, reliable and legally certain standard of protection. In the second place, the acceptance of the ECtHR jurisdiction would show the Union's serious consideration of and commitment to human rights². This first call for accession, however, was not reacted to mainly due to the political reservations made by the United Kingdom, Ireland and Denmark. The debate was restarted, and the effort was renewed by the Commission once again in its Programme for 1990:

“The Commission will take action during the year with a view to the Community becoming a party to the Strasbourg Convention on Human Rights, thereby guaranteeing enhanced protection for citizens' rights in respect of Community acts, in keeping with the principle of subsidiarity.”³

The first obstacle standing in the way of the EU accession was the ECJ's Opinion 2/94. On April 26, 1995, the Council of the European Union requested the ECJ to deliver an opinion on whether the European Community's accession to the ECHR could be compatible with the Treaty of Rome⁴. The Council also more specifically raised the question on whether it was possible to use the general competence under Article 235 EEC⁵ as a legal basis for such accession. However, at the moment of this request the Council had not even taken a formal decision to start the negotiations. So, the question to the Court was actually referred to the possibility and capability of negotiating an envisaged agreement rather than an opinion on an already negotiated, written, existing agreement between the Community and the CoE. In this regard, the ECJ determined that the request was admissible and that it could deliver the requested opinion since the Community institutions, and third parties of any agreement, have a legitimate interest in knowing, even before the beginning of the negotiations, whether the Community is actually competent to conclude an agreement, in particular in a case such as this one in which the objective and the consequences of the accession were well-known.

² Juliane Kokott, and Frank Hoffmeister. “Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” *The American Journal of International Law* 90, no. 4 (1996): 664–69. <https://www.jstor.org/stable/2203995>.

³ Commission's Programme for 1990, page 40 paragraph 72.

⁴ Treaty establishing the European Economic Community, signed 25 March 1957.

⁵ Now Article 352 TFEU.

Regarding the merits of the Community's competence to accede the Convention, the ECJ reiterated the important principle of conferred powers according to which the Community only had those powers that the Member States had agreed to confer upon it. In this context, the competence to enter into an international agreement can be provided either explicitly or implicitly by provisions. According to the latter scenario, an implicit competence can be envisaged when the Community has powers to attain a particular objective, and it becomes necessary to enter an international agreement to accomplish such objective, even if there is no express provision on the specific matter at hand. When the ECJ applied this standard to human rights, it ruled that the Treaty did not provide, in any provision, the Community with any general power to enact rules on human rights or to conclude international agreements on the matter. The ECJ thus went on to examine whether Article 235 could be used as a legal basis for accession in the absence of specific express provisions. Such article was specifically designed for the aforementioned cases in which there are no explicit nor implicit powers for the Community to act in a field, in the advent in which there is an important need for the Community to still act notwithstanding such absence. However, in carrying out the analysis in this regard, the ECJ concluded that, even if the importance of respect for human rights had been declared in many occasions by the Community institutions, the Community still lacked the competence to accede the Convention because such accession would entail a substantial modification of the Community system and several implications for the Community institutions, due to its entry into a different international system and consequent integration of the Convention's provisions into the Community legal order. The ECJ went on to state that such change and the consequent "fundamental institutional implications" would have a "constitutional significance" for the Community and the Member States, thereby going beyond the scope of Article 235 that could not be used to adopt provisions that would have the effect of amending the treaties, bypassing the specific procedures for that objective. The Article could thus only be used for small changes, but not for major modifications, amounting to actual Treaty amendments⁶. In this context, it became clear that only a Treaty amendment could empower the Union to bring about the accession.

⁶ Opinion 2/94 of the Court of Justice (28 March 1996).

At this point, the Member States had three possibilities to proceed with the development of fundamental rights in the Union order⁷: the ECJ could have the competence to develop such fundamental rights as general principles of EU law, as they were already declared to be, a EU specific bill of rights could be established, and finally, the Founding Treaties could be revised in order to provide for an explicit legal basis upon which the Union accession to the ECHR could be negotiated and accomplished. The focus was put on the realisation of the last two options. In fact, the Charter of Fundamental Rights of the European Union was proclaimed in 2000 and, as was thoroughly explained in the second chapter of the present thesis, it was given binding effect and primary law status with the Treaty of Lisbon through a cross reference inserted in the new Article 6 TEU in 2009. Furthermore, the drafters of the Treaty decided to provide the legal basis for the EU accession to the ECHR in the second paragraph of Article 6, using the formulation that the EU “shall accede” to the ECHR, leading to the establishment of an obligation.

The requirements and the specific characteristics that any possible agreement negotiated for the agreement are described in Article 6 (2), in Protocol No. 8, enacted and coming into force at the same time as the Treaty of Lisbon, and the Declaration on Article 6 (2) TEU, annexed to the Lisbon Treaty. Their main objective was to make extremely clear that any accession agreement must not modify the specific characteristics and the unique system of the European Union. In particular, Article 1 of Protocol 8 reiterates the commitment to the preservation of the particular character of the Union and its law, requiring a mechanism allowing for the division of the responsibility for breaches of the ECHR between the EU and its Member States. Article 2 of the Protocol not only repeats, on behalf of the Member States, that accession must not affect EU competences and the powers of its institutions, but it also clarifies that accession will not affect neither the position of the Member States in regard of the ECHR and its protocols, nor the derogation measures taken or reservations lawfully made by the Member States.

Also the ECHR needed to take measures to allow for the Union accession. On 1 June 2010, Protocol No. 14 to the ECHR entered into force, six years after it was opened for ratification by Member States. It was particularly relevant because it aimed at reforming

⁷ Adam Łazowski, and Ramses A. Wessel. “When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR.” *German Law Journal* 16, no. 1 (2015): 179–212. <https://doi.org/10.1017/S2071832200019477>.

the Convention system to alleviate the overwhelming workload of the ECtHR, especially in view of the eventual EU accession⁸. In this last regard, Article 17 of the Protocol allowed for EU accession by amending Article 59, adding a new second paragraph reciting: “The European Union may accede to this Convention”.

4.2 Key legal milestones

4.2.1 The 2013 Draft Accession Agreement (DAA)

The Draft Accession Agreement (DAA) was developed by an informal working group situated within the Steering Committee on Human Rights of the Council of Europe (CDDH), consisting of 14 experts, 7 from High Contracting Parties non-EU Member States and 7 HCPs also Members of the EU, chosen for their expertise and not acting as representatives of their governments. The Union’s negotiator was the European Commission, entrusted with such function by the Council of the EU. The negotiations, attended by experts from the Council of Europe, started in July 2010 and ended with the presentation of the DAA on 24 June 2011, which was finally endorsed by the CDDH on 14 October 2011⁹.

The DAA consisted of 12 amending articles and was published with an explanatory report. Its focus was on the ECHR system for human rights protection, introducing changes in the procedure before the ECtHR for cases involving the EU. The rules envisaged to bring about such modifications were deliberately drafted in a general, almost vague, manner as a result of the many difficulties faced to find a balance between the accomplishment of the accession on the one hand, and the constraints put by EU law, in particular the ECJ’s restrictive stance on the conferral of jurisdiction to international courts, on the other.

The final DAA brought about institutional, substantive and procedural issues¹⁰. From an institutional perspective the two main points of contention were based on the essential

⁸ Kirk Brincau, Rachel-Marie Vella-Baldacchino, “Accession of the European Union to the ECHR,” *Elsa Malta Law Review*: 147-169. <https://www.um.edu.mt/library/oar/handle/123456789/64574>.

⁹ Tobias Lock, “End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR,” *Yearbook of European Law* 31, no. 1 (January 1, 2012): 162–97, <https://doi.org/10.1093/yel/yes024>.

¹⁰ Xavier Groussot, Tobias Lock, and Laurent Pech, “EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011,” *Fondation Robert Schuman European issues*, no. 218 (November 7, 2011), <https://doi.org/10.2139/ssrn.1958003>.

question of whether the EU should accede the Convention on an equal footing as any other High Contracting Party. Firstly, the drafters were concerned with the one judge per party rule: should the EU judge's mandate be similar to that of the other judges, or should it be more limited allowing the EU judge to only sit on EU law-related cases and have only have a consultative function in non-EU related cases? The drafters decided to leave the functions established by Article 20 ECHR unaffected and thus to not treat the EU judge any differently from the other judges. Furthermore, since it has always been out of the discussion for the EU to join the CoE, meaning that the EU would not be represented automatically in the PACE¹¹, the DAA provides for specific rules on the way such judge is appointed by a delegation of the EU Parliament to the PACE, specific to the purpose of judge selection. Secondly, the presence of a permanent representative of the EU in the Committee of Ministers of the Council of Europe was debated. The latter body is noteworthy in that it is the one that supervises the execution of the ECtHR's judgements and the HCPs' compliance to such judgements. On the one side, the European Commission of course argued in favour of having such representation, while on the other side many non-EU High Contracting Parties were afraid that in some cases the EU and its Member States could coordinate and control and block the proceedings in the Committee. The DAA, as with many other sensitive issues, provided for a middle-ground solution, whereby the EU would be entitled to be represented, with voting rights, in the Committee of Ministers in cases involving decisions on the ECHR. To calm the fears of the other High Contracting Parties, the DAA also allowed for the adaptation of the rules of procedure of the Committee to ensure the effective functioning of the body and that the EU would not vote on cases where the Committee is supervising on obligations by EU Member States.

As regards the substantive issues, the DAA provided for the review of EU primary law, envisaging one of the scenarios where the co-respondent mechanism, that will be further discussed later on, can be applied. Moreover, the DAA did not expressly speak about the fate of the *Bosphorus* rule and the equivalent protection doctrine in the event of the EU accession. Therefore, it would have been left to the ECtHR to evaluate whether the test continued to apply or not. The request by some EU Member States' governments about

¹¹ Parliamentary Assembly of the Council of Europe.

the initial accession of the EU only to those Protocols, namely Protocol No. 1 and 6, to which all Member States were already party had also been endorsed by the drafters, allowing the EU to eventually sign the other Protocols at a later stage.

Importantly, the principle of interpretative autonomy of the ECJ would not have been violated by the DAA. The ECtHR would in fact only be capable of finding a provision of EU law, an action or an omission by EU institutions, to be incompatible with the ECHR, and it would still be unable to rule a binding interpretation of an EU law provision since its findings would always be based on the previous interpretation of the ECJ¹². This is also one of the reasons why they wanted to establish a mechanism to provide for prior ECJ involvement in EU related cases.

The most difficult, and indeed relevant, issues on which the negotiators had to work on attentively were without doubt the procedural issues dealing with the prior involvement of the ECJ and the co-respondent mechanism.

The ECJ was greatly concerned with the possibility of having the ECtHR deciding on the compatibility of a Union act with the ECHR, when there has been no prior ECJ ruling on the validity of such act. In this regard, it is important to remember that one of the most important criteria that a complaint must fulfil to be admitted in front of the ECtHR is that of having exhausted all domestic remedies. Applying such requirement to the EU, it has nonetheless been clear from the outset that any natural or legal person that wanted to challenge the legality of a legally binding Union act must bring the case in front of the EU General Court, meaning that a prior involvement of a Union court is required before the applicant can bring any further complaint to Strasbourg. This mechanism complicates in the case of preliminary rulings by the ECJ at the request of national courts or tribunals of the Member States on the interpretation of Union law or validity of acts of the institutions of the EU. In fact, the decision of asking for a preliminary ruling depends exclusively on the national judge, and is out of the hands of the applicant, possibly leading to instances in which the case is decided without a prior involvement of the ECJ even if the case had raised an issue of compatibility between EU law and the ECHR. In this regard, the President of the ECtHR Costa and of the ECJ Skouris expressed the view that the preliminary ruling by the ECJ is normally not considered a domestic remedy because

¹² See note 10, pages 9-10.

decision to undertake it does not depend on the applicant¹³. Accordingly, they suggested the establishment of a procedure to ensure that the ECJ could carry out an internal review of an EU act on fundamental rights grounds, before the external review of the ECtHR. This, however, importantly needs to be undertaken by the ECJ in the form of an accelerated procedure, to prevent the ECtHR proceedings from being delayed unreasonably. The DAA confirmed the fact that when an individual wants to challenge the legality of EU measures directly with EU institutions, the case must first be referred to the EU General Court before it can be brought before the Strasbourg Court. Instead, in the case of national measures implementing EU law, the drafters agreed that a reference to the ECJ for a preliminary ruling is not to be considered a domestic remedy because applicants cannot force national courts to request it. Thus, absence of such ruling will not make any complaint before the ECtHR inadmissible for lack of exhaustion of domestic remedies. It was further decided to provide for a prior involvement of the ECJ in the cases in which it had not yet investigated on the compatibility of the Union measure in question with the Convention right at issue¹⁴. This procedure could be started only when the ECJ had not expressed at all on the measure considered in the case. However, there may be cases where the ECJ had pronounced itself referencing to its own Charter and in such case, it would be left to the ECtHR to decide whether the EU right on which the ECJ decided upon corresponded to any rights contained in the ECHR. Unfortunately, the DAA is silent on the manner in which the ECJ should be involved in such procedure. In fact, it only set the obligation for the EU to ensure that the ECJ carries out its ruling in a rapid manner as to not delay any further the proceedings in front of the Strasbourg Court.

The co-respondent mechanism was established to determine more clearly and effectively the division of competences and responsibilities between the EU and its Member States as regards the implementation of EU law, and consequently any possible breaches of ECHR fundamental rights, coming from said EU law measures. Such mechanism needed to comply with the requirements set in the EU Protocol No. 8 regarding proceedings by non-Member States and individual applicants being correctly and appropriately addressed to EU Member States and/or the EU. The co-respondent mechanism configured in the DAA of course only applies to situations involving the EU and its Member States, and

¹³ European Court of Human Rights, Joint Communication from Presidents Costa and Skouris.

¹⁴ Article 3 Draft Accession Agreement (DAA).

not to the other High Contracting Parties. There are thus two situations envisaged: one in which the EU is co-respondent and one or more EU Member States are the main respondents, and one in which one or more EU Member States are co-respondents and the EU is the main respondent. First and foremost, however, it is important to distinguish such mechanism from third party intervention¹⁵ where the third party is not a formal part of the proceedings, and it will consequently not be bound by the ECtHR's judgement; and also from those cases where the applicant nominates more respondents from the beginning. In the latter case, in fact, the applicant must have exhausted all domestic remedies in both the respondents' legal systems and the respondents will be obliged to answer the case, which is not the case of the co-respondent mechanism.

In general, a party can become a co-respondent only at its own request, it is not obliged to answer the case and thus the mechanism is voluntary in nature.

The first instance to be analysed is that in which one of the EU Member States is the respondent in proceedings brought by an individual, and the EU becomes a co-respondent "if it appear that [the alleged violation of the ECHR] calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law"¹⁶. This can happen in cases where a Member State has implemented obligations stemming from EU primary law or EU legislation and a case on the compatibility of such implementing national measures with the ECHR was subsequently raised before the relevant national court. The violation complained of can be originated either directly if the EU law is not compliant with the ECHR, and consequently rendering the implementing act uncompliant, or by an incorrect implementation of an EU law that was originally in accordance with the ECHR. In both cases the Member States are fully responsible for resulting ECHR violations, and the EU accession as envisaged in the DAA would have not affected this. However, the co-respondent mechanism would enable the EU to join proceedings in case its own law does not comply with the rights set in the ECHR. This scenario is of course advantageous for the applicant in that the judgement of the ECtHR will bind both the co-respondents. This, in the case of EU legislation, is

¹⁵ Article 36 ECHR.

¹⁶ See note 3.

extremely important because the EU itself is the only one able to amend its own law. As said above, it is the EU that has the possibility to voluntarily forward a request of joining the proceedings as co-respondent, however, following such request it is up to the ECtHR to examine whether the conditions of the DAA¹⁷ are met. In this regard only abusive requests would not be admitted.

The second scenario described in the DAA is when a Member State asks the ECtHR to be designated as co-respondent. Also in this case the request by the Member State is completely voluntary in nature, and it will be accepted where there is a question over “the compatibility with the Convention rights at issue of a provision of the Treaty on European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments”¹⁸. This translates into the fact that EU Member States can become co-respondents in cases brought against the EU where a provision of EU primary law allegedly breaches the ECHR. The reason behind the involvement of the Member States is that a Treaty can be amended after having been ratified only if all the Member States agree, meaning that they are the only ones responsible for any possible remedy of alleged violations of the ECHR by a primary law Union measure¹⁹.

There can be also a third path viable for the application of the co-respondent mechanism. In the case of complaints fulfilling the criteria of the first two scenarios and directed against both the EU and its Member State(s), either party may have its status changed to co-respondent²⁰.

The greatest advantage for the ECtHR brought about by the co-respondent mechanism is the fact that the ECtHR avoids the determination of the responsible actor (between the EU and its Member States), thereby respecting the peculiar and specific nature of the Union and its legal order. However, the need to respect the independence and authority of such system as well, led to the voluntary nature of the co-respondent mechanism, that

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See note 10, pages 10-13.

²⁰ Demi-Lee Franklin, Vassilis P Tzevelekos, “The 2023 Draft Agreement on the EU Accession to the ECHR: Possible ‘Gaps’ and ‘Cracks’ in the Co-respondent Mechanism and the Implications for the Bosphorus Doctrine,” *European Papers*, Vol. 9, 2024, No 2 (November 29, 2024): 745-768. <https://doi.org/10.15166/2499-8249/781>

also turned out to be one of its weaknesses, enabling the possible co-respondent to not be held accountable by not making a request for acquiring the co-respondent status in a certain case. Particularly problematic can be the case where a complaint about EU primary law is brought against the EU, and where some Member States, but not all of them, request to be co-respondents. In such case the judgement finding a violation by such primary law would be less useful in that it will not be able to express the collective responsibility of the EU Member States as regards the adoption of EU primary law.

On the part of the applicant, the co-respondent mechanism is useful because it allows them to possibly bring the case against more than one actor without the need to fulfil the criteria of exhaustion of domestic remedies in both legal orders.

4.2.2 Opinion 2/13 of the European Court of Justice

The ECJ was subsequently asked by the European Commission to provide an opinion on the compatibility of the DAA with EU law. The answer of the ECJ was thus Opinion 2/13 of 18 December 2014, and it was a hardly expected harsh surprise. The ECJ in fact famously ruled that the DAA in the form presented could not be considered to be compatible with the EU treaties and that it did not respect the principle of autonomy of the EU legal system. Such strict view was subject to many critiques, especially since it strongly went against the opinions of the major EU institutions and the EU Member States, which for the most part had given a positive response to the DAA.

The ECJ divided its arguments under different headings, which the paragraph will turn to analyse: the specific characteristics and the autonomy of EU law, Article 344 TFEU, the co-respondent mechanism, the procedure for the prior involvement of the ECJ and finally the specific characteristics of EU law in the CFSP²¹.

Firstly, the ECJ feared that Article 53 ECHR, allowing the HCPs to adopt higher human rights protection standards with respect to the ECHR, could compromise EU law. It is important to note that such ECHR article is similar to Article 53 of the CFR, however the latter was limited in scope with the *Melloni* judgement, where the ECJ ruled that where the EU had fully harmonised law, the Member States could not adopt higher standards than those provided by the CFR. The ECJ's aim was to avoid such scenario using Article

²¹ See note 8, page 159.

53 ECHR and its proposal was therefore a coordination of Article 53 ECHR and Article 53 CFR to be interpreted in the very same way. This would entail the fact that where the rights enshrined in the CFR correspond to those in the ECHR, the Member States would see their power, under the ECHR, to establish higher protection limited to ensure that the protection provided by the CFR and the primacy and effectiveness of EU law are fully respected.

The ECJ was further concerned with the principle of mutual trust and mutual recognition, which are at the basis of the horizontal relationship between the EU Member States. In fact, according to such principles, Member States have to accept the decisions of other Member States “as if they had adopted these decisions themselves”²². This creates an assumption that fundamental rights are respected in the other Member States and therefore a Member State will only check fundamental rights compliance of other Member States in exceptional cases. In this respect, the DAA was considered by the ECJ to violate the mutual trust principle in that it required Member States to oversee if another Member State is complying to its fundamental rights obligations, thereby undermining the basic principle governing the EU Member States relations. The problem in this context is that the agreement was treating the EU in the very same way as any other party, disregarding its intrinsic federal nature and overemphasizing the independent contracting status of each state²³.

Secondly, the ECJ turned its analysis to Article 344 TFEU that recites:

“Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”

The aim of this Article is to guarantee that EU Member States submit disputes regarding EU law interpretation only to the Courts of the EU. The ECJ found that such Article was clashing with Article 55 ECHR, which requires that disputes relating to the ECHR are brought to the ECtHR through the inter-State procedure, according to Article 33 ECHR that, in the ECJ’s view, could be applied also to cases between the Member States or between Member States and the EU, even in instances where EU law is in question.

²² Robert Schutze, *European Union Law*. (S.L.: Oxford Univ Press, 2021), page 478.

²³ *Ibid.*

Article 5 of the DAA limits the scope of Article 55 but nonetheless allows the EU or its Member States to apply to the ECHR under its Article 33 about an alleged violation of the Convention by a Member State or the EU, in conjunction with EU law. Still, such inter-State procedure is not mandatory in that the EU and its Member States can still bring cases about the interpretation and application of the ECHR to the ECJ. However, the Luxembourg Court went on to consider this an interference with its exclusive jurisdiction and autonomy, thereby alleging a violation of Article 344 TFEU. The demand of the ECJ was therefore the inadmissibility of state complaints in front of the ECHR, in cases where the relevant ECHR provisions also are within the scope of action of EU law and where on the applicant and respondent roles there are the EU or its Member States.

Thirdly, the ECJ scrutinised the co-respondent mechanism and found two main issues: the procedure for prior involvement and the method of allocation of responsibility. In the first, the problem lied in the fact that for the ECtHR to review the request of the EU or a Member State to be a co-respondent, it has to assess rules of EU law, which fall under the exclusive jurisdiction of the ECJ, and it could also adopt a final binding decision on the Member States and the EU. Furthermore, Article 3 DAA gave the ECtHR the right to allocate responsibility to the EU and its Member States, which according to the ECJ would affect negatively the division of powers between them. Importantly, the DAA does not account for cases in which the Member States have made reservations: this could mean that a Member State may be held responsible for violations even if they have made reservations in a certain regard.

Fourthly, the procedure for the prior involvement of the ECJ was looked into, as the ECJ was the one who demanded the establishment of such mechanism. Still, the ECJ found the prior involvement mechanism envisaged in the DAA to be incompatible with the EU Treaties for two main reasons. First, the ECJ thought that giving the ECtHR the power to decide whether the ECJ had already ruled over a certain law question amounted to conferring it the power to interpret the ECJ's caselaw, and accordingly the decision over the prior involvement should be left to the competent EU institution. Second, the ECJ thought that the DAA did not allow the prior involvement procedure to bring in front of the ECJ a matter on the interpretation of secondary law.

Finally, the ECJ turned to CFSP matters, in which its jurisdiction is generally excluded, except for monitoring compliance with Article 40 TEU and reviewing a certain decision's legality according to Article 275. However, the DAA would empower the ECtHR to rule on the compatibility of certain acts, actions and omissions enacted under the CFSP, with the ECHR. This would mean that exclusive judicial jurisdiction over a certain area of action of the EU would be given to a non-EU body, and naturally the ECJ strongly affirmed that this would be prejudicial to the EU functioning and autonomy. The demand of the ECJ in this regard was thus to either exclude the CFSP from the jurisdiction of the ECtHR, or for the ECJ itself to be given jurisdiction over the CFSP through a Treaty amendment²⁴.

In general, what the ECJ seems to have done in Opinion 2/13, is not so much to emphasise the obligation of the EU to accede to the Convention, established under Article 6 TEU, but to rather focus on the limitations to which the accession is subject, set in Article 6 (2) and Protocol No. 8. It was thus again made clear that accession must not modify in any way EU competences and the specific characteristics as they are defined in the Treaties.

4.3 The 2023 new Draft Accession Agreement

In October 2019, the Secretary General of the CoE was informed by the European Commission about the EU's willingness to resume the negotiations for its accession to the ECHR. In January 2020, the competence of the Steering Committee for Human Rights was renewed to begin the negotiations again in cooperation with the EU representatives. An ad-hoc negotiation group called 47+1 (that will later become 46+1 due to the expulsion of Russia from the CoE) was created, reuniting representatives of the 47 CoE High Contracting Parties and one EU representative, to negotiate the new DAA on the basis of the work already conducted in the first negotiations²⁵. The group had a first informal meeting in June 2020, in which the European Commission affirmed its intention to realise the accession through "modulations" to the DAA respecting the EU's special characteristics, as well as the requirements and limits set in Opinion 2/13. Even if it was clear that this would require some serious work, it was still deemed to be achievable. In

²⁴ See note 8.

²⁵ Council of Europe, "EU Accession to the ECHR," Human Rights Intergovernmental Cooperation, n.d., <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights>.

particular, it was made clear that these new talks did not represent a wholly new beginning for the accession, but they were rather picked up from where they were left in 2013. This went to confirm that the 2013 DAA was the foundation of the work the group was preparing to undertake. The group proceeded in their work through other 13 meetings between September 2020 and March 2023. Upon the last meeting, all the issues had been discussed and decided upon, except for the jurisdiction over alleged violations of ECHR rights stemming from acts or omissions made under the EU's CFSP. In such regard, it was instead decided that the EU would firstly discuss the matter internally and consequently inform the CDDH of any developments.

The European Commission focused on four main areas during the negotiations: the EU specific mechanisms of the procedure before the ECtHR, inter-party applications under Article 33 ECHR and references for an advisory opinion under Protocol No. 16, the principle of mutual trust and finally the EU's CFSP²⁶.

The final negotiated agreement was thus built upon the old DAA as well as upon an alleged case-law convergence between the ECJ and the ECtHR on cases involving the principle of mutual trust, after Opinion 2/13. The new DAA was provisionally approved by the (now) 46+1 group on 17 March 2023, and is currently going under internal EU procedure, after which it will be then for the ECJ to assess the agreement's compatibility with EU law.

The paragraph will now turn to analyse how each of the four areas of focus of the new 2023 Draft Accession Agreement has addressed the corresponding concerns of the ECJ as expressed in Opinion 2/13, and how it developed from the 2013 DAA²⁷.

Firstly, as concerns the EU specific mechanisms in the procedures in front of the ECtHR, both the 2013 and the 2023 Draft Accession Agreements contain provisions on the correspondent mechanism, allowing for the respect of the distribution of powers between the EU and its Member States while still holding them responsible for alleged breaches of ECHR rights, and on the prior involvement of the ECJ providing the Luxembourg Court with the competence to internally review an act before the external review of the

²⁶ Anita Kovacs and Stian Øby Johansen, <https://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html>

²⁷ Tonje Meinich, "From Opinion 2/13 to the 2023 Draft Accession Agreement: The Chair's Perspective," *European Papers*, Vol. 9, 2024, No 2: 685-694. <https://doi.org/10.15166/2499-8249/777>

Strasbourg Court. The instances and the ways in which either the EU or the Member States can become co-respondents and how the ECJ can be involved have been examined in the precedent paragraph, but it is worth recalling that the main motivation behind the establishment of both mechanisms was to make sure that all the parties holding the power to remedy the breach are bound to do so by the judgement. However, the ECJ raised some issues on the matter, for instance it was concerned with the actor responsible to decide whether the criteria to become a co-respondent were met. In the 2013 DAA, the final decision rested with the ECtHR, after an assessment of the ECJ. The Luxembourg Court however, found that this would give the ECtHR the power to examine and interfere with the internal functioning of the EU. In the 2023 DAA, it is still confirmed that the ECtHR holds the power to make the formal final decision to admit either the EU or the Member States as co-respondents, but it made extremely clear that such admission has to be made upon the declaration of the EU that the criteria for the application of the mechanism are met. Conversely, if the EU finds that such criteria are not fulfilled, the ECtHR cannot admit the EU or its Member States as co-respondents. A new provision was also added establishing the possibility of terminating the application of the co-respondent mechanism if the criteria for being a co-respondent are no longer met. The ECJ then wanted to address the responsibility of the respondent and the co-respondent in the context of the remedy of the ECHR breach. Article 3 of the 2013 DAA stated that both the parties would be held jointly responsible for the violation, still the ECtHR could decide differently based on reasons submitted by either of the parties or the applicant. In the 2023 draft, it was agreed that the ECtHR will still hold both the respondent and the co-respondent jointly responsible for violations in its judgement. However, the distribution of such responsibility will be decided by the EU and its Member States under the supervision of the ECJ.

Secondly, the DAA addressed the points discussed by the ECJ as regards inter-party applications under Article 33 ECHR and the possibility of requesting an advisory opinion to the ECtHR under Protocol No. 16. According to Article 344 TFEU, the ECJ has exclusive jurisdiction over a dispute concerning a question of EU law raised by a Member State. Neither Article 33 ECHR, nor the 2013 DAA provided for any special rules on possible inter-State applications between EU Member States, or between the EU and a Member State. The ECJ thus analysed that the fact that EU Member States were able to

submit an application to the ECtHR could undermine Article 344 TFEU and the whole nature of EU law. The final decision of the negotiators on this point was to insert two paragraphs to Article 4 of the new DAA obliging the EU Member States not to use Article 33 ECHR, when the dispute concerns the application or interpretation of EU law, as well as providing the EU with sufficient time to assess whether a case between two Member States concerns the interpretation or application of EU law, in the case the EU requests so. Protocol No. 16 creates the possibility for the highest courts or tribunals of a High Contracting Party to request an advisory opinion to the ECtHR on a question of principle on the interpretation or application of the rights and freedoms defined in the Convention or its protocols. However, within the EU framework, Article 267 TFEU gives EU Member States' courts the power to ask the ECJ for a preliminary ruling on the interpretation of EU primary and secondary law. The Luxembourg Court stated in its Opinion that, since after accession the ECHR would become an integral part of the EU legal order, Protocol No. 16 and its mechanism could affect the autonomy and effectiveness of Article 267 TFEU. The negotiators thus inserted a new Article 5 in the DAA according to which, in the case highest courts or tribunals of an EU Member State find a question falling within the realm of EU law, such court or tribunal shall not be considered as a highest court or tribunal of an HCP for the purposes of Protocol No. 16.

Furthermore, one of the biggest concerns of the ECJ was that the accession of the EU to the ECHR would undermine the founding principle of mutual trust between the Member States. An interference with this principle would cause the malfunctioning of mutual recognition schemes, such as that within the EU's Area of Freedom, Security and Justice, and that allowing for inter-State cooperation and further integration and recognition of each other's laws, decisions, products and certificates as equivalent to their own. In this regard, the problem was rooted in the asymmetry between the case law of the ECtHR and ECJ on the cases in which national authorities could avoid upholding the mutual recognition principle to be able to examine a violation of an ECHR right. This kind of issue was particularly noticeable in cases about transfers of asylum seekers and on the prohibition of inhuman and degrading treatment²⁸. In fact, in these cases the ECJ and ECtHR adopt slightly different thresholds for the application of the mutual trust principle,

²⁸ Article 3 ECHR.

leading the ECJ to fear that the Member States would bypass the principles to apply the higher protection standard provided by the ECHR, thereby violating the autonomy of EU law. Importantly, during the negotiations, it was noticed that since the 2014 Opinion 2/13, there had been a convergence of the case law of the ECJ and the ECtHR on mutual trust related cases. This was on the one hand because the ECtHR had been more willing to recognise the importance of mutual trust in the functioning of the EU and consequently in the cases involving Union acts, and on the other hand because the ECJ had started to extend the exceptional circumstances allowing for derogations from mutual trust obligations. It was proposed by the Secretariat to add three amendments in the new DAA: a preambulatory clause recognising the relevance of mutual trust schemes in the EU framework and thus in EU-related cases, a substantive provision²⁹ and a note in the explanatory report. The formulation of Article 6 proved rather complicated in that there was the need to balance the recognition of the importance of mutual trust for the correct functioning of the EU with the concern of non-EU High Contracting Parties about the principle of equality between all High Contracting Parties. The final consolidated version thus recites that accession “[s]hall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured”. The non-automaticity of mutual trust was instead referenced in the Explanatory Report, pointing at the increased recognition of limits to the mutual recognition schemes by the ECJ, especially in cases of risks of violation of Article 3 ECHR. The approach adopted by the ECtHR on mutual trust was thus one recognising the legitimate relevance of mutual recognition mechanisms for EU integration, while still maintaining the position that such mechanisms should not always be automatically applied at the expense of fundamental rights protection. Moreover, while the tendency shown by the case law of the ECJ is to respect such ECtHR view on cases involving art 3 ECHR, on its part, the Strasbourg Court does not embrace the differentiation between different rights when deciding if mutual trust should be set aside or not³⁰.

²⁹ Article 6 of the 2023 DAA.

³⁰ Eleonora Di Franco, Mateus Correia de Carvalho, “Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?,” *European Papers*, Vol. 8, 2023, No 3: 1221-1233. <https://doi.org/10.15166/2499-8249/714>

The ECJ has a limited jurisdiction over Common Foreign Security Policy matters, and the complexity of this matter was already understood in the first negotiations in 2013. In fact, the first DAA did not include any special rules concerning CFSP matters, implying that the regular rules of the ECHR and of the DAA would also apply in that case. This issue had not really been addressed in Opinion 2/13, with the ECJ only affirming that it had not yet defined the limits of its action within the CFSP realm and that certain acts adopted within such policy fall outside its jurisdiction. The EU accession in such terms would instead give the ECtHR jurisdiction over CFSP acts, actions or omissions of the EU even if they fall outside the jurisdiction of the ECJ. During the new negotiations, the EU tried to propose a so-called “re-attribution clause” enabling the EU to allocate responsibility for an EU CFSP act to one or more Member States if such act would be excluded from the ECJ’s jurisdiction³¹. However, such proposal was deemed to be too complex and unclear, thus the 2023 DAA still does not have any provisions concerning the CFSP.

The future application of the *Bosphorus* doctrine after accession remains an open question as well. On a first look, such doctrine should be rendered unnecessary by the application of the co-respondent mechanism, established by both DAAs. In general, following the EU accession to the ECHR, the latter will be able to exercise full direct scrutiny over the conduct of the EU and its Member States. The ECtHR may still be presented with alleged violations regarding EU Member States’ implementation of EU law where they have no discretion, in which case it currently applies the *Bosphorus* doctrine. The DAA instead creates the possibility for the EU to join such proceedings directed against its MS as a co-respondent and vice versa. There thus seems to be little space for the continuation of the application of the *Bosphorus* doctrine after accession, when a complaint is directed against an EU Member State in the implementation of EU law. In fact, the possibility of finding a presumption of equivalent protection in such instances would be equivalent to affording the EU with a different privileged treatment with respect to the other High Contracting Parties. This would defeat the whole purpose of the accession, which is to bolster coherence, convergence and cooperation in human rights protection in Europe. Still, there could be potential “loopholes” in the co-respondent mechanism that can

³¹ See note 27, pages 692-693.

undermine its applicability, in which case the Court may decide to refrain from full scrutiny, either through the *Bosphorus* doctrine or by creating a new test for the specific purpose.

There can be three potential loopholes. Firstly, the DAA sets prerequisites and conditions for the applicability of the co-respondent mechanism, that can be considered as limits. Accordingly, a wider applicability of the co-respondent mechanism would increase the equivalent treatment of the EU and its Member States as a unique entity, possibly holding them jointly responsible; on the contrary, a narrower applicability, would create more possibilities for the ECtHR to still be able to apply the *Bosphorus* doctrine. Secondly, the co-respondent mechanism can be weakened by its voluntary nature, depending on the willingness, or the lack thereof, of the involved actors to engage with the application of the mechanism. In fact, for the framework envisaged in the DAA to work, all three actors, namely the ECtHR, the EU and the Member States, must cooperate with each other through good faith and trust. The lack of such co-operation on the part of either of these actors, could entail the avoidance of the application of the mechanism, thus leaving possible space for the application of the *Bosphorus* doctrine. This should not be so common in that all the actors involved should usually be aware of the advantages of the use of the co-respondent mechanism. Finally, Article 2 of the DAA amends Article 57 of the ECHR allowing the EU, on an equal footing as the other HCPs, to make reservations to any particular provision of the Convention. In its opinion, the ECJ raised an argument related to the responsibility of the EU and its Member States for breaches of an ECHR provision to which a state has made a reservation, that would result in a modification of the situation of an EU Member State in relation to the ECHR. The explanatory report thus establishes that in the case that the subject of a reservation made by the EU or its Member State(s) is being brought in front of the ECtHR, it will not be possible to hold the EU or such Member State(s) jointly responsible through the application of the co-respondent mechanism, even if the criteria for its application are fulfilled. It will be more likely that the EU will be the sole respondent, since it is the states that have made reservations to the ECHR in the first place. But the case may also be that the EU makes a reservation, and in such instance, the sole respondent will be an EU Member State. There, the ECtHR will be faced with cases similar to those pre-accession, in which it has to judge over an alleged violation stemming from a respondent state's compliance with EU law, without the

jurisdiction to fully and directly scrutinise the EU. This, post-accession, would be the most likely scenario in which the ECtHR could more legitimately still use the *Bosphorus* doctrine, because through a reservation, the EU expresses the desire to not be bound by a certain ECHR provision and thus to not be subject to its jurisdiction and scrutiny³².

³² See note 20.

CONCLUSION

This thesis has attempted to provide a comprehensive portrayal of the situation of human rights protection regimes in the European continent, focusing on the ones established by the major regional organisations, namely the European Union and the Council of Europe with its European Convention on Human Rights, and further investigating on their evolving relationship. Starting from an historical overview, the first chapter emphasized how the common necessity to avoid new wars and gross violations of fundamental rights bolstered European integration as well as cooperation and efforts in the creation of human rights regimes. Importantly, the separate focus on the historical and institutional development of the EU and the CoE showed how the Council of Europe was precisely created for the objective of cooperation within human rights protection, while the EU had to develop a specific approach in this context, starting from the ECSC. The second and third chapter dealt specifically with the human rights approaches and instruments adopted by the EU and CoE respectively. In particular, the second chapter explained the distinctive progressive evolution of the EU's approach to fundamental rights towards a stronger and more comprehensive institutional and legal framework. This is specific to the development of the European Union's competences outside the economic cooperation among the Member States, spreading to other spheres of action closer to the EU citizens. As of today, such framework is rather complete, encompassing primary, secondary and soft legislation addressing the position of human rights in EU law, bodies and agencies entrusted with the function of monitoring the situation of fundamental rights, gathering data and advising the institutions allowing them to make more conscious decisions, and a written bill of rights specific to the EU, the Charter of Fundamental Rights, clearly recognising a set of fundamental rights. The most complicated aspect in this framework is the relationship to the protection of human rights as promoted by the CoE and protected under the ECHR, under the judgement of the ECtHR. In fact, as much as the two organisations collaborate through references and correspondences in each other's legal frameworks, the obligation enshrined in Article 6 TEU is still difficult to put into practice, prejudicing an integration of the two protection systems. In contrast, the third chapter analysed the CoE's pivotal role in the protection of human rights in the European context, anchored by the European Convention on Human Rights and brought forward by the European Court of Human Rights. This new framework was rather significant in that the

CoE was the first regional organisation specifically dealing with human rights cooperation between its Member States and establishing a concrete convention, the ECHR setting down detailed rights and procedures for states and individuals to directly challenge acts that allegedly breach such rights. Moreover, the creation of a Court with the exact function of judging cases of violations of Convention rights with compulsory jurisdiction over the High Contracting Parties has proved to be rather successful in promoting and elevating human rights protection, not only regionally but also globally. Even so, the ECtHR has historically had some difficulties in dealing with a certain type of cases: those where the applicant claimed a violation of Convention rights stemming from EU law measures, since the EU is not party to the ECHR. The initial approach of the Strasbourg Court was to declare those applications non admissible *ratione personae* under Article 1 ECHR. However, a series of cases from the 1950s to the 2000s has shaped the trajectory of the ECtHR's approach towards the European Union leading to the establishment of the equivalent protection doctrine, further clarified through the *Bosphorus* case. Finally, the fourth chapter focused on the issue of EU accession to the ECHR, starting with an historical discourse over the various calls for accession both from the EU institutions and from the CoE bodies. After the first unsuccessful attempts, culminating with the first negative ECJ Opinion 2/94, the accession was finally rendered obligatory under Article 6 TEU, as amended in the Lisbon Treaty. Importantly, the Article calls for an accession that "[...] shall not affect the Union's competences as defined in the Treaties", creating specific requirements that the accession has to respect, also reiterated in Protocol No. 8. Further progress only started in 2010 with the negotiations that brought about the 2013 DAA, consisting of 12 articles regarding institutional, substantive and procedural issues. Relevantly, the DAA provided for the co-respondent mechanism enabling an effective determination of the division of competences and responsibilities between the EU and its Member States in cases brought before the ECtHR about alleged breaches of human rights involving the implementation of EU law acts. Even if such DAA was endorsed by all the major EU institutions, the last word rested with the Opinion 2/13 of the ECJ. However, quite surprisingly, the ECJ declared the DAA to not be compatible with the EU Treaties as it did not respect the vital principle of autonomy of the EU legal system. The ECJ's approach was thus to focus more on the second paragraph of Article 6 TEU, providing for the respect of the competences as established by the Treaties, rather

than to the sole objective of accession. Finally, the fourth chapter went on to analyse the latest 2023 DAA, as an attempt to answer to the issues raised by the ECJ. The final form of the agreement, in fact, deals with four main areas: the EU specific mechanisms of the procedure before the ECtHR, inter-party applications and references for an advisory opinion from national courts to the European Convention of Human Rights, the principle of mutual trust and finally the EU's CFSP.

In conclusion, although there has always been a certain level of recognition and cooperation between the EU and the CoE, the European human rights regime is still not coherent nor complete. In particular, the fact that the European Union is still not part of the ECHR leaves a gap in the direct protection of human rights since it provides the Union with a lower degree of revision by the Strasbourg Court. In this context, accession would be incredibly important under several points of view. Firstly, it would be emblematic in showing the commitment to the protection of human rights in the European continent in general, but specifically from the European Union finally officially engaging completely with human rights. In fact, accession would strengthen the human rights protection system in Europe as a continent by making it more cohesive, against the current opinion of some critiques that focus on such gap between the EU and ECHR approaches. Furthermore, even if it is not clear what the future of the *Bosphorus* doctrine will be, accession would change the way responsibilities are attributed to the Member States and the EU. As a matter of fact, MS are now the only actors obliged to obey to the judgement of the ECHR, also for violations from EU acts from which they enjoy no discretion. In these cases, it is important that there is a collaboration with the Union Institutions in order to end the violations and eventually prevent more. In this regard, accession would be very impactful in that it would mean that judgements in cases involving the EU would also be binding on the EU itself and its institutions, obliging them to obey to such rulings. Finally, accession would also avoid the rise of conflicts between the human rights levels of protection of the ECHR and the EU by setting more consistent standards³³. As analysed in the thesis, however, the main issues that need to be overcome regard the respect of the unique federal nature of the EU and its legal autonomy, as stated by the ECJ. As the 2023

³³ Tobias Lock. "EU Accession to the ECHR: When, How and Implications." SSRN Electronic Journal, January 1, 2024. <https://doi.org/10.2139/ssrn.4766356>.

DAA tries to solve these problems, the decision over the future of the EU accession to ECHR will finally rest with another opinion of the European Court of Justice.

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