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## Human Rights, the European Union, and the Treaty Route: From Maastricht to Lisbon

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# HUMAN RIGHTS, THE EUROPEAN UNION, AND THE TREATY ROUTE: FROM MAASTRICHT TO LISBON

*Elizabeth F. Defeis\**

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## *INTRODUCTION*

The Treaty of Lisbon, adopted in December 2009, continues the process of integrating human rights into the *Acquis Communautaire* of the European Union through treaty obligation. The Maastricht Treaty, adopted in 1992, converted the obligation to respect human rights previously articulated by the European Court of Justice (“ECJ”), into a treaty obligation of the Union and of Member States by virtue of their membership in the European Union. However, the Maastricht Treaty itself did not contain a catalogue or bill of rights.<sup>1</sup> Subsequent treaties, such as the Treaty of Amsterdam, elaborated on the concept of human rights and expanded the parameters of rights to be protected, particularly equality rights.

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1. *See* Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1 [hereinafter Maastricht TEU]. In 1992, the Treaty of Maastricht (“Maastricht TEU”) amended the Treaty Establishing the European Community (“EC Treaty”) and created what is now known as the European Union. *See id.*

With the entry into force of the Treaty of Lisbon, there now exists a Charter of Fundamental Rights that EU citizens can look to for protection against actions of the European Union and its institutions as well as against actions of Member States when implementing EU policy and legislation.<sup>2</sup>

The Maastricht Treaty or the Treaty of the European Union (“TEU”) provides:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>3</sup>

Subsequently, the Treaty of Amsterdam, signed by the Member States on October 2, 1997, and effective May 1, 1999, strengthened the European Union’s commitment to human rights and explicitly affirmed that the identity of the European Union is based on democracy and human rights.<sup>4</sup> It adds to the TEU an explicit statement that “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.”<sup>5</sup> In addition, sanctions may be imposed on a Member State in cases of “serious and persistent breach” of these principles.<sup>6</sup> The Amsterdam Treaty also adds the explicit requirement that the ECJ apply these human rights standards as they relate to actions taken by institutions of the Union, where the Court has jurisdiction.<sup>7</sup> This requirement adopts the ECJ principle that conformity with human rights standards is a necessary condition for the lawfulness of European Community (“Community”) acts, which was initially articulated in a series of cases that included *Stauder v. City of*

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2. See Consolidated Version of the Treaty on European Union art. 6, 2010 O.J. C 83/13, at 19 [hereinafter TEU post-Lisbon].

3. Maastricht TEU, *supra* note 1, art. F, 1992 O.J. C 191, at 5.

4. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam].

5. See *id.* art. 1(8)(a), at 9.

6. TEU post-Lisbon, *supra* note 2, art. 7, 2010 O.J. C 83, at 19.

7. See Treaty of Amsterdam, *supra* note 4, art. 1(13)(d), 1997 O.J. C 340, at 23–24 (amending Article L of the Maastricht TEU, *supra* note 1, as it regards Article F(2)).

*Ulm, Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, and *Nold v. Commission*.<sup>8</sup>

The Amsterdam Treaty was pivotal in the articulation and enhancement of the equality principle as an integral component of EU law.<sup>9</sup> It imposed a general obligation on the Union in all of its activities to eliminate gender-based inequalities, and incorporated the comparable worth standard and permitted affirmative action in the workplace,<sup>10</sup> both of which had previously been the subjects of EU directives.<sup>11</sup> Further, it expanded the scope of the equality principle and allowed the Council of the European Union (“Council”) to take action against discrimination based on sex, race or ethnic origin, religion or belief, disability, age, or sexual orientation within the limits of its powers. As a result, a vast network of regulations governing Member State action affecting gender, race, age, religion and belief, sexual orientation, and disability is now in effect.<sup>12</sup> All applicant states are now required to respect human

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8. *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491; *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125; *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419; *see Rutili v. Ministre de l'Intérieur*, Case 36/75, [1975] E.C.R. 1219, ¶ 32; *see also* Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT'L L. 771, 771–72 (2006); Elizabeth F. Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality?*, 23 B.C. INT'L & COMP. L. REV. 1, 30 (1999) (“Although the [Treaty of Rome] focuses on economic integration rather than on human rights, the [European Court of Justice] declared early on that respect for human rights is one of the general principles of Community law.”).

9. *See* EVE C. LANDAU & YVES BEIGBEDER, FROM ILO STANDARD TO EU LAW: THE CASE OF EQUALITY BETWEEN MEN AND WOMEN AT WORK 50 (2008); Sonia Mazzy, *The European Union and Women's Rights: From the Europeanization of the National Agendas to the Nationalization of a European Agenda*, 5 J. EUR. PUB. POL'Y 131, 140 (1998); *see also* J.H.H. WEILER & MARTINA KOČJAN, THE LAW OF THE EUROPEAN UNION, PRINCIPLES OF CONSTITUTIONAL LAW: THE PROTECTION OF HUMAN RIGHTS 87–88 (Teaching Material, NYU School of Law 2004/2005).

10. *See* Defeis, *supra* note 8, at 30–32.

11. *See* Council Directive 76/207/EEC 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, 1976 O.J. L 39/40; Council Directive 75/117/EEC on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. L 45/19.

12. *See, e.g.*, Council Directive 2000/78/EC on Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. L 303/16; Council Directive 2000/43/EC on Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. L 180/22.

rights, democracy, and the rule of law as a condition of admission.<sup>13</sup>

Within this framework, as early as 1974, the ECJ has utilized all treaties that the Member States of the European Union have signed or participated in, including international treaties such as the International Covenant on Civil and Political Rights,<sup>14</sup> as interpretive tools for the content and scope of “fundamental rights.” International treaties for the protection of human rights on which the Member States have collaborated, or to which they are signatories, supply guidelines that should be followed within the framework of Community law.<sup>15</sup> The European Convention on Human Rights is recognized as a document with “special significance.”<sup>16</sup>

The Treaty of Lisbon is a significant breakthrough in the protection of fundamental rights in Europe. It requires the accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms, sometimes called the European Convention on Human Rights (“Convention”),<sup>17</sup> and the relationship between the ECJ in Luxembourg and the European Court of Human Rights (“ECtHR”) in Strasbourg.<sup>18</sup> The Treaty gives legal force to the Charter of Fundamental Rights of the European Union (“Charter of Rights”),<sup>19</sup> which was proclaimed in Nice in 2000, and thus is incorporated into European constitutional law.<sup>20</sup> Although the Treaty of Lisbon provides that “[t]he provisions of the Charter shall not extend

13. See Treaty of Amsterdam, *supra* note 4, art. 1(8)(a), 1997 O.J. C 340, at 9.

14. See International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; see also *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491; *Otto v. Postbank*, Case C-60/92, [1993] E.C.R. I-5683; *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283; *Solvay v. Commission*, Case 27/88, [1989] E.C.R. 3355.

15. See *Nold*, [1974] E.C.R. 491; see also *Otto*, [1993] E.C.R. I-5683; *Orkem*, [1989] E.C.R. 3283; *Solvay*, Case 27/88, [1989] E.C.R. 3355.

16. See *European Parliament v. Council of the European Union*, Case C-540/03, [2006] E.C.R. I-5769, ¶ 35.

17. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

18. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 1(8), 2007 O.J. C 306/01, at 13 [hereinafter Treaty of Lisbon] (amending the Consolidated Version of the Treaty on European Union art. 6, 2006 O.J. C 321 E/5, at E/12).

19. See Charter of Fundamental Rights of the European Union pmbl., 2010 O.J. C 83/389, at 391 [hereinafter Charter of Rights].

20. See Treaty of Lisbon, *supra* note 18, art. 1(8), 2007 O.J. C 306, at 13.

in anyway the competences of the Union as defined in the Treaties,”<sup>21</sup> its provisions are far-reaching and its new status has not been accepted by all Member States who are suspicious of increased Brussels oversight and ongoing “competence creep.”<sup>22</sup>

This Essay charts the development of human rights in the European Union through treaty. It analyzes the impact of the Treaty of Lisbon on human rights, including the issues raised by accession by the European Union to the Convention and the adoption as a treaty obligation of the Charter of Rights.

### I. *HUMAN RIGHTS & TREATY OBLIGATIONS PRIOR TO THE TREATY OF LISBON*

Shortly after World War II ended, the Council of Europe, a regional intergovernmental organization, was created in 1949 by Western European nations committed to “creat[ing] a common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law.”<sup>23</sup> Perhaps its most important accomplishment is the drafting of the Convention and the creation of the ECtHR. Although the Universal Declaration of Human Rights (“UDHR”) was adopted by the UN General Assembly in 1948, because of the ensuing divisions among the UN member states generated by the Cold War, it became increasingly difficult to translate the guarantees of the UDHR into binding obligations through an international treaty.<sup>24</sup> The UDHR encompassed both civil and political rights favored by the Western countries and economic and social rights favored by the socialist countries. It was therefore problematic to

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21. *Id.*

22. See Heiko Walkenhorst, *The Changing Role of EU Education Policy—A Critical Assessment* 5 (Mar. 31–Apr. 2, 2005) (paper for the EUSA Ninth Biennial International Conference), available at [http://aei.pitt.edu/3177/1/Walkenhorst\\_EUSA\\_2005\\_final.pdf](http://aei.pitt.edu/3177/1/Walkenhorst_EUSA_2005_final.pdf).

23. *Council of Europe in Brief*, COUNCIL OF EUR., <http://www.coc.int/aboutCoc/index.asp?page=nosObjectifs&l=en> (last visited May 25, 2012); see ECHR, *supra* note 17, pmb1., 213 U.N.T.S. at 222; Statute of the Council of Europe pmb1., ch. 1, arts. 1, 3, May 5, 1949, 87 U.N.T.S. 103.

24. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); LOUIS HENKIN ET AL., *HUMAN RIGHTS* 321–22 (1999); Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U.J. INT’L HUM. RTS. 5, 35 (2004).

agree on the adoption of one legally binding document that would encompass both categories of rights.<sup>25</sup>

With the devastation wreaked by World War II still apparent throughout Europe, the Council of Europe decided that a regional human rights convention that would bind the European nations should be created.<sup>26</sup> The Convention was adopted in 1950 and entered into force in 1953.<sup>27</sup> Recognizing the common interests and values of the European states, the Preamble to the Convention says: "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration . . . ."<sup>28</sup> The Convention guarantees the core civil and political rights, such as the right to a fair trial, the right to privacy, the right to an effective remedy, freedom against the abuse of rights, and freedom of thought.<sup>29</sup> Equality and freedom from nondiscrimination on the basis of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" with regard to rights specified in the Convention is a core guarantee.<sup>30</sup> Additional protocols include freedom of movement, the right to appeal in criminal matters, the right to equality between spouses, and freedom against double jeopardy.<sup>31</sup> The ECtHR, sometimes called the Strasbourg Court, has substantive responsibility for rendering decisions concerning rights guaranteed by the Convention. Most member states of the Council of Europe, including all EU Member States, have incorporated the Convention into their domestic legal

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25. See HENKIN ET AL., *supra* note 24, at 321–22.

26. See Gillian White, *Foreword to First Edition* of J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS*, at viii, viii (1993).

27. See ECHR, *supra* note 17, 213 U.N.T.S. at 222.

28. *Id.* pmbl., at 222.

29. *Id.* arts. 6, 8, 9, 13, 17, at 229–30, 232, 234.

30. *Id.* art. 14, at 233.

31. See Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 1, 1998, Europ. T.S. No. 46 [hereinafter Protocol No. 4]; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms arts. 2, 4, 5, Nov. 1, 1998, Europ. T.S. No. 117 [hereinafter Protocol No. 7].

systems.<sup>32</sup> In 1961, a Social Charter was adopted by the Council of Europe and is the counterpart of the Convention.<sup>33</sup> It guarantees fundamental social and economic rights, including the protection of children, the right to collective bargaining, the right of workers to safe and healthy working conditions, and the rights of mothers and children to social and economic protection against discrimination.<sup>34</sup>

The Comité d'études pour la constitution européenne, a group composed primarily of scholars, was established in 1952 to assist in the drafting of a constitution or statute for a new European Political Community ("EPC").<sup>35</sup> In the series of resolutions that emerged from the study, the protection of human rights figured prominently. The subsequent draft treaty proposing the establishment of the EPC also contained strong human rights provisions.<sup>36</sup> When the EPC treaty failed to be adopted, primarily because of the objections of France, a more limited plan for European integration emerged, and the Treaty of Rome creating the European Economic Community was adopted in 1957.<sup>37</sup>

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32. See Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter on Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 291, 291 (Ingolf Pernice et al. eds., 2006). In 2010, Protocol 14 was adopted to address the huge backlog of cases then pending, to make the system more efficient and expedite the process for obtaining a decision from the European Court of Justice. See Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention pmbl., May 13, 2004, Europ. T.S. No. 194 [hereinafter Protocol No. 14]. In 2009, the European Court of Human Rights ("ECtHR") considered 57,200 cases, with a backlog of 119,300 cases, ninety percent of which would end up being inadmissible. See Bret Stephens, *The Decline of Human Rights*, WALL ST. J., Jan. 31, 2012, at A13.

33. European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 [hereinafter ESC].

34. See *id.* pt. I(2), I(6), I(7), I(17), at 92, 94. It is monitored by the European Committee of Social Rights and the Council of Ministers. A new version of the European Social Charter entered into force in 1996. European Social Charter (Revised), May 3, 1996, 2151 U.N.T.S. 277.

35. See Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649, 652–55 (2011) (discussing early efforts to establish political integration in Europe and the role of human rights in those efforts).

36. See *id.* at 652.

37. See *id.* at 662–64.



The Treaty of Rome was silent on the protection of fundamental rights.<sup>38</sup> Although the issue of human rights protection was raised by the German delegation, it does not appear that fundamental rights were discussed extensively during the drafting process.<sup>39</sup> However, the Treaty did contain some provisions that reflected basic human rights, such as the principle of nondiscrimination based on nationality. Provisions providing for free movement and residence of workers also might be viewed as a human rights provision.<sup>40</sup> One provision, generally considered a human rights guarantee, required equal pay for equal work based on gender.<sup>41</sup> It is, however, generally acknowledged that the provision was inserted as an economic measure rather than a human rights measure because some states required equal pay by their domestic law and would be at an economic disadvantage without such a provision.<sup>42</sup> It was through a series of decisions of the ECJ that human rights were placed at the forefront of the EU agenda and integrated as an integral component of the *Aquis Communautaire* of the European Union. In order to ensure application of Community law throughout the Member States, in 1964, the ECJ established the principle of primacy of Community law over the domestic law of Member States.<sup>43</sup> In an exercise of “bold judicial

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38. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

39. See de Búrca, *supra* note 35, at 664–65.

40. See, e.g., EEC Treaty, *supra* note 38, art. 48, 298 U.N.T.S. at 36.

41. See *id.* art. 119, at 62.

42. See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT'L L.J. 331, 337 (2003); see also Rachel A. Gichowski, *Women's Rights, the European Court, and Supranational Constitutionalism*, 38 LAW & SOC'Y REV. 489, 501 (2004); June Neilson, *Equal Opportunities for Women in the European Union: Success or Failure?*, 8 J. EUR. SOC. POL'Y 64, 64 (1998) (citing Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, May 23, 1953, 165 U.N.T.S. 303).

43. See *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, Case 6/64, [1964] E.C.R. 585; see also Stefan Enchelmaier, *Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence*, 23 OXFORD J. LEGAL STUD. 281, 281 (2003). The doctrine was resisted by some states. For example, in 1967 the German Constitutional Court held that since the Community legal order lacked specific protection of human rights, the transfer of powers from the German legal system to the Community had to be measured against domestic constitutional provisions. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 18, 1967, 22 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 293, 1967 (Ger.).

activism,”<sup>44</sup> the ECJ elaborated a robust jurisprudence of human rights protection and declared that human rights were enshrined in the general principles of Community law and would be protected by the Court.<sup>45</sup> The Convention had special significance when identifying the fundamental rights applicable under EU law. The ECJ referred to the provisions of the Convention, but for some time resisted citing to its decisions.<sup>46</sup> Subsequent treaties reflected the developing human rights policy of the European Union then being articulated by the ECJ, although not initially as a treaty obligation. For example, the preamble to the Single European Act of 1986 stated that Member States should “work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.”<sup>47</sup>

In 1992, the Maastricht Treaty in effect codified the case law of the ECJ and gave formal treaty recognition to human rights as part of EU law. It provided that the European Union must respect fundamental rights in accordance with the protections afforded by the Convention, as they arise from the constitutional traditions common to Member States and as general principles of Community law. The Maastricht Treaty states: “Community policy in this area shall contribute to the general objective of developing and consolidating democracy

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44. Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1105 (1986).

45. The European Court of Justice outlined its position in a series of cases. See *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491; *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125; *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419, ¶ 1; see also Weiler, *supra* note 44, at 1105, 1119.

46. See *Rutili v. Ministre de l'Intérieur*, Case 36/75, [1975] E.C.R. 1219, ¶ 32; see also Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT'L L. 301, 316 (2001).

47. Single European Act pmbl., 1987 O.J. L 169/1 (amending EEC Treaty, *supra* note 38).

and the rule of law, and to that of respecting human rights and fundamental freedoms.”<sup>48</sup>

## II. *THE TREATY OF LISBON & HUMAN RIGHTS*

### A. *European Convention on Human Rights*

The ECtHR, which oversees the implementation of the Convention, has had a profound impact on the development of human rights throughout Europe. Although its proactive stance is not universally applauded, it is sometimes called a constitutional court for Europe.<sup>49</sup> Each of the founding members of the European Union was a signatory to the Convention and today all forty-seven members of the Council of Europe are parties. When the EU accession is completed, it will be the forty-eighth member. Thus, the Convention guarantees protection to more than 800 million persons and its jurisdiction extends to Iceland in the north, Greece in the south, Spain in the west, and Russia in the east. For over thirty years, the accession of the European Union itself to the Convention has been discussed. It had been argued that accession would be symbolically important and would stress the European Union’s commitment to the protection of fundamental rights.<sup>50</sup> In 1994, the Council of Europe requested an opinion concerning the legality of accession by the European Union and, in 1996, the ECJ advised that the (then) European Community lacked the

48. See Maastricht TEU, *supra* note 1, art. 130u, 1992 O.J. C 191, at 29–30.

49. Most recently, UK Prime Minister David Cameron, in a speech to the Parliamentary Assembly of the Council of Europe, accused the ECtHR of having a “corrosive effect” on people’s support for civil liberties. See Nicholas Watt & Owen Bowcott, *Cameron Calls for Curbs on European Human Rights Court: British Plans to Impose Case Time Limit Attacked PM Criticises Ruling on Abu Qatada Deportation*, *GUARDIAN* (U.K.), Jan. 26, 2012, at 17; see also Alec Stone Sweet, *Sur la Constitutionnalisation de la Convention Européenne des Droits de l’Homme: Cinquante Ans Après son Installation, la Cour Européenne des Droits de l’Homme Conçue Comme une Cour Constitutionnelle*, 80 *REVUE TRIMESTRIELLE DES DROITS DE L’HOMME* 923, 924 (2009).

50. See, e.g., FRANCIS G. JACOBS, *THE SOVEREIGNTY OF LAW: THE EUROPEAN WAY* 147–48 (2007); Sionaidh Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, 11 *HUM. RTS. L. REV.* 645, 658–59 (2011); Martin Kuijer, *The Accession of the European Union to the ECHR: A Gift for the ECHR’s 60th Anniversary or an Unwelcome Intruder at the Party?*, 3 *AMSTERDAM L.F.* 17, 20–22 (2011); Jean M. Scola, Note, *The Case for Accession by the European Union to the European Convention for the Protection of Human Rights*, 14 *B.U. INT’L L.J.* 151, 176–77 (1996).

competence to accede to the Convention without specific treaty amendment.<sup>51</sup> Although the Treaty of Amsterdam was then being discussed and dealt extensively with human rights, accession to the Convention was not provided for in the Treaty, nor was a catalogue or bill of rights included.<sup>52</sup> Moreover, accession to the Convention was problematic since it was open only to state parties—international organizations, such as the European Union, were ineligible to become party to the Convention. The Treaty of Lisbon now specifically provides for EU accession, and Protocol 14 of the Convention, which entered into force on June 1, 2010, allows accession by nonstate parties.<sup>53</sup> Indeed, Article 1(8) of the Treaty of Lisbon amends Article 6(2) of the TEU placing the European Union under an obligation to accede to the convention. The Treaty states that the “Union shall accede” to the Convention and accession to the Convention has become a priority for the European Union.<sup>54</sup> Member States, including Russia, have called for swift accession.<sup>55</sup>

Because of the complex issues involved, as well as the numerous parties that must agree to the accession agreement, extensive negotiations are underway.<sup>56</sup> A draft agreement on the accession negotiated by the Steering Committee for Human Rights of the Council of Europe and the European Commission of the European Union was published in 2011 (“Draft

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51. Opinion 2/94, Re the Accession of the Community to the European Human Rights Convention, [1996] E.C.R. I-1759.

52. See Treaty of Amsterdam, *supra* note 4.

53. Treaty of Lisbon, *supra* note 18, art. 1(8), 2007 O.J. C 306, at 13; Protocol No. 14, *supra* note 32, art. 17 (amending Article 59(2) of the ECHR, *supra* note 17).

54. Treaty of Lisbon, *supra* note 18, art. 1(8), 2007 O.J. C 306, at 13.

55. EU accession will give central role to the Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”). *EU Accession to Human Rights Convention Will Give Central Role to ECHR*, RUSSIA & CIS GENERAL NEWSWIRE, May 17, 2011, available at LEXIS (quoting Russian Foreign Minister Sergei Lavrov as saying: “We are calling for swift accession by the European Union to the Convention on Human Rights and Fundamental Freedoms, based on the [European Union’s] recognition of the jurisdiction of the European Court of Human Rights.”).

56. See European Union & Council of Europe, *8th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission: Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights*, CDDH-UE(2011)16 (July 19, 2011).

Agreement”).<sup>57</sup> As set forth in the Draft Agreement, the main rationale for accession is to “enhance the coherence of the judicial protection of human rights in Europe” and to offer individuals the right to access the ECtHR in Strasbourg.<sup>58</sup> The European Union will not accede to all substantive protocols of the Convention, such as the Protocol prohibiting imprisonment for breach of contract, the expulsion of nationals, and the right to free movement within a Member State, as well as the Protocol dealing with criminal procedure and family members.<sup>59</sup> Instead accession will be limited to the Convention itself, to its first protocol providing for the protection of possessions and the right to education, and Protocol 6 abolishing the death penalty,<sup>60</sup> a high profile and priority issue within the European Union.<sup>61</sup>

There was much speculation concerning whether the EU representative on the ECtHR would deal only with issues affecting the European Union or all cases in general. It has now been proposed that a single judge be elected to the ECtHR to represent the European Union.<sup>62</sup> This judge will have the same duties and status as the other judges, participate in the work of

57. *See id.*

58. *Id.* at 11.

59. *See id.* at 2; *see also* Protocol No. 4, *supra* note 31; Protocol No. 7, *supra* note 31.

60. *See* ECHR, *supra* note 17, 213 U.N.T.S. at 221; Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1–2, Mar. 20, 1952, 213 U.N.T.S. 262, 262–64; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty art. 1, Apr. 28, 1983, Europ. T.S. No. 114 [hereinafter Protocol No. 6] (“The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”).

61. *See* Protocol No. 6, *supra* note 60, art. 1; *see also* European Parliament Resolution on the Abolition of the Death Penalty, 1997 O.J. C 200/0171; ALAN W. CLARKE & LAURELYN WHITT, *Preface* to *THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY*, at ix (2007) (noting that the death penalty is all but abolished for member states of the Council of Europe and for war criminals in international tribunals); *Abolitionist and Retentionist Countries*, AMNESTY INT’L, <http://www.amnesty.org/cn/death-penalty/abolitionist-and-retentionist-countries> (last visited May 25, 2012) (noting all of the European countries who have abolished the death penalty after the establishment of the Convention).

62. *See* Viviane Reding, Vice President of the European Comm’n Responsible for Justice, Fundamental Rights & Citizenship, Hearing of the European Parliament’s Constitutional Affairs Committee: The EU’s Accession to the European Convention on Human Rights; Towards a Stronger and More Coherent Protection of Human Rights in Europe, at 3 (Mar. 18, 2010).

the Court, and decide cases on an equal basis with the other judges. Both the European Union and its Member States can, when they so wish, ask to be involved in cases as a correspondent party rather than as a mere intervening third party.<sup>63</sup> Since Member States as well as EU institutions and bodies can implement EU acts, this provision avoids gaps in participation, accountability, and enforceability in the Convention system. Whenever the European Union is correspondent and the ECJ has not yet had the opportunity to assess the compatibility of EU law with the Convention in a particular situation, the Draft Agreement provides that the ECJ may make an assessment “quickly,” that is, under the accelerated procedure of the ECJ. Thus, at its option, the ECJ can decide a case involving a challenged practice or rule prior to the Convention should it choose to do so.<sup>64</sup>

Under the Draft Agreement, the European Union will fund part of the budget of the Council of Europe’s human rights machinery.<sup>65</sup> The agreement will enter into force three months after ratification by all Council of Europe member states and by the European Union. However, as ratification of prior Convention protocols demonstrates, this process is likely to be a lengthy one.<sup>66</sup>

Yet, even after accession some difficult issues remain to be resolved, such as the continuing viability of the supremacy doctrine of EU law and the practice of deferral by the ECtHR to the decisions of the ECJ. The deferral issue was involved in *Bosphorus Hava Yollari Turizm v. Minister for Transportation, Energy & Communications & Others*, in which the Irish authorities impounded an aircraft on the basis of an EC Regulation that formed part of the sanctions regime against the Former Republic of Yugoslavia.<sup>67</sup> The applicant argued that the impounding of its leased aircraft by the respondent state

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63. See *id.* at 4 (describing the importance of Member States having equal representation and footing with regards to judges and the importance of the European Union having coparty status); see also European Union & Council of Europe, *supra* note 56, ¶ 69.

64. See European Union & Council of Europe, *supra* note 56, ¶ 61.

65. See *id.* ¶¶ 82–88.

66. See Kuijter, *supra* note 50, at 24.

67. *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transp., Energy & Commc’ns & Others*, Case C-84/95, [1996] E.C.R. I-3953.

breached its rights of respect for property as provided for in the European Convention.<sup>68</sup> The ECJ ruled that the impoundment did not violate fundamental human rights, including the right to peaceful enjoyment of property as set forth in the Convention.<sup>69</sup> Subsequently, the applicant filed suit in the ECtHR. The ECtHR found that the system in the European Union was equivalent although not identical to the Convention system both substantively and procedurally.<sup>70</sup> In effect, it deferred to the previous decision of the ECJ. Whether the ECtHR will continue to defer to the decisions of the ECJ after accession is an open question and one that has provoked much scholarly debate.<sup>71</sup>

A further and possibly divisive issue is raised by the need as set forth in the Treaty of Lisbon to respect “the specific characteristics of the Union and Union Law” in connection with accession to the European Convention. In 1963, the ECJ declared that the Community, now the Union, constitutes a new legal order of international law for the benefit of which states have limited their sovereignty.<sup>72</sup> Since its inception, the ECJ has been the sole interpreter of EU law, and has been unwavering in asserting its authority to interpret the EU legal order. Article 220 of the Treaty Establishing the European Community (“EC Treaty”), now Article 19(1) of the Treaty on European Union post-Lisbon (“TEU post-Lisbon”), provides: “[The Court of Justice] shall ensure that in the interpretation and application of

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68. See *id.* ¶ 19; see also Joseph Phelps, *Reflections on Bosphorus and Human Rights in Europe*, 81 TUL. L. REV. 251, 252 (2006).

69. See *Bosphorus*, [1996] E.C.R. I-3953, ¶ 27.

70. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 2005-VI Eur. Ct. H.R. 107.

71. See, e.g., 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*, 10 HUM. RTS. L. REV. 529 (2010); Sera, *supra* note 50, at 163; Ricardo Alonso Garcia, *Lisbon and the Court of Justice of the European Union* (Instituto de Derecho Europeo e Integración Regional (IDEIR), Working Paper No. 1, 2010).

72. See Treaty of Lisbon, *supra* note 18, Protocol Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 2007 O.J. C 306, at 55; N.V. Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Admin. (*Van Gend en Loos*), Case 26/62, [1963] E.C.R. I.

the Treaties, the law is observed.”<sup>73</sup> The autonomy of the EU legal order was reaffirmed by the ECJ in *Kadi v. Council & Commission*, which involved the implementations by Community regulations of UN Security Council resolutions. Responding to the argument that such regulations violated fundamental rights that were protected under community law, the Court stated:

[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.<sup>74</sup>

The Court’s ruling on the relevant EU legal norms is considered authoritative.<sup>75</sup> Thus, despite the fact that the ECJ will have an opportunity to decide whether an act of the Union is in conformity with the Convention before a definitive ruling by the ECtHR on the matter, the provision raises interesting questions regarding the interpretive autonomy of the ECJ.<sup>76</sup> Indeed, one may wonder whether the doctrine of primacy or supremacy of EU law has now been eroded.

The accession process is likely to be a lengthy one and will require further negotiation. The Draft Agreement has been transmitted to the Council of Europe for further discussion. The two European Courts as well as the Parliamentary Assembly of the Council of Europe will also comment on the draft. The agreement must then be adopted by the Committee of Ministers.<sup>77</sup> Despite the fact that accession is a political priority

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73. TEU post-Lisbon, *supra* note 2, art. 19(1), 2010 O.J. C 83, at 27. Note that the words “of international law” following new legal order no longer appear in subsequent cases. See, e.g., *Costa v. Ente Nazionale per l’Energia Elettrica (ENEL)*, Case 6/64, (1964) E.C.R. 585.

74. *Kadi v. Council & Commission*, Joined Cases C-402/05 P & C-415/05 P, [2008] E.C.R. I-6351, ¶ 316; see de Búrca, *supra* note 35, at 676–80.

75. GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 60–61 (3d ed. 1993).

76. See *Van Gend en Loos*, [1963] E.C.R. 1; Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 *CARDOZO L. REV.* 1045, 1052 (2000).

77. See Comm. on Legal Aff. & Hum. Rts., Eur. Parl. Ass., *The Accession of the European Union/European Community to the European Convention on Human Rights*, Doc. 11533 (2008), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11533.htm> (discussing the path to accession); see also



for the European Union, sufficient time and reflection must be directed towards the issues raised in the accession agreement itself as well as those raised by cases both of the ECJ and the ECtHR prior to final accession.

B. *Charter of Fundamental Rights of the European Union*

In contrast, however, the Charter of Rights is now legally binding throughout the European Union with the entry into force of the Treaty of Lisbon. There had been several attempts to elaborate a charter of rights that would bind the European Union and its institutions. For example, in 1979 the European Commission proposed that the European Community accede to the Convention, and in 1989 the European Parliament proposed a catalogue of human rights. Neither attempt was successful. The decision of the ECJ in 1996 that the European Community could not accede to the Convention without a treaty amendment was the precipitating factor for the Charter of Rights. A treaty amendment incorporating the Charter of Rights would have required a unanimous agreement on the part of Member States.<sup>78</sup> This unanimity did not exist at that time. Although the Council of Europe had initially resisted the elaboration of a charter of rights for the European Union, preferring instead that the Union accede to the Convention, it changed its position following the 1996 decision of the ECJ. Thus, in 1999 at the Cologne European Council, the Charter of Fundamental Rights was proposed.<sup>79</sup> The Conclusions of the Presidency of the Cologne European Council proclaimed: "There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens."<sup>80</sup> A body, which was subsequently designated a convention, was established to draft the proposed

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Hans Christian Krüger, *The European Union Charter of Fundamental Rights and the European Convention on Human Rights: An Overview*, in *THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS*, at xxv, xxvi (Steve Peers & Angela Ward eds., 2004).

78. See David Anderson & Cian C. Murphy, *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe* 1 (Eur. Univ. Inst., Paper No. LAW 2011/08, 2011); see also Krüger, *supra* note 77, at xxvi.

79. See Cologne European Council, Conclusions of the Presidency, E.U. BULL., no. 6, Annex IV, at 43 (1999).

80. See *id.* at 43.

Charter of Rights. Rather than incorporate the Charter of Rights into the treaties via the Treaty of Nice, which would not be acceptable to some Member States, it was “solemnly proclaimed” by the European Parliament, Council of Ministers, and European Commission. However, it was not “proclaimed” by Member States. Instead, various states including Denmark, France, and Germany accepted the Charter of Rights while the United Kingdom initially did not, until it was made explicit that the Charter would apply to Member States only when they are implementing EU law.<sup>81</sup>

The need for enhanced human rights protection against actions of the European Union and its institutions was now recognized as appropriate. The adoption of the Charter of Rights was urged as necessary to reflect the legal and political changes that had occurred since the adoption of the Treaty of Rome.<sup>82</sup> Although the European Union was created as primarily an economic entity to promote market integration, it evolved into an institution that was political, cultural, social, and economic in nature.<sup>83</sup> Further, the Convention drafted in 1950 was viewed as outdated since it focused exclusively on civil and political rights and did not include social and economic rights, which were intrinsic to the European conception of human rights. Although a social charter for the European Union was adopted in 1961, the recommendation of the European Committee of Social Rights appointed by the Council of Ministers made to Member States after reviewing state reports does not have the same legal force as a decision of the ECtHR.<sup>84</sup> In addition, the international law of human rights has expanded exponentially since the promotion of human rights was set forth

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81. See de Búrca, *supra* note 35, at 670–71; see also Elizabeth F. DeFeis, *A Constitution for the European Union? A Transatlantic Perspective*, 19 TEMP. INT'L & COMP. L.J. 351, 379 (2005).

82. See Krüger, *supra* note 77, at xxiii (“Since the European Communities are not parties to the European Convention on Human Rights, Europeans have at present no possibility of bringing complaints against the European Union institutions directly before the European Court of Human Rights.”).

83. See Carol L. Klinc, *EU Inconsistencies Regarding Human Rights Treatment: Can the EU Require Czech Action as a Criterion for Accession?*, 23 B.C. INT'L & COMP. L. REV. 35, 36 (1999).

84. ESC, *supra* note 33, pmbl., 529 U.N.T.S. at 90; see *European Committee of Social Rights*, COUNCIL OF EUR., [http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp) (last visited May 25, 2012).

as one of the purposes of the United Nations, and the protection of human rights as a major concern of the international community needed to be addressed. Thus, the new Charter of Rights would recognize fifty years of developments in human rights law and, as stated in the preamble, would “strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments.”<sup>85</sup> Clearly, however, the strongest argument for adoption was that a human rights instrument that would bind the institutions of the European Union itself was lacking.<sup>86</sup>

As is well known, the Charter of Rights, when proclaimed at the Nice Summit in 2000, was a declaration with political but not legal force.<sup>87</sup> Nevertheless, the Charter soon became a focus within the European Union and its institutions for human rights.<sup>88</sup> The European Parliament has consistently cited the Charter of Rights as a human rights standard that must be adhered to in all legislative acts, and the Advocate General of the Court of First Instance cited the Charter within a year after it was proclaimed.<sup>89</sup> While the ECJ initially resisted referring to the Charter, in 2006, for the first time, it referenced the Charter as a guide to general principles of Community law, which it is directed to apply.<sup>90</sup> The aim of the Charter, it noted, is to reaffirm rights as they result from constitutional traditions and international obligations common to Member States, the TEU

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85. See Charter of Rights, *supra* note 19, pmbi., 2010 O.J. C 83, at 391.

86. See Daniel Denman, *The Charter of Fundamental Rights*, 2010 EUR. HUM. RTS. L. REV. 349, 351–52.

87. See Charter of Rights, *supra* note 19, 2010 O.J. C 83; Denman, *supra* note 86, at 349.

88. See generally Charter of Rights, *supra* note 19, 2010 O.J. C 83; Denman, *supra* note 86.

89. See, e.g., EUROPEAN PARLIAMENT, RULE OF PROCEDURE: 7TH PARLIAMENTARY TERM, Rule 36 (2012), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20120521+0+DOC+PDF+V0//EN&language=EN>; Maas & Others v. Commission, Joined Cases T-81–83/07, [2009] E.C.R. II-2411, ¶ 82; Max.Mobil Telekommunikation Service GmbH v. Commission, Case T-54/99, [2002] E.C.R. II-313, ¶¶ 48–49, 57; TNT Traco SpA v. Poste Italiane SpA, Case C-340/99, [2001] E.C.R. I-4142, ¶ 2; Opinion of Advocate General Tizzano, Broad., Entm’t, Cinematographic & Theatre Union (BECTU) v. Sec’y of State for Trade & Indus., Case C-173/99, [2001] E.C.R. I-4881, ¶¶ 26–28.

90. European Parliament v. Council (*Family Reunification*), Case C-540/03, [2006] E.C.R. I-5769; see Anderson & Murphy, *supra* note 78, at 14; Krüger, *supra* note 77, at 2.

post-Lisbon, and the Convention.<sup>91</sup> Nevertheless, powerful arguments have been made by numerous EU scholars against adoption of the Charter as legally binding, including, most notably, Justice Francis Jacobs, who stated that “the Charter is likely to disappoint expectations: to deliver less than it promises.”<sup>92</sup>

The Charter of Rights could be compared to the UDHR, a document that was not legally binding when adopted by the General Assembly of the United Nations, but that had political force as a standard towards which all nations would aspire. The guarantees of the UDHR were, however, subsequently converted into legally binding instruments including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the European Convention on Human Rights.<sup>93</sup> Similarly the Charter of Rights, although not initially legally binding, has shaped community pronouncements and regulations as well as decisions of the courts of the European Union.

The Charter of Fundamental Freedoms was included as an integral part of the Treaty Establishing a Constitution for Europe and was signed in 2004 but rejected in referenda in the Netherlands and France. Indeed, its importance in the draft Constitution was compared to the Bill of Rights in the United States Constitution by one of the drafters who commented, “[i]t was the Bill of Rights that created American identity. . . . It will be the same with the Europeans.”<sup>94</sup> Ironically, although the Charter included in the Constitutional Treaty was urged as necessary to promote transparency, its text is not integrated into the Treaty of Lisbon.<sup>95</sup> Instead, the Treaty of Lisbon simply

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91. *Family Reunification*, [2006] E.C.R. I-5769, ¶ 38.

92. See JACOBS, *supra* note 50, at 151.

93. In part, the Universal Declaration of Human Rights could be considered customary international law and now has a legal force of its own. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. d (stating that it is increasingly accepted that states party to the UN Charter are legally obligated to respect some of the rights recognized in the Universal Declaration of Human Rights).

94. Edward Rothstein, *Europe's Constitution: All Hail the Bureaucracy*, N.Y. TIMES, July 5, 2003, at B9 (quoting a representative who worked on the European constitution).

95. See JENS-PETER BONDE, FROM EU CONSTITUTION TO LISBON TREATY 65 (2012); Rainer Arnold, *A Fundamental Rights Charter for the European Union*, 15 TUL. EUR. & CIV.

provides, in a single article, that the Charter is legally binding. In addition, the Charter provides that the Convention as well as the case law of the ECtHR must be referred to when interpreting the Charter.<sup>96</sup> Thus, the Charter cannot be viewed as a self-contained document. However, the Charter also makes clear that the provisions of the Convention constitute a floor for human rights protection and that the European Union and Member States can provide protection greater than that provided for in the Convention.<sup>97</sup> Since both the ECJ and the national courts will be called upon to apply and interpret the Charter, and given the expansiveness of some of its provisions, future decisions are difficult to predict. Although specific rules for interpretation are contained in the Treaty of Lisbon, such as reference to the Convention and explanations, the ECJ in the past has taken a proactive approach with respect to human rights issues and indeed was responsible in large part for integrating human rights into the fabric of EU law despite the absence of a specific treaty provision or authorization.<sup>98</sup> Moreover, some provisions of the Charter require further clarification. For example, it appears that rights or freedoms set out in the Charter might have different legal effects. Some provisions of the Charter refer to “principles” while others refer to “rights.”<sup>99</sup> However, the text of the Charter does not clearly

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L.F. 43, 48 (2001) (stating that the Charter of Fundamental Rights of the European Union (“Charter”) does not represent binding law but instead represents “an act of self-obligation” for the Member States); see also KRISTIN ARCHICK & DEREK E. MIX, CONG. RESEARCH SERV., RS21618, *THE EUROPEAN UNION’S REFORM PROCESS: THE LISBON TREATY 2–5* (2009); EUROPEAN UNION COMMITTEE, *1 THE TREATY OF LISBON: AN IMPACT ASSESSMENT, REPORT, 2007–8*, H.L. 62-I, ¶ 1.3 (U.K.); *Your Darkest Fears Addressed, Your Hardest Questions Answered*, ECONOMIST, June 21, 2003, at 52.

96. See Charter of Rights, *supra* note 19, pmbl., 2010 O.J. C 83, at 391.

97. See *id.* art. 52(3), at 21 (“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.”).

98. See Philip Alston & J. H. H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy*, 9 EUR. J. INT’L L. 658, 709 (1998) (noting that “the European Court of Justice deserves immense credit for pioneering the protection of fundamental human rights within the legal order of the Community when the Treaties themselves were silent on this matter”).

99. See, e.g., Charter of Rights, *supra* note 19, arts. 23, 49, 51, 2010 O.J. C 83, at 396, 401, 402 (providing examples of articles in the Charter of Rights that are

specify whether such provisions constitute rights or principles. Generally, rights are self-executing and must be respected and refer to matters that are capable of immediate enforcement, such as the right to freedom of expression or the right to due process.<sup>100</sup> In contrast, principles may be implemented by the European Union or by Member States when implementing EU law and refer to economic, social, and cultural rights such as the right to health care and the right to work.<sup>101</sup>

Some Member States continued to be concerned that the Charter of Rights would unduly enlarge the power of the European Union. In order to counter the reservations of several states, the Charter specifically states that it does not enlarge in any way the powers of the Union. Article 51 of the Charter provides:

1. 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.
2. 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.<sup>102</sup>

Nevertheless, several states remain skeptical. The Czech Republic feared that inclusion of the Charter would result in the return of certain lands to Germany and delayed its adoption of the Treaty of Lisbon until the matter could be resolved. To meet the objections of the Czech Republic, Poland, and the United

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“principles”); *id.* arts. 6, 9, 14–15, 17, 18, at 393–95 (providing examples of articles in the Charter of Rights that are “rights”).

100. *See id.* arts. 51–52, at 21.

101. *See* Elizabeth F. Deftis, *Current Development in the European Union: The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT’L & COMP. L. 413, 418 (2010) (“One could characterize the rights enshrined in the Charter as follows: civil and political rights . . . social, economic, and cultural rights...and finally rights specifically reserved for citizens of the E.U.”).

102. Charter of Rights, *supra* note 19, art. 51, 2010 O.J. C 83, at 402.

Kingdom, these states were permitted to opt out from provisions of the Treaty of Lisbon relating to the Charter.<sup>103</sup>

The rights in the Charter are organized in six chapters: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. They also could be designated as civil and political rights, largely similar to those contained in the Convention and the International Covenant on Civil and Political Rights; social, economic, and cultural rights, largely similar to those contained in the European Social Charter of 1960, the Revised European Social Charter of 1996, and the International Covenant on Economic, Social and Cultural Rights; and finally rights specifically reserved for EU citizens.<sup>104</sup>

The sources for each of the rights or principles set out in the Charter of Rights are contained in the "explanations" that were prepared under the authority of the praesidium of the Convention.<sup>105</sup> Most frequently cited as sources in the explanations for rights enumerated in the Charter are the Convention and the European Social Charter, as well as the EU treaties. International treaties relating to the status of refugees, such as the Geneva Convention, are cited and decisions of the ECJ as well as constitutional traditions of Member States are referenced.<sup>106</sup>

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103. See Treaty of Lisbon, *supra* note 18, Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom art. 2, 2007 O.J. C 306, at 157; Brussels European Council, Conclusions of the Presidency, 15265/1/09 REV 1, 2, 14 (Dec. 2009), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/cc/110889.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cc/110889.pdf).

104. See generally Charter of Rights, *supra* note 19, 2010 O.J. C 83.

105. See Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. C 303/17. The explanations do not have the status of law but are referred to in Article 6(1) of the Treaty on European Union post-Lisbon and in Article 52(7) of the Charter itself as a source to which "due regard" should be paid by Union and national courts in interpreting the Charter. See TEU post-Lisbon, *supra* note 2, art. 6(1), 2010 O.J. C 83, at 19; Charter of Rights, *supra* note 19, art. 52(7), 2010 O.J. C 83, at 403.

106. See, e.g., Explanations Relating to the Charter of Fundamental Rights, *supra* note 105, at 21, ¶ 1. For instance, the explanation on Article 11 discusses the freedom of expression and information. Article 11 corresponds to Article 10 of the European Convention on Human Rights. *Id.* at 21, ¶ 1. Explanation on Article 18 discusses the right to asylum. See *id.* at 24 (stating that "[t]he text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees").

Although the Charter has been characterized as merely crystallizing and clarifying the catalogue of rights developed in the Court's case law, it does contain numerous innovations. For example, there are protections for academic freedom, prohibition on eugenics practices, and a right to good administration.<sup>107</sup> Unlike the Convention, the right to marry is couched in gender neutral language.<sup>108</sup>

The equality and nondiscrimination guarantees in the Charter of Rights are more expansive than the equality guarantees in the Convention. The Convention requires equality in the application of rights guaranteed in the Convention itself. The basic equality clause in the Charter is not as restrictive and states simply: "Everyone is equal before the law."<sup>109</sup> Article 21 of the Charter provides:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.<sup>110</sup>

These are expansive and in some instances novel guarantees that will require elaboration by the ECJ as well as national courts when applying the Charter of Rights.

### *CONCLUSION*

There is much uncertainty ahead with respect to the direction that the continued advancement of human rights within the European Union will take. Although many issues remain to be clarified, the Treaty of Lisbon continues the process begun with the Maastricht Treaty of integrating human

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107. See Charter of Rights, *supra* note 19, arts. 3, 13, 41, 2010 O.J. C 83, at 392, 394, 399–400.

108. See *id.* art. 9, at 10.

109. *Id.* art. 20, at 13.

110. *Id.* art. 21, at 13.



rights, through treaty, into the Aquis of the European Union. For the first time there exists a “Bill of Rights” that is treaty-based and which can be referred to as authoritative when challenging actions of Member States implementing EU law as well as actions of the European Union itself and its institutions. Additionally, the oversight role of the ECtHR, particularly as it pertains to the institution of the European Union, will certainly be carefully calibrated. With the broad and in some respects open-ended guarantees in the Charter of Rights, and the expanded substantive jurisdiction of the ECJ, the role of the ECJ will be enhanced.

What is clear is that in the decades ahead, many challenges facing the European Union, its Member States, as well as the Strasbourg system, must be resolved through negotiation and cooperation. Additional treaty reform in the area of human rights is unlikely in the near future.