

Policy Department C
Citizens' Rights and Constitutional Affairs



**PROMOTING AND PROTECTING FUNDAMENTAL
RIGHTS IN THE EUROPEAN UNION:**

**The relations between the European Convention of Human Rights,
the European Charter and the EU member states constitutions**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS



PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
PARLEMENT EUROPÉEN PARLAMENTO EUROPEO EIROPAS PARLAMENTS
EUROPOS PARLAMENTAS EURÓPAI PARLAMENT IL-PARLAMENT EWROPEW EUROPEES PARLEMENT
PARLAMENT EUROPEJSKI PARLAMENTO EUROPEU EURÓPSKY PARLAMENT
EVROPSKI PARLAMENT EUROOPAN PARLAMENTTI EUROPAPARLAMENTET

**Directorate-General Internal Policies
Policy Department C
Citizens Rights and Constitutional Affairs**

PROMOTING AND PROTECTING FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION:

The relations between the European Convention of Human Rights, the European Charter and the EU member states constitutions

BRIEFING PAPER

Résumé:

This briefing note examines the consequences which result from the fact that the same rights and freedoms, sometimes with identical or almost identical formulations, are guaranteed in the European Convention on Human Rights, in the EU Charter of Fundamental Rights, and in national constitutions of the EU Member States. These rights and freedoms, in addition, are considered to belong to the general principles of law which the European Court of Justice ensures respect for in the field of application of EU Law, in accordance with Article 6(2) of the EU Treaty. The briefing note examines the problems which, according to certain commentators, such coexistence may create. Two sets of problems are considered. One set of problems relate to the integrity of the EU legal order. This includes the question whether the 'level of protection' clause (Article 53 of the EU Charter of Fundamental Rights) results in a threat to the primacy of EU law – a question which will be examined taking into account the position of national courts in applying EU law in circumstances where this may result in a violation of a fundamental right recognized in the national constitution –; and whether the autonomy of the EU legal order might be undermined by the obligation to refer to the European Convention on Human Rights in the interpretation of the corresponding clauses of the EU Charter of Fundamental Rights (Article 52(3) of the Charter). A second set of problems relates to the coexistence of norms emanating from the Council of Europe and norms adopted within the European Union, which some allege may create the risk of 'double standards' (or of a 'two-speeds Europe' in the field of human rights). The note shows that these fears, expressed both in legal doctrine and in institutional settings, are ill-founded, and that a sound understanding of both the interpretation of the EU Charter of Fundamental Rights and its scope of application should reassure those who entertain such fears.

PE 393.251

This note was requested by The European Parliament's committee on Civil Liberties, Justice and Home Affairs.

This paper is published in the following languages: EN, FR.

Authors: **Professor Olivier de Schutter, University of Louvain**

Manuscript completed in September 2007

Copies can be obtained through:

M. Jean-Louis Antoine-Grégoire

Tel: +32 2 2842753

Fax: +32 2 2832365

E-mail: jean-louis.antoine@europarl.europa.eu

Informations on DG Ipol publications:

<http://www.ipolnet.ep.parl.union.eu/ipolnet/cms>

Brussels, European Parliament

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

1. THE HISTORICAL BACKGROUND: THE SOURCES OF THE INCORPORATION OF HUMAN RIGHTS IN THE EU LEGAL ORDER

In order to describe the relations between the European Convention on Human Rights,¹ the EU Charter of Fundamental Rights,² and the fundamental rights recognized in the EU member States' constitutions, it may be useful to recall the historical background from which the EU Charter of Fundamental Rights emerged, and the choice made by the drafters of the Charter about its relationships to these two other sources of fundamental rights.

Initially, the jurisprudence of the Court of Justice of the European Communities (European Court of Justice) including fundamental rights among the general principles of European Community which it should ensure respect for,³ was developed as a means to reassure the national courts of the EU Member States that the supremacy of European Community law would not oblige these national courts to set aside guarantees set out in the national constitutions. Specifically, following a first series of cases where the European Court of Justice refused to accept that the Community was bound to respect the fundamental rights guaranteed by the constitutions of the Member States,⁴ but made it clear that the national jurisdictions of the Member States should accept the supremacy of EC Law,⁵ the German federal Constitutional Court (*Bundesverfassungsgericht*) and the Italian Constitutional Court (*Corte costituzionale*) reacted by stating that they would not accept this supremacy where this would oblige them to set aside the provisions relating to fundamental rights in their respective national constitutions, in situations where the implementation of EC law would conflict with those guarantees.⁶ The resistance it faced led the European Court of Justice to accept that 'fundamental human rights' are 'enshrined in the general principles of Community law and protected by the Court',⁷ and that it would henceforth identify those fundamental rights by referring to the common constitutional traditions of the Member States, although 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'.⁸

This dependency of the case-law of the European Court of Justice in the field of fundamental rights on the protection afforded to these rights in the national constitutions of the EU Member States has remained a significant factor to this day. Indeed, the German federal Constitutional Court (*Bundesverfassungsgericht*) insisted that, despite the 1969-1970 judgments of the European Court of Justice in the cases of *Stauder* and *Internationale Handelsgesellschaft*, it did not consider that it was bound to accept unconditionally the supremacy of EC law, as long as the European Community did not possess a catalogue of rights offering the same legal certainty as the German Constitution (*Grundgesetz*) ('Solange' decision).⁹ Later, following the confirmation of the case-law of the European Court of Justice

¹ E.C.T.S., n°5, signed in Rome on 4 November 1950.

² The EU Charter of Fundamental Rights (OJ C 364 of 18.12.2000, p. 1) was proclaimed jointly by the Council of the European Union, the European Commission, and the European Parliament, at the Nice Summit of December 2000.

³ On the basis of Article 220 EC (ex-Article 164 of the EC Treaty).

⁴ Case 1/58, *Stork v. High Authority* [1959] ECR 17 at 25-26; Joined Cases 36, 37, 38 and 40/59, *Geitling v. High Authority* [1960] ECR 423 at 438-9; Case 40/64, *Sgarlata v. Commission* [1965] ECR ECR 215 at 227.

⁵ Case 6/64, *Costa v. Enel* [1964] ECR 585.

⁶ On the origins of this debate, see Cl.-D. Ehlermann, "Primauté du droit communautaire mise en cause par la Cour constitutionnelle fédérale allemande", *Revue du marché commun*, 1975, p. 10; J. Darras et O. Pirotte, "La Cour constitutionnelle fédérale allemande a-t-elle mis en danger la primauté du droit communautaire?", *Revue trimestrielle de droit européen*, 1976, p. 415; G. Bebr, "A Critical Review of Recent Case Law of National Courts", *C.M.L. Rev.*, 1974, p. 408.

⁷ Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419.

⁸ Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125.

⁹ BVerfG, judgment of 29 May 1974, [1974] 2 CMLR 551 ('Solange' decision) (stating that the integration process of the Community had not progressed so far that Community law also contained a codified catalogue of

and the political support it received from the then 9 EC Member States,¹⁰ the German federal Constitutional Court somewhat relaxed its approach, agreeing not to control the compatibility with fundamental rights of EC law it was asked to implement, as long as the level of protection of fundamental rights within the European Community would remain satisfactory ('Solange II' decision).¹¹ Other supreme courts in the EU Member States have adopted the same attitude.¹²

In a judgment of 7 June 2000, the German federal Constitutional Court finally took the view that

constitutional complaints and submissions by courts [to the Constitutional Court] are [...] inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the required standard of fundamental rights after the "Solange II" decision [of 22 October 1986]. Therefore, the grounds for a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case.¹³

In other terms, while the German federal Constitutional Court retains the right to exercise jurisdiction in order to ensure that the implementation of EC law will not lead to limit fundamental rights substantively below what would be allowed under the German Basic Law, it nevertheless agrees that, in principle, the European Court of Justice guarantees these rights at an adequate level of protection, justifying that a presumption of compatibility be established in favor of EC law: it is therefore up to the applicant, or to the court referring a case to the Constitutional Court, to bring forward elements justifying that this presumption will be reversed.

This historical background explains why, during the German presidency of the first semester of 1999, the idea was pushed forward of the European Union preparing a Charter of Fundamental Rights codifying and making visible to the citizen the *acquis* of the Union in this field. Although other factors played a role in creating a political consensus on this objective, one of the reasons why the Green party, then a member of the German governmental coalition, pushed this idea forward, was in reaction to the doubts expressed by the German federal Constitutional Court about the solidity and irreversibility of this *acquis*, and in order to provide European integration with precisely this important building block the absence of

fundamental rights decided on by a Parliament and of settled validity, which could be considered adequate in comparison with the catalogue of fundamental rights contained in the German Basic Law (*Grundgesetz*)).

¹⁰ Joint Declaration of the Council, of the European Parliament and of the Commission on human rights, OJ 1977 No. C 103, p. 1.

¹¹ BVerfG, judgment of 22 October 1986, 2 BvR 197/83, 73 BVerfGE 339 [1987] 3 CMLR 225 ('Solange II' judgment). This position was confirmed in the 'Maastricht' judgment delivered on 12 October 1993, 2 BvR 2134/92 and 2159/92, 89 BVerfGE [1993] 1 CMLR 57. In this latter judgment, the Federal Constitutional Court noted that the effective protection of fundamental rights for the residents of Germany should also be secured against the sovereign powers of the Communities by means substantially similar to the protection of fundamental rights required unconditionally by the Basic Law. It added that the Court of Justice of the European Communities is competent for the protection of the fundamental rights of the citizens of the Federal Republic of Germany against acts done by the national (German) public authority on account of secondary Community law, i.e., in the implementation of Community law, and that the intervention of the Federal Constitutional Court would therefore only be required should the Court of Justice of the European Communities depart from the standard of fundamental rights stated by the 'Solange II' decision of 1986.

¹² This is the case, in particular, for the Danish Supreme Court, see *Hanne Norup Carlsen and others v. Prime Minister Poul Nyrup Rasmussen* [1999] 3 CMLR 854.

¹³ BVerfG, 2 BvL 1/97 (judgment of 6 June 2000), available on http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607_2bvl000197en.html (last consulted September 9th, 2007).

which the Constitutional Court had deplored in its first ‘Solange’ judgment of 1974, and which surfaced again in the 1986 and 1993 decisions it delivered on this issue. Therefore, the adoption of the EU Charter of Fundamental Rights was also motivated by the need to strengthen the legitimacy of further steps towards European integration, and to justify further integration in the eyes of national constitutional or supreme courts.

2. THE POSITION OF THE EUROPEAN COURT OF JUSTICE : ENSURING A HIGH LEVEL OF PROTECTION OF FUNDAMENTAL RIGHTS, TAKING INTO ACCOUNT THE DEVELOPING CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES

This historical background which has been recalled also explains why the European Court of Justice has generally sought to protect fundamental rights at a very high level, in practice aligning itself on the most protective constitutional traditions of the EU Member States. Indeed, in developing its case-law in this area, not only does the Court rely on the European Convention on Human Rights and on its interpretation by the European Court of Human Rights, as well as on other international human rights instruments to which the EU member States are parties or in which they have cooperated – which may provide guidelines for the identification of fundamental rights to be included among the general principles of Union law –; it also builds on the common constitutional traditions of the EU Member States. This, of course, is expressed in Article 6(2) of the EU Treaty:

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.

But the formulation of Article 6(2) of the EU Treaty is in fact overly restrictive. The case-law of the European Court of Justice clearly shows that it is willing to recognize as ‘fundamental rights’, among the general principles of Union law, certain guarantees which are not necessarily recognized by *all* the EU Member States, provided that they may be defensibly be presented as corresponding to shared values. While this already is clear from cases in which the ECJ accepted the very generous reading made of the requirements of freedom of expression by the Dutch authorities (a reading which, in the view of the Dutch authorities, justified that certain restrictions be made to the freedom to provide audio-visual services, for the sake of pluralism),¹⁴ more recent cases such as *Schmidberger*¹⁵ and *Omega Spielhallen*¹⁶ are even more illustrative in this respect. This latter case is particularly remarkable, since, while it does not note that the requirement of human dignity is one common to all the EU Member States,¹⁷ the Court states that the German authorities may justify a restriction to the freedom to provide services by referring to the understanding of the notion of ‘human dignity’ as protected under Article 1(1) of the German Basic Law (*Grundgesetz*). The Court notes in this respect that it is ‘not indispensable [...] for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected’.¹⁸ It was clearly impressed by the fact that ‘according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in

¹⁴ Case 353/89, *Commission v Netherlands* [1991] ECR I-4089, para 30; Case 288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v Commissariaat voor de Media* [1991] ECR I-4007, para 23; Case C-148/91, *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-513, paras 9 and 10.

¹⁵ Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659.

¹⁶ Case C-36/02, *Omega Spielhallen*, judgment of 14 October 2004.

¹⁷ See Article 1 of the EU Charter of Fundamental Rights.

¹⁸ At para. 37.

the territory of the Federal Republic of Germany'.¹⁹ If the Court had imposed the prioritization of the fundamental economic freedom to provide services over the interpretation given in German constitutional law to the notion of 'human dignity', it would have been accused of lowering the level of protection of fundamental rights in Germany, and this is an accusation it obviously wanted to avoid.

3. THE RELATIONSHIP OF THE EU CHARTER OF FUNDAMENTAL RIGHTS TO THE FUNDAMENTAL RIGHTS CATALOGUES INCLUDED IN THE EU MEMBER STATES' NATIONAL CONSTITUTIONS

The historical background recalled above matters in the understanding of the EU Charter of Fundamental Rights itself, and of its position within the broader framework of the protection of fundamental rights in the legal order of the European Union. Two elements stand out in this respect. It is remarkable, first of all, that when the incorporation of the EU Charter of Fundamental Rights in the Treaty establishing a Constitution for Europe was discussed (first during the European Convention (February 2002-July 2003), then during the Intergovernmental Conference of 2003-2004), it was agreed that such incorporation should not prohibit the European Court of Justice from further developing its case-law in the area of fundamental rights, in particular in order to take into account the constitutional traditions common to the Member States: by replicating the wording currently contained in Article 6(2) of the EU Treaty, Article 9(3) of the 2004 Treaty establishing a Constitution for Europe indicated that the Court of Justice must be able to carry on developing the fundamental rights by elaborating the general legal principles which ensures the observance of, without being prevented from doing so by certain rights in the Charter²⁰. This is consistent with the position of the drafters of the EU Charter of Fundamental Rights themselves, who also avoided to give priority at all cost to the concern for legal certainty over that of leaving scope for the fundamental rights that are recognized within the Union to evolve. Article 53 of the Charter provides that

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

One of the reasons why this provision has been included in the Charter is in order to ensure that the adoption of the Charter, especially after its incorporation in the treaties, would not 'freeze' the development of fundamental rights in the legal order of the European Union, in particular through the case-law of the European Court of Justice. It was considered that the Court should be allowed to continue to align the fundamental rights recognized within the general principles of Union law with those of the evolving constitutional traditions of the EU Member States. For the reasons explained above (section 2, above), in ensuring such an evolution, the Court will generally opt for the most favourable interpretation of those traditions, in order to avoid the accusation of imposing the supremacy of Union law at the expense of the level of protection of fundamental rights achieved within the national legal orders of the Member States.

¹⁹ At para. 39.

²⁰ Under Article 9(3) of the Treaty establishing a Constitution for Europe : 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. The Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (Draft Reform Treaty) (CIG 1/07, 23 July 2007), proposes to include an identically worded provision in the amended Article 6 of the EU Treaty, at para. 3 of that article.

It is to be welcomed that Article 53 of the EU Charter of Fundamental Rights, as well as the maintenance of Article 6(2) of the EU Treaty in the event of an incorporation of the Charter in the European treaties,²¹ will allow the European Court of Justice to continue to develop fundamental rights in its case-law, thus reassuring the national constitutional courts which might otherwise be suspicious about the impact on the protection of human rights of the expansion of Union law. However, in another respect, the formulation of Article 53 of the EU Charter of Fundamental Rights is unfortunate. Some authors have been tempted to read it literally, and have seen it as introducing an exception to the principle of the primacy of Union law,²² since it asserts that the Charter does not challenge the protection of human rights as guaranteed by ‘the Member States’ constitutions’. No interpretation could be further from the truth, however.²³ This provision does not imply that the Union is obliged to respect the fundamental rights as they are defined by the constitutions of the Member States: it is only in their ‘respective fields of application’ that the national constitutions must be observed, that is to say, with respect to acts of Member States that are not governed by Union law. The important, but limited, purpose of Article 53 of the Charter, is to make clear that the Charter should not be invoked as a pretext to limit the scope of the human rights obligations the EU Member States might be imposed either under Union law itself (i.e., where fundamental rights are included among the general principles of Union law beyond the provisions of the Charter, as a result of the case-law of the European Court of Justice), under international human rights instruments they have ratified, or under their respective national constitutions. It is quite common to include such a ‘safeguard clause’ in human rights instruments: the drafters of the EU Charter of Fundamental Rights simply followed in this respect the examples provided, *inter alia*, by Article 53 of the European Convention on Human Rights,²⁴ or by Article 2(5) of the International Covenant on Civil and Political Rights.²⁵

Thus, a clear solution emerges from Article 53 of the Charter, read in combination with the principle of primacy of Union law above all national rules (including constitutional norms), and taking into account the reaffirmation, even after a consensus was reached about incorporating the Charter in the European treaties, of the need for the European Court of Justice to protect fundamental rights included among the general principles of Union law – the content of which is in permanent evolution, under the influence of the common constitutional traditions of the Member States –. The relationship between national constitutions and the EU Charter of Fundamental Rights may be characterized as follows: although Union law does not have to respect the provisions of each national constitution, the constitutional traditions of the Member States may constitute a source of inspiration for the Court of Justice in its development of fundamental rights, and the Member States cannot take the fact that the rights recognized in the Charter offer a lower level of protection as a pretext for brushing aside guarantees offered by their national Constitution, there where respect for those guarantees is compatible with Union law. This solution is both legally sound and politically opportune. Because of the flexibility it allows the European Court of Justice, it manages to reconcile the supremacy of Union law with the need, in order to justify such

²¹ See the preceding footnote.

²² Article I-6 of the Treaty establishing a Constitution for Europe intended to codify this principle in the following terms : ‘The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States’. Such a provision would only have served to confirm what, in any event, is well-established as one of the foundations of the European Community legal order (see Case 6/64, *Costa v. Enel*, cited above), and which in any case follows from the principle of *pacta sunt servanda* and from the commitments made by the EU Member States upon acceding to the EC/EU.

²³ On the ambiguities of the wording of Article 53 of the Charter, see Jonas Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, Jean Monnet Paper, available on <http://www.jeanmonnetprogram.org/papers/01/010401.html> (last visited on September 8th, 2007).

²⁴ According to Article 53 of the European Convention on Human Rights : ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party’.

²⁵ According to Article 5(2) of the International Covenant on Civil and Political Rights: ‘There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent’.

supremacy and to ensure that it will be seen as legitimate by the national courts which are to recognize it, to avoid situations where Union law would conflict openly with provisions of constitutional law guaranteeing fundamental rights.

4. THE RELATIONSHIP OF UNION LAW TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE PRINCIPLE OF THE AUTONOMY OF THE EU LEGAL ORDER

The relationship of Union law to the European Convention on Human Rights is of a different nature. It is also much easier to describe.²⁶ Since 1989, the European Court of Justice recognizes that, in the elaboration of the general principles of Union law, the ECHR has a 'special significance'.²⁷ This means, first, that the European Court of Justice recognizes that the substantive provisions of the ECHR are de facto binding within the EU legal order: although neither the European Community nor the European Union are formally parties to the ECHR, the European Court of Justice applies the ECHR as if this were already the case, and it has in fact incorporated the ECHR within the EU legal order. Second, the special significance recognized to the ECHR refers to the status accorded to the case-law of the European Court of Human Rights : to the fullest extent possible – i.e., where there exists an interpretation of the ECHR available in the case-law of the European Court of Human Rights –, the European Court of Justice has aligned itself with that interpretation, which it considers as authoritative.²⁸ Thus, as noted by the Council of Europe's Secretariat on the Proposal for a EU Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 'ECJ rulings on questions of fundamental rights have so far followed the ECHR and the Strasbourg Court's case-law in exemplary fashion'.²⁹ This practice is codified under Article 52(3) of the EU Charter of Fundamental Rights :

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.

In sum, as noted by Prime Minister Juncker in his 2006 report on the relationships between the Council of Europe and the European Union, 'When questions relating to the rights and freedoms enshrined in the ECHR are raised before the [ECJ], the latter treats the ECHR as forming a genuine part of the EU's legal system'.³⁰ This situation it to be welcomed, and it also puts into perspective the proposal for the accession of the Union to the European Convention on Human Rights: while, for a number of reasons, such accession is both feasible and highly desirable, it will not bring about the fundamental changes some Member States seemed to fear until a few years ago.

In particular, it should be emphasized that neither the current practice of the European Court of Justice, which is to refer systematically to the case-law of the European Court of Human Rights when applying the European Convention on Human Rights, nor the accession of the

²⁶ See, for a further elaboration on this, O. De Schutter, 'L'influence de la Cour européenne des droits de l'homme sur la Cour de justice des Communautés européennes', in G. Cohen-Jonathan & J.-Fr. Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant-Nemesis, 2005, pp. 189-242.

²⁷ Joined Cases 46/87 and 227/88, *Hoechst AG* [1989] ECR I-2859 (para. 13) (judgment of 21 September 1989); and Case 260/89, *Elliniki Radiophonia Tilleorassi (ERT)*, [1991] ECR I-2925 (para. 41) (judgment of 18 June 1991).

²⁸ For example, Case C-249/96, *Grant* [1998] ECR I-621; Case C-185/95, *Baustahlgewebe* [1998] ECR I-8417; *Connolly*, Case C-274/99 [2001] ECR I-1611, and *Karner*, Case C-71/02, judgment of 25 March 2004.

²⁹ 13759/06 DROIPEN 62, 10.10.2006, §14.

³⁰ [Council of Europe – European Union: "A sole ambition for the European continent"](#), Report by Jean-Claude Juncker, 11 April 2006, at p. 4.

Union to the ECHR, would threaten the principle of ‘autonomy’ of the legal order of the Union. While it has sometimes been misunderstood, this principle does *not* mean that there are limits to which form of external supervision the EU may submit to. Rather, this principle is derived from the rule according to which the European Court of Justice ensures observance of the law in the interpretation and application of Union law³¹ as well as from the rule according to which the Member States undertake not to submit a disagreement on the interpretation or application of the EU Treaties to any other mode of settlement than those provided for by the EU Treaties³². The European Court of Justice saw in those provisions the expression of a general principle, according to which the Court itself must remain the ultimate interpreter of the law of the Union, and more particularly the rules in the EU Treaties establishing the division of competences between the Union and its Member States. The principle of autonomy of the Union’s legal order consequently rules out that the Court of Justice can be bound by the interpretation which another court of law may give of Union law. Situated according to Opinion 1/91 of 14 December 1991 ‘at the foundations of the Community’, this principle thus requires that questions of interpretation and application of Union law cannot be settled according to procedures outside the European Union, but only according to the rules of settlement which the Union itself has instituted³³. Nevertheless, this principle does not exclude all forms of international commitment of the European Union that are placed under the control of an international court outside the Community’s legal order.³⁴

After accession, the European Convention on Human Rights will be part of EU law, and, both as a result of this and because this is prescribed by Article 52(3) of the Charter, the European Court of Justice will apply the Convention taking into account the case-law of the European Court of Human Rights.³⁵ This corresponds to what is already its current practice. No supplementary provision, in the rules of procedure of the Union jurisdictions or elsewhere, are required for this to continue.

5. THE COEXISTENCE OF THE EU CHARTER OF FUNDAMENTAL RIGHTS WITH OTHER CATALOGUES OF RIGHTS AND THE RELATIONSHIP BETWEEN THE EUROPEAN UNION AND THE COUNCIL OF EUROPE

A final set of problems having their source in the coexistence of catalogues of human rights within the European Union, the Council of Europe, and the national constitutions of the member States, concerns the alleged risk of ‘double standards’, or of a ‘two-speeds Europe’ in the field of human rights. There are two dimensions to this argument.

On the one hand, there is the fear that the European Union is competing with the Council of Europe in the setting of standards for the European continent. In this respect, the Union would be too ambitious: by seeking to impose human rights norms on the EU Member States at least

³¹ Article 220 EC (former article 164 of the EC Treaty); also intended to be reproduced in the Treaty establishing a Constitution for Europe (Article I-29(1), par. 1).

³² Article 292 EC (former article 219 of the EC Treaty); also intended to be reproduced in the Treaty establishing a Constitution for Europe (Article III-375(2)).

³³ See Opinion 1/91 of 14 December 1991, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079 (“First EEA opinion”); Opinion 1/92 of 10 April 1992, [1992] ECR I-2821 (“Second EEA opinion”).

³⁴ Opinion 1/91, par. 40 (“The Community’s competence in the area of international relations and its authority to enter into international agreements necessarily entails the possibility of submitting to the decisions of a court of law that has been set up or designated by virtue of such agreements for the interpretation and application of their provisions”).

³⁵ According to this provision, “Insofar 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”. The reference to the ECHR for the interpretation of the corresponding clauses of the EU Charter of Fundamental Rights also should be read as referring to the case-law of the European Court of Human Rights.

in certain fields of activities and by establishing certain control mechanisms, both judicial and non-judicial in nature, it would be transforming itself into a 'human rights organization',³⁶ and this would entail a risk of marginalization of the Council of Europe. The fear, here, is not that the European Union would threaten human rights as protected either under national constitutions or under the Council of Europe instruments, including in particular under the European Convention of Human Rights. On the contrary, the fear is that – in particular by the adoption of the Charter of Fundamental Rights –, the Union would be moving ahead in the protection of human rights on the European continent, thus marginalizing the standards developed by the Council of Europe and leading to a 'two-speeds Europe', with the European Union deciding to define its own human rights standards without contenting itself with referring to the instruments adopted in the framework of the Council of Europe.³⁷ The successive enlargements of the Union, now to 27 Member States, have clearly fueled this fear, since this has led to a situation in which the Member States of the European Union form a majority within the 47-members wide Council of Europe. As a result, from standard-setter, the Council of Europe risks becoming a standard-receiver: where the Union has taken action, especially legislative action – in the field of trafficking of human beings, for instance, or in combating child pornography and sexual exploitation of children –, it is difficult for the Council of Europe not only to ignore those standards – but also, quite simply, not to align itself with them.³⁸ Of course, it is not a specificity of the most recent instruments concluded under the framework of the Council of Europe that they are inspired by instruments adopted within the European Community or the European Union in the same field.³⁹ However, it is clear that the more the European Community or the Union adopt instruments in the field of human rights, the more narrow the margin of appreciation will be in the negotiation of Council of Europe instruments, especially since most of the Council of Europe Member States are now members of the European Union.⁴⁰

³⁶ Armin von Bogdandy, 'The European Union as a human rights organisation? Human Rights and the core of the European Union', 37 *Common Market Law Review* 1312 (2000).

³⁷ See in particular P. Drzemczewski, 'The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights', *Human Rights Law Journal*, vol. 22, n°1-4, 2001, pp. 14-31.

³⁸ For instance, the relevant provisions Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197, opened for signature on 16 May 2005) closely mirror the Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203 of 1.8.2002, p. 1) and Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261 of 6.08.2004, p. 19). The Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198, opened for signature on 16 May 2005) was influenced by the instrument then under preparation within the European Community (Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15) and by the Community instruments already existing in this field (Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991, p. 77, as amended by Directive 2001/97/EC of the European Parliament and of the Council (OJ L 344, 28.12.2001, p. 76)). Both these examples also have in common that the Council of Europe and the European Community have sought to implement the requirements of instruments negotiated in the framework of the United Nations : see, respectively, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ; and the International Convention for the Suppression of the Financing of Terrorism.

³⁹ For instance, the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Dataflow (CETS No. 181, opened for signature on 8 November 2001), was inspired by the chapter relating to the establishment of such supervisory authorities in the field of data protection in Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23.11.1995, p. 31); and a number of provisions both in the 1988 Additional Protocol (CETS No. 128) to the 1961 European Social Charter (CETS No. 35) and in the 1996 Revised European Social Charter (CETS No. 163) were inspired by provisions from European Community directives adopted in the field of social rights.

⁴⁰ Currently, a new instrument is being negotiated within the Council of Europe on combating the sexual exploitation and abuse of children. Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004, p. 44) figures prominently among the references used in the elaboration of this instrument.

On the other hand however, the European Union has sometimes been accused of being selective in its approach to human rights. This argument surfaced, in particular, in 1999-2000, during the drafting of the EU Charter of Fundamental Rights, since certain instruments, in particular the European Convention on Human Rights, being recognized a privileged position in the Charter, while other instruments of the Council of Europe, such as the European Social Charter and the Framework Convention for the Protection of National Minorities, were comparatively neglected.

These arguments are not only in tension with one another; each of them is also mistaken. The first argument fails once we recognize that the instruments of the Council of Europe impose *minimum* standards on the States parties, and they contain provisions which allow these Parties to go beyond those minimal requirements either by the adoption of internal legislation, or by the conclusion of international agreements affording a more favorable protection to the individual.⁴¹ It is no more a problem for the European Union to ensure a guarantee of fundamental rights under the jurisdiction of its Member States which goes beyond the requirements of the Council of Europe instruments concluded by those States, than it would be for any individual State to go beyond those requirements in its national constitutional or legislative framework. Indeed, when the European Community adopted directives on the basis of Article 13 EC,⁴² or adopted Directive 95/46/EC on the basis of Article 95 EC (then Article 100A of the EC Treaty),⁴³ this did not lead to 'dividing lines in Europe' in the field of fundamental rights. Quite to the contrary, it contributed to the progress of the overall protection of human rights and inspired, in turn, developments within the framework of the Council of Europe itself. Nothing in the Council of Europe instruments imposes a prohibition on the EU Member States or on the Union itself to improve further the protection of human rights in their respective spheres of competence.

The second argument may have more validity but, here again, a correct understanding of the role of Union and its relationship to the national rules of the EU Member States should reassure those who fear that by entering the field of human rights, the Union would provide an easy pretext for the Member States to escape their international obligations. As we have seen, Article 53 of the EU Charter of Fundamental Rights (the level of protection clause) seeks to ensure that the Charter will not be invoked as a pretext to limit the scope of the human rights obligations the EU Member States might be imposed, in particular, under international human rights instruments they have ratified. Nor has the European Court of Justice imposed on the EU Member States to denounce certain international commitments they have made in the field of human rights in order to comply with their obligations under Union law, except where these commitments were considered in violation with the development of societal norms relating, for instance, to the requirements of equal treatment between women and men.⁴⁴

⁴¹ See, for example, Article 53 of the European Convention on Human Rights; Article 32 of the 1961 European Social Charter; Article H of the Revised European Social Charter; Article 11 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; Article 22 of the Framework Convention for the Protection of National Minorities; Article 27 of the Convention on Human Rights and Biomedicine.

⁴² 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 of 19.7.2000, p. 22) and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16).

⁴³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995 p. 31.

⁴⁴ On the obligation imposed on the EU Member States to denounce treaties, preexisting their accession to the Union, where such treaties impose obligations incompatible with Union law, see Article 307 EC (for a commentary, P. Manzini, "The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law", *European Journal of International Law*, vol. 12, n° 4, September 2001, p. 781). France denounced Convention (n°89) of the International Labour Organisation concerning Night Work of Women Employed in Industry (1948), since this instrument was found to violate the right to equal treatment between men and women under Directive 76/207/EEC (see Case C-345/89, *Stoekel*, [1991] ECR I-4047; and see also, on the use of Article 307 EC in this context, Case C-158/91, *Lévy* [1993] ECR I-4287). This is however a highly unusual

The Memorandum of Understanding between the Council of Europe and the European Union adopted in May 2007 states that ‘the European Union regards the Council of Europe as the Europe-wide reference source for human rights’ and that in this context, ‘the relevant Council of Europe norms will be cited as a reference in European Union documents. The decisions and conclusions of its monitoring structures will be taken into account by the European Union institutions where relevant’.⁴⁵ While, as already noted by the Juncker report of April 2006, this merely codifies existing practice, it will ensure that the development of human rights within the legal order of the Union will take into account the standards of the Council of Europe, and build on those standards without seeking either to circumvent them or to rewrite them. This however, should not be an obstacle to the Union ensuring the protection of human rights at a higher level than that provided in the standards of the Council of Europe, since these are merely minimum standards which all States are encouraged to develop further.

CONCLUSION

This briefing note has recalled, first, the context in which the European Court of Justice developed its fundamental rights jurisprudence, as a way to alleviate fears of national constitutional courts about the potential impact of the imposition of the supremacy of EC law above all national rules, including bill of rights included in national constitutions. This explains why the Court of Justice has been extremely dynamic in this field. In practice – although it may be reluctant to admit it –, it has aligned itself on the most far-reaching protection offered to fundamental rights offered at national level, at least where fundamental rights are invoked by the Member States in order to derogate from their obligations under Union law. It is desirable that this will be allowed to continue in the future. It is therefore to be welcomed that, as the Charter of Fundamental Rights will be referred to as a binding source of law in the Reform Treaty, the Court of Justice will continue to progressively develop the content of fundamental rights as general principles of Union law, beyond the partial codification made of those rights by the Charter. The ‘level of protection’ clause of the Charter (Article 53) allows for this.

The briefing note also explained why the practice of the European Court of Justice, to base its reading of the fundamental rights protected in the EU legal order on the case-law of the European Court of Human Rights where those rights correspond to rights protected under the European Convention on Human Rights, is desirable and should not be seen as a threat to the autonomy of the EU legal order. Article 52(3) of the Charter of Fundamental Rights transforms this practice into a rule for the Court of Justice.

Finally, the note explained why, contrary to certain fears which have been expressed, the coexistence of standards developed by the Council of Europe and fundamental rights adopted within the European Union, creates neither the risk of a ‘two-speeds Europe’ in the field of human rights (with the Union defining standards for the EU Member States at the risk of marginalizing the Council of Europe standards), nor the risk of ‘double standards’ (with the Union neglecting the Council of Europe standards and seeking to circumvent those standards by adopting its own human rights norms). The Council of Europe standards, including the European Convention on Human Rights, are only minimum standards, and both the Union and the Member States of the Council of Europe should be encouraged to move beyond that minimum. And, while there are a number of standards of the Council of Europe which the Union has not sufficiently taken into consideration hitherto, the EU Member States are not

circumstance. In general, confronted with such a situation where international undertakings of Member States under human rights instruments would make it difficult or impossible for those States to comply with obligations imposed under the EC or EU Treaties, the European Court of Justice would tend to allow the human rights protected under those instruments to justify exceptions to the scope of States’ obligations under Community or Union law. See on this question L. Besselink, “Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union”, *Common Market Law Review*, 1998, p. 629.

⁴⁵ CM(2007)74 10 May 2007, para. 17.

authorized to escape their obligations under Council of Europe instruments because of their membership in the Union; and they have not been required, nor incentivized, to limit the scope of their undertakings under such instruments. The accession of the Union to the European Convention on Human Rights should reassure those entertaining these fears, especially if such accession can be considered in the broader context of the Union systematically referring to the Council of Europe instruments and monitoring mechanisms in the area of human rights.