HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE EUROPEAN UNION

FROM THE PERSPECTIVE OF THE APPLICANT COUNTRIES

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LIST OF ABBREVIATIONS

CFI	Court of First Instance of the European Communities
AG	Advocate General of the Court of Justice of the European Communities
CFSP	Common Foreign and Security Policy
CoE	Council of Europe
CSCE	Conference for Security and Cooperation in Europe
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
Ed(s).	Editor(s)
EEC	European Economic Community
EP	European Parliament
EPC	European Political Cooperation
ESC	European Social Charter
EU	European Union
EUMC	European Monitoring Centre against Racism and Xenophobia
EURATOM	European Atomic Energy Community
ICJ	International Court of Justice
ILO	International Labour Convention
NGO	Non-governmental Organization
OJ	Official Journal (of the European Communities)
OSCE	Organization for Security and Cooperation in Europe
p.	page
para	Paragraph
PeVL	Perustuslakivaliokunnan lausunto (FIN), Opinion of the Constitutional Committee of the Parliament (EN)
PHARE	Program for Aid for Central and Eastern Europe
SEA	Single European Act
SuVL	Suuren Valiokunnan Lausunto (FIN), Statement of the Grand Committee of the Parliament (EN)
TEC	Treaty Establishing the European Community
TEEC	Treaty Establishing the European Economic Community
TEU	Treaty of European Union
UaVM	Ulkoasiain Valiokunnan Mietintö (FIN), Proposal of the Foreign Affairs Committee (EN)
UN	United Nations
v.	versus
VNS	Valtioneuvoston Selonteko (FIN), Report of the Government (EN)
vp.	Valtiopäivät (FIN), Parliamentary session (EN)

1. INTRODUCTION

1.1 Subject, Objectives and Contents of the Study

On the 1st of May 2004 ten new European States[1] joined the European Union (EU), while the possible accession of three other applicant countries[2] was postponed to the year 2007. The criteria, which the applicants have to meet before joining the Union was defined in 1993 by the Copenhagen European Council. As a political precondition the applicant countries were expected to have the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.[3]

The subject of the study being "human rights and fundamental freedoms in the European Union from the perspective of the applicant countries", the study has two main objectives. The first of the two primary objectives is to examine, what was the legal basis behind the political precondition given to the applicant countries of respecting "human rights and fundamental freedoms" as it was posed in Copenhagen? As over ten years have passed since the Copenhagen criterion was posed, it is also essential to find out what this requirement means now, and on what is it currently legally based? In another words, the role of fundamental rights in the enlargement process, both the current one as well as the continuing one is under review. To be able to answer the questions posed, one has to look deeper into the legal order or the Union, which brings us to the second of the two primary objectives. Namely, bearing in mind that the applicants are expected to adopt the entire *acquis communautaire* when joining the Union, the aim is also to examine the position of "human rights and fundamental freedoms" in the legal order of the European Union as well as its contents.

The aim of the study is strictly speaking not to examine the level of human rights or fundamental rights protection given by the applicant countries. Neither is the purpose to examine the ways in which the fundamental rights norms of the EU law are being implemented into the national legal orders of the applicant countries. Rather, as the subject of the study is fundamental rights in the legal order of the EC/EU, the aim is to consider, what is expected from the applicant countries as far as fundamental rights protection as a future member state of the Union is concerned. As a "by-product" of this

[1] Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia
[2] Romania, Bulgaria and Turkey
[3] Conclusions of the Presidency, Cologne European Council 3rd and 4th of June 1999

examination, the situation of the fundamental rights protection in the applicant countries is at some extend observed, especially when assessing the reliability of the monitoring reports of the European Commission, which is done by comparing the results of the reports of the Commission in other documents published by different human rights organizations. Also, a short excursion is made to the level of fundamental rights protection in the current member states of the Union, as is has affect on the credibility of the Union in the eyes of the applicant countries. Finally, the challenges regarding the European Union as regards to the fundamental rights protection are reflected, as the system of fundamental rights protection in the Union is currently undergoing changes, not least through the new Constitutional Treaty of the European Union.

The perspective of the study is that of the applicant countries. Even though, when examining the situation of the fundamental rights protection in the current and in the future member states, some aspects of the legal orders of the applicant countries are discussed, the subject of the study is primarily the legal order of the European Community/European Union and its level of protection of /respect for fundamental rights in trying to define what is expected from the applicant countries.

While trying to accomplish the aims and objectives presented above, after the introduction, I first take a look at the development of the human rights and fundamental rights protection into the European Union in Chapter 2. As the role of the European Court of Justice (ECJ) in the development of the human rights dimension into the Community law is decisive, the early case law is rather thoroughly examined.

On the other hand, since the Treaty of Maastricht, fundamental rights have little by little found their way, to the primary and to the secondary law of the European Union. For this reason, regarding the time after Maastricht, the role of other material, such as the foundation treaties, secondary law as well as relevant political documents, is increased. This “time after Maastricht”, i.e. the current human rights and fundamental freedoms regulation in the European Union is examined in Chapter 3. In the first two sub-chapters the fundamental rights provisions of the primary law and in the secondary law of the European Union are examined, after which the role of human rights in the external relations of the European Union is reflected in Chapter 3.3. When examining human rights in the external relations of the Union, the knowledge of the relevant Treaty provisions or directives is not enough to give a correct picture of the role of human rights in the external relations of the Union. To understand what the treaty provisions

mean, one has to take a look at the development of the role of human rights in the external relations, as well as the current practices. The examination of external relations of the Union is important because, let me quote the words of Professor Weiler, "*internal and external dimensions of human rights policy can never be satisfactorily kept in separate compartments. They are, in fact, two sides of the same coin*".[4] This is true especially in the case of the enlargement. However, also in the review of the role of human rights in external relations is done trying to keep the perspective of the applicant countries in mind. Therefore, many internationally important initiatives on human rights are left outside of this study. The Charter of Fundamental Rights of the European Union is examined in a separate sub-chapter 3.4. Even though it could be reviewed with the other relevant "soft law" instruments, its central status in the core of the constitutional process of the Union requires more thorough review. Before turning to the examination of the level of respect for fundamental rights in the applicant countries, a short excursion is made of what kind of level of respect the Union requires from its current member states, and how the Union monitors this, in Chapter 3.5. In the best case this could give the applicant countries an indirect view also regards to them selves. Instead of doing an extensive evaluation of the human rights situation in the current member states, the attention is drawn to the problems the current member states are facing themselves whilst demanding the respect for fundamental rights from the applicant countries, as this affects to the credibility of the Union.

In Chapter 4 the requirement to have respect for human rights and fundamental freedoms posed to the applicant countries is reflected in the light of the preceding Chapter. After having examined the so-called political criteria, the legal conditions of eligibility for membership are reflected in Chapter 4.2. In the third and fourth sub-chapters the way in which the Union monitors the applicant countries and an assessment of the candidate countries in this regard is presented.

The fifth Chapter is dedicated to the challenges of the European Union in the field of human rights and fundamental freedoms. First the challenges the ECJ faces as regards to its line of reasoning are reflected, after which a closer look is taken to the accession of the Union to the ECHR. The Draft Treaty establishing a Constitution for Europe[5] (hereinafter: Draft Constitutional Treaty or Draft Constitution) is also dealt in

[4] Alston and Weiler 1999, p. 10
[5] CONV 850/03

connection to the challenges the Union faces. This is due to the fact that the Member States of the Union have so far not been able to agree on the exact contents of the future Constitution for Europe. Therefore, not only are the contents of the Constitutional Treaty still subject to changes, but also the entire acceptance of the Constitution remains insecure. The fact that since the recent enlargement of the Union on May 1st, 2004 there are now 25 in many aspects different member states in the European Union that have to agree on the Constitution does obviously not make the signing of the Constitutional Treaty any easier. The last sub-chapter (5.4) reflects the needed institutional arrangements and other desired developments in order for the Union's human rights and fundamental freedoms policy to gain both visibility as well as credibility. Finally, in the sixth chapter the study is concluded by the main remarks made from the preceding chapters.

The importance of the Human Rights and Fundamental Freedoms in the European Union is crowing by the time. Provided that the Member States will one day agree on the contents of the Constitutional Treaty, human rights and fundamental freedoms will become part of the core of the European Union. However, as the realisation of the European Constitution is by no means certain, and as there will in any case still remain much to be done, this study will need to be reviewed as well, which is promising considering additional studies.

1.2 Theoretical Framework, Research Methods and Source Material

Without getting deeper into all aspects of the special nature of the research of EC/EU law, few remarks should be made. The study of EC/EU law differs from the research of the national law at least in three central points; as regards to the validity of the legal norm, to the doctrine of sources of law, and to the tradition of the legal interpretation.[6]

When doing research in the field of Community/Union law, it is essential to notice the special nature of the Community's/Union's legal order. In legal doctrine, EU law is often characterised as an independent legal order. However, even though, for example, any provision of national law has to be disregarded by the national authorities

[6] Timonen 1998, p. 37

concerned when standing in the way of *direct effect*[7] of the Community law, on the other side of the balance sheet the national constitutions are a source of inspiration on which the Court of Justice draws.[8] Therefore, the legal systems of member states and their common legal system of EC law are best described as distinct, but overlapping and partly independent, but interacting systems of law being in reciprocal relation with each other.[9] Be it as it may, when doing research on the EC/EU law, the principle of the *autonomy*[10] of the EC/EU law, as well as to the doctrines of *direct effect* and the *supremacy*[11] of the EC/EU law are essential.

The main legal sources of the EU law are enshrined in the *acquis communautaire (acquis),* that is, the body of common rights and obligations, which bind all the Member States together within the European Union. Besides of the primary law (foremost of the content, principles and political objectives of the three founding Treaties[12] - as consolidated with the subsequent treaties), and of the secondary law, (that is, of the legislation adopted pursuant to the Treaties - regulations, directives and decisions), the *acquis* consists also of the case law of the Court of Justice; statements and resolutions adopted within the Union framework; joint actions, common positions, declarations, conclusions and other acts within the framework of the common foreign and security policy; joint actions, joint positions, conventions signed, resolutions, statements and other acts agreed within the framework of justice and home affairs; and the international Agreements concluded by the Community and those concluded among themselves by the Member States with regard to Union activities.[13] Furthermore, the *common constitutional tradition* (enshrining the constitutions and the member states as well as the international Agreements concluded by them), and the *general principles of law* complement the written sources of EC/EU law. They are in fact very important sources

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[7] Through the doctrine of direct effect (Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1) the ECJ has made the foundation treaties, decisions and secondary legislation (directives and regulations) directly enforceable by individuals in their national courts. (Persaud 1997, p. 352)

[8] Besselink 2001, p. 69

[9] Nieminen 1998, p. 31

[10] According to case 6/64, *Costa v. ENEL* [1964] ECR 585, the EEC (EC/EU) law, by contrast with ordinary international treaties, has created its own legal system *which (...) has became an integral part of the legal systems of the Member States and which their courts are bound to apply*." (Piris 2000, p. 9)

[11] The ECJ affirmed the supremacy or "*precedence of Community law*" in the case of *Costa v. Enel* in 1964 (see supra note 15 above). (Piris 2000, p. 9)

[12] The three founding Treaties are 1) the Treaty of Paris (1951) establishing the European Coal and Steel Community (ECSC), 2) the Treaty of Rome (1957) establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) and 3) the Treaty of Maastricht (1993) on the European Union

[13] Lenaerts and Van Nuffel 1999, p. 274-275

of EU law.[14] Indeed, in the absence of written legal provisions, the European Court of Justice has used the concept of *general principles of law* to include certain rights in the Community law and granted them the status of a primary norm.[15] To this I shall return in greater detail in Chapter 2.2.

In addition to these strictly legally binding sources, there are important *soft law* in the European Union. Even though no general theory on *soft law* in the context of the Union has been created, it has been argued that the *soft law* in the EU would enshrine all those rules of conduct that are strictly speaking legally non-binding, but which are, according to the intention of their drafters, are meant to have legal scope.[16] Despite the non-binding legal nature of the *soft law*, it nevertheless has some legal bearing, at least as support when provisions of EC law were being interpreted.[17] One of the most important *soft law* documents of the Union is the Charter of Fundamental Rights, which is under review in Chapter 3.4. of this thesis.[18]

The central role of the case law of the ECJ as a source of law requires special attention. This is where the research of a national legal order and that of the Union's legal order differ the most. When examining fundamental rights in the Community or the Union, the importance of the case law of the ECJ is further enhanced, as it was the ECJ that included fundamental rights in the Community's legal order in the first place, and which has continued to protect fundamental freedoms in its case law despite the early absence of fundamental rights provisions in the founding Treaties of the European Community. Even though the human- and fundamental rights provisions have since gained support by the primary law provisions, the ECJ continues to play its important role in interpreting the treaty provisions as well as other sources used by it. And, as the examination of the relevant case law will show, the Court can be rather innovative in finding legal support (for example from the International Treaties) for its views on human rights and fundamental freedoms. In the end, the European Court of Justice remains the "ultimate guardian" of the human rights and fundamental rights in the EU, at least as far as the Union remains outside the European Convention on Human Rights (ECHR). Thus, the examination of the case law provides us with a good picture of the Union's legal order and of the position human rights and fundamental freedoms have in

[14] These are reviewed more thoroughly in chapter 2.2 below
[15] Jyränki 2001 (II), p. 37
[16] Joutsamo, Aalto, Kaila and Maunu 1996, p. 117. See also supra notes 371-372 on the same page.
[17] Rosas 1999 (II), p. 211 and Craig and de Búrca 2003, p. 349

it. For these purposes, the examination of the ECJ's case law is rather thorough in this thesis.

As a clear difference to the research of national law, in the EU law the *travaux préparatoires* have traditionally a very limited role. For example, before the European Court of Justice, arguments based on explanatory reports have usually failed. A distinction, however, must be drawn between the *travaux prépatoires* in the primary law and in the secondary law. The Treaty drafts, amendments and minutes of the intergovernmental discussions are generally not publicly available, whereas initial drafts of secondary legislation are published. There have been cases where the Court has referred to "soft law" preparatory sources to secondary legislation such as joint declarations and even minutes of meetings between institutions[19], but it is still exceptional. However, with respect to the Charter and the Draft Constitutional Treaty of the European Union, the role of the *travaux prépatoires* might provide an additional source not to be disregarded completely. This is due to the openness in the process (e.g. the use of a conventional process – see Chapter 3.4.1 for more) in drafting these documents. [20]

In this research, the legal literature is used in interpreting the meaning and the contents of the written and unwritten EC/EU law. Generally said, there is a very large number research published of the EC/EU law. However, as the sphere of the European Union is very wide and can be examined from many different perspectives, to find the relevant legal literature is by no means an easy task. Moreover, and somewhat surprisingly, even though human rights and fundamental freedoms in the European Union are the subject of many studies, there is a very limited number of research done of fundamental rights in the context of the enlargement. And when such research can be found, either the views of the studies have been more particularly defined to extend only a certain area (for example the rights of minorities in the enlargement process), or then the examination has been done from the perspective of the European Union. Indeed, due to these aspects as well as to the wideness of the study[21], and the fact that the importance of fundamental rights in the legal order of the European Union has grown rapidly since

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[18] See also Chapter 2.3 for the most relevant *soft law* before the Treaty of Maastricht

19 Case C-106/96, the United Kingdom v. Commission, [1989] ECR I I-1279

[20] Liisberg 2001, p. 22-23

[21] Indeed, to be able to answer the main question of what is expected from the applicant countries as regards to the fundamental rights protection, the relevant *acquis communautaire* in the field of human

the Treaty of Maastricht[22], the role of the legal literature as a research material in this thesis is relatively large.

In the research of the Community Law and its fundamental rights dimension, *Tuori*'s theory, called *critical legal positivism* provides an excellent basis. This theory has several aspects. First of all, *Tuori* reminds that even though the concepts and theoretical frameworks developed in a nation-state context are a good starting-point for an examination of the politico-legal peculiarities of the EU, this examination should proceed through a *critical* application and, at the same time, modification of the inherited conceptual tools. *Tuori* proposes that modern legal systems be analysed with the help of two basic distinctions. Firstly, modern law comprises two aspects: it should be treated both as a normative phenomenon, that is, as a legal order, and as consisting of specific social practices: legal practices such as lawmaking, adjudication and legal scholarship, which continuously contribute to the production and reproduction of the law as a legal order and which also proffer "ontological support" for the latter.[23] Indeed, in critical legal positivism the ties of the modern law with to the modern society and modern culture are acknowledged so that the impact of law-external factors, such as politics is taken into consideration.[24]

Secondly, *Tuori* emphasizes that modern law as a legal order, should be examined using the multi-layered view of law as a framework.[25] According to this *multi-layered view of law*, the law as a legal order contains more than just the "surface level of the law", representing individual statutes and other regulations as well as court decisions. In addition to the surface level, a "mature" legal order also includes two "sub-surface" layers; the "legal culture" and the "deep structure of the law".[26] These different levels of the law are then connected through reciprocal relations, such as relations of sedimentation, constitution and limitations; the deeper levels of the law on one hand constitute the possibility for surface-level events and on the other hand impose restrictions on what can become apparent at the surface. The sub-surface cultural and

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rights and fundamental freedoms needs to be examined, which alone would provide enough material for several master's thesis's.

[22] The adoption of the Charter of fundamental rights in 2000 has bolstered this development even more. Only few years after the Charter was proclaimed, the Union is as we speak about to adopt a Constitution, which would bring the human rights and fundamental freedoms to the very core of the European integration.

[23] Tuori 2003, p. 6-7

[24] Tuori 2002, p. xiv

[25] See supra note 7

deep-structural levels are results of sedimentation processes, that is, the formation of the legal culture and the law's deep structure through specific legal practice.[27]

In *Tuori*'s theory, "legal culture" consists of the meta-norms determining the normative doctrine of the sources of law, the standards used in the case of contradictions between norms and in the interpretation, the patterns of argumentation employed in legal decision-making and scholarship, and the general doctrines including legal concepts and general legal principles. According to *Tuori*, whereas at the surface level of the law changes are continuous and of daily nature, at the legal culture level the change is more slow. The "deep structure of the law" in turn represents the *longue durée* of the law. This is where one can detect common features crossing legal cultural differences, such as fundamental human rights principles. As for the stability of the deepest level of the law, while stating that the this level is the most stable of the different layers, *Tuori* on the other hand reminds that contrary to what is presumed by natural-law way of thinking, even the deep structure is subject to changes.[28]

Tuori's theory is especially useful in this thesis for its view of the legal order (especially in the perspective of the enlargement), as well as for its fundamental rights dimension. Starting with the fundamental rights as part of the legal order, *Tuori* agrees with *Habermas* in identifying the normative deeper structure of "mature modern law" in human rights and *Rechtsstaat* principles.[29] As for the relation between human rights and the legal order of the European Union, *Tuori* mentions that the increasing emphasis on human rights principles within EC law[30] can perhaps be interpreted as implying that the formation of an independent legal order is extending to the deep structure, that EU law is gradually acquiring deep structural support.[31] However, on the other hand *Tuori* argues, that the Community law is not yet a "mature legal order" in which the surface level provisions would be supported by a stabilised legal culture or where the categories of law or normative principles would be part of the deep structure of the law. When reaching our view also deeper than just on the surface level, it becomes clear that the

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[26] See supra note 8, p. 147
[27] See supra note 7, p. 7-14
[28] See supra note 8, p. 190-196
[29] Ibid, p. 86, 112
[30] While stating that fundamental human rights principles are a prominent part of the deep structure of the modern law, Tuori also reminds that basic rights can only be juridically in force due to positive law; they have to be specified and given a historically conditioned interpretation through the constitution. Thereby, the function of the deep structure of the law is to comprehend the common core to which positive constitutions give more specific shape. (Tuori 2002, p. 190-196)

layers sustaining the surface level are, at best, in the process of formation, which both questions the independence of EC law and creates unpredictable jacks-in-the-boxes[32] of the EC law. As for the enlargement, *Tuori* argues that the development of the legal orders of the post-socialist Central and Eastern European countries partly confirms that surface level reforms, such as making human rights principles part of the constitution, does not suffice to guarantee their realisation. Reminding that the sedimentation process of these principles into the legal culture and the deeper structure of the law takes time, *Tuori* asks, at what stage can the legal order of an applicant country be regarded as having an acceptable level of respecting human rights?[33]

The research material is analysed mainly using legal dogmatic approach, meaning that the existing legal order and the rules of law are examined through interpretation and systematisation.[34] For the most part the research methods are descriptive. However, also some comparative methods are used, especially in the examination of the level of human rights protection/respect in the current member states and in the applicant countries. The same applies to the limited comparison made between the case law of the European Court of Justice (ECJ) and the ECtHR. Finally, despite the clearly legal approach of the study, one cannot completely avoid the use of some "political" material due to the politico-legal peculiarities of the EU[35]. Especially when trying to answer the question on whether the relevant provisions of the EC/EU law are respected in the reality, one has to go further than just the surface-level provisions. Here I am mostly referring to the various reports of both the institutions of the Union themselves, as well as to the reports of several "Union-external" organisations, such as for example the reports of the Amnesty International or of the European Council Commissioner for Human Rights.

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[31] Tuori 2002, p. 207-209
[32] Tuori uses the term "jack-in-the-box" developed by Wilhelmsson (1997) to describe the way in which EC law functions in national courts in the application of the municipal legal order, continuously causing surprises by popping up in contexts where its appearance in not expected (Tuori 2002, p. 205-209)
[33] See supra note 15, p. 205-209
[34] Aarnio 1978, p. 48-52
[35] The term is used by Kaarlo Tuori (Tuori 2003, p. 6)

1.3 What are human rights and fundamental freedoms?

1.3.1 Terminology of human rights and related concepts

Human rights are a special type of rights. In the most general sense they are understood as rights, which belong to any individual as a consequence of being human.[36] Human rights can also be described as those internationally acknowledged (that is, protected by international treaties) fundamental rights, which are equal to all human beings regardless of their race, sex, colour, language, national origin, age, class or religious or political beliefs.[37] These are the political and social guarantees necessary to protect individuals from the standard threats to human dignity posed by modern society and the market economy.[38] In the national constitutions human rights are usually called "basic rights" or "fundamental rights"[39]. In Finland the term "basic rights" is used of those fundamental rights of the individual, which are protected by the Finnish constitution. [40]

As for the European Community/Union, in addition to implying to the constitutionally protected basic rights, the term "fundamental rights" (*droit fundamental, Grundrecht*) also comprises the rights of fundamental nature protected by the EC/EU law.[41] As the examination of the early case law of the Court of Justice of the European Communities (ECJ) will show, the term "fundamental rights" in fact comprises also the "basic rights" protected by the national constitutions as "unwritten general principles of the EC/EU law" as well as "human rights" protected by the international human rights treaties. The term "human rights and fundamental freedoms" in turn includes both the fundamental (human) rights not listed in the Foundation Treaties, as well as the fundamental (economic) freedoms listed in the Foundation Treaties.[42] In this thesis, for practical reasons the terms are be used interchangeably. However, when attaching external relations of the Union, the term "human rights" is primarily used. The same applies for the situations when human rights and fundamental freedoms are being discussed in a more general sense.

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[36] Piechowiak 2002, p. 3
[37] Fröberg, Ann-Mari 2004, p. 9
[38] Kardos-Kaponyi 2001, p. 137
[39] In colloquial speech, the term "fundamental rights" is commonly used as a synonym to "basic rights", placing emphasize on the fundamental nature of these rights (Karapuu and Jyränki 1999, p. 62)
[40] Karapuu and Jyränki 1999, p. 62-66
[41] Ibid
[42] Liisberg 2001, page 6, supra note 3

1.3.2 Background and contents of fundamental rights

Stating that reflecting the basic values of the society human rights and basic rights are rights, which have been given a greater permanence at different times, implies that the meaning an the content of these rights have varied in the course of time.[43] Whereas in the rationalist natural law thinking of the early modern age, human rights were seen as moral philosophically justified natural-law principles restricting the powers of the sovereign, they have become elements of modern, positive law as a result of long process of positivisation.[44] According to the dominant conception, the superiority of basic rights is based on the fact that the legislator has regarded these rights as important enough to be protected by a constitution not as easily changed as customary law.[45] However, following the thoughts of *Tuori*, human rights principles can also be regarded as essential components of the normative "deeper structure" of the modern law.[46] As such, they influence behind customary law and can be said to form the common constitutional tradition common to the Member States of the European Union, which the European Court of Justice upholds.[47]

The modern concept of human rights is the result of the adoption of the Universal Declaration of Human Rights of the United Nations (1948) and of the International Human Rights Covenants[48] (1966). This international system of human rights set up within the UN framework, has been supplemented by regional instruments. In Europe the main regional instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) adopted in 1950 in the framework of the Council of Europe and the European Social Charter of 1961 guaranteeing economic, social and cultural rights. The ECHR has since been added by three Protocols in 1988, 1991 and 1995. In 1999 the Revised Social Charter came into force and is meant to progressively replace the first Charter. The main difference between these two European human rights instruments is that whereas the implementation of the first is monitored by two organs created for the purpose, the European Court of Human rights

[43] Nieminen 1987, p. 12-13
[44] Tuori 2002, p. 201
[45] Nieminen 1987, p. 13
[46] Tuori 2000, p. 211
[47] Helander 1998, p. 13
[48] The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights are collectively considered "the International Bill of Human Rights" as a set of authoritative international human rights standards.

and the Committee of the Ministers of the Council of Europe, the application of the latter is to be supervised internationally.[49]

Even though human rights are essentially written in international conventions, also international customary law comprises human rights norms.[50] Some of these customary law human rights are regarded to be part of the international peremptory norms, norms of *jus cogens*, which are universally obligatory and of which no derogation is permitted in any circumstances. The existence of such norms was confirmed in a multilateral international instrument with the Vienna Convention on the Law of Treaties in 1969[51].[52] Although the Vienna Convention does not exactly define what norms fall in the scope of *jus cogens*, fundamental rights like the right to life, the right to self-determination, the prohibition of slavery, the prohibition of discrimination and the prohibition of the death penalty are considered to be part of it.[53]

Human rights have during the course of years been categorized in many different ways. The most common way to do this is to divide human rights in three groups. The notion of "three generations of human rights" was put forward by Karel Vasak in 1979, and has been repeated since by many. According to this notion, human rights are divided in (1) civil and political rights representing the first generation, (2) economic, social and cultural rights belonging to the second generation and (3) the so-called solidarity rights being regarded as rights of the third generation.[54] The civil and political rights are often seen as a child of the American and French revolutions, constituting the "traditional core" of human rights, whereas the economic, social and cultural rights are associated with normative and doctrinal developments taking place since the beginning of the 20th century. The third generation of human rights comprises collective rights, such as the right to peace, the right to development, minority rights, the rights of self-determination, the right to food and environmental rights.[55] Despite of being often used, this division into generations of human rights has been widely criticized by many scholars. [56] Being well aware of the problems related to the division not least due to the interrelationship between the different rights, the division is however used in this study when assessing

[49] Kardos-Kaponyi 2001, p. 138
[50] Scheinin 1991, p. 11
[51] Vienna Convention on the Law of Treaties, Vienna 23 May 1969 (entry into force January 27th, 1980)
[52] Hannikainen 1988, Abstract
[53] Hakapää 1995 p. 55-56
[54] Eide and Rosas 1995, p. 16
[55] Rosas and Scheinin 2002, p. 54-55
[56] See for example Asbjørn and Rosas 1995 p. 16 and Rosas and Scheinin 2002, p. 49

the level of respect for human rights and fundamental freedoms in the applicant countries of the European Union. This is due to the fact that the Commission of the European Union has done so in its monitoring of the applicant countries.

1.3.3 Characteristics of human rights

Human rights can be characterised as *universal*, *inalienable* and *fundamental*. The *universality* of human rights refers on to the global applicability of human rights meaning that these rights are common to all people on all continents irrespective of cultural or economic differences. The universal nature of human rights was confirmed in the Vienna Declaration of 1993, which states that "Human rights and fundamental freedoms are the birthright of all human beings" and that "the universal nature of these rights and freedoms is beyond question". The *inalienability* of human rights in turn derives from the inherent dignity of human being and means that nobody can deprive anybody of these rights and nobody can renounce these rights by himself. From this follows that legal norms do not establish fundamental rights and freedoms, they only guarantee them. The third characteristic of human rights, the fact that they are considered as *fundamental*, means that only the most important rights should be called human rights. When these three points are combined, we reach the following solution to the problem of different cultures and common human rights. Human rights protect dissimilarity and culture-specific features, assuming that these features are not a means of violating the human rights of an individual or an attempt to deny some people their human rights.[57]

An important feature of the contemporary conception of human rights is also the recognition of the *indivisibility* and *interdependence* of different rights. This means that globally all human rights must be treated equally and with the same emphasis. In another words, despite the fact that human rights can be historically divided in three groups, none of these groups should be regarded as more fundamental as the others.[58] However, despite the development of the modern concept of human rights and the various international and European human rights treaties adopted, one should not forget that even in the European level, there is no single "European" theory of human rights.[59]

[57] Piechowiak 2002, p. 5-6
[58] Ibid, p. 9
[59] Pernice 2003, p. 5

There are substantial differences both between the scholars and the governments as regards to the conception of human rights. For example, although *universality, indivisibility* and *interdependence* of human rights was affirmed in the Vienna Declaration of 1993, not all constitutions of the current member states of the European Union provide equal protection of civil and political rights on one hand, and of economical, social and cultural rights on the other hand. Whereas the Nordic countries emphasize the *indivisibility* of human rights, i.e. recognize equally the political and civil rights, as well as the economical, social and cultural rights in their constitutions, the United Kingdom for example emphasises the priority of the first generation of human rights and does not regard social rights as fundamental rights at all.[60] Yet, according to the 2003 European Union Annual Report on Human Rights, the Union adheres to the principles of universality, interdependence and indivisibility of all human rights and democratic freedoms. The understanding of this is essential as the development and the prospects of the fundamental rights protection within the European Communities and the Union are examined.

Also, as regards to the applicant countries, one should not forget the communist legal tradition of the past of many of these states, in which social and economic rights, such as the rights to work, housing, healthcare and education, were emphasized. Nor should one disregard the characteristics of the conception of human rights in countries like Turkey with Islamic tradition[61]. Without getting deeper into these characteristics, or taking a stance to the debate between the defendants of *universalism* of human rights and of those who emphasize the impact the culture has on the conception of human rights, the different backgrounds of the applicant countries as regards to the fundamental rights protection can not be disregarded. At the very least this divergence increases the need for clarity in the European Union's affirmation towards human rights and fundamental freedoms.

1.4 General remarks on the enlargement

Founded in 1957 by six European States, Belgium, France, Germany, Italy, Luxembourg and The Netherlands, previously to the recent accession of the ten new

[60] European Parliament: Fundamental Social Rights in Europe, 1999 p. 8
[61] For example Riad Daoudi reminds that in Islam the human being has no rights, as all the rights belong to God. Human rights are thus a reflection of God's rights. A human being can only become free by submitting himself/herself to God. (Nieminen 1988, p. 41)

member states, the Community has accepted new Member States four times in its history. In 1973 Britain, Denmark and Ireland joined the Community, followed by Greece in 1981, and Portugal and Spain in 1986. Finally, in 1995 Austria, Finland and Sweden acceded the newly formed European Union.

The collapse of communism around 1990 resulted in a new wave of Eastern European applicants. In June 1993, the Copenhagen Summit, the European Council declared *"the associated countries of Central and Eastern Europe that so desire shall become members of the Union",* and defined the conditions on which the Applicant Countries would be able to join the European Union. This, so-called "political criteria"[62] consists of three points. First, the countries wishing to join the Union are expected to have the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Secondly, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union is expected. Lastly, the Applicant countries are required to have the ability to take on the obligations of membership including adherence to the aims.[63]

In December 1997, the Luxembourg European Council launched the latest enlargement process by singling out the Czech Republic, Estonia, Hungary, Poland and Slovenia, followed by Latvia, Lithuania, Bulgaria, Slovakia and Romania, Cyprus and Malta[64] in 1999. Also Turkey - an applicant since 1987 but long rejected on human rights grounds - was finally agreed to be a candidate.[65] At present, also Croatia[66] and the former Yogoslav Republic of Macedonia[67] have submitted their membership applications, but have not by the time of writing been given the status of a candidate.[68] Formal negotiations with six of the applicants - Poland, Hungary, the Czech Republic, Slovenia, Estonia and Cyprus - were opened in March 1998. After receiving the green light from EU leaders at their Helsinki European Council meeting in December 1999, formal

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[62] The criteria, also known as the "Copenhagen criteria", is called "political" in contrast to the legal criteria enshrined in Article 49 TEU since the Amsterdam Treaty (Gras 2000, supra 131)
[63] EU enlargement information campaign: Background – Enlargement process. Available in the Internet: http://www.european-movement.org/enlargement/background_process.php
[64] In fact, Malta had been an Applicant since 1990, but froze its application in 1996 only to reactivate it again in 1998
[65] Euro-know dictionary, available in the Internet: http://www.euro-know.org/dictionary/e.html#Enlargement, date of reference: 6.2.2004
[66] Croatia left its application for the Membership of the European Union in February 2003
[67] Macedonia left its application for the Membership of the European Union in March 2004
[68] Activities of the European Union: Enlargement: http://europa.eu.int/pol/enlarg/overview_en.htm, date of reference: 6.2.2004

negotiations were launched in February 2000 with another six candidate countries - Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia.[69]

The negotiation process is following: In the first stage a screening is exercised involving a series of multilateral and bilateral meetings with the candidates. These enable the European Commission to present the *acquis communautaire* and to determine whether the applicants are able to apply it. This is followed by detailed negotiations on the 31 individual policy chapters. The Commission then continues to monitor the progress each applicant makes in actually implementing and applying EU legislation and, increasingly, emphasis is placed on its proper transposition into national law.[70]

In December 2002 the European Council, meeting once again in Copenhagen, concluded the accession negotiations with ten of the applicant countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, and the accession treaties with these countries were signed in Athens on April 16th 2003. Formally these countries joined the European Union on May 1st, 2004. Negotiations still continue with Bulgaria and Romania, who will join the EU in 2007, providing that they meet the required criteria in time. For Turkey, no accession date has been agreed. Turkey's readiness to begin negotiations will be reconsidered at the European Council in December 2004.

2. THE DEVELOPMENT OF THE HUMAN RIGHTS DIMENSION INTO THE EUROPEAN COMMUNITY

2.1 The point of departure – Tabula rasa

Originally, there was little place for human rights in the European economical integration.[71] Indeed, neither the Treaty of Paris (1951) establishing the European Coal and Steel Community (ECSC) nor the Treaty of Rome (1957) establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) contained any specific "Bill of Rights" as part of the Community's legal

[69] Presidency conclusions of the Brussels European Council 12 December 2003, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=DOC/03/5|0|AGED&lg=EN&display=, date of reference 2.3.2004

[70] The European Commission's Delegation to the Republic of Mauritius: The European Union, a global player: EU enlargement - a historic opportunity, Chapter 3. Available in the Internet: http://www.delmus.cec.eu.int/en/eu_global_player/, date of reference 23.05.2001.

order.[72] Even though few sentences referring to specific rights close to traditional fundamental rights[73] were to be found in the Treaty establishing the European Economic Community (TEEC), were these sentences created to protect the "four freedoms" and the objectives of the these provisions were therefore purely economic.[74] Moreover, with the exception of the Article 119 TEEC, the references to human rights did not belong to the individual by virtue of his or her humanity, but because of his or her status as a Community national.[75]

The omission of provisions concerning the protection of fundamental rights or human rights in the conduct of Community affairs in the original treaties may be explained in many ways. One explanation might be that the drafters assumed that a functionally limited economic organization would be unlikely to encroach on traditionally protected fundamental human rights, and that individual citizens would most likely not be directly affected. After all, at the time of drafting of the original treaties the rights being at the forefront of the discussion were not the economic and social ones, but in fact the civil and political rights, which do not relate directly to the sphere of Community activities.[76] This having been said, it would however be incorrect to suppose that the drafters would not have had any interest in the protection of human rights and fundamental freedoms.[77] It is more likely, that the establishment of the Council of Europe (CoE) and of the European Convention on Human Rights (ECHR)[78] with its supervisory organs in 1949 and 1950 to uphold peace and to protect human rights in Europe, made certain countries consider this to provide sufficient fundamental rights protection in Europe.[79] In addition, as some scholars have pointed out, including Human Rights in the TEEC would perhaps once again have resulted in the abandon of the entire treaty. This argumentation is supported by the fact that the proposals drawn up in 1953 for a European Political Community, one of whose primary aims would have been the protection of human rights and fundamental freedoms, had been turned down after the

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[71] Renucci 1999, p. 15
[72] Alston and Weiler 1999, p. 9-10
[73] Article 7 (discrimination based on nationality), Article 48 (free movement of workers), Article 119 (equal pay for men and women) and Article 120 (discrimination based on sex)
[74] Rosas 1999 (II) p. 908, Ojanen 1994 p. 10
[75] Gras 2000, p. 7 and Scheinin 1995 p. 711
[76] Binder 1995, footnote 8
[77] Ibid, footnote 5
[78] In fact, several of the original Member states participated in the drafting of the European Convention of Human Rights (Binder 1995, footnote 5)
[79] Rosas 1999 (I) p. 205. For more on the historical context, see also Craig and de Búrca 2003, p. 318

French National Assembly failed to ratify the European Defence Treaty signed in 1952.[80]

2.2 The decisive role of the European Court of Justice

2.2.1 Initial resistance of the European Court of Justice

Initially, the European Court of Justice (ECJ) did not to see any link between the Community law and Human Rights.[81] Indeed, in the cases brought before it in the late 1950's and early 1960's it resisted attempts by litigants to invoke principles and rights which were recognized in domestic law, but not specifically set out in the Treaties, as part of the Community's legal order.[82] In *Stork*[83] the applicant claimed that an EEC measure governing the sale of coal infringed his fundamental rights to free development of the individual and to occupational freedom guaranteed by the German Constitution. The Court dismissed the complaint by declaring that the EC institutions had only to act in accordance with EEC law, and not with internal law of a Member State.[84] In another coal-wholesaler case, *Geitling*[85]*,* two years after the Stork-decision, the Court not only rejected the relevance to the dispute of a German constitutional principle, but also dismissed the suggestion that Community law might give similar protection. In its judgment the Court noted that "*Community law (...) does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights*"[86].[87]

The ECJ's initial resistance should not, however, be interpreted as general negativity towards Human Rights principles as such. It is more likely that both the lack of a catalogue of fundamental human rights in the Treaty and the fact that the Court was not expressly given the power to review Community acts for infringements of such rights contributed to the Court's early refusal to exercise such review.[88] On the other hand, the court's objection was also to a large extent to the danger of subordinating Community law to national constitutional law and to the domestic source of the principles invoked. However, the Community soon became a powerful entity whose actions had

[80] Craig and de Búrca 2003, p. 318
[81] Woods 2002 p.363
[82] Craig and de Búrca 2003, p. 319
[83] Case 1/58, Stork v. High Authority [1959] ECR 17.
[84] Pernaud 1997, p. 366
[85] Cases 36,37,38,40/59, Geitling v. High Authority [1960] ECR 423.
[86] Ibid, 438.
[87] Graig and de Búrca 2003, p. 320
[88] Binder 1995, Chapter I, para 2

considerable impact on many broader political and social issues, and its policy competences were extended into areas having direct effect on the individual, such as the environment, consumer protection, culture, health and education.[89]

Furthermore, due to the Courts own judicial activism; that is, after having developed the doctrines of direct effect (*Van Gend en Loos*)[90] and primacy of Community law (*Costa v. ENEL*)[91], the question was raised whether the Community law would also prevail over the Fundamental Human Rights guarantees enshrined in the national constitutions. [92] Both these judgments had an important role to the development of human rights into the Community law. After all, without the principles of direct effect and supremacy, individuals could not have directly invoked Community law to contest violations of their fundamental rights, and the Community measures contrary to national fundamental rights guarantees would have been held inapplicable by national courts.[93] It became therefore legally and politically imperative to find a way to acknowledge fundamental Human Rights at the Community level.[94] The Court had thereby itself laid the foundations of its own role in developing a human rights dimension to the law of the Community. [95]

2.2.2 Human Rights dialogue between the European Court of Justice and the national courts

Even though the development of a Human Rights dimension to the Community Law can with good reason be said to be the merit of the ECJ, one should not forget the significant role of the national courts in the process either. In the academic literature the process has been described as dialogue[96] or power came[97] between the ECJ and the national constitutional courts of Germany and Italy. As the impetus for the dialogue was the question, whether the fundamental rights protection provided by the Community law would be sufficient, and whether this level of protection would correspond to the

[89] Craig and de Bürca 2003, p. 319-320
[90] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.
[91] Case 6/64, Costa v. ENEL [1964] ECR 585.
[92] Rosas 1999 (I), p. 207-208 and Ojanen 1994, p. 9
[93] Weiler 1991, pages 574-575, supra note 5
[94] Weiler 1999 (II), page 107
[95] Ibid. See also Ojanen 1994 p. 9
[96] See Helander 1998 p. 13-14 and Ojanen 1994 p. 19-20
[97] Jyränki 2001, p. 2

protection provided by the national constitutions.[98] It slowly became apparent to the Court of Justice, that national courts were hesitant to accept the principles of supremacy and direct effect if Community institutions were not required to respect fundamental rights guarantees.[99]

The first act of the power came was the *Stauder*[100] case from 1969, in which the ECJ was confronted with an apparent conflict between a social welfare scheme and the right to privacy.[101] The case concerned a Decision of the Commission[102], who had authorized Member States to dispose of surplus butter by allowing the sale of the butter at reduced prices to the social security recipients.[103] One of the recipients argued before the German courts that the fact that he had to reveal his name and address in order to get butter at a reduced rate was contrary to his fundamental human rights protected under German constitutional law.[104] When making the reference to the ECJ, a German Administrative Court gave the ECJ an ultimatum, according to which the German Constitutional Court would reserve itself the right not to apply Community law if the Fundamental Rights guaranteed in the German Constitution weren't effectively protected within the Community law.

Thus, in *Stauder*, although in an unexpected context, the ECJ was forced to take the matter of Human Rights in the Community law into consideration. Being between a rock and a hard place the Court for the first time did not reject the applicability of Human Rights principles. However, through a technicality, that is, by deciding that the German text of the regulation did not match other language versions of the regulation, and thereafter finding that it was unnecessary for a recipient of subsidized butter to be identified by name, the Court found a way to evade the question of the possible incompatibility of the Commissions act in question. By putting the blame on the Member State any potential infringement of the Human Rights could be avoided.[105]

Even though the ECJ found no infringement of Human Rights in the *Stauder* case, it took the first decisive step for Human Rights by stating in the final paragraph of the

[98] Helander 1998, p. 13-14
[99] Binder 1995, Chapter I, para 3
[100] Case 29/69, Stauder v. City of Ulm [1969] ECR 419, at 425.
[101] Goldsmith 2001, p. 1202
[102] Decision 69/71/EEC of the Commission of the European Communities (12.2.1969)
[103] Neuwahl 1995, p. 6
[104] Craig and de Búrca 2003, p. 320
[105] Persaud 1997, p. 367 and Craig and de Búrca 2003, p. 320-321

judgment, that "*(i)nterpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court*"[106]. By regarding Human Rights as part of the general principles of Community law enabled the Court to ensure respect of these rights on the basis of Article 164 (then 220) TEC[107], according to which *"(t)he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed"*.[108] Apart from the fact that thus fundamental human rights were for the first time acknowledged by the Court, it was also the first time that an applicant managed to plead successfully particular principles of law other than those expressed in the Treaties.[109] However, more than as the first step the judgment cannot be regarded. After all, the Human Rights were merely mentioned in the *obiter dictum* of the judgment.[110] In addition, the Court made no reference to the previous contradictory case law, nor did it provide any comment in the case on the nature, identity, or extent of the "general principles", part of which it for the first time considered the Human Rights to be.[111]

Only a year after the *Stauder* judgment, in the *Internationale Handelsgesellschaft*[112] case the ECJ was again confronted with an apparent conflict between a Community measure and a right protected within a Member State's law.[113] A German firm challenged before a German Administrative Court the validity of the Community system of "agricultural deposits", which was based on a Council's Regulation.[114] In the reference to the ECJ the German court stated that the Community deposit system in question was contrary to principles of national constitutional law, including freedom of action and of disposition, economic liberty, and proportionality.[115] However, the ECJ did not see any infringement of the rights claimed, stating that the restriction on the freedom to trade was not disproportionate to the general interest advanced by the deposit system. Furthermore, as a response to the challenge given by the German court, the ECJ also reaffirmed its position in that the validity of the Community measures can only be judged in the light of Community law, and that therefore, the validity of such a

[106] Case 29/69, Stauder v. City of Ulm [1969] ECR 419, 428
[107] Article 164 (then) TEC: " The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."
[108] Lenaerts and De Smijter 2001, p. 276
[109] Craig and de Búrca 2003, p. 321
[110] Clapham 1991, p. 46
[111] Craig and de Búrca 2003, p. 321
[112] Case 11/70, Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel [1970] ECR 1125
[113] Craig and de Búrca 2003, p. 321
[114] Neuwahl 1995, p. 3-4

measure within a member state cannot be affected by allegations that it infringes fundamental human rights.[116]

However, in *Handelsgesellschaft* the Court furthered the recognition of fundamental rights within the Community by affirming that "*respect for fundamental human rights forms an integral part of the general principles of law protected by the Court of Justice*."[117] The ECJ also recognized, as a fundamental right, the German constitutional doctrine of proportionality, providing that government authorities may impose on citizens only those obligations that are necessary for attaining the public objective at issue.[118] The Court then went on to declare that the protection of the fundamental rights, while "*inspired by the constitutional traditions common to the Member States*", must however be ensured "*within the framework of the structure and objectives of the Community*". Thus, while *Stauder* had confirmed that fundamental rights exist in the Community law, *Internationale Handelsgesellschaft* acknowledged the constitution of Member States as a primary source of these rights, while specifying that these rights would in any case have to be reviewed in the light of the framework of the Community.[119] On the other hand, by stating that it does protect fundamental rights the ECJ wanted to signal the national courts that this area is no longer within the exclusive competence of the Member States.[120]

The reaction of the Member States to the *Internationale Handelsgesellschaft* judgment is well known as the famous *Solange I*[121] and *Frontini*[122] judgments of the German and Italian Constitutional Courts. In the "*Solange I*" judgment the German Federal Constitutional Court (Bundesverfassungsgericht) stated that the German Constitution could not have empowered to conclude such a treaty, which would destroy the "valid constitutional structure" of the Federation, and reminded that the inalienability of the core of the fundamental rights forms a crucial part of this constitutional structure.[123] The German Court then went on to referring to the fact that the EEC suffered for lack of democracy, and stated that as long as (in German: "solange") the Community is not

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[115] Craig and de Búrca 2003, p. 321-322
[116] Gras 2000, p. 8
[117] Ibid
[118] Flaherty and Lally-Green 1998, p. 77
[119] Neuwahl 1995, p. 7
[120] Persaud 1997, p. 368
[121] "Solange I"; Bundesverfassungsgericht 29.5.1974, 37 BVerfGE 271.
[122] Corte constituzionale, Frontini v Ministero delle Finanze of 27 December 1973 [1974] 2 CMLR 372
[123] Jyränki 2001, p. 4

endowed with a catalogue of fundamental rights, equivalent to the one in the German Constitution (Grundgesetz), German courts should not apply Community legislation which conflicts with the Constitution.[124] Thus, the German Constitutional Court reserved itself the right not to apply a Community law, which violated the constitutional fundamental rights.[125]

The Italian response to the ECJ's judgment in the *Internationale Handelsgesellschaft* case is the story of "*Frontini*". When the case was brought before the Italian Constitutional Court it had become a question of the constitutional legitimacy of the Italian EEC Treaty Ratification Act 1957, which made Article 189 (now 249) of the EEC Treaty providing for the direct applicability of Community regulations, effective in Italy.[126] Similarly to the *Solange I* judgment, also the Italian Constitutional Court (*Corte Costituzionale)* denied that the Italian Constitution would have empowered Parliament to confer to the EEC the right to infringe upon the fundamental principles of the constitutional order or the inalienable rights of man.[127] Even though it did, in general, confirm, that the provisions of Community law have "*full compulsory efficacy and direct application in Italy*", it also held that if a Community provision should violate fundamental constitutional or human rights principles, the *Corte Costituzionale* would ensure that Community law was compatible with those principles.[128]

Both the case of Solange I as well as the one of Frontini illustrated the difficulty that the ECJ faced after having assimilated the "common constitutional principles" of the Member States as part of the Community legal order. After all, if ECJ's interpretation of these principles would differ significantly from the one of the Member States, the legitimacy of the Court's adjudication might be called into question.[129]

2.2.3 Defining the origins of fundamental rights as general principles of the Community law

In the period following the *Internationale Handelsgesellschaft* litigation, the ECJ developed further the fundamental rights doctrine by continuing to emphasize the

[124] Neuwahl 1995, p. 3-4
[125] Jyränki 2001, p. 4
[126] Craig and de Búrca 1998, p. 276
[127] Jyränki 2001, p. 3
[128] Craig and de Búrca 1998, p. 277
[129] Craig and de Búrca 2003, p. 322-323

autonomy of Community's general principles of law, and by defining the sources of these general principles.[130]

In the *Nold*[131] case from 1974 concerning the right to property, a Commissions decision[132] was once again challenged. According to the applicant, the decision was not only discriminatory but also in breach of his fundamental rights (right to property and the free pursuit of business activity).[133] In the judgment the Court found that no discrimination had taken place, because the applicant was not treated differently from other undertakings. The Court also stated that as the substances of the fundamental rights had been left untouched, no breach had occurred. As disappointing as the judgment was to the applicant, for the Human Rights protection in the Community it was an important step forward. The Court not only reaffirmed its earlier position that "*fundamental rights form an integral part of the general principles of law, the observance of which it ensures*" and that "*(i)n safeguarding these rights, the court is bound to draw inspiration from the constitutional traditions common to the Member States*", but went further stating that the "*international treaties for the protection of Human Rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law*". [134]

The effect of the *Nold* case was twofold: firstly it gave a hint that the Court would annul a Community rule which functions contrary to fundamental rights enshrined in the Member States constitutions, at least if the "core" of these rights were violated. Secondly, the case identified international treaties as a new source of fundamental rights. In fact, the Court went further than that by stating that for the Court to draw inspiration from an international treaty on human rights, it was enough for Member States to have collaborated on these treaties, despite their non-binding nature.[135] It has been suggested that the Court included in the formula international treaties that Member States had participated in drafting but had not yet ratified because of the fact that one of

[130] Craig and de Búrca 2003, p. 323
[131] Case 4/73, Nold [1974] ECR 491, at 506.
[132] Commissions decision of 21 December 1972
[133] Case 4/73, Nold [1974] ECR 491.
[134] Ibid
[135] De Witte 1999, p. 867 and Neuwahl 1995, p. 7

the then Member States – France – managed to ratify the European Convention only 11 days before the Court rendered its decision in the case.[136]

The *Rutili*[137] case, in turn, handled the principle of free movement and discrimination based on nationality. Mister Rutili, of Italian nationality, felt that he had been discriminated by the French Ministry of Interior and raised charges before the administrative tribunal by invoking to the EEC Treaty[138] as well as to a Council's Regulation[139] and Directive[140]. When the case reached the ECJ, the Court dismissed the case by stating that limitations of the freedom of movement would be regarded as non-discriminatory provided that identical restrictions could be imposed under the same conditions on nationals of the host State.[141]

What was important in the *Rutili* judgment for the development of the Community's fundamental rights protection was, once again, written in the *obiter dictum* of the judgment. Even though the role of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was not discussed, the Court for the first time referred explicitly to certain provisions[142] of this Convention and to the Protocol no. 4 of the ECHR[143].[144] This way the Court wanted to show that the Community regulation in question were in fact a specific manifestation of the more general provisions of the ECHR.[145] The fact that the Court referred to the ECHR is even more remarkable when one considers that the rights invoked by the applicant were expressed in provisions of Community's own legislation and thus recognition of the ECHR provision was not necessary.[146] It has therefore been suggested that this was provoked by the earlier judgments of the Italian and German Constitutional Court and had therefore more of an instrumental reason instead of an ideal one. In addition, referring to the Protocol no. 4 of the ECHR seemed to suggest that the Court found itself subject to the requirements of the Protocol even though the Community was and

[136] See for example Binder 1995, supra 14 and Oliver 2000, p. 321
[137] Case 36/75, Roland Rutili v. Minister for the Interior, 1975 E.C.R. 1219, [1976] 1 C.M.L.R. 140 [1975]
[138] Articles 7 and 48 (then) TEEC
[139] Regulation no 1612/68 of the Council of 15 October 1968
[140] Directive of the Council no 68/360 of 15 October 1968 on the freedom of movement of workers
[141] Binder 1995, Chapter II, Part C, Para 2
[142] Articles 8, 9, 10 and 11 of the ECHR
[143] Article 2 of Protocol no. 4 of the ECHR
[144] Gras 2000, p. 8 and Turner 1999, p.457
[145] Turner 1999, p. 457
[146] Craig and de Burcá 2003, p. 323-324 and Ovey and White 2002, p. 443

still is not a signatory.[147] The reference to the mentioned Protocol the ECHR, on the other hand, is interesting keeping in mind that France, the Member State in question, had ratified the mentioned Protocol only after the material facts had risen and just shortly before the ECJ's judgment.[148]

Few years later, in the *Hauer*[149] judgment, the ECJ made the most profound Human Rights analysis so far.[150] The plaintiff, Mrs Hauer, contested a German authorities' act based on a Community regulation[151], which, in order to control the wine surpluses, prohibited the planting of vines for a period of three years.[152] When referring the case to the ECJ the German administrative court made clear, that the prohibition might be incompatible with the German Basic Law guarantees of the right to property and the right to pursue trade and professional activities.[153] In the judgment, after having stated once again that only it could rule on the validity of the Community regulation, the Court affirmed that *"(t)he right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first protocol to the European Convention for the protection of human rights."* The Court then continued by finding that as the Regulation in question was justified by the objectives of general interest pursued by the Community, it did not infringe the substance of the right to property. The most interesting part of the judgment from the perspective of the Human Rights is to be found in the grounds of the judgment, and is worth mentioning in full:

> *"15. The Court also emphasized in he judgment cited[154], and later in the judgment of 14 May 1974, Nold (1974) ECR 491, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the Constitutions of those States are unacceptable in the Community, and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. That conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case law of the Court,*

[147] Weiler 1995, p. 62
[148] Oliver 2000, supra 10
[149] Case 44/79, Liselotte Hauer v. Land Rheinland-Pfalz, [1979] E.C.R. 3727
[150] Persaud 1997, s. 372
[151] Council Regulation No 1162/76
[152] Jacobs 2001, p. 332
[153] Persaud 1997, s. 372
[154] In the Chapter 14 of the judgement, the Court referred to the Internationale Handelsgesellschaft [1970] ECR 1125.

> *refers on the one hand to the European Convention for the protection of Human Rights and Fundamental Freedoms of 4 November 1950."*[155]

Thus, in *Hauer*, the Court not only referred to the ECHR but also to the Joint Declaration of the European Parliament, the Council and the Commission of 5 April 1977. Even though the contents of the mentioned declaration were not discussed in the judgment, alone mentioning the declaration was notable.[156] Remarkable was also the unusual measure of deference shown by the Court to national constitutions.[157] Indeed, the Court made specific reference to provisions of the German, Italian and Irish Constitutions, and to the fact that in all Member States there were legislative provisions restricting the use of real property in order to promote various public interests.[158]

From the pre Single European Act (SEA) era comes also the judgment of the ECJ on *Cinéthèque*[159]. These joined cases concerned an alleged restriction on the free movement of goods. In two similar cases several firms brought two actions before the Tribunal de Grande Instance, Paris, to have lifted a French order restricting the issue of films shown in cinemas in the form of videos until the expiration of a twelve-month period. According to the plaintiffs, the mentioned French order was contrary to the provisions of Articles 30 to 36 and 59 of the TEEC. In the main proceedings the plaintiffs argued that the French order had the effect of restricting intra-Community trade in view of the fact that its application prevented certain products from being made available for sale in one Member State even though they already circulated freely in another Member State.[160] Moreover, before the proceedings of the ECJ, the plaintiffs raised an argument according to which the French measure in case was in breach of freedom of expression protected by Article 10 ECHR.[161]

Although the ECJ in its judgment reaffirmed its duty to ensure observance of fundamental rights in the Community law, it nevertheless, stated that it had "*no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the*

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[155] Case 44/79, Liselotte Hauer v. Land Rheinland-Pfalz, [1979] ECR. 3727, para 15
[156] Ojanen 1994 p. 13
[157] Jacobs 2001, p. 332
[158] Weiler 1995, p. 65 and Craig and de Búrca 2003, p. 326
[159] Cases 60/84 and 61/84, Cinéthèque v. Fédération Nationale des Cinémas Français [1985] ECR 2605.
[160] Ibid
[161] Craig and de Búrca 2003, p. 342

national legislator."[162] By so providing, the ECJ on one hand established a distinction between cases where Member States are implementing Community law and cases where the matter is within the jurisdiction of the Member States themselves, even if questions of Community law may also arise. On the other hand the Court explicitly refused to apply Community fundamental rights standards to Member State actions derogating from the Treaty.[163]

2.2.4 Expanding Judicial Review to Member State Actions

Getting further in the examination of the ECJ's case-law, in the joined cases *Marthe Klensch v. Secretaire d'Etat à L'Agriculture*[164] three dairies brought actions against the State secretary for agriculture and viticulture of Luxembourg for the annulment of certain orders of the latter implementing a Councils regulation[165]. In the view of the applicant dairies, the order in question was a violation of Article 40(3) (then Article 34(2)) TEEC prohibiting discrimination between producers and consumers in the establishment of the common agricultural market. When the case reached the ECJ, the Court ruled the case for the applicants and thus subjected, for the first time, Member State actions to review in situations in which they acted for and/or on behalf of the Community. More precisely, the Court subjected the action of a Member State to general principles of Community law, of which Human Rights form an integral part. Behind the reasoning of the Court seems to be the thought that, in implementing a Community Policy, for which the Community primarily has the responsibility, the Member State is acting under authority granted to it by the Community itself.[166]

The position taken by the Court in *Klensch* was few years later confirmed in the case of *Wachauf*[167]. Also *Wachauf* involved Community regulations concerning the production of milk, this time as implemented by Germany.[168] In *Wachauf* the Court was faced with a question, whether the way in which the Member State implemented the provision was in conformity with the fundamental rights principles.[169] After having been refused a

[162] Craig and de Búrca 2003, p. 342
[163] Neuwahl 1995, p. 10 and Binder 1995, part B, para 19
[164] Joined Cases 201 and 202/85, *Klensch* v. *Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1986] ECR 3477
[165] Council regulation no. 857/84 of 31 March 1984
[166] Binder 1995, Part B, para 28-30
[167] Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609
[168] Binder 1995, supra 70
[169] Neuwahl 1995, p. 9-10

compensation for the discontinuance of milk production pursuant to the German Law, which in turn was based on a power contained in Commission's Regulation No 857/84, Mr Wachauf brought an action against the decision of the German authorities before a German administrative court. When referring the case to the ECJ, the questions posed by the German court were rather technical and no direct reference to fundamental rights was made. Despite this technicality, a question was soon raised on whether, in implementing the Community milk quota system, the Member States were bound to observe rights of property as a matter of Community law.[170]

Although in the *Wachauf* judgment the ECJ affirmed that such Community rules, which had the effect of depriving a Community national of his right to property, would be incompatible with the requirements of the protection of fundamental rights in the Community legal order, it nevertheless held the regulation valid by claiming that not the EC measure but the German implementing instrument was to blame.[171] According to the Court, *"(s)ince those requirements are also binding on the Member States when they implement Community rules, the Member State must, as far as possible, apply those rules in accordance with those requirements*." After the Court's reasoning in *Wachauf*, it was clear that when implementing Community law, the Member States were bound by the same rights which bound the Community itself in its actions. In the end, there were rather practical reasons for the ECJ's logic. If the institutions of the Community were expected to respect Human Rights in their actions, laying the same claim to the Member State would be at least as important. After all, the national authorities implement a majority of the Community's regulations. Furthermore, the importance of an effective control of the Member States when they act as "Community agents" can hardly be denied. If this control were left to national law, the uniformity of Community law could be jeopardized.[172]

Interestingly, soon after *Wachauf,* in the *Solange II* judgment[173], the German Constitutional court of Karlsruhe stated in its judgment that the German court would no longer review the conformity of the EC acts to the fundamental constitutional rights as long as the ECJ would exercise an effective protection of the fundamental rights.[174]

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[170] Jacobs 2001, p. 333-334
[171] Persaud 1997, p. 376
[172] Jacobs 2001, p. 333
[173] *Solange II*, [1987] 3 CMLR 225

The next step was taken in the *ERT*[175] case, where the ECJ more or less interpreted *Wachauf* in broader terms.[176] Having been prosecuted for television broadcasting against a Greek statute giving the monopoly to a Greek television and radio company ERT, the defendants (Dimotiki Etairia Pliroforissis (DEP) and the Mayor of Thessaloniki) claimed in their defence that the existence of the television monopoly violated the provisions on free movement of goods and services and the rules on competition of TEEC, as well as Article 10(1) of the European Convention on Human Rights. [177]

When the case reached the ECJ, both the Commission and the intervening French Government Greece relied on *Cinéthèque* by arguing that the ECJ had no jurisdiction to rule whether the Greek legislation was in violation of the ECHR. In the judgment, the Court indeed repeated the position it had taken in *Cinéthèque*, stating that it indeed had "*no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law*." The ECJ continued, however, that where the national rules in question fall within that scope, the Court had the duty to provide "*all of the criteria of interpretation needed by the national court*" to determine whether the rules in question are compatible with Community fundamental rights guarantees.[178] According to the Court, the restrictions on the freedom to provide services and the justification of such restrictions under Articles of the TEEC for reasons of public order, public security and public health must be understood in the light of the general principle of freedom of expression, enshrined in Article 10 ECHR.[179] Stated another way, the national legislation in question may only benefit from the exceptions provided for, by the combined provisions of mentioned articles if it is acting in conformity with fundamental rights.[180]

Thus, although the ECJ had initially refused to extend the review further to acts of the Member States when derogating from Community law in the *Cinéthèque* case, in *ERT* it did exactly this.[181] In fact, the Court went even further since the Member State measures

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[174] Jyränki 2001, p.5
[175] Case C-260/89, Elliniki Radiophonia Tileorasi v. Dimotiki Etairia Pliroforissis [1991] ECR I-2925
[176] Neuwahl 1995, p. 10
[177] Craig and de Búrca 2003, p. 343
[178] Binder 1995, part II, Chapter C1, paras 1-9
[179] Case C-260/89, Elliniki Radiophonia Tileorasi v. Dimotiki Etairia Pliroforissis [1991] ECR I-2925, para 41
[180] Neuwahl 1995, p. 11
[181] Turner 1999, p. 456-457

must not only be subject to fundamental rights review wherever they derogate from the Treaty rules, but also wherever such measures restrict the exercise of a "common market freedom".[182] Thus, the judgment can be seen as further encroachment by the general principles of law into the legal systems of the Member States.[183] On the other hand, ERT also marked a development of *Rutili* in that it uses the European Convention on Human Rights as an additional standard on the basis of which to judge Member State action, rather than, as in *Rutili*, merely a declaration echoing general principles of existing Community law".[184]

In *Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Grogan*[185], the Court was faced with a conflict between the right of free expression and the right to life of the unborn protected by Article 40(3) of the Irish Constitution. The Irish Supreme Court, just a few years before the Grogan case, in the case of *Open Door v. Ireland*[186], had interpreted the mentioned Article finding that it prohibited individuals from assisting women in obtaining abortions by helping them with the travel arrangements or by gibing them information about the abortion services outside Ireland. Despite this ruling, a group of students kept on producing and distributing material containing information about the location of abortion clinics in Britain. Considering these activities as violation of the Irish Constitution, the Society for the Protection of Unborn Children took the case to court wanting to obtain an injunction against the students.[187] The students defended their actions by claiming that the right under Community law to receive medical services legally provided in another member state includes the right to receive information about such services. In the main proceedings before the ECJ the defendants also maintained that a prohibition such as the one at issue violated their fundamental rights, especially the freedom of expression and the freedom to receive and pass on information, enshrined in particular in Article 10(1) of the ECHR.[188] The Justice of the High Court of Ireland saw a possible link between the case and the Community freedom to receive services in another Member State provided by the Article 60 TEEC. When referring the case to the ECJ, the court asked the European Court whether

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[182] Jacobs 2001, p. 335
[183] Craig and de Búrca 2003, p. 344
[184] Binder 1995, supra 98
[185] Case C-159/90, Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Grogan [1991] ECR I-4685
[186] Attorney General ex rel. Society for the Protection of Unborn Children (Id) Ltd. v. Open Door Counselling Ltd., 1988 I.R. 619 (Ir. S.C.) (1988)
[187] Binder 1995, Part C2, Chapters 1-2
[188] Case C-159/90, Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Grogan [1991] ECR I-4685

abortion was to be regarded as a medical service and, if so, whether the students have the right to distribute information about abortion clinics in other Member States based on Article 59 TEEC, which prohibit any restriction on the freedom to supply services.[189]

Even though in its judgment the ECJ found abortion to be a medical service within the meaning of the Article 60 TEEC, it however stated that because the students disseminating the information in question had no economic link to the providers of abortion services in England, the Article 59 TEEC did not apply.[190] The Court then referred to its judgment in *ERT* declaring that *"(a)ccording to (...), the judgment of 18 June 1991 in Elliniki Radiofonia Tileorasi, where national legislation falls within the field of application of Community law the Court (...) must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights (...) the observance of which the Court is to ensure."* The ECJ then went on to state that since the Irish prohibition fell outside the scope of Community law, it had no jurisdiction to assess the compatibility of that prohibition with Community fundamental rights standards.[191] By establishing the requirement of an economic link between the distributor of information and the provider of services, the Court was able to evade the question of fundamental rights. Indeed, the judgment has been criticized as taking a purely economic approach to a question of fundamental rights.[192]

However, as not in every case the Court will not be able to find the kind of a lack of an "economic link" providing a way out of the fundamental rights issue like in the case of *SPUC*, it may not be able to avoid the issue for long. Thus, the case illustrates what kind of difficulties the ECJ faces when applying Community fundamental rights standards to Member State actions that involve such sensitive rights especially when there is no consensus in the Community. Another problem about this kind of line of reasoning is that of a possible conflict between the jurisprudence of the ECJ and that of the European Court of Human Rights (ECtHR)[193].

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[189] Clapham 1991, p. 32-33
[190] Persaud 1997, p. 384
[191] Binder 1995, Part II, Chapter C2, Para 8-10
[192] Persaud 1997, p. 384
[193] See the judgement of the ECtHR in *Open Door Counseling v. Ireland* (ECtHR, No. 64/1991, Judgment of 23 September 1992, Open Door and Dublin Well Women v. Ireland). The defendants, after having received the judgement of the Irish Supreme Court appealed that judgment to the ECtHR. This Court found that the Irish authorities had violated the right of the applicant to free expression enshrined in

2.2.5 Summa summarum

2.2.5.1 General remarks

The early fundamental rights protection of the EC was characterized by the fact that the activities of the Community were concentrated above all on economical and technical co-operation. Therefore the building of the "common market" and other economic aims and especially the "four freedoms" had such a strong position. This could be seen also in the case law of the ECJ, which often favoured these freedoms at the cost of (other) fundamental rights. From this perspective the concern expressed by the national courts (especially those of Italy and Germany) is more than understandable.[194]

As the examination of the ECJ's case law shows, the Court has developed its case law on the protection of human rights by the following premises: First, the ECJ has protected those fundamental human rights enshrined in the general principles of Community law found in the common constitutional traditions of the Member States, international agreements to which the Member States are parties, and express provisions of Community legislation manifesting general fundamental principles of Community law.[195] Second, the application of human rights must be carried out within the structures and objectives of the Treaty, i.e. in the context of relevant Community law. In another words, also the provisions of the ECHR have to be applied. [196] Third, human rights protected by the ECJ cannot be defined with the reference to purely national rules. Instead, they must be inferred from the "common traditions" or from international treaties, in particular the ECHR. [197] As to the scope of application, the Court of Justice has consistently ruled that Union fundamental rights are binding on Member States only when they are implementing Union law or when the Member States act under explicit derogation from EC law.[198]

The role of the ECJ in developing unwritten fundamental rights to the Community law is not to be underestimated. However, there are still several unclear and contentious questions relating to the status, contents and effect of fundamental rights protected by

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Art. 10 ECHR since the information provided by the students was freely available by other means. (Röben 2003, p. 26)
[194] Ojanen 2001, p. 892
[195] Rosas (II) 1999, p. 909
[196] Pellonpää 2000 p. 74-75
[197] Gras 2000, p. 8-9
[198] Duvigneau 1998, p. 68

the ECJ. [199] The diversity of the sources of inspiration used, as well as the practice of the ECJ to interpret these sources in the light of the Community law as general principles, certainly contributed to the ambiguity of the contents of the protection. *Helander* calls this problem as an indeterminance built within the doctrine, which manifests itself in two aspects. Firstly, already at the level of regulations the rights listed in the sources used by the ECJ are sometimes inconsistent or otherwise incongruous. Secondly, there may be considerable differences in the interpretation and in the comparison of different justice cultures. In addition, taken into consideration the fact that in every legal order there are at least some mutually rivalling fundamental freedoms as well as interpretations of them, inconsistencies cannot be avoided. Thus, not every single fundamental right originating from the mentioned sources can be protected within the framework of the Community law, at least not exactly as they are protected within the legal order of a certain Member State.[200]

Furthermore, as long as the ECJ keeps protecting human rights and fundamental freedoms within the scope of the structures and objectives of the Community, the differences, not only between the Union and its Member States, but also between the ECJ and the ECtHR are more than likely to occur.[201] The situation is not helped with the fact that the random nature of the cases brought before the ECJ influences greatly not only on the contents of the fundamental rights protection afforded by the Court, but also on the length of time that goes by developing this protection. For the same reason, examination of the Court's case law cannot tell which single fundamental right would be protected by the Court, would it come before it.[202]

2.2.5.2 Sources of inspiration

Besides the European Convention on Human Rights and Fundamental Freedoms, the ECJ's cases reflect judicial notice of the European Social Charter signed at Turin on 18 October 1961 [203], the Community's Social Charter from 1977, Labour Conventions, and the written constitutions of the Member States.[204] The Court has also referred to the International Covenant on Civil and Political Rights (1966), to the International

[199] Ojanen 2001, p. 892
[200] Helander 1998, p. 12
[201] Ojanen 1994, s. 23-24
[202] Eur-Lex: Fundamental Rights in the European Union 2003, Chapter 9
[203] See for example Case 149/77, Defrenne v. Sabena, ECR 1381

Covenant on Economic, Social and Cultural Rights (1966) and to the agreements done within the International Labour Organisation (ILO).[205] However, the ECJ seems to distinguish the ECHR from other Conventions; whereas the first "forms part" of Community Law by virtue of Article 6(2) TEU, the latter operate merely as guidelines for the interpretation and application of Community Law.[206] In any case, the sources of law applied by the ECJ are *the general principles of Community law* rather than the international treaties as such.[207] Furthermore, the Court has no obligation to follow the guidelines derived from international treaties, it only has an obligation to look to these guidelines in the first place.[208] In fact, as the judgment in *Orkem*[209] shows, the ECJ is ready to go even beyond the sources listed above in defining the contents of the fundamental freedoms protection within the Community.[210]

The European Court of Justice has also stated, that European Union law cannot be in conflict with the *jus cogens* -norms known in the International Law. ECJ has based this line of reasoning to the fact that also The European Community, as a subject of international law, is bound by general international law. More precisely, the ECJ has based its perspective on Article 53 of the Vienna Convention on the Law of Treaties, which states that a treaty (for example the Treaty of Rome or a procedure based on it) is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.[211]

2.2.5.3 Contents of the Fundamental Rights protection provided by the European Court of Justice

Although the "sources of inspiration" for the general principles of EC law are relatively clear, the way in which the ECJ has derived particular concrete rights from these

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[204] Flaherty and Lally-Green 1998, p. 30
[205] Ojanen 1994, p. 14
[206] European Commission: *Affirming Fundamental Rights in the Union - Time to Act*. Report of the expert croup on Fundamental Rights, 1999, p. 9
[207] Rosas 2001, p. 3
[208] Turner 1999, p. 457
[209] Case 374/87, Orkem v. Commission [1989] ECR 3283. In this Case the ECJ found that there exists a fundamental right for a company not to be obliged to give answers a question of the Commission's, which would have resulted in the Company incriminating itself. The Court did this even though no such right could be found in the constitutions of the Member States (at least not concerning companies), nor in the international human rights agreements. (Clapham 1991, p. 57-58)
[210] Clapham 1991, p. 57
[211] Ojanen 1994 p. 14

sources is more difficult to conceptualise.[212] In any case, the ECJ has recognized quite a few rights regarded to have a human rights character. Following the example of Ojanen[213] the contents of the concrete fundamental rights protection of the ECJ can be divided in four categories. The first category consists of liberty related rights, of which the Court has protected among others human dignity[214], right of respect for private life[215] (including respect for family life[216] and inviolability of the domicile[217]), freedom of religion and confession[218], freedom of expression and publication[219] and freedom to form associations[220]. The second category is formed by social or equality related rights, such as equal treatment[221] and non-discrimination[222]. The third category rights are economic in nature, including right to property[223], freedom of profession[224], freedom of trade[225], freedom of industry[226] and freedom of competition[227]. Finally, the fourth group consists of different rights related to a judicial process and protection under the law. Of these, the Court has recognized entitlement to effective legal defence and a fair trial[228], non-retroactivity of penal liability[229] and the principle of *non bis in idem*[230].[231]

As the content of the fundamental rights protection of the ECJ largely depends on what kind of cases are brought before it, the list presented above does not exactly describe which rights would be protected by the Court as the "general principles of Community law". At the very least, in addition to the list above, as the Court itself has stated in its

[212] Craig and de Búrca 2003, p. 337
[213] Ojanen 1994, p. 15-16
[214] Case 9/74, Casagrande, [1974] ECR 773
[215] Case 136/79, National Panasonic (UK) Ltd. v. Commission, [1980] ECR 2033, 2056 et seq. and Case 165/82, Commission v United Kingdom, [1983] ECR 3431
[216] Case 333/87, Commission v Germany, [1989] ECR 1263
[217] Joined cases 97-99/87, Dow Chemical Ibérica and Others v Commission, [1989] ECR 3165, at 3185 and case 227/92, Hoechst AG v. Commission, [1989] ECR 2919
[218] Case 130/75, Prais [1976], ECR 1589 ja 1599
[219] Case C-100/88, Oyowe and Traore v Commission, [1989] ECR 4285 and the Joined Cases 43 and 63/82, VBVB and VBBB v. Commission [1984] ECR 19
[220] Case 175/73 Gewerkschaftsbund, Massa e.a., [1974] ECR 917 and 925
[221] Case 17/61, Klöckner-Werke AG, [1962] ECR 653 and Case 283/83, Racke, [1984] ECR 3791
[222] Case 43/75, Defrenne v. Sabena, [1976] ECR 455
[223] Case 44/79 Hauer v. Land Rheinland Pfalz [1979] ECR 3727
[224] Case Her [1979] ECR 3727, 3745 et seq.
[225] Case International Trade Association, [1970] ECR 1125, 1135 et seq
[226] Case 19/60, Usinor [1984] ECR 4177 et seq.
[227] Case France [1985] ECR 531
[228] Case 222/84, Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651 et seq. and Case 98/79, Pecastaing v Belgium [1980]] ECR 691 et seq.
[229] Case 63/83, Regina v Kent Kirk, [1984] ECR 2689
[230] Joined cases 18/65 and 35/65, Gutmann v Commission, [1966] ECR 150
[231] Ojanen 1994, p. 15-16

case law, the constitutions of the Member States and the principles of the ECHR[232] must be taken into consideration in Community law.[233] In fact, even though the Court has sometimes been cautious in finding an actual violation of an alleged fundamental right, it has seldom refused to include a fundamental right in the ”general principles” protected by it.[234] In the end, it is relevant to notice again, that a mere interface to Fundamental Freedoms is not enough for the Court; a connection to (other) Community provisions is also required.[235]

2.3 The role of the other institutions in the fundamental rights development of the European Community

The significance of the ECJ and the constitutional courts of certain Member States in developing a human rights dimension to the European Community is certainly a decisive one. However, other actors in the “Community Human Rights came” should not be forgotten. Indeed, each one in its own way, the European Parliament, the Commission, the Council and the ECJ have all contributed to the elaboration of a Community system of protection of fundamental rights.[236] This early development of human rights at the political level is characterized by various *soft law* instruments such as proposals, declarations and resolutions.[237]

The first time some kind of “hints” to the respect for human rights and fundamental freedoms were to be found, was in the *Paris Summit Declaration* of 1972, in which the Member States affirmed their determination to base the development of the Community on “*democracy, freedom of opinion, free movement of men and ideas and participation by the people through their freely elected representatives*”. The exact term of “human rights” appeared for the first time in the *Document on the European Identity,* made in the Copenhagen Summit of December 14th, 1973, in which the Member States affirmed

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[232] See for example case 222/84, note 228 above, where the ECJ stated that *“(t)he principles on which the European Convention for the protection of Human Rights and Fundamental Freedoms is based must be taken into consideration in Community Law”*

[233] This having been said, it seems however that EU's competence does not extend to some of the central Articles of the ECHR, like Article 3 (prohibition of torture), Article 5 (right to liberty and security) and Article 6 (right to a fair trial). However, the protection of property secured in the First Protocol, as well as the processual rights linked to Community law in Articles 6, 7 and 13, and even Articles 8 (right to respect for private and family life) and 10-11 (freedom of expression and freedom of assembly and association) do weigh in the Community law. (Pellonpää 2000 p. 74-75)

[234] De Witte 1999, p. 868-869

[235] Helander 1998, s. 21-22

[236] Lenaerts and De Smijter 2001, p. 277-278

[237] Gras 2000, p. 9 and EU Annual Report on Human Rights 2003, p. 35

their "*determination to defend the principles of representative democracy, of the rule of law, of social justice (...) and of respect for human rights*".[238]

In 1977 the European Parliament, the Council and the Commission issued a *Joint Declaration on Fundamental Rights*, where the three institutions confirmed their commitment to respect human rights in their actions, and named the constitutions of the Member States and the ECHR as the source of these rights, therefore adopting the ECJ language.[239] Even though the Joint declaration was not legally binding, it has nevertheless been referred to by the ECJ in its case law[240]. The Joint Declaration was also symbolically important in indicating that the Community's institutions supported the ECJ's derivation of rights from the ECHR and from national constitutional principles.[241]

The first text to formulate some kind of a catalogue of human rights was the *Declaration of Fundamental Rights and Freedoms*, which was adopted by the European Parliament in April 12th 1989.[242] The Declaration consists of a number of classic rights as well as social rights and administrative type rights. There is also a provision for a right of petition to the Parliament and a declaration on environment and consumer protection. By providing such a comprehensive list of rights, it has been regarded as the first step towards the Community Bill of Rights. In fact, as the nature of the Declaration was legally non-binding, there were even hopes that the ECJ would have gradually incorporated the Declaration in the Community legal order.[243]

Later that same year, eleven Member States (the United Kingdom not included) adopted the *Community Charter of the Fundamental Social Rights of Workers*, the nature of which was meant be "merely" a declaration or a piece of "soft law" to be used as an interpretative mechanism by the ECJ. Therefore, the Charter had no effect on the legal situation of the Community and its implementation relied entirely upon the Treaty provisions relating to social policy.[244] In addition to not having legal effect, the Charter has also been criticized for being too restrictive since it only applied to the Community

[238] Gras 2000, p. 9
[239] Ibid
[240] See for example the judgements in *Hauer*, *Cinéthèque* and *Johnston*
[241] Craig and de Búrca 2003, p. 324
[242] Gras 2000, p. 10-11
[243] Clapham 1991, p. 70
[244] Szyszcak 1995, p. 212-213

nationals. Be it as it may, the Treaty establishing the European Community refers to the Charter in the social provisions[245].[246]

During the pre-Maastricht era various Declarations and Resolutions on Racism and Xenophobia were given. However, all of these statements and resolutions constituted a rather hollow response to the judicial activism of the ECJ in the field of human rights and fundamental freedoms. Nevertheless, they did add weight to the ECJ's line of reasoning and could be used as support when interpreting other provisions of Community law.[247]

3. HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE EUROPEAN UNION

3.1 Human Rights and Fundamental Freedoms in primary law of the European Union

3.1.1 General rules for the protection of fundamental rights within the European Union

In 1986 the obligation "*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*" was confirmed by the Member States in the preamble of the Single European Act (SEA)[248].[249] Even though this reference to the protection and promotion of human rights and democratic principles has been criticized to be more of a political than of a legal nature[250], it is bound to have significance, as it was the first explicit reference to the protection of human rights in the treaties constituting the Communities.[251]

The Treaty of Maastricht[252] changed the name of the "European Economic Community" (EEC) to "European Community" (EC) and created "European Union", in which the so-called "I pillar" was to correspond to the EC, whereas the two newly created

[245] Article 136(1) TEC
[246] Gras 2000, p. 11
[247] Craig and de Búrca 2003, p. 349
[248] The Single European Act was signed on February 28th, 1986 and came into force on July 1st, 1987
[249] Scheinin 1995, p. 712
[250] See for example Gropas 1999, p. 12
[251] Woods 2002, p. 356
[252] Treaty on European Union was signed on February 7th, 1992 and came into force on November 1st, 1993

dimensions: the common foreign and security policy and police and judicial co-operation were to represent pillars II and III.[253] The Treaty of Maastricht marked a decisive step forward for the protection of Human Rights and Fundamental Freedoms.[254] The preamble to the Treaty of Maastricht reaffirmed the Member States attachment to the principles of liberty, democracy as well as the respect for Human Rights and Fundamental Freedoms and the rule of law. Furthermore, the human rights doctrine developed by the ECJ was incorporated into Article F(2) (now 6(2)) of the EU Treaty as follows:

> "*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*".[255]

It is noteworthy that the article only refers to the ECHR – and not to other "*international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories*"[256]. That the European Social Charter for example was left out is due to the opposition of the British government.[257] However, it can be assumed that this was not meant to change the established case law of the ECJ.[258]

The guarantee of respect for fundamental rights has been further strengthened by the Treaty of Amsterdam[259], which substantially revised the Article 6 (ex Article F). The first paragraph of Article F referring to national identities of the Member States was transferred as Article 6(3), and a new first paragraph was added to the Article 6 (former F) TEU, which states as follows:

> *"The Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*".[260]

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[253] Ojanen 2003, p. 139
[254] Persaud 1997, p. 355
[255] Article F (now 6(2)) TEU
[256] Case 4/73, Nold v Commission, [1974] ECR 491, para 13
[257] Rosas 1999 (II), p. 210 and Ojanen 2003, p. 139
[258] Lenaerts and De Smijter 2001, p. 277
[259] The Treaty of Amsterdam was signed on October 2nd 1997 and came into force on May 1st, 1999
[260] Article 6(1) TEU

3.1.2 Jurisdiction of the Court of Justice in matters relating to fundamental rights

The Amsterdam Treaty extended the jurisdiction of the Court of Justice to cover respect for the rights deriving from Article 6(2) (ex Article F(2)) TEU by revising Article 46 TEU. With the Article 46(d) TEU, the ECJ was given the power to ensure that the Union institutions respect Human Rights and Fundamental Freedoms insofar as the Court has jurisdiction under the founding Treaties. Thus, the ECJ was given jurisdiction to review the conduct of the European institutions not only under the EC Treaty, but also under many provision of the second and, especially, the third pillar. As welcome as it was to extend the ECJ's jurisdiction to the principles set out in Article 6(2) TEU, this in fact only legitimated what had happened *de facto* for some 30 years.[261] Some have even regarded this to be a step backwards, since the Article 46(d) only applies to the actions of the Institutions although the case law of the ECJ has already been extended to national implementation of Community law.[262] However, it seems highly unlikely that the absence of a specific mention of the Member States could change the established practise of the ECJ.[263]

3.1.3 Suspension clauses

A new suspension clause (Article 7) to the EU Treaty was added with the Treaty of Amsterdam.[264] Under this clause, some of a Member State's rights (e.g. its voting rights in the Council) may be suspended if it seriously and persistently breaches the principles mentioned in Article 6(1) TEU. The obligations of the Member State would, however, remain binding.[265] It is interesting to note that reference is not made to Article 6(2), with its concept of "fundamental rights as general principles of Community law", but to the broader framework of Article 6(1). Thus, the behaviour of a member state is not to be screened solely within the context of Community law, but against the broader background of international human rights principles.[266] Furthermore, the breach concerned can also relate to matters falling outside the scope of EU or EC law.[267] Also Article 309 TEC (*ex* Article 236) deals with the implications of a serious and persistent

[261] Craig and de Búrca 2003, p. 350
[262] Nowak 1999, p. 688
[263] Oliver 2000, p. 336
[264] Rosas 2001, p. 8
[265] The Amsterdam Treaty: A comprehensive guide
[266] Rosas 2001, p. 8

breach of principles mentioned in Article 6(1) TEU. According to paragraph 1 of Article 309 TEC, if a decision to suspend the voting rights of the Member State in accordance with Article 7(3) TEU is made, the voting rights are also suspended with regard to TEC.[268] With the new suspension clauses respect for human rights and fundamental freedoms by the Member States, which had previously been presented as an implicit condition of their membership of the Union, has become an explicit condition of that membership.[269]

The procedure laid down in Article 7 TEU, as after Amsterdam, consisted of two steps. First, the Council, meeting in the composition of the Heads of State of Government and acting unanimously on a proposal by on third of the Member States or by the Commission, after obtaining the assent of the European Parliament, may have determined the existence of a serious and persistent breach. In a second step, the Council, acting by a qualified majority as laid down in Article 205(2) TEC, may have decided to suspend certain of the rights deriving from the application of the TEU to the State in question, including the voting rights.[270] After the experiences gained with the Austria sanctions discussed later in this thesis, the Treaty of Nice[271] supplemented the sanction procedure with a preventive instrument by adding a new first paragraph to Article 7 TEU, providing that already the existence of a risk of a serious violation of the principles mentioned in Article 6(1) can be determined by the Council. As the procedure now stands, the Council, acting by a majority of four-fifths of its members, after having receiving the assent of the European Parliament and after having heard the Member State concerned, may decide that there is a clear risk of a serious breach by a Member State of the fundamental rights or freedoms. The initiative for such a decision can also come from one-third of the Member States, the Commission or the European Parliament. In any case, the assent of Parliament is required. After such a danger of a breach is thereby found, the Member State in question is given appropriate recommendations.[272] With the Treaty of Nice, Article 46 TEU was also changed so that the sanction procedures described above fall now within the jurisdiction of the ECJ.

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[267] Oliver 2000, p. 335
[268] Nowak 1999, p. 697
[269] Lenaerts 2000 (II), p. 461
[270] Nowak 1999, p. 690
[271] The Treaty of Nice was signed on February 26th, 2001 and came into force on February 1st, 2003
[272] The European Commission, Archives, Intergovernmental Conference 2000, Factsheets, Democratic Values, http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheets/fact-sheet10/index_en.htm

However, the Court is not competent for the appreciation of the justification or the appropriateness of the decisions taken.[273]

3.1.4 Fundamental rights as a precondition to the membership of the European Union

Regarding the enlargement of the Union, the Article 49 (*ex* Article O) of the Maastricht Treaty was changed with the Treaty of Amsterdam (signed on October 2nd, 1997) and accession to the Union was made dependant on the principles set out in Article 6(1) TEU. The Article 49 TEU states that:

> *"Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.*
>
> *The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the Applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."*

However, regrettably Article 49 TEU is one of the provisions of the TEU over which the ECJ has no jurisdiction by virtue of Article 46.[274]

3.1.5 Non-discrimination

The principle of non-discrimination is a core element of many other fundamental rights. The Amsterdam Treaty provided for the Union two new legal bases giving the Community better means to combat discrimination. First of them, Article 13 TEC empowers the Council, within the limits of the powers conferred by TEC and after consultation of the European Parliament, to take appropriate actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[275] It is essential to notice that Article 13 TEC is no more itself a prohibition on discrimination than directly effective, but is meant to be an instrument in

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[273] Nowak 1999, p. 696
[274] Oliver 2000, supra 69
[275] Lenaerts 2000 (II), p. 452

enabling the Community in the fight against discrimination.[276] The Article has however been criticized as being inadequate as it is not a general disposition consecrated to the principle of non-discrimination in all domains.[277] Furthermore, by requiring unanimity, it has been claimed to restrict an active and comprehensive Human Rights policy of the Union in the field of discrimination.[278] However, despite its shortcomings, Article 13 TEC can serve as an ideal foundation upon which a more comprehensive fundamental rights policy could be built on.[279]

The other legal base in the fight against discrimination is constituted in the Article 141 (ex Article 119) TEC, which has been changed with the Treaty of Amsterdam. The wording of the Article was changed so that it now allows the Council, acting jointly with the European Parliament, and after consulting the Economic and Social Committee, to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Furthermore, the new fourth paragraph of the Article allows the Members States to maintain or to adopt measures of positive action in order to make it easier for the under-represented sex to prevent or compensate for disadvantages in professional life.[280]

3.1.6 Legal basis for human rights in the external policies of the Union

As regards to the external policies of the EU, in the Article 11(1) (ex Article J.1(2)) TEU[281] the development of respect for Human Rights and Fundamental Freedoms was explicitly laid down as one of five objectives of the Common Foreign and Security Policy (CFSP)[282], the so-called "second pillar" of the EU.[283] The TEU also introduced

[276] Craig and de Búrca 2003, p. 357
[277] Renucci 1999, p. 264
[278] Duvigneau 1998, p. 74-75
[279] Lenaerts 2000 (II), p. 452
[280] Ibid, p. 453
[281] Article 11(1) TEU: "*The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: — to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter*"
[282] As the Treaty now stands, explicit objectives of the CFSP include the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms
[283] Nowak 1999, p. 688

two new instruments to the CFSP, these being common positions[284] (ex Article J.2 TEU, new Article 15) and Joint actions[285] (ex Article J.3 TEU, new Article 14). Until the Maastricht Treaty Common Strategies[286] (ex Article J.1, new Article 13) were the main instruments in the CFSP. In addition the Treaty brought economic sanctions within the CFSP sphere of activity.[287] With regard to development co-operation ("first pillar"), the Treaty establishing the European Community (Article 177 (ex Article 130u)) states that the Community development co-operation policy also contributes to the achievement of the objectives mentioned in the Article 11 TEU.[288] Furthermore, with the Treaty of Nice a new Article 181a was added relating to co-operation with third countries other than developing countries, providing an express basis for human rights clauses in co-operation policy, mirroring that which already existed for development policy under Article 177 TEC. [289]

3.1.7 Rights of citizenship

With the Maastricht Treaty, citizenship of the EU was established. Part II of the TEC on the citizenship of the Union contains provisions having human rights character. Especially the freedom of movement guaranteed in Article 18 (ex. Article 8a), the right to vote and stand as a candidate at municipal elections in the Member State where a citizen of the Union is residing guaranteed in Article 19 (ex. Article 8b) as well as the right of every citizen to petition the European Parliament and to apply to the Ombudsman guaranteed in Article 21 (ex. Article 8d) should be mentioned. This right belongs also any natural or legal person residing and having its registered office in a Member State (Article 194 (ex. Article 138d) and Article 195 (ex. Article 138e) TEC).[290] Given that the provisions on European citizenship operated a change in the nature of the Community, the limited number of rights mentioned in the Citizenship

[284] Common positions define the approach of the Union to a particular matter of general interest of a geographic or thematic nature. Member States must ensure that their national policies conform to the common positions. (EU Annual Report on Human Rights 2003, p. 32)
[285] Joint actions address specific situations where operational action by the Union is deemed to be required. (EU Annual Report on Human Rights 2003, p. 31)
[286] The aim of common strategies is to set objectives and increase effectiveness of EU actions through enhancing the overall coherence of the Union's policy. They are adopted by the European Council (Heads of State or Government) to be implemented by the Union in areas where the Member States have important interests in common. (EU Annual Report on Human Rights 2003, p. 30)
[287] Gras 2000, p. 23
[288] European Union Annual Report on Human Rights 2003, p. 6 and Brandtner and Rosas 1998, p. 471
[289] Rosas 2001, p. 9 and Craig and de Búrca 2003, p. 354
[290] Rosas 1999 (II), p. 212-213

chapter has been criticized as not sufficient to meet the gravity of the concept of European Citizenship.[291]

3.1.8 Other primary law provision on human rights and fundamental freedoms of the European Union

The primary law of the European Union, as it is presently, contains also other important regulations in the field of human rights. One of the most central changes done with the Amsterdam Treaty was that of the transfer of the provisions on measures concerning asylum, refugees and immigration (Articles 61-69 (ex Articles 73i-73q) TEC) - areas that are extremely sensitive to Human Rights, and therefore important to be recognized in the foundation Treaties – to the "first pillar" from the "third pillar".[292]

After the changes done with the Amsterdam Treaty, the Treaty establishing the European Community also contains a notable number of provisions relating to economic, social and cultural rights (Part III, Title XI TEC). Most importantly, Article 136 regarding the promotion of employment, improved living and working conditions refers to the European Social Charter and to the 1989 Community Charter of the Fundamental Social Rights of Workers (latter of which is a Declaration, and as such not legally binding). [293]

Furthermore, with the Amsterdam Treaty a new paragraph 2 was added to the Article 1 of the TEU providing that decisions are taken as openly as possible and as closely as possible to the citizen. This provision is complemented with Article 255 TEC regarding openness and access to documents. What is especially welcomed in this respect, is the fact that the right to review documents of the institutions of the Union on certain conditions, is granted to all human beings within the circuit of law of the Union.[294]

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[291] Alston and Weiler 1999, p. 58
[292] Duvigneau 1998, p. 75
[293] Rosas 1999, p. 910 and Brandtner and Rosas 1998, p. 470
[294] Ojanen 2003, p. 141

3.2 Human Rights and Fundamental Freedoms in the secondary law of the European Union

The Union's crowing concern on the protection of Human Rights and Fundamental Freedoms can be seen also in the Regulations and Directives of the Union. Councils "anti-racism" directive[295] gives a good example of how a Treaty provision can be given a wider scope. The mentioned Directive, under Article 13 TEC, was the first directive in which the Council ventures in the area of racial or ethnic discrimination "to ensure the development of democratic and tolerant societies". The Directive provides for equality of treatment in relation to access to employed and self-employed activities, education, social protection, including social security and health care, and access and supply of public goods and services, including housing.[296]

Whereas earlier Human Rights were found mainly in occasional phrases or references in the Directives or Resolutions[297], they can now be found more and more independently. And as the Regulations and Directives as regards to Human Rights earlier attached separate subjects like gender equality[298] or racism and xenophobia[299], they now attach fundamental rights more generally. Good examples of this serve two Council's Regulations of 1999 regarding human rights in the development co-operations.[300] These regulations are worth mentioning also because they provided for the first time a legal basis for the Union's human rights budget lines for various human rights operations.[301]

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[295] Council Directive 2000/43/EC, OJ 2000, L180/22.
[296] Tridimas 2001, p. 3
[297] See for example Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America Official Journal L 052 , 27/02/1992
[298] See for example Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *Official Journal L 225 , 12/08/1986 p. 0040 - 0042*
[299] See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, as well the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment in employment and occupation. See also the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 29 May 1990 on the fight against racism and xenophobia, *Official journal NO. C 157 , 27/06/1990 P. 0001 - 0003*
[300] Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development co-operation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, *Official Journal L 120 , 08/05/1999 p. 0001 - 0007.* And the Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, *Official Journal L 120 , 08/05/1999 p. 0008 - 0014*
[301] Gras 2000, p. 20

The Employment Equality Directive[302] implementing the principle of equal treatment in the areas of employment and training, irrespective of religion or belief, disability, age and sexual orientation is another example of a more general approach taken by the Union towards fundamental rights in its secondary law.[303]

3.3 Human rights in the external relations of the European Union

3.3.1 External human rights policy before the Treaty of Maastricht

Despite the absence of a legal basis for the human rights policy in the pre-Maastricht era, human rights played an important role already in EEC external policies. However, due to the lack of the legal basis, the nature of these commitments was political rather than legal.[304] Moreover, during the pre-Maastricht era human rights were for a long time only a secondary interest in the Community's external relations.[305] Since 1970's EEC's organs have applied human rights in the framework of the European Political Cooperation (EPC)[306] in their relations to third states. Since then, the European Parliament has given hundreds of resolutions on human rights violations around the world. It has also used its powers provided by the TEEC thereby refusing to give its assent to certain Protocols on ground of violations on human rights concerning Israel and Turkey. Since 1983 the Parliament has also adopted annual reports on human rights in the world and on Community policy on human rights. Moreover, since the adoption of the SEA, the Parliament has had the power to give or deny its consent to all new co-operation agreements concluded by the Union with the third countries. [307]

The activities of the Council and the Commission as regards to promoting human rights in their relations with third countries were for a long time rather limited.[308] Since the 1980's their role has gradually grown bigger. In July 1986, the Twelve Foreign Ministers declared in the *Statement on Human Rights* their commitment to the universal observance of human rights and highlighted the duty of the international community to

[302] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment in employment and occupation
[303] EU Annual report 2003 p. 17
[304] Gras 2000, p. 22
[305] Lundberg 1994, p. 92
[306] The framework of the European Political Cooperation was established with the Single European Act of 1989
[307] Clapham 1991, p. 72
[308] Lundberg 1994, p. 92

ensure their protection.[309] The Statement also declared, that the expressions of concern at violations of human rights cannot be considered as interference in the domestic affairs of a state.[310] This was in 1988 followed by the affirmation made by the Rhodes European Council declaring that the Community would take the opportunity to promote Western values and principles, requiring at the time respect for provisions in which the promotion of human rights and fundamental freedoms was included.[311]

The Council has also applied different economic sanctions towards third countries due to human rights violations, as an example of which serves the suspension of trade negotiations with Romania in April 1989 and again in June 1990 as a result of Romania's failure to respect human rights.[312] Finally, the *Declaration on Human Rights* of the Luxembourg European Council of June 1991 and the *Resolution on Human Rights*, Democracy and Development of the Development Council of Ministers of November 1991[313] made human rights a legitimate interest in the external relations of the Community.[314] The Declaration on Human Rights affirmed the Member States affirmation to act for the promotion of human rights, emphasized universality and indivisibility of human rights and paid particular attention to the situation of certain special groups, such as minorities, immigrants, children, women and elderly people. The Resolution in turn, emphasized the role of democracy and the principle of *Rechtsstaat* or good governance and confirmed that the Community was no longer willing to accept the argument of sovereignty from third countries in justifying the infringement of human rights. [315] Subsequently, the Community and its Member States committed themselves to include so-called *human rights clauses*[316] in the co-operation agreements thereon.[317]

The Commission, in addition to having worked within the framework of the EPC, has also taken own initiatives since 1980's, and thus made different appeals to the

[309] Gropas 1998, p. 12
[310] Gras 2000, p. 22
[311] Lenaerts 2000 (II), p. 472
[312] Clapham 1991, p. 74
[313] SEC (91) 61 final
[314] Gropas 1998, p. 13
[315] Lundberg 1994, p. 98
[316] The basic term of reference for the human rights clause is the Universal Declaration of Human Rights, proclaimed by the UN General Assembly in 1948 (Brandtner and Rosas 1998, p.475). Defining the democratic principles as "essential element" of the agreement, human rights clauses provide the parties a legal base to take restrictive measures in proportion to the gravity of a human rights offence, and to regard serious and persistent violations as a "material breach" of the agreement as stated in the Vienna Convention on the Law of the Treaties (Gras 2000, p. 26).

authorities of third countries concerning human rights violations, allocated funds in different kinds of emergency aid programs and human rights programs. In 1988 a direction F was established within the office of the Secretary General of the Commission to coordinate the different human rights activities of the various Commission directorates, to ensure that different services do not act outside Community competence, to liase with Parliament, NGO's and international organization, to inform Directorates dealing with EPC, and to prepares conferences, discussions and general information.[318]

3.3.2 Human rights in the external relations of the European Union

A considerable step in integrating human rights and democratic principles into the policies of the European Union was taken with the entry into force of the Treaty on European Union on 1 November 1993. With the establishment of the European Union fundamental rights not only became part of the Union's codified primary law, but also an overall transformation of the Union's more positive attitude towards fundamental rights could be seen.

In 1995, the Commission's communication "*The European Union and the external dimension for human rights policy: from Rome to Maastricht and beyond*" laid down what the EU stood for in terms of human rights and democratic principles. In fact, this communication marked the beginning of a series of actions taken by the Commission in order to make human rights a priority of the Union. The same year the Council decided to include human rights clauses systematically in all bilateral agreements of general nature.[319] According to a judgment[320] of the ECJ from 1996, the incorporation of human rights clause seems not be an alternative but a legal obligation of the Community due to Articles 177 and 181 (ex Articles 130u(2) and 130y) TEC.[321] As the *human rights clause* is based on reciprocity, the European Union too, has committed itself to respect democratic principles and fundamental human rights and has accepted in principle, a right for the other Contracting Parties to suspend the agreement in case of serious

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[317] Gras 2000, p. 26
[318] Clapham 1991, p. 74
[319] Gras 2000, p. 20-27
[320] Case C-268/94 Portuguese Republic v Council of the European Union [1996], ECR I-6177
[321] Gras 2000, p. 30-31

violations of these principles on the part of the EU institutions or the EU Member States.[322]

On 10 December 1998 the European Union adopted a Declaration on the occasion of the 50th anniversary of the Universal Declaration of Human Rights, which states that the EU policies in the field of human rights must be "continued and, when necessary strengthened and improved". The communication from the Commission to the Council and the Parliament on the EU's Role in Promoting Human Rights & Democratisation in Third Countries from May 2001 concentrated mainly on developing a coherent strategy in this field for EU external assistance. The document took into account recent developments in the legal and political framework for the EU's activities including the Amsterdam and Nice Treaties and the Charter of Fundamental Rights. Furthermore, in order to provide a legal basis for all human rights and democratisation activities of the European Union, the Council adopted two Regulations on 29 April 1999 (975/1999 & 976/1999) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms under Articles 179 and 308 TEC. This chapter B7-70, entitled "European Initiative for Democracy and Human Rights", was created by an initiative of the European Parliament in 1994. Since 1st January 2001, EuropeAid Co-operation Office is responsible for the project. The Directorate-General for External Relations and the Directorate-General for Development are responsible for the programming of external assistance.[323]

As regards to the applicant countries, a good example of a Union Measure adopted in the field of fundamental freedoms and the enlargement is Communication from the Commission of 26 May 1999 to the Cologne European Council meeting on 3 and 4 June 1999: countering racism, xenophobia and anti-Semitism in the candidate countries.[324]

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[322] Rosas 2001, p. 11
[323] European Commission: *Introducation to the EU's human rights and democratisation policy*, available at: http://europa.eu.int/comm/external_relations/human_rights/intro/, date of reference 15.3.2004
[324] COM(99) 256 final, not published in the Official Journal

3.4 Charter of Fundamental Rights of the European Union

3.4.1 Background of the Charter

The idea of drafting EU's own "Catalogue of Human Rights and Fundamental Freedoms" is, although sometimes forgotten, not a new one. By mid-1970's, the inevitably unpredictable development of the ECJ's case law led to a wide-spread debate on whether the Community should draw up a Charter of fundamental rights (Charter) in contrast to or simultaneously acceding the ECHR.[325] As we have seen earlier in this thesis, the German constitutional court was the initiator of the first option in the *Solange I* judgment. Even though the Declaration of fundamental rights, adopted by the European Parliament in 1989, and the Community Charter of the Fundamental Social Rights of Workers signed by eleven of the twelve member states that same year can be said to have been first attempts to get a Community catalogue of fundamental rights, there was no sign of any willingness to go as far as adopting a legally binding instrument.[326]

Finally, the Cologne European Council of June 4th, 1999 decided that it was necessary, "*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.*" The idea was that the existing EU law of fundamental rights would be consolidated.[327] Together with the European Parliament and the Commission, the Council was to solemnly proclaim the Charter.[328] The Cologne European Council left still to be decided, whether the Charter would be integrated into the treaties. The mandate to create the Charter was given to a special body, the "Convention on fundamental rights", consisting of representatives of the Member States (15), of members of the national parliaments (30), of members appointed by the European Parliament (16) and of one representative of the European Commission. The work of the Convention was begun in December 1999.[329]

The European Parliament, in its "*Working Paper of Strategies and options to reinforce the constitutional nature of the Treaties*", divided the advantages gained by establishing

[325] Oliver 2000, p. 323
[326] Lenaerts and De Smijter 2001, p. 277
[327] Weber 2002, p. 23
[328] Presidency conclusions Cologne European Council 3rd and 4th of June 1999; annex IV

a "catalogue of human rights" to three main points, the points being (1) the reinforcement of the constitutional character of the treaties, (2) the existence of a point of reference for the European Institutions and the national authorities when planning and implementing Union measures, and (3) the enhancement of the image of the Union, so that it would no longer appear to be a purely economic organisation.[330]

The Finnish Government was originally somewhat reserved about the Charter, although it never was completely unfavourable about it. In its Report to the Foreign Affairs Committee from 1996[331], the Government wrote that it did not rule out the possibility to incorporate certain fundamental rights in the TEU or the TEC, or to draw the Union separate catalogue of fundamental freedoms. The Union's adherence to the ECHR was however mentioned as the primary objective for the Union. The Report to the Parliament in February 2nd, 2000 the Government accepted the drafting of the Charter while expressing its reservation about incorporating the Charter to the TEU or the TEC. In the drafting of the Charter Finland emphasized the inclusion of the economical, social and cultural rights to the Charter, as well as articles on the good governance and the environment. Whereas these objectives of the Finnish Government were achieved, a proposed article on the rights of the minorities was not. The European Union Charter of Fundamental Rights was proclaimed by the three main institutions of the Union (the Council, the Commission and the Parliament) in Nice on December 7th 2000.

3.4.2 Contents of the Charter

In its Preamble, the Charter reiterates the values which had already been explicitly laid down in the Maastricht Treaty: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law". The Preamble also notes that the rights reaffirmed in it result from the constitutional traditions common to the Member States of the European Union, the Union itself and Community Treaties and the case-law of the ECJ, the international obligations common to the Member States, the European Convention on Human Rights, the European Social Charter and the case-law of the European Court of Human Rights. The final sentence of

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[329] Weber 2002, p. 21
[330] European Parliament: "What form of constitution for the European Union" 1999
[331] VNS 1/1996 vp

the Preamble states that *"(t)he Union therefore recognises the rights, freedoms and principles set out hereafter"*.

In addition to the Preamble and a Chapter (VII) for the general provisions, the Chapter consists of 54 Articles, which are divided into six chapters, named (I) Human Dignity, (II) Freedoms, (III) Equality, (IV) Solidarity, (V) Citizen's Rights and (VI) Justice. The Charter enshrines all the classic rights and freedoms (the civil and political rights included in the ECHR), and citizenship rights deriving from EU and EC Treaties, as well as social and economical rights, which correspond to provisions of employment and social law. In addition, the Charter covers rights of children and of disabled persons, as well as environmental rights; rights which are not protected by the ECHR, but by the common constitutional traditions of the Member States.[332]

In addition to the above, also so-called "modern" rights intended in particular to meet challenges connected with current and future developments in information technology and genetic engineering are contained in the Charter.[333] Furthermore, another new provision, not included in the Treaties in their present form, confirms the right to good administration.[334] Although the mandate of the European Council to the body drafting the Charter was to render visible the already existing fundamental rights in the European Union, the Charter goes in several respects beyond the case law of the Court of Justice, for example with respect to those "dignity" rights that have a distinctly non-economic context,[335] certain "freedoms"[336] and "equality rights"[337] and the "citizens' rights" [338].[339] In the end, the Charter is perhaps best described as a summary of rights contained in the various European and international agreements and national constitutions on which the ECJ had for some years already been drawing. [340]

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[332] Goldsmith 2001, p. 1209
[333] EU Annual Report on Human Rights 2003, p. 29
[334] Tuori 2003 p. 23
[335] See for example Art. 2 – right to life, Art. 3 – right to the integrity of the person (especially the prohibition on reproductive human cloning), Art. 4 – prohibition of torture and inhuman or degrading treatment or punishment and Art. 5 – prohibition of slavery and forced labour.
[336] Art. 6 - liberty and security, Art. 7 - respect for private and family life, Art. 9 - right to right to marry and found a family and Art. 13 – freedom of the arts and sciences
[337] See for example rights of the child (Art. 24), of the elderly (Art. 25), of persons with disabilities (Art. 26).
[338]See for example right to vote and stand as a candidate at elections to the European Parliament and at municipal elections (Arts. 39, 40) and access to documents (Art. 42)
[339] Röben 2003, p. 25-26 and Lenaerts and de Smijter 2001, p. 280
[340] Craig and de Búrca 2003, p. 358

3.4.3 Scope of the Charter

According to Article 51(1), the Charter's provisions are addressed to the institutions of the Union, and to the Member States only when implementing Union law. The Charter's limited scope reflects the complementary nature of the EU's fundamental rights law; it is aimed at providing protection for human rights in areas where the provisions of national constitutions or the European Convention are not applicable.[341] Paragraph 2 of the mentioned Article in turn verifies that the Charter does not establish any new power or task for the EC or the EU, or modify powers and tasks defined by the Treaties. Thereby the Charter is presented not as a source of positive legislative action, but simply as a codified form of what already exists under the jurisprudence of the ECJ.[342]

Article 52(1) contains a general "derogation clause" indicating the nature of the restrictions on Charter rights, which will be acceptable. Article 52(2) then goes on confirming, that the rights recognised by the Charter, which are based on the TEC or the TEU shall be exercised under the conditions and within the limits defined by those Treaties. This indicates that the Charter is meant to serve as a neutral confirmation of the rights already included in the foundation treaties, without widening or reducing their scope.[343] Indeed, the mentioned article explicit refers to the limitations in the primary law of the Union, especially in the field of free movement.[344] In other words, even if a particular right in the Charter would seem to give broader protection than an Article of the foundation treaties, the latter would nevertheless prevail.[345] According to the Article 52(3) of the Charter, the meaning and scope of those rights of the Charter, which correspond to rights guaranteed by the European Convention on Human Rights shall be the same as those laid down by the said Convention. The Article is meant to promote harmony between the provisions of the Charter and those of the ECHR while not preventing the Union from developing more extensive protection.[346]

According to the Article 53, nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised not only by Union law and the Member States constitutions but also by international law and by

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[341] Tuori 2003, p. 24
[342] Craig and de Búrca 2003, p. 357-358
[343] Lenaerts and De Smijter 2001, p. 282
[344] Triantafyllou 2002, p. 55
[345] Lenaerts and De Smijter 2001, p. 283
[346] Craig and de Búrca 2003, p. 361

international agreements to which the Union, the Community or all the Member States are party, including the European Convention on Human Rights. In other words, Article 53 is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law.[347]

Finally, Article 54 contains a clause modelled on Article 17 of the ECHR, providing that no provision of the Charter shall imply the right to engage in any activity aimed at the destruction or excessive limitation of any of the rights contained therein.[348]

3.4.4 Legal status of the Charter

Although one can draw the conclusion of the way the Charter was drafted that it was meant to have legal effect one day, [349] in Nice the question of its legal status was left to be decided later. Thus, the Charter has currently the status of a non-binding "soft law" instrument in the Community legal order.[350] The fact that the Charter is not legally binding, but "only" a solemn proclamation of the three institutions of the EU, does not however prevent the Charter from having at least some legal effect. In fact, at least as far as the Union institutions are concerned, precisely the fact the Charter was given by the three institutions of the Union implies that it is bound to have legal effect as far as the proclaiming institutions are concerned.[351] Indeed, in its communication of 11 October 2000 on the nature of the European Union Charter of Fundamental Rights, the European Commission affirmed that regardless of the legal nature of the Charter, it would be difficult for the Council and the Commission to ignore it. Subsequently, the Commission decided in March 2001 that any legislative proposal connected with the protection of fundamental rights would be considered for its compatibility with the Charter,[352] and has since put its promise into practise.[353]

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[347] Draft Charter of Fundamental Rights of the European Union - Text of the explanations relating to the complete text of the Charter as setout in. CHARTE 4487/00 CONVENT 50, p. 50
348 Craig and de Búrca 2003, p. 361
349 Pernice 2003, p. 6
350 Liisberg 2001, p. 6
[351] Eeckhout 2002, p. 947
[352] Craig and de Búrca 2003, p. 362
[353] As examples of the Commission's respect for its promise, see recital no. 2 of Regulation 1049/2002 on access to documents of the institutions, and recital no. 18 of Council Decision 2002/187 setting up the Eurojust. (Pernice 2003, p. 6)

Before the Charter was proclaimed, the "three wise men" in their report[354] of the Austria-situation referred to the Charter even before the final version of the Draft Charter had was published giving an indication of the Charter's importance. Interestingly, in several paragraphs, the Charter was referred to first and the ECHR second.[355] Also the Finnish Constitutional Committee dealt with the implications of the Charter in its Statement 2/2000 stating that "*it is very likely, that in the activities of the Union's institutions the Charter in reality would have the same kind of meaning that the actual primary law itself*". [356] Also many Scholars regarded the Charter as having legal significance. For example *Leif Savón*, a Justice of the ECJ, quite early estimated that the ECJ would use the Charter as source of inspiration.[357]

Despite the estimations of many, the ECJ has so far not referred to the Charter in its judgments. As the Charter is said to only codify the existing fundamental rights law of the EU, this is however not surprising. Nevertheless, the Court of First Instance (CFI)[358] has invoked the Charter of Rights as legal authority on several occasions. The first time the CFI referred to the Charter was in the case of *Maxmobil*[359] where the Court made explicit references to Articles 41 and 47 of the European Union Charter of Fundamental Rights and thus recognised the judicial impact of the Charter. Soon after that, in the *Jégo-Quéré*[360] judgement the CFI made a remarkable change in the rules governing individual access to the European courts. Referring to Article 47 of the Charter the Court broadened the concept of "individual measure" thus allowing individuals and businesses to challenge general measures of the Community that have a direct impact on their own situation.[361] In the joined cases of *Philip Morris International and others*[362] the CFI took a stance on the status of the Charter by saying that *"(a)lthough this document does not have legally binding force, it does show the importance of the rights*

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[354] Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, Paris September 8th, 2000
[355] Ménéndez 2001, p. 14
[356] PeVL 2/2000 vp
[357] Helander 2000, p. 3
[358] The Court of First Instance was attached to the Court of Justice in 1989. It has the jurisdiction to hear direct actions including cases brought by individuals. The judgments of the CFI can be referred to the ECJ.
[359] Case T-54/99, *max.mobil Telekommunikation Service GmbH v Commission*, 2002 ECR II-00313, paras 48 and 57
[360] Case T-177/01, *Jégo-Quéré & Cie SA v Commission*, 2002 ECR II-02365, paras 42 and 47
[361] EUROPA/European Commission/Justice and Home Affairs/The Charter of Fundamental Rights/The Charter in the European context: A point of reference for the courts, http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html
[362] Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International, Inc. and others v Commission*, judgement of 15 January 2003, paragraph 122

it sets out in the Community legal order".[363] Since then the CFI has continued to refer to the Charter, most recently in the *JCB Service*[364] judgment of January 13th 2004.

Judge Alber was the first Advocate General (AG) to make reference to the Charter[365] on February 1st, 2001. Since then the Charter has been mentioned regularly by the Advocate Generals. A few of them are of special interest as they deal the legal status o the Charter. In the *BECTU*[366] case, just one week after the Opinion of the *AG Alber*, the *AG Tizzano* not only referred to the Charter but also discussed the implications of it. Even though he admitted that the Charter does not have *"genuine legislative scope in the strict sense",* he nevertheless stated that the Charter reaffirms rights already enshrined in other instruments. He then continued by saying that *"(i)n proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right."*[367]

In *Booker Acquaculture*[368], *AG Mischo* in turn invoked the Charter as additional evidence of that the right to private property. After having taken the stand his colleague took in the *BECTU* case by admitting that the Charter was not legally binding, he went on stating that the Charter was in any case worthwhile referring to since it constitutes the highest level expression of "*a democratically established consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order*".[369] The wording of Advocate-General *Léger* in *Hautala*[370] case should also be noted: "*As the solemnity of its form and the procedure which led to its*

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[363] Ibid, para 122
[364] Case T-67/01, JCB Service v Commission, Judgment of the Court of First Instance of 13 January 2004, not yet reported
[365] Advocate General Alber in Case C-340/99, TNT Traco SpA contre Poste Italiane SpA (formally, Ente Poste Italiane), Michele Carbone, Raffaele Ciriolo et Clemente Marino, 1.2.2001
[366] Case C-173/99, Broadcasting, Entertainment, Cinematocraphic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry, Opinion of the Advocate General Tizzano, delivered on 8 February 2001
[367] Ibid, paras 26-28
[368] Advocate General Mischo in Joined Cases C-20/00 and C-64/00, Booker Aquaculture Ltd trading Marine Harvest McConnell and Hydro Seafood GSP Ltd v The Scottish Ministers, delivered on 20 September 2001
[369] Ibid, para 126

adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law."

However, not only the actors of the European Union themselves have referred to the Charter. On 11 July 2002, the European Court of Human Rights established a precedent by referring to the Charter in a ruling on the right of transsexual people to marry.[371] Before the Charter was proclaimed, *Helander* estimated that the Charter would potentially affect the judicial argumentation in Europe in wider sense also. According to him, the possibility to arguments leaning on the Charter were more than likely to arise even in the cases that in the narrow sense do not fall within the scope of Community law; this being true for especially in countries, where strict demarcations within the judicial system have been abandoned. According to *Helander*, it was presumable that in such countries like Finland at least the material rights of the Charter would be used as institutional support[372].[373] Even though the Finnish courts have evidently not so far referred to the Charter, for example the Spanish Constitutional Court[374] has done so by invoking Article 8 as authority for the Community status of the right to protection of personal data. The judgment was delivered a week before the Charter was solemnly proclaimed in Nice .[375] Thus, as the praxis of the ECJ, of the ECtHR and some Supreme or Constitutional Courts of the Member States has demonstrated, the Charter has proven to have legal relevance as a codification of existing fundamental rights law of the European Union.[376]

In the human rights report, published in March 2004 the Finnish government noted, that despite the expectations, the legal implications of the Charter have so far not been clear. Nevertheless the government noticed the increased visibility of fundamental rights protection in the European Union in the eyes of the citizens.[377] By providing a codified catalogue of the existing rights the Charter raises their visibility, contributing at the

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[370] Advocate-General Léger in Case 353/99 P, Council v. Hautala et al.
[371] Goodwin v United Kingdom (2002) 35 EHRR at p. 447
[372] Helander presumes that the Charter will be referred to both in the advance surveillance of the laws to be in accordance with the Constitution, as well as in the human rights -friendly interpretation of the law.
[373] Helander 2001, p. 71, footnote 47
[374] Judgment 292/2000, delivered on 30 November 2000
[375] Menéndez 2002, Chapter I, para 15
[376] Tuori 2003, p. 23, supranote 26
[377] VNS 2/2004 vp

same time to their invocability by the subjects of the EU legal order.[378] Indeed, with a good reason it can be said that rights included in the Charter are the "general principles of law" mentioned in the Article 6(2) TEU and as such the best evidence of the existing EU law on fundamental rights.[379] Thus, the legal status of the Charter, if not yet based on its formal incorporation into community law, can be grounded on its character as authoritative consolidation of existing law.[380] At the very least, the Charter is a strong statement on the values and principles the EU stands for.[381] Stated this way, the main significance of the Charter is attached to the symbolic-cultural level affirming a shared value basis corresponding to the principles of the democratic *Rechtsstaat*.[382] Thus, coming back to *Tuori*'s thoughts, the Charter can also be regarded as an effort in describing what a "European deeper structure of the law" consists of. On the other hand, even though the factual significance of the Charter in the legal argumentation is considerable, as a political proclamation the Charter however is no more than another "surface level" addition to the legal structure of the European Union. This having been said, the Charter in any case has potential in laying foundations for the sedimentation of fundamental rights principles into the deeper structures of the EU law.[383]

From the point of view of the countries wishing to join the Union the Charter is in any case a valuable instrument as it makes the candidate countries aware of their rights and of the values on which the Union is built by clarifying what the "respect for human rights and fundamental freedoms" enshrined in Article 6(1) TEU means.[384] This conclusion is supported by the Regular Reports of the Commission, which since 2001 include references to the Charter.[385]

3.5 Excursion: Fundamental Rights in the Member States of the European Union

3.5.1 Assessment of fundamental rights situation in a Member State

[378] Lenaerts and de Smijter, 2001, p. 281
[379] Helander 2000, p. 3
[380] Ménendéz 2002, Chapter I, para 7
[381] Lenaerts 2000 (I), p. 599-600, See also Helander 2001, p. 61
[382] Tuori 2003, p. 26
[383] Helander 2000, p. 7
[384] Dutheil de la Rochère, p. 10
[385] Menéndez 2002, Chapter IA, para 5-6

As envisaged above, the Article 7 (ex Article O) TEU, as well as Article 309 (ex Article 236) TEC establish the procedure for the suspension of rights of Member States in the case of a "serious and persistent breach by a Member State of principles mentioned in Article 6(1)". An overall assessment of the Human Rights situation in a Member State must always be made before any decision on either the suspension of aid or other negative measures. This assessment should take in a consideration of the gravity of the violation as well as the specific situation of the country concerned.[386] However, the implementation of the Article by the Union's institutions has unfortunately not always been clear, of which the rather controversial reaction by the fourteen other Member States of the Union to the entry of a very right-wing Freedom Party to the Austrian government in 2000 serves as an example.[387] The obvious lack of transparency and the absence of clearly formulated and publicised criteria as regards to the measures in the procedures was recognized by the European Heads of State as well. Subsequently, the Article 7 TEU was changed in Nice to provide more accurate and fairer procedures before the decision to suspend rights of a member state can be made. Moreover, a mechanism to prevent fundamental rights violations was introduced in Nice and the ECJ was given jurisdiction over the procedural provisions of the Article.[388]

Even though the procedures for the suspension of some of the Member State's rights is now clearer than it was when Austria was sanctioned, and despite the fact that at least some kind of mechanism to prevent fundamental rights now exists, the way in which the monitoring of the Member States is done remains inadequate. And even though as impartial monitoring as possible is needed when assessing whether a "serious breach" of the Article 6 TEU has occurred or is about to occur in a Member State, the use of a EU-external bodies, such as the use of the group of "three wise men" in the Austria

[386] Gras 2000, p. 24-25

[387] If sanctions are imposed by the Council, pursuant to Article 7 TEU, the Council can only take the decision on the basis of a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament. In the case of Austria however, the Heads of State and Government in taking its decision imposing sanctions on Austria may have acted on a proposal by on third of the Member States, although this is by no means evident), but most certainly did not act on the basis of a proposal from the Commission, nor did it not obtain the assent of the European Parliament. Also, had there been a breach by Austria of any of the principles set out in Article 6 TEU, such breach was not identified at the time of the decision, nor was Austria been given the opportunity to desist from any such breach. Only after the sanctions had been imposed, did the Union start investigating the matter. (Regan 2000, para 4) The investigation was done by the so-called "three wise men" by the mandate of the President of the European Court of Human Rights, who had been requested for a report by the Portuguese prime-minister acting as President of EU. (European Court of Human Rights: Press release July 12th, 2000). In the report, adopted on September 8th, 2000, the "three wise men" concluded that no violation of the Article 6 TEU exists in Austria. (Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, Paris September 8th, 2000)

[388] Craig and de Búrca 2003, pp. 350

case, cannot provide the answer in the long rung. Moreover, even if the use of EU-external bodies should not entirely be ruled out because of objectivity, a credible fundamental rights policy aiming first at prevention and only secondly on sanctions would require constant transparent monitoring done by the Union itself instead of for example mere ad-hoc instruments or EU-external reports done *a posteriori*. No wonder, that many scholars have called for an own mechanism body for the Union throughout the years[389]. In their Report of the Austria-situation, also the "three wise men" called for a mechanism within the EU to monitor and evaluate the commitment and performance of individual Member States with respect to "the common European values".[390] When the report of the "three wise men" was published, the only monitoring body of the EU was the European Monitoring Centre against Racism and Xenophobia (EUMC), which had been established in June 1997 to Vienna. As important as the mission of the EUMC is, it couldn't and was not even meant to serve as an "overall fundamental rights monitoring body" because of its defined purpose.[391]

The absence of a Union's own Human Rights Agency has, however, not prevented the Union's institutions from monitoring its Member States at least at some level. One example of the means to make the Union's human rights policy more consistent and effective has been the publishing of the European Union's Annual Report since 1999. The main aim of the Annual Reports have been to present a global view of the European Union's human rights policy, which is why the reports have concentrated on the Union's external relations and on its international role. However, the reports also contain a section devoted to human rights within the Union itself including matters like trafficking in human beings, racism and xenophobia, asylum and migration, and human rights and business.[392] The evaluations made in the context are rather general and rarely address any particular Member State. Concentrating mainly on the development of the respect for fundamental rights in the Union-level, the Annual Reports are not the best

[389] See for example Alston and Weiler 2001, p. 56-60
[390] Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, Paris September 8th, 2000
[391] The EUMC was created namely for three purposes: 1) to provide the Community and its Member States data at the European level on racism, xenophobia and anti-Semitism, 2) to study the extent and development of the phenomena and manifestations of racism, xenophobia and anti-Semitis, analyse their causes, consequences and effects, and examine examples of good practice in dealing with them, and 3) to disseminate information, data and examples of good practice with a view to contributing to the development of policies and practices in the Member States to combat racism, xenophobia and anti-Semitism (EUMC Media Release, Issue 194-03-04-03-01-EN, 10 March 2004, note 2, available at: http://eumc.eu.int/eumc/material/doc/404f01c1a6196_doc_EN.pdf, date of reference: 23.3.2004)
[392] EU Annual Report on Human Rights 2002, p. 10

instruments as far as the monitoring of the Member State's compliance of Article 6 TEU is concerned.

From the initiative of the European Parliament[393], the European Commission set up the Network of independent experts on Fundamental Rights to prepare Annual Reports on the situation of Fundamental Rights in the European Union in September 2002. The network published its first report in March 2003 regarding the year 2002, and will be handing out its second report in the near future. As the network itself in its 2002 Report stated, the advantage of an independent body monitoring the compliance of Fundamental Rights in the Member States of the Union is that on one hand it may guarantee the objectivity of the assessment, and on the other hand it may contribute to equal treatment of all Member States. Thereby, the meaning of the network is primarily to constitute an instrument for the European Commission and the European Parliament to carry out the roles given to them by Article 7 TEU: for the European Parliament, that of giving an assent so that the Council can establish the existence of a serious and persistent breach by a Member State of principles laid down in Article 6(1) TEU; for the Parliament and the Commission, that of taking the initiative to propose that the Council of Ministers establish a "clear risk of serious breach" of these principles by Member States, to which State the Council may then "address appropriate recommendations". The Reports of the Network are drawn up using the European Union Charter of Fundamental Rights as the reference instrument. Chapter by chapter, Article by Article the Reports examine the current situation and the developments in the field of fundamental rights in Member States urging the Countries in question on measures needed in each case. In the evaluation, the network monitors, not only the changes in legislation, regulations and case law, but stresses also the practises of the authorities. [394] The importance of the Network's Reports cannot be overestimated as they provide for the first time a coherent, comprehensive and structured assessment of the fundamental rights situation in the Member States. However, to insure continuity of the reports, attention will still have to be paid to the status of the Network, and the appropriate legal basis should still be provided.[395]

[393] Resolution of the European Parliament on the situation as regards fundamental rights in the European Union (2000), 5 July 2001.
[394] E.U. network of independent experts in Fundamental Rights: Report of the situation of Fundamental Rights in the European Union and its Member States in 2002, p. 26
[395] COM(2003) 606 final, p. 10

In October 2003 the Commission published a Communication on Article 7 TEU[396], in which it examines the conditions for activating the procedures of Article 7 TEU and identifies the operational measures, which could make for respect and promotion of the common values. The Communication makes the meaning of the mentioned article clearer as it analyses the concepts used in the article. The Commission mentions first the European Parliament's annual reports on the fundamental rights situation in the European Union as "a major contribution to the elaboration of an exact diagnosis on the state of protection in the Member States and the Union".[397] The Reports of the Parliament are however mainly concentrated on the actions of the Union and of its institutions in the field of human rights. Only occasionally are specific Member States mentioned. Also, as the reports are "reported" each year by different "reporter", they vary substantially both in perspective and in the content. As valuable instrument as the Parliaments Annual Reports are, they do not nevertheless provide the information needed in a serious monitoring of the Member States. The Communication also lists certain Union-external reports, such as the Resolutions of the UN General Assembly and reports by the Human Rights Commission, the Council of Europe, and its Commissioner for Human Rights[398] in particular, and the OSCE, as instruments used in the monitoring. In addition, reports of NGO's, such as Amnesty International, Human Rights Watch and Fédération International des Droits de l'Homme are mentioned, as well as the decisions of relevant international Courts. Furthermore, the reports of the EUMC and the individual complaints made to the Commission and to the Parliament are mentioned before the major role of the reports given by the Network of independent experts of Fundamental Rights in the monitoring is stressed.[399] By describing the way in which the Union would examine the Member States compliance with the respect for fundamental rights, the Communication makes the procedure more visible to both to the current Member States, as well as to the Applicant Countries. However, a response to the Communication from the Council of Ministers would be needed to add its significance.

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[396] Ibid

[397] Since 1984 the Human Rights Sub-Committee of the European Parliament has published Annual Reports on Human Rights in the World and European Union's human rights policy to inform and to alert European Public Opinion to human rights violations committed throughout the world.

[398] Established in 1999 as an independent institution within the Council of Europe, the Commissioner for Human Rights is a non-judicial body responsible for promoting respect for and education in human rights, as derived from the Council of Europe's instruments. It submits an annual report and "country visit reports" to the Committee of Ministers and the Parliamentary Assembly. (COM(2003) 606 final, p. 11)

[399] COM(2003) 606 final, p. 9

Recently, in December 2003, the demands for Union's own Human Rights body were meat as the Heads of State decided at the Brussels European Council to establish a European Union Human Rights Agency to collect and analyse Human Rights data with a view to defining the Human Rights policy of the Union. The future EU Human Rights Agency was decided to be built upon the existing European Monitoring Centre against Racism and Xenophobia (EUMC).[400] The Commission has indicated that later this year a consultation process will be launched to determine the appropriate remit, powers and structure of the new Human Rights Agency.[401] The Finnish government has had a relatively cautious attitude towards the Agency. In its first-ever human rights report, released on 24 March 2004 the government stated, that instead of giving human rights-related the tasks to a separate Agency, a human rights-perspective should be strengthened within the institutions of the Union. The government was nevertheless ready to confer "some monitoring duties" to the Agency.[402] The standpoint of the Finnish government can be criticized to be rather restricted, as the mainstreaming of human rights into all politics does not reduce the need for monitoring of the Member States.

3.5.2 Evaluation of the respect for Fundamental Rights in the current Member States

In the current Member States of the European Union there are clearly many human rights challenges which persist and to which greater attention should be given. This has been noticed by a wide range of sources, including the first Annual Report on the situation of Fundamental Rights in the European Union by the Network of independent experts on Fundamental Rights, as well as the reports published by the European Parliament, by the European Commission (especially by the Human Rights Commissioner), and by non-governmental groups such as Amnesty International and Human Rights Watch. The reports note among other things the existence of racist and xenophobic behaviour, failures to fully live up to equality norms or to eliminate various types of discrimination, major shortcomings in the enjoyment of economic, social and

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[400] Conclusions of the Representatives of the Member States, meeting at Head of State or Government level in Brussels on 13 December 2003, available at: http://ue.eu.int/pressData/en/misc/78398.pdf (date of reference: 23.3.2004)
[401] EUMC Media Release, Issue: 194-03-04-03-01-EN, 10 March 2004, available at: http//eumc.eu.int/eumc/material/doc/404f01c1a6196_doc_EN.pdf, date of reference: 23.3.2004
[402] VNS 2/2004 vp.

cultural rights of disadvantaged and vulnerable groups[403], unsatisfactory treatment of refugees and asylum seekers[404], inhumane and degrading treatment of detainees, inadequate prison conditions[405] and so on.[406]

Although a more thorough examination is to be done outside of this study, some questions are worth of special attention. The danger of *refoulement* was reported to exist in Austria and Sweden by the 2003 Report of the Amnesty. The danger is however wider-spread, as the on-going discussion of the *refoulement* of asylum seekers in many of the "old" member states of the Union indicates. Regarding the situation of minorities, which has been carefully monitored by the Commission as regards to the applicant countries, recent reports of the Council of Europe Commissioner for Human Rights[407] and the EU Annual Report on human rights 2003 have raised, for instance, issues related to Roma in the EU area.[408]

Also the 2002 Report the independent network of experts on Fundamental Rights has paid particular attention to unsatisfactory situation Roma living in the Member States of the EU. Overall, many of the current member states of the European Union have not yet properly dealt with the question of ethnic minorities living in their territories, of which North Ireland, Corsica and the Basque country serve as examples. This is perhaps due to the fact that in the framework of the European Union the question has so far been regarded as an internal affair of a Member State in question.[409]

Furthermore, racism and xenophobic behaviour has been reported by many sources during the preceding years. For example Amnesty's 2003 report mentioned Belgium, Finland, France, Ireland, Italy, Portugal, Spain and Sweden as having problems with racism.[410] Also EU's own monitoring agency – EUMC, has expressed concern on racism in the Member States. The 2002 report mentioned in fact increased racist

[403] In June 2002 the UN Committee on Economic, Social and Cultural Rights expressed concern that discrimination against people with physical and mental disabilities persisted in Ireland (Amnesty 2003 Report)
[404] Amnesty's 2003 report expressed concern about Austria's and Denmark's new legislations, Germany in not respecting human rights at deportation and Spain for insufficient access to lawyers at the detention center for immigrants and overcrowding. Also Greece, Ireland and UK were listed.
[405] Amnesty's 2003 report listed Germany, Ireland, Italy, Portugal, Spain, UK
[406] Alston and Weiler 1999, p. 16
[407] For example, regarding Greece, the Commissioner noted that the Roma/Gypsy population was highly vulnerable and at a disadvantage in many areas such as access to health care, housing, employment or schooling. (CommDH(2003)7, p. 45)
[408] EU Annual Report on Human Rights 2003
[409] Corbetta 2002, p. 31

violence and crimes in most of the Member States over the last few years,[411] which was partly explained by the 11th September 2001 attacks and overall political development (including immigration) both at international as well as in the European level.[412]

The EU Annual Report on human rights 2003 as well acknowledged the existence of the problem of trafficking in human beings. However, in the report, no countries are mentioned. The problems are instead described as common and the attention is drawn to the actions of the Community institutions in this field.[413]

One question that seems to require more and more attention by the time is the respect for human rights and fundamental freedoms in the fight against terrorism. This can be seen by various sources, such as, to mention few of the most recent ones, the EU's own annual reports on human rights 2002 and 2003, and the 2003 Reports of the Amnesty International. The question is indeed relevant and has more than just one dimension. On one hand, in the fight against terrorism fundamental rights or the suspected terrorists can easily be violated. On the other hand, even strictly from a point of view of the human rights, the fight against terrorism is essential as terrorism does pose a serious threat to the realisation of fundamental rights of the individual. Thus, both the member states of the Union as well as the Union's institutions are faced with a clear challenge.

As the applicant countries are monitored in regard to the international human rights treaties that they have not signed and/or ratified, few words of how the current member states are living up to this requirement should also be said. Indeed, to mention just a few of the Treaties still to be signed or ratified by the current member states, the Convention against Torture has not yet been ratified by Belgium and Ireland, whereas Belgium, France and the United Kingdom still have to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) aiming at the abolition of the death penalty. Moreover, there are still some European Council instruments needing ratifying by the current member states. Protocol No. 4 to the ECHR of 1963, which prohibits imprisonment for breach of contract, guarantees freedom of movement and residence and bans collective expulsions, has not been ratified by Greece, Spain or the United Kingdom. Also, Protocol 7 to the ECHR of 1984 still need to be ratified by

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[410] Amnesty 2003 Report
[411] EUMC: Annual report on racism and xenophobia in the EU member states 2002, Part 2, p. 13
[412] Ibid, p. 18
[413] EU Annual Report on Human Rights 2003

Belgium, Germany, Netherlands, Portugal, Spain and United Kingdom. Furthermore, Protocol No. 13 to the ECHR of 2002 preventing the use of capital punishment in all circumstances (including war) is waiting for the ratification of Finland[414], France, Germany, Greece, Italy, Luxembourg, Netherlands and Spain, whereas Protocol No. 12 to the ECHR of 2000 hasn't been ratified by any of the current member states. As for the revised European Social Charter, only Belgium, Finland, France, Ireland, Italy, Portugal and Sweden have ratified it. Also the Framework Convention for the Protection of National Minorities has not gained appropriate commitment from within the EU member states as Belgium, France, Greece, Luxembourg and Netherlands have yet to ratify the treaty.[415]

4. RESPECT FOR FUNDAMENTAL RIGHTS AS A PRECONDITION OF THE MEMBERSHIP

4.1 The political criteria

Already in the *European Council Declaration on Democracy*[416] of 1978 the respect for human rights was prescribed as a condition for admission to the Community.[417] However, as when Finland, Sweden, Norway and Austria at the end of 1980s were having accession negotiations with the Union, there was little evidence of explicit human rights conditionality applied to potential members. As entry was only possible through the unanimous approval of all the existing Member States and of the majority of the European Parliament[418], it was perhaps clear that any applicant for membership had to ascribe to the fundamental principles of the Union, part of which, mostly to the credit of the ECJ, human rights and fundamental freedoms had been seen since the end of the 1960's. Besides, the mentioned countries hardly posed any particular problem in respect for human rights.[419] Turkey of course was an exception, but with all of its economical and political problems of the time, the Community did not even grant it the status of an Applicant.

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[414] Finland signed the Protocol in May 2002 and will ratify it during the spring 2004 (VNS 2/2004 vp.)
[415] Ratification status 25.03.2004 (European Council: Human rights information bulletin, No. 61, 2004, Appendix)
[416] Declaration on Democracy (Copenhagen European Council, 8 April 1978), EC Bull. 4-1978
[417] Clapham 1991, p. 73
[418] Since the Single European Act of 1986 the assent of the majority of the Parliament must be given in order for any new Member State to join the Community (Clapham 1991, p. 73)
[419] Williams 2000, p. 602. Also as Gras (2000, p. 34) points out, certain references to "the respect for and maintenance of representative democracy and human rights" were included in to the Declaration of

Whatever the reason for the Community's accession policy's absence for human rights conditionality was in the 1980s, the fall of the Iron Curtain and subsequent democratisation of the Central and Eastern European countries resulted in a change of attitude. As a response, the Council in Dublin declared in 1990 that "*this process of change brings ever closer a Europe which, having overcome the unnatural divisions imposed on it by ideology and confrontation, stands united in its commitment to democracy, pluralism, the rule of law, full respect for human rights and the principles of the market economy*."[420] Within that conception, human rights occupied, at least rhetorically, a vital role developing as a key element in the conditions attached first to the relations of "association" with the ex-communist states and then those of potential "accession". The so-called "Europe Agreements"[421], that have become part of the pre-accession framework, contain the condition for the respect for human rights. Even so, there still was no clear definition as to the substance of the human rights in the context of the "Europe Agreements", nor was there any measures designed to promote human rights *per se* or even to set out the scope of rights which were to be considered. [422]

When the Copenhagen European Council in June 1993 approved the principle of the Community's enlargement to embrace the associated countries of Central and Eastern Europe, the foundation treaties itself had hardly any formal requirements for applicant countries, apart from being a European State.[423] Therefore, it was for the European Council to define the relevant criteria, the so-called "Copenhagen criteria". In addition the Copenhagen European Council made it clear, that the applicant countries would have to adopt the entire *acquis communautaire* ("*acquis")* before joining the Community.[424] The requirement to adopt and implement the entire *acquis* of the Union has since been written in the Accession Treaties. According to this obligation, exceptions of applying the full *acquis* from the first day of the membership are only

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Democracy given by the Copenhagen European Council in 1978 as regards to the applying Members Greece, Spain and Portugal).

[420] Special Meeting of the European Council, Dublin April 28, 1990 E.C.Bull 4-1990, p. 7.

[421] A Europe agreement is a specific type of association agreement concluded between the European Union and certain Central and Eastern European states. Its aim is to prepare the associated state for accession to the European Union. To date, Europe agreements have been concluded with ten countries: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. (European Union: SCAD Plus - Glossary: Institutions, policies and enlargement of the European Union)

[422] Williams 2000, p. 603-606

[423] Treaty of Maastricht, Article O

[424] Novak 1999, p. 691

accepted in those areas where transitional arrangements have been agreed in the negotiations.[425]

The Copenhagen 1993 Council also re-emphasised that the Commission should compile Opinions and subsequent periodic Reports on each of the applicant states paying particular attention to progress made towards complying with the Copenhagen accession criteria.[426] The direct expression of a rights conditionality to be applied to the applicant states has been seen to demonstrate the emplacement of a substantially more transparent policy for full entry to the Union; it certainly did establish the base from which the observation of an applicant state's human rights situation could be reflected.[427]

4.2 The legal conditions of eligibility for membership of the Union

4.2.1 General remarks

Before the Treaty of Amsterdam the only legal condition to join the Union was that the applicant country must be a European State. As dealt with previously, the Article 49 (*ex* Article O) TEU was changed with the Treaty of Amsterdam and accession to the Union was made dependant on the principles set out in Article 6(1) TEU. In principle, fulfilment of the applicant country's condition to respect human rights and fundamental freedoms may be the subject of judicial review by the ECJ, but in practise however, it is a matter for political assessment by the Council acting by unanimity and the European Parliament acting by an absolute majority of its members. Subsequently, it is clear that the Union requires European states applying for membership to respect human rights in all circumstances. [428]

To ensure compliance with the requirement to respect human rights and fundamental freedoms, the Union relies essentially on the political decisions of its democratic institutions and on the machinery for controlling respect for human rights established by the ECHR. It has therefore been argued that a European State cannot be accepted as a member of the EU without first acceding to the ECHR. This does not however mean that the requirement would be a sufficient condition for accession as the EU now has its

[425] Monitoring Report 2003, p. 5
[426] Gras 2000, p. 35
[427] Williams 2000, p. 607

own catalogue of fundamental rights, which clearly gives a wider protection of fundamental rights as the ECHR. After all, even though the Union's own Charter of Fundamental Rights is not legally binding, it does enumerate the fundamental rights as already protected by the ECJ and as they result from the common constitutional traditions of the Member States, and as such could not be completely overlooked.[429] Even more to the point, the recent admission practice of the Council of Europe in respect of countries such as Albania, Croatia, the Russian Federation, or the Ukraine, raises doubts about the seriousness of the Council of Europe in applying its own membership criteria and thus membership to the Council of Europe no longer means that the political admission criteria in Article 6(1) TEU are met.[430]

When developing the accession criteria, Article 7 TEU (and Article 309 TEC) could provide a basis.[431] In fact, it has been suggested that it was probably the very thought of Eastern enlargement that inspired the fundamental right supervision mechanism to be introduced by the Amsterdam Treaty into the EU Treaty as a new Article 7 and into the EC Treaty as a new Article 309 (*ex* Article 236).[432] There have even been suspicions implying that the existing Member States only accepted the Article 7 concerning the possibility of suspension because they had considered that if this sanction mechanism were to be used, they themselves would never be subjected to it. As a consequence, Article 7 has been regarded to offer a possibility vis-à-vis new member States, which might fail to meet the requirement of democracy and human rights. The way the other Member States of the Union reacted to Austria's situation certainly reaffirms this conception.

Be that as it may, it is nevertheless clear that the mentioned Article is applicable both to the present as well as to the future Member States of the Union.[433] Furthermore, one should not underestimate the potential preventing effect that the existence of such a mechanism may have on authorities tempted to breach fundamental rights in the European States applying for EU membership.[434] What is said before about the implications of the Article 7 TEU referring to the broader framework of Article 6(1)

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[428] Lenaerts 2000 (I), page 599
[429] Ibid
[430] Nowak 1999, p. 692
[431] Gras 2000, p. 16
[432] Pieters and Nikless 1998, para 2.4
[433] Gras 2000, p. 16
[434] Lenaerts 2000 (II), p. 463

holds true to the Article 49 TEU as well, and therefore the behaviour of a Candidate Country is to be screened against the broader background of international Human Rights principles.[435] However, whilst acknowledging the possible positive effects Article 7 TEU may have on the applicant countries, one cannot disregard, that as the contents of Article 7 TEU remain rather indistinct, the main emphasis should be put to the Article 6 TEU.

The Articles 6 and 49 TEU certainly constitute the legal basis for demanding the applicant countries to respect human rights and fundamental freedoms. However, although the TEU provides that human rights Human Rights are fundamental principles of Community action, it fails to make clear how those rights are to be defined and certainly needs clarification. [436]

4.2.2 Civil Rights

In doing systematic interpretation of Article 6 as a whole, we can come to conclusion that, as a minimum, the term "fundamental rights" includes all rights and freedoms guaranteed by the European Convention on Human Rights, which is explicitly referred to in Article 6(2), to which all Member States of the Union are parties, and the ratification of which is today a precondition to membership of the Council of Europe. A problem arises however, when observing the Additional Protocols to the Convention, as not all the current member states are parties to all of them. On the other hand, the new Charter of Fundamental Rights in the European Union, even though not legally binding, does provide important information of the contents of the Article 6(2) TEU.

It is to be recalled also that in Amsterdam a Declaration to the Final Act on the abolition of the death penalty has been adopted. It has therefore been suggested, that an application for EU membership by a State where the death penalty is still used could be refused.[437] This suggestion is supported by the European Union Annual Reports on Human Rights published by the Commission. In the 2003 European Union Annual Report for example the Commission emphasized the standards and values of the Council of Europe as a reference framework for countries applying for EU membership,

[435] Rosas 2001, p. 8
[436] Flaherty and Lally-Green 1998, p. 92
[437] Nowak 1999, p. 692

and stresses that the intention to make Europe a zone free from the death penalty is an important part of these standards.[438]

4.2.3 Economic, Social and Cultural Rights

In the new fourth preambular paragraph to the TEU the attachment to fundamental social rights, as defined in the European Social Charter (ESC) and the 1989 Community Charter of the Fundamental Social Rights of Workers, was confirmed. However, the Union in itself is not a party to ESC, and the Community Charter of Fundamental Social Rights of Workers is no more than a solemn declaration by the Heads of State or Government of the Member States. [439] In addition, since most of the current Member States (like the United Kingdom) have not yet inserted this "second generation of human rights" as fundamental rights into their constitutions, it would be difficult to assert that the respect for these rights "result(s) from the constitutional traditions common to the Member States", as stated in Article 6(2) TEU. [440]

On the other hand, the Community Courts have repeatedly drawn inspiration from international social rights standards when interpreting certain EC Treaty provisions with a view to developing a set of EC based social rights.[441] Furthermore, the 1997 Commission proposal for a human rights financing regulation is based on the principle of indivisibility of human rights. That economic and social rights are included in the concept of human rights is spelled out in a preambular paragraph. [442] Last but not least, a substantial part of the EU Charter of Fundamental Rights is reserved to the fundamental economic and social rights.[443]

4.2.4 Third generation of human rights

It is even more problematic to analyse whether the collective rights of the so-called "third generation of human rights" fall within the definition of Article 6 TEU, since whereas, for example the protection of minorities is explicitly referred to in "the

[438] EU Annual Report on Human Rights 2003, p. 50
[439] European Parliament: Fundamental Social Rights in Europe 1999, p. 40
[440] Nowak 1999, p. 693-694
[441] Brandtner and Rosas 1998, p. 485
[442] Weiler 1999, para 3.2
[443] See Chapter 3.4 above for more

Copenhagen Criteria", it is not referred to in Article 6 TEU.[444] On the other hand, Article 13 TEC enabling the Council to "take appropriate action to combat discrimination based, *inter alia*, on "racial or ethnic origin" could to provide, at least indirectly, the basis for minority protection within the Union. Moreover, Article 151 (4) TEC requires the Community to take cultural aspects into account in its action under other provisions of the Treaty, "in particular in order to respect and to promote the diversity of its cultures".[445] In fact, the amended EC Treaty contain also another reference that indicate concern about the continued existence of each of the Member States and their identities, which is the principle of subsidiarity[446].[447] As regards to the Charter, it does not include a specific Article for the rights of the minorities. However, Article 21 of the Charter prohibits all discrimination also in the case of the national minorities, as well as any discrimination on grounds of nationality, whereas Article 22 affirms that the Union shall respect cultural, religious and linguistic diversity.[448] The most comprehensive statement on the protection of minorities, however, which is contained in the Copenhagen Document of the Conference for Security and Cooperation in Europe (CSCE) Human Dimension Conference of June 1990, was adopted unanimously by all CSCE participating States.[449] Furthermore, the *Stability Pact for Europe*, signed in 1999, recognizes this and pledges commitment to the protection of the rights of minorities. [450]

As for other collective rights, Article 37 of the Charter of Fundamental Rights of the European Union is dedicated to environmental rights. Furthermore, even though the right to peace is not expressively mentioned in the Charter, the "*affirmation to share a peaceful future based on common values*" by the peoples of Europe written in the Preamble of the Charter could be taken as an indicative in this direction.

4.3 Of the monitoring process

4.3.1 Foundations of the monitoring process

[444] Nowak 1999, p. 693
[445] Weiler 1999, para 3.3
[446] The principle of subsidiarity is used to determine the appropriate level of government at which decisions should be taken.
[447] Woods 2002, p. 360
[448] Hughes and Sasse 2003, p. 11
[449] Nowak 1999, p. 693-694
[450] EU Annual Report on Human Rights 2003, p. 81

In assessing the situation of human rights and fundamental freedoms in a future Member State of the EU, relevant decisions and recommendations of independent expert monitoring bodies, such as the European Court of Human Rights, the European Committee for the Prevention of Torture, the Committee of Independent Experts monitoring compliance with the ESC, the OSCE High Commissioner on National Minorities, and the respective expert bodies of the United Nations, above all the Human Rights Committee, the Committee against Torture, and the various Working Groups and Special Rapporteurs of the UN Commission on Human Rights should be taken into account. [451] The existence of the Charter of Fundamental Freedoms in the European Union is more than useful as regards to the enlargement as it sets out the values and principles of the Human Rights in the Union. Bearing in mind what was said before about the rights included in the Charter to be the "general principles of law" mentioned in the Article 6(2) TEU, it can be said to raise the threshold for membership. Therefore, the Charter should not be overlooked when assessing the Applicant Countries' level of Human Rights protection. Furthermore, to build up a comprehensive picture of the human rights situation in a country and to attain an as realistic picture as possible, the monitoring should concentrate on areas and target groups like prisons and detention centres, hospitals, trials and vulnerable groups such as refugees and internally displaced persons, women and children, the disabled and mentally ill, as well as minorities.[452] Moreover, the assessment of respect for human rights and fundamental freedoms as an admissibility criterion must address not only the overall legal, but especially the factual situation in candidate countries. Coming back to *Tuori,* reforms done in the surface level of the law, like affirming the principle of human rights in the written constitution, are not enough to guarantee the realisation of these rights. [453]

However, the Union has been widely criticized for a general absence of any systematic and coherent approach to monitoring and reporting on the actual human rights situation in the countries candidate for accession[454]. This lack of transparency in the external human rights policy of the European Union is understandably unsatisfactory for the countries applying to join the Union as these countries aren't aware of the basis on which their performances are evaluated by the EU.[455] Rather understandably, the

[451] Nowak 1999, p. 694-695
[452] Gras 2000, p. 73
[453] Tuori 2000, p. 228
[454] See for example Lenaerts 2000 (I)
[455] Lenaerts 2000 (I), p. 596-597

monitoring procedure is, from the point of view of the applicant countries not systematic enough, nor transparent enough.

4.3.2 Annual Reports of the Commission

The main instruments in assessing the readiness of an Applicant Country to join the Union are the Opinions and subsequent annual Reports of the Commission. The first Opinions on the progress made by each of the applicant countries towards accession were published in 1997.[456] Following the decision of the Luxembourg European Council[457], the Commission has since 1998 continued monitoring the applicant countries' progress in the light of the Copenhagen criteria by publishing annually Regular Reports on each applicant country, as well as a Composite Paper or a Strategy Paper[458] combining the results of the Regular Reports[459]. In 2003 Regular Reports were made of the three remaining Applicant Countries: Bulgaria, Romania and Turkey. In addition the Commission published Comprehensive Country Monitoring Reports of the ten Acceding Countries as well as a Comprehensive Monitoring Report combining the main issues dealt with in the Country Monitoring Reports.

According to the Commission, the Regular Reports highlight legal measures actually adopted rather than those under preparation, and the assessment is based initially on information provided by the candidate countries themselves. In addition, the Commission also draws upon information provided in the context of the accession negotiations as well as in meetings held under the Association Agreements. It has compared information from these sources with that contained in the new National Programmes for the Adoption of the *Acquis*, which were transmitted to the Commission in the first part of 2001. The Commission has drawn on the reports of the European Parliament, evaluations from the Member States, the work of international organizations, in particular the Council of Europe and the OSCE, and international financial institutions, European business associations as well as non-governmental

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[456] The 1997 Opinions of the Commission are part of the "Agenda 2000". The Opinions on each country can be found at: http://europa.eu.int/comm/enlargement/intro/ag2000_opinions.htm, date of reference 1.4.2004

[457] Conclusions of the Luxembourg European Council, PE 167.145, para 26

[458] The report combining the results of the Regular Reports was called "Composite Paper" in 1998 and 1999. Since the year 2000 it has been called "Strategy Paper".

[459] The Reports on the progress made towards accession by each of the applicant countries, published since 1998, can be found at: http://europa.eu.int/comm/enlargement/docs/index.htm, date of reference 1.4.2004

organizations.[460] The Commission has stated, that while doing the monitoring of the applicant state's respect for fundamental rights, it examines the descriptions of the other institutions of the Union and also the factual situations in the applicant countries on how the various rights and freedoms are exercised.[461] In the Strategy Paper of 2001, the Commission noted that it was time to pay greater attention to the Candidate Countries' capacity to implement and enforce the *acquis communautaire* as on its transposition into law. Since then, the Commission has tried to give particular attention to the candidates' administrative and judicial capacity.[462]

With regard to human rights, the Commission has noted that it also analyses the way in which the candidate countries respect and implement the provisions of the major human rights conventions, including in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms.[463] In addition to observing whether an applicant country is a member of the ECHR, it has also been noted in the Commission's Opinions and Regular Reports on each Candidate Country, whether the candidate country has adhered to a series of human rights instruments other than the ECHR, these instruments being the European Social Charter of 1961, the European Torture Convention of 1987 and the Framework Convention for the Protection of National Minorities of 1994, as well as the global instruments like the two Covenants of 1966 and the Convention against Torture (1984), Against Racial Discrimination (1965), Rights of Women (1979), Rights of Children (1989). In the 2000 Regular Report, the Commission mentioned that one of the candidate countries (Turkey) has not signed the Rome Statute of the International Criminal Court. While such references should not be seen as imposing the ratification of each and every instrument referred to as an absolute condition for EU membership, they are clearly meant to encourage early adherence, and also serve as yardsticks for the Commission in its overall evaluation of the human rights developments in the candidate countries.[464]

The Opinions of the Commission on ten Central and Eastern European candidate countries published in July 1997, included a chapter on 1) democracy and the rule of law and 2) human rights and the protection of minorities. The first sub-chapter discussed the political and constitutional system and the judiciary. The second sub-

[460] See the 2001 Strategy Paper, p. 8
[461] See the 2002 Strategy Paper
[462] See supra note 160
[463] See supra note 161

chapter included sub-headings on civil and political rights, economic, social and cultural rights, as well as minority rights. The Opinions avoided sharp distinctions between these different categories, and seemed to view them as interrelated and mutually reinforcing.[465] The examination of the fundamental/human rights situation of the Member States in the Regular Reports of the Commission published since 1998 has in turn been divided in three chapters. Whereas the first sub-chapter deals with civil and political rights and the second sub-chapter focuses on the economic, social and cultural rights, the third sub-chapter is dedicated to minority rights. In the assessment of civil and political rights the Commission has reviewed the access to the judicial system, death penalty, the right not to be arrested arbitrarily, electoral rights, freedom of association and peaceful assembly, freedom expression, the rights of ownership, respect for private life, refugees and asylum-seekers, and cases of inhuman and degrading treatment.[466] As for the economic and social rights, the Commission has included the state of certain economic and social rights in the reports. However, the attention paid to the economic and social rights is much lesser than that of the civil and political rights. This has been regarded as an indicative of the fact that economic, social and cultural rights, while being seen also as part of the human rights agenda, have not yet been conceived as enjoying quite the same *status qua* human rights as civil and political rights.

Minority rights on the other hand have been very thoroughly reviewed by the Commission in its Opinions and Regular Reports. Especially for countries with large minority populations, such as Estonia and Latvia, there is a fairly detailed discussion of existing problems and the need to integrate the minority population into the society. The Regular Reports are based on a broad conception of what constitutes a minority, including that part of the permanent population of "non-citizens", which has not been granted citizenship in countries such as Estonia and Latvia. With respect to these countries, the Opinions discuss the criteria for acquiring citizenship and the rights of the minority populations with respect to freedom of movement, political participation and access to public posts, access to courts, freedom of information and the educational system. This status of minority rights as part of the enlargement process has recently

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[464] Rosas 2001, p. 13
[465] Brandtner and Rosas 1998, p. 484
[466] Gras 2000, p. 117-119

been confirmed in the new Regulation concerning the pre-accession strategy, by reference to the Copenhagen criteria. [467]

4.4 Evaluation of the Candidate Countries for the Membership of the EU

4.4.1 General observations of the Opinions and the Reports of the Commission

In the first Regular Report of the Commission of 1998, the Commission concluded that as all of the Applicant Countries have acceded to ECHR, all of the Candidate countries, except for Slovakia and Turkey, met the political criteria, but that a number of them still had to make progress concerning the practice of democracy and protection of human rights and minorities.[468] In the 1999 reports, the Commission arrived to the conclusion that all the candidate countries met the political criteria, even if some still had progress to make as for the human rights and fundamental freedoms protection.[469] Since 2000 each of the Commission's Strategy Reports have concluded progress to have taken place since the publication of the previous report, but have nevertheless called for more work from the applicant countries in the human rights protection provided.[470] In the 2001 Strategy Report the Commission referred to the Charter of Fundamental Rights of the European Union. While taken the position of the previous year as regards to the progress made, the Commission concluded that the main areas still requiring attention were democratic systems of the government, public administration, judicial system, corruption, childcare institutions, trafficking of women and children, pre-trial detention, gender equality and minorities, of which the situation of the Roma has been seen to be especially worrying. In addition, the Commission urged Turkey to take the necessary decisions to translate its intentions concerning the protection of human rights into concrete measures.[471]

The 2002 Regular Reports, which convinced the Heads of State and government meeting at the Copenhagen Summit on December 2002 to invite ten new States to join the European Union in 2004, were strikingly positive as regards to the fundamental rights protection in the applicant countries. Indeed, they concentrated clearly on the

[467] Brandtner and Rosas 1998, p. 486-488
[468] Composite Paper 1998
[469] Composite Paper 1999
[470] Strategy Paper 2000
[471] Strategy Paper, 2001 p. 10-11

positive developments rather than on the areas that still requiring working. The 2002 Strategy Report called for better promotion of the economic and social equality between women and men. Even though the Report praised the progress made as regards to the Roma, it still stated that continuing efforts should be made with the adoption and implementation of the Community's anti-discrimination *acquis*. As regards to the minorities, the Strategy Report settled for noting the positive steps that were made.[472]

After the readiness for the accession of the ten applicant States was confirmed, the Commission published in 2003 Regular Reports of the three remaining applicant countries; Bulgaria, Romania and Turkey. Of the ten countries joining the Union in 2004 the Commission published a "Comprehensive Monitoring Report" (Monitoring Report). Interestingly, regardless of the fact that the respect for fundamental rights was defined as an essential element of the accession criterion in Cologne in 1993, and contrary to the practise since the 1997 Opinions of the Commission, the 2003 Monitoring Report does no longer contain a separate chapter dedicated to fundamental rights. Instead, the report settles for mentioning that the required legal instruments relating to human rights are in place.[473] In addition, only some issues dealing with fundamental rights can be found here and there amongst other Chapters. For example, the 2003 Monitoring Report mentions that Cyprus, Poland and Slovakia should now complete alignment with EU's visa policy, and Latvia and Lithuania with migration policy. In addition, the report stated that the acceding countries, except for Estonia, Poland and Slovenia, are not yet properly implementing the *acquis* on asylum, and must now tackle this issue.[474]

4.4.2. Civil and Political Rights

Regarding civil and political rights, there are three main issues that have raised concern throughout the Regular Reports of the Commission, the first being prison conditions, the second being trafficking in human beings and the third being the degrading treatment or ill-treatment by the police officers.

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[472] Strategy Paper 2002, p. 14
[473] Monitoring Report 2003, p. 10
[474] Ibid, p. 14

In the first Regular Report for Estonia issued in November 1998, the Commission raised the question of prison conditions and demanded further improvement. Estonia is however by no means the only one of the Applicant Countries having this problem. In fact, as the 2000 Regular Report shows, the conditions in prisons and detention centres have given cause for concern in most of the Applicant Countries.[475] Also *Matti Wuori* dealing with the subject in the EP's Annual Report on human rights in the world in 2000 and on the European Union human rights policy remarked that detainees faced inhumane treatment in the majority off prisons in the candidate countries due to substandard, overcrowded prisons and detention facilities with alarming health and sanitary conditions. He also expressed his concern for the length and poor quality of pre-trial detention, for abusing police officials and prison employees and for insufficiency of legal aid for persons who cannot afford legal fees.[476] Even though the Commission has welcomed the progress that has been made up to this day, the 2002 Regular Reports still called for improvement in the prison conditions in all of the then applicant countries except for Malta.[477] The Strategy Paper from 2003 on Bulgaria, Romania and Turkey were no less negative in this regard as in all of these countries excessive police violence was reported.[478] The Monitoring Report of the Acceding countries, however, paid no attention to the problem. Yet, in the Amnesty's 2003 reports the prison conditions were mentioned to be either poor or suffering from overcrowding in Estonia and Latvia of the acceding countries, and in Romania of the applicant countries.[479]

The second question to which much attention is paid throughout the Regular Reports is trafficking in human beings. The Commission has called for vigorous measures since the 2000 Regular Reports.[480] Still in the 2002 Reports Bulgaria, Czech, Cyprus, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Turkey were mentioned to need efforts in this area. The 2003 Strategy Paper on Bulgaria, Romania and Turkey reaffirmed the existence of these problems. Also the European Council

[475] Strategy Paper 2000
[476] Wuori 2000, p. 35 (See European Parliament: Annual Report on human rights in the world in 2000 and the European Human Rights Policy)
[477] In the case of Slovenia and Slovakia for example prison conditions are regarded to fulfil generally international standards, but prisons are mentioned to remain overcrowded (see the 2002 Regular Reports)
[478] Strategy Paper 2003 and the 2003 Regular Reports on Bulgaria, Romania and Turkey
[479] See the Amnesty International Annual Reports on Human Rights 2003, available at: http://web.amnesty.org/report2003/, date of reference 1.3.2004
[480] Strategy Paper 2000

Commissioner for Human Rights has reported of serious problems as regards to trafficking in human beings in the applicant countries.[481]

As regards to police violence or degrading treatment by the police seems to be a wider-spread problem judging by the Regular Reports[482] as well as by the Reports of the European Council Human Rights Commissioner[483]. Also Amnesty International has reported of either police ill-treatment, torture or extensive use of force by the police officials in the acceding countries of Czech Republic, Estonia and Hungary. From the remaining applicant countries Romania and Turkey were also mentioned.[484]

In addition to these main problems, human rights violations or causes for concern in the area of civil and political rights are raised by the Commission regarding rights of refugees and asylum legislation, racism and xenophobia, processes of the restitution of property as well as property rights overall.[485] As regards to the rights of refugees and the asylum legislation, the Amnesty's 2003 reports mentioned Hungary as especially having problems in this regard.[486]

Furthermore, Turkey continues being the applicant country having the most efforts to do to fulfil the political Copenhagen criteria as regards to the respect for civil and political rights. Subsequently, the Commission noted in its 2003 Strategy Paper that in spite of the recent positive developments, and in spite of the determination of the government, Turkey does not yet fully meet the Copenhagen political criteria, and called for improvement in the judicial system, torture and ill-treatment, prison system, access to lawyers and trial practise, freedom of expression, freedom of demonstration and peaceful assembly, freedom of association and freedom of religion. The Report also regretted the fact that Turkey has not executed many judgments of the ECtHR, by

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[481] See Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on the Czech Republic (CommDH(2003)10, on Cyprus (CommDH(2004)2), on Estonia (CommDH(2004)5), on Lithuania (CommDH(2004)6, on Romania (CommDH(2002)13), and on Slovenia (CommDH(2003)11).
[482] See for example the 2002 and 2003 Regular Reports as well as the 2003 Strategy Paper
[483] See Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on Cyprus (CommDH(2004)2), on Latvia (CommDH(2004)3), on Poland (CommDH(2003)4), on Romania (CommDH(2002)13 and on Slovenia (CommDH(2003)11)
[484] See the Amnesty International Annual Reports on Human Rights 2003, available at: http://web.amnesty.org/report2003/, date of reference 1.3.2004
[485] Regular Reports 2002
[486] The concern raised by the Amnesty International were 1) new regulations concerning asylum-seekers and other foreign nationals creating even more restrictive conditions for asylum-seekers, 2) danger of refoulement, and 3) access to legal aid in detention (See the Amnesty International Annual Report on Human Rights 2003, available at: http://web.amnesty.org/report2003/hun-summary-eng, date of reference: 1.3.2004

means of ensuring payment of just satisfaction or reversing decisions made in contravention of the ECHR.[487] On the other side of the coin, Turkey has also been praised for the reforms that it has done. To mention one of these positive developments, in November 2003 Turkey ratified Protocol No. 6 abolishing death penalty in peacetime. This has been described as milestone in Europe's path towards a death penalty-free zone and as an important step for Turkey's add its changes for accession.[488]

Compared to the 2003 reports of the Amnesty International, the Commissions 2003 Regular Reports make no mention of the prisoners of conscience. Yet, according to the Amnesty International, both Latvia and Turkey face problems in this regard.[489] Furthermore, whereas the 2003 reports of the Amnesty International list Romania and Slovakia as having problems in respecting the freedom of expression, the 2003 Reports of the Commission reported of no such problems.

4.4.3. Economic, Social and Cultural Rights

Overall estimated, when it comes to the ex-communist countries, the transition to democracy has paradoxically lead to a new emphasis on civil and political rights at the expense of the socio-economic rights.[490] Yet, the Commission's Regular Reports pay rather limited attention to the economical, social and cultural rights. In Agenda 2000[491] the Commission made reference to the compliance of applicant states with the European Social Charter and the UN Covenant on Economic, Social and Cultural Rights, although minimal attention was actually devoted to the relevant rights.[492]

The Regular Reports published since 1998 are also rather limited as regards to the assessment of the economical, social and cultural rights. They are focused on equal opportunities, children's rights, treatment of disabled and mentally ill persons and trade union rights. The Commission's 1998 Regular Reports recognized no major problems related to economic, social and cultural rights even though they did call for some improvements in the health sector, health protection and safety at the workplace and in

[487] Strategy Paper 2003, p. 15
[488] Council of Europe: Human rights information bulletin, No. 61, 2004 , p. 56
[489] See the Amnesty International Annual Reports on Human Rights 2003, available at: http://web.amnesty.org/report2003/, date of reference 1.3.2004
[490] Pogány 2004, p. 86
[491] Agenda 2000, Commission of the European Communities, COM(97)2000 final, 2 vols.

the social dialogue in almost all of the then applicant countries.[493] Tensions in the social dialogue were said to occur especially in Slovakia.[494] In the Commission's 2000 Reports, what is said about the Applicant Countries' respect for economic, social and cultural rights in the 1998 Reports is repeated. On the other hand only Cyprus, the Czech Republic and Slovenia no specific problem is identified.[495] In the 2000 Reports the Commission paid particular attention to the legal protection of gender equality saying that although the situation has progressed, further efforts are needed to promote the economic and social equality of women.[496] In fact, only in the cases of Cyprus, the Czech Republic and Lithuania the situation was considered to be somewhat satisfactory by the 2000 Reports.

The 2003 Monitoring report criticized especially Estonia for having persistently delayed the adoption of EU rules in the areas of labour law and equal treatment of women and men. According to the Commission, urgent remedial action and parallel efforts to set up the necessary institutional (control) structures as well as to acquaint economic operators with the new rules so as to ensure their implementation as from accession are required. The interest of the Commission in this regard is rather economical one as it is worried that the situation could cause unequal competitive conditions between companies in Estonia and in other Member States. [497] However, serious concern in this matter has not been expressed to occur in any of the applicant countries, except for Turkey, where according to the 2000 Regular Report exists a need for improvement of educational position of women, equality of treatment and overall discrimination. Moreover, violence in the family, including so-called "honour killings" was an issue of serious concern according to the Commission.[498]

With regard to children's rights, great emphasis has consistently been placed upon the condition of children in care and people with disabilities in Romania. The short term priorities established in the Accession Partnership 1999 for achievement by 2000 include a requirement to guarantee adequate budgetary provisions for the support of

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[492] Alston and Weiler 1999, p. 33
[493] Gras 2000, p. 117-119 and European Parliament 1999: Working Paper on Fundamental Social Rights in Europe, p. 36-37
[494] Gras 2000, p. 117-119
[495] See the Commission's Composite Paper on Reports towards accession… 1998
[496] European Commission: 2000 Regular Reports from the Commission on Bulgaria, Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia, Slovenia, Malta and Turkey
[497] Monitoring Report 2003, p. 15
[498] Regular Report on Turkey 2000, p. 18-19

children in care and undertake a full reform of the child care system as well as of provisions for the treatment of children.[499] Still the 2003 Regular Report of the Commission paid wide attention to Children's rights in Romania although at the same time recognizing the considerable efforts made.[500] Also as regards to Turkey, the Commission calls for improvement concerning children's rights and child labour.[501] Furthermore, in the 2000 Regular Reports, also Slovakia was criticized as not making satisfactory progress and does not comply with the relevant conventions. Especially the living and educational conditions of the abandoned children were considered inadequate.[502] However, the 2002 Regular Report on Slovakia recognized no more problems in this area.[503]

Also the treatment of disabled and mentally ill persons, as well as the treatment of the socially vulnerable people overall, has raised considerable concern by the Commission. The 2002 Reports for example called for improvements in this area in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Poland, Slovakia, Slovenia, Malta and Turkey.[504]

4.4.4 Minority Rights

Due to the enlargement to the east, the current Member States are faced with a challenge: in the communist regimes the demands made by the ethnic minorities to recognize their identity were suppressed, which has led and still continues to lead to various problems.[505] This remains to be the case even though the end of communism on the other hand, for the first time, made possible the enforcement of minority rights in the Central and Eastern European Countries.[506] The deterioration in the situation of the minorities is true especially in the case of the Roma population[507], which subject to unemployment and escalating living costs have not been able to take advantage of the political, cultural or economic opportunities now available to them. Unfortunately, the

[499] Williams 2000, p. 612-613
[500] Regular Report on Romania 2003, p. 23
[501] Regular Report on Turkey 2000, p. 19 and 2002 Regular Report on Turkey, p. 40
[502] Regular Report on Slovakia 2000, p. 19
[503] Regular Report on Slovakia 2002, p. 29
[504] See the Regular Reports 2002 on these countries
[505] Corbetta 2002, p. 31
[506] Hughes and Sasse 2003, p. 4
[507] It has been estimated that there are around six million Roma living in Central and Eastern Europe. See for example *EU Support for Roma Communities in Central and Eastern Europe* (May 2002), p. 4

recognition of minority rights has had relatively little impact on the Roma of Central and Eastern Europe. Subsequently, hundreds of thousands of Roma, particularly in Slovakia, Romania, Bulgaria, and in parts of the former Yugoslavia, endure social exclusion, racist assaults, dwindling employment opportunities and a general deterioration in their standard of living.[508]

Considering the above-mentioned facts, it is understandable that a very substantial emphasis in the Commissions 1997 reports has been given to the assessment of the applicant countries level of protecting the minorities, and in the situation of the Roma minority in particular.[509] This is repeated throughout the Regular Reports. For example the 2003 Regular Report on Slovakia stated that despite continuous efforts across all sectors, the situation of the Roma minority remains very difficult. Also *Matti Wuori* in his 2000 Working Report published by the EP handled the subject stating that although, generally speaking, the rights of minorities are being increasingly safeguarded, the plight of the Roma, in particular, continues to cause grave concern. According to him the Roma continue to suffer from widespread discrimination, racial harassment and violence, combined with a lack of protection by the police and the judiciary. The problem is biggest in Bulgaria, Czech Republic, Hungary and Slovakia. Despite the mentioned countries have adopted policies and programmes for the integration of the Roma population, more emphasis is needs on their implementation and allocation of adequate budgetary resources.[510] Also Amnesty International has in its 2003 reports raised its concern for the situation of the Rome as regards to Hungary, Romania and Slovakia.[511]

Another minority group that has gained rather thorough attention by the Commission is the Russo phonic minority in the Baltic States, especially Estonia and Latvia[512]. For example the 1998 Commission's Report on Estonia, identified the "integration of non-citizens" as a matter of concern meriting the demand for "measures to facilitate the

[508] Pogány 2004, p. 85
[509] Gras 2000, p. 117-119
[510] Wuori 2000, p. 35 (See European Parliament: Annual Report on human rights in the world in 2000 and the European Human Rights Policy)
[511] See the Amnesty International Annual Reports on Human Rights 2003, available at: http://web.amnesty.org/report2003/, date of reference 1.3.2004
[512] Of the Estonian population (1,36 million) the Russian speaking minority consists around 30%, and of the Latvian population (2,33 million) almost 40% belong to the Russian speaking minority (Eurostat 8/2003)

naturalisation process"[513] including language training and financial support.[514] The following year the Commission recognised the positive development of both Estonia and Latvia, while stating that certain weaknesses still remained in both countries, such as the language law in Estonia and the draft legislation in Latvia still falling short of meeting international standards.[515] The 2000 Report the Commission recognised the positive developments in these countries since the previous year, and welcomed the progression in the integration of "non-citizens" and the continuance to fulfil all the OSCE recommendations regarding citizenship and naturalisation. In addition, the Commission noted that in both countries, the language law had been brought into compliance with international standards.[516] Still the 2003 Comprehensive Monitoring Reports of the Commission on Estonia's and Latvia's preparations for membership encouraged these countries to further promote integration of the Russian minority by, in particular, continuing to increase the speed of naturalization procedures and by taking other proactive measures to increase the rate of naturalization. Latvia and Estonia were also encouraged to ensure sufficient flexibility regarding transition to bilingual education in minority schools, and to ensure that at all levels the implementation of the language law respects the principle of justified public interest and proportionality, as well as Estonia's and Latvia's international obligations.[517]

Once again, the Turkey with its Kurdish minority has been seen as having grave problems in complying with the demand for the rights of the minorities. From the first Commission's Opinion from 1997 to this day, very little has been achieved in reality. Although the Commission in its latest report recognises reforms and legislation done to comply with the Copenhagen political criteria, as well as Turkey's signing two major Human Rights conventions, the Commission still has continued to express concern for the remaining shortcomings.[518] Turkey has also been largely criticised regarding the linguistic and cultural rights of the Kurdish population in all of the Commission's

[513] When Latvia, for example, gained its independence, only persons who had acquired Latvian nationality before 1940 and their descendents were automatically treated as citizens. All other persons could obtain citizenship only through the process of "naturalisation". At the time the number of these "non-citizens" was 32%. In 1995 a law was enacted on the status of former citizens of the Soviet Union not possessing Latvian or any other citizenship. According to this law these persons have been granted so-called "non-citizen" passports. However, other civil and political rights were not granted with the law to the non-citizens. (CommDH(2004)3, p. 8)
[514] Williams 2000, p. 611
[515] Regular Report 1999
[516] See the Regular Reports on Estonia and Latvia 2000
[517] See the Comprehensive Monitoring Reports on Estonia's and Latvia's preparations for membership 2003, page 35 of the Report on Estonia and page 36 of the Report on Latvia
[518] See the Strategy Paper 2000as well as the Regular Report on Turkey 2003

reports. Also *Wuori* reminds that in order for Turkey to fulfil the accession criteria, it has to find an equitable political solution with regard to the Kurdish population, the solution including a full recognition of the political, cultural and linguistic rights.[519]

4.4.5 Concluding remarks of the evaluation

The way the European Union monitors the applicant countries with the Commission's Regular Reports has been largely criticized. First of all, there are inconsistencies in the reports. Whereas on one year certain problem is mentioned, the other year it is completely left out of the report. For example, even though Latvia has yet to ratify the FCPNM, it is no more mentioned in the 2002 Regular Report. There is also the problem of using double standards both as regards to the relation between the "old" member states and the applicant countries, as well as between the different applicant countries. Furthermore, although there are significant minority populations in most of the newly acceded member states as well as in the remaining applicant countries, the conditions of only two minority groups are consistently stressed in the Regular Reports. These minority groups are the Russo phone minority in the Baltic States, and the Roma minorities in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia. Considerable lesser attention is paid on for example other sizeable minority groups such as the Hungarians of Romania and Slovakia, as well as on the Turks of Bulgaria.[520]

From a point of view of the indivisibility of human rights, in turn, it is regrettable that judging by the space reserved to the social and economical rights, these rights have little importance in the Reports. Also, attention is strikingly paid to the positive developments rather than to questions still needing improvement. Although positive signals are also needed to encourage the applicant countries to continue the fundamental rights reforms, the fact however remains that the Regular Reports quite often leave out very important issues that would need to be taken into consideration. Finally, despite these problems still existing in large extend in the new member states of the European Union according to various sources[521], the 2003 Reports on the countries that acceded

[519] European Parliament: Draft Annual Report on human rights in the world in 2000 and the European Human Rights Policy, p. 35
[520] Hughes and Sasse 2003, p. 14-15
[521] See for example the Country visit Reports of the European Council Commissioner for Human Rights as well as the reports of NGO's such as the Amnesty International and the Human Rights Watch

the Union on May 1st 2004 are strikingly positive as regards to the fundamental rights or human rights protection.

5. THE CHALLENGES OF EUROPEAN UNION IN THE FIELD OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

5.1 European Court of Justice in a turning point

The ECJ's line of reasoning has several shortcomings. First of all, there is the question of legitimacy. As such, there is nothing negative about the ECJ basing its jurisprudence on the unwritten general principles of law. However, as *Toth* has pointed out, the ECJ can be rather contradictory in letting individuals to rely on the general principles of law, but not in Article 6 TEU for example, which should constitute the core of fundamental rights protection as a primary law provision.[522] Furthermore, even though the Court made great advance in the *Stauder* judgment of 1969 by regarding fundamental rights as part of these general principles of law, within the past 35 years it has not managed to define what exactly those principles enshrine. After all, the general principles may have different functions and different effects, and they may differ in their scope. Moreover, the Court cannot determine the cases and issues brought before, which makes the development only on *ex post facto* basis case-by-case.[523] Therefore one can seriously raise doubt about the status of legal certainty, as individuals are not aware of which human rights or fundamental freedoms the ECJ in the end ends up protecting. Also the inability to bring an action for human rights violations *per se* is a big weakness.[524]

The Court has also been criticized for having misused the language of rights, while in reality merely advancing the commercial goals of the common market, being biased towards "market rights" instead of protecting values, which are genuinely fundamental to the human condition.[525] Some experts have even claimed that instead of having developed a construction of rights grounded in the principle of individual liberty, the ECJ has reconstructed these rights in terms of other requirements such as the supremacy of Community law and the completion of the single market in goods, services, capital

[522] Toth 1997, p. 494
[523] O'Leary 1999, p. 369 and Toth 1997, p. 495
[524] Turner 1999, p. 458
[525] Craig and de Búrca 2003, p. 363-365

and persons.[526] This having been said, it should however been granted that the Court in some of its case law has sometimes recognized that rights created by the Treaty do not attach only to individuals as "factors of production", but to individuals as human beings. These human rights, such as the right to family life or the freedom from discrimination, have occasionally been required to prevail even over a Member State's conception of the public interest or a competing human right. For example, in *Deutsche Telekom v. Schröder*[527] the Court stated that the economic goals were secondary to the social ones, which "constitute the expression of a fundamental human rights".[528]

In the context of the enlargement, although the TEU provides that nations seeking to accede must agree to abide by the Convention, many of these states do not share in the human rights customs and traditions of the current Member States. The challenge to the ECJ will therefore be to determine whether a right is fundamental when more than one Member State does not recognize a right in their written constitutions or in their traditions.[529]

5.2 Accession of the Union to the ECHR

Since the mid-1990's the ECJ commenced to rely more extensively on the jurisprudence of the Strasbourg Organs[530].[531] It should be remembered, however, that as the Community is not bound by the ECHR (even though it regularly refers to it), no more is the Court bound by the interpretation of the ECtHR.[532] Nevertheless, since the ECJ uses the ECHR as a guideline, divergent or inconsistent interpretations between the Strasbourg Court (i.e. the European Court of Human Rights - ECtHR) and the Luxembourg Court (ECJ) are possible.[533] The ECJ's interpretations of fundamental rights under the Convention certainly aren't always consistent with those recognized by the ECtHR. In fact, the Court's interpretations have, for the most part, been more restrictive than those of the ECtHR[534]. In *Hoechst*[535] for example, whereas the ECJ

[526] See in particular Persaud 1997, p. 365
[527] Case C-50/99, Deutsche Telekom v. Schröder [2000] ECR I-473, paras 57
[528] Craig and de Búrca 2003, p. 363-365
[529] Flaherty and Lally-Green 1998, p. 92
[530] See for example case C-368/95, Familiapress [1997], ECR I-3689
[531] Alston and Weiler 1999, p. 46-47 and Oliver 2000, p. 322
[532] Rosas 1999, p. 205
[533] Spielmann 2000, p. 760-761
[534] Flaherty and Lally-Green 1998, p. 91
[535] Joined Cases 46/87 and 227/88, Hoechst v. Commission, [1989] ECR 2859

refused to encompass professional premises to the concept of inviolability of the home protected by Article 8 of the ECHR, the ECtHR has by contrast in several judgments[536] done so. The potential for differences in interpretation and different conclusions on the same issues have also been seen by contrasting decisions like that of the Court of Human Rights in *Open Door Counselling* with the opinion of the Advocate General in *Grogan*, or the approach of the ECJ in ERT with that of the ECtHR in *Lentia v. Austria*[537]; only to mention few examples.[538]

The European Commission, hoping to find a solution to the problem of differential interpretation, listed the main arguments in favour of the accession in its Communication in 1990 stating that, the accession would first of all enable the ECtHR to review judgements of the ECJ for compliance with the ECHR. On the other hand, the accession would also afford citizens better fundamental rights protection with the ECHR. At the same token the Commission reminded that in any case the accession would affect only the areas covered by Community law, and that the accession should in any case be regarded as a complementary rather than an alternative measure to the idea of drafting a Bill of Rights for the Union.[539]

After proposals from the Commission and the Parliament, the Council in 1994 decided to seek an Opinion from the ECJ in whether the Community was empowered to accede to the ECHR.[540] In its Opinion 2/94[541], after having declared that it could not rule on the compatibility of accession with the TEEC in the absence of sufficient information about the institutional arrangements envisaged, the ECJ then stated that the Community lacks competence to accede.[542] The ECJ further stated that adhering to the ECHR would bring such fundamental changes in the Community's system of protecting Human Rights, that such a change would not be possible on the basis of Article 235 TEC (now 308) TEC[543].

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[536] See for example Chappell v. United Kingdom, Judgment of 30 March 1989, Series A, No. 152; (1990) 12 EHRR 1 and Funke and others v. France, Judgment of 25 February 1993, Series A, No. 256-A; (1993) 16 EHRR 297

[537] Informatonsverein Lentia v. Austria, Series A no 276. (In this case the ECtHR found that the radio and television monopoly of the Austrian Broadcasting Corporation constituted a violation of Art. 10 of the ECHR, whereas the ECJ in *ERT* left the Art. 10 issue to be decided by the national court.)

[538] Craig and de Búrca 2003, p. 367

[539] Commission Communication SEC (90) 2087

[540] Oliver 2000, p. 328

[541] Opinion 2/94 [1996] ECR I-1759

[542] Craig and de Búrca 2003, p. 351-352

[543] Article 308 (former 235) TEC: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of theCommunity and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

Instead it would require the amending of the Treaty.[544] The ECJ's Opinion 2/94 has been widely criticised as being both evasive and laconic. In particular, the criticisers have drawn attention to the fact that the real reason for the Court's decision was a fear that its jurisdiction would've been diluted.[545]

Some experts have doubted that the accession to the Convention would be put on the political agenda again.[546] Subsequently, other options have also been proposed in the course of time. For example an expert croup gathered by the European Commission, conscious of the ECJ's Opinion 2/94, pondered different options to the accession, the first of which would be a system of reference by which the ECJ could refer questions of interpretation to ECtHR. Another option would be the creation of a system in which the final appeal would be made to the ECtHR. However, as a system of references could not rectify the problem of legal certainty, and as both of these options would result in considerable changes of the existing procedural structures, the expert group ended up suggesting the continuing and strengthening of informal co-operation between the two courts.[547] The Finnish government, on the other hand, has consistently[548] defended the accession of the Union to the ECHR, and in the Government's Report to the Finnish Parliament of February 2nd 2000[549], it was once again insisted that the Union would adhere to the ECHR. According to the Finnish Government, the creating of the Charter does not diminish the importance and topicality of the Union adhering to the ECHR. As the Finnish Constitutional Law Committee stated in its Statement 6/1999[550], the overlapping role of the ECJ and the ECtHR in the protection of Human Rights and Fundamental Freedoms is likely to lead in practise to problematic situations, in which the noteworthy case law of the ECtHR would in any case be critical to overlook. Accordingly, and with the support of the Constitutional Law Committee, the Finnish Government took the initiative to chance the Article 303 TEC with the Treaty of Nice to read as follows: "The Community has a competence to accede the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on

[544] Rosas 1999 p. 909. See also the differing opinion of Alston and Weiler 1999 p. 19
[545] Oliver 2000, p. 328-329
[546] See for example Spielmann 1999, p. 777 or Nowak 1999, p. 687-688
[547] European Commission: Affirming Fundamental Rights in the European Union - time to act
[548] See for example VNS 1/1996 vp, SuVL 2/1996 vp, PeVL 6/1996 vp, UaVM 2/2000 vp and PeVL 29/2000 vp, as well as PeVL 6/1999 vp and PeVL 2/2000 vp.
[549] VNS 2/2000 vp
[550] PeVL 6/1999 vp

November 4th, 1950". [551] However, before the current constitution process (see the following Chapter) the initiative did not meet adequate response.

On the other side of the balance sheet the accession of the Union to the ECHR cannot serve as a cure-all. After all, despite the significance of the ECHR, it is over 50 years old and not entirely representative of contemporary European standards, particularly as economic and social rights are lacking.[552] This remains to be true even though the ECHR can with a good reason be described as a "living instrument", which is developed all the time by the ECtHR in an "evolutive" way, e.g. in the light of contemporary standards and to deal with modern issues. In this process the ECtHR is in close connection, in a dialogue with other actors of the same field, i.e. the domestic authorities as well as other European and International actors; thus also with the ECJ.[553] Furthermore, one cannot deny the different nature of the two European Courts, which is manifested at least in two ways. First of all, in the context of the ECJ, the protection of the "four freedoms" is always in the background as the ECJ interprets the ECHR in accordance with the objectives the Community law, whereas the ECtHR is focused purely on human rights and would thus interpret the Community law in accordance with the objectives of the ECHR. Secondly, in the case of the ECJ, the matter in question can only become before the Court if a national court refers the case to the ECJ, whereas, at least so far, the cases are brought before the ECtHR by the individuals themselves. However, rather than concluding from this, that the accession should be put off the agenda, and coming back to the Commission's Communication of 1990[554] and the views of the Finnish government[555], the accession should be considered as a parallel development to the legalisation of the Charter as well as other needed arrangements.

5.3 A Constitutional Treaty for the European Union

5.3.1 Background of the Constitution process and general remarks

Only a year after the Charter was proclaimed in Nice, the "Laeken Declaration", delivered by the Laeken Summit in December 2001, stated that it was time to simplify

[551] PeVL 29/2000 vp
[552] Neuwahl 1995, p. 20
[553] Viljanen 2003, p. 14 and Lord Goldsmith 2001, p. 1210
[554] Commission Communication SEC (90) 2087
[555] See for example VNS 2/2003 vp and VNS 2/2004 vp

the various Union's instruments (foundation treaties) by defining them better and by possibly reducing their number. The Summit decided to set up a "European Convention on the Future of Europe" (hereinafter "Convention") to reflect whether one constitutional text, "a European Constitution", could be adopted by the Union.[556] Moreover, the Convention was given a mandate to reflect whether the EU Charter of Fundamental Rights should be incorporated into the Treaties or to the new constitutional text and whether accession by the EU to the ECHR should be pursued.[557] The Convention finished its work on July 18th, 2003 and submitted the "Draft Treaty establishing a Constitution for Europe"[558] (hereinafter "the Draft Constitutional Treaty") to the Italian EU presidency. The Intergovernmental Conference (IGC), which started on October 2003 was supposed to produce the final text so that it could have been signed soon after the ten new Member States have joined the Union on May 1st 2004.[559] However, the IGC coming together at Brussels on December 2003 failed to reach an agreement on an amended version of the Draft Constitutional Treaty, and the fate of the Constitutional Treaty was left to be decided later, however not before June 2004.

The Constitutional Treaty, if and/or when it is signed, will mark a significant step in the history of the European Integration. It will group the provisions of the current second and third pillars with the Community provision of the respective fields and merge the current foundation treaties. This simplification and clarification of the current primary law of the Union is by all means more than desirable, but will lead to the rewriting of thousands of existing manuals attaching EU law. Even though the current provisions of the foundation treaties will thus be reorganised, renumbered and even slightly changed, in the following however, I will settle for examining the main achievements of the Draft Constitutional Treaty. For the purpose of the study, suffice to say here, that the Draft Convention for the future of Europe brings nothing new to the preconditions set for the countries wishing to join the Union.[560] In the following, the examination of the position

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[556] The Declaration of the Laeken Council, 15 Dec. 2001, available at: http://european-convention.eu.int/pdf/LKNEN.pdf (date of reference: 16.4.2004)
[557] Williams 2003, p. 794
[558] Draft Treaty establishing a Constitution for Europe of 18 July 2003, CONV 850/03, available at http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf (date of reference: 16.4.2004)
[559] Kokott and Rüth 2003, p. 1315
[560] The Title IX of the Part I deals with the membership of the Union. According to Article I-57(1) of the Draft Treaty "*(t)he Union shall be open to all European States which respect the values referred to in Article 2, and are committed to promoting them together*". Article 2 of the Draft Constitutional Treaty in turn states that "*(t)he Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination.*" Thus these provision correspond to the current primary law of the Union.

of human rights and fundamental freedoms in the Draft Constitutional Treaty is divided into three parts. First, I will take a look at fundamental rights in the first part of the Draft Constitutional Treaty where the values and objectives of the Union are defined. I will then attach the matter of incorporating the EU Charter of Fundamental Rights into the second part of the Constitutional Treaty. Finally, the clause inserted in the Draft Constitutional Treaty for accession of the Union to the ECHR is reflected.

5.3.2 Fundamental rights as an objective of the European Union

The central place of fundamental rights in the Draft Constitutional Treaty can be seen in many ways. First of all, in the Title I prescribing the definitions and objectives of the Union, fundamental rights are defined as one of the principles on which the Union is founded. Article I-2 of the Draft Treaty more or less reproduces Article 6(1) TEU: "*The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination*."

Article I-3(1) of the Draft Constitutional Treaty in turn affirms the promotion of its values as its objectives. Furthermore, paragraph 3 of the Article I-3 defines the areas for which the Union shall work. According to it "(*t)he Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights. It shall promote economic, social and territorial cohesion, and solidarity among Member states. The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced*." The upholding and the promotion of the values of the Union in its relations with the third countries and the international organizations is laid down in paragraph 4 of the Article 3, which reads as follows: "*In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade,*

eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter."

Finally, Article 4 on fundamental freedoms and non-discrimination affirms Union's respect for the "four freedoms" and condemns all discrimination on national grounds.

5.3.3 Incorporation of the Charter in the Constitution of Europe

Article I-7(1) of the Draft Constitutional Treaty declares that the rights, freedoms and principles set out in the Charter to "constitute the Second Part of this Constitution". With some modifications made as regards to the scope of the Charter, the provisions of the Charter, in both numbering and content, have been included as Part Two in the Draft Constitutional Treaty.[561] The full incorporation of the EU Charter of fundamental rights into the future European Constitution as Part II despite the strong British opposition[562] has been regarded as one of the main achievements of the Convention for the future of Europe. Indeed, making the Union's own "Bill of Rights" legally binding, as part of the Constitution would provide additional legitimacy to it.[563] The Finnish Constitutional Committee has emphasized the need to make the provisions of the Charter formally binding with the new Constitutional Treaty of the Union (PeVL 38/2002). Both the government (VNS 3/2001 vp and VNS 2/2004 vp) and the parliament (PeVL 2/2000 vp, SuVL 4/2001 and UaVM 18/2001 vp) have however stressed that while making incorporating the provisions of the Charter to the Constitutional Treaty, the tasks or the powers of the Union should not be widened or added. In the Draft Constitutional Treaty this is laid down in the Article II-51 (2).

Originally, the Convention was not supposed to reopen discussions on the material content of the Charter. However, largely due to the pressure of the United Kingdom[564],

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[561] Tuori 2003, p. 23

[562] The point of view of the United Kingdom is explained by following. First of all, the United Kingdom is a dualistic country in which the ECHR has not been introduced into the national legal order. (Neuwahl 1995, p. 20-21). Second of all, the revised ESC has not even been ratified by the United Kingdom. (European Council: Human rights information bulletin, No. 61) See for more in Birkinshaw 2004, p. 76 and Lord Goldsmith 2001, p. 1210-1214

[563] Kokott and Rüth 2003, p. 1328

[564] The British point of view as regards to the division to rights and principles of the Charter's provisions has been explained i.a. by Lord Goldsmith (2001, p. 1212). According to him the important differences from the classic civil and political rights are that, first, social economic rights are usually (at least not in the United Kingdom) not justiciable individually in the same way as other rights, but inform policy makig

the Convention ended up making some adjustments to the horizontal provisions of the Charter. Namely, the Convention suggested that a new paragraph 5 be added to the Article II-52, according to which *"(t)he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member states when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."* By dividing the articles of the Charter to *rights* and *principles* (economical, social and cultural rights belonging to the group of *principles*), the contents of the Charter are changed and the ECJ is being put to an awkward position.[565]

Even though the preamble of the Charter in its present state also seems to divide its contents into *rights, freedoms* and *princ*iples, it nevertheless does not contain a difference in the implementation of the rights and principles like the Draft Constitutional Treaty does. *Ojanen* sees this as a clear step backwards as he draws conclusion of the proposed changes. He reminds that as the actual realisation of the *principles* presupposes separate legal action from the institutions of the Union and of the Member States when implementing Union law, the exact content of these *principles* would be defined only on the basis of a attaching fundamental rights provision. Also, the *principles* do not have the same nature of subjective law as the *rights* do, meaning that individuals could not provoke the *principles* before the courts. Naturally, the division would also tie the hands of the ECJ as it could not rely on the *principles* when evaluating the validity of the regulations given and of the decisions made in the implementation of the Union law. To put it short, dividing the provisions of the Charter to *rights* on one hand, and on *principles* on the other, would make the obligation, the forms and the means of realisation as well as the legal implications of these provisions lesser than those of the actual *rights.*[566]

Understandably, the division to rights and principles has been criticized this from various points of view. First of all, the division would be against the principle of indivisibility of human rights, which the Union has already on several occasions

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by the legislator. Secondly, social and economic rights are recognized and given effect to in different ways in the Member States whose competence this primarily is. Thirdly, from the British point of view, at the very least to include economic and social rights would raise expectation that the Charter was giving rights, which the EU was in no position to deliver, having neither competence nor the budget.

[565] Vranes 2003, p. 7

[566] Ojanen 2003 (II), p. 674-675

affirmed to respect. [567] This becomes all the more controversial considering that as regards to the external relations of the Union the Draft Constitutional Treaty in Article III-193 affirms the Union's action on the international scene shall be guided by the principles, which it claims to have inspired its own creation, i.e. the very principle of indivisibility of human rights and fundamental freedoms. Thus the possibility of double standards as regards to the internal and external policies on human rights and fundamental freedoms is by no means about to vanish! From the point of view of countries like Finland, where the civil and political rights on one hand, and the economic, social and cultural rights on the other hand are protected hand in hand by the constitution, this could be very problematic. Especially at danger are the public social services in Finland if they are one day no longer regarded as a matter of a national discretion. Still, having fought for the inclusion of the economic, social and cultural rights to the Charter when it was drafted, the Finnish government settle for in finding the division of the articles of the Charter to rights and principles as "not necessary". However, conscious of the fact that the division might be the only way to get the Charter incorporated into the primary law of the Union, the Finnish government nevertheless has expressed its willingness to accept this categorization hoping that there will not be such a great difference between the two categories in reality.[568] On the other hand, Article II-53 of the Draft Constitutional Treaty states that nothing in the Treaty shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by the Member States constitutions, might provide a way out of these fears.

As for the other horizontal provisions of the Charter in the Constitution, the Finnish authorities have welcomed the proposed paragraphs 4 [569] and 6 [570] of the Article 52 of the Charter, which clarify that the provisions of the Charter could never replace provisions of the national constitutions. Furthermore, the Finnish Constitutional Committee has stressed (PeVL 6/1999 vp, 2/2000 vp and 25/2001 vp), that a legally binding Charter is to be accepted only if the Charter applies primarily to the institutions of the Union, and to the Member States only when implementing the Union law. In the

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[567] Ibid
[568] VNS 2/2004 vp.
[569] Article II-52 (4) of the Draft Treaty Establishing a Constitution of Europe: "Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
[570] Article II-52 (6) of the Draft Treaty Establishing a Constitution of Europe: "Full account shall be taken of national laws and practices as specified in this Charter."

Draft Constitutional Treaty this is reaffirmed in the Article II-52 (5). On the other hand, considering the paragraph from another point of view, the provision can be regarded as a step backwards since it ignores the constant jurisprudence of the ECJ, according to which the Member States are required to respect human rights not only in the implementation of the Community/Union law, but also when they derogate from community law.[571]

Despite the obvious shortcomings, defining the values, objectives and central principles are in the beginning of the first part of the Draft Constitution as well as incorporating the EU Charter of Fundamental Rights as the second part of the Draft Constitution are very welcomed in the current state of the European integration. As the Finnish government has stated, this not only clarifies the nature and objectives of the Union and the relationship between the Union and its member states, but also increases legal certainty of the Union's citizens.[572]

5.3.4 Legal basis for the accession of the Union to the ECHR

Another remarkable result of the drafting process of the Constitution was to create a legal basis in the Draft Constitutional Treaty for the accession of the Union to the ECHR.[573] Article I-5(2) of the Draft Constitutional Treaty expressly grants the Union the competence to accede to the ECHR by stating that "*(t)he Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution*".[574]

Regarding the provisions in the Draft Constitution on accession of the European Union to the ECHR, Article III-227 paragraph 9[575] *in fine* foresees the requirement of unanimity for Union accession to this convention, by derogation of the general rule of qualified majority in paragraph 9 phrase 1 relating to the EU entering into international

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[571] Vranes 2003, p. 4
[572] VNS 2/2003 vp
[573] Ibid
[574] Röben 2003, p. 31
[575] Article III-227 (9) of the Draft Constitutional Treaty reads as follows: "*The Council of Ministers shall act by a qualified majority throughout the procedure. It shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and for Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms*."

agreements in general. While welcoming the Union's affirmation in the Draft Constitution to adhere the ECHR, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the European Council has expressed its concern that the requirement of unanimity could make the fulfilment of the intention expressed in article I-7 unnecessarily difficult. According to the Committee, given that the expression of intention to join the ECHR is already foreseen in the Draft Constitution itself, the requirement of unanimity for merely implementing this intention does not appear to fulfil any additional protective function.[576]

In its human rights report published in March 2004 the Finnish government welcomed the fact that in the Convention the accession of the Union to the ECHR finally met adequate response. The government also reaffirmed its commitment to ensure that the obligation to join the ECHR remains in the text of the Convention on the future of Europe.[577] However, even though most eager ones might already paint pictures of the Union acceding to the ECHR, one must not forget that there are still questions to be answered before such an accession could take place. First of all, the ECHR itself will first have to be changed to allow the Union to join it. Secondly, the Member States would still have to agree on the accession. That the affirmation of the Union's pursue to access the ECHR remains in the final version of the future Constitution for Europe is by no means a certainty. And even if a consensus could be reached, there are no guarantees that the Member States will one day agree on the actual accession. After all, some member states, notably the United Kingdom and to some extend Ireland, have showed hesitance in this regard.[578]

5.4 Institutional arrangements and other developments

In 1999, a year before the IGC in Nice, Alston and Weiler criticized the institutional arrangements made by then as inadequate, both in relation to internal and external matters.[579] The "three wise men" proposed in their report of the Austria situation as institutional arrangements, the creation of a Human Rights office within the Council reporting to the Council, the appointment within the Commission of a Commissioner

[576] The Council of Europe and the Convention on the Future of Europe, Doc. 9849, 24 June 2003 Opinion of the Committee on Legal Affairs and Human Rights, available at: http://assembly.coe.int/Documents/WorkingDocs/Doc03/EDOC9846.htm, date of reference 1.3.2004
[577] VNS 2/2004 vp
[578] Neuwahl 1995, p. 20-21

responsible solely on human rights issues, and, particularly, the extension of the activities, budget and status of the existing EU Observatory on racism and xenophobia in order to make possible the establishment of a full EU Agency of Human Rights.[580] Since the report only the last proposition has meat adequate response.

Now that the EU's own "Bill of rights" is about to become legally binding, and the possibility of the accession of the Union to the ECHR is closer than never before, one could easily be tempted to settle for these developments. However, it should also be considered whether the EU should accede to some other human rights conventions, such as the ESC as well. In order to further strengthen the human rights protection, the possibility of at least incorporating other human rights conventions in the foundation treaties or preferably to the future Constitution of the Union without a formal accession, should be taken into consideration.[581] On the other hand, the Draft Constitutional Treaty, whilst not expressively mentioning other international human rights treaties, does however open the door for such accessions by stating in Article III-225 (1) that "*(t)he Union may conclude agreements with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives fixed by the Constitution, where there is provision for it in a binding Union legislative act or where it affects one of the Union's internal acts."*

One more question remaining to be answered is the widening the conditions for direct access by individuals to the ECJ. An introduction of a specific legal remedy based on alleged violation of the fundamental rights granted by the Charter was discussed in relation to the incorporation of the Charter into the Constitution, but was not supported widely enough. As such a remedy of a constitutional character would effectively ensure citizens' enjoyment of the rights contained in the Charter, the questions should still be re-considered in the future. [582]

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[579] Alston and Weiler 1999, p. 12
[580] Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, Paris September 8th, 2000
[581] For example the 1966 UN Covenants on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights would provide a good international basis
[582] Kokott and Rüth, p. 1328-29

6. CONCLUSIONS

The western conception of Human Rights is, alongside with the democracy perhaps the very factor that most firmly links the people of Europe together. It constitutes the common foundation of the values and provides a mutual language for the observation of the inner relations of these values. Human Rights and Fundamental Freedoms are not to be considered only as norms creating unconnected rights. Indeed, in addition to the previous, they are to be considered as a kind of an ideology or a deeper structure of the law that guide the judicial decision even in the occasional cases.[583] Considered this way, the enlargement of the Union is not only understandable and reasonable, but also a very welcomed process.

The message of the Cologne European Council to the applicant countries was clear; states wishing to join the Union have to have the stability of institutions guaranteeing human rights and respect for and protection of minorities. With the Amsterdam Treaty, the Treaty of the European Union was changed so that it now includes an obligation to the states wishing to join the Union to respect fundamental rights, as guaranteed by ECHR and as they result from the constitutional traditions common to the Member States (Articles 6 and 49 TEU). In examining the applicant country's capability to fulfil this requirement, an understanding of the contents of human rights and fundamental freedoms in the EU is essential. As the TEU does not make clear how the rights are to be defined, one must look for the answers elsewhere in the *acquis communautaire*. A review of ECJ's case law and Opinions, Declarations, the European Union Charter of Human Rights, Commissions Opinions and Regular Reports on the applicant countries, Commissions proposals and the General Principles of the Community law as well as Human Rights Agreements concluded among themselves by the Member States, is needed. Especially the importance of the Charter in assessing what the "general principles of the European Union" actually consist of, is substantial. By studying the above-mentioned *acquis*, the conclusion can be made that fundamental rights in Article 6(1) include all human rights presently recognized by EU Member States in the context of the United Nations, the OSCE, and the Council of Europe. Stated another way, the applicant countries are expected to respect not only the traditional set of Human Rights, but also social, cultural and economical rights, as well as the collective rights of the so-

[583] Helander 2001, p. 30

called third generation; the last-mentioned group of rights at least as far as minority rights are concerned.

Union's commitment to the protection of human rights and fundamental freedoms can no longer be denied. Even though, in the earlier stages of the Integration the development of the Community's fundamental rights protection was mainly in the hands of the ECJ, it has since made its way to the actions of other institutions of the Union as well. The past decade is especially decisive in this regard. Suffice to mention here the implications of the Amsterdam Treaty, of the Charter of Fundamental Rights of the Union, of the creation of the EU's own Human Rights Agency and of the current constitutional process. However, the protection remains partly incoherent, and far off from being adequate. As important it has been to include human rights and fundamental rights in the founding treaties since the treaty of Maastricht, one should not forget that even after the changes done with the Amsterdam Treaty, fundamental rights still remain in the same level of hierarchy as for example the provisions on competition.[584] Besides, as Alston and Weiler have pointed out, an appropriately broad human rights policy can hardly be constructed entirely on the basis of individual provisions in the foundation treaties.[585]

As envisaged above, even the Draft Constitutional Treaty has shortcomings, especially compared to the way in which fundamental rights and human rights are traditionally protected by constitutions. What is especially regrettable, is that the Draft Constitutional Treaty, whilst taking important steps in the development of human rights and fundamental freedoms in the Union, at the same time endangers the realisation of the principle of indivisibility by dividing the Charter's provisions to rights and principles, economic, social and cultural rights belonging to the latter.

Furthermore, in the fundamental rights policy of the Union there seems to be a tendency of using double standards.[586] The fact that the EU member states themselves still have not adequately dealt with certain questions as far as human rights and fundamental rights are concerned, or that they still have various international or European human rights treaties to ratify, whilst at the same time requiring the ratification of the same

[584] Helander 2000, p. 7
[585] Alston and Weiler 1999, p. 26
[586] E.U. network of independent experts in Fundamental Rights: Report of the situation of Fundamental Rights in the European Union and its Member States in 2002, p. 20-21

treaties from the applicant countries, not only jeopardizes the principles of universality and indivisibility, but also weakens the credibility of the Union as a promoter of human rights especially in the eyes of the applicant countries. Instead of showing example, the Union thus sends a message: Don't do what I do, do what I tell you to do.[587]

On the other hand, one can ask how well the reality meets the requirements posed to the applicant countries with the Copenhagen criteria and with the relevant provisions of the TEU? After all, how could one claim that the level of the respect for human rights is adequate for example in the new member state Slovakia when the number Roma seeking for asylum in Finland and in other "old" member states of the Union does not seem to get any smaller? Indeed, as *Tuori* reminds, the mere proclaiming such universalistic values as the human dignity, freedom, equality and solidarity does not yet ensure the formation of a unifying political and legal culture. Surface-level provisions do not automatically trigger off the cultural and socio-psychological mechanisms which would attach these values to the EU and which, at the same time, could give rise to a common civic identity for EU citizens.[588]

Clearly the scope of rights scrutinised in the accession criteria seems to extend some way beyond that which falls within the European Union's internal concerns. On the other hand, this could be justified by the Union's increasing pursuit of better level of respect for Human Rights and Fundamental Freedoms overall. On the other side of the balance sheet, as confirmed also by Union-outside actors, the Copenhagen criteria has in any case already contributed to several important reforms in the human rights field in the applicant countries.[589]

In order for the Union's Human Rights policy to be credible in the eyes of the applicant countries, the Union should at the very least have the contents of human rights and fundamental freedoms defined. The drawing up of the Charter and making it legally binding by incorporating it to the "Constitution of the Union" is very welcomed. However, the mere existence of the Charter is not enough if it is not used at least by the institutions that have proclaimed it. Yet, so far the Charter has been almost invisible in the monitoring process. As the enlargement continues, it is essential to start making use of the Charter. Furthermore, changes will also have to be done in the Courts line of

[587] Weiler and Fries 1999, p. 147
[588] Tuori 2003, p. 26

reasoning in referring to the traditions of the Member States and in it's relation to the ECtHR. While Union's accountability could already in the present situation be advanced on the basis of voluntary co-operation with the treaty bodies established under the various conventions, EU's adherence to such human rights conventions as the ECHR, the European Social Charter or the 1966 Covenants of the UN should seriously be taken into consideration. The Draft Constitution does provide a possibility for this, but does not without political will lead anywhere in this regard. The future will show how big of an impact the EU Human Rights Agency or the Network of Independent Experts on Human Rights will have to the credibility of the Union's fundamental rights policy. The legal basis for the EU Human Rights Agency will of course have to be dealt with, and by no means will the establishment of the Human Rights Agency be simple.

Finally, it should be emphasised that membership of the EU should not be seen as a cure-all. Members of minority groups should of course expect and insist on fair treatment as the process of enlargement advances. Membership requires the acceptance of the *acquis communautaire*, which will enhance the legal protection of minorities. The Copenhagen criteria, based on the values of the European Convention on Human Rights and Fundamental Freedoms should also be fulfilled. Arguably, the Treaty of Amsterdam raised the threshold a little, with the addition of expanded provisions on non-discrimination.[590] In the end, coming back to Tuori, sedimenting human rights as part of the justice culture and even the deeper structure of the law can be a very long process.[591] Subsequently, the further we go from the "core of Europe", the slower is the process of sedimentation, which in turn may provide us an explanation on why certain Eastern European Countries, not to mention Turkey, in particular have great difficulties in meeting the Copenhagen requirements as regards to fundamental rights protection. The next "wave" of the enlargement after the admission of Bulgaria and Romania (and possibly Turkey) will be even more challenging with countries like the former Yugoslavian states in line, where only a decade ago fundamental rights were horribly disregarded in the ethnic disputes.

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[589] See for example CommDH(2004)4, p. 3
[590] Kosztolányi 2000
[591] Tuori 2000, p. 228