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How Just Is the Union's Area of Freedom, Security and Justice?:an Assessment of the Normative Status of International Fundamental Rights in the Union's Legal Order.

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HOW JUST IS THE UNION'S AREA OF 'FREEDOM, SECURITY AND JUSTICE'? AN ASSESSMENT OF THE NORMATIVE STATUS OF INTERNATIONAL FUNDAMENTAL RIGHTS IN THE UNION'S LEGAL ORDER

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**HOW JUST IS THE UNION'S AREA OF 'FREEDOM, SECURITY
AND JUSTICE'?**

**AN ASSESSMENT OF THE NORMATIVE STATUS OF
INTERNATIONAL FUNDAMENTAL RIGHTS IN THE UNION'S
LEGAL ORDER**

by

Dr. Stephen Robert Carruthers

CONTENTS

<i>Acknowledgments</i>	<i>viii</i>
<i>Declaration on Access to Contents</i>	<i>ix</i>
<i>Abstract</i>	<i>x</i>
<i>Abbreviations</i>	<i>xi</i>
<i>Table of Cases</i>	<i>xiii</i>
<i>Table of Treaties, Union Acts and National Legislation</i>	<i>xx</i>

1 INTRODUCTION

1.1 Objectives and Methodology	1
1.2 Subject Matter	5

PART I: JUSTICE, INTERNATIONAL FUNDAMENTAL RIGHTS AND UNION LAW

2 JUSTICE AND UNION LAW: AN ANALYTICAL FRAMEWORK

2.1	Introduction	10
2.2	Why Justice?	10
2.3.	Treaties and Customary International Law as Normative Standards	14
2.4	The Relationship between Treaties and Customary International Law	20
2.5	International Fundamental Rights as a Measure of Justice	22
2.5.1	Introduction	22
2.5.2	Objectivity	23
2.5.3	Neutral Values	23
2.5.4	A Recognized Criterion of Justice	25

3 INTERNATIONAL LAW, FUNDAMENTAL RIGHTS AND THE AUTONOMY OF UNION LAW

3.1	Introduction	31
3.2	<i>Judicial Kompetenz-Kompetenz</i>	
3.2.1	Introduction	34
3.2.2	<i>Judicial Kompetenz-Kompetenz</i> and the Treaties	36
3.2.3	<i>Judicial Kompetenz-Kompetenz</i> and the Constitution	39
3.2.4	Conclusions	45
3.3	Jurisdiction to Review the Validity of Union Law	46
3.3.1	Introduction	46
3.3.2	Jurisdiction of the ECtHR	48

3.3.2.1	Introduction	48
3.3.2.2	<i>Matthews</i> and the Limits of the Autonomy of Union Law	49
3.3.2.3	Extension of the <i>Matthews</i> Doctrine	53
3.3.2.4	Conclusions	59
3.4	Hierarchy of Judgments Interpreting the ECHR	61
3.4.1	Introduction	61
3.4.2	Hierarchy of Judgments: The ECJ and the ECtHR	63
3.4.3	National Courts and the ECHR: a Tale of Two Masters	67
3.5	General Conclusions	71

4 THE NORMATIVE STATUS OF INTERNATIONAL FUNDAMENTAL RIGHTS IN UNION LAW

4.1	Introduction	73
4.2	The Normative Status of Fundamental Rights Treaties in Union Law	75
4.2.1	Union Accession to Fundamental Rights Treaties	75
4.2.2	Transfer of National Competences to the Union	77
4.2.2.1	Introduction	77
4.2.2.2	The UN Charter and UN Security Council Resolutions	79
4.2.2.3	The Refugee Convention	82
4.2.2.4	The ECHR	85
4.2.2.5	Conclusions	85
4.2.3	Article 307 EC Treaty	86
4.2.3.1	Introduction	86
4.2.3.2	The ECHR	89
4.2.3.3	The UN Charter	90
4.2.3.4	Conclusions	90
4.2.4	Treaty Norms as General Principles of Union Law	91
4.2.4.1	Introduction	91
4.2.4.2	Conflict between ECHR Fundamental Rights and Community Fundamental Freedoms	94
4.2.4.3	Fundamental Rights as General Principles of Union Law: a Right of Redress?	96
4.2.4.4	A Conflict of Rulings	97
4.2.4.5	The Absence of Control Mechanisms	98
4.2.4.6	Treaty Reservations and Alternative International Proceedings	98
4.3	The Normative Status of Customary International Law in Union Law	102
4.3.1	Introduction	102
4.3.2	Customary International Law and Union Law	104
4.3.3	Judicial Review and Customary International Law	106
4.3.4	Conclusions	108
4.4	The Normative Status of <i>Jus Cogens</i> in Union Law	109
4.4.1	Introduction	109
4.4.2	<i>Jus Cogens</i> and Union Law	112
4.4.3	<i>Jus Cogens</i> in National Law: Conflict Resolution	113
4.5	General Conclusions	116

5 THE CONSTITUTION AND REFORM OF THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE UNION LAW

5.1	Introduction	119
5.2	Sources of Fundamental Rights under the Constitution	122
5.2.1	Introduction	122
5.2.2	Article I-9(3) and the Retention of Fundamental Rights as General Principles	123
5.2.3	Amendments to the Charter	126
5.2.3.1	Introduction	126
5.2.3.2	Article II-112(4)	127
5.2.3.3	Article II-112(5)	128
5.2.3.4	Article II-112(6)	129
5.2.3.5	Article II-112(7)	130
5.2.4	Hierarchy of Sources of Fundamental Rights under the Constitution	131
5.2.5	Conclusions	134
5.3	Union Fundamental Rights and the Rule of Law	135
5.3.1	Introduction	135
5.3.2	The Union and the Rule of Law	137
5.3.3	Conclusions	139
5.4	Incorporation of the Charter and the Relationship between National and Union Law	140
5.4.1	Introduction	140
5.4.2	The Charter and National Competences	141
5.4.3	Conclusions	143
5.5	The Control of Derogations from Union Fundamental Rights in the Constitution	144
5.5.1	Introduction	144
5.5.2	Derogations from Fundamental Rights under Union Law	145
5.5.2.1	Derogations from Fundamental Rights as General Principles of Union Law	146
5.5.2.2	Derogations from Charter Rights	147
5.5.2.3	Union Derogation from the ECHR	149
5.5.3	Conclusions	149
5.6	Enforceability of Fundamental Rights	150
5.6.1	Introduction	150
5.6.2	Reforms to the Enforceability of Fundamental Rights	151
5.6.2.1	The European Convention's Reform Proposals	151
5.6.2.2	Constitutional Reform of Judicial Remedies	153
5.6.2.2.1	Introduction	153
5.6.2.2.2	Union Accession to the ECHR	153
5.6.2.2.3	Incorporation of the Charter	156
5.6.2.2.4	Reforms to the Union's Existing Remedies	157
5.6.3	Conclusions	160
5.7	Union Accession to the ECHR: A Change in Normative Status	161
5.7.1	Introduction	161

5.7.2	Article I-9(2) and the ECHR Protocol	162
5.7.3	The Modalities, Scope and Normative Effect of ECHR Accession	165
5.7.4	Conclusions	167
5.8	Incorporation of the Charter: An Entrenched Bill of Rights?	167
5.8.1	Introduction	167
5.8.2	The Drafting and Proclamation of the Charter	169
5.8.3	The Incorporated Charter: a Bill of Rights for the Union?	172
5.9	General Conclusions	175

PART II: THE ROLE OF JUSTICE IN THE UNION'S 'AREA OF FREEDOM, SECURITY AND JUSTICE'

6 THE 'AREA OF FREEDOM, SECURITY AND JUSTICE': GENESIS AND CHARACTERISTICS

6.1	Introduction	179
6.2	The Development of the AFSJ: From Periphery to Centre Stage	180
6.2.1	Pre-Maastricht: Intergovernmental Cooperation	180
6.2.2	Treaty of Maastricht: Creation of the Third Pillar	182
6.2.3	Maastricht to Amsterdam	185
6.2.4	Treaty of Amsterdam and Creation of the AFSJ	186
6.2.4.1	A New Objective: An 'Area of Freedom, Security and Justice'	186
6.2.4.2	Partial Communitarisation of Justice and Home Affairs	187
6.2.4.3	Third Pillar Changes: Title VI TEU	190
6.2.5	The Vienna Action Plan: The Meaning of 'Freedom, Security and Justice'	194
6.2.6	Tampere to the Treaty of Nice	197
6.2.7	September 11 to the Laeken Declaration	199
6.2.8	The European Convention: Reform Proposals	201
6.2.9	The Constitution and Reform of the AFSJ	206
6.3	General Conclusions	208

7 FUNDAMENTAL RIGHTS IN THE AFSJ: A FLAWED SYSTEM OF JURISDICTION

7.1	Introduction	210
7.2	Fundamental Rights, Jurisdiction and the Third Pillar	212
7.2.1	Introduction	212
7.2.2	ECJ Jurisdiction over Third Pillar Measures	213
7.2.3	Scope of Article 46(d) TEU	214
7.2.4	ECJ Jurisdiction under Article 35 TEU	216
7.2.5	The ECtHR and Third Pillar Measures	222
7.3	Fundamental Rights and Title IV EC Treaty	226
7.3.1	Introduction	226
7.3.2	Scope of Article 68 EC Treaty	226
7.3.3	ECJ Jurisdiction under Article 68 EC Treaty	228

7.3.4	The Schengen <i>Acquis</i> and Judicial Review	230
7.4	Jurisdiction over the AFSJ under the Constitution	231
7.4.1	Reform Proposals of Working Group X	231
7.4.2	The AFSJ Jurisdictional Structure in the Constitution	233
7.5	General Conclusions	235

8 THE PRINCIPLE OF *NON-REFOULEMENT*: A CASE STUDY ON JUSTICE IN THE AFSJ

8.1	Introduction	237
8.2	The Principle of <i>Non-Refoulement</i> in International Law	240
8.2.1	Introduction	240
8.2.2	The Scope and Content of <i>Non-Refoulement</i>	242
8.2.2.1	Introduction	242
8.2.2.2	<i>Non-Refoulement</i> as an Absolute Principle	242
8.2.2.3	The Accountability or Protection Theory	244
8.2.2.4	Indirect <i>Refoulement</i>	247
8.2.2.5	Non-Admittance at the Frontier	248
8.2.2.6	<i>Non-Refoulement</i> and Extradition	251
8.2.3	<i>Non-Refoulement</i> as a Principle of Customary International Law and <i>Jus Cogens</i>	252
8.3	The Principle of <i>Non-Refoulement</i> in Union Law	253
8.3.1	Introduction	253
8.3.2	<i>Non-Refoulement</i> as a Fundamental Right	253
8.3.2.1	General Principles of Union Law	253
8.3.2.2	Customary International Law and <i>Jus Cogens</i>	254
8.3.2.3	Article 63(1) EC Treaty	254
8.3.2.4	The Charter and <i>Non-Refoulement</i>	255
8.3.3	<i>Non-Refoulement</i> in Union Refugee and Asylum Law	258
8.3.3.1	Introduction	258
8.3.3.2	The 2001 Temporary Protection Directive	260
8.3.3.3	The 1996 Joint Position	261
8.3.3.4	The Dublin II Regulation	262
8.3.3.5	The 1997 Asylum Protocol	264
8.3.3.6	The 2002 European Arrest Warrant	268
8.3.3.7	The 2001 Mutual Recognition Directive	272
8.4	The Refugee Qualification and Status Directive	274
8.4.1	Introduction	274
8.4.2	The Object and Scope of the RQSD	275
8.4.3	The RQSD and <i>Non-Refoulement</i>	279
8.4.3.1	Introduction	279
8.4.3.2	The RQSD and the Absolute Character of <i>Non-Refoulement</i>	280
8.4.3.3	The RQSD and State Accountability	282
8.4.3.4	The RQSD and Indirect <i>Refoulement</i>	283
8.4.3.5	The RQSD and Non-Admittance at the Frontier	283
8.4.3.6	The RQSD and Extradition	284
8.5	General Conclusions	285

9 GENERAL CONCLUSIONS

9.1	Measuring the Justice of the AFSJ: International Fundamental Rights	288
9.2	The Autonomy of Union Law: A Misguided Objective	289
9.3	A Partnership to Promote the Integrity of International Law	291
9.4	The Constitution and Beyond	292
9.5	The Principle of <i>Non-Refoulement</i> : a Case Study on Justice in the AFSJ	294
Annex 1	Selected UN Conventions	296
Annex 2	Selected European Conventions	298
	Bibliography	300
	Table of Source Websites	323

Abstract

This thesis argues that international fundamental rights provide the most appropriate measure of justice for the Union's area of 'freedom, security and justice' (AFSJ). However, it is argued that the normative status of international fundamental rights in Union law is undermined by the pursuit of the objective of autonomy of Union law and deficiencies in the legal mechanisms for giving effect to those rights.

This research analyses the sources and normative status of international fundamental rights in Union law, and in particular the AFSJ, both as currently constituted and under the Constitution, and assesses the robustness and effectiveness of the Union's constitutional order in guaranteeing the protection of those rights.

Part one investigates the relationship of Union law with international fundamental rights. Chapter two provides the theoretical justification for the selection of international fundamental rights as a standard. Chapter three critically analyses the pursuit of autonomy as an objective. Chapter four examines the normative status of international fundamental rights in Union law. Chapter five critically analyses the reforms in the Constitution. Part two investigates the role of justice in the AFSJ. Chapter six outlines the development and ideological basis of the AFSJ. Chapter seven critically assesses the effectiveness of fundamental rights protection in the AFSJ. Chapter eight undertakes a case study on the compatibility of key Union asylum and immigration measures with the principle of *non-refoulement*.

In conclusion, Chapter nine argues that partnership rather than autonomy should be the basis of the relationship between the Union and national courts with the objective of enhancing the status of international fundamental rights in Union law. The reforms in the Constitution to the structure of fundamental rights protection and to the AFSJ would overall facilitate achievement of this objective and would further the attainment of justice in the AFSJ.

Abbreviations

<i>AFSJ</i>	Area of Freedom, Security and Justice
<i>AG</i>	Advocate General
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>BHRC</i>	<i>Butterworths Human Rights Cases</i>
<i>BVerfGE</i>	<i>Bundesverfassungsgericht</i>
<i>BYIL</i>	<i>British Yearbook of International Law</i>
<i>CAT</i>	Convention against Torture
<i>CDDH</i>	Steering Committee for Human Rights of the Council of Europe
<i>CDDH Report</i>	Study of Technical and Legal Issues of a Possible EC/EU Accession to the ECHR
<i>CEAS</i>	Common European Asylum System
<i>CEDAW</i>	Convention on the Elimination of All Forms of Discrimination against Women
<i>CEDAW-P</i>	Optional Protocol to CEDAW
<i>CERD</i>	International Convention on the Elimination of All Forms of Racial Discrimination
<i>CFI</i>	Court of First Instance
<i>CFSP</i>	Common Foreign and Security Policy
<i>CIG</i>	<i>Conférence Intergouvernementale</i>
<i>Charter</i>	Charter of Fundamental Rights of the European Union
<i>Charter Explanations</i>	Explanations to the Charter
<i>CMLR</i>	<i>Common Market Law Reports</i>
<i>CML Rev.</i>	<i>Common Market Law Review</i>
<i>Commission</i>	European Commission
<i>Communities</i>	EC and Euratom
<i>Constitution</i>	Treaty establishing a Constitution for Europe
<i>Council</i>	Council of the European Union
<i>CRC</i>	Convention on the Rights of the Child
<i>Crim. LR</i>	<i>Criminal Law Review</i>
<i>CUP</i>	<i>Cambridge University Press</i>
<i>CYELS</i>	<i>Cambridge Yearbook of European Legal Studies</i>
<i>DR</i>	<i>Decisions and Reports of the European Commission on Human Rights</i>
<i>ECSC</i>	European Coal and Steel Community
<i>EC</i>	European Community
<i>ECHR</i>	European Convention on Human Rights
<i>ECJ</i>	European Court of Justice
<i>EC Treaty</i>	European Community Treaty
<i>ECRE</i>	European Council on Refugees and Exiles
<i>ECSC</i>	European Coal and Steel Community
<i>ECommHR</i>	European Commission on Human Rights
<i>ECtHR</i>	European Court of Human Rights
<i>EDU</i>	European Drugs Unit
<i>EHRLR</i>	<i>European Human Rights Law Review</i>
<i>EHRH</i>	<i>European Human Rights Reports</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>EL Rev.</i>	<i>European Law Review</i>
<i>EP</i>	European Parliament
<i>EPP</i>	European Public Prosecutor
<i>EPL</i>	<i>European Public Law</i>
<i>ETS</i>	<i>European Treaty Series</i>
<i>EU</i>	European Union
<i>Euratom</i>	European Atomic Energy Community
<i>Eurojust</i>	European Judicial Cooperation Unit
<i>European Convention</i>	Convention on the Future of Europe
<i>European Conventions</i>	The Conventions listed in Annex 2.
<i>Europol</i>	European Police Office

<i>Ga. J. Int'l & Comp. L.</i>	<i>Georgia Journal of International and Comparative Law</i>
GA	General Assembly of the United Nations
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
<i>Harvard Int'l L. J.</i>	<i>Harvard International Law Journal</i>
HRC	Human Rights Committee
HRLJ	<i>Human Rights Law Journal</i>
HRQ	<i>Human Rights Quarterly</i>
ICCPR	International Covenant on Civil and Political Rights
ICCPR-PI	First Optional Protocol of the ICCPR
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	<i>International and Comparative Law Quarterly</i>
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGC	Intergovernmental Conference
IJRL	<i>International Journal of Refugee Law</i>
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILRM	<i>Irish Law Reports Monthly</i>
<i>Int. J. Constitutional Law</i>	<i>International Journal of Constitutional Law</i>
IR	<i>Irish Reports</i>
JHA	Justice and Home Affairs
<i>Mich. L. Rev.</i>	<i>Michigan Law Review</i>
MLR	<i>Modern Law Review</i>
<i>New York Protocol</i>	Protocol Relating to the Status of Refugees
NGOs	Non-Governmental Organisations
OJ	<i>Official Journal of the European Communities</i>
OLAF	European Anti-Fraud Office
OUP	<i>Oxford University Press</i>
<i>Refugee Convention</i>	Convention Relating to the Status of Refugees
RQSD	Refugee Qualification and Status Directive
SEA	Single European Act
SEM	Single European Market
Stat.	U.S. Treaties at Large
<i>Social Charter</i>	European Social Charter
TEU	Treaty of European Union
<i>Third Pillar</i>	Title VI TEU
<i>Treaties</i>	EC Treaty and TEU
UDHR	Universal Declaration of Human Rights
UKTS	<i>United Kingdom Treaty Series</i>
<i>UN Conventions</i>	The Conventions listed in Annex 1
UN	United Nations
<i>UN Charter</i>	United Nations Charter
Union	European Union
UNHCR	Office of United Nations High Commissioner for Refugees
UNHCHR	Office of the United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
UNTS	<i>United Nations Treaty Series</i>
VAP	Vienna Action Plan
VCLT	Vienna Convention on the Law of Treaties
VCLT(SIO)	Vienna Convention on the Law of Treaties between States and International Organizations
<i>Web JCLI</i>	<i>Web Journal of Current Legal Issues</i>
WGII	Working Group II on Incorporation of the Charter/Accession to the ECHR
<i>WGII Final Report</i>	Final Report of WGII
WGX	Working Group X on Freedom, Security and Justice
<i>WGX Final Report</i>	Final Report of WG X

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Electronic Communications Privacy Act of 1986

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INTRODUCTION

1.1 OBJECTIVES AND METHODOLOGY

This study investigates the normative status of international fundamental rights¹ in the Union's legal order,² with particular reference to the Union's 'Area of Freedom, Security and Justice' (AFSJ).³ The Union is used as an umbrella term to refer to both the European Union and the European Community (Community).⁴ In particular, the objective of the research is to examine the relationship between the normative content of international fundamental rights and the Union's constitutional structure, or

¹ International fundamental rights is used as a term in this study to refer to fundamental rights derived from the sources of international law listed in Article 38(1) of the 1945 Statute of the International Court of Justice, and in particular international conventions and international custom. The scope of the fundamental rights derived from these sources is analysed in Sections 2.3 of Chapter two and the relationship between them is considered in Section 2.4. The term fundamental rights has been adopted since this is the terminology generally adopted in the context of the Union's legal order. However, no distinction is drawn in this study between fundamental rights and human rights. See for a discussion of the legal notion of fundamental rights: Jaqueline Dutheil de la Rochère, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty' (2004) 41 *CML Rev.*, pp. 345-354, at p. 346.

² 'Legal order' is a phrase frequently used, but less often defined, in the academic literature and indeed the case law of the European Court of Justice (ECJ). Reference to the ECJ, unless otherwise specified, also includes reference to the Court of First Instance (CFI). Kenneth Winston suggests the following test: 'Among a number of prominent theorists in the twentieth century, for example, the dominant criterion has been that law must take the form of a "system", involving a master test for determining which norms are included in the system – and hence binding on legal subjects – and which are not. Any social arrangement lacking this feature fails to qualify as legal order.': 'Constructing Law's Mandate', in David Dyzenhaus (ed.) *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing, 1999), pp. 281-308, at p. 281. Legal order is often used interchangeably with legal system or legal regime and is closely related to the notion of 'constitutionalism', which has been defined in the context of the Union as: 'the process by which the EC Treaties evolved from a set of legal arrangements, binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law – enforceable even against the Member States and national law,': J.H.H. Weiler, 'Epilogue: The European Court of Justice: Beyond 'Beyond Doctrine' or the Legitimacy Crisis of European Constitutionalism', in Anne-Marie Slaughter, Alec Stone Sweet and J.H.H. Weiler (eds.) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford, Hart Publishing, 1998), pp. 365-391, at p. 365. See also: J. Shaw, 'Process and Constitutional Discourse in the European Union', in C. Harvey, J. Morison, and J. Shaw (eds.), *Voices, Processes and Spaces in Constitutionalism* (Oxford, Blackwell, 2000), pp. 4-37.

³ See Chapter six for the development and scope of the AFSJ and the reasons underlying its selection as an appropriate area of Union policy for critical analysis in terms of international fundamental rights.

⁴ However, when the context requires, and in particular in the analysis of Article 63 EC Treaty measures, reference will be made to the Community. Reference to the Treaties is, unless otherwise specified, to the Treaty establishing the European Community (EC Treaty) and the Treaty on European Union (TEU), as amended respectively by the 1986 Single European Act (SEA), the 1992 Maastricht Treaty, the 1997 Treaty of Amsterdam and the 2000 Treaty of Nice. A full list of the constitutive Treaties of the Community, Euratom and the European Union is in T.C. Hartley, *The Foundations of European Community Law* (5th edn.) (Oxford, OUP, 2003), at pp. 93-94.

operating system, within which those rights are recognized and applied.⁵ The normative content fulfills two functions attributable to a norm: a measure of justice and directive force.⁶ The justice of the AFSJ is here measured by reference to international fundamental rights in both a positive and negative sense: positive insofar as international human rights norms set the agenda for legislative and policy initiatives by the Union institutions; and negative insofar as they constrain the Union institutions from pursuing action in violation of such norms.⁷ The Union's constitutional structure, among other features, should guarantee the rule of law,⁸ identify the sources of Union law and their hierarchical ordering, determine the enforceability of rights, delimit the allocation of powers between the Union and Member States,⁹ establish rules of jurisdiction, and create judicial institutions to settle disputes.¹⁰

Both strands of the inquiry, normative content and constitutional structure, are pursued in tandem since while the 'compliance pull' or legitimacy of fundamental rights norms will in part depend on their fulfilling defined characteristics,¹¹ the robustness and effectiveness¹² of the Union's constitutional order in fulfilling the

⁵ The use of the term 'operating system', and the components of that system, draws on the conceptions of Paul F. Diehl, Charlotte Ku, and Daniel Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems' (2003) 57 *International Organization*, pp. 43-75, at pp. 46-50.

⁶ A norm being defined as: 'a standard, rule, principle used to judge or direct human conduct as something to be complied with.': Ted Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford, OUP, 1995), at p. 626.

⁷ The directive force of the principle of *non-refoulement* within the Union's legal order is examined in both senses in Chapter eight.

⁸ T. Risse and K. Sikkink, 'The socialization of human rights norms', in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, CUP, 1999), pp. 1-38, at p. 5.

⁹ See Alan Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 *CML Rev.*, pp. 355-381; and Paul Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 *EL Rev.*, pp. 323-344.

¹⁰ An analysis of the extent to which the Union's constitutional order fulfils these objectives is examined in Chapter five. This list is based in part on the non-exhaustive list of the components of the operating system of international law identified by Diehl, Ku, and Zamora, above n. 4, at p. 47. Many of these objectives were affirmed in the Laeken Declaration of the European Council on the Future of the European Union of December 2001: available at:

<http://europa.eu.int/comm/laeken_council/index_en.htm>. See also Koen Laenarts and Marlies Desomer, 'Bricks for a Constitutional Treaty of the European Union: values, objectives and means' (2002) 27 *EL Rev.*, pp. 377-407; and Andrew Williams, 'EU human rights policy and the Convention on the Future of Europe: a failure of design?' (2003) 28 *EL Rev.*, pp. 794-813.

¹¹ See Thomas F. Franck, 'Legitimacy in the International System' (1988) 82 *AJIL*, pp. 705-759. The indicators of rule legitimacy for rules of international law identified by Franck are: 'determinacy, symbolic validation, coherence and adherence (to a normative hierarchy).', *ibid.*, at p. 712.

¹² 'By *effectiveness* I accept the usual notion that regimes enable the participants to realize certain goals (which would otherwise have been impossible or difficult to reach) and that the rules and norms of

functions specified will impact on how significant a role fundamental rights norms play in the functioning of the Union's legal order. This analysis of fundamental rights norms and the effectiveness and robustness of the constitutional structure within which such norms operate in the Union's legal order is undertaken both with respect to the Union's existing constitutional order¹³ and the Constitution.¹⁴

This study argues that international fundamental rights provide the most appropriate basis for measuring the justice of the AFSJ. However, the status of those rights in Union law is undermined by the pursuit of the objective of autonomy for the Union's legal order and deficiencies in the legal mechanisms for giving effect to those rights. The Constitution would remedy a number of these failings but would not resolve the uncertain status of fundamental rights falling outside the ECHR or the Charter of fundamental rights of the European Union of 7 December 2000 (the Charter).¹⁵ The

regimes are defences against unilateral action and opportunism. *Robustness*, on the other hand, refers to the ability of regimes to withstand the challenges of change and their capacity to adjust to and provide orderly procedures for dealing with 'environmental shocks'.': F. Kratochwil, 'How do Norms Matter?' in Michael Byers (ed.) *The Role of Law in International Politics* (Oxford, OUP, 2000), pp. 35-68, at p. 53. The concepts of robustness and efficiency are also linked to the notion of legitimacy as defined by Franck (1988), above n. 11, at p. 712; and see Kratochwil, *ibid.* at p. 57.

¹³ There is an extensive literature on the Union's constitutional order: see in particular: Weiler, *The Constitution of Europe* (Cambridge, 1999); J. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (Cambridge, CUP, 2003); and the bibliography in Weiler, in Slaughter, Sweet and Wiener (eds.), above n. 2, at pp. 388-391. See for an analysis of the potential impact of the Constitution: Koen Lenaerts and Damien Gerard, 'The Structure of the Union according to the Constitution for Europe: the Emperor is Getting Dressed' (2004) 29 *EL Rev.*, pp. 289-322, at 293-298. This study adopts the position that the existing constitution of the Union is based on the Treaties: 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.': Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339, at para. 23.

¹⁴ Reference to the Constitution is to the *Treaty establishing a Constitution for Europe* signed at Rome on 29 October 2004: [2004] OJ C310/1. References to Articles of the Constitution generally refer only to the article number unless the context otherwise requires for clarity. The process of ratification of the Constitution is currently suspended following a declaration at the meeting of the European Council of 16-17 June 2005: SN 117/05 of 18 June 2005; available at <http://ue.eu.int/ueDocs/cms_Data/Docs/pressData/en/ec/85325.pdf>. As of 15 July 2005 the situation on ratification was as follows: Austria, Cyprus, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Slovakia, Slovenia, and Spain have completed the procedures necessary for ratification of the Constitution; Belgium and Luxembourg have approved ratification subject to final approval by the Flemish regional parliament and the second reading of the Chamber respectively. France and the Netherlands held referenda that rejected ratification on 29 May and 1 June 2005 respectively. The nine other Member States have in practice postponed the ratification procedure until the matter is revisited by the European Council in the first half of 2006. Although the prognosis for the Constitution is unclear, this thesis refers to the Constitution both for the purpose of analysing the proposed changes to existing Union law and as an authoritative statement of the constitutional structure agreed by the Heads of State or Government of the Member States. Provided all the ratifications have been duly deposited, Article IV-447(2) of the Constitution provides it should enter into force on 1 November 2006. This date has been postponed following the results of the referenda in France and the Netherlands.

¹⁵ [2000] OJ C364/1.

research aim is to carry out a critical analysis of the sources and normative status of fundamental rights in Union law, and in particular in the AFSJ, both as currently constituted and under the Constitution and to assess the robustness and effectiveness of the Union's constitutional order in guaranteeing that status.

However, the basis for measuring the significance of normative standards in directing the Union's legal order requires elucidation. The purpose of this inquiry is not to measure significance empirically by seeking to establish a causal connection between a normative standard and the rationale for a specific legislative provision.¹⁶ There will be a number of factors in a politically and socially sensitive area such as the AFSJ that determine a specific norm.¹⁷ In such a context, it may be difficult, if not impossible, to identify the decisive factor in the amendment and adoption of a particular provision, be it in conformity or at variance with international fundamental rights norms.¹⁸ However, by establishing a base line of applicable fundamental rights standards against which to measure the conformity or otherwise of Union legislation and by then assessing the extent to which relevant Union legislation is moulded and constrained by those standards one can make a reasoned judgment as to the extent to which the Union's legal order recognizes such standards and provides effective protection against their violation. It is this value judgment that forms the basis for assessing the significance of fundamental rights standards in the Union's legal order.

This evaluative exercise has similarities with that adopted by Risse and Sikkink in comparative studies undertaken to understand the 'process by which international norms are internalized and implemented domestically' in a process they have

¹⁶ On the difficulties of rules as 'normative guidance for decisions', see Kratochwil, in Byers (ed.), above n. 12, at p. 53 and pp. 62-68.

¹⁷ See Chapter six for the history and development of the AFSJ. On the specific area of the Union's asylum and refugee policy, see Maria Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum' (2002) 9 *EPL*, pp. 544-562.

¹⁸ This line of reasoning has been employed to justify the reluctance of the courts in the UK to rely on parliamentary proceedings for the purpose of interpreting statutes. This problem has been resolved in part by the increasing use of a 'purposive' approach to statutory interpretation by the English courts: see Tom Campbell, 'Incorporation through Interpretation' in T. Campbell, K.D. Ewing and A. Tomkins (eds.) *Sceptical Essays on Human Rights* (Oxford, OUP, 2001), pp. 79-101. In the UK context, remedial action taken under section 10 of the Human Rights Act 1998 (HRA) would identify amendments resulting from incompatibility with the ECHR following a declaration of incompatibility by a relevant court under section 4 of the HRA. A striking example of this process was provided by the repeal of section 23 of the Anti-Terrorism, Crime and Security 2001 (ATCSA) by the Prevention of Terrorism Act 2005 following the declaration of incompatibility in respect of section 23 ATCSA made by the House of Lords in *A and others v. Secretary of State for the Home Department* [2004] UKHL 56.

characterised as ‘socialization’.¹⁹ However, these studies were undertaken in countries with a history of substantial human rights violations, either in the recent past or currently, and it is doubtful whether the causal mechanisms identified equally apply to the Union.²⁰ The evaluative method adopted is complementary to the critical studies of Union compliance with fundamental rights standards carried out both by NGOs and by Union institutions or appointed experts. Thus the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, drawn up by the EU Network of Independent Experts in Fundamental Rights (2002 EU Network Report),²¹ and the European Parliament’s Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs 2003 *Report on the Situation as regards Fundamental Rights in the European Union* (2003 EP Report),²² which was in part based on the 2002 EU Network Report, systematically examine compliance by the Union’s institutions and the Member States operating within the scope of Union law with international fundamental rights norms.²³ However, neither the 2002 EU Network Report nor the 2003 EP Report focused specifically on the issue of evaluating the impact of international norms on the Union’s legal order.

1.2 SUBJECT MATTER

Part one addresses the basis of the relationship of Union law with international fundamental rights law. Chapter two justifies the adoption of international fundamental rights as the standard for measuring the justice of the AFSJ by reference to three characteristics. Firstly, they are objectively ascertainable and exert normative force. Secondly, they lay strong, if not undisputed, claims to universality and neutrality. Thirdly, fundamental rights are an essential component of any meaningful conception of justice.

¹⁹ Risse and Sikkink, above n. 8, at p. 5. The countries selected for the comparative studies included Poland and the former Czechoslovakia. Poland, Slovakia and the Czech Republic acceded to the Union on 1 May 2004.

²⁰ Indeed, Risse and Sikkink differentiate between ‘liberal democratic states’ and authoritarian or ‘norm-violating states’ and present the Union as a paradigmatic member of the former category: *ibid.*, at p. 9.

²¹ Available at: < http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf>.

²² Document A5-0281/2003 of 21 August 2003. Available on the European Parliament website.

²³ The Charter of Fundamental Rights of the European Union of 7 December 2000 (the Charter) was the formal reference document: [2000] OJ C364/1.

Chapter three investigates the basis and justification for the Union's pursuit of the objective of autonomy. In particular, it examines three areas where the foundations of the principle of Union autonomy have been subject to challenge and questions whether the principle needs to be redefined to ensure that international fundamental rights are interpreted and applied in the Union legal order in a manner that is consistent with the international law obligations both of the Union and the Member States. The first section examines the issue of whether the ECJ has judicial *Kompetenz-Kompetenz*. The second section investigates whether the ECJ has competence to rule on the legality of Union law in the light of case law of the ECJ and the European Court of Human Rights (ECtHR). The final section addresses the question of the hierarchy within the Union's legal order between judgments of the ECJ and those of the ECtHR.²⁴

Chapter four examines the normative status of international fundamental rights derived from treaties and customary international law in Union law. The first section critically analyses the legal status of fundamental rights treaties in the Union's legal order. The second section examines the normative status of customary international law in Union law. In the final section, the developing law on the status of norms ascribed the status of *jus cogens* is addressed in the context of the relationship between the national legal orders of the Member States and Union law.

Chapter five critically examines the fundamental rights provisions of the Constitution in the framework of the constitutional objectives set the Convention on the Future of Europe by the European Council in the 2001 Laeken Declaration.²⁵ The normative consequences of Union accession to the ECHR and incorporation of the Charter on the existing system for the protection of fundamental rights are analysed and evaluated. The retention of the doctrine of fundamental rights as general principles of Union law and the modifications in the Constitution to the incorporated Charter are on analysis found to be unnecessary and detrimental to achievement of the Laeken objectives.

²⁴ Reference to the ECtHR includes reference to the European Commission on Human Rights (ECommHR) unless otherwise specified.

²⁵ *Laeken Declaration of the European Council on the Future of the European Union* of December 2001, above n. 10.

Part two consists of Chapters six to eight and focuses on the normative status of fundamental rights in the AFSJ. Chapter six traces the development and characteristics of the AFSJ from its inception through to the proposed reforms in the Constitution and the 2005 Hague Program.²⁶ This analysis of the development and ideological basis of the AFSJ provides the necessary background to the subsequent evaluation of the AFSJ in terms of access to justice and democratic legitimacy. In particular, Chapter six explores how far security has dominated the Union's policy and legislative initiatives in the AFSJ at the expense of freedom and justice.

Chapter seven analyses the restricted role and status of fundamental rights in the AFSJ both under Title VI TEU and Title IV TEC and assesses how far the reforms in the Constitution would remedy the deficiencies. In particular, the Chapter examines the recent case law of the ECtHR and the CFI demonstrating serious gaps in access to justice in respect of Third Pillar measures adopted under Title VI TEU. The analysis of the reforms in the Constitution of the AFSJ concludes they would mark a substantial improvement in the legitimacy of AFSJ legislation in terms of compliance with fundamental rights standards.

Chapter eight undertakes a case study to assess the status of the international law principle of *non-refoulement* in Union law with specific reference to measures of primary and secondary law in the refugee and asylum field. The study first outlines the scope and content of critical aspects of the principle of *non-refoulement* in selected instruments of international law. It then examines the protection afforded to the principle in Union law both generally and in specific refugee and asylum measures. The final section analyses in detail the conformity of the 2004 Refugee Qualification and Status Directive with the principle of *non-refoulement* as set out in the selected international instruments.²⁷

Chapter nine sets out the conclusions by reference to the research hypothesis. The first conclusion is that international fundamental rights provide the most appropriate

²⁶ *Hague Programme on Strengthening Freedom, Security and Justice in The European Union*, Brussels, 4-5 November 2004, Annex 1 to the Presidency Conclusions (14292/04): available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf>.

²⁷ Directive 2004/83/EC of 1 May 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

standard for assessing the justice of the AFSJ both from an internal and external perspective. The second conclusion is that the normative status of international fundamental rights in Union law is undermined by the pursuit of the objective of autonomy of the Union's legal order and deficiencies in the legal mechanisms for giving effect to those standards. It is argued that instead a partnership model between the Union and national legal orders in their relation to international fundamental rights should be pursued. Proposals are made for reform of the system for the protection of fundamental rights based on the reforms in Constitution. Finally, the conclusions based on the analysis of the AFSJ are set out with particular reference to the case study on the principle of *non-refoulement*.

The law is stated as of 1 September 2005.

PART 1

JUSTICE, INTERNATIONAL FUNDAMENTAL RIGHTS AND UNION LAW

JUSTICE AND UNION LAW: AN ANALYTICAL FRAMEWORK

2.1 INTRODUCTION

This Chapter explores and justifies the analytical framework outlined in the Introduction in the context of scholarship by both legal and international relations theorists.¹ Firstly, it explores why justice is relevant to the Union's legal order, and in particular the AFSJ. Secondly, it identifies international fundamental rights norms derived from treaties and customary international law as the standard to measure the justice of the AFSJ. Thirdly it analyses the interrelationship between these two sources of international law. Fourthly, the selection of international fundamental rights standards as the measure for justice is justified by reference to three characteristics of such standards: objectivity, neutrality and theoretical consistency with theories of international justice.

2.2 WHY JUSTICE?

What is the justification for an inquiry into how far the Union's legal order, and in particular the AFSJ, meets the requirements of justice?² Firstly, the Union asserts justice as an objective and value both internally and externally, although on a more

¹ On the value of interdisciplinary scholarship between international law and international relations, see Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *AJIL*, pp. 205-239; and Stephen J. Toope, 'Emerging Patterns of Governance and International Law', in M. Byers (ed.), *The Role of Law in International Politics* (Oxford, OUP, 2000), pp. 91-108.

² Thomas F. Franck, in his inquiry into the role of justice in the international legal order, concluded justice had little relevance: 'The exposed role of legitimacy and the minimal role of justice distinguish the international rule system from its domestic counterparts.': 'Is Justice relevant to the International Legal System' (1989) 64 *Notre Dame Law Review*, pp. 945-963, at p. 945. See also by the same author: *Fairness in International Law and Institutions* (Oxford, OUP, 1995). For an analysis of the characteristics distinguishing the Union's legal order from public international law, see J.H.H. Weiler and Ulrich R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in Slaughter, Sweet and Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford, Hart Publishing, 1998), pp. 331-364.

explicit basis in the Constitution than in the Treaties.³ The second Recital to the Preamble to the Constitution refers to Europe's wish to 'strive for peace, justice and solidarity throughout the world'. Article I-2 of the Constitution provides:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

The final paragraph of Article I-3 of the Constitution establishes, *inter alia*, the promotion of 'social justice and protection' as an objective of the Union. Title VI of Part II of the Constitution, incorporating the corresponding provisions of the Charter, is entitled 'Justice' and consists of Articles II-107 to II-110 which list the basic rights in civil and criminal proceedings.⁴

The only specific reference to justice in the preambles to the EC Treaty and the TEU is in the eleventh Recital of the TEU which refers to the establishment of an 'area of freedom, security and justice'. Article 6(1) TEU does not refer to justice as one of the principles on which the Union is founded nor does Article 2 EC Treaty include justice in the list of the Community's tasks. However, the objectives of the Union listed in Article 2 TEU include the requirement for the Union:

'To maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

³ The references to justice in the Constitution independently of the AFSJ may reflect reduced sensibility on the part of the Member States in the light of the mainstreaming of Third Pillar competences under the Constitution. The references to justice in the Preamble to the Constitution and in Articles I-2 and I-3 were present in the 25 November 2003 draft of the Constitution and were not subject to controversy in the subsequent Intergovernmental Conference (IGC) proceedings: CIG 50/03 of 25 November 2003. IGC documents are available at:

<http://ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?content=DOC&lang=EN&cmsid=754> (the IGC website) and are not further referenced.

⁴ These rights are derived primarily, but not exclusively from the European Convention on Human Rights (ECHR): see the Explanations to the Charter of 11 October 11 2000 (Charter Explanations), at pp. 40-45. The Charter Explanations, as updated under the authority of the Praesidium of the European Convention, are published as Declaration No. 12 to the Constitution: [2004] OJ C310/424-459.

Furthermore the references in both Articles 6(1) TEU and 11(1) TEU to the rule of law should be construed as including a reference to substantive justice.⁵

In the case of the AFSJ, the scope and meaning of the justice component has to be deduced from the different contexts in which it is employed in the Treaties and the Constitution.⁶ The primary references to the establishment of the AFSJ in the TEU are in the eleventh Preamble, Article 2 and Article 29. Article 61 EC Treaty contains the only specific reference to the AFSJ in the EC Treaty. Article I-3(2) of the Constitution establishes the AFSJ as an objective of the Union and Article I-42 sets out specific provisions relating to the AFSJ. Chapter IV of Title III of Part III of the Constitution sets out in Articles III-257 to 277 the scope of the AFSJ.

Since there is no single unifying conception of the term ‘justice’ in the Constitution or in the Treaties, the meaning must be determined on each usage in accordance with the general principles of international law for the interpretation of treaties.⁷ Nevertheless, the term justice is generally associated, at least in the Constitution, with respect for fundamental rights either with reference to specific rights or in general and this association may be taken as representing the benchmark by which the Union has accepted to be judged. International fundamental rights therefore provide a yardstick for measuring justice that is consistent with the constitutional texts of the Union.

A second justification is that by establishing objective criteria for measuring the justice of the Union’s legal order the coherence and legitimacy of the Union’s policy in the field of fundamental rights can be assessed both internally and by non-Union institutions and agencies. Furthermore, pressure for reform can be applied with the

⁵ This argument is considered, but rejected, by Anthony Arnall, ‘The Rule of Law in the European Union’, in Arnall and Wincott (eds.) *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), pp. 239-255, at pp. 252-255.

⁶ For a discussion of the conceptual significance of the AFSJ, see: Hans Lidahl, ‘Finding a Place for Freedom, Security and Justice: the European Union’s Claim to Territorial Unity’ (2004) 29 *EL Rev.*, pp. 461-484. See also Neil Walker, ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’, in N. Walker (ed.) *Europe’s Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 3-37. For the security component of the AFSJ, see: Sionaidh Douglas-Scott, ‘The Rule of Law in the European Union – Putting the Security into the “Area of Freedom, Security and Justice”’ (2004) 29 *EL Rev.*, pp. 219-242. See Chapter six for a detailed analysis of the genesis and scope of the AFSJ.

⁷ Namely, Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331) (VCLT). See generally on the interpretation of the constituent instruments of international organisations: Dapo Akande, ‘International Organizations’, in Malcolm D. Evans (ed.) *International Law* (Oxford, OUP, 2003), pp. 269-297, at pp. 280-282. See also, R. Higgins, ‘The ICJ, the ECJ and the Integrity of International Law’ (2003) 52 *ICLQ*, pp. 1- 20, at pp. 6-9.

backing of internationally recognised standards. This method of holding the Union accountable for any failure to comply with such standards is of particular value since the Union is not integrated into either of the European systems for the protection of fundamental rights, not being a member of the Organisation for Security and Cooperation in Europe (OSCE)⁸ or the Council of Europe, or party to the relevant treaties negotiated under its auspices,⁹ or into the United Nations system of human rights treaties.¹⁰ The Union is not, therefore, subject to the formal reporting, monitoring and enforcement procedures applicable to the parties to those treaties. Furthermore, the Union itself provides very limited formal remedies against fundamental rights violations resulting directly or indirectly from the Union's foreign development policy.¹¹ The advantages of using international fundamental rights standards for monitoring the Union's performance in the field of fundamental rights is recognised both by the Union's institutions and independent bodies. The European Parliament's 2003 *Report on the Situation as Regards Fundamental Rights in the European Union* (the 2003 EP Report)¹² draws extensively on international fundamental rights standards.¹³ The *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002* (2002 EU Network Report) uses the Charter as its reference instrument but the authors stress the importance of indexing the Charter's rights and principles to international and European human rights standards:

⁸ See for the OSCE's legal status: Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th edn.) (London, Thomson, 2001), at pp. 199-201.

⁹ Although many international human rights treaties are only open for accession by states, mechanisms can be devised for Union accession as shown in the case of the ECHR: see *Study of Technical and Legal Issues of a Possible EC/EU Accession to the ECHR* dated 28 September 2002 by the Steering Committee for Human Rights (CDDH) of the Council of Europe (the CDDH Report), reproduced in Working Document No. 8 of Working Group II of 12 July 2002. Available on the European Convention website at: <<http://european-convention.eu.int/>>. Documents available on the European Convention website are not further referenced. The documents associated with the organizations and bodies contributing to the European Convention up to 29 October 2004 are available on the *Futurum* website at: <http://europa.eu.int/constitution/futurum/index_fr.htm>.

¹⁰ See Allan Rosas, 'The European Union and International Human Rights Instruments. Discord or Harmony?', in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (Hague, Kluwer, 2001), pp. 53-67.

¹¹ See Bruno Simma, Jo Beatrix Aschenbrenner, and Constanze Schulte, 'Human Rights Considerations in the Development Co-operation Activities of the EC', in Philip Alston with Mara Bustelo and James Heenan (eds.) *The EU and Human Rights* (Oxford, OUP, 1999), pp. 571-626, at pp. 618-620.

¹² Document A5-0281/2003 of 21 August 2003. Available on the European Parliament website.

¹³ The sources relied on are set out in the 2003 EP Report, at p. 6. For a critique of the resources available to the EP for this task, see Williams, 'EU Human Rights Policy and the Convention on the Future of Europe: a Failure of Design?' (2003) 28 *EL Rev.*, pp. 794-813, at p. 97.

‘Reading the provisions of the Charter in the light of international and European human rights law seems to us to be opportune primarily because it is objective, which avoids the institutions of the European Union of the Member States being surprised by the interpretation given to them.’¹⁴

In this study, however, international standards are adopted as the reference instruments on the basis that the Charter has a number of limitations, and in particular uncertainty as to its legal scope and interpretation.¹⁵

2.3 TREATIES AND CUSTOMARY INTERNATIONAL LAW AS NORMATIVE STANDARDS

The rules of international fundamental rights law selected in this study as standards to measure the justice of the Union’s legal order are those derived from the sources listed in Article 38(1) of the 1945 Statute of the International Court of Justice (ICJ Statute):

‘1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of general practice accepted as law; c. the general principles of law recognised by civilised nations; d. subject to Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’¹⁶

Treaties and customary international law are the most important sources for the development of international fundamental rights and are the primary sources drawn upon in this study.¹⁷ However, the position of the Union with regard to these two

¹⁴ At p. 23. The working method adopted is set out in the 2002 EU Network Report, at pp. 27-29. The 2002 EU Network Report is available at:

<http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf>.

¹⁵ See further Sections 5.2, 5.4 and 5.8 of Chapter five.

¹⁶ Adopted on 26 June 1945, in force 24 October 1945, 1945 UKTS 67. See generally: Hugh Thirlway, ‘The Sources of International Law’, in Evans (ed.) *International Law* (Oxford, OUP, 2003), pp. 117-144.

¹⁷ See L. Henkin, G.L. Neuman, D.F. Orentlicher, and D.W. Leebron, *Human Rights* (New York, Foundation Press, 1999). For a discussion of the reasons for custom being cited rather than general principles as a source for fundamental rights as norms of international law, see Martti Koskenniemi, ‘The Pull of the Mainstream’ (1999-2000) *Mich. L. Rev.*, pp. 1946-1961: ‘For most modern lawyers, and the World Court, international law consists, for all practical purposes, of only two sorts of norms: treaty norms and custom’: at p. 1948. Sources other than those listed in Article 38(1) ICJ Statute have been mooted, including *jus cogens* and decisions of international organizations. See generally Michael

sources is not unproblematic. The Union is not party to any of the key international or regional treaties for the protection of fundamental rights and it is unclear as to the extent it can contribute to the formation of customary international law through 'state' practice and *opinio juris*¹⁸ or indeed, by expressing dissent, prevent the application of an emerging customary rule of international law.¹⁹ However, the Union's current somewhat passive relationship to the formation of international law does not detract from the validity of applying the norms of international law to its activities. On the contrary, the increasingly important role played by the Union in international affairs and human rights issues militates in favour of remedying this anomalous situation by Union membership of the key international human rights treaties and recognition of the Union as an actor on the international stage with equal rights and duties commensurate with its economy and population.²⁰ The Constitution would further expand the Union's competences and influence in international affairs, in particular through the provision for creation of the post of Union Minister for Foreign Affairs.²¹

Multilateral treaties form the bedrock of international fundamental rights law and the core United Nations²² and European²³ fundamental rights treaties to which a

Akehurst, 'The Hierarchy of Sources of International Law', (1974-5) 47 *BYIL*, pp. 273-285, at pp. 280-285; Thirlway, in Evans (ed.), above n. 16, at pp. 138-142. For a 'neo-Kelsenian' analysis, see Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 *EJIL*, pp. 523-553. For a refutation of *jus cogens* as a source, see Gennady M. Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 *EJIL*, pp. 42-64.

¹⁸ Sands and Klein do not specifically address this issue, although they do conclude that international organizations are bound by the rules of customary international law, including any rules of *jus cogens*: above n. 8, at pp. 458-459. Akehurst considers that 'the practice of international organizations can also create rules of customary law.': 'Custom as a Source of International Law' (1974-5) 47 *BYIL*, pp. 1-53, at p. 11. However, in the case of organs of international organizations composed of representatives of states, Akehurst argues: 'their practice is best regarded as the practice of States.': *ibid.*, at p. 11. On the role of resolutions of international organizations and in the particular those of the UN General Assembly, in creating norms of international law, see: Akehurst, *ibid.*, at pp. 5-7; and Higgins, *Problems and Process: International Law and How We Use It* (Oxford, OUP, 1994), at pp. 22-26. It could be argued that measures adopted under the Second Pillar of the TEU, to the extent at least that they are adopted by unanimity, reflect the views of the Member States and as such contribute to the formation of customary international law.

¹⁹ It is generally assumed that only states can object: see R. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYIL*, pp. 1-24.

²⁰ See Dominic McGoldrick, *International Relations Law of the European Union* (Harlow, Longman, 1997), especially at pp. 181-205.

²¹ Article I-28 of the Constitution. For the background to the provisions in the Constitution on the Union's powers in the foreign relations field, see: *Final Report of Working Group VII on External Action* of 16 December 2002: CONV 459/02; available on the European Convention website.

²² Key UN Conventions for the protection of fundamental rights adopted as reference standards in this study are listed in Annex 1 and are collectively referred to as the UN Conventions.

²³ Key European Conventions for the protection of fundamental rights adopted as reference standards in this study are listed in Annex 2 and collectively referred to as the European Conventions.

substantial majority of the Member States²⁴ are signatory are those adopted here as reference standards.²⁵ The criterion of signature by a substantial majority of the Member States is less demanding than the unanimity of signature required by the case law of the ECJ on admitting fundamental rights as general principles of Union law.²⁶ However, it has the advantage of conferring conformity of the standards with the treaty obligations of the Member States, while ensuring that failure by a minority of Member States to sign a relevant treaty does not prevent the standards being applied in assessing the Union's legal order. The treaties concluded under the auspices of both the Council of Europe and the UN selected as reference treaties broadly correspond to those adopted by the 2002 EU Network Report save for the more specialised treaties listed in that Report.²⁷ The selection of fundamental rights treaties in this study is based on the thematic areas covered by the Union's AFSJ and is not meant to be exhaustive, immutable or indicative of a hierarchy between treaties. On the contrary, one of the advantages of adopting international human rights norms as standards for

²⁴ The member states of the Union (the Member States) are: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom. Bulgaria and Romania signed a Treaty of Accession on 25 April 2005 with membership, subject to ratification, foreseen for 1 January 2007. However, this target date may be delayed if membership requirements have not been fully met. As of June 2005, Croatia and Turkey are candidate countries. The status of ratifications by each of the Member States as of January 2003 to each of the UN Conventions and the European Conventions, including reservations and declarations, is annexed to the 2002 EU Network Report, above n. 14. See also the list of ratifications of UN Conventions as of 9 June 2004 published by the Office of the UN High Commissioner for Human Rights at: <<http://www.unhchr.ch/pdf/report.pdf>>.

²⁵ It may be argued that even this more liberal standard, as compared to the criteria adopted by the ECJ, is too restrictive and that *all* international treaties, and decisions interpreting them, which are germane to the point at issue should be included as reference standards. This appears to be the position under Section 39 of the South African Constitution which 'details how courts are to approach their interpretative task when giving content to the Bill of Rights.' : Max de Plessis, 'The Application and Influence of U.N. Human Rights Standards in Practice: The South African Experience' (2002) 4 *EHRLR*, pp. 452-467, at p. 460. However, as de Plessis, at p. 458, explains the South African Constitution was drafted in the specific context of the transition from the Apartheid regime which had failed to sign any fundamental rights treaties. It is in this respect not comparable to the situation of the Union whose Member States are members of the UN and European Conventions.

²⁶ The common constitutional traditions of the Member States are also a source, although in practice one of lesser significance: see Section 4.2.4 of Chapter four for an analysis of fundamental rights as general principles of Union law.

²⁷ These treaties being: the Convention on Human Rights and Biomedicine (ETS 164, signed 4 April 1997, in force 1 December 1999) and the Additional Protocol (ETS 168, signed 12 January 1998, in force 1 March 2001); and the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (ETS 108, signed 28 February 1981, in force 1 October 1985). International Labour Organisation (ILO) conventions relevant to fundamental rights are also listed in the 2002 EU Network Report, above n. 14, at p. 22. The Union is not a member of the ILO or party to any of its conventions relating to fundamental principles and rights at work, although the Commission has signed a series of letters of co-operation with the ILO. See for details the Commission website at: <http://europa.eu.int/comm/employment_social/news/2001/jun/131_en.html>.

the assessment of the justice of the AFSJ is the flexibility and adaptability of such a methodology while retaining sufficient determinacy to engender compliance.²⁸

The second primary source for international fundamental standards adopted to evaluate the justice of the Union's legal order is customary international law.²⁹ Although opinions vary on the importance of custom as a source of international fundamental rights norms,³⁰ it is established that a core minimum of fundamental rights are protected under customary international law.³¹ One frequently cited, if controversial, statement of such rights is set out in section 702 of the American Law Institute's 1987 Third Restatement of the Foreign Relations Law of the United States (the 1987 Third Restatement):

‘A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.’³²

This list has been criticised for its focus on rights protected under the law of the United States to the exclusion of economic, social and cultural rights.³³ Furthermore,

²⁸ ‘Conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule towards compliance and to justify non-compliance.’: Franck, *Fairness in International Law and Institutions*, above n. 2, at p. 31.

²⁹ See generally: Akehurst, above n. 18; and Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1992) 12 *Australian Yearbook of International Law*, pp. 82-108.

³⁰ ‘Customary law has had a smaller part in human rights law than in many other areas of international law.’: Henkin *et al.*, above n. 17, at p. 304; and in the same sense L. Henkin, *The Age of Rights* (New York, Columbia University Press, 1990), at pp. 18-21. But other writers have emphasized the significance of custom in the formation of new norms of human rights: see Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Nijhoff, 1991), at pp. 335-341.

³¹ ‘Although not as visible as treaty law, customary law represents the essential basis upon which the modern human rights regime is formulated.’: Javaid Rehman, *International Human Rights Law* (Harlow, Longman, 2003), at p. 20.

³² American Law Institute (1987), Vol. 2, 161. The Comment to Section 702 of the Third Restatement gives guidance on the scope of the rights protected, and in particular what constitutes a ‘consistent pattern of gross violations of internationally recognized human rights’. Note (n) of the Comment indicates that the human rights norms listed in paragraphs (a) to (f) of section 702 are also peremptory norms (*jus cogens*). Text reprinted in D.J. Harris, *Cases and Materials on International Law* (6th edn.) (London, Thomson, 2004), at pp. 772-777. See for comment on section 702 of the Third Restatement: T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, OUP, 1989), at pp. 95-98.

³³ Simma and Alston, above n. 29, at pp. 93-95.

the prohibitions listed in the Third Restatement need to be supplemented by recognition of new rights based on customary international law.³⁴

The principle of *non-refoulement* is an example of an established norm of customary international law not listed in the 1987 *Third Restatement*.³⁵ Furthermore, a number of the provisions of the Universal Declaration of Human Rights (UDHR)³⁶ and the 1945 United Nations Charter (the UN Charter)³⁷ are generally accepted as obligations under customary international law, notwithstanding the debate over the UDHR's original and continuing legal status.³⁸ In respect of the UN Charter, the International Court of Justice (ICJ) has held:

‘As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law ... ; the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.’³⁹

In the same Opinion, the ICJ held:

‘The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 102, para. 29).’⁴⁰

³⁴ Schachter discusses a number of economic and social rights which ‘may be on their way to acceptance as general international law’: above n. 30, at p. 340.

³⁵ See Section 8.2 of Chapter eight.

³⁶ Adopted 10 December 1948, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948). On the history of the drafting of the UDHR, see J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (Philadelphia, Univ. of Pennsylvania Press, 1999).

³⁷ See Annex 1.

³⁸ See Paul Sieghart, ‘International human rights law: some current problems’, in R. Blackburn and J. Taylor (eds.), *Human Rights for the 1990s* (London, Mansell, 1991), pp. 24-42, at pp. 29-30; Rehman, above n. 31, at pp. 53-61, and Schachter, above n. 30, at pp. 336-338.

³⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, Judgment of 9 July 2004, at para 87. Available at:

<<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

⁴⁰ *Ibid.*, at para. 88.

Furthermore, certain of the rules of international humanitarian law as embodied in the 1949 Geneva Conventions⁴¹ and the 1977 Additional Protocols⁴² have become part of customary international law.⁴³

While these examples demonstrate the significant role of customary international law in establishing norms for the protection of fundamental rights, customary international law as a source has been criticised as inadequate to ‘achieve many of the goals appropriately sought by the strongest proponents of international human rights law.’⁴⁴ This argument points to the requirement for both state practice and *opinio juris* for the creation of norms of customary international law. In the case of fundamental rights, evidence of state practice in the traditional sense is hard to establish as states have tended to limit their reaction to human rights violations in other states to the protection of the interests of their citizens.⁴⁵

However, the response of the international community to fundamental rights violations is rapidly evolving and the traditional requirements for the formation of

⁴¹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field, 12 August 1949, in force 21 October 1950: 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, in force 21 October 1950: 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, in force 21 October 1950: 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, in force 21 October 1950: 75 UNTS 287.

⁴² Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, in force 7 December 1978, 1125 UNTS 17512; and Protocol II Additional to the Geneva Conventions of 12 August 1949 relating to Protection of Victims of Non-International Armed Conflicts, 8 June 1977, in force 7 December 1978, 1125 UNTS 17513.

⁴³ See generally: Christopher Greenwood, ‘The Law of War (International Humanitarian Law)’, in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 789-823; Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *AJIL*, pp. 348-370; and Michael J. Matheson, ‘The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions’ (1987) 2 *American University Journal of International Law and Policy*, pp. 419-431.

⁴⁴ Simma and Alston, above n. 29, at p. 100. The issue of whether the consent of all or at least a majority of states to the emergence of a rule of customary international law is still disputed. Henkin has argued it is unnecessary: ‘The international system, having identified contemporary human values, has adopted and declared them to be fundamental law, international law. But, in a radical derogation from the axiom of ‘sovereignty’, that law is not based on consent: at least, it does not honor or accept dissent, and it binds particular states regardless of their objection.’: ‘Human Rights and State “Sovereignty”’ (1995/1996) 31 *Ga. J. Int’l & Comp. L.*, pp. 31-45, at p. 37. See on the problem of inferred consent, Kammerhofer, above n. 17, at pp. 533-536. For the problems of establishing the right to peace as a right recognised by customary international law, see: Higgins (1994), above n. 18, at p. 103.

⁴⁵ Schachter, above n. 30, at p. 336; and Simma and Alston, above n. 29, at pp. 90-100.

customary international law are under challenge.⁴⁶ Moreover, notwithstanding the limitations of customary international law as a source of fundamental rights protection, it fulfils an essential role in complementing gaps in the scope and membership of international treaties.⁴⁷ The evolutive or ‘incremental’ development of customary international law makes it particularly appropriate for establishing norms to serve as a measure of justice which are capable of responding to changes in circumstances without waiting for the laborious process of codification through international treaty law.⁴⁸ For these reasons, customary international law has been adopted as an essential additional source of international fundamental rights standards to measure the justice of the AFSJ.

2.4 THE RELATIONSHIP BETWEEN TREATIES AND CUSTOMARY INTERNATIONAL LAW

The relationship between treaties and custom as sources of international law is complex but in their function as a measure of justice the position adopted here is to treat them as symbiotic and non-hierarchical sources. Symbiotic because treaty provisions may embody existing rules of customary law or may contribute to the formation of a new rule of customary law⁴⁹ and non-hierarchical because there is no shared *grundnorm* of international law regulating their respective ranking.⁵⁰

⁴⁶ See Schachter, above n. 30, at p. 342; Higgins (1994), above n. 18, at pp. 22-28; and Frederic L. Kirgis, ‘Custom on a Sliding Scale’ (1987) 81 *AJIL*, pp. 146-151. For a critical commentary on this development, see Anthea Roberts, ‘Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11’ (2004) 15 *EJIL*, pp. 721-747, at pp. 737-741. See also, C. Campbell, ‘Wars on Terror’ and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict’ (2005) 54 *ICLQ*, pp. 321-356, at pp. 355-356.

⁴⁷ See Simma and Alston, above n. 29, at pp. 82-88.

⁴⁸ See for an important analysis of these features of customary international law and its advantages over ‘premature’ codification in the context of humanitarian intervention: Jane Stromseth, ‘Rethinking humanitarian intervention: the case for incremental change’, in J.L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge, 2003), pp. 232-272.

⁴⁹ See Higgins, above n. 18, at pp. 28-32. On the issue of the role of multilateral treaties in the creation of customary law, see: Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’ (1965-66) 41 *BYIL*, pp. 275-300.; and Craig L. Carr and Garry L. Scott, ‘Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law’ (1999) 27 *Denv. J. Int’l Law and Pol’y*, pp. 313-335.

⁵⁰ This view follows what Kammerhofer, above n. 17, at p. 275, refers to as the ‘default theory’: ‘The three main formal sources are not hierarchically ordered and the sources are themselves not normatively connected.’: at p. 549. Akehurst, above n. 17, at p. 275, reaches a similar conclusion: ‘Where the maxim *lex specialis derogat generali* provides no clear guidance, or where it is shown not to reflect the intention of the States concerned, it seems that treaties and custom are of equal authority.’

However, the issue of hierarchical ordering arises not only between the sources of international law but also between different categories of norms which have been developed to bestow ‘higher’ normativity on one specific category of norms, whether derived from custom or treaty.⁵¹ Thus fundamental rights norms of international law overlap with other normative categories such as peremptory norms (*jus cogens*),⁵² obligations *erga omnes*,⁵³ international crimes,⁵⁴ and non-derogable rights.⁵⁵ The establishment of a hierarchy of norms in the field of fundamental rights based on such categories has generally been opposed on the basis that prioritising certain rights at the expense of others would threaten the interdependence and indivisibility of human rights.⁵⁶ However, recent academic opinion has been more favourable to an ordering of fundamental rights, arguing for example that non-derogable rights can form the basis of understanding hierarchy in international law.⁵⁷

⁵¹ See for a critique of this development, Higgins, above n. 18, at pp. 20-22.

⁵² The effect of *jus cogens* on conflicting treaties is regulated in Articles 53 and 64 of the 1969 VCLT and in identical terms in Articles 53 and 64 of the Vienna Convention on the Law of Treaties between States and International Organizations (VCLT(SIO)), adopted 21 March 1986, not in force: UN Doc. A/Conf. 129/15. The ICJ has cited the view of the International Law Commission in its work on codification of the law of treaties that the prohibition on the use of force is a ‘conspicuous example of a rule of international law having the character of *jus cogens*.’: in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) Judgment 27 June 1986 (1986) ICJ Reports 14, at para. 190. See for comments: Fred L. Morrison, ‘Legal Issues in the Nicaragua Opinion’ (1987) 81 *AJIL*, pp. 160-166; and John Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’ (1996) 16 *Oxford Journal of Legal Studies*, pp. 85-128. Other examples of *jus cogens* are cited in G. Schwarzenberger, ‘International *jus cogens*?’ (1965) 43 *Texas Law Review*, pp. 455-478. See generally, L. Hannikainen, *Peremptory Norms (Jus cogens) in International Law: Historical Developments, Criteria, Present Status* (Helsinki, Finnish Lawyers Publishing, 1988); and Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, OUP, 1997). See further Section 4.4 of Chapter four.

⁵³ The *Barcelona Traction* case gives examples of obligations *erga omnes*: ‘Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of universal or quasi-universal character.’ *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Judgment 5 February 1970 (1970) ICJ Reports 3, at para. 34.

⁵⁴ On the difficulties of defining an international crime, see: Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London, Thomson, 2003), at p. 13. On the distinction between international crimes and international delicts, see P. Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *AJIL*, pp. 413-442, at pp. 423-424.

⁵⁵ See Teraya Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights’ (2001) 12 *EJIL*, pp. 917-941.

⁵⁶ See on the issue of hierarchy in international law: Weil, above n. 54; and for an analysis applied to fundamental rights: T. Meron, ‘On a Hierarchy of International Human Rights’ (1986) 80 *AJIL*, pp. 1-23.

⁵⁷ Koji, above n. 55; and J. Tasioulas, above n. 52; but see the critique of Tasioulas’ position by J. Beckett, ‘Behind Relative Normativity: Rules and Process as Prerequisites of Law’ (2001) 12 *EJIL*, pp. 627-650.

However, these categories have not been adopted in this study as the standard for evaluating the justice of the Union's legal order since there remains considerable uncertainty in identifying the rights falling within each category.⁵⁸ Another drawback of adopting a particular category of rights such as *jus cogens* or non-derogable rights is that it may result in prioritizing a specific sub-set of fundamental rights, and in particular civil and political rights, at the expense of economic, social and cultural rights or emerging rights such as the right to democratic governance.⁵⁹ Such a result would run counter to the main objective of adopting a standard which is sufficiently demanding and dynamic to test the validity of the Union's claim both internally and externally for the justice of its legal order.

2.5 INTERNATIONAL FUNDAMENTAL RIGHTS AS A MEASURE OF JUSTICE

2.5.1 INTRODUCTION

Justice is a normative concept which does not have a single settled meaning. Assigning a meaning to justice is therefore not a descriptive but an evaluative exercise: 'Philosophers of justice understand that they are taking sides: that their theories are as normative as the claims about justice and injustice that politicians, leader writers and citizens make.'⁶⁰ International fundamental rights have been selected in this study as the most appropriate value to be attributed to the notion of justice in the context of the AFSJ.

⁵⁸ In the case of non-derogable rights, the uncertainty arises not from the identification of the rights but in determining a common rationale for non-derogable rights which vary between treaties: 'However, the term of non-derogable rights is often employed with different connotations within the same treaty. In fact, the criteria used to identify non-derogable rights vary in both their formulation and rationale.' Koji, above n. 55, at p. 921.

⁵⁹ On the need for a broad view of human rights to encompass all those listed in the UNDHR, see Mary Robinson, 'From Rhetoric to Reality: Making Human Rights Work' (2003) 1 *EHRLR*, pp. 1-8, at pp. 2-4. For the emerging right to democratic governance, see Susan Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford, OUP, 2000) and Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford, OUP, 1999), pp. 255-276. On the problems associated with the promotion of new fundamental rights outside established international procedures, see Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *AJIL*, pp. 607- 621.

⁶⁰ Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies*, pp. 1-38, at p. 8.

There are several reasons for adopting fundamental rights, and in particular those derived from international law, as a measure of the justice of the Union's legal order. Firstly, such rights are objectively ascertainable and exert normative force. Secondly, they lay strong, if not undisputed, claims to universality and neutrality and thus avoid or at least mitigate the charge that they represent a particular or partial political or cultural tradition. Thirdly, as discussed in section 2.5.4 below, fundamental rights are treated by a number of leading theorists as an essential component of any meaningful conception of justice. Each of these justifications is examined in turn.

2.5.2 OBJECTIVITY

Legal theory, and in particular legal positivism, favours a clearly established legal source for a right to be characterised as such.⁶¹ International law as a source of norms generally satisfies this requirement: 'When States enter an agreement, or when some behaviour is understood to turned from habit into custom, the assumption is that something that was loose and disputed crystallizes into something that is fixed and ascertainable.'⁶² Standards recognised by international law benefit from validity and universality which qualities are the consequence of their formal identification as rules of international law.⁶³

The identification of a fundamental rights standard as one recognised by international law is not, however, *per se* a sufficient condition for determining whether it provides a just standard with which the Union *ought* to comply.⁶⁴ A norm of international law may violate a particular conception of justice, such as the principle of non-

⁶¹ 'In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where merits, in the relevant sense, include the merits of its sources.): J. Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 *American Journal of Jurisprudence*, pp. 199-229, at p. 222. For a trenchant criticism of the 'sources' theory, see Dworkin, above n. 60, at pp. 19-23. See generally: D. Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24 *Oxford Journal of Legal Studies*, pp. 39-67.

⁶² Martti Koskenniemi, 'What is International Law for?', in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 89-114, at p. 102.

⁶³ For the advantages of the formalist perspective of international law, and a comparison with instrumentalism, see Koskenniemi, *ibid.*, at pp. 102-103. For an analysis of international law in the context of transitional justice, see: C. Bell, C. Campbell and A. Ní Fionnuala, 'Justice Discourses in Transition' (2004) 13 *Social and Legal Studies*, pp. 305-328, at p. 323.

⁶⁴ See, Dyzenhaus for a discussion of the issue of normative force and legal positivists such as Hobbes, Bentham and Hart: above n. 61, at pp. 57-58.

interference in a sovereign state's internal affairs where non-interference may permit genocide or crimes against humanity.⁶⁵

2.5.3 NEUTRAL VALUES

The second advantage of fundamental rights standards recognised by international law is that they are more resistant than fundamental rights norms based on a fundamentalist or objectivist approach⁶⁶ to the arguments of cultural relativists that such norms reflect a specific moral tradition or ideological agenda, and in particular that of Western liberal values.⁶⁷ Several arguments have been deployed against cultural relativism which has undoubtedly weakened its currency. In one set of arguments, a conflict between cultural values and the universality of human rights is denied on the basis that human rights are ideologically neutral,⁶⁸ or it is argued that the fundamental source of conflict is political and ideological rather than cultural,⁶⁹ or the conflict between human rights and cultural values is recognised but the former are treated as overriding such values.⁷⁰ A second approach developed by John Rawls has been to accept that there is a valid objection to human rights foundationalism based on the Western liberal philosophical tradition. In response Rawls has proposed a theory of international justice designed to overcome the objections of cultural relativists by incorporating a pared down set of fundamental rights as a necessary

⁶⁵ The relationship of justice and international law is explored further in Section 2.5.4 below. For an example of the consequences of non-interference, see Vaclav Havel, 'Stop North Korea's evil regime', in the *Irish Times* of 18 June 2004: available at <<http://www.ireland.com/newspaper/opinion/2004/0618/1209300306OPHVAEL.html>>.

⁶⁶ For the distinction between the positivist and the objectivist conception of fundamental rights, see Jaqueline Dutheil de la Rochère, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty' (2004) 41 *CML Rev.*, pp. 345-354, at p. 346.

⁶⁷ See R. Rorty, 'Human Rights, Rationality and Sentimentality', in S. Schute and S. Hurley (eds.), *On Human Rights: The Amnesty Lectures 1993* (New York, Basic Books, 1993), pp. 111-134, at p. 116. For a survey of the debate on universalism and cultural relativism, see Henry J. Steiner and Philip Alston (eds.), *International Human Rights in Context: Law, Politics, Morals* (2nd edn.) (Oxford, OUP, 2000), at pp. 366-402. An excellent analysis of the links between liberalism and human rights is presented by Makau wa Mutua in 'Politics and Human Rights', in Byers (ed.), *The Role of Law in International Politics* (Oxford, OUP, 2000), pp. 149-175.

⁶⁸ Thomas Scanlon, 'Human Rights as a Neutral Concern' in P. G. Brown and D. Maclean (eds.) *Human Rights and US Foreign Policy, Principles and Applications* (Lexington, Lexington Books, 1979), pp. 83- 92.

⁶⁹ Fred Halliday, 'Relativism and Universalism in Human Rights: the Case of the Islamic Middle East', in David Beetham (ed.), *Politics and Human Rights* (New York, Blackwell, 1993), pp. 152-167.

⁷⁰ P. Jones, *Rights* (London, Macmillan, 1994).

condition of a regime's legitimacy.⁷¹ In response to critiques of cultural relativism, recent advocates have argued for 'a multicultural approach in the reconstruction of the entire edifice of human rights' and preferred the terms 'cultural agnostics' or 'human rights pluralists'.⁷² However, both sides of the debate now accept that a core set of fundamental rights constitute an irreducible minimum for a defensible conception of justice. Fundamental rights recognised by international law provide a determinable but evolving standard.

In the context of the Union, the requirement to identify a standard that accommodates the rich diversity of historical traditions and cultures of the Member States is particularly compelling. While the current Member States have primarily, but far from exclusively, developed within the Judaeo-Christian and Enlightenment traditions, other traditions have contributed to the formation of European ideas and future member states of the Union may not share the same background.⁷³ Moreover, within each of the Member States there is a rich, diverse and cosmopolitan set of communities comprised both of citizens of the Union and non-citizens who are entitled to tolerance,⁷⁴ equal consideration and equal treatment irrespective of their culture or beliefs. Any standard adopted for the evaluation of the justice of the Union's legal order must therefore be equally applicable to Union citizens and non-citizens alike, independently of their cultural or ideological background or beliefs.⁷⁵

⁷¹ See John Rawls, 'The Law of Peoples', in S. Shute and S. Hurley (eds.), *On Human Rights: The Amnesty Lectures 1993* (New York, Basic Books, 1993), pp. 41-82. For a critical discussion of Rawls' restricted list of core rights and proposals for its extension, see: A. Buchanan, 'Justice, Legitimacy, and Human Rights', in V. Davion and C. Wolf (eds.), *The Idea of Political Liberalism: Essays on Rawls* (Maryland, Rowman and Littlefield, 2000), pp. 73-89.

⁷² See Makau wa Mutua, in Byers (ed.), above n. 67, pp. 149-175, at p. 166.

⁷³ Turkey is a candidate for accession, as are potentially a number of West Balkan states with a diverse set of religious and ideological traditions, such as Bosnia and Herzegovina and Albania. For a discussion of diversity and identity in the history of Europe, see: Thomas M. Franck, above n. 59, at pp. 6-17.

⁷⁴ On the importance of toleration 'based on mutual recognition and mutual acceptance of divergent worldviews', see: Jürgen Habermas, 'Intolerance and Discrimination' (2003) 1 *Int. J. Constitutional Law*, pp. 2-12.

⁷⁵ The requirement for equality is set out as a value of the Union in Article I-2 of the Constitution. Article II-81(1) provides: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'. Article I-45 provides: 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.' The retention of citizenship as a core criterion for the principle of equality is debatable and should not be extended to the field of fundamental rights. 'But the premise of human rights is that fundamental rights flow from our common humanity, not from legal concepts such as nationality.': Rabinder Singh Q.C., 'Equality: The Neglected Virtue' (2004) 2 *EHRLR*, pp. 140-157, at p. 144.

Fundamental rights norms recognized by international law most closely meet these requirements.⁷⁶

2.5.4 A RECOGNISED CRITERION OF JUSTICE

Many of the arguments used to defend the universality of fundamental rights standards are relevant to the task of justifying the use of such standards derived from international law for assessing the justice of the Union's legal order. While, as discussed below, several leading contemporary theories of justice have incorporated fundamental rights as a core component, they have not adopted international norms for this purpose. This approach seems in part based on concerns that the adoption of international norms would leave the theory open to challenge from cultural relativists and this argument has been addressed in the preceding section. A second objection to adopting such standards is based on the view that international law is the product of the Westphalian state system and as such is incapable of satisfying acceptable criteria of justice: 'The rules applicable among states cannot be expected to embody principles of justice because the notion of *states*, itself, is an arbitrary and unfair suspension of personal equality.'⁷⁷ However, the view that only states are legitimate representatives of the interests of their citizens at the international level is increasingly challenged.⁷⁸ In this context, international human rights constitute a preferable standard of justice, both in terms of determinacy and acceptability, to a *sui generis* list of fundamental rights or alternative standards such as international principles of equity.

The following analysis of contemporary theories of international justice has the limited objective of justifying the adoption of international human rights as the standard of justice for the *Union's* legal order. The theories set themselves a different objective, namely establishing a standard for evaluating the justice or fairness of the international legal order. The different characteristics of the Union's legal order and

⁷⁶ For the widespread popular acceptance of democracy and core fundamental rights as basic values of the Union, see Anne Peters, 'European Democracy after the 2003 Convention' (2004) 41 *CML Rev.*, pp. 37-85, at p. 74.

⁷⁷ Franck, 'Is Justice Relevant to the International Legal System', above n. 2, at p. 963.

⁷⁸ See: Franck, *Fairness in International Law and Institutions*, above n. 2, at pp. 196-223; Richard Falk, *On Humane Governance* (Cambridge, Polity, 1995); and Thomas W. Pogge, *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms* (Cambridge, Polity, 2002), at pp. 168-195.

the international legal order justifies adopting a different measure of justice.⁷⁹ Nevertheless, it is useful to examine in more detail the role played by fundamental rights and alternative measures of justice developed in contemporary legal theory to assess the justice of the international legal order in order to determine how far such standards converge, or diverge from, fundamental rights norms as embodied in international law.⁸⁰ If theories of international justice attribute a central role to fundamental rights, the argument for adopting international human rights norms as a measure of justice for the Union's legal order is strengthened by analogy.

Rawls in formulating his influential *The Law of Peoples* specifies the requirement for a well-ordered hierarchical society's system of law to secure a minimum set of basic rights:

‘... we can say that its conception of the common good of justice secures for all persons at least certain minimum rights to means of subsistence and security (the right to life), to liberty (freedom from slavery, serfdom, and forced occupations) and (personal) property, as well as to formal equality as expressed by the rules of natural justice (for example, that similar cases be treated similarly).’⁸¹

The rights listed by Rawls, while in some cases corresponding to rights recognized in international instruments, are presented as an autonomous list derived from the requirements of his theory of the law of peoples.

Buchanan has criticised the minimalism of Rawls' list of rights within the framework of Rawls' own theory:

‘A plausible understanding of the burdens of judgment and the idea of fair terms of cooperation carries us beyond the truncated list of Rawlsian human

⁷⁹ These separate characteristics are set out by Weiler and Haltern, in Slaughter, Sweet and Weiler (eds.), above n. 2, especially at pp. 336-342. See, however, Eileen Denza, ‘Two Legal Orders: Divergent or Convergent?’ (1999) 49 *ICLQ*, pp. 257-284.

⁸⁰ Theories of justice date back to the origins of political philosophy, and notably the works of Aristotle and Socrates. The following discussion is limited to contemporary theories.

⁸¹ Rawls, above n. 71, at p. 62. He also refers to the right to practice a religion ‘in peace and without fear’ and the right of emigration: *ibid.*, at p. 63.

rights and much closer to what might be called the mainstream of contemporary human rights doctrine.’⁸²

However, in his ‘attempt to develop moral foundations for international law’⁸³ Buchanan also adopts a justice based approach which, in one of the two senses he posits,⁸⁴ places basic human rights at the center of his conception of justice:

‘... justice, understood chiefly as respect for basic human rights, serves as the fundamental vantage point from which to evaluate the existing international legal system and to formulate proposals for improving it.’⁸⁵

Buchanan defines basic human rights for this purpose as:

‘... rights whose violation poses the most serious threat to the individual’s chance of living a decent human life. Put more positively, they are those rights that, if respected, protect those interests that are most crucial for having a good human life.’⁸⁶

Buchanan then provides a non-exhaustive list of such basic human rights which substantially overlaps with the list of Rawlsian basic rights outlined above, but is extended to include, *inter alia*, the right to resources for subsistence, the right to freedom of expression, and the right to association.⁸⁷ These rights are ‘acknowledged in the central human rights conventions of the existing system of international law’⁸⁸ but are more limited than the full range of treaty rights since some do not meet Buchanan’s definition of basic rights.

As indicated above, the reasons for Rawls and Buchanan restricting the list of basic rights as against internationally recognized standards are related to the requirements of their theoretical objectives: in the case of Rawls the establishment of a law of peoples which can legitimate certain types of hierarchical society; and in the case of

⁸² Buchanan (2000), above n. 71, at p. 88. See also: Tom Campbell, ‘Human Rights: The Shifting Boundaries’, in T. Campbell, J. Goldsworthy and A. Stone (eds.), *Protecting Human Rights: Instruments and Institutions* (Oxford, OUP, 2003), pp. 17-37, at pp. 34-37.

⁸³ Alan Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford, OUP, 2004), at p. 1.

⁸⁴ The other is to ensure access to ‘institutions of justice – understood as institutions that protect their basic human rights ..’, *ibid.*, at p. 73.

⁸⁵ *Ibid.*, at p. 73.

⁸⁶ *Ibid.*, at p. 129.

⁸⁷ *Ibid.*, at p. 129.

⁸⁸ *Ibid.*, at p. 129.

Buchanan the development of a moral theory of international law. However, these requirements do not apply to the task of measuring the justice of the Union's legal order. There is no compelling reason, therefore, to adopt their approach and restrict the list of fundamental rights to a sub-set of fundamental rights recognized by international law.

Another leading theorist on international justice, Thomas Pogge, also attaches a central role to fundamental rights in creating an internationally acceptable core criterion of basic justice.⁸⁹ However, in order to deflect the arguments of cultural relativism, Pogge avoids 'any conceptual connection of human rights with legal rights' but instead defines a human right as a 'moral claim *on* any coercive social institutions imposed upon oneself and therefore a moral claim *against* anyone involved in their imposition.'⁹⁰ Pogge then postulates:

'the preeminent requirement on all coercive institutional schemes is that they afford each human being secure access to minimally adequate shares of basic freedoms and participation, of food, drink, clothing, shelter, education, and health care.'⁹¹

Pogge's theory is developed for establishing 'an internationally acceptable core criterion of justice' and he recognises that national institutions may be subject to a 'stronger criterion of justice that involves a more specific measure of human flourishing.'⁹² It is the argument advanced in this research that in the case of the Union's legal order such a stronger criterion can best be provided by international fundamental rights.

Finally, it is instructive to consider whether measures of justice based on concepts other than fundamental rights and applied to evaluate international law might be of relevance to the Union's legal order. Thomas Franck adopts fairness rather than justice in his analysis of international law and breaks down fairness into 'a composite

⁸⁹ Pogge, above n. 78, at pp. 44-45. For a critique, see Samantha Besson, 'Human Rights, Institutional Duties and Cosmopolitan Responsibilities' (2003) 23 *Oxford Journal of Legal Studies*, pp. 507-523.

⁹⁰ Pogge, above n. 78, at p. 46. See for the difficulties of such a separation of human rights and legal rights: Besson, above n. 89, at pp. 519-521

⁹¹ Pogge, above n. 78, at p. 51.

⁹² *Ibid.*, at p. 50. Although Pogge's theory is of relevance to domestic legal orders, see Besson, above n. 89, at p. 514.

of independent variables: legitimacy and justice.’⁹³ However, Franck selects principles of equity derived from common principles of municipal legal systems, and not fundamental rights, as fulfilling a ‘growing role in ensuring the fairness of the system.’⁹⁴ However, equitable principles in international law are open to the criticism of judicial subjectivity:

‘What is disturbing about ‘the equitable principles to produce equitable results’ formula is not that there are choices being made to achieve a result – but that the result is nowhere articulated other than the self-serving description of ‘equitable.’⁹⁵

Equitable principles, whether derived from international law or the national legal systems of the Member States, in view of their indeterminacy and excessive reliance on judicial subjectivity would not provide an appropriate measure of justice for the Union’s legal order.

Two points can be made from this survey of the relationship between fundamental rights and conceptions of justice applied to international law. Firstly, fundamental rights generally form one, if not the core, element of a theory of justice which seeks to address the issues of cultural relativism and create a notion of justice with reasonable claims for universal validity and acceptability. Secondly, the basic fundamental rights identified in the theories of justice developed by Rawls, Buchanan and Pogge are too minimalist or lacking in specificity to serve as a standard to judge the Union’s legal order.⁹⁶ In the context of the Union’s legal order, international fundamental rights provide the necessary determinacy, objectivity and neutrality to provide a fair measure of justice.

⁹³ Franck, *Fairness in International Law*, above n. 2, at p. 47.

⁹⁴ *Ibid.*, at p. 80.

⁹⁵ Higgins, above n. 18, at p. 227. For a reply to Higgins’ critique, see Franck, *Fairness in International Law*, above n. 2, at pp. 49-50.

⁹⁶ Rawls indeed specifies that the conception of human rights in the law of peoples has been developed to accommodate both liberal and hierarchical societies: above n. 71, at p. 68. There is no need for such accommodation when evaluating the Union’s legal order.

INTERNATIONAL LAW, FUNDAMENTAL RIGHTS AND THE AUTONOMY OF UNION LAW

3.1 INTRODUCTION

The Union's legal order has had an ambivalent relationship towards international law from its inception. In some of its earliest judgments the ECJ, while recognizing the international law basis of the Treaties, was at pains to stress the specificity of the Union's legal order.¹ The ECJ has preferred to base its judicial reasoning in developing general principles of law from national sources rather than international law.² This approach is in part explained by the fact that the judges of the ECJ 'have reasoned as national lawyers thinking about international relations'³ but also reflected a political judgment that the objectives of the Union would best be secured by securing the autonomy of the Union's legal order.⁴

Autonomy is asserted as an objective for the Union's legal order both in the context of autonomy from the national legal orders of the Member States and from the

¹ Case 26/62, *Van Gend & Loos v. Nederlands Administratie der Belastingen* [1963] ECR 1 (*Van Gend en Loos*). See for the specificity of Union law, J.H.H. Weiler and Ulrich R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in *The European Court and National Courts – Doctrine and Jurisprudence*, in Anne-Marie Slaughter, Alec Stone Sweet and J.H.H. Weiler (eds.) (Oxford, Hart Publishing, 1998), pp. 331-364, at pp. 139-140. See also Anne Peters, 'The Position of International Law within the Community Legal Order' (1997) *German Yearbook of International Law*, pp. 1-77, at pp. 10-11. This characterisation has not been accepted by all commentators: Bruno de Witte, 'Rules of Change in International Law: How Special is the European Community?' (1994) 25 *Netherlands Yearbook of International Law*, pp. 299-333; and Theodor Schilling, 'The Autonomy of the Community Legal Order – An Analysis of Possible Foundations' (1996) 37 *Harvard Int'l L. J.*, pp. 389-409; (1996a); and 'Rejoinder: The Autonomy of the Community Legal Order.': Jean Monnet Working Paper No. 10/96: available at <<http://www.jeanmonnetprogram.org/papers/96/9610-Rejoinde.html>> (1996b). For an analysis of the impact of the creation of the three pillar structure in the 1992 Treaty of Maastricht on the debate as to the nature of the Union's legal order, see: Eileen Denza, 'Two Legal Orders: Divergent or Convergent?' (1999) 48 *ICLQ*, pp. 257-284, at pp. 270-273 .

² See Ole Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *EJIL*, pp. 763-789, at p. 777. For a detailed exposition of the important role comparative studies of the national law of the Member States played in the development of Union law, see: K. Lenaerts, 'Interlocking Orders in the European Union and Comparative Law' (2003) 52 *ICLQ*, pp. 873-906.

³ Spiermann, above n. 2, at p. 778.

⁴ 'The Community's aspiration for autonomy, therefore, appears to be an attempt to achieve and strengthen an identity of its own.': Robert Uerpman, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions', Jean Monnet Working Paper No. 9/03, at p. 45; available at <<http://www.jeanmonnet-program.org/papers/03/030901-02.html>>.

international legal order.⁵ The keystone doctrines of direct effect and supremacy form the basis for the autonomy of the Union's constitutional order:

‘The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.’⁶

The theory of supremacy confers on international law incorporated into Union law supremacy over conflicting national law, including posterior legislation and constitutional law.⁷ The theory of direct effect confers on the ECJ, and not the courts of the Member States, jurisdiction to determine whether or not an international treaty obligation of the Community confers an enforceable individual right capable of being invoked within the Union's legal order.⁸

The Constitution, while not expressly incorporating the doctrine of direct effect, enshrines the doctrine of supremacy in Title I of Part I headed ‘Definition and Objectives of the Union’. Article I-6 provides: ‘The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have

⁵ For an analysis of the concept of the autonomy of Community law and its possible meanings, see René Barents, *The Autonomy of Community Law* (Hague, Kluwer, 2004), at pp. 239-274. For an analysis of the principle of autonomy in the context of Community membership of international organisations: see Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, OUP, 2004), at pp. 206-209.

⁶ *Opinion 1/91* [1991] ECR I-6079, at para. 20. The doctrine of supremacy was first established in Case 6/64, *Costa v ENEL* [1964] ECR 585 (*Costa*). See generally: K. Alter, *Establishing The Supremacy of European Law* (Oxford, OUP, 2002). The doctrine of direct effect was first established in *Van Gend en Loos*, above n. 1. For an analysis of *Costa* and *Van Gend en Loos* from an international law perspective see: Spiermann, above n. 2, at pp. 765-775.

⁷ Peters points out that this conclusion depends on whether one accepts that a rule of international law accepted into the Union's legal order law is ‘transformed’ into Union law and thus subject to the *Costa* rule of supremacy or whether it retains its character as a norm of international law and therefore its reception into national law depends on the constitution of each Member State: above n. 1, at pp. 23-35. Eeckhout argues that Article 300(7) EC Treaty does not resolve this issue: ‘The provision is limited to expressing the binding character of agreements concluded by the Community, and it does not describe the legal consequences or effects of this characteristic.’: above n. 5, at p. 277.

⁸ Case 104/81, *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641. In the case of a mixed agreement this jurisdiction only extends to that part of the agreement within the Union's competence: Cases C-390 & 392/98, *Parfums Christian Dior v. Tuk Consultancy* [2000] ECR I-11307. For a detailed discussion of the doctrine of direct effect of international agreements in Union law in the context of the WTO, see Uerpman, above n. 4, at pp. 10-26. Uerpman compares direct effect in Community law to the notion of ‘self-execution’ treaties in national law: ‘Norms are on the whole only self-executing if the courts can interpret and apply them without taking on political functions.’: *ibid.*, at p. 12. He also would apply the notion of direct effect independently of the conferral by the treaty of an individual right: *ibid.*, at p. 12. See generally Eeckhout, above n. 5, at pp. 274-344.

primacy over the law of the Member States'. The first Declaration to the Constitution provides in respect of Article I-6: 'The Conference notes that Article I-6 reflects existing case law of the Court of Justice of the European Communities and of the Court of First Instance.' The combined effect of Article I-6 and the attached Declaration is to consolidate the existing scope of the doctrine of supremacy rather than provide the basis for a radical extension.⁹ However, constitutional recognition of the doctrine of supremacy would weaken the legitimacy of decisions by national constitutional courts contesting the doctrine.¹⁰

However, the radical potential of the doctrines of supremacy and direct effect to remove from national courts of the Member States power to determine the conformity of Union law with their national constitutions and international law has led to reservations as to their scope by both national and international judicial authorities.¹¹ In particular, Article 103 of the UN Charter¹² and the rules of *jus cogens*¹³ may be cited as examples of international law obligations of the Member States which take precedence over their obligations under the Treaties.

This Chapter analyses the basis and justification for the Union's pursuit of the objective of autonomy and argues that the objective of effective protection of fundamental rights in the Union's legal order should be accorded priority. In particular, the Chapter focuses on one specific aspect of the autonomy of Union law

⁹ Without the Declaration, the text of Article I-6 was open to an expansionist reading: see A. Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 *CML Rev.*, pp. 355-381, at pp. 379-380. Such an extension was not the intention behind Article I-6 and the Declaration makes this clear. See also the House of Lords Select Committee on the European Union, 6th Report, *The Future Role of the European Court of Justice*; HL Paper 47, Session 2003-2004, printed 2 March 2004, at paras. 32-53. For a discussion of the doctrine of supremacy in the context of secession from the Union by a Member State, see Raymond J. Friel, 'Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) 53 *ICLQ*, pp. 407-428, at pp. 411-415.

¹⁰ See in this sense: Anneli Albi and Peter Van Elswege, 'The EU Constitution, national constitutions and sovereignty: as assessment of a "European constitutional order"' (2004) 29 *EL Rev.*, pp. 741- 765, at p. 751.

¹¹ The German *Bundesfinanzhof* has ruled that Community legislation in violation of international law 'falls outside the scope of the Member States' constitutional authorisation of Community powers and therefore does not bind the Member States.'; Order of 9 January 1996 (1996) 7 *Europäische Zeitschrift für Wirtschaftsrecht*, 126, at pp. 127-128: cited in Peters, above n. 1, at p. 19, n. 45. The position of the ECtHR is explored in Section 3.3 below.

¹² 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' See Eeckhout, above n. 5, at pp. 440-441. Article 307 EC Treaty may provide a solution for a Member State faced with such a conflict: see Section 4.2.3 of Chapter four.

¹³ '... international *jus cogens*, which cannot be abrogated, is *per definitionem* superior to all other law.'; Peters, above n. 1, at p. 37.

that is interpreted so as to require preservation of the position of the ECJ as ‘sole supreme arbiter of questions of Union law and on the validity of Union Acts’.¹⁴ This Chapter examines three specific areas where the foundations of the principle of the autonomy of Union law as applied to the status of the ECJ have been subject to challenge from the national and international legal orders. The principal argument advanced is that the principle of autonomy needs to be refined to ensure that international fundamental rights standards are interpreted and applied in the Union legal order in a manner that is consistent with the international law obligations both of the Union and the Member States. The first section examines the issue of whether the ECJ has judicial *Kompetenz-Kompetenz*. The second section investigates whether the ECJ has competence to rule on the legality of Union law, and in particular primary Union law. The final section addresses the question of the hierarchy within the Union’s legal order between judgments of the ECJ and those of the ECtHR.

3.2 JUDICIAL *KOMPETENZ-KOMPETENZ*

3.2.1 INTRODUCTION

The question of whether the ECJ is the ultimate arbiter of the Union’s legal order has generally been framed in terms of which body has final authority to determine the scope of the Union’s competences, or the issue of judicial *Kompetenz-Kompetenz*.¹⁵ Weiler and Haltern have emphasized the significance of determining judicial *Kompetenz-Kompetenz*: ‘Since the jurisdictional limits laid out in the European Treaties are notoriously difficult to identify with precision, the question of who gets

¹⁴ Final Report of Working Group II (WGII) on “Incorporation of the Charter/Accession to the ECHR” (WGII Final Report); CONV 354/02: WG II 16, Brussels, October 22, 2002, at p. 12. Available on the European Convention website. For the political dimension to this claim, see *Report on the Relationships between International Law, Community Law and the Constitutional Law of the Member States*, European Parliament Committee on Legal Affairs and Citizens’ Rights, adopted on 24 September 1997, A4-0278/97, PE 220.225/fin, 14. Available on the European Parliament’s website: <<http://www.europarl.eu.int/>>.

¹⁵ ‘The question as to which jurisdiction, Community or national, has the ultimate authority to declare the unconstitutionality of Community measures on the grounds of *ultra vires* and effectively to become the arbiter of the jurisdictional limits of the Community legal order.’: Weiler and Haltern, in Slaughter, Sweet and Weiler (eds.), above n. 1, at p. 331. The question of legislative *Kompetenz-Kompetenz* is separate. The Member States as *Herren der Verträge* can amend the allocation of competences under the Treaties in accordance with Article 48 TEU. This situation is fundamentally unchanged by the corresponding provisions in the Constitution (Articles IV-443 to IV-445). However, Schilling, in his rejoinder to Weiler and Haltern, has argued that ‘there is a strong *prima facie* case’ that legislative *Kompetenz-Kompetenz* is a necessary prerequisite of judicial *Kompetenz-Kompetenz*: above n. 1, at paragraph I.

to decide is of tremendous political importance.’¹⁶ The constitutional significance of the answer to this question, and its relevance to the issue of the allocation of powers between the Union and the national legal orders of the Member States for determining the institutional basis for the protection of fundamental rights, may be illustrated by reference to *Opinion 2/94*.¹⁷

If the ECJ had reached a different conclusion in *Opinion 2/94*, namely that the Community had competence under the EC Treaty to accede to the ECHR, a subsequent Council decision to accede to the ECHR may have been challenged before a national court of a Member State on the basis that accession exceeded the Community’s competence.¹⁸ If a national court of final instance had decided it had jurisdiction and that Community accession to the ECHR was *ultra vires* there would have been the potential for a crisis of confidence between the Union and the Member State’s legal order on a scale similar to that arising from the judgment of the German Federal Constitutional Court in ‘*Solange I*’.¹⁹ A refusal by a national court of final instance to give effect to the Community’s accession to the ECHR within its national legal order would have exposed the Member State to the risk of infringement proceedings under Article 226 EC Treaty for breach of the Member State’s obligations under Article 300(7) EC Treaty²⁰ and may also have exposed the Member State to liability in damages.²¹

¹⁶ Weiler and Haltern, in Slaughter, Sweet and Weiler (eds.), above n. 1, at p. 333.

¹⁷ [1996] ECR I-1759.

¹⁸ In practice, such a challenge may have been unlikely since the proposed basis for accession was Article 308 (ex Art. 235) EC Treaty which requires unanimity in the Council. However, a non-state actor may have challenged the legality of the Council’s accession decision. In Ireland such a challenge was successfully made to the proposed ratification of the 1986 Single European Act (SEA) in *Crotty v An Taoiseach* [1987] 1 IR 713. The Supreme Court of Ireland held that ratification of the SEA required prior amendment of the Irish Constitution since Title III of the SEA would otherwise impose unconstitutional restrictions on the Government’s power to determine freely its foreign policy. Amendment of the EC Treaty to enable the Community to accede to the ECHR would also have required a constitutional amendment in consequence of its significant implications for the status of rights protected under the Irish Constitution. Union accession to the ECHR without an amendment to the EC Treaty would therefore have deprived the Irish people of their constitutional right to vote in a referendum on accession.

¹⁹ *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, Decision of 29 May 1974, BvL 52/71, BVerfGE 37, 271; [1974] 2 CMLR 540. In *Solange I*, the German Constitutional Court asserted its residual right to review the applicability of Community legislation with the fundamental rights provisions in the Constitution of the Federal Republic of Germany. For a discussion of the background to the case and its effects, see Alter, above n. 6, at pp. 87-98.

²⁰ See T. Hartley, *The Foundations of European Community Law* (5th edn.) (Oxford, 2003), at p. 225.

²¹ See the recent decision of *Gerhard Köbler v Republik Österreich*: Case C-224/01 [2003] ECR I-10239. In *Köbler* the ECJ held: ‘It follows from the foregoing that the principle according to which the

The potential for conflict between the Union and national legal orders over the delimitation of competences in respect of fundamental rights would not disappear under the Constitution.²² For example, such a conflict may arise in relation to determining the scope of the Union's mandate to accede to the ECHR or the scope of the incorporated Charter.²³ Conflict may also arise if the Union seeks accession to fundamental rights treaties other than the ECHR.²⁴ The following sections analyse the basis for determination of judicial *Kompetenz-Kompetenz* firstly under the existing Treaties and secondly under the Constitution. The concluding section argues that attribution of judicial *Kompetenz-Kompetenz* to a new constitutional court is the preferred outcome from the perspective of the effective protection of fundamental rights in the Union.

3.2.2 JUDICIAL KOMPETENZ-KOMPETENZ AND THE TREATIES

Two conflicting solutions to the problem of judicial *Kompetenz-Kompetenz* have been proposed based on an international law interpretation of the Treaties.²⁵ Schilling argues that 'the Member States, individually, must have the final word on questions concerning the scope of the competences they have delegated to the Community.'²⁶ Weiler and Halter reach the opposite conclusion: 'Surely the reach of an international

Member States are liable to afford reparation of damages caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from the decision of a court adjudicating at last instance.', at para. 50. In that case no liability of the Austrian State for a failure by the *Verwaltungsgerichtshof* to make an Article 234 reference was established as the infringement of Community law was not sufficiently serious.

²² For a detailed discussion of the impact of the Constitution on the debate over judicial *Kompetenz-Kompetenz*, see the report of the House of Lords Committee on the European Union (2003/2004), above n. 9, at paras. 54-81.

²³ Union accession to the ECHR and incorporation of the Charter is discussed in detail in Chapter five. See also Stephen Carruthers, 'Beware of Lawyers Bearing Gifts: A Critical Evaluation of the Proposals on Fundamental Rights in the EU Constitutional Treaty' (2004) 4 *EHRLR*, pp. 424-435.

²⁴ On the risk of disputes over delimitation of competences in the CSFP under the Constitution, see Eeckhout, above n. 5, at pp. 151-152.

²⁵ Reliance on the rules of international law to decide the issue is appropriate since the issue turns on the attribution of jurisdiction to determine the boundaries of the Treaties. Schilling and Weiler and Haltern proceed on this basis: Schilling (1996a), above n. 1, at p. 405 and Weiler and Haltern, in Slaughter, Stone Sweet and Weiler (eds.), above n. 1, at p. 336. A resolution of the issue by reference to national law will vary depending on the constitutional order of each Member State. In the event of a conflict between Union law and a Member State's Constitution, the ECJ has ruled that Union law prevails: Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, at 3744. The manner in which the national law of each Member State would resolve the issue is not further considered here. The 2003/2004 Report of the House of Lords Committee on the European Union contains a summary of submissions on the position of national constitutional courts on the issue of *Kompetenz-Kompetenz*: above n. 9, at paras. 65-68.

²⁶ Schilling (1996a), above n. 1, at p. 407. Schilling's arguments for this conclusion are set out at pp. 403-409.

treaty is a matter of international law and depends on the proper interpretation of that treaty. Therefore from the internationalist perspective, the ECJ must be the final umpire of that system.’²⁷ The following analysis does not attempt to resolve these conflicting interpretations of the Treaties based on international law but focuses on the ECJ’s position on the question of judicial *Kompetenz-Kompetenz*. The reason for this approach is that while the ECJ’s position on the issue is not conclusive from an international law perspective,²⁸ it is nevertheless significant in establishing the basis from which the Member States conducted the negotiation of the provisions of the Constitution relevant to the demarcation of powers between the Union and the Member States.

The ECJ has consistently ruled it has judicial *Kompetenz-Kompetenz* in determining the boundaries of both the internal and external powers of the Union.²⁹ Internally, the ECJ has principally relied on Article 220 EC Treaty that requires the ECJ to ‘ensure that in the interpretation and application of this Treaty the law is observed.’³⁰ In the *Tobacco Advertising Directive Case* the ECJ held that in order to discharge its functions under Article 220 (ex 164) EC Treaty it had to verify whether, *inter alia*, Article 95 (ex 100a) EC Treaty was a proper basis for the Council adopting Directive 89/552/EEC.³¹ In deciding that Article 95 EC Treaty did not provide such a basis, the ECJ was determining the scope of the Treaties and thus exercising the power of judicial *Kompetenz-Kompetenz*. In the *Airport Transit Visas Case* the ECJ held that it had jurisdiction under Article 46 (ex. Article L) TEU to determine if a measure adopted by the Council in relation to airport transit visas under the TEU did ‘not

²⁷ Weiler and Haltern, in Slaughter, Stone Sweet and Weiler (eds.), above n. 1, at p. 363. The authors marshal an impressive body of international case law and state practice to refute Schilling’s reliance on the doctrine of auto-interpretation: Weiler and Haltern, *ibid.*, at pp. 345-346.

²⁸ Judicial decisions of national courts form part of state practice: see Akehurst, ‘Custom as a Source of International Law’ (1974-5) 47 *BYIL*, pp. 1-53, at p. 10. It seems reasonable to include decisions of the ECJ as part of the ‘state’ practice of the Union. However, Akande cautions against excessive reliance on the practice of organs of international organizations: ‘Subsequent practice of organs should therefore be confined to cases where it establishes the agreement of the parties, confirms a result already reached or to cases where other methods of interpretation lead to an ambiguity or an unreasonable result.’: ‘International Organizations’, in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 269-297, at p. 282. However, it is unclear if Akande would include a judicial institution such as the ECJ as an ‘organ’ of the Union.

²⁹ Weiler and Haltern, in Slaughter, Stone Sweet and Weiler (eds.), above n. 1, at p. 363.

³⁰ The conferral of jurisdictional powers on the ECJ under Articles 228, 230 and 234 EC Treaty also support the view it has judicial *Kompetenz-Kompetenz*: see Weiler and Haltern, *ibid.*, at pp. 348-356. It is also significant that in the *Tobacco Advertising Directive Case*, below n. 31, none of the intervening Member States pleaded lack of judicial *Kompetenz-Kompetenz* on the part of the ECJ.

³¹ Case C-376/98, *Germany v EP and Council* [2000] ECR I-8419, at para. 84.

encroach upon the powers conferred by the EC Treaty on the Community' in violation of Article 47 (ex. Article M) TEU.³² The ECJ therefore has asserted jurisdiction not only to determine the boundaries of the Union's competences under the EC Treaty but also the demarcation of competences between the TEU and the EC Treaty.

Externally, Article 300(6) EC Treaty provides the mechanism by which the ECJ has asserted judicial *Kompetenz-Kompetenz* to determine the scope of the Union's external competences. Article 300(6) EC Treaty provides the European Parliament (EP), the Council, the Commission or a Member State may obtain the opinion of the ECJ 'as to whether an agreement envisaged is compatible with the provisions of this Treaty'. In *Opinion 2/00* the ECJ was asked to give an opinion under Article 300(6) EC Treaty as to the correct legal basis under the EC Treaty for conclusion of the *Cartagena Protocol on Biosafety* adopted on 29 January 2000.³³ The ECJ first confirmed the scope of its jurisdiction:

'... the Court has consistently stated that its opinion may be obtained, pursuant to Article 300(6) EC, in particular on questions concerning the division between the Community and the Member States of competences to conclude a given agreements with non-member countries ...'.³⁴

The ECJ then set out in clear terms the nature of this jurisdiction:

'The choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the Protocol to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed'.³⁵

As in the internal field, the ECJ has asserted judicial *Kompetenz-Kompetenz*.³⁶

³² Case C-170/96, *Commission v Council* [1988] ECR I-2763, at paras. 14-17. See for analysis of the case: Eeckhout, above n. 5, at pp. 148-151. See Chapter seven for analysis of the jurisdiction of the ECJ over the Third Pillar under Article 46 TEU.

³³ *Opinion 2/00* [2001] ECR I-9713.

³⁴ *Ibid.*, at para. 3.

³⁵ *Ibid.*, at para.5.

³⁶ The fact that under Article 300(6) EC Treaty the reference for an opinion by the ECJ is discretionary does not detract from this conclusion. Even without a reference, the ECJ has competence to review the legality of the basis on which a decision is made by the Council to adopt an international agreement. Indeed, the Council argued in the *Cartagena Protocol* case that the Commission could have adopted

It has been argued that since the Member States have not *a posteriori* restricted the ECJ's construction of the scope of its jurisdictional powers to rule on the Union's competences by an amendment at the various revisions of the Treaties this practice may be treated as implied confirmation of the ECJ's case law.³⁷ However, an amendment of the Treaties requires the unanimous agreement of the Member States and therefore a failure to amend the Treaties to restrict the ECJ's jurisdiction does not necessarily represent the views of all or even a majority of the Member States. In such circumstances non-amendment of the Treaties would not satisfy the requirements of subsequent practice as set out in Article 31(3)(b) VCLT.³⁸ In conclusion, the failure of the Member States to amend the Treaties to resolve the judicial *Kompetenz-Kompetenz* issue is inconclusive.³⁹

3.2.3 JUDICIAL KOMPETENZ-KOMPETENZ AND THE CONSTITUTION

The Constitution does not explicitly address the issue of judicial *Kompetenz-Kompetenz* as between the ECJ and the national constitutional courts. However, the retention of Article 220 EC Treaty and the new provisions on Union competences in Title III of Part I of the Constitution support the view that the Member States have accepted the judicial *Kompetenz-Kompetenz* of the ECJ.⁴⁰ Article I-29(1) is on the same terms as Article 220 EC Treaty which formed the basis for the ECJ's decision in the *Tobacco Advertising Directive Case*.⁴¹ Working Group V (WGV), which was

this procedure by challenging the decision to sign the Protocol on behalf of the Community: *ibid.*, at para. 10.

³⁷ See for this argument Weiler and Haltern, in Slaughter, Stone Sweet and Weiler (eds.), above n. 1, at p. 351. For omissions or failure to act as constitutive of state practice in the development of customary international law, see Akehurst, above n. 28, at p. 10.

³⁸ Article 31(3) VCLT: 'There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;'

³⁹ On the political and institutional difficulties of amending the Treaties, or the 'joint-decision trap', see K. Alter, 'Who are the "Masters of the Treaty"? European Governments and the European Court of Justice' (1998) 52 *International Organization*, pp. 121-147, at pp. 136-142.

⁴⁰ The submissions to the House of Lords Committee on the European Union were divided on whether the Constitution would alter the current position on the issue of judicial *Kompetenz-Kompetenz*: see the Committee Report (2003/2004), above n. 9, at para. 72-74. Professor Craig submitted that the inclusion of the principle of conferral in Article I-11(1) and (2) and the provisions on the competences of the Union strengthened the view that the national courts retained judicial *Kompetenz-Kompetenz*: *ibid.*, at para. 73.

⁴¹ Cited above n. 31. An earlier version of Article I-29(1) of 25 November 2003, and numbered Article 1-28(1), had a different wording: 'It [the ECJ] shall ensure respect for the law in the interpretation and application of the Constitution.': CIG 50/03. The 2004-2005 Intergovernmental Conference (IGC/CIG) documents are available at the IGC website:

mandated to report to the European Convention on the issue of complementary competences, endorsed the ECJ's role in determining the competences of the Union:

'Exclusive competence and shared competence should be defined in the future Treaty in accordance with existing jurisprudence of the Court of Justice, and areas of exclusive and shared competence respectively determined in accordance with the criteria developed by the Court.'⁴²

This recommendation was implemented in Article I-11 which sets out the fundamental principles applicable to the competences of the Union, Article I-12 which defines the categories of competence, and Articles I-13 and I-14 which define the areas of exclusive and shared competence respectively.⁴³

WG V also recommended incorporating an extended version of Article 6(3) TEU which obligates the Union to respect the national identities of the Member States:

'Were the Court of Justice to be given power with respect to such an article in a future "basic treaty of constitutional significance", the Court could be the ultimate interpreter of the provision if the political institutions went beyond a reasonable margin of appreciation.'⁴⁴

This recommendation was incorporated in a modified form as Article I-5(1):

'The Union shall respect the equality of the Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect the essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.'

<http://ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?content=DOC&lang=EN&cmsid=754>. These documents are not further referenced. However, the reversion to the text of Article 220 EC Treaty seems to have been a technical amendment rather than based on any substantive difference between the two versions.

⁴² Final Report of Working Group V of 4 November 2002, CONV 375/1/02, at p. 7. Available on the European Convention website.

⁴³ See generally on the Union's competences under the Constitution: Paul Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 *EL Rev.*, pp. 323-344.

⁴⁴ Final Report of Working Group V, above n. 42, at p. 11.

The interpretation of Article I-5(1) of the Constitution would fall within the jurisdiction of the ECJ.⁴⁵ This conclusion is supported both by the absence of an express exclusion of the ECJ's jurisdiction over Article I-5(1) and by the maintenance in Title VI of the Constitution of the substance of the existing provisions conferring jurisdiction on the ECJ.⁴⁶

The provisions of the Constitution on the Common Foreign and Security Policy (CFSP) further support the proposition that the Constitution validates the judicial *Kompetenz-Kompetenz* of the ECJ. In *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England (Centro-Com)* the ECJ was referred questions on the validity of national measures of the British Treasury blocking payments to the plaintiff for medical products already exported to wholesalers in Montenegro in conformity with the applicable Community sanctions regulation against the Federal Republic of Yugoslavia implementing UN Security Council Resolution 757.⁴⁷ The British Government argued that the national measures were adopted:

‘... by virtue of its national competence in the field of foreign and security policy and that performance of its obligations under the Charter and under resolutions of the United Nations falls within that competence. The validity of those measures cannot be affected by the exclusive competence of the Community in relation to the common commercial policy or by the Sanctions Regulation, which does no more than implement at Community level the exercise of Member States’ national competence in the field of foreign and security policy.’⁴⁸

⁴⁵ Article I-5(2) is a modified version of Article 10 EC Treaty and extends to the Union in paragraph one the Member States’ existing duty of sincere cooperation. It is justiciable on the basis of the existing case law of the ECJ which has interpreted the scope of that duty in the context of the direct effect of directives: see Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, at para. 26. There are no grounds under the Constitution for the ECJ refusing jurisdiction to interpret Article I-5(1) but exercising that right over Article I-5(2).

⁴⁶ For a review of the changes in the Constitution to the judicial system and jurisdiction of the ECJ, see: Michael Dougan, ‘The Convention’s Draft Constitutional Treaty: bringing Europe closer to its lawyers?’, (2003) 28 *EL Rev.*, pp. 763-793, at pp. 787-792. None of these changes are of direct relevance to the issue of judicial *Kompetenz-Kompetenz*.

⁴⁷ Case C-124/95, *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England* [1997] ECR I-81. The case is commented by Eeckhout (2004), above n. 5, at pp. 431-436.

⁴⁸ *Centro-Com, ibid.*, at para. 23.

While the ECJ accepted that the Member States had retained competence in the field of foreign and security policy, it concluded that those powers ‘must be exercised in a manner consistent with Community law’.⁴⁹ The ECJ continued:

‘Similarly, the Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the common commercial policy on the ground that they have foreign and security objectives ... Consequently, while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article 113 [now Article 133] of the Treaty.’⁵⁰

In *Centro-Com* the ECJ asserted the power to adjudicate on the boundaries between the Common Commercial Policy and the Member States competence in the field of foreign and security policy. As Eeckhout has emphasised: ‘The political subordination to foreign policy decisions was not matched by any form of legal subordination.’⁵¹ The Constitution provided an opportunity for the Member States to remove this jurisdictional power but on the contrary they explicitly confirmed it. While Article III-376 in general excludes the ECJ from jurisdiction over the CFSP, the second paragraph of Article III-376 confers jurisdiction on the ECJ to monitor compliance with Article III-308 and to rule on judicial review proceedings by natural or legal persons under Article III-365(4) in respect of restrictive measures against them adopted by the Council under the CFSP. Article III-308 provides:

‘The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences referred to in Article I-13 to I-15 and I-17. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences under this Chapter.’

⁴⁹ *Ibid.*, at paras. 24-25.

⁵⁰ *Ibid.*, at paras. 26-27. The ECJ referred in para. 26 to its earlier judgment *Werner v Germany* on the export of ‘dual-use’ goods by Germany to Libya: Case C-70/94 [1995] ECR I-3189. For an analysis of *Werner*, and Case C-83/94, *Leifer and Others v. Germany* [1995] ECR I-3231 that raised similar issues, see Eeckhout (2004), above n. 5, at pp. 36-37.

⁵¹ Above n. 5, at p. 434.

Article I-13(1)(e) specifies the Common Commercial Policy (CCP) as an area of exclusive Union competence and therefore the second paragraph of Article III-376 confirms the jurisdiction of the ECJ to police the boundaries between the CCP and the CFSP which it had asserted in *Centro-Com*. If the Member States were prepared to confirm the ECJ's judicial *Kompetenz-Kompetenz* in such a politically sensitive area then *a fortiori* they must be taken to have accepted it in the other areas of Union competence.

Furthermore, in the period between signature and entry into force, the Constitution arguably constitutes evidence of the common agreement of the Member States to confer judicial *Kompetenz-Kompetenz* on the ECJ. The normative effect of the Constitution between 29 October 2004, the date of its signature by all the Member States, and the date of its entry into force, depends on international law. Article IV-447(1) provides for ratification by all the Member States in accordance with their respective constitutional requirements and Article IV-447(2) provides that the Constitution shall enter into force on 1 November 2006 or on the first day of the second month following deposit of the final instrument of ratification.⁵² However, signed but unratified treaties may entail legal consequences. Article 18 VCLT provides:

‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.’

⁵² Article IV-447(2) provides the Constitution shall enter into force on 1 November 2006, subject to ratification by all the Member States. This date has been postponed following the rejection of the Constitution in the referenda in France and the Netherlands of 29 May 2005 and 1 June 2005 respectively: see *Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe* of 18 June 2005: available at: <http://ue.eu.int/ueDocs/cms_Data/Docs/pressData/en/ec/85325>.

Article 18(a) VCLT therefore applies in the case of the Constitution to restrict the actions of the Member States unless and until they unequivocally reject it.⁵³ The rejection of the Constitution in the referenda held in France and the Netherlands did not constitute such an unequivocal rejection since the Declaration of the Heads of State or Government issued unanimously by the European Council at its meeting on 16 and 17 June 2005 explicitly stated: ‘The recent developments do not call into question the validity of continuing with the ratification process.’⁵⁴ Furthermore, the ICJ has held that: ‘...signed but unratified treaties may constitute an accurate expression of the understanding of the Parties at the time of signature.’⁵⁵ Independently of whether the process of elaboration by the European Convention provides additional legitimacy to the Constitution, as compared to previous Treaties resulting solely from inter-governmental negotiation,⁵⁶ the Constitution prior to entry into force has normative effect.⁵⁷

Although the Constitution provides support for the view that the ECJ has judicial *Kompetenz-Kompetenz* this does not necessarily signify that the constitutional courts of the Member States will abandon their claims to adjudicate on the *vires* of Union law.⁵⁸ However, the Constitution does place a heavier onus on national courts to

⁵³ Article 18 VCLT has been applied by the CFI in the context of the period between signature and ratification of the EEA Agreement: Case T-115/94, *Opel Austria v. Council* [1997] ECR II-39, at paras. 78-80.

⁵⁴ SN 117/05 of 18 June 2005; available at: <http://ue.eu.int/ueDocs/cms_Data/Docs/pressData/en/ec/85325.pdf>.

⁵⁵ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment of 16 March 2001, (2001) ICJ Reports 40, at para 89. For a critical analysis of this case and generally on international tribunal decisions bestowing effect on unperfected legal acts see: W. Michael Reisman, ‘Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions’ (2002) 35 *Vanderbilt Journal of Transnational Law*, pp. 729-747.

⁵⁶ ‘The draft Constitution also represents a powerful source of authority as the expression of a *volonté constituante* by a democratic *pouvoir constituant*, the composition of which should serve to identify the people and governments with its outcome.’: Koen Lenaerts and Damien Gerard, ‘The Structure of the Union according to the Constitution for Europe: the emperor is getting dressed’ (2004) 29 *EL Rev.*, pp. 289-322, at p. 293.

⁵⁷ It may be that for policy reasons the ECJ will be reluctant, as in the case of the Charter, to refer explicitly to the Constitution prior to the date of its entry into force. The results of the French and Netherlands referenda undoubtedly strengthened arguments for a cautious approach. However, the ECtHR has referred to Article I-9 of the Constitution in the recent case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (Bosphorus), Grand Chamber, Application No. 45036/98, Judgment of 30 June 2005, at para. 159. Not yet reported.

⁵⁸ The German Constitutional Court has challenged the ECJ’s right to determine the limits of the Union’s powers: see the *Maastricht* Decision of the *Bundesverfassungsgericht* of 12 October 1993: BVerfGE 89 [1994] 1 *CMLR* 57. Recent case law suggests, however, that the risk of such a conflict has subsided: see Schwarze, ‘Judicial review in EC Law – Some reflections on the Origins and the Actual Legal Situation’ (2002) 51 *ICLQ*, pp. 17-33, at pp. 22-27. But compare the analysis of Alter: ‘To use a Constitutional Court judge’s own metaphor, the new powers mean the BVerfG [German Constitutional

justify such an assertion of jurisdiction and it increases the political and legal risks of such a course of action.⁵⁹

3.2.4 CONCLUSIONS

The assertion of judicial *Kompetenz-Kompetenz* provided the basis for the ECJ to pursue a policy of judicial activism by developing an expansionist reading of the powers of the Union under the Treaties and thereby to promote economic and social integration. However, the conservative approach to the Community's fundamental rights competence adopted by the ECJ in *Opinion 2/94* demonstrated reluctance by the ECJ to adopt this policy in such a sensitive area for the national judiciary of the Member States. In order to address the concerns of the constitutional courts of the Member States, there is merit in the proposals for the creation of a constitutional court for the Union with judicial *Kompetenz-Kompetenz* composed of judges both from the ECJ and the national constitutional courts.⁶⁰ However, this proposal was not on the agenda during the European Convention or subsequent IGC.

Whether or not the Constitution is finally adopted, the issue of judicial *Kompetenz-Kompetenz* will remain controversial in light of the political sensitivity over demarcation of Union and national competences. However, adoption of the Constitution would provide the ECJ with additional grounds to pursue a more dynamic approach to the scope of the Union's competences in the area of fundamental rights. If the Constitution is abandoned, then the issue of Union competence to accede to the ECHR will resurface and require addressing by the Member States. From a fundamental rights perspective, the preferred solution would be an amendment of the Treaties to provide the Union with a general competence to accede to international fundamental rights treaties. In order to address the concerns of Member States relating to the potential extension of Union competences arising from Union accession to the ECHR and the other European Conventions and the UN

Court] can play a role refereeing the rules of the European policy-making game.'; above n. 6, at p. 116. See also the decision of the Danish Supreme Court asserting its right of judicial *Kompetenz-Kompetenz*: *Carlsen v. Rasmussen*, Judgment of April 6, 1998; [1999] 3 *CMLR*, pp. 855-862. *Carlsen* is commented on by Albi and Elsuwege, above n. 10, at p. 745.

⁵⁹ The negative reaction to the *Solange I* judgment in both German and Community circles is discussed by Alter, above n. 6, at p. 93.

⁶⁰ See Weiler and Haltern, in Slaughter, Stone Sweet and Weiler (ed.), above n. 1, at p. 364.

Conventions, the proposals for creation of a constitutional court for the Union should also be given consideration as part of the negotiation of an alternative package of reforms if the Constitution is abandoned.⁶¹

3.3 JURISDICTION TO REVIEW THE VALIDITY OF UNION LAW

3.3.1 INTRODUCTION

This section addresses the separate, but related,⁶² question of identifying the judicial institution or institutions with jurisdiction to decide on the validity of Union law, and in particular primary Union law.⁶³ Recent examples of provisions of national security and immigration legislation being ruled unconstitutional illustrate the critical bearing of this inquiry on assessing the robustness of a constitutional order in times of crisis. Anti-terrorism legislation passed in the US and UK following the events of 11 September 2001 has been challenged successfully for infringement of fundamental rights.⁶⁴ In 1996 the Swiss Federal Parliament invalidated a proposed referendum on

⁶¹ See further Chapter nine.

⁶² An *ultra vires* act is also unlawful. However, in this section the focus is on illegality in the sense of violation of a norm of international law, and in particular international fundamental rights. In the case of the Treaties, the consequences of invalidity are set out in Article 69(1) VCLT: 'A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.' In the case of secondary Union measures, paragraph one of Article 231 EC Treaty provides that the ECJ shall declare an act void if it rules the act illegal under Article 230 EC Treaty. Paragraph one of Article III-366 of the Constitution is on substantially the same terms as Article 231 EC Treaty

⁶³ Hartley divides the acts of the Member States into the constitutive treaties, subsidiary conventions and acts of the representatives of the Member States: above n. 20, at pp. 93-102. This category of acts is referred to here as primary law.

⁶⁴ In *Doe v. Ashcroft*, No. 04 Civ. 2614, Southern District of New York, Sept. 28, 2004, a federal district court ruled section 505 of the 2001 USA Patriot Act, amending the 1986 Electronic Communications Privacy Act, violated the Fourth Amendment. The case is currently under appeal. See also the pending case of *Muslim Community Association of Ann Arbor v. Ashcroft*, No. 03-72913 ((Eastern District of Michigan). See generally: Penelope Nevill, 'United States: The Bush administration's "war on terrorism" in the Supreme Court' (2005) 3 *Int. J. Constitutional Law*, pp. 115-127. An extension of the USA Patriot Act of 2001, which expires at the end of 2005, is currently being sought by the Bush administration. See for an analysis of the existing flaws, *Testimony at an Oversight Hearing on sections 206 and 215 of the USA Patriot Act of 2001 before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee*, Gregory T. Nojeim and Timothy H. Edgar, American Civil Liberties Union, 28 April 2005. Available at: <<http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18133&c=206>>. In the UK, the relevant legislation includes the Anti-Terrorism, Crime and Security Act 2001(c.24) and The Prevention of Terrorism Act 2005 (c.2). In *A and others and X and another v. Secretary of State for the Home Department*, the House of Lords made, *inter alia*, a declaration under section 4 of the Human Rights Act 1998 that section 23 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Articles 5 and 14 of the ECHR insofar as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status: [2005] 2 AC 477. The Prevention of Terrorism Act 2005 was passed to address the implications of

the grounds that the constitutional amendment summarily to deport asylum seekers violated the international peremptory norm prohibiting *refoulement*.⁶⁵ In such situations, ready and secure access to an authority with jurisdiction to rule on the validity of contested legislation is a key indicator of the robustness of a constitutional order in protecting fundamental rights.

The ECJ's role as ultimate adjudicator of the legality of Union law is challenged by two specific features of the Union's legal order. Firstly, the Union's constitutional order is based on international treaties rather than on an autonomous constitutional instrument.⁶⁶ As a result, unlike a national constitution, the interpretation and validity of the Treaties⁶⁷ is subject to the rules of international law and in particular the VCLT.⁶⁸ Both international tribunals and national courts may in specific circumstances claim jurisdiction to rule on the validity of the Treaties,⁶⁹ although such a ruling would not create a binding precedent in international law.⁷⁰ Secondly,

that judgment. Following the terrorist incidents of July 7 and 21 2005 in London, further changes to the UK terrorist legislation have been proposed by the UK Government: see the proposals in the letter of 15 September 2005 by Charles Clarke, Home Secretary, to David Davis and Mark Oates, published in *The Guardian*, 16 September 2005: <<http://image.guardian.co.uk/sys-files/Politics/documents/2005/09/15/letterplusannexe.pdf>>.

⁶⁵ Erika de Wit, 'The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law' (2004) 15 *EJIL*, pp. 97-121, at pp. 112-114. The degree of entrenchment afforded to fundamental rights under the Constitution is considered in Section 5.8 of Chapter five.

⁶⁶ Several national constitutions have originated in international treaties. However once the constitution is adopted the treaty basis is superseded. The US Constitution, for example, was drafted by twelve independent states (Rhode Island later also ratified the US Constitution in 1790) but established a federal republic the basis of which was no longer subject to amendment by the individual states but by the institutions established by the constitution. This is not the case for the Union and will not be even if the Constitution enters into force. See generally on the 'original constituent power' of constitutions, Schilling (1996a), above n. 1, at pp. 390-395.

⁶⁷ The same principles would apply to the Constitution.

⁶⁸ Article 5 VCLT provides it applies 'to any treaty which is the constituent instrument of an international organisation.'. Hartley: 'We have also seen that the validity of the Community Treaties (like that of the whole EU legal system) depends on international law', above n. 20, at p. 95. Some commentators, however, have questioned whether the VCLT is applicable to the Treaties in the light of the fact that the *travaux préparatoires* of the Treaties have never been published: see Weiler and Haltern, in Slaughter, Stone Sweet and Weiler, above n. 1, at p. 350, n. 87. However, Peters, in a review of the differences between the ECJ's methods of interpretation of the Treaties and the principles of international law, concludes: 'All in all, the differences in interpretation of international law and Community law are – the 'constitutional' approach of the ECJ notwithstanding – at best differences in degree, but not in kind.': above n. 1, at p. 26.

⁶⁹ See, for example, the dispute resolution procedures relating to the application or interpretation of Articles 53 and 64 VCLT on *jus cogens* in Article 66(a) VCLT involving submission of the dispute to the ICJ or arbitration. Cassese argues that a third party state may also under the rules of customary international law be entitled to challenge the validity of a treaty that violates *jus cogens*: *International Law* (2nd edn.) (Oxford, OUP, 2005), at pp. 177-178.

⁷⁰ See Cassese, referring to rules of customary international law based on Articles 59 and 38(1)(d) of the Statute of the ICJ: 'It follows that judgments of such courts [international courts] do not make law,

the Union's legal order is based on the principle of conferred powers⁷¹ unlike a sovereign state whose powers are, in theory at least, unlimited. The principle of conferred powers raises two significant questions for the autonomy of the ECJ: firstly, whether the ECJ has jurisdiction to rule on the legality of primary Union law; and secondly, whether, the Member States have a continuing responsibility under international fundamental rights treaties, and in particular the ECHR, for the legality of Union acts adopted under conferred powers. These questions are addressed in the following sections in the specific context of the jurisdiction of the ECtHR to review the legality of Union law.

3.3.2 JURISDICTION OF THE EUROPEAN COURT OF HUMAN RIGHTS

3.3.2.1 Introduction

The responsibility of a state for the acts of an international organisation of which it is a member is a matter of international law.⁷² In the absence of special circumstances, courts have generally declined to impose liability on member states for the acts of international organizations on the basis to do so would be to undermine the principle of international legal personality and the autonomy of such institutions which is a key reason for their establishment.⁷³ However, the breadth of competences transferred to the Union by the Member States has raised issues of control for the monitoring bodies

nor is the common law doctrine of *stare decisis*, or binding precedent, applicable.' : *ibid.*, at p. 194. It is submitted this rule would apply equally to a ruling by the ECJ on the legality of Union primary law, although it may be argued that a judgment of the ECJ would constitute evidence of a regional custom as between the Member States if they failed to object to the judgment.

⁷¹ Article 5 EC Treaty and Article I-11(1) and (2) of the Constitution.

⁷² Sands and Klein, *Bowett's Law of International Institutions* (5th edn.) (London, Thomson, 2001), at p. 514.

⁷³ 'More precisely, arguments based on representations of agency, control, or the absence of provisions excluding liability have all failed.' : Sands and Klein, *ibid.*, at p. 522. The authors analyse cases where these arguments have been raised, in particular in the context of unsuccessful attempts by creditors to pursue member states for the debts of the International Tin Council and the Arab Organization for Industrialisation, although they emphasise that member states may incur liability in exceptional circumstances: *ibid.*, at pp. 521-523. See also Gerard Conway, 'Breaches of EC Law and the International Responsibility of Member States' (2002) 13 *EJIL*, pp. 679-695. In *Banković and Others v. Belgium and Sixteen Other Contracting States*, the Grand Chamber of the ECtHR declared an application for violation of Articles 2, 10 and 13 ECHR inadmissible arising from the bombing by NATO of the Serbian Radio-Television station on 23 April 1999 on the grounds the action fell outside the jurisdiction of the Court under Article 1 ECHR: Application No. 52207/97, Decision of 12 December 2001: (2002) 11 *BHRC* 435. The ECtHR did not therefore address the issue of whether the contracting parties member of NATO could be held responsible for NATO's action. See: Dr. K. Altıparmak, 'Bankovic: An Obstacle to the Application of The European Convention on Human Rights In Iraq?' (2004) 9 *Journal of Conflict and Security Law*, pp. 213-251.

of international conventions for the protection of fundamental rights to which the Member States, but not the Union, are party.

This section focuses on the ECtHR's jurisdiction to review the legality of Union law with the ECHR since the ECHR has a special status within the Union's legal order as specified both by the ECJ in its general principles case law and Article 6(2) TEU. Accession by the Union to the ECHR and incorporation of the Charter under Articles I-9(1) and I-9(2) of the Constitution would further strengthen the status of the ECHR.⁷⁴ However, similar jurisdictional issues may be relevant to monitoring and compliance bodies established under other international human rights treaties. For example, Article 50 ICCPR provides the ICCPR 'shall extend to all parts of federal states without any limitation or exception.' Furthermore, the Human Rights Committee (HRC) of the ICCPR has stated:

'The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.'⁷⁵

The principle of unified state responsibility could logically be extended to hold a Member State party to the ICCPR responsible for actions carried out by the Union in violation of the ICCPR under competences transferred by that state.

3.3.2.2 *Matthews and the Limits of the Autonomy of Union Law*

In *CFDT v. European Communities*, the ECommHR decided that it had no jurisdiction *ratione personae* to control decisions of the Community for its conformity with the ECHR since the Community was not a party to the ECHR.⁷⁶ Furthermore, it subsequently held that, since the Community provided 'equivalent protection' to fundamental rights to those guaranteed under the ECHR, the transfer of powers by a Member State to the Community did not require a Member State to

⁷⁴ See Chapter five for analysis of the effect of ECHR accession and incorporation of the Charter.

⁷⁵ *General Comment Number 31: The Nature of the General Legal Obligations Imposed on State Parties to the Convention*, eightieth session, adopted 29 March 2004. CCPR/C/21/Rev.1/Add.13.

⁷⁶ App. No. 8030/77, 13 DR 231 (1978). The same reasoning was applied by the European Commission to the powers transferred by the parties to the European Patent Office established under the 1973 European Patent Convention: *Heinz v Contracting States also Parties to the European Patent Convention*, Appn. No. 21090/92, (1994) 18 EHRR CD 168.

review each Community measure for conformity with the ECHR and an application seeking such review therefore failed *ratione materiae*.⁷⁷ While the ECtHR has not expressly departed from these decisions of the ECommHR, in *Matthews v. United Kingdom*⁷⁸ and subsequent cases it has established boundaries to the autonomy of the Union's legal order in terms of the Members States' continuing obligations under the ECHR notwithstanding the transfer of competences to the Union.

In *Matthews*, the relevant issue turned on the status of the 1976 *Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage* (the 1976 Act) signed by the Foreign Ministers of the Member States and attached to Council Decision 76/787 of 20 September 1976 (the 1976 Council Decision).⁷⁹ An annex to the 1976 Act excluded Gibraltar citizens from participation in EP elections and Mrs Matthews claimed this exclusion violated her rights under Article 3 of Protocol No. 1 to the ECHR. The UK Government argued that the 1976 Act 'had the status of a treaty, was adopted in the Community framework and could not be revoked or varied unilaterally by the United Kingdom'.⁸⁰ Relying on the earlier decisions of the ECommHR, The UK Government argued that this characterization of the 1976 Act as an act 'adopted by the Community or consequent to its requirements' took it outside the scope of review by the ECtHR since the UK had no 'power of effective control' over the 1976 Act.⁸¹

The applicant in *Matthews* agreed that the 1976 Act was an international treaty but drew the opposite conclusion that, unlike Union secondary legislation, it was subject to review by the ECtHR since the UK remained responsible for its effects. Alternatively, the applicant argued that if the 1976 Council Decision and the 1976

⁷⁷ *M. & Co. v. Germany*, App. No. 13258/87, 64 DR 144 (1990). In *Pafitis v. Greece*, (1997) 27 EHRR 566, the ECtHR summarily dismissed the argument that the length of the preliminary reference procedure under Article 234 (ex 177) EC Treaty contributed to a violation of Article 6(1) ECHR: '...to take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article': at para. 95. See for comment: C. Costello and E. Browne, 'ECHR and the European Union', in U. Kelly (ed.) *ECHR and Irish Law* (Dublin, Jordans, 2004), pp. 35-80, at p. 69; and K. Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 *EL Rev.*, pp. 575-600, at pp. 583-584.

⁷⁸ (1999) 28 EHRR 361.

⁷⁹ The Council Decision is published in [1976] OJ L278/1. The judgment in *Matthews* also examines the status of the EP following the Maastricht Treaty amendments and concluded it had become as a result a 'legislature' within the meaning of Article 3 of Protocol No.1 ECHR. See Lenaerts, above n 77, at pp. 584-5.

⁸⁰ *Matthews*, above n. 78, at para. 26.

⁸¹ *Ibid.*, at para. 26.

Act did involve a transfer of powers to the Community institutions there was a lack of ‘equivalent protection’ within the Community legal order as required by the decisions of the ECommHR.

The ECtHR based its decision on the construction of Article 1 ECHR which requires the parties to ‘secure to everyone within their jurisdiction the rights and freedoms defined in’ the ECHR. The ECtHR characterized the 1976 Act, together with the 1976 Council Decision and the 1992 Maastricht Treaty increasing the powers of the EP, as international instruments ‘which were freely entered into by the United Kingdom’.⁸² The 1976 Act was not a ‘normal act of the Community’ but ‘a treaty within the Community legal order’ and as such ‘cannot be challenged before the European Court of Justice’.⁸³ The fact that the UK had entered into these treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 ECHR engaged its responsibility under Article 1 ECHR to secure the rights guaranteed by Article 3 of Protocol No. 1.⁸⁴

Following *Matthews*, therefore, the review powers of the ECtHR over the Union legal order on the basis of the continuing responsibilities of the Member States under the ECHR depends on the characterization of the act in question. If it constitutes primary Union law, namely a constitutive treaty or an international agreement amending such a treaty, the ECtHR will review the conformity of such an act with the ECHR. If it constitutes secondary Union legislation, the ECtHR will not review such an act provided ‘equivalent’ protection for fundamental rights is provided to that of the ECHR by the Union’s legal order.⁸⁵ The ECtHR in *Matthews* based this distinction in treatment on the basis that the ECJ lacked power to adjudicate on the legality of Union primary law.

⁸² *Ibid.*, at para 33.

⁸³ *Ibid.*, at para. 33.

⁸⁴ *Ibid.*, at para. 34.

⁸⁵ In *Matthews* the ECtHR did not expressly refer to the previous case law on its jurisdiction to review secondary Community legislation since it was not at issue. Indeed, the *Matthews* judgment is not entirely clear on whether the continuing obligations of the UK under Article 1 ECHR and Article 3 of Protocol No. 1 only extend to primary Union law. In paragraph 34 the ECtHR states: ‘To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to ‘secure’ the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be ‘secured’ in respect of purely domestic legislation.’ However, this is best interpreted as relating to the substance of the right protected by Article 3 of Protocol No. 1, namely the right of a citizen to vote in elections for a legislature competent to legislate with effect in the territory where the citizen resides, and not equating primary and secondary Union law for the purposes of Article 1 ECHR.

The critical issue for the autonomy of the ECJ is whether the analysis of the ECtHR as to the lack of jurisdictional competence of the ECJ over primary Union law is supported by the EC Treaty.⁸⁶ A literal reading of the jurisdictional powers of the ECJ in the EC Treaty and the Constitution supports the ECtHR's analysis in *Matthews*.⁸⁷ Article 220 EC Treaty confers on the ECJ and the CFI, each within its jurisdiction, a duty to ensure that 'in the interpretation and application' of this Treaty the law is observed but does not specify a duty to control the legality of the EC Treaty. Article 234(a) EC Treaty only confers power on the ECJ to give preliminary rulings concerning the interpretation of the EC Treaty whereas Article 234(b) specifically refers to rulings on the validity and interpretation of secondary Community legislation. Article 230 EC Treaty restricts the judicial review powers of the ECJ to the legality of acts of the Unions' institutions. The Constitution incorporates provisions on substantially the same terms.⁸⁸ This textual reading is confirmed, at least in the context of Article 230 EC Treaty proceedings, by the decision in *Roujansky v Council*.⁸⁹ In that case the ECJ upheld the CFI's decision rejecting the admissibility of a challenge to the legality of a declaration of the European Council of 29 October 1993 and the TEU:

'As the Court of First Instance has held, neither the declaration of the European Council nor the Treaty on European Union is an act whose legality is subject to review under Article 173 [230] of the Treaty and hence the appeal brought by the appellant against the finding of inadmissibility is clearly unfounded.'⁹⁰

Canor has argued, by reference to the principle of consistency, that the ECJ may construe its jurisdiction under Article 234(1) EC Treaty as extending to the interpretation of primary Union law amending the Treaties in a manner consistent with fundamental rights as protected by Union law.⁹¹ Canor refers in support to

⁸⁶ A ruling of the ECtHR on the ECJ's jurisdictional competence is not binding or even authoritative for the purposes of the Union's obligations under Article 6(2) TEU or the general principles doctrine since it does not relate to the interpretation of the rights and freedoms protected by the ECHR but the scope of the contracting parties' obligations under Article 1 ECHR.

⁸⁷ See Section 7.2 of Chapter seven for the jurisdiction of the ECJ under Article 46 TEU.

⁸⁸ Article I-29(1) corresponds to Article 220 EC Treaty; Article III-365 corresponds to Article 230 EC Treaty; and Article III-369 to Article 234 EC Treaty. As discussed in Section 7.4 of Chapter seven, the Constitution confers jurisdiction on the ECJ over the AFSJ but subject to Article III-377. The ECJ's powers over the CFSP remain limited under Article III-376.

⁸⁹ Case C-253/94 [1995] ECR I-7.

⁹⁰ *Ibid*, at para. 11. The CFI decision is: Case T-584/93 [1994] ECR 585.

⁹¹ I. Canor, '*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25 *EL Rev.*, pp. 3-21, at p. 7.

Opinion 2/91 where the ECJ decided it had jurisdiction under Article 300(6) EC Treaty to review the respective competences of the Community and the Member States in the areas covered by ILO Convention No. 170 concerning Safety in the Use of Chemicals at Work.⁹² This decision was reached notwithstanding the textual argument advanced by the German and Netherlands Governments that Article 300(1) EC Treaty refers only to the conclusion of agreements between ‘the Community and one or more States or international organisations’. Since the Community was not a member of the ILO, it was precluded under the ILO’s constitution from signing Convention No. 170 and Article 300(6) EC Treaty proceedings were therefore inapplicable.⁹³ Such an interpretative approach to primary Union law would also accord with the ECJ’s preferred teleological approach to the interpretation of the Treaties.⁹⁴

However, an obligation to interpret Union law insofar as possible with fundamental rights standards falls short of a jurisdiction to review the legality of Union law and to that extent the ECtHR’s assessment in *Matthews* accords with the case law of the ECJ. Consequently, in the absence of jurisdiction conferred on the ECJ, the legality of primary Union law,⁹⁵ and perhaps more significantly the consequences of such illegality on the Union’s legal order,⁹⁶ falls to be decided exclusively by the national constitutional courts of the Member States or by an international arbitral or judicial body seized with a dispute where the legality of primary Union law is at issue.⁹⁷

3.3.2.3 Extension of the *Matthews* Doctrine

Matthews left open the issue of whether the ECtHR would extend its jurisdiction to include a power to review the legality of any Union measure which is not subject to

⁹² [1993] ECR 1061

⁹³ *Ibid.*, at paras. 3-5.

⁹⁴ See generally on the ECJ’s approach to interpretation of Union law: Piet Eeckhout, ‘The European Court of Justice and the Legislature’ (1998) 18 *Yearbook of European Law*, pp. 1-28, at pp. 15-18.

⁹⁵ It is established under Union law that the ECJ has exclusive jurisdiction to rule on the legality of Union secondary legislation: Case 314/85, *Foto-Frost (Firma) v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199 (*Foto-Frost*).

⁹⁶ In particular the issue would arise whether an illegal provision of primary Union law could be severed from the rest of the instrument. Cassese argues that in the case of a *jus cogens* violation severance should be possible notwithstanding Article 44.5 VCLT: above n. 69, at p. 206.

⁹⁷ Cassese addresses the question of the forum in which a non-party may invoke the absolute invalidity of an international treaty: ‘Arguably, before an international court or tribunal having jurisdiction under the relevant jurisdictional clauses; if such jurisdiction is lacking, the third State is entitled to call upon the relevant contracting States or State to either undertake negotiations with a view to legally settling the matter, or bring the issue before an arbitral or judicial body.’: *ibid.*, at p. 178.

review by the ECJ.⁹⁸ In *Waite and Kennedy v. Germany*, a judgment given on the same day as *Matthews*, the ECtHR confirmed its potential continuing jurisdiction over the contracting parties to the 1975 Convention for the Establishment of a European Space Agency:

‘The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.’⁹⁹

In *T.I. v. UK* this reasoning was confirmed in relation to the arrangements entered into by the Member States in the 1991 Dublin Convention concerning the attribution of responsibility for deciding asylum claims.¹⁰⁰ While neither *Waite and Kennedy* nor *T.I. v. UK* was decided in respect of the transfer of competences to the Union by the Member States under the Treaties, the principle of continuing responsibility for compliance with the ECHR obligations for signatories to international organizations if the right of access to the courts is restricted is relevant to areas of the Union’s legal order where such restrictions apply, in particular in respect of the CFSP and the AFSJ.¹⁰¹

In *Senator Lines* the issue of extending *Matthews* to secondary Community measures that were subject to review by the ECJ was raised.¹⁰² While the ECtHR did not rule

⁹⁸ See in support of this proposition: Lenaerts, above n. 77, at pp. 584-585; and Costello and Browne, in Kelly (ed.), above n. 77, at pp. 69-76. In *Emesa Sugar v. Netherlands*, the applicant challenged the compatibility with Article 6(1) ECHR of the judgment of the ECJ in *Emesa Sugar (Free Zone) NV v Aruba* (Case C-17/98 [2000] ECR I-675) on the basis it had not been allowed to respond to the Opinion of the Advocate General in that case: App. no. 62023/00, decision of 13 January 2005 (unreported). However, the ECtHR did not address whether it had jurisdiction to rule on that issue but declared the application inadmissible on the unrelated ground that the national proceedings fell outside the scope *ratione materiae* of Article 6 ECHR.

⁹⁹ (2000) 30 EHRR 261, at paras. 67 and 68.

¹⁰⁰ *T.I. v. United Kingdom*, App. No. 43844/98, admissibility decision of 7 March 2000; (2000) 12 *IJRL*, pp. 244-267. See Section 8.3.3.4 of Chapter eight for further analysis of this case.

¹⁰¹ For details of the limits on the ECJ’s jurisdiction over the AFSJ, see Chapter seven.

¹⁰² *Senator Lines GmbH v. Member States of the European Union* (App. No. 56672/00); admissibility decision of 10 March 2004. Not reported.

on this point, since it declared the case inadmissible on the unrelated ground that the applicant could not claim to be a victim of a violation of the ECHR within the meaning of Article 34 ECHR, the arguments of the parties highlight the conflicting pressures facing the ECtHR in deciding whether or not to extend *Matthews* and the implications such an extension would have for the principle of the autonomy of Union law.¹⁰³

The applicant in *Senator Lines* argued that the decision by the CFI and ECJ not to suspend the Commission's decision to require a bank guarantee from the applicant's major shareholder for payment of a competition fine imposed on the applicant constituted a violation of its rights of access to court guaranteed under Article 6 ECHR and that the Member States 'were individually and collectively responsible for the acts of the Community institutions'.¹⁰⁴ The applicant accepted that the acts of the Community could not be challenged directly before the ECtHR but invited the ECtHR to distinguish the *CFDT* decision and treat the 'equivalent protection' test as set out in *M. & Co. v. Germany* as impliedly overruled by the *Matthews* case.¹⁰⁵ Of particular interest to the issue of autonomy, the Applicant argued that the effect of *Matthews*:

'... is not limited to primary law which cannot be challenged before the Community organs, as such a divide would give rise to different levels of human rights protection depending on the formal criterion of whether the contested rule or act was one of Community primary law or not. Such an approach would create a major loophole in human rights protection'.¹⁰⁶

The Member States contested the admissibility of the action against them in their capacity as Member States. Their principal submission relied on the principles of international law applicable to the relations between member states and international organizations as applied by the ECommHR and the ECtHR. Firstly, the Member States argued that the acts complained of were not sovereign acts of any of the Member States and thus fell outside their jurisdiction within the meaning of Article 1

¹⁰³ The importance of the issues raised may be judged from the number of organisations which submitted observations in *Senator Lines*, including the International Commission of Jurists and the *Fédération Internationale des Ligues des Droits de l'Homme*.

¹⁰⁴ *Senator Lines*, above n. 102, at p. 4. See for the decisions of the ECJ and CFI: Case C-364/99P, *DSR-Senator Lines v Commission* [1999] ECR I-8733 and Case T-191/98, *DSR-Senator Lines v Commission* [1999] ECR II-2531.

¹⁰⁵ *Senator Lines*, above n. 102, at p. 4.

¹⁰⁶ *Ibid.*, at p. 6.

ECHR. Secondly, they relied on the authority of the *CFDT* decision to establish that no application may be made under the ECHR against the Community or the Member States. Thirdly, they argued that the Community had separate legal personality and ‘neither it nor its organs in any way represent its Member States’.¹⁰⁷ In the alternative, the Member States relied on the authority of *M & Co. v. Germany*.¹⁰⁸ Since the ECommHR had found that in 1990 the Community provided such ‘equivalent protection’, the Member States argued that *a fortiori* the ECtHR should refrain from a review of the contested decision of the Community on the grounds of the ‘principle of subsidiarity’ since the subsequent treaties of Maastricht and Amsterdam had strengthened the system of protection.¹⁰⁹

In *Bosphorus*,¹¹⁰ the ECtHR in a judgment of the Grand Chamber had the opportunity to address the arguments raised in *Senator Lines*. The applicant alleged that the impounding by Ireland of an aircraft leased by it from Yugoslav Airlines (JAT) in Ireland for maintenance pursuant to EC Regulation 990/93 of 28 April 1993 (the 1993 EC Sanctions Regulation),¹¹¹ implementing UNSC Resolution 820 (1993) of 17 April 1993, violated its right to peaceful enjoyment of its possessions under Article 1 of Protocol No. 1 ECHR. The Irish Supreme Court, on appeal from a decision of the High Court in favour of the applicant,¹¹² referred under Article 234 EC Treaty an issue of interpretation of Article 8 of the 1993 EC Sanctions Regulation. The ECJ ruled that the 1993 EC Sanctions Regulation required Ireland to impound the applicant’s aircraft and that impoundment did not violate the fundamental rights of the applicant.¹¹³ The Irish Supreme Court by judgment of 29 November 1996 allowed

¹⁰⁷ *Ibid.*, at p. 4.

¹⁰⁸ *Ibid.*, at p. 5.

¹⁰⁹ Reference is made in *Senator Lines* to Articles 6 and 46(d) of the TEU in this respect: above n. 102, at p. 5. However, as discussed in Section 7.2.3 of Chapter seven, it is hard to sustain the view that the introduction of those articles made any substantial improvement to the protection of fundamental rights in Union law.

¹¹⁰ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (Grand Chamber), App. No. 45036/98. Judgment of 30 June 2005. Unreported.

¹¹¹ [1993] OJ L102/14.

¹¹² *Bosphorus v Minister for Transport, Energy and Communications*. Judgment of 21 June 1994. [1994] 2 *ILRM* 551.

¹¹³ Case C-84/95, *Bosphorus v. Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-1475.

the appeal of the Minister of Transport against the judgment of the High Court of 21 June 1994 on the basis of the preliminary ruling by the ECJ.¹¹⁴

Both the applicant and the Irish Government in their submissions in *Bosphorus* focused on whether the Irish State had any discretion in implementing the 1993 EC Sanctions Regulation. The Irish Government submitted that Ireland was obliged to impound the JAT aircraft in application of the ruling of the ECJ interpreting the 1993 EC Sanctions Regulation and that the doctrine of equivalent protection developed in *M & Co.*¹¹⁵ applied rather than the *Matthews* doctrine where the UK Government had acted in exercise of its discretion.¹¹⁶ The applicant argued on the contrary that Ireland had exercised its discretion in deciding to appeal the judgment of the High Court in making the Article 234 EC Treaty reference, and in the manner in which it applied the ruling of the ECJ.¹¹⁷

The ECtHR first held that Article 1 ECHR applied since the impounding of the aircraft leased by the applicant by the Irish authorities on Irish territory brought the applicant within the ‘jurisdiction’ of the Irish State ‘with the consequence that its complaint about that act is compatible *ratione loci, personae, and materiae* with the provisions of the Convention.’¹¹⁸ The ECtHR then ruled that the sole relevant legal basis for the impounding by the Irish authorities of the JAT aircraft was the 1993 EC Sanctions Regulation, and not UNSC Resolution 820, which was not part of domestic Irish law, or the implementing Irish S.I. 144 of 1993.¹¹⁹ The ECtHR agreed with the submissions of the Irish Government and the Commission that the Irish authorities were bound to appeal the High Court decision of 21 June 1994 pursuant to their obligations of sincere cooperation under Article 10 EC Treaty and that the Supreme Court had no discretion as regards making the preliminary reference to the ECJ and giving effect to that ruling by reversing the decision of the High Court.¹²⁰ In such

¹¹⁴ Unreported. Related proceedings before the High Court and the Supreme Court for the release of the aircraft are reported at *Bosphorus Hava Yollari Turozm Ve Ticaret Anonim Sirketi v. The Minister for Transport, Energy and Communications* [1997] 2 IR 1.

¹¹⁵ Cited above n. 77.

¹¹⁶ *Bosphorus*, cited above n. 110, at paras. 109-110.

¹¹⁷ *Ibid.*, at paras 115-117.

¹¹⁸ *Ibid.*, at para. 137. Although the ECtHR did not make this explicit, this finding undermined the basis of the decision of the ECommHR in *M & Co.*, above n. 77. The Joint Concurring Opinions of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki and the Concurring Opinion of Judge Reiss make this point explicitly, at para. 1 of each Opinion respectively.

¹¹⁹ *Ibid.*, at para. 145.

¹²⁰ *Ibid.*, at paras. 146-147.

circumstances, where a state is implementing its obligations as a member of an international organisation, the ECtHR affirmed the test developed in *M & Co.*:

‘In the Court’s view, State action taken in compliance with legal obligations is justified as long as the relevant organization is considered to protect fundamental rights as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides’.¹²¹

The ECtHR said that if such equivalent protection was found to exist, which finding was subject to review ‘in the light of any relevant change in fundamental rights’ protection,¹²² there existed a presumption that a state merely implementing obligations arising from membership of an international organisation had not violated the ECHR, although this presumption could be rebutted if the protection of ECHR rights was ‘manifestly deficient.’¹²³ However, the ECtHR emphasised that a state remained ‘fully responsible’ under the ECHR for all acts falling outside its ‘strict international obligations’ as in the case of the ‘international instruments freely entered into’ by the UK in *Matthews*.¹²⁴ Since the ECtHR found that the protection of fundamental rights in EC law¹²⁵ did provide equivalent protection at the relevant time the presumption of compatibility arose in favour of Ireland’s implementation of the 1993 EC Sanctions Regulation. This presumption was not rebutted since the ECtHR concluded that there was no manifest deficiency in the protection of the applicant’s ECHR rights.¹²⁶

In *Bosphorus* the ECtHR showed it is reluctant to adopt the maximalist position of exercising a case by case review over secondary Union legislation for conformity with the ECHR.¹²⁷ This approach can best be attributed to pragmatism pending

¹²¹ *Ibid.*, at para. 155.

¹²² *Ibid.*, at para. 155.

¹²³ *Ibid.*, at para. 157.

¹²⁴ *Ibid.*, at para. 157.

¹²⁵ The ECtHR refers to EC law as opposed to Union law. This may be read as a signal that it is leaving open the issue of whether the protection of fundamental rights in the TEU relating to Second and Third Pillar measures under Title V and VI TEU respectively provides equivalent protection. See Chapter Seven for analysis of the fundamental rights provisions affecting the Third Pillar.

¹²⁶ *Bosphorus*, above n. 110, at para. 166.

¹²⁷ This position was advocated in the Joint Concurring Opinions of Judges Rozakis, Tulkns, Traja, Botoucharov, Zagrebelsky and Garlicki in *Bosphorus*, at para. 3, and in the Concurring Opinion of Judge Reiss, at para. 2. Some academics have argued for a more generalised scrutiny by the ECtHR of Union measures, see: Uerpmann, above n. 4, at pp. 35-37; and Lenaerts, above n. 77, at p. 589.

resolution of the Constitution's future,¹²⁸ and in particular Union accession to the ECHR provided for in Article I-9(2). An extension of the ECHR's jurisdiction to review the legality of secondary Union legislation is problematic while the Union has not acceded to the ECHR.¹²⁹ If the Union accedes to the ECHR, the technical issues of the representation of the Union's institutions in the control bodies of the ECHR will be addressed in the Union's accession treaty.¹³⁰ Union accession to the ECHR would also effectively render the debate over whether Union law provides equivalent protection for fundamental rights to that of the Member States moot since Union measures will be subject to the same review procedures under Articles 33 and Article 34 ECHR.¹³¹ However, the issue of whether the ECtHR would continue to exercise jurisdiction to review the validity of primary Union law and measures of the Union not subject to the jurisdiction of the ECJ will remain even if the Union accedes to the ECHR. Since the Constitution does not confer jurisdiction on the ECJ to review its validity the basis of *Matthews* would be unaffected.¹³²

3.3.2.4 *Conclusions*

The critical criterion of whether a legal order provides effective protection for fundamental rights in states of emergency or political crisis is the existence of an adjudicating authority with jurisdiction to rule on and invalidate emergency measures adopted in violation of such rights. In sovereign states, the identification of that authority is generally provided for in the constitution. The relevant adjudicating authority is subject to the constitution and generally lacks jurisdiction to rule on the validity of the constitution or constitutional amendments.¹³³ However, this general

¹²⁸ The judgment in *Bosphorus* was delivered on 30 June 2005. Ratification of the Constitution was rejected in France in the referendum of 29 May 2005 and in the Netherlands in the referendum of 1 June 2005.

¹²⁹ There are significant drawbacks to such scrutiny resulting from the Union not being a member of the ECHR or party to proceedings before the ECtHR, including, the Union's lack of formal representation before the ECtHR, the non-applicability of the rule of exhaustion of domestic remedies under Article 35(1) ECHR as a condition of admissibility, and the unresolved question of how far the attribution by the ECtHR of a margin of discretion to the Member States would apply to the Union. See further Section 5.7 of Chapter five.

¹³⁰ See Section 5.7.3 of Chapter five.

¹³¹ On the assumption that the Union will accede to all the ECHR Protocols and not make its accession subject to substantive reservations.

¹³² However, Canor argues that the ECtHR could have decided *Matthews* in favour of the applicant by relying on a violation of Article 14 ECHR: above n. 91, at pp. 14-15.

¹³³ This proposition may be subject to qualification in legal systems where the courts are entitled to recognise the natural law rights of the citizen in priority to amendments to the constitution which infringe those rights. Phelan makes such an argument in the context of Irish constitutional law: 'Certain Irish constitutional fundamental rights are possessed by individuals by virtue of their rational

rule is increasingly subject to exception in the case of violations of international fundamental rights standards, and in particular rules of *jus cogens*.¹³⁴

The lack of ECJ jurisdiction to review the legality of primary Union law raises the issue of which authority does have the necessary jurisdiction to control the conformity of Union primary law with international fundamental rights standards. In *Matthews* the ECtHR asserted this jurisdiction insofar as concerns compliance with the ECHR. However, the ECtHR has no jurisdiction to rule on the validity of primary Union law with international fundamental rights other than those incorporated in the ECHR. Indeed, no international court has general competence to rule on the legality of Union primary law with such rights.¹³⁵ In particular, an alleged conflict of a rule of primary Union law with *jus cogens* is only subject to the jurisdiction of the ICJ under Article 66.1(a) of the ICJ Statute in a dispute between parties both to the VCLT and the instrument of primary Union law.¹³⁶ In the absence of an international tribunal with universal jurisdiction to rule on the validity of primary Union law, the constitutional courts of the Member States may, depending on the relevant national constitution, assert a residual competence in this respect.

While in practice it is unlikely that primary Union law will be subject to frequent challenge on grounds of incompatibility with international fundamental rights, *Matthews* demonstrates that such a scenario is realistic. The absence of a single court with recognised jurisdiction to adjudicate on such challenges undermines the effectiveness of the Union's legal order as a bulwark against ill-conceived and flawed primary Union law. The conferral of jurisdiction on the existing ECJ to review primary Union law would risk compounding the problem that the objective of autonomy would take priority over the protection of fundamental rights. As in the

nature and human personality; they are antecedent to positive law and superior to it.' D. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin, Roundhall, 1997), at p. 297. However, natural law is not a realistic basis for the Union's constitutional order: see Schilling (1996(a)), above n. 1, at pp. 401-403.

¹³⁴ See Section 4.4 of Chapter four.

¹³⁵ The ICJ has no jurisdiction over cases involving the Union since Article 34(1) of the ICJ Statute provides: '... only States may be parties in cases before the Court.' Sands and Klein reject the view of Weissberg that the UN should be treated as a state for the purposes of Article 34(1): above n. 72, at p. 355, n. 51. The argument is made by Weissberg, *The International Status of the UN* (New York, Oceana, 1961), at p. 195. *A fortiori* the Union could not be so treated.

¹³⁶ See Cassese, above n. 69, at pp. 203-204. Cassese further points out that, even if reliance is placed on the less restrictive rules of customary international law, there is no compulsory judicial mechanism for determination of a violation of *jus cogens*: *ibid.*, at p. 205.

case of judicial *Kompetenz-Kompetenz*, the creation of a new constitutional court for the Union with jurisdiction to hear such cases would be a preferable option that would bolster the legitimacy of the Union's legal order.

3.4 HIERARCHY OF JUDGMENTS INTERPRETING THE EUROPEAN CONVENTION OF HUMAN RIGHTS

3.4.1 INTRODUCTION

The status of judgments of the ECtHR interpreting the scope and meaning of ECHR rights within Union law raises questions with implications not only for the autonomy of the ECJ but also the coherence and authority of the ECHR system.¹³⁷ This section addresses these questions from the perspective of the ECJ and from that of the national courts of the Member States. Section 3.4.2 examines the extent to which the ECJ is bound to apply the case law of the ECtHR as binding precedent under existing Union law and if the Union accedes to the ECHR. Section 3.4.3 examines whether national courts are obliged in the field of Union law to follow the case law of the ECJ interpreting the ECHR, or in the absence of such case law to make a reference under Article 234 EC Treaty, or whether they may apply the ECtHR's jurisprudence in accordance with the terms of incorporation of the ECHR in domestic law. Both sets of questions raise issues that should be addressed in the instrument of Union accession to the ECHR in order to establish a coherent and unified system for the interpretation of ECHR rights. In the absence of Union accession, the current uncertain status of judgments of decisions of the ECtHR in Union law gives rise to substantial concerns as to whether Union law provides 'equivalent protection' to that provided by the ECHR.¹³⁸

¹³⁷ See on the potential conflicts between the ECHR and Union systems for the protection of fundamental rights: L. Betten, 'Human Rights' (2001) 50 *ICLQ*, pp. 690-701, at pp. 697-701.

¹³⁸ Judge Reiss raised this point in his Concurring Opinion in *Bosphorus*, above n. 110, at para. 3: 'One would conclude that the protection of the Convention right would be manifestly deficient if, in deciding the key question in a case, the ECJ were to depart from the interpretation or the application of the Convention or the Protocols that had already been the subject of well-established ECHR case-law.'

In the following analysis, a distinction is drawn between the normative status of the rights and freedoms listed in the ECHR and that of judgments of the ECtHR.¹³⁹ While the ECHR rights determine the minimum standards the contracting parties must enforce,¹⁴⁰ a judgment of the ECtHR determines the scope and meaning of those standards in a specific case. The status of the ECHR rights and of the judgments of the ECtHR may therefore be subject to separate normative consequences in the legal order of a contracting party.¹⁴¹ In the context of Union law, the treatment of each issue is of particular importance in light of the consequences for the national legal orders arising from the application of the Union law doctrines of supremacy and direct effect.¹⁴² An unduly simplistic application of the doctrine of supremacy may result in separate standards developing for the protection of ECHR rights within the Union sphere and the national sphere. This result would be unacceptable both from the perspective of maintaining equal protection of ECHR rights within the national and Union legal orders and in achieving transparency and coherence of fundamental rights protection. This section examines the problems associated with the normative status of judgments of the ECtHR in Union law. The related issue of the normative status of ECHR rights in Union law is addressed in Section 4.2.4 of Chapter four.

¹³⁹ This distinction is artificial in the sense that the meaning of the ECHR rights can only be understood by reference to the judgments of the ECtHR. However, in theory at least, a national court may decide, depending on the terms of the legislation incorporating the ECHR, to disregard a previous judgment of the ECtHR if it disagrees with its interpretation of the ECHR. Although such a decision of the national court may ground an application under Article 34 ECHR, it would remain authoritative in the national legal system.

¹⁴⁰ Article 53 ECHR provides: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.' See for a discussion of how far Article 53 (ex Art. 60) ECHR sets a minimum standard in the sense both of ceding to a higher standard and ousting a lower standard: L. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *CML Rev.*, pp. 629-680, at pp. 657-659.

¹⁴¹ For example, section 1(2) of the UK's Human Rights Act 1998 (c. 42) determines the status of the ECHR rights specified under that Act, while section 2(1) determines the status of judgments of the ECtHR.

¹⁴² The two doctrines are interlinked since it is generally considered that only a directly effective rule of Union law operates to disapply conflicting national law: see Hartley, above n. 20, at p. 228. However, this limitation on the doctrine of supremacy is not accepted by all commentators: see the conflicting views expressed to the House of Lords European Committee (2003/2004), above n. 9, at paras. 35-36.

3.4.2 HIERARCHY OF JUDGMENTS: ECJ AND ECtHR

It has been argued that the ECJ 'is not legally obliged to follow the interpretation of the European Court of Human Rights'.¹⁴³ This view is supported by the opinion of Advocate General Darmon in *Orkem v. Commission*:

'This Court may therefore adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court. It is not bound, in so far as it does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities.'¹⁴⁴

However, the credibility of the Union's commitment to protect ECHR rights as confirmed in Article 6(2) TEU would be undermined if the ECJ failed to give due weight and authority to the decisions of the ECtHR.¹⁴⁵ Developments in the case law of the ECJ supports this view since, following a long period of infrequent references,¹⁴⁶ there has in recent years been a marked increase in references to decisions of the ECtHR.¹⁴⁷ Indeed in *Limburgse Vinyl Maatschappij* the ECJ explicitly recognised its duty to take account of developments since *Orkem* in the case law of the ECtHR in interpreting Article 6 ECHR relating to the right to remain silent and the right against self-incrimination.¹⁴⁸

¹⁴³ D. Spielmann, 'Comparing ECJ and ECHR Case Law' in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 757-780, at p. 762, n. 21.

¹⁴⁴ Case 374/87, *Orkem v Commission* [1989] ECR 3351, at pp. 3337-3338. The ECJ did not in *Orkem* decide this point. See: R. Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in R. Lawson and M. de Bloijs (eds.) *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Vol. III (Dordrecht, Kluwers, 1994) pp. 219-252, at pp. 228-229.

¹⁴⁵ See for this point: Lenaerts, above n. 77, at pp. 580-581.

¹⁴⁶ B. de Witte, 'The Role of the ECJ in Human Rights', in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 859-897, at p. 878. References to the ECHR itself, however, was more frequent. For a detailed list of ECJ references to specific rights protected under the ECHR, see Hartley, above n. 20, at p. 141, n. 32.

¹⁴⁷ See, for example: Case C-249/96, *Grant v South-West Trains Ltd.* [1998] I-621, at paras. 33 and 34; Case T-185/95P, *Baustahlgewebe GmbH v. Commission* [1998] ECR I-8417, at para. 29; Case C-274/99P, *Bernard Connolly v Commission* (2001) ECR I-1611, at paras. 39-49; Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, at para. 42; and Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, at para. 79; and Joined Cases *C-238/99 P to C-254/99P, Limburgse Vinyl Maatschappij NV (LVM) and others v. Commission* [2002] ECR I-8375, at para. 274.

¹⁴⁸ *Limburgse*, above n. 147, at para. 247; and Case 374/87, *Orkem v Commission* [1989] ECR 3351. The relevant subsequent decisions of the ECtHR cited were: *Funke v France* (1993) 18 EHRR 297;

The increased frequency of references to decisions of the ECtHR by the ECJ has, however, been matched by the development of divergent interpretations of specific areas of the ECHR between the ECJ and the ECtHR.¹⁴⁹ The ECHR does not impose a specific method on a state party implementing its obligations under the ECHR and this extends to the scope of a national court's obligation to adhere to the case law of the ECtHR. However, as Lawson points out, resulting divergences in the case law of the ECtHR and national courts can be addressed by the mechanism of individual applications to the ECtHR under Article 34 ECHR.¹⁵⁰ However, since the Union is not party to the ECHR, that mechanism is not available in the context of ECJ proceedings. A litigant in proceedings involving issues of Union law therefore has no means of testing the interpretation of the ECHR adopted by the ECJ.

Incorporation of the Charter under Article I-9(2) of the Constitution would further increase the risk of divergence since 'experience tends to show that it is difficult to avoid contradictions where two differently worded texts on the same subject-matter are interpreted by two different courts' and the 'provisions of Article 52 and 53 of the EU Charter will probably not be sufficient to avoid the risk of contradictions, certainly not where the application and interpretation of the Charter and the ECHR by national courts is concerned'.¹⁵¹ The problem of divergence was identified by Working Group II (WGII) on 'Incorporation of the Charter/Accession to the ECHR', but its conclusion was to favour preserving the autonomy of the ECJ:

'After accession, the Court of Justice would remain the sole supreme arbiter of questions of Union law and of the validity of Union Acts; the European Court on Human Rights could not be regarded as a superior Court but rather

Saunders v United Kingdom (1996) 23 EHRR 313; and *J.B. v Switzerland* (2001) *Crim. LR* 748. See for a discussion of whether there is a divergence between the case law of the ECJ and the ECtHR in this area: Janet Dine, 'Criminal Law and the Privilege against Self-Incrimination' in S. Peers and A. Ward (eds.) *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 269-286.

¹⁴⁹ For an analysis of divergences between the case law of the ECJ and the ECtHR, see: Spielmann, in Alston (ed.), above n. 143, at pp. 764-771; Costello and Browne, in Kilkelly (ed.), above n. 77, at pp. 39-46; and Lawson, in Lawson and de Blois (eds.), above n. 144, at pp. 234-250.

¹⁵⁰ Lawson, in R. Lawson and M. de Blois (eds.), above n. 144, at pp. 230-231.

¹⁵¹ *Study of Technical and Legal Issues of a Possible EC/EU Accession to the ECHR* dated September 28, 2002 by the Steering Committee for Human Rights (CDDH) of the Council of Europe (the CDDH Report), reproduced in WD No 8 of WG II: at pp. 26-27. Available on the European Convention website. See Section 5.2.4 of Chapter five for an analysis of Article II-112 and II-113 of the Constitution, which correspond to Articles 52 and 53 of the Charter.

as a specialized court exercising external control over the international law obligations of the Union resulting from accession to the ECHR.’¹⁵²

The Declaration on Article I-9(2) of the Constitution endorses this approach but proposes strengthened cooperation between the two bodies as a means to avoid conflict:

‘The Conference agrees that the Union's accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.’¹⁵³

However, there would be significant advantages to the ECJ being subject to an express obligation to take account of the case law of the ECtHR in its construction of the ECHR along the lines of Section 2(1) of the UK's Human Rights Act 1998.¹⁵⁴ It would limit the development of divergent case law between the two courts and minimise uncertainty as to the ECJ's future construction of the ECHR rights in areas where there is well-established case law of the ECtHR. It would also limit the requirement, and the associated procedural delays, for references by national courts to

¹⁵² WGII Final Report, above n. 14, at p. 12. This conclusion is, however, debatable. As the CDDH Report makes clear, a procedure before the ECJ would not be considered, at least following Union accession, as a procedure of ‘international investigation or settlement’ in the sense of Article 35(2)(b) ECHR and ‘the mere fact that a case has been dealt with by the Luxembourg Court should not prevent the Strasbourg Court from accepting an application as admissible’: above n. 151, at pp. 16-17. See also Section 4.2.4.6 of Chapter four on Article 35(2)(b) ECHR. If the ECtHR found that a judgment of the ECJ had failed to protect an ECHR right, the ECJ would, following Union accession, be obliged to follow the decision of the ECtHR under Article 46(1) ECHR provided the Union was a party to the proceedings before the ECtHR. Furthermore, Protocol No. 14 ECHR introduces in Articles 46(4)-(5) ECHR a new procedure whereby a refusal to comply with a judgment may be referred to the ECtHR by the Committee of Ministers, and if confirmed, the ECtHR must refer the matter back to the Committee ‘for consideration of the measures to be taken’: ETS No. 194; signed 13 May 2004 (not yet in force). Protocol 14 is based on the CDDH report to the Council of Europe of 8 April 2003 on *Guaranteeing the Long-term Effectiveness of the ECHR*: CM(2003)55. Available at: <http://www.coe.int/T/F/Droits_de_l'Homme/2003cm55.asp#TopOfPage> Accessed 1 September 2005.

¹⁵³ [2004] OJ C310/420.

¹⁵⁴ ‘A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.’ Available on the HMSO website at: <<http://www.uk-legislation.hmso.gov.uk/acts.htm>>.

the ECJ on the interpretation of the ECHR within the scope of Union law since the meaning of the ECHR as construed by the ECtHR could be considered as falling within the *acte clair* doctrine.¹⁵⁵ In response to the argument that such an obligation would restrict the ECJ's ability to construe the ECHR in a way that provides greater protection than that provided by the ECtHR's jurisprudence,¹⁵⁶ the ECtHR is established under the ECHR as the judicial institution with primary responsibility for its interpretation and this mandate would be undermined if the ECJ developed as a competing source of precedent.¹⁵⁷

The Union's accession treaty to the ECHR should therefore recognise that the ECtHR is the superior court as regards interpretation of the ECHR and that the ECJ should be bound to take account of a ruling of the ECtHR.¹⁵⁸ This solution would maximize the benefits of accession by the Union to the ECHR¹⁵⁹ and limit possible inconsistencies between decisions of the ECJ and the ECtHR.¹⁶⁰ Article II-112(3) of the Constitution in any event obliges the ECJ to review the relevant case law of the ECtHR in order to ensure that those Charter rights which correspond to ECHR rights have the same 'meaning and scope' as the ECHR rights.¹⁶¹

¹⁵⁵ The criteria for the application of the *acte clair* doctrine established in *CILFIT* would need to be developed accordingly: Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

¹⁵⁶ Costello and Browne refer to the 'self-limiting tendency' of the ECtHR, reflected in doctrines such as the margin of appreciation and deference to common established values of the signatory states, which might not be appropriate to the ECJ in the context of judicial review, in Kilkelly (ed.), above n. 77, at p. 45. See generally, Pietro Sardaro, '*Jus Non Dicere* for allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court', (2003) 6 *EHRLR*, pp. 601-630.

¹⁵⁷ It should also be noted that Article II-112(3) of the Constitution, which corresponds to Article 52(3) of the Charter, provides that Union law may provide more 'extensive protection' for Charter rights corresponding to ECHR rights than the meaning and scope of those rights laid down in the ECHR. See further Section 5.2.4. of Chapter five.

¹⁵⁸ On the proposed modalities of accession by the Union to the ECHR see the discussion paper of June 18, 2002 forwarded to the Convention Secretariat by WG II (CONV 1116/02). Available on the European Convention website. See also the CDDH Report, above n. 151, at pp. 18-19.

¹⁵⁹ For further arguments in favour of the ECtHR as final arbiter on the protection of human rights in the Union see: Betten, above n. 137, at pp. 698-699 and I. Canor, above n. 91, at pp. 20-21.

¹⁶⁰ See the CDDH Report, above n. 151, at paras. 78-82. Conflicts could still arise where the ECtHR had not ruled on an issue or subsequently over-ruled its existing case law.

¹⁶¹ See further on Article 112(3), Section 5.2.4 of Chapter five.

3.4.3 NATIONAL COURTS AND THE ECHR: A TALE OF TWO MASTERS

The status of decisions of the ECtHR in Union law raises two further questions: the treatment by national courts of decisions of the ECJ interpreting the ECHR,¹⁶² and the scope of their obligation to refer questions of interpretation of the ECHR to the ECJ under the preliminary reference procedure.¹⁶³ These issues are relevant to the autonomy of the Union's legal order both under the current system, whereby ECHR rights are treated as general principles of Union law, and if the Union accedes to the ECHR when such rights will also be international obligations of the Union. In both cases, the existence or absence of an obligation for national courts to follow or make a preliminary reference for the ECJ's interpretation of ECHR rights in cases falling within the scope of Union law will have substantial implications for the relative authority of the ECJ and the ECtHR. Moreover, the resolution of these questions will impact on the relationship between the national courts and the ECJ with consequences for the relative autonomy of the national and Union legal orders.

On the first issue, the ECHR does not oblige the contracting parties to secure adherence by the national courts to the jurisprudence of the ECtHR, except under Article 46(1) ECHR in relation to a final judgment in any case to which the state is party. Therefore it is left to each contracting party to determine the status in domestic law of judgments of the ECtHR.¹⁶⁴ However, this relative autonomy of the national legal order¹⁶⁵ may be circumscribed in the case of a judgment of the ECJ interpreting the ECHR and any relevant case law of the ECtHR since such an interpretation is technically one of general principles of Union law and not of the ECHR.¹⁶⁶ Since the

¹⁶² The analysis of this issue is limited here to the precedential authority for national courts of past decisions of the ECJ interpreting the ECHR. The separate issue of a potential conflict in a specific case between the ECJ's interpretation of the ECHR resulting from a preliminary reference and that of a national court is addressed in Section 4.2.4.4 of Chapter four.

¹⁶³ As set out in Article 234 EC Treaty and Article III-369 of the Constitution. For the specific preliminary reference procedures applicable to the AFSJ under Article 35(1) TEU and Article 68(1) EC Treaty, see Chapter seven.

¹⁶⁴ Article 2 of the UK's Human Rights Act 1998 provides a court or tribunal 'must take account' of any judgment, decision, declaration or advisory opinion of the ECtHR. Section 4 of the Republic of Ireland's European Convention on Human Rights Act 2003 requires 'judicial notice' shall be taken of 'any declaration, decision, advisory opinion or judgment' of the ECtHR.

¹⁶⁵ Relative because Articles 1 and 13 ECHR impose an overall obligation on the signatory states to secure the ECHR rights and freedoms and provide an effective remedy for violations. Compliance with this obligation is ultimately to be decided by the ECtHR.

¹⁶⁶ See for further analysis of the status of fundamental rights as general principles of Union law Section 4.2.4 of Chapter four.

ECJ has developed a doctrine of binding precedent, at least in the context of Article 234 EC Treaty proceedings,¹⁶⁷ it is arguable that the national courts of the Member States are therefore obliged to follow the ECJ's ruling on the scope of ECHR rights within the field of Union law if the ruling satisfies the *CILFIT* criteria. However, this result would be undesirable since it could result in divergent interpretations of an ECHR right depending on whether the case involve issues within the field of Union law or national law and undermines the authority of the ECtHR. It is therefore submitted that the ECJ's interpretation of ECHR rights, or rights under any other fundamental rights treaty forming part of the general principles case law, should be treated as falling outside the scope of Union law for the purposes of the *CILFIT* doctrine.¹⁶⁸

The second issue is to determine the circumstances under which the national courts of the Member States are obliged to refer a question to the ECJ that requires construction of the ECHR in the context of proceedings where such construction is necessary for the national court to determine the validity of national measures falling within the scope of Union law.¹⁶⁹ Since the ECHR rights and freedoms in the Union legal order are currently treated as general principles of Union law,¹⁷⁰ the position is the same as with respect to the obligation to refer the interpretation of any other

¹⁶⁷ 'Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.': *CILFIT*, above n. 155, at para. 16. See also Cases 28-30/62, *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31. On the development of the ECJ's doctrine of precedent, see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (3rd edn.) (Oxford, OUP, 2003), at pp. 439-453.

¹⁶⁸ Of course, it may be difficult to disentangle the part of a judgment of the ECJ interpreting the ECHR and the part applying that interpretation to the determination of the general principle of Union law: see, for example, paragraphs 79 to 80 of *Schmidberger*, above n. 147, where the ECJ refers to both case law of the ECJ and the ECtHR in establishing the criteria for justified limitations to the right of freedom of expression and assembly under Articles 10 and 11 ECHR.

¹⁶⁹ Such a question was implicit in the references to the ECJ in both *Schmidberger*, cited above n. 147, and Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*; Judgment of 14 October 2004; [2005] 1 *CMLR* 5. Under the *Foto-Frost* principle, cited above n. 95, national courts are always obliged to refer a question as to the invalidity of Union measures.

¹⁷⁰ If the Union accedes to the ECHR, the interpretation of the ECHR will fall within the ECJ's jurisdiction under Article III-369(b) of the Constitution on the basis of the application of the ECJ's expansive interpretation of its jurisdiction under Article 234(b) EC Treaty to interpret international agreements concluded by the Community: Case 181/73 *Haegeman v Belgium* [1974] ECR 449, at paras. 2 to 6. See Peters, above n. 1, at p. 17.

general principle of Union law. While Article 234(b) EC Treaty does not specifically refer to general principles as a category in respect of which the ECJ may give a preliminary ruling, the ECJ has provided such rulings in cases where the interpretation of the scope of a general principle is necessary for the interpretation of a provision of the EC Treaty or a Union measure or for determining its validity.¹⁷¹ However, this practice of the ECJ falls short of imposing an obligation of referral of a question of construction of the ECHR on courts of last instance of a Member State within the meaning of the third paragraph of Article 234 EC Treaty but rather highlights the uncertainties created by treating ECHR rights as general principles of Union law.¹⁷² It is submitted that in such circumstances the national court should be entitled to refer directly to the case law of the ECHR without referring the issue to the ECJ.

Indeed, it is debatable how far an obligation on a national court to refer the interpretation of an ECHR right to the ECJ would be compatible with the Member State's obligations under Article 55 ECHR.¹⁷³ Article 55 ECHR provides:

‘The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purposes of submitting by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.’

The only decision directly on the scope of Article 55 ECHR was given by the ECommHR in *Cyprus v Turkey*.¹⁷⁴ The ECommHR rejected Turkey's arguments that Article 55 ECHR applied to render the application inadmissible on the grounds the parties had undertaken by ‘special agreement’ to resolve the dispute within the

¹⁷¹ The ECJ in determining the scope of its jurisdiction under Article 234 EC Treaty generally uses the umbrella term ‘Community law’ which includes general principles: ‘In that regard, according to settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate ..’: *Carpenter*, cited above n. 147, at para. 30. See also Hartley, above n. 20, at p. 273.

¹⁷² See Section 4.2.4.4 of Chapter four for analysis of the situation where the ECJ does rule on the meaning of an ECHR provision and the referring court disagrees with that interpretation.

¹⁷³ See in this sense Besselink, above n. 140, at p. 656.

¹⁷⁴ App. No. 25781/94; Admissibility Decision of 28 June 1996, (1997) 23 EHRR 244. The ECtHR did not address the issue on being referred the case by the ECommHR and the Government of Cyprus in its judgment of 10 May 2001: (2002) 35 EHRR 30.

framework of the UN. The ECommHR stated that a contracting party could only rely on a special agreement within the meaning of Article 55 (ex Art. 62) ECHR to withdraw a dispute from the jurisdiction of the ECHR organs in ‘exceptional circumstances’ and held:

‘The principle stipulated in Article 62 (Art. 62) is the monopoly of the Convention institutions for deciding disputes arising out of the interpretation and application of the Convention ... the performance of its functions under ... the Convention cannot in any way be impeded by the fact that certain aspects of the situation underlying an application filed with it are being dealt with, from a different angle, by other international bodies.’¹⁷⁵

It is, however, unclear from this decision whether Article 55 ECHR is limited to interstate disputes or whether it also applies to disputes within the jurisdiction of a single Member State.¹⁷⁶ Since Article 55 ECHR simply refers to ‘a dispute arising out of the interpretation or application of this Convention’, and is not limited to disputes between ECHR contracting parties, the latter interpretation is preferable. If that is correct, the compatibility of the Article 234 EC Treaty reference procedure with Article 55 ECHR will depend on whether a reference is a ‘means of settlement’ within the meaning of Article 55 ECHR.¹⁷⁷ If the national court were obliged to follow the ECJ’s ruling on the meaning of the ECHR there would be grounds for the ECtHR to take the view that such a system did constitute a ‘settlement’.¹⁷⁸ In order to eliminate this uncertainty, it would be preferable in order to achieve uniform interpretation of the ECHR, both within the ambit of Union law and national law, that national courts could refer directly to the jurisprudence of the ECtHR without submitting the question to the ECJ. This result could be achieved by stipulating in the

¹⁷⁵ *Ibid.*, at pp. 282-283.

¹⁷⁶ *Cyprus v Turkey* involved a dispute between two contracting parties to the ECHR and therefore did not need to address the issue.

¹⁷⁷ A separate question is as to the meaning of the word ‘petition’ in Article 55 ECHR. The ECommHR in *Cyprus v Turkey* on this point simply noted that it was not provided in the agreements establishing intercommunal talks that any dispute as to the interpretation of the ECHR can be submitted to the Committee on Missing Persons ‘by way of petition’: above n. 174, at p. 30.

¹⁷⁸ The ECtHR did not need to address this issue in *Bosphorus*, cited above n. 110, since the question referred by the Irish Supreme Court related to the interpretation of an EC Regulation and not its conformity with the ECHR.

ECHR accession agreement that the ECJ is bound by judgments of the ECtHR or, in the absence of accession, by adapting the *CILFIT* criteria.¹⁷⁹

3.5 GENERAL CONCLUSIONS

The autonomy of Union law has been a pivotal value in determining the relationship of Union law both to international law and the national law of the Member States. While securing the autonomy of Union law served a legitimate purpose in creating a legal order robust enough to impose itself on the Member States during its early development, the pursuit of autonomy as an objective in an era characterised by globalisation and supranationalism is outdated.¹⁸⁰ The doctrine of supremacy should be adapted to recognise the plurality of sources of international norms in the field of fundamental rights.¹⁸¹ Equal status for such norms both within the Union and national legal orders should be the objective. This approach reflects the reality of interdependence rather than autonomy that forms the basis of the relationship between Union and national law: ‘European community law is not an autonomous legal system. It is integrated with the legal systems of the Member States at various levels and in many forms.’¹⁸²

It is submitted that national courts of the Member States should be empowered, outside the confines of a specific case referral to the ECJ, to construe international standards within the area of Union law in according with the canons of international law. This approach would foster a harmonious construction of international fundamental rights provisions both within and outside the scope of Union law. The normative status of such rights within the Union’s legal order would not be diminished since both the national courts and the Union’s courts would be applying the same principles in construing such standards. In order to facilitate this partnership,

¹⁷⁹ See also the CDDH Report, above n. 151, especially its discussion at paras. 75-77 on the feasibility of establishing an alternative mechanism for references by the ECJ to the ECtHR on the interpretation of the ECHR. However, the delays associated with such a procedure are a dissuasive factor.

¹⁸⁰ See on the impact of globalisation on the US constitutional order: M. Tushnet, *The New Constitutional Order* (Princeton, Princeton University Press, 2003).

¹⁸¹ See for a discussion of alternative models for the relationship of Union and national law: Neil MacCormick, ‘Liberalism, Nationalism and the Post-sovereign State’, in Richard Bellamy and Dario Castiglione (eds.) *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford, Blackwell, 1996), pp. 141-155, especially at pp. 146-150.

¹⁸² Eeckhout (1998), above n. 5, at p. 2.

international fundamental rights should retain their international law character and not be treated as transformed into Union law.¹⁸³

Pursuit of the conflicting objectives of autonomy and a system of fundamental rights protection based primarily on standards derived from international law has resulted in a constitutional order that is in its relationship to international law complex, restrictive and contradictory.¹⁸⁴ Complex in that there is no clear constitutional ordering in the Treaties or the Constitution of the relationship between the two legal systems;¹⁸⁵ restrictive insofar as the ECJ has rejected a broad Union competence in the field of fundamental rights, including the power to accede to the ECHR;¹⁸⁶ and contradictory insofar as the ECJ has veered between a monist and dualist approach to the relationship.¹⁸⁷ The prioritisation of the autonomy of the Union's legal order by the ECJ, culminating in *Opinion 2/94*,¹⁸⁸ has meant the Union has reached an *impasse* in its relationship to international fundamental rights, and in particular the ECHR, that can best be resolved through Union accession to the ECHR.¹⁸⁹

¹⁸³ Peters advocates transposition: 'However, transposing international rules strengthens them by allowing them to partake in the special effects of Community law. If changed into Community law, rules of international origin have the status of immediately valid, superior law in all Member States.': above n. 1, at p. 34. However, this presupposes that Union law affords more effective protection to international fundamental rights than national law. However, there is no compelling reason to assume that the ECJ's construction of such standards will be more, or less, progressive than national courts.

¹⁸⁴ For a perceptive analysis of the Community's 'aspiration for autonomy' and its impact on how the Community legal order addresses international law, see Uerpman, above n. 4, at pp. 43-46.

¹⁸⁵ Article 300(7) EC Treaty, which provides Article 300 EC Treaty agreements 'shall be binding on the institutions of the Community and on the Member States', has been construed as supporting either a monist relationship (Uerpman, above n. 4, at p. 27) or a dualist relationship (Peters, above n. 1, at p. 31). Eeckhout convincingly argues that it does neither: above n. 5, at p. 277. The Union's relationship to international law was not specifically discussed by any of the European Convention Working Groups. Working Group III on Legal Personality was the logical place to address these issues but had no mandate to do so: see Final Report of Working Group III of 1 October 2002, CONV 305/02, WG III 16. Available on the European Convention website.

¹⁸⁶ *Opinion 2/94* [1996] ECR I-1759. On whether *Opinion 2/94* was motivated by autonomy concerns *vis-à-vis* the ECtHR, see Uerpman, above n. 4, at p. 30. See also J.H.H. Weiler and S.C. Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences' in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 147-165.

¹⁸⁷ Peters refers to the continuing debate as to whether monism or dualism is more appropriate to describe the relationship between Union and International law: above n. 1, at p. 20, n. 48. For the view that the ECJ has adopted a dualist perspective view based on an analysis of *Fediol v. Commission* (Case 70/87 [1989] ECR 1781) and *Nakajima v. Council* (Case C-69/89 [1991] ECR I-2069) on the legal status of the World Trade Organisation (WTO) agreements in the Union's legal order, see: Uerpman, above n. 4, at pp. 26-28. Peters prefers the term 'communitarization' of international law to describe 'the incorporation of international law through alteration of the legal character of the rule, without modification of its language or contents': above n. 1, at p. 35.

¹⁸⁸ See Canor, above n. 91, at p. 4, n. 3: 'Clearly, the political reason for giving the opinion was to free the Court of Justice from obedience to the rulings of institutions external to it.'

¹⁸⁹ See Chapter five for the analysis underlying this conclusion.

4

**THE NORMATIVE STATUS OF INTERNATIONAL FUNDAMENTAL RIGHTS
IN UNION LAW****4.1 INTRODUCTION**

This Chapter examines the normative status in the Union's legal order of international fundamental rights based on treaties and customary international law, including the specific issues raised by fundamental rights recognized as constituting *jus cogens*. The impact of the Constitution on the existing normative status of fundamental rights in Union law is also assessed. The purpose of this Chapter is to determine how effectively the Union's legal order integrates these rights. The issue of normative status is addressed here from a general perspective while a specific case study of the normative status in Union law of the principle of *non-refoulement* is undertaken in Chapter eight.

The first part of this Chapter critically analyses the legal status of fundamental rights treaties in the Union's legal order. Since neither the Union nor the EC has acceded to any fundamental rights treaty, this analysis is conducted in the context of three mechanisms whereby normative effect may be given to such treaties in the Union's legal order. The first mechanism is through the transfer of competences from the Member States to the Union resulting in the Union assuming the obligations and rights of the Member States under the relevant treaty. The second mechanism is through the application of Article 307 EC Treaty that prohibits pre-accession agreements with third countries concluded by a Member State from being affected by the application of the EC Treaty. The third, and most significant, mechanism is the reception of international fundamental rights based on treaties into Union law either as general principles of Union law or through a reference in the TEU or the EC Treaty, and in particular the reference to the ECHR in Article 6(2) TEU.¹

¹ The legal consequences of the reference in Article 63(1) EC Treaty to the Geneva Convention of 28 July 1951 (the Refugee Convention), in force 22 April 1954, 189 UNTS 137, is analysed in Section 8.3.2.3 of Chapter eight. Unless the context otherwise requires, reference to the Refugee Convention includes

The second part of this Chapter examines the normative status of rules of customary international law in Union law. Firstly, the status of such rules is reviewed in the context of a comparison with the treatment of other fundamental rights standards recognized in Union law as general principles of law. Secondly, an analysis is conducted of the case law of the ECJ on the status of customary international law in the Union's legal order and the criteria for judicial review of Union measures based on a violation of customary international law. In conclusion, it is argued that insufficient weight has been attached by the ECJ to customary international law as a source of fundamental rights protection and that deficiency has not been addressed by the Constitution.

The third part of the Chapter considers the impact of the developing international law on norms ascribed the status of *jus cogens* on the Union's legal order. Such norms are based on both treaty and customary international law and as a result raise issues common to both sources in respect of their reception into Union law. However, unlike international obligations of the Union based on treaties and customary international law, *jus cogens* take precedence over both primary and secondary Union law.² *Jus cogens* therefore gives rise to specific jurisdictional issues in the case of conflict with Union primary law. However, *jus cogens* may also give rise to problems in the relationship between national and Union law in the event a rule of *jus cogens* conflicts with a rule of primary or secondary Union law. The potentially conflicting obligations of the Member States under international law and Union law are analysed in this context.

reference to the New York Protocol of 31 January 1967 (the New York Protocol), in force 4 October 1967: 606 UNTS 267.

² '...it is virtually unanimously agreed that international law and Community rules stand in the following hierarchy: international *jus cogens*, which cannot be abrogated, is *per definitionem* superior to all other law. It is followed by the EC Treaty. International norms (both general rules and treaties binding the EC) rank below the EC Treaty. Then follows Community legislation.' A. Peters, 'The Position of International Law within the Community Legal Order' (1997) *German Yearbook of International Law*, pp. 1-77, at pp. 37-38.

4.2 THE NORMATIVE STATUS OF FUNDAMENTAL RIGHTS TREATIES IN UNION LAW

4.2.1 UNION ACCESSION TO FUNDAMENTAL RIGHTS TREATIES

Article 1 TEU provides: ‘The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.’ Of the three constituents of the Union,³ only the EC and the European Atomic Energy Community have expressly been conferred with international legal personality.⁴ However, notwithstanding the lack of express conferment, it is generally accepted that, at least since the introduction of Article 24 TEU by the Treaty of Amsterdam, the Union also has international legal personality.⁵ Article 38 TEU provides Article 24 TEU agreements may also cover matters falling under the Third Pillar. This view has been confirmed by the fact that the Union has concluded a number of international agreements on the basis of Articles 24 and 38 TEU.⁶ Working Group III on Legal Personality recommended expressly conferring a single legal personality on the Union in the new Constitution and this recommendation was adopted in Article I-7 of the Constitution.⁷

However, the Union does not participate directly in either the European or UN structures for the protection of fundamental rights. This failure is reflected in both the Union’s failure to adhere to the relevant international organisations for the protection of

³ The ECSC Treaty expired on 23 July 2002.

⁴ See Article 281 EC Treaty and Article 184 Euratom Treaty.

⁵ Prior to Article 24 TEU, the basis for implying international legal personality for the Union was the Advisory Opinion of the ICJ in the *Reparation for Injuries Suffered in the Services of the United Nations*: [1949] ICJ Rep 174. For the application of the case to the Union, see Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, OUP, 2004) at pp. 155-157. On the effect of the introduction of Article 24 TEU, see Eeckhout, *ibid.*, at pp. 157-160; Hartley, *The Foundations of European Community Law* (5th edn.) (Oxford, OUP, 2003), at pp. 159-160; and Craig and de Búrca, *EU Law: Text, Cases and Materials* (3rd edn.) (Oxford, OUP, 2003), at p. 131. See generally, Dominic McGoldrick, *International Relations Law of the European Union* (Harlow, Longman, 1997), at pp. 26-39; and Nanette Neuwahl, ‘Legal Personality of the European Union – International and Institutional Aspects’ in V. Kronenberger (ed.), *The EU and the International Legal Order: Discord or Harmony* (Hague, Asser Press, 2001), at pp. 3-24.

⁶ A list of such agreements is given by Eeckhout, above n. 5, at pp. 159-160, n. 86.

⁷ ‘The Union shall have legal personality.’ See Final Report of Working Group III on Legal Personality of 1 October 2002: CONV 305/02. Available on the European Convention website.

fundamental rights⁸ and its failure to accede to the UN Conventions and the European Conventions. The most significant attempt by the EC to adhere to a fundamental rights treaty, the ECHR, foundered on the ECJ's restricted reading of the EC's powers in *Opinion 2/94*.⁹ Notwithstanding *Opinion 2/94*, it has been argued the EC could accede to other Council of Europe treaties without amending the EC Treaty.¹⁰ However, attempts to amend the European Social Charter to allow membership of the EC have failed.¹¹ The Constitution does not explicitly confer a general competence on the Union in the field of fundamental rights and indeed the provisions for incorporation of the Charter and Union accession to the ECHR were premised on the opposite basis.¹² However, it has been argued that Articles I-2 and I-3 of the Constitution may be interpreted as conferring

⁸ Union membership of international organizations has reflected the predominant trade orientation of EC policy in the international arena. EC membership is currently limited to the European Bank for Reconstruction and Development, the Food and Agriculture Organization, the World Trade Organization, and a number of specialised fisheries organisations. Eeckhout discusses in detail the powers under the Treaty for the EC to join international organizations and the reasons which have militated against extensive use of those powers: above n. 5, at pp. 199-206.

⁹ *Accession to the ECHR, re* [1996] ECR I-1759. Eeckhout analyses *Opinion 2/94* in the context of the principle of the autonomy of the Union's legal order: above n. 5, at p. 208.

¹⁰ See Alston and Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 3-66, at p. 31. They refer as examples to: the European Social Charter of 18 October 1961, in force 26 February 1965 (ETS No. 35); the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 February 1981, in force 1 October 1985 (ETS No. 108), and the 1997 European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of 4 April 1997, in force 1 December 1999 (ETS No. 164). A number of recent Council of Europe Conventions provide for signature by the EC, although the EC has not to date signed any of them. See, for example: the 1997 Convention on Human Rights and Biomedicine; the 1998 Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings of 12 January 1998, in force 1 March 2001 (ETS No. 168); the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin of 24 January 2002, not in force (ETS No. 186); the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research of 25 January 2005, not in force (ETS No. 195); and the Convention on the Prevention of Terrorism of 16 May 2005, not in force (ETS No. 196). Eeckhout, above n. 5, at p. 471, refers to an exclusive EC competence to conclude Protocol 12 to the ECHR of 4 November 2000, in force 1 April 2005 (ETS 177), 'in so far as the provisions of that Protocol affect Community legislation.'. See generally: Weiler and Fries, 'A Human Rights Policy for the European Community and Union: the Question of Competences' in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 147-165.

¹¹ See A. Clapham, 'Human Rights in the Common Foreign Policy' in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 627-683, at p. 676.

¹² Working Group II on Incorporation of the Charter/Accession to the ECHR (WGII) was concerned to ensure that accession by the Union to the ECHR 'would thus not lead to any extension of the Union's competences, let alone to the establishment of a general competence of the Union on fundamental rights': WGII Final Report on Incorporation of the Charter/Accession to the ECHR; CONV 354/02: WG II 16, Brussels, 22 October 2002, at p. 13. Available on the European Convention website.

increased powers for the Union to ‘promote human rights regardless of context and across the internal/exterior divide.’¹³

The Union’s failure to accede to international instruments for the protection of fundamental right is in part to be explained by the technical difficulties of accession or accession arising from the fact that the Union is an international organisation rather than a state. However, the limited scope of the technical amendments necessary to permit Union accession to the ECHR shows such obstacles can be surmounted.¹⁴ Adoption of the Constitution and subsequent accession to the ECHR may, however, not be sufficient to overcome the substantial political barriers and competence problems that have to date prevented Union membership of other international treaties or organisations for the protection of fundamental rights.¹⁵ The following sections examine the alternative mechanisms for providing normative effect to fundamental rights treaties in Union law and assess their effectiveness as a substitute for direct Union membership.

4.2.2 TRANSFER OF NATIONAL COMPETENCES TO THE UNION

4.2.2.1 Introduction

One mechanism by which the EC may be treated under Union law as bound by international agreements entered into by the Member States is in areas where it subsequently exercises internal competence.¹⁶ In *International Fruit Company*, the ECJ

¹³ Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, OUP, 2004), at p. 116.

¹⁴ See the *Study of Technical and Legal Issues of a Possible EC/EU Accession to the ECHR* of 28 September 2002 by the Steering Committee for Human Rights of the Council of Europe (CDDH Report). Other parties to the relevant treaty may of course be unwilling to make the necessary amendments to facilitate Union membership. For an analysis of the various obstacles to EC membership of international organisations and also the problems associated with EC membership of GATT and the WTO: see Eeckhout, above n. 5, at pp. 200-206.

¹⁵ For an analysis of political and ideological constraints to Union adoption of fundamental rights instruments, see Williams, above n. 13, at pp. 194-196. Articles III-323 and III-327 of the Constitution expand the current scope of the Union’s powers to conclude agreements and maintain relations with international organizations. These provisions are based on recommendations of Working Group VII: *Final Report of Working Group VII on External Action* of 16 December 2002: CONV 459/02. Available on the European Convention website.

¹⁶ A separate question is whether the Union is bound to comply with the international obligations of the Member States by the international law doctrine of succession. This theory was applied to Community succession to GATT and then extended in terms of ‘functional’ succession in respect of the ECHR: see, P. Pescatore, ‘La Cour de Justice des Communautés Européennes et la Convention Européenne des Droits de

held: ‘..in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area covered by the General Agreement [GATT], the provisions of that agreement have the effect of binding the Community’.¹⁷ In *Procureur Général v. Arbelaz-Emmezabel*, Advocate-General Capotorti stated that four requirements had been established in *International Fruit Company* for determining if the EC has been ‘subrogated’ to the obligations of the Member States:

‘.. the Member States were all already parties to the agreement when the EEC Treaty was concluded; that it was the wish of those States to pledge the Community to observe the agreement, its aims being shared by the Community; that actions should actually have been taken by the Community institutions within the framework of the agreement; and that the other contracting parties should have recognized that powers had effectively been transferred to the Community with respect to the subject-matter of the agreement.’¹⁸

It is unclear, however, whether these requirements are specific to GATT or whether the ECJ would relax them in the context of other international agreements. Indeed, in *Arbelaz-Emmezabel* the requirement for prior membership of a treaty by all Member States was impliedly waived. The ECJ held that the interim EC regime established to conserve fishing stocks in respect of Spanish vessels in French territorial waters ‘replaced the prior international obligations existing between certain Member States, such as France and Spain’ notwithstanding that these prior obligations arose from the London Fisheries Convention of 9 March 1964 and an implementing Franco-Spanish

l’Homme’, in G. Wiarda, F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension* (Cologne, Heymann, 1988), pp. 441-455. Clapham has suggested that by application of the doctrine of succession, the Community ‘is bound by the norms contained in’ the International Covenant on Economic, Social and Cultural Rights (ICESCR) and that in consequence the Commission may be obliged to comply with the monitoring and reporting obligations under the ICESCR: in Alston (ed.), above n. 11, at pp. 658-659. Clapham also argues the same principles may be applicable to other UN and European Conventions to which all the Member States are party such, as the ICEAFDW, the CRC, the ECHR, and the Social Charter. However, the validity of this extension in strict legal terms is doubtful: see Uerpman, ‘International Law as an Element of European Constitutional Law: International Supplementary Constitutions’ (2003) Jean Monnet Working Paper No. 9/03, at pp. 31-37. Available at: <<http://www.jeanmonnet-program.org/papers/03/030901-02.html>>.

¹⁷ Cases 21-24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, at para. 18.

¹⁸ Case 181/80 [1981] ECR 2961, at p. 2987. See for comment Hartley, above n. 5, at pp. 181-182.

agreement of 26 March 1967, both of which post-dated the Treaty of Rome.¹⁹ It has been further questioned whether a transfer of exclusive competence from the Member States to the Union is required under the *International Fruit Company* doctrine.²⁰ A relaxation of the requirement for all Member States to be members of the relevant international agreement would further expand the scope of the doctrine.

The following sections examine the potential application of the *International Fruit Company* doctrine to the UN Charter and UN Security Council Resolutions, the Refugee Convention, and the ECHR. While the doctrine is of potential application to other UN and European Conventions, the analysis of these key international instruments allows an assessment to be made of the potential effectiveness of the doctrine as a substitute for direct Union accession to international treaties for the protection of fundamental rights.

4.2.2.2 *The UN Charter and UN Security Council Resolutions*

‘The Charter does not establish any particular regime of human rights protection and the emphasis is upon the non-intervention in the affairs of member States of the United Nations.’²¹ However, the UN Charter does refer to fundamental rights. Article 1(3) includes in the purposes of the UN the promotion and respect for ‘human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’ and Article 55(c) requires the UN to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.’²²

The Security Council plays an important role in the protection of fundamental rights and in particular under Chapters VI and VII of the UN Charter in the maintenance of

¹⁹ *Arbelaiz-Emmezabel*, at para. 30. See also, *ibid.*, at para. 13 where the ECJ emphasized that the parties to the London Convention ‘must have known’ that at a certain time the EC institutions would exercise on behalf of the Member States the conservation measures provided for in the Convention.

²⁰ Eeckhout, above n. 5, at p. 438.

²¹ Rehman, *International Human Rights Law: A Practical Approach* (Harlow, 2003), at p. 27.

²² For an analysis of the provisions in the UN Charter concerning fundamental rights see: A. Cassese, *International Law* (2nd edn.) (Oxford, OUP, 2005), at pp. 331-333 and 377-379; and Rehman, above n. 21, at pp. 24-26.

international peace and security.²³ Article 41 UN Charter provides the basis for the Security Council to adopt sanctions against states, groups or individuals in order to maintain or restore international peace and security:

‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Member States of the United Nations to apply such measures. These may include complete or partial interruption of economic relations, and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’²⁴

This section first examines whether, independently of the application of the *International Fruit Company* doctrine, the Union is bound by the UN Charter and UN Security Council Resolutions in international law.²⁵ It has been argued that insofar as obligations under the UN Charter exceed those obligations arising under general international law they do not bind non-members.²⁶ However, Article 2(6) of the UN Charter requires the UN to ensure that ‘States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.’ While this obligation is imposed on the UN and refers to states which are non-members, the logic of Articles 2(6) and 2(7)²⁷ of the UN Charter and the practice of the Security Council in seeking compliance by non-members of the UN, including international organisations,²⁸ with sanctions resolutions leads to the conclusion that the Union is, as a minimum, bound by measures adopted under Chapter VII of the UN Charter.

²³ See Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart Publishing, 2004).

²⁴ For examples of Security Council Resolutions adopted either explicitly or by implication under Article 41 of the UN Charter, see Cassese, above n. 22, at p. 341, n. 2. UN Security Council resolutions are available at: <<http://www.un.org/documents/scres.htm>>.

²⁵ See: S. Bohr, ‘Sanctions by the United Nations Security Council and the European Community’ (1993) 4 *EJIL*, pp. 256-268; and Ricardo Pavoni, ‘UN Sanctions in EU and National Law’ (1999) 48 *ICLQ*, pp. 582-613.

²⁶ Eeckhout concludes that the ‘the UN Charter does not appear to bind the EU or the EC on the basis of international law.’: above n. 5, at p. 437.

²⁷ Article 2(7) of the UN Charter excludes enforcement measures under Chapter VII of the UN Charter from the prohibition on the UN intervening in ‘matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter.’

²⁸ See for the position of non-members of the UN: Sands and Klein, *Bowett’s Law of International Institutions* (5th edn.) (London, 2001), at pp. 26-27; and Cassese, above n. 22, at p. 186.

As regards the applicability of the *International Fruit Company* in binding the Union under internal law, Eeckhout has concluded that the criteria set out in *International Fruit Company* are broadly satisfied as regards the UN Charter and UN Security Council resolutions except for the requirement for substitution of the Union for the Member States.²⁹ However, there are strong arguments for relaxing this requirement in the light of the obligations under Union law of the Member States that are member of the UN Security Council. Article 19(2) TEU requires Member States which are also members of the Security Council to ‘concert and keep the other Member States fully informed’ and requires permanent members ‘to ensure the defence of the positions and the interests of the Union without prejudice to their responsibilities’ under the UN Charter. Article III-305(2) of the Constitution substantially reproduces Article 19(2) TEU but provides, in sub-paragraph three, a new obligation on members of the Security Council to request, when the Union has defined a position on the Security Council agenda, a hearing for the Union Minister for Foreign Affairs.

The firm political commitment of the Union to the UN further supports the view that the Union should be treated as bound under the *International Fruit Company* doctrine by the UN Charter and resolutions of the Security Council.³⁰ Although recent proposals for reform of the Security Council do not envisage Union membership, much less a seat on the Security Council for the Union,³¹ the Union as part of the Common Foreign and Security Policy (CFSP) issues joint statements through the President of the EU Council or through the Commission before the UN General Assembly and the UN Commission on Human Rights.³² The provisions of the Constitution would significantly strengthen

²⁹ Above n. 5, at pp. 437-439. See also the analysis of Bohr, above n. 25, at pp. 264--265.

³⁰ See: *Communication from the Commission to the Council and the European Parliament: The European Union and the United Nations: The choice of multilateralism*. Brussels, 10 September 2003. COM(2003) 526 final; and the *Final Report of Working Group VII on External Action* of 16 December 2002: CONV 459/02. Available on the European Convention website.

³¹ UN Report of 1 December 2004: *A more secure world: our shared responsibility*: Document A/59/565 available at <<http://www.un.org/secureworld/>>. For a summary of previous proposals for reforming the permanent membership of the UN Security Council, some of which do favour conferring a seat on the Union: see Michael J. Kelly, ‘U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council’ (2000) 31 *Stetson Hall Law Review*, pp. 319-399, at pp. 329-341. The 2005 World Summit held in New York from 14-16 September 2005 failed to resolve the issue of Security Council reform and mandated the General Assembly to report further by the end of 2005. See: <<http://www.un.org/News/Press/docs/2005/ga10385.doc.htm>>.

³² Clapham, in Alston (ed.), above n. 11, at pp. 644-645.

and extend the existing provisions in the TEU and the EC Treaty concerning the obligations of the Union in respect of the UN Charter.³³

Application of the *International Fruit Company* principles therefore provides a mechanism for achieving full Union adherence to the UN Charter and UN Security resolutions in the absence of a realistic perspective of Union membership of the UN. It would also mitigate the risk of conflicts between the obligations of the Member States under the UN Charter and their obligations under Union law. However, since the Union is in any event bound to comply with UN Security Council resolutions adopted under Chapter VII of the UN Charter and all the Member States are party to the UN Charter, the ECJ may well adopt a broader basis for concluding that the Union is bound both by the UN Charter and UN Security council resolutions in general.³⁴

4.2.2.3 *The Refugee Convention*

The Refugee Convention is another key international instrument where the issue of whether the Union is bound by application of the *International Fruit Company* criteria arises. However, the artificiality of transposing criteria developed by the ECJ in respect of the Common Commercial Policy (CCP) to the different context of refugee and asylum policy is even more apparent in the light of the complex inter-relationship between Union and national competences in this area. Although the Union acts on the express basis that its actions are subject to compliance with the Refugee Convention and membership of the Refugee Convention is a requirement for a state's admission to the Union,³⁵ the Union has not replaced the Member States in fulfilling their obligations under the Geneva

³³ Article I-3(4) of the Constitution commits the Union to contribute, *inter alia*, 'to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.' Article 11(1) TEU includes as an objective of the Union: 'to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders.' In comparison, Preamble seven of the EC Treaty provides: 'Intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations.'

³⁴ After analysing the various potential legal bases in Union law, Eeckhout takes this view: 'In conclusion, the Court [ECJ] might well, if the question were ever to come before it, be inclined to recognise the binding character of the UN Charter and of Security Council resolutions, and could find support for such recognition in its own case law.': above n. 5, at p. 439.

³⁵ G. Noll and J. Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies', in Alston (ed.), *The EU and Human Rights* (Oxford, 1999), pp. 359-410, at pp. 374-375.

Convention. While the Union has adopted measures within the framework of the Refugee Convention both internally and externally,³⁶ a common European asylum system (CEAS) has not yet been developed.³⁷ The Member States retain shared competence with the EC in negotiating and concluding agreements in the asylum and refugee field, including any future re-negotiation of the Geneva Convention.³⁸

This conclusion is supported by specific powers retained by Member States in respect of Title IV EC Treaty. Firstly, Article 64(1) EC Treaty provides Title IV ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’ which establishes limits on the internal competence of the EC which are automatically mirrored in the external field.³⁹ Secondly, Article 63 EC Treaty permits Member States to maintain or introduce national provisions notwithstanding the Council adopting measures under Article 63(3) or (4) EC Treaty, which includes in this context measures on illegal immigration and illegal residence, including repatriation of illegal residents (Article

³⁶ As regards internal measures, see the Commission's *Acquis of the European Union in the field of JHA*; consolidated version; update December 2004; available at: <http://europa.eu.int/comm/justice_home/doc_centre/intro/docs/jha_acquis_1204_en.pdf>. As regards external measures, the European Council meeting at Seville on 21-22 June 2002 declared: ‘The European Council urges that any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.’; available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72638.pdf>. Readmission agreements have been signed between: the EC and Hong Kong on 27 December 2002, approved by Council Decision of 17 December 2003 [2004] OJ L17/23; and the EC and Macao on 13 October 2003, approved by Council Decision of 21 April 2004 [2004] OJ L143/97.

³⁷ However, the 2004 Hague programme adopted by the European Council provides: ‘The aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase.’: *Strengthening Freedom, Security and Justice in The European Union*, 4-5 November 2004. Available as Annex 1 to the Presidency Conclusions, at para. 1.3; available at: <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf>.

³⁸ The legal basis for EC competence to re-negotiate the Refugee Convention would be Article 63(1) EC Treaty. Article III-266 of the Constitution sets out the terms of the CEAS. It is noteworthy that the references in Article 63(1)(b), (c), (d) and in Article 63(2)(a) EC Treaty to the adoption of ‘minimum standards’ have not been carried forward into Article III-266 of the Constitution which may arguably provide the legal basis for the Union to acquire exclusive competence to conclude international agreements in those areas. See Eeckhout for an analysis of the EC’s external powers in the area of visas, asylum and immigration, above n. 5, at pp. 132-134.

³⁹ Article 64(1) EC Treaty is retained in Article III-262 of the Constitution. See further Sections 6.2.7 and 6.2.8 of Chapter six.

63(3)(b) EC Treaty), provided the national provisions ‘are compatible with this Treaty and with international agreements.’⁴⁰ Thirdly, Declaration 18 to the Treaty of Amsterdam provides that ‘Member States may negotiate and conclude agreements with third countries’ within the scope of Article 63(3)(a) EC Treaty provided such agreements ‘respect Community law’.⁴¹ Fourthly, the UK, Ireland and Denmark have negotiated complex flexibility arrangements under Protocols to the Amsterdam Treaty as to whether to participate in measures taken under Title IV EC Treaty which undermine the achievement of common standards.⁴² Finally, Member States have retained significant powers in the area of immigration policy covered by Articles 63(3) and 63(4) EC Treaty.⁴³

Moreover, additional criteria established in *International Fruit Company* are not met in respect of the Geneva Convention. The New York Protocol was concluded after the EC Treaty and, unlike GATT, the other parties to the Refugee Convention have not as yet recognized the effective transfer of powers to the Union from the Member States with regard to the subject matter of the Geneva Convention. In conclusion, it seems unlikely at the current stage of development of the Common European Asylum System that *International Fruit Company* provides a basis for concluding that the EC is bound by the

⁴⁰ This provision has not been included in the Constitution. However, Article III-267(5) provides: ‘This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work whether employed or self-employed.’

⁴¹ Article 63(3)(a) covers measures on immigration policy relating to: ‘conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purposes of family reunion’. See on the scope of Declaration 18: S. Peers, *EU Justice and Home Affairs* (Harlow, Longman, 2000), at p. 101. There is no corresponding declaration to the Constitution. The Declaration on Article III-325 concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice provides: ‘The Conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Sections 3, 4 and 5 of Chapter IV of Title III of Part III of the Treaty establishing a Constitution for Europe insofar as such agreements comply with Union law.’ However, this does not affect Section 2 of Chapter IV dealing with policies on border checks, asylum and immigration.

⁴² See Protocols No. 4 and 5 to the Treaty of Amsterdam concerning the position in relation to Title IV EC Treaty of respectively the UK and Ireland (Protocol No. 4) and Denmark (Protocol No. 5). For a detailed discussion of the effect of these Protocols see Fletcher, ‘EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum’ (2002) 9 *EPL*, pp. 544-562, at pp. 543-551. These special arrangements have been retained in the Constitution in Protocols 19 and 20 respectively.

⁴³ See: Peers, above n. 41, at pp. 99-103; K. Hailbronner, ‘European Immigration and Asylum Law after the Amsterdam Treaty’ (1998) 35 *CML Rev.*, pp. 1047-1067; and J. Monar, ‘Justice and Home Affairs in the Treaty of Amsterdam Treaty’ (1998) 23 *EL Rev.*, pp. 320-335.

Geneva Convention. However, under Article 63(1) EC Treaty the EC is obliged to adopt measures on asylum in accordance with the Refugee Convention and other relevant treaties. In these circumstances, the application of the *International Fruit Company* doctrine would not materially enhance the protection afforded by Article 63(1) EC Treaty.⁴⁴

4.2.2.4 *The ECHR*

In the case of the ECHR, fulfillment of the *International Fruit Company* conditions is also problematic. France only ratified the ECHR on 3 May 1974 and the various ECHR Protocols entered into force after conclusion of the EC Treaty.⁴⁵ Even more problematic would be the issue of how far the Member States have transferred to the Union responsibility for matters subject to the ECHR. However, as in the case of the Geneva Convention, the issue is largely academic since under Article 6(2) TEU the Union is bound to respect fundamental rights as guaranteed by the ECHR. Although the Union's obligations under Article 6(2) TEU fall short of actual membership, application of the *International Fruit Company* doctrine would not confer any substantial additional benefits in terms of compliance and enforceability.

4.2.2.5 *Conclusions*

It remains unclear how far the doctrine developed in *International Fruit Company* to address the specific issues relating to GATT would be applied in the very different context of international fundamental rights treaties. In order to be effective, the ECJ would have to relax significantly the criteria developed in *International Fruit Company*. The fact it has not to date found it necessary to extend this mechanism to the arena of fundamental rights, despite the substantial academic doctrine supporting such an initiative, suggests it considers that the general principles mechanism for the reception of international treaties on fundamental rights is sufficient. The analysis of the potential applicability of the doctrine of *International Fruit Company* to the UN charter and UN Security Council resolutions, the Geneva Convention, and the ECHR shows that

⁴⁴ See for analysis of Article 63(1) EC Treaty, section 8.3.2.3 of Chapter eight.

⁴⁵ See Annex II for the date of entry into force of each of the substantive ECHR Protocols. See generally, Uerpman, above n. 16, at pp. 34-35.

alternative legal mechanisms for binding the Union to these instruments exist and the doctrine is unlikely to provide significant added protection in this context. The provisions in Article I-9 of the Constitution for the incorporation of the Charter, retention of the fundamental rights as general principles doctrine, and the mandate for Union accession to the ECHR would, if implemented, further lessen the requirement for any radical development of the *International Fruit Company* doctrine.⁴⁶

4.2.3 ARTICLE 307 EC TREATY

4.2.3.1 Introduction

The second mechanism for recognition of international treaties in Union law is provided under Article 307 EC Treaty and governs the extent of the Union's obligations not to obstruct the performance by the Member States of their pre-existing international obligations.⁴⁷ Article 307 EC Treaty provides:

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'⁴⁸

⁴⁶ See Chapter five for a detailed analysis of Article I-9.

⁴⁷ Article III-435 of the Constitution substantially reproduces Article 307 EC Treaty. Article 307 EC Treaty (ex. Article 234) was the result of an amendment at the Treaty of Amsterdam to clarify that the provision also applied to agreements concluded post-1 January 1958. For an analysis of Article 307, see: Pietro Manzini, 'The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law' (2001) 12 *EJIL*, pp. 781-792. See also Eeckhout, above n. 5, at pp. 333-342; and Hartley, above n. 5, at pp. 182-183.

⁴⁸ The relationship between Article 307 EC Treaty and Article 30 VCLT, on the application of successive treaties relating to the same subject-matter, is analysed by Manzini, above n. 47, at pp. 782-783.

One preliminary question concerning Article 307 EC Treaty is the status of fundamental rights treaties concluded by the Member States after 1 January 1958, or the date of their accession if later. Hartley is of the opinion that in such a situation ‘the position should be analogous to that under Article 307 [234], provided the subject matter of the agreement was not, under EC law, within the exclusive competence of the EC.’⁴⁹ However, in *Elide Gottardo v INPS* the ECJ ruled that in the case of the Italo-Swiss Social Security Convention of 14 December 1962 the obligation lay on Italy to facilitate application of a provision of EC law ‘liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty’.⁵⁰ In *Arbelaiiz-Emmezabel*, Attorney General Capotorti also rejected the application of Article 307 EC Treaty to a treaty concluded by a Member State after accession to the Union but before the Union had exercised competence in the area covered by the EC Treaty.⁵¹ This literal interpretation of the scope of Article 307 EC Treaty severely limits its value as an effective mechanism for introducing into the Union’s legal order norms derived from international fundamental rights treaties to which a Member State is party.

In *Attorney General v Juan C. Burgoa*,⁵² the ECJ established the following principles concerning Article 307: firstly, it applies ‘to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty’;⁵³ secondly, it implies a duty on the EC institutions:

‘... not to impede the performance of the obligations of Member States which stem from a prior agreement. However, that duty on the Community institution is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question’;⁵⁴

and thirdly, it:

⁴⁹ Hartley, above n. 5, at p.183.

⁵⁰ Case C-55/00, [2002] ECR I-413, at para. 30.

⁵¹ Cited above n. 18, at p. 2988. This construction is supported by Manzini, above n. 47, at p. 787.

⁵² Case 812/79, [1980] ECR 2787.

⁵³ *Ibid.*, at para 6.

⁵⁴ *Ibid.*, at para 9.

‘... cannot have the effect of altering the nature of the rights which may flow from such agreements. From that it follows that ... [Article 307] does not have the effect of conferring upon individuals who rely upon an agreement concluded prior to the entry into force of the Treaty or, as the case may be, the accession of the Member State concerned, rights which the national courts of the Member States must uphold, nor does it adversely affect the rights which individuals may derive from such an agreement’.⁵⁵

An analysis of these principles reveals that Article 307 EC Treaty provides an inadequate basis for an effective judicial remedy in the event a Union measure conflicts with an international fundamental rights treaty concluded by a Member State prior to membership of the Union.⁵⁶ The legality of a Union measure will only be reviewable on the basis that it infringes Article 307 EC Treaty if it can be shown that the measure impedes a Member State from fulfilling its obligations under a pre-existing international treaty.⁵⁷ However, the applicant would not derive a directly effective right under Union law from the pre-existing treaty, as made clear in *Burgoa*.⁵⁸ Even if, according to the Member State’s *domestic* law, the applicant had such a right under the relevant treaty it might prove difficult to mount a challenge to the Union measure before the national courts of a Member State. A preliminary reference would not be available in respect of such an agreement since it does not fall within the scope of Article 234 EC Treaty.⁵⁹ In the absence of a reference, application of the *Foto-Frost* principle would prevent a national court making a ruling that the Union measure was unlawful.⁶⁰ Moreover, Article 307 EC Treaty does not oblige the Union to uphold a right protected under an

⁵⁵ *Ibid.*, at para 10.

⁵⁶ See Hilson for a discussion of the related problems facing an individual seeking to rely on a fundamental right guaranteed by Union law but outside the scope of application of the Treaties: ‘What’s in a Right? The Relationship between Community, Fundamental and Citizenship rights in EU law’ (2004) 29 *EL Rev.*, pp. 636-651, at p. 641.

⁵⁷ Subject to the applicant satisfying the requirements for exercising a judicial review remedy available under the EC Treaty.

⁵⁸ Case 812/79, *Attorney General v Juan C. Burgoa* [1980] ECR 2787.

⁵⁹ Hartley, above n. 5, at p. 183, n. 79. This view is supported by Case C-158/91 *Ministère Public et Direction de Travail et de l’Emploi v. Levy* [1993] ECR I-4287, at para 13. Manzini argues that this rule should only apply to the interpretation of a Union measure and not to its validity: above n. 47, at pp. 786-787. Eeckhout supports the view that the ECJ has no jurisdiction under Article 234 EC Treaty to rule on the interpretation of the international agreement in question but argues that under Article 226 EC Treaty proceedings the ECJ may exercise greater control over a Member State’s obligations under the UN Charter: above n. 5, at p. 442.

⁶⁰ Case 314/85, *Foto-Frost (Firma) v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

international fundamental rights treaty: ‘it merely requires the Community not to prevent the Member State from upholding it.’⁶¹

4.2.3.2 *The European Convention on Human Rights*

Even if the problems of establishing grounds under Union law for judicial review of Union measures can be overcome, there remain serious doubts as to how far Article 307 EC Treaty is an effective mechanism for enforcing international fundamental rights standards in Union law. The ECHR is a treaty frequently cited in the context of Article 307 EC Treaty on the basis that the Member States, except for France,⁶² all satisfy the temporal criteria for its application.⁶³ Moreover, as is generally the case for fundamental rights treaties, the ECHR is a treaty that is not realistically open to denunciation or termination by the Member States.⁶⁴ However, the juridical rationale for Article 307 EC Treaty is to ensure the Member States are not obliged under Union law to breach their international law obligations rather than impose specific obligations on the Union to protect individual rights guaranteed under the ECHR.⁶⁵ Furthermore, the ECtHR has held it is satisfied, subject to ongoing verification, that Union law provides equivalent protection to fundamental rights to those guaranteed under the ECHR.⁶⁶ In consequence, a conflict between Union secondary legislation and the ECHR leading to a Member State’s obligations under the ECHR being ‘affected’ for the purposes of Article 307 EC Treaty is unlikely.⁶⁷

⁶¹ Hartley, above n. 5, at p. 141, n. 30.

⁶² France signed the ECHR on 4 November 1950 and ratified on 3 May 1974. Article 307(1) EC Treaty refers to ‘agreements concluded before 1 January 1958, or for acceding States, before the date of their accession.’ However, Manzini convincingly argues that this must be construed as referring to agreements in force: above n. 47, at pp. 785-786.

⁶³ See Besselink, ‘Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union’ (1998) 35 *CML Rev.*, pp. 629-680, at pp. 659-663; Uerpman, above n. 16, at pp. 37-38; and Canor, ‘*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?’ (2000) 25 *EL Rev.*, pp. 3-21, at pp. 10-11.

⁶⁴ See Manzini on the scope of the obligation on Member States to denounce pre-existing agreements under Article 307 EC Treaty, and in particular the effect of Case C-62/98, *Commission v. Portugal* [2000] ECR I-5171 and Case C-84/98, *Commission v. Portugal* [2000] ECR I-5215: above n. 47, at pp. 788-792. See also: Uerpman, above n. 16, at p. 38; and Eeckhout, above n. 5, at pp. 340-342.

⁶⁵ See Canor, above n. 63, at p. 9.

⁶⁶ See case law cited in Sections 3.3.2.2 and 3.3.2.3 of Chapter three.

⁶⁷ See in this sense, Canor: above n. 63, at p. 10. Besselink, however, adopts a wider view as to the scope of Article 307 EC Treaty in the context of the ECHR, based on Article 55 (ex. Art. 62) ECHR and a critical view of *M. & Co. v. Germany*, and concludes: ‘In case of conflict of the Community measure with the

4.2.3.3 *The UN Charter*

In the case of the UN Charter, the temporal applicability of Article 307(1) EC Treaty is satisfied for all the Member States and ‘they are therefore entitled not to fulfill their obligations under the EC Treaty if doing so would put them in breach of their obligations under the Charter.’⁶⁸ The *Centro-Com* case supports this conclusion.⁶⁹ The United Kingdom Government argued in *Centro-Com* that national measures which conflicted with the EC’s sanctions regime were required by its obligations under the UN Charter and under UN Security Council Resolution 757 (1992).⁷⁰ The ECJ, in reply to the second question referred by the Court of Appeal on the scope of Article 307 EC Treaty, held that it was a matter for the national court to determine if the measures adopted by the United Kingdom Government were so *required* but, if they were so required, the United Kingdom Government could rely on Article 307 EC Treaty.⁷¹ However, it should be emphasized that the effect of the application of Article 307 EC Treaty in such circumstances is not to invalidate the conflicting Union measures but insulate national measures from being overridden by application of the doctrine of supremacy. As such Article 307 EC Treaty does not provide an effective mechanism for conferring normative status on international fundamental rights norms in the Union’s legal order.

4.2.3.4 *Conclusions*

Article 307 EC Treaty is of potential application to other international fundamental rights conventions, such as the Refugee Convention,⁷² but in most cases similar

ECHR, Article 234 [307] EC entails that the national court cannot apply the Community measure.’: above n. 63, at p. 662.

⁶⁸ Eeckhout, above n. 5, at p. 441. Eeckhout also considers the scope of Article 297 EC Treaty and its relationship to Article 307 EC Treaty: *ibid.*, at pp. 443-444. Article 297 EC Treaty has been retained in Article III-131 of the Constitution.

⁶⁹ Case C-124/95, *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England* [1997] ECR I-81. See for analysis, Section 3.2.3 of Chapter three.

⁷⁰ *Ibid.*, at para. 23.

⁷¹ *Ibid.*, at paras. 58-61. For a discussion of the *Centro-Com* case in the context of Article 307 EC Treaty, see Eeckhout: above n. 5, at pp. 441-442.

⁷² The six original members of the EC all signed and ratified the Refugee Convention before 1 January 1958 but not the New York Protocol. On a literal interpretation, Article 307 EC Treaty is therefore of limited application. The subsequent accession states all signed and ratified the Refugee Convention and the New York Protocol prior to accession and therefore Article 307 EC Treaty is applicable. The dates of signature and ratification of the Refugee Convention and the New York Protocol are available on the UNHCR website: < <http://www.unhcr.ch/>>.

obstacles to its effectiveness will apply. It is of most assistance in the case of a fundamental rights treaty that has not been signed by a substantial majority of the Member States, and thus is not introduced into Union law under the general principles doctrine, but has been ratified by one or more Member States prior to 1 January 1958 or the date of accession to the Union.⁷³ However, even in these cases the limited availability of judicial review proceedings in Union law against Union measures violating such a treaty means Article 307 EC Treaty is a mechanism of limited effectiveness. Direct Union accession to international treaties protecting international fundamental rights is therefore a preferable mechanism for the effective protection of fundamental rights.

4.2.4 TREATY NORMS AS GENERAL PRINCIPLES OF UNION LAW

4.2.4.1 Introduction

The third, and most comprehensive, mechanism for the introduction of norms derived from international fundamental rights treaties is as general principles of law developed by the ECJ.⁷⁴ The ECJ has defined the sources for the fundamental rights forming an integral part of the general principles of law as follows:

‘The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures..... For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms ...has particular significance.’⁷⁵

⁷³ Eeckhout points out that Article 307 EC Treaty is likely to be of most significance for Member States who acceded to the Union after 1 January 1958: above n. 5, at p. 334.

⁷⁴ See generally: T. Tridimas, *The General Principles of EC Law* (Oxford, OUP, 1999); J. Usher, *General Principles of EC Law* (Harlow, Longman, 1998); J. Coppel and A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 *CML Rev.*, pp. 669-692; and J.H.H. Weiler and N. Lockhart, ‘“Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence’ (1995) 32 *CML Rev.*, pp. 51-94 and pp. 579-627.

⁷⁵ Case C-7/98, *Krombach v. Bamberski* [2000] ECR I-1935, at para. 25. It seems unlikely that failure by one Member State to sign would exclude a treaty from the ECJ’s definition. The ECJ refers to signature or collaboration, so it seems signature is not required by each Member State. Signature rather than ratification

The ECJ has also specified that Article 6(2) TEU, which was introduced by the Maastricht Treaty and unmodified by either the Amsterdam or Nice Treaties, embodies its case-law.⁷⁶ The Charter rights and principles, although not formally incorporated into the Union's legal order, have become a further source of fundamental rights standards.⁷⁷ This section focuses on the normative status of international treaties for the protection of fundamental rights as general principles of Union law.

The criteria established by the ECJ for identifying a treaty which forms a source of fundamental rights as general principles of Union law ('Qualifying Treaty') provide a greater degree of certainty than in the case of the common constitutional traditions.⁷⁸ However, the normative status of Qualifying Treaties is undermined by the ECJ's formulation that such treaties only provide guidelines from which it draws inspiration.⁷⁹ In *Watson and Belmann*, Advocate General Trabucchi emphasised the limited reach of international instruments in the Union's legal system:

'The extra-Community instruments under which those States have undertaken international obligations in order to ensure better protection for those rights can, without any question of their being incorporated as such in the Community order, be used to establish principles which are common to the States themselves.'⁸⁰

This restrictive view of the normative status of international fundamental rights norms in Union law has been confirmed by the ECJ in the case of ECHR rights the protection of which is guaranteed in Union law under Article 6(2) TEU. In *Limburgse* the ECJ upheld

is the criterion adopted by the ECJ presumably on the basis once signed by the parties the text of the agreement is settled. See for an analysis of the ECJ's formulation: Besselink, above n. 63, at pp. 650-651.

⁷⁶ *Krombach, ibid.*, at para. 27.

⁷⁷ See for a list of references as of 1 July 2003 to the Charter by Advocates General and the CFI: Appendix 1 to S. Peers and A. Ward (eds.), *The European Union Charter of Fundamental Rights* (Oxford, Hart Publishing, 2004). The normative status of the Charter is considered separately in Section 5.8 of Chapter five.

⁷⁸ See on the problems of the constitutional traditions common to the Member States as the basis for protection of fundamental rights: Besselink, above n. 63, at pp. 633- 650. See also Section 5.2.2 of Chapter five.

⁷⁹ *Krombach*, above n. 75, at para. 25.

⁸⁰ Case 118/75, *Lynne Watson and Alessandro Belmann* [1976] ECR 1185, at 1207. The judgment of the ECJ does not specifically address the issue of the normative status of international treaties as general principles.

on appeal the position of the CFI that ECHR rights form part of the Union's legal order as general principles both under the case law of the ECJ and under Article 6(2) TEU:

‘As to the substance, the Court of First Instance, referring to the wording of Article F.2 [6(2)] of the Treaty on European Union, correctly held that, in the Community legal system, the fundamental rights guaranteed by the ECHR are protected as general principles of Community law.’⁸¹

The hierarchical status of ECHR rights and principles is on this authority equated to that of other general principles of Union law. However, this equation of ECHR rights with other general principles of Union law undermines the special status of ECHR rights in the Union's legal order conferred by Article 6(2) TEU.⁸² It signifies that, in the event of a conflict between an ECHR right and another general principle of Union law, the ECJ would in principle have discretion as to which principle to apply.⁸³ However, the discretionary application of international fundamental rights norms radically undermines the normative status of such rights. In order to avoid this result, Article 6(2) TEU should be construed as establishing a binding obligation on the Union to respect ECHR rights irrespective of conflict with other general principles of Union law.⁸⁴ Any conflict between ECHR rights and the general principles derived from the constitutional traditions common to the Member States, which are given equal status with ECHR based general principles under Article 6(2) TEU, is unlikely since all the Member States are members of the ECHR.

The detrimental consequences for the effective protection of fundamental rights in Union law flowing from the current status of international fundamental rights treaties as general

⁸¹ Case C-238/99 P, *et. seq.*, *Limburgse Vinyl Maatschappij NV (LVM) and others v. Commission* [2002] ECR I-8375; at paras. 170-171. The CFI judgment is Case T-305/94, *et. seq.*, [1999] ECR II-931.

⁸² For a discussion of conflicting opinions on whether Article 6(2) TEU creates binding internal obligations for the Union in respect of the ECHR, see Uepermann, above n. 16, at pp. 39-40.

⁸³ In practice, the ECJ: ‘acknowledges, quite properly, that the ECHR embodies minimum standards, and that EU law can and does provide higher level of protection in some areas.’ : C. Costello and E. Browne, ‘ECHR and the European Union’, in U. Kelly (ed.) *ECHR and Irish Law* (Dublin, Jordans, 2004), pp. 35-80, at p. 39. They refer in support of this conclusion to the Opinion of AG Lenz in Case 137/84 *Ministère Public v Mutsch* [1985] ECR 2681. The judgment of the ECJ in that case, however, does not refer to the ECHR.

⁸⁴ Support for this proposition may be found in the Opinion of AG Stix-Hackl (at para. 50) in Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*: Judgment of 14 October 2004; [2005] 1 CMLR. 5.

principles of Union law is demonstrated by analysis of the following three scenarios: firstly, a conflict between fundamental rights recognised as general principles of Union law and the fundamental freedoms protected under the EC Treaty and the TEU;⁸⁵ secondly, the ECJ failing to take account of a qualifying treaty relevant to the case before it; and thirdly, a conflict between the ECJ's interpretation of a qualifying treaty and the interpretation of that treaty's principle adjudicating organ or of the national courts of the Member States.

4.2.4.2 Conflict between ECHR Rights and Community Fundamental Freedoms

A conflict between ECHR rights and Community fundamental freedoms arose in a preliminary reference in *Schmidberger v Austria*:

'... the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.'⁸⁶

The ECJ referred to its case law on international fundamental rights as general principles as confirmed by Article 6(2) TEU and concluded:

'It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community ... Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.'⁸⁷

⁸⁵ See for a definition of fundamental, EC and citizen rights: Hilson, above n. 56, at pp. 636-640.

⁸⁶ Case C-112/00 [2003] ECR I-5659, at para. 77. The facts of the case involved the orderly closure of the Brenner motorway for thirty hours to allow a peaceful demonstration by environmentalists by local Austrian authorities with a consequent impact on the applicant's trucking business which transited goods on the Brenner motorway in Austria while transporting goods between Germany and Italy. See for commentary: Matthew Humphreys, 'Free Movement and Roadblocks: the Right to Protest in the Single Market' (2004) 6 *EL Rev.*, at pp. 192-197; and G. Facenna, 'Freedom of Expression and Assembly vs Free Movement of Goods' (2004) 1 *EHRLR*, pp. 73-79.

⁸⁷ *Schmidberger, ibid.*, at paras. 73 and 74.

However, the ECJ undermined the clarity of this analysis by referring to the need ‘to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty’.⁸⁸ Firstly, the ECJ noted that the principle of free movement of goods might be subject to restriction either under Article 30 EC Treaty or one of the ‘mandatory requirements’ established in and after *Cassis de Dijon*.⁸⁹ Secondly, it noted that paragraph 2 of Articles 10 and 11 ECHR permitted restrictions on the freedom of expression and assembly:

‘justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.’⁹⁰

The ECJ then analysed whether ‘the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.’⁹¹ The ECJ concluded:

‘Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.’⁹²

It is submitted that the ECJ’s approach in *Schmidberger* is unsatisfactory since, instead of focusing solely on the restrictions permitted under paragraph two of Articles 10 and 11 ECHR, it imports the principles of EC law regulating the free movement of goods,

⁸⁸ *Ibid.*, at para. 77.

⁸⁹ Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

⁹⁰ *Schmidberger*, above n. 86, at para. 79. The ECJ referred in support of this formulation to both its own case law and that of the ECHR: Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR I-3689, at para. 26; Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, at para. 42; and *Steel and Others v. The United Kingdom* (1998) 28 EHRR 603.

⁹¹ *Schmidberger*, above n. 86, at para. 82.

⁹² *Ibid.*, at para. 93.

including derogations from those principles, into the permitted restrictions.⁹³ A preferable approach, which would have bolstered the normative status of ECHR rights in Union law, would have been to lay down that provided the national court was satisfied that the measures adopted were required by Austria's obligations under the ECHR there could be no violation of Union law. In other words, ECHR and other fundamental rights protected as general principles of Union law should trump conflicting principles of Union law.

4.2.4.3 *Fundamental Rights as General Principles of Union Law: a Right of Redress?*

The second scenario raises the question of the redress available for a litigant if the ECJ fails to take account of a Qualifying Treaty relevant to the case before it. Since there is no appeal from decisions of the ECJ,⁹⁴ the litigant could argue that a national court with jurisdiction should refuse to give effect to the ECJ's ruling on the grounds of incompatibility with the Member State's international obligations to give effect to the relevant Qualifying Treaty.⁹⁵ Alternatively, having exhausted domestic remedies, the applicant could pursue any available remedy before the competent adjudicatory organ under the Qualifying Treaty on the basis the Member State signatory to the Qualifying Treaty remained responsible for violations notwithstanding a transfer of competences to the Union.⁹⁶ However, a litigant pursuing either option is likely to face both procedural and substantive obstacles and lacks any remedy in Union law.

⁹³ See also: Peers, 'Taking Rights Away? Limitations and Derogations, in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 140-179, at p. 148.

⁹⁴ The problems from a fundamental rights perspective of the lack of a review mechanism of ECJ judgments is illustrated by Lenaerts in the context of an alleged infringement of Article 6(1) ECHR by ECJ proceedings, although he suggests the ECtHR may exercise its *Matthews* jurisdiction and hold the Member States to account for such an infringement: 'Fundamental Rights in the European Union' (2000) 25 *EL Rev.*, pp. 575-600, at p. 585. In *Emesa Sugar v. Netherlands*, the ECtHR side-stepped this issue by deciding the application was inadmissible on other grounds: App. No. 62023/00, Admissibility Decision of 13 January 2005. Unreported.

⁹⁵ In most cases this would mean the national court refusing to implement the ECJ's ruling on the questions submitted under Article 234 EC Treaty. Such a refusal would open the Member State to an enforcement action by the Commission under Article 226 EC Treaty and might also lead to an action in damages against the Member State for breach of Union law resulting from the national court's refusal: a possibility raised in Case C-224/01, *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

⁹⁶ In effect relying on similar reasoning to that adopted by the ECtHR in *Matthews* as discussed in Section 3.3.2.2 of Chapter three.

4.2.4.4 *A Conflict of Rulings*

The third scenario arises if a preliminary ruling of the ECJ based on the interpretation of a fundamental right protected by a Qualifying Treaty, and in particular the ECHR, conflicts with the interpretation adopted by the Qualifying Treaty's principle adjudicating organ or by the national courts where the preliminary reference originated.⁹⁷ In *Schmidberger* this conflict would have arisen if the ECJ had held that the Austrian authorities' decision to close the Brenner motorway could not be justified under Union law but the Austrian courts⁹⁸ nevertheless held that the decision to close was required by the case law of the ECtHR.⁹⁹ The doctrine of primacy requires the national courts where the preliminary reference originated to give effect to the ECJ's ruling since the ECJ is interpreting the provisions of the ECHR as general principles of Union law.¹⁰⁰ In the specific case in which the ruling of the ECJ was made, therefore, the national court would be bound to apply the ruling under Union law.¹⁰¹ Moreover, the national court's application of the ruling would on current case law of the ECtHR be difficult to challenge unless the ECtHR adopts a wider version of the *Matthews* doctrine.¹⁰² This outcome is unsatisfactory as it denies a litigant the possibility of having the ECJ's interpretation of

⁹⁷ Such a conflicting result is a realistic scenario in the light of the differences in the criteria adopted by the ECJ and the ECtHR Court for determining if a limitation of fundamental rights is lawful under Union law and the ECHR respectively: see Peers for an analysis of the two approaches, in Peers and Ward (eds.), above n. 93, at pp. 140-152. See also Section 3.4.3 of Chapter three for an analysis of the related issues of the scope of a national court's obligation under Union law to follow a prior judgment of the ECJ interpreting the ECHR and to refer a question of interpretation of the ECHR for a preliminary ruling by the ECJ.

⁹⁸ The Article 234 EC Treaty reference was made by the *Oberlandesgericht* Innsbruck.

⁹⁹ In *Schmidberger* the rights of the demonstrators to freedom of expression and freedom of assembly were also guaranteed by the Austrian Constitution: above n. 86, at para. 69. The basis on which a national court could apply the national constitutional standard of protection of fundamental rights in preference to the Union standard is considered by Besselink in the context of the constitutional position of Union law in specific Member States: above n. 63, at pp. 643-650.

¹⁰⁰ As Besselink points out in respect of an interpretation by the ECJ of the ECHR: 'It is an interpretation of a Community general principle, not an interpretation of the ECHR provision as such': above n. 63, at p. 654. If the Union accedes to the ECHR, the status of its rulings will change to that of interpreting an international obligation of the Union: see Section 5.7 of Chapter five.

¹⁰¹ For the precedential authority of such a ruling, see Section 3.4 of Chapter three.

¹⁰² See Section 3.3.2.3 of Chapter three for analysis of post-*Matthews* case law of the ECtHR. Besselink argues that, notwithstanding the primacy of Union law, Member States in which the ECHR is incorporated in the national legal order in such a situation face a conflict between their obligations under the ECHR and under Union law and rejects the argument that national courts may rely on either Article 35(2)(b) (ex Article 27(1)) ECHR or the line of reasoning adopted by the ECommHR in *M & Co v. Federal Republic of Germany* to give effect to the Union standard: above n. 63, at pp. 653-657. See Section 4.2.4.5 below for an analysis of Article 35(2)(b) ECHR in the different context of admissibility of proceedings before the ECtHR.

the ECHR reviewed by the ECtHR. Union accession to the ECHR would provide such a mechanism and consequently provide a significant improvement in judicial protection.

4.2.4.5 *The Absence of Control Mechanisms*

In addition to the inferior normative status conferred on international fundamental rights treaties as general principles of Union law, there are a number of significant additional disadvantages arising from the general principles mechanism. Firstly, the reporting and monitoring requirements of the Qualifying Treaties, which form an essential element of control over a signatory's compliance, do not apply to the Union.¹⁰³ Secondly, the enforcement mechanisms of the relevant treaties, whether collective or individual, are not applicable in respect of the Union institutions.¹⁰⁴ Four universal human rights treaties provide for an individual remedy at the international level: the first Optional Protocol of the ICCPR (ICCPR-P1); the Article 14 procedure under the Convention against Racial Discrimination (CERD); the Article 22 procedure under the Convention against Torture (CAT); and the 1999 Optional Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-P).¹⁰⁵

4.2.4.6 *Treaty Reservations and Alternative International Proceedings*

The non-accession of the Union to the UN Conventions raises potential additional obstacles to the ability of an individual to exercise a complaint under the relevant individual complaints mechanisms. Article 5(2)(a) ICCPR-P1 provides:

‘The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement; (b) The

¹⁰³ But see Clapham, in Alston (ed.), above n. 11, at pp. 658-9. Clapham proposes that the Commission ‘volunteer reports to the United Nations treaty bodies and to the relevant treaty monitoring mechanisms of the Council of Europe.’: *ibid.*, at p. 659.

¹⁰⁴ See generally on these mechanisms: P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Monitoring* (Cambridge, CUP, 2000); H. J. Steiner and P. Alston, *International Human Rights in Context* (2nd edn.) (Oxford, 2000), pp. 592-862; and Rehman, above n. 21.

¹⁰⁵ See Annex 1 for references to these UN Conventions. For a discussion of proposals to introduce a complaints procedure in relation to the ICESCR, see: Walter Vandenhole, ‘Completing the UN Complaints Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights’ (2003) 21 *Netherlands Quarterly of Human Rights*, pp. 432-462.

individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.’

Reservations have been entered by a number of Member States in respect of Article 5(2)(a) ICCPR-P1.¹⁰⁶ The precise terms of the individual reservations vary but in substance they are intended to prevent the possibility of an appeal from decisions of the ECtHR.¹⁰⁷ However, with the exception of the reservation made by Austria, which specifically refers to matters previously examined by the ECommHR, reservations made by Member States refer generally to other procedures of international investigation or settlement and thus have a wider scope. Similar reservations have been entered by a number of Member States in respect of Article 14 CERD.¹⁰⁸ Article 22(5)(a) CAT makes such reservations unnecessary since it precludes the CAT Committee from considering any individual communication under Article 22 CAT unless it has ascertained that ‘the same matter has not been, and is not being, examined under another procedure of international investigation or settlement’.¹⁰⁹ Similarly, Article 4(2) of CEDAW-P provides: ‘The Committee shall declare a communication inadmissible where: (a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;’.¹¹⁰ In the light of these provisions, the question arises whether proceedings before the ECJ are to

¹⁰⁶ For a list of the reservations entered by each Member State to the ICCPR-P1, see: the Annex to the *2002 EU Network Report*, of 31 March 2003 by the EU Network of Independent Experts in Fundamental Rights, at pp. 269-273. Available at:

<http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf>.

The content of the declarations and reservations entered by each party to the ICCPR is available at:

<http://www.unhchr.ch/html/menu3/b/treaty6_asp.htm>.

¹⁰⁷ The effect of the reservations, as interpreted by the HRC, has been to extend the prohibition under Article 5(2)(a) ICCPR-P1 from the case where contemporaneous proceedings are before the ECtHR to exclude any individual communication if a decision has been reached on the substance of a claim, as opposed to a procedural ruling, by the ECtHR. See S. Joseph, J. Schultz and M. Castan, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn.) (Oxford, 2004), at pp. 100-104.

¹⁰⁸ For a list of the reservations entered by each Member States to Article 14 CERD, see: the Annex to the *2002 EU Network Report*, above n. 106, at pp. 269-273. The content of each reference can be accessed at: <<http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>>.

¹⁰⁹ Rehman interprets the Article 22 CAT prohibition to exclude examination of cases examined by the ECHR and the HRC but that ‘it does not affect those situations considered under the ECOSOC Resolution 1503 procedure or those situations under the consideration of the Special Rapporteur on Torture. Similarly it would not be affected by a consideration of such bodies as the UN working group on indigenous peoples or the working group on minorities.’: above n. 21, at p. 428.

¹¹⁰ Under Article 17 of CEDAW-P no reservations to the Protocol are permitted.

be treated as ‘another procedure of international investigation or settlement’ so as to bar individual proceedings under the relevant treaty.

Although the issue has not yet been directly addressed by any of the adjudicative bodies of the relevant UN Conventions, guidance may be obtained from the ECtHR’s recent *Decision on the Competence of the Court to give an Advisory Opinion*.¹¹¹ The Grand Chamber refused as inadmissible a request for an advisory opinion under Article 47 ECHR by the Committee of Ministers of the Council of Europe as to whether the Human Rights Commission of the Commonwealth of Independent States established under the 1995 Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States¹¹² constituted ‘another procedure of international investigation or settlement’ for the purposes of Article 35(2)(b) ECHR. Article 35(2)(b) ECHR provides:

‘The court shall not deal with any individual application submitted under Article 34 that ... (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.’

The ECtHR endorsed the earlier decisions of the ECommHR in respect of Article 35(2)(b) (ex. Art. 27 (1)(b)) ECHR to the effect that:

‘... an examination of the question whether the same matter has already been submitted to another procedure of international investigation or settlement may be required and that this examination is not limited to a formal verification but extended, where appropriate, to ascertaining whether the nature of the supervisory body, the procedure which it follows and the effect of its decisions are such that the Court’s jurisdiction is excluded by Article 35(2)(b)’.¹¹³

¹¹¹ Decision of 2 June 2004. Unreported. Copy supplied by the Registry of the ECtHR.

¹¹² (1996) 17 *HRLJ* 159.

¹¹³ *Advisory Opinion*, cited above n. 111, at p. 12. The ECtHR referred to the following decisions of the ECommHR directly on the issue: *Calcerrada Fornieles and Cabeza Mato v. Spain*, no. 17512/90, decision of 6 July 1992, DR 73, p. 214; *Pauger v. Austria*, no. 24872/94, decision of 9 January 1995, DR 80, p. 170; *C.W. v. Finland*, no. 17230/90, decision of 9 October 1991, unreported; *Cereceda Martin v. Spain*, no. 16358/90, decision of 12 October 1992, DR 73, p. 120; *Lukanov v. Bulgaria*, no. 21915/93, decision of 12 January 1995, DR 80, p. 108; and *Varnava and others v. Turkey*, nos. 16064-66/90 and 16068-73/90, decision of 14 April 1998, DR 93, p. 5.

On the basis of the ECtHR's view that the Union guarantees equivalent protection for fundamental rights to that available under the ECHR,¹¹⁴ this formulation suggests that decisions of the ECJ may be treated as constituting 'another procedure of international investigation or settlement'. Union accession to the ECHR would, however, resolve the issue as regards the ECHR:

'Irrespective of the question of whether the procedure before the Luxembourg Court should today be considered as a procedure of "international investigation or settlement" in the sense of Article 35, paragraph 2.b of the ECHR, it is clear that the answer would be negative as a necessary consequence of accession.'¹¹⁵

Similarly, if the Union acceded to the ICCPR-P1, CEDAW, CAT or CERD-P, the relevant instrument of accession would be able to clarify that proceedings before the ECJ do not constitute a procedure of international investigation or settlement for the purposes of those Conventions.

A further area of uncertainty as to the normative effect of obligations in a qualifying Treaty in Union law relates to the treatment in Union law of reservations, objections and declarations to Qualifying Treaties entered into by the Member States.¹¹⁶ The formulation adopted by the ECJ as regards Qualifying Treaties as general principles of

¹¹⁴ See Sections 3.3.2.2 and 3.3.2.3 of Chapter Three.

¹¹⁵ *Study of Technical and Legal Issues of a Possible EC/EU Accession to the ECHR* dated September 28, 2002 by the Steering Committee for Human Rights of the Council of Europe (CDDH Report), at p. 17. Available at: < <http://european-convention.eu.int/docs/wd2/1711.pdf>>.

The CDDH Report does not opine on the current position, but does, in n. 11 to p. 17, refer to the fact the issue was raised in *Senator Lines GmbH v. Member States of the European Union*, App. No. 56672/00; admissibility decision of 10 March 2004. Unreported. As discussed in Section 3.3.2.3 of Chapter three, the case was dismissed as inadmissible on other grounds and so the ECtHR did not rule on the issue.

¹¹⁶ The normative effect of reservations to international treaties is addressed in the Advisory Opinion of the ICJ in the *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (ICJ Reports 1951, p. 15) and Articles 19-23 VCLT. For a general review of reservations and declarations, see: Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties', in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 173-201, at pp. 191-196. The specific issue of reservations to human rights treaties has given rise to controversy in the light of HRC General Comment No. 24 of 11 November 1994: *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (CCPR/C/21/Rev.1/Add.6; reproduced in (1995) 15 *HRLJ* 262) and the HRC decision in *Rawle Kennedy v. Trinidad and Tobago*, Comm. No. 845/1999, Decision, 2 November 1999, UN Doc A/55/40, vol. II, Annexe XI, A. See for analysis: Cassese, above n. 22, at p. 175; and Fitzmaurice, above n. 116, at pp. 194-195.

Union law does not refer to any limitation on the normative status of the qualifying treaties by reference to reservations, objections or declarations entered by a Member State. It may therefore be assumed that the Union's obligations to respect the substantive rights protected by a Qualifying Treaty are unaffected by such reservations, objections or declarations. However, it is anomalous that Qualifying Treaties in Union law should be applied regardless of reservations made by Member States. Indeed, WGII specifically pointed out that upon Union accession to the ECHR the issue of reservations, as well as which ECHR Protocols would be acceded to by the Union, would need to be decided by the Council.¹¹⁷

The failure of the general principles doctrine to take account of reservations is unsatisfactory in view of the fact that in areas of Union law subject to shared competence between the Union and the Member States different fundamental rights standards may be applicable depending on the specific reservations entered by an individual Member State. Further examples of the inadequacies of the general principles mechanism include uncertainty as to the status of the various protocols to the qualifying treaties in Union law and the effect of enlargement of the Union on the status of a specific Qualifying Treaty or protocol to which an acceding Member State is not party. These inadequacies demonstrate the relatively unsophisticated nature of general principles as a mechanism for integrating human rights treaties into Union law in comparison to Union accession to the Qualifying Treaties and militate in favour of Union accession.

4.3 THE NORMATIVE STATUS OF CUSTOMARY INTERNATIONAL LAW IN UNION LAW

4.3.1 INTRODUCTION

This section examines the normative status of the rules of customary international law in the Union's legal order with specific reference to international fundamental rights standards. The role and status of customary international law in the development of

¹¹⁷ Document 295/02 of 26 September 2002, at p. 2. Available on the European Convention website.

fundamental rights norms in international law has been outlined in Chapter two. It is generally recognized that customary international law plays a significant and developing role alongside treaty law as a source of fundamental rights norms.¹¹⁸ In the context of the Union, which is not party to any international treaty for the protection of fundamental rights, customary international law is of particular significance as a source of human rights protection. However, the status afforded in the Union's legal order to fundamental rights norms recognized in customary international law has been limited compared to that of norms contained in treaties. Thus, the formulation by the ECJ of the general principles doctrine is limited to treaty based international law as a source of fundamental rights derived from international law. This position is reflected both in Article 6(2) TEU and Article I-9(3) of the Constitution.¹¹⁹ Moreover, the case law of the ECJ on the normative status of rules of customary international law has not to date explicitly addressed the status of fundamental rights norms derived from customary international law.

In international law the obligations of the Union under customary international law prevail over both primary and secondary Union law.¹²⁰ It is incumbent on the Union to integrate fundamental rights based on customary international law in a manner which gives effect to this primacy. Effective recognition and integration of customary international law is also critical in order to ensure the Member States are not exposed to a potential conflict between their overriding obligations under international law to comply with fundamental rights based on customary international law and their obligations under Union law.¹²¹

¹¹⁸ Although the development of this source has created problems of determinacy, see: Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 *Australian Yearbook of International Law*, pp. 82-108.

¹¹⁹ Article I-9(3) is analysed in Section 5.2.2 of Chapter five.

¹²⁰ Peters, above n. 2, at p. 36. The primacy of international law obligations is acknowledged in the objectives of the Union set out in Article I-3(4) of the Constitution: 'In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to ...the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

¹²¹ 'General international law therefore continues to bind the Member States and this indirectly primes the EC Treaty and EC legislation as far as the legal relations between the EC and third states or other subjects are concerned.': Peters, above n. 2, at p. 36.

As the scope of Union competences expands in the AFJS, norms of customary international law, and in particular those that are categorized as peremptory norms, will assume greater significance as a key normative element in regulating the AFJS. The increasing significance of customary international law in setting the normative standards applicable to Union legislation is particularly visible in the field of immigration and asylum policy. This development is examined in Chapter eight on the normative status in Union law of the principle of *non-refoulement*. The focus here is on a more general analysis of the status of fundamental rights norms of customary international law in relation to other sources of Union law. In particular, the case law of the ECJ on the availability of judicial review as a remedy for a violation of customary international law is analysed in the context of its application to a violation of fundamental rights.

4.3.2 CUSTOMARY INTERNATIONAL LAW AND UNION LAW

The Union is bound by the rules of customary international law both under international law and Union law. The International Court of Justice (ICJ) has held: ‘International organisations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.’¹²² Notwithstanding its specific features, the Union continues to fulfil the key characteristics of an international organisation and is thus bound by the general rules of international law.¹²³ The Constitution would not fundamentally alter that characterisation since these key

¹²² *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Reports, p. 73 at pp. 89-90.

¹²³ Sands and Klein refer to the following characteristics of an international organisation: ‘.. its membership must be composed of states and/or other international organisations; it must be established by treaty; it must have an autonomous will distinct from that of its members and be vested with legal personality; and it must be capable of adopting norms addressed to its members.’: above n. 28, at p. 16. For an argument that an international organization such as the UN may, for certain objectives, be treated as a state, see: Guenter Weissberg, *The International Status of the UN* (New York, 1961), at p. 195. Sands and Klein, however, reject Weissberg’s argument that the UN may be treated as a state for the purposes of Article 34(1) of the Statute of the ICJ: above n. 28, at p. 355, n. 51. See for an analysis of alternative ‘metaphors’ for the form of state most appropriate to describe the Union: J. Caporaso, ‘The European Union and Forms of State: Westphalian, Regulatory and Post-Modern’ (1996) 34 *Journal of Common Market Studies*, pp. 29-52; and the contributions in J. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (Cambridge, CUP, 2003).

characteristics are maintained.¹²⁴ As a consequence of being bound by the rules of customary international law, the Union is obliged under international law to ensure its internal law is in conformity with those rules.¹²⁵ The international responsibility of the Union would also be engaged in the event of the violation by the Union of a rule of customary international law.¹²⁶ It is therefore incumbent on the Union to ensure that the normative status of customary international law in its internal law is sufficiently robust to ensure conformity with its obligations under general international law.

The ECJ has held that under Union law the rules of international customary law are binding on the Union's institutions and form part of the Union's legal order.¹²⁷ In *Poulsen and Diva Navigation* the issue arose in the context of a criminal prosecution in Denmark against the Danish master of a Panamanian registered vessel and a Panamanian company as to the construction of Article 6 of Regulation (EEC) No. 3094/86 which prohibited the handling of salmon or sea trout in the Union even though the fish had been caught outside waters under the jurisdiction of the Member States.¹²⁸ In reply to an Article 234 EC Treaty reference, the ECJ held:

‘As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 above-mentioned must be interpreted, and its scope limited, in the light of the relevant rules of international law of the sea.’¹²⁹

¹²⁴ Although it has been argued that the participation in the European Convention not only of representatives of the Member States but also of civil society constitutes a ‘major element to found the transition from a treaty-based system to a constitutional regime.’: K. Lenaerts and D. Gerard, ‘The structure of the Union according to the Constitution for Europe: the emperor is getting dressed’ (2004) 29 *EL Rev.*, pp. 289-322, at p. 298.

¹²⁵ Peters, above n. 2, at p. 36.

¹²⁶ For the potential liability of the UN for the action of its officials, see: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory opinion, ICJ Reports 1999, p. 62, at para. 66. See for the responsibility of international organizations under general international law: James Crawford and Simon Olleson, ‘The Nature and Forms of International Responsibility’, in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 445-472, at pp. 446-447.

¹²⁷ For a discussion of the case law, see: R. Higgins, ‘The ICJ, the ECJ and the Integrity of International Law’ (2003) 52 *ICLQ*, pp. 1- 20, at pp. 6-9; and Eeckhout, above n. 5, at pp. 324-333.

¹²⁸ Case C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation Corp.* [1992] ECR I-6019.

¹²⁹ *Ibid.*, at para. 9.

The ECJ then applied the relevant rules of the international law of the sea, including treaty law insofar as it codified general rules recognized by international custom, to construe the relevant provisions of Community law.

4.3.3 JUDICIAL REVIEW AND CUSTOMARY INTERNATIONAL LAW

Poulsen left open whether the validity, as opposed to the construction, of a measure of Union law could be challenged for infringement of customary international law.¹³⁰ The subsequent case of *Opel Austria* did not resolve this issue since the decision is explicable on the grounds that the relevant rule of public international law, the principle of good faith as codified by Article 18 VCLT, was the corollary of the principle of protection of legitimate expectations which formed part of the Union's legal order.¹³¹ In *Racke*, however, the ECJ directly addressed the issue of the availability of judicial review in the context of a challenge to the validity of Council Regulation on the grounds of violation of the customary rules of international law embodied in Article 62 VCLT.¹³² The ECJ ruled it had jurisdiction under Article 234 EC Treaty to rule on 'all grounds affecting the validity' of acts of the institutions of the EC including examining 'whether their validity may be affected by reason of the fact that they are contrary to a rule of international law'.¹³³ The validity of Regulation (EEC) No. 3300/91 could therefore be challenged indirectly under Article 234 EC Treaty for alleged violation of the 'rules of customary international law governing the termination and suspension of treaty relations'.¹³⁴ However, the ECJ qualified the scope of the right of judicial review, and in particular in the context of Article 234 EC Treaty proceedings, by ruling the test to be applied was

¹³⁰ See Eeckhout, above n. 5, at p. 326.

¹³¹ Case T-115/94, *Opel Austria GmbH v Council of the European Union* [1997] ECR II-39, at para. 93. See for comment, Eeckhout, above n. 5, at pp. 326-327.

¹³² Case C-162/96, *Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655. The Council Regulation at issue suspended trade concessions provided for by an earlier Cooperation Agreement of 2 April 1980 between the EEC and the Socialist Federal Republic of Yugoslavia (1980 Co-operation Agreement) following the outbreak of hostilities in Yugoslavia.

¹³³ *Ibid.*, at paras. 26 and 27. Such grounds may also found a challenge based on the other judicial review proceedings specified in the EC Treaty: see Hartley, above n. 5, at pp. 418-420; and Peters, above n. 2, at pp. 12-14. For a general analysis, see 'Thomas Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *CML Rev.*, pp. 1199-1246. For an analysis of *Racke*, see Eeckhout, above n. 5, at pp. 328-333.

¹³⁴ *Racke*, above n. 132, at para. 51.

whether the EC institution had ‘made manifest errors of assessment concerning the conditions for applying those rules’.¹³⁵ On the facts of the case, there had been no such manifest error of assessment by the Council.¹³⁶

It seems that the requirement for a ‘manifest error of assessment’ adopted in *Racke* as a precondition for judicial review was predicated on the assumption that rules of customary international law relating to the termination and suspension of treaties were not capable of producing direct effect and therefore this higher standard was required for a successful challenge. The issue of direct effect was critical because in the *International Fruit Company* case the ECJ had established two conditions for judicial review:

‘Before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision. Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts.’¹³⁷

In *Racke*, Jacobs AG reviewed the ECJ’s case law on the direct effect of international agreements entered into by the EC and the status of customary international law in the national legal systems of the Member States and concluded that rules of customary international law relating to treaties were not conducive to direct effect.¹³⁸ Although the ECJ in *Racke* did not consider it necessary to rule on the direct effect of the relevant rules of customary international law, since the plaintiff’s case depended rather on the direct effect of provisions of the 1980 Cooperation Agreement, it is submitted that their reasoning on this point is unconvincing and they in effect adopted Jacobs AG’s analysis.¹³⁹

¹³⁵ *Ibid.*, at paras. 51 and 52.

¹³⁶ Higgins notes the ECJ’s cautious approach compared to earlier judgments in allowing the EC institutions such a wide margin of assessment: above n. 127, at p. 9.

¹³⁷ Cases 21-24/72, *International Fruit Company v. Produuktschap voor Groenten en Fruit* [1972] ECR 1219, at paras 7 and 8.

¹³⁸ *Racke*, above n. 132, at para. 84 of the Opinion of AG Jacobs.

¹³⁹ Eeckhout, above n. 5, points out that in both *Racke* and *International Fruit Company* the material issue was ‘the validity of a regulation under rules of international law.’: at p. 332. In *Racke* the ECJ seemed to address the issue of direct effect when referring to the ‘complexity of the rules in question and the imprecision of some of the concepts to which they refer’: above n. 132, at para. 52.

On this reading of *Racke*, it may be deduced that in the case where a norm of customary international law does satisfy the requirements of direct effect a lower standard is required to establish a successful challenge to Union measures for infringement of that norm. While the customary international law of treaties regulates primarily relations between states and does not confer rights on individuals, the same reasoning is not applicable to fundamental rights provisions that are designed to protect individuals against violations by the state of those rights. Indeed, Jacobs AG acknowledged this distinction in *Racke*: ‘It may be noted in passing that there may be other types of rules of customary international law which do intend to confer rights on individuals, for example rules of international humanitarian law.’¹⁴⁰ Adoption of a less stringent test for judicial review for violation of fundamental rights based on customary international law would enhance the normative status of those rights and should it is submitted be the course taken by the ECJ.

4.3.4 CONCLUSIONS

The status of fundamental rights based on customary international law in Union law has not been as yet fully determined by the ECJ. In comparison to fundamental rights protected under international treaties that qualify as general principles of Union law, fundamental rights based on customary international law have not featured in the protection developed by the ECJ or been afforded explicit protection in the Treaties. Article I-4 of the Constitution would provide the basis for the development of a jurisprudence according equal status to fundamental rights recognized in customary international law with that accorded in Union law to fundamental rights protected under international treaties. Even if the Constitution does not enter into force, however, the ECJ has the latitude to develop its case law in such a way as to provide equal status to fundamental rights protected by customary international law with that accorded to international treaty rights in Union law.

¹⁴⁰ Opinion of Jacobs AG, above n. 132, at para. 84.

4.4 THE NORMATIVE STATUS OF *JUS COGENS* IN UNION LAW

4.4.1 INTRODUCTION

Jus cogens, or peremptory norms of general international law,¹⁴¹ are rules based either on customary international law or treaty law.¹⁴² The definition of a peremptory norm of general international law and the consequences of its violation on a treaty is regulated by the VCLT.¹⁴³ Article 53 VCLT provides:

‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’¹⁴⁴

Article 64 VCLT provides: ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’ Article 66(a) VCLT provides:

‘(a) any one of the parties to a dispute concerning the application or the interpretation of Articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;’¹⁴⁵

¹⁴¹ The terms *jus cogens* and peremptory norms are used interchangeably: Dina Shelton, ‘International Law and “Relative Normativity”’ in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 145-172, at p. 150, n. 13.

¹⁴² See Malcolm N. Shaw, *International law* (5th edn.) (Cambridge, CUP, 2003), at p. 118. This view is not shared by all commentators: Simma and Alston argue that *jus cogens* is incapable of meeting the requirements of customary international law and should be treated as general principles of law within the meaning of Article 38 of the ICJ Statute: above n. 118, at p. 104.

¹⁴³ The Vienna Convention on the Law of Treaties between States and International Organizations of 21 March 1986 VCLT(SIO), which is not yet in force, has identical provisions to the VCLT on peremptory norms of general international law.

¹⁴⁴ For an analysis of the Article 53 VCLT tests for the existence of *jus cogens*, see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, OUP, 1997), at pp. 51-59.

¹⁴⁵ However, Article 66(a) VCLT would not confer jurisdiction on the ICJ in a case involving the Union as a party since Article 34(1) of the Statute of the ICJ provides: ‘Only states may be parties in cases before the Court.’

Article 71 VCLT sets out the consequences of the invalidity of a treaty which conflicts with a peremptory norm of international law.

Jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) has extended the scope of application of *jus cogens* beyond that set out in the VCLT.¹⁴⁶

The ICTY ruled in *Prosecutor v. Anto Furundzija*:

‘The fact that torture is prohibited by a peremptory norm of international law has effects at the inter-state and individual levels. At the inter-State level, it serves to internationally delegitimise any legislative, administrative or judicial act authorizing torture ... at the individual level, that is of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.’¹⁴⁷

National courts and legislatures have also considered the impact of *jus cogens* on conflicting national law and claims of sovereign immunity.¹⁴⁸

The scope of the substantive content of *jus cogens* is disputed: ‘Except for the general acceptance of the peremptory character of the prohibition of aggression and the protection of some, but not all, human rights, the definition of the precise content of *jus cogens* is uncertain.’¹⁴⁹ As in the case of customary international law there is, however, a core set of norms which are generally acknowledged as constituting peremptory

¹⁴⁶ The extension of *jus cogens* outside the field of international treaty law is controversial: see, the reference cited in Caplan, ‘State Immunity, Human Rights, And *Jus Cogens*: A Critique Of The Normative Hierarchy Theory’ (2003) 97 *AJIL*, pp. 741-781, at p. 772, n. 233.

¹⁴⁷ Case no. IT-95-17/1-T10; Trial Chamber; Judgment of 10 December 1998; at paras. 155-157; available at: <www.un.org/icty>. For an analysis of the case, see Erika de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law’ (2004) 15 *EJIL*, pp. 97-121, at pp. 97-100.

¹⁴⁸ See Shelton, above n. 141, at pp. 156-157; and Cassese, above n. 22, at p. 203. On the Swiss federal authorities reaction to a violation of peremptory prohibition of *refoulement*, see E. de Wet, above n. 147, at pp. 101-105. The interaction of *jus cogens* and the doctrine of state immunity is analysed by Caplan, above n. 146, in the context of *Al-Adsani v United Kingdom* [2002] 34 EHRR 273.

¹⁴⁹ Ragazzi, above n. 144, at p. 48. National courts have been granted universal jurisdiction to adjudicate on specific violations of *jus cogens*. See, for example, section 5(1) of the Criminal Justice (United Nations Convention against Torture) Act 2000 which confers universal jurisdiction on the Irish courts over commission of the offence of torture.

norms.¹⁵⁰ Moreover recent judgments of the ICTY have identified specific rules of international law as *jus cogens*. In *Prosecutor v. Anto Furundzija* the Trial Chamber held in relation to the principle proscribing torture: ‘Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.’¹⁵¹ In *Prosecutor v. Zoran Kupreškić et al.*, the Trial Chamber held: ‘Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.’¹⁵² However, it remains unclear to what extent the views of the ICTY will be adopted by the ICJ and other international and national tribunals.¹⁵³

The following analysis of *jus cogens* focuses on its normative status in the Union’s legal order both in terms of the obligations it creates for the Union under international law and the potential conflicts that it may generate between national law and Union law. The extension of the competences of the Union in the field of refugee and asylum law both under the Treaty of Maastricht and the Treaty of Amsterdam significantly increased the

¹⁵⁰ Caplan refers to an emerging consensus as to the status of certain norms as *jus cogens*, including ‘piracy, genocide, slavery, aggression, and torture’: above n. 146, at p. 772. Cassese, above n. 22, at pp. 202-203, refers to the examples listed in the draft version of Article 19 of the International Law Commission (ILC) *Draft Articles on State Responsibility*, but removed from the final version adopted by the International Law Commission (ILC) at its 53rd Session held in November 2001: *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1. Available at: <http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm>. The former Article 19 of the *Draft Articles on State Responsibility* referred to the norms prohibiting aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, or apartheid, and massive pollution of the atmosphere or seas. Cassese also refers to norms prohibiting the use or threat of force, customary rules banning racial discrimination or torture, the general rules on self-determination, and the fundamental principles of humanitarian law: *ibid.*, at p. 203. As discussed in section 8.2.3 of Chapter eight, it has also been argued that the principle of *non-refoulement* constitutes a peremptory norm. For a discussion of the International Law Commission *Draft Articles on State Responsibility*, see David D. Caron, ‘The ILC Articles On State Responsibility: The Paradoxical Relationship Between Form and Authority’ (2002) 96 *AJIL*, pp. 857-873.

¹⁵¹ See above at n. 147, at para. 153. The defendant appealed the decision to the Appeals Chamber of the ICTY but not on the *jus cogens* aspect of the Trial Chamber’s decision.

¹⁵² Case no. IT-95-16-T; Trial Chamber; Judgment, of 14 January 2000; at para. 520. Available at: <www.un.org/icty>.

¹⁵³ For a discussion of the assertion of *jus cogens* in various international and national *fora*, see Shelton, in Evans (ed.), above n. 141, at pp. 150-159

potential impact of *jus cogens* in the Union's legal order. The adoption of the Constitution would further extend the Union's powers in sensitive areas of the AFSJ.¹⁵⁴

4.4.2 *JUS COGENS AND UNION LAW*

As in the case of customary international law, *jus cogens* applies not only to states but also to international organisations.¹⁵⁵ The consequences of breach of a peremptory norm by the Union would therefore be to engage the international responsibility of the Union.¹⁵⁶ Moreover, under international law the Union would have an obligation to cooperate in bringing an end to serious violations of *jus cogens* since the principles in Articles 40 and 41 of the ILC Draft Articles on State Responsibility would apply in broadly similar terms to an international organization such as the Union.¹⁵⁷ If a provision of one of the Treaties or the Constitution, at the time of its conclusion or upon creation of a new norm of *jus cogens*, violated a peremptory norm of international law, the Treaty or the Constitution would be void.¹⁵⁸

¹⁵⁴ See Chapter six for a discussion of Union competences under the AFSJ. See Chapter eight for further analysis of the Union's powers in relation to refugee and asylum policy.

¹⁵⁵ Shelton refers to the Commentary on the VCLT(SIO): 'it is apparent from the draft articles that peremptory norms of international law apply to international organizations as well as to states, and this is not surprising.' : in Evans (ed.), above n. 141, at p. 153, n. 23. See also in the same sense: Sands and Klein, above n. 28, at pp. 456-461. The implications of the developing law on *jus cogens* for customary international law is discussed by E. de Wet, above n. 147, at pp. 114-119.

¹⁵⁶ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p. 62, at para 66: cited by Crawford and Olleson, in Evans (ed.), above n. 126, at pp. 446-447. See also Sands and Klein, above n. 28, at p. 519: 'Finally, it is clear that international organisations are responsible under international law for breaches of international norms binding upon them.'

¹⁵⁷ Article 40: '1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.' Article 41: '1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.': above n. 150. Article 57 of the ILC *Draft Articles on State Responsibility* provides: 'These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.' However, Sands and Klein argue persuasively, in the context of the practice and jurisprudence relating to the UN, that similar rules apply to international organisations: above n. 28, at pp. 519-521.

¹⁵⁸ This assumes that Articles 53 and 64 VCLT reflect rules of customary international law. In this sense, see Cassese, above n. 22, at pp. 176-177 and 204-205. Cassese also argues that, notwithstanding the provisions of Article 44.5 VCLT, a court may be entitled to '*disregard* or declare *null and void* a single

The Union is also bound by the rules of *jus cogens* according to Union law. This follows, *a fortiori*, from the case law of the ECJ on the effect of customary international law and is confirmed in Article I-3(4) of the Constitution which commits the Union to ‘strict observance and development of international law, including respect for the principles of the United Nations Charter.’ Moreover it has been argued that *jus cogens* enjoys a higher ranking than both treaty and customary international law in Union law since it also prevails over conflicting primary Union law.¹⁵⁹ As regards the Union’s internal legal order, therefore, any conflict of primary or secondary Union law with *jus cogens* would result in the invalidity of the act in question. It is submitted that, as argued in the case of fundamental rights protected under customary international law, the standard for judicial review of secondary Union measures for violation of *jus cogens* should not include the requirement for a manifest error of assessment by the Union authorities.

4.4.3 *JUS COGENS IN NATIONAL LAW: CONFLICT RESOLUTION*

The most problematic area of *jus cogens*, however, is how it impacts on the Union legal order’s relationship with the national legal orders of the Member States. Traditionally, the basic principle has been that international law ‘leaves each country *complete* freedom with regard to how it fulfils, nationally, its international obligations.’¹⁶⁰ However, the *dicta* of the ICTY in *Prosecutor v. Anto Furundzija* indicate that a violation of the *jus cogens* norm against torture may ‘delegitimise any legislative, administrative or judicial act authorizing torture.’¹⁶¹ Furthermore, a number of international treaties that include a

treaty provision that is contrary to *jus cogens*, if the remaining provisions of the treaty are not tainted with the same legal invalidity.’: *ibid.*, at p. 206. The difficult question of which court or courts would have jurisdiction to rule on the invalidity of primary Union law is considered in Section 3.3 of Chapter three.

¹⁵⁹ See in this sense, Peters, above n. 2, at pp. 37-38. It should be noted, however, that this conclusion has not been confirmed by a judgment of the ECJ or other competent court.

¹⁶⁰ Cassese above n. 22, at p. 219. Although according to international law a state may not rely on its internal law as justification for its failure to perform its international law obligations. This rule is, in the context of treaty obligations, embodied in Article 27 VCLT.

¹⁶¹ See above n. 147, at para. 155.

prohibition of specific violations of *jus cogens* require the parties to enact specific legislation to give effect to the prohibition.¹⁶²

In such conditions, a national court faced with a measure of Union law that conflicted with *jus cogens* would have to address two challenges to the validity of that measure notwithstanding the doctrine of the supremacy of Union law. Firstly, if the national court recognized or gave effect to the Union measure the Member State would be in violation of its international law obligations since it could not rely on its obligations under the Treaties, or the Constitution, to give effect to that measure notwithstanding conflicting rules of international or national law.¹⁶³ Such a course of action would be unacceptable to the court of the Member State concerned and it would either construe the Union measure in a way that renders it in conformity with the norm of *jus cogens* or disregard the measure.¹⁶⁴ Secondly, national legislation of the Member State giving effect to a norm of *jus cogens* would be violated if the national court gave effect to a conflicting measure of Union law.¹⁶⁵ In such a case the national court would have to consider whether the constitutional basis for giving effect to the primacy of Union law extended to shield such a measure of Union law.¹⁶⁶

¹⁶² For example, see: Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in force 12 June 1951, 78 *UNTS* 277; Article 2(1)(d) CERD; Article 2(2) ICCPR; and Articles 4 and 5 CAT. See generally, Cassese, above n. 22, at pp. 218-219.

¹⁶³ See for a similar argument in the context of resolutions of the UN Security Council which conflict with *jus cogens*: Cassese, above n. 22, at pp. 206-207; and de Wet, above n. 23, at pp. 99-100.

¹⁶⁴ If the requirements of Article 307 EC Treaty were satisfied the national court would in any event be entitled to disregard the Union measure: see Section 4.2.3 above. The approach of the court would be guided by the national rules on the status of international law in the domestic legal system. See generally, Eileen Denza, 'The Relationship between International and National Law', in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 415-442.

¹⁶⁵ It may also possibly constitute a violation of the Member State's constitution. As an example, outside the Union's membership, the Swiss Constitution prohibits popular proposals for reform of the Swiss Constitution in violation of *jus cogens*: see E. de Wet, above n. 147, at pp. 101-105.

¹⁶⁶ The German *Bundesfinanzhof* has ruled that effect should not be given to a measure of Union law: in violation of international law: Order of 9 January 1996, *Europäische Zeitschrift für Wirtschaftsrecht*, Bd. 7, 1996, 126, 127-128: cited in Peters, above n. 2, at p. 19, n. 45. Article 29(10) of the Irish Constitution provides: 'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.' A provision of Union law that violated *jus cogens* would not be construed by the Irish courts as 'necessitated' by the obligations of membership.

Both these scenarios demonstrate the importance for the integrity of Union law that any violation of *jus cogens* is effectively sanctioned. It is therefore submitted that if a challenge to the validity of a measure of Union law on grounds of a violation of *jus cogens* is raised in judicial review proceedings before the ECJ, whether as the result of a direct action or a preliminary reference, the ECJ should adopt a standard of review that in all circumstances requires compliance with the norm of *jus cogens* and does not require the applicant to prove a manifest error of assessment by the Union's authorities. This approach would minimize the risk that the ECJ and the national courts would adopt divergent views on the compatibility of a Union measure with *jus cogens*.

In the case of a conflict between national legislation implementing an international agreement containing a rule of *jus cogens* and a provision of Union law, the Article 234 EC Treaty reference procedure provides a mechanism to resolve the conflict by allowing the ECJ to control whether the violation by the Union measure of the implementing national legislation also constituted a violation of *jus cogens* for the purposes of Union law. Although Article 234 EC Treaty does not expressly provide the ECJ with jurisdiction to interpret treaties to which the EC is not party, the ECJ nonetheless has assumed such jurisdiction in the context of the GATT agreement 'in order to ensure the uniform interpretation of Community law.'¹⁶⁷ Moreover in *SPI* the ECJ ruled that its jurisdiction under Article 234 EC Treaty extended to interpret the GATT treaty both in the context of the validity of EC law and implementing national measures: 'In that regard it does not matter whether the national court is required to assess the validity of Community measures or the compatibility of national legislative provisions with the commitments binding the Community.'¹⁶⁸

However, a rigid application of the principles in the *SPI* case would have the disadvantage of imposing the ECJ's interpretation of the relevant rule of *jus cogens* on the national courts. Such an approach would be inconsistent with the argument advanced in this study that a decentralized approach to the interpretation of

¹⁶⁷ Case 267-9/81, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983] ECR 3415, at para. 15. But see Hartley for a critical analysis of the ECJ's reasoning in this case: 'This is the reasoning of politics, not law.': above n. 5, at p. 275.

¹⁶⁸ *SPI, ibid.*, at para. 15.

international fundamental rights standards is to be preferred.¹⁶⁹ It is therefore submitted that a national court should be entitled to refer directly to the interpretation in international law of the relevant norm of *jus cogens* and disapply any conflicting provision of Union law without being obliged to make a preliminary reference to the ECJ. This approach would require a development of the doctrines in *CILFIT* and *Foto-Frost*.¹⁷⁰

4.5 GENERAL CONCLUSIONS

The Union is obliged to comply with international law by virtue of its status as an international organization endowed with legal personality. It is also subject to constraints based on the international law treaty obligations of the Member States arising either from treaties entered into prior to membership of the Union under Article 307 EC Treaty or in respect of treaties to which the Member States are all party and fall within an area of competence transferred to the Union. The ECJ has also developed through its general principles of law doctrine, as confirmed in Article 6(2) TEU, an obligation on the Union's institutions and the Member States, in implementing or derogating from Union law, to respect fundamental rights protected by international treaties to which the Member States are party.

However, the current mechanisms in Union law for providing legal effect to international fundamental treaty rights are unsatisfactory. Article 307 EC Treaty and the *International Fruit Company* doctrine provided incomplete and inconsistent mechanisms for the protection of treaty based fundamental rights. Although the general principles doctrine is more comprehensive in its scope of application, it suffers from a number of deficiencies in terms of accountability and transparency.¹⁷¹

¹⁶⁹ See, for the development of this argument in the context of the ECHR, Section 3.4.3 of Chapter three.

¹⁷⁰ Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415; and Case 314/85, *Foto-Frost (Firma) v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

¹⁷¹ See Section 5.2.2 of Chapter five for a detailed analysis.

In the case of fundamental rights established in customary international law and *jus cogens*, there is no provision in the Treaties or ruling by the ECJ clearly establishing their normative status. However, uncertainty as to the identification and scope of such rights should not be grounds for restricting their enforceability. Effective recognition and enforcement of such rights will become of increasing significance as the Union's activity in the AFSJ is extended and deepened.¹⁷² The lack of clarity on their normative status undermines their contribution to the protection of fundamental rights in the Union's legal order and has the potential for creating conflicts with the national legal orders of the Member States.

The recognition in Article I-3(4) of the Constitution of the protection of fundamental rights and respect for international law as an objective of the Union provides a potential basis for strengthening the normative status of fundamental rights derived from both treaty law and custom. Union accession to the ECHR, as mandated by Article I-9(2) of the Constitution, would be a milestone in achieving effective protection of fundamental rights in Union law. However, ECHR accession needs to be complemented by Union accession to the other European Conventions and the UN Conventions. Direct membership by the Union of fundamental rights treaties should be the preferred strategy since the more securely international fundamental rights standards are integrated into the Union's legal order and the more effectively compliance is monitored by external and independent bodies the greater the accountability and legitimacy of the Union's legal order both domestically and internationally.¹⁷³

Finally, the rules on the judicial review of the legality of Union measures should be developed to take account of the specific characteristics of fundamental rights norms. Both norms of customary international law and *jus cogens* should be recognised as grounding

¹⁷² See Sections 6.2.8 and 6.2.9 of Chapter six.

¹⁷³ On the relationship between accountability and legitimacy, see Anne-Marie Slaughter, 'Governing Through Government Networks', in Byers (ed.), *The Role of Law in International Politics* (Oxford, OUP, 2000), pp. 177-205, at pp. 195-196. See generally Anthony Arnull and Daniel Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002). On the dichotomy between internal and external Union policy on fundamental rights, see Clapham, in Alston (ed.), above n. 11, at p. 659; and Williams, above n. 13, *passim*.

an absolute right to judicial review to determine compliance of Union measures with such norms. Notwithstanding a transfer of competences to the Union, the continuing obligations of the Member States to comply with their fundamental rights obligations under both treaty and customary international law, and in particular those obligations which constitute *jus cogens*, requires that the ECJ and the national courts adopt a co-operative approach to the resolution of conflicts in the interpretation and application of international fundamental rights norms based on the primacy of international law.

5

**THE CONSTITUTION AND REFORM OF THE PROTECTION OF
FUNDAMENTAL RIGHTS IN THE UNION LAW**

5.1 INTRODUCTION

This Chapter analyses the extent to which the reforms in the Constitution¹ would improve the Union's existing normative system for the protection of international fundamental rights. The two principal reforms in the Constitution to the structure of fundamental rights protection in Union law are the obligation in Article I-9(1) for the Union 'to recognize the rights, freedoms and principles set out in the Charter which constitutes Part II' of the Constitution and the obligation in Article I-9(2) for the Union to accede to the ECHR.² The substance of these reforms were included in the draft Constitution establishing a Constitution for Europe presented by the Presidency of the Convention on the Future of Europe (the European Convention)³ to the President of the European Council in Rome on 18 July 2003,⁴ on the basis of the final report of Working Group II (WGII Final Report).⁵

The Intergovernmental Conference (IGC), which opened at Rome on 4 October 2003 under the Italian Presidency and ended under the Irish Presidency at the European Council meeting of 17-18 June 2004, accepted these reforms in principle but adopted

¹ [2004] OJ C310/1. Reference throughout this Chapter is, unless otherwise specified, to the numbering of articles in the Constitution. Previous versions of the Constitution during its negotiation had different numbering.

² Article I-9(2) refers to Union accession to the ECHR. The question of the Protocols of the ECHR to which the Union would accede has been left open for resolution during the accession negotiations.

³ See the *Report from the Presidency of the Convention to the President of the European Council* of 18 July 2003 (CONV 851/03). Available on the European Convention website at: <<http://european-convention.eu.int/>>. Documents available on the European Convention website are not further referenced. The documents associated with the organizations and bodies contributing to the European Convention up to 29 October 2004 are available on the *Futurum* website at: <http://europa.eu.int/constitution/futurum/index_fr.htm>.

⁴ The 18 July 2003 draft text of the Constitution is available on the European Convention website.

⁵ The Final Report of Working Group II on 'Incorporation of the Charter/Accession to the ECHR' (WGII Final Report): CONV 354/02: WGII 16, Brussels, 22 October 2002. Available on the European Convention website. For a detailed study of the issues raised in WGII Final Report, see the 6th report of the Select Committee on European Union of the House of Lords, *The Future Status of The EU Charter of Fundamental Rights* (Session 2002-2003); HL Paper 48; published 4 February 2003.

amendments both of a substantive and technical nature to the fundamental rights provisions in the 18 July 2003 draft Constitutional Treaty.⁶ The Italian Presidency proposed amendments strengthening the status of the Explanations to the Charter of 11 October 2000 (the Charter Explanations),⁷ amending Article I-9(2) by requiring the Union to accede to the ECHR rather than, as in the draft Constitutional Treaty of 18 July 2003, ‘to seek accession’, and replacing the requirement for unanimity in the Council in negotiating the Union’s accession to the ECHR under Article III-325(8) by a qualified majority throughout the accession procedure.⁸

Following failure of the IGC to reach agreement at the European Council meeting of 12-13 December 2003, the Irish Presidency submitted a report to the European Council meeting of 25-26 March 2004 which was broadly positive on the perspectives for adoption of the Constitution.⁹ On 29 April 2004, the Irish Presidency submitted a working document based on the proposals of the Italian Presidency which included a new Protocol relating to Article I-9(2) on the accession of the Union to the ECHR (the ECHR Protocol).¹⁰ Draft texts subject to a broad consensus were circulated by the Irish Presidency in May and June 2004 which included proposed amendments relating to the terms of Union accession to the ECHR, the ECHR Protocol and a new draft Declaration relating to Article I-9(2).¹¹ Issues requiring further discussion, in preparation for the meeting of Heads of State or Government in Brussels on 17-18 June 2004, were subsequently circulated, including proposals on the status of the Charter Explanations.¹²

⁶ IGC documents are available at:

<http://ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?content=DOC&lang=EN&cmsid=754> (the IGC website). IGC documents are not further referenced.

⁷ The Charter Explanations as updated under the authority of the Praesidium of the European Convention are published as Declaration No. 12 to the Constitution: [2004] OJ C310/424-459.

⁸ The Italian Presidency proposals are in CIG 60/03 of 9 December 2003; CIG 60/03 ADD1 of 9 December 2003; and CIG 60/03 ADD 2 of 11 December 11 2003. Available on the IGC website.

⁹ CIG 70/04 of 24 March, 2004. Available on the IGC website.

¹⁰ CIG 73/04 of 29 April, 2004. Available on the IGC website. The modified version of the ECHR Protocol annexed as Protocol 32 to the Constitution is set out in Section 5.7.2. below.

¹¹ CIG 76/04 of 13 May 2004; CIG 79/04 of 10 June 2004; and CIG 81/04 of 16 June 2004. See Section 3.4.2 of Chapter three for the final version of the Declaration relating to Article I-9(2).

¹² CIG 75/04 of 13 May 2004; CIG 80/04 of 12 June 12 2004; and CIG 82/04 of 16 June 2004. Available on the IGC website.

Agreement on the Constitution was finally reached on 18 June 2004.¹³ Signature of the Constitution took place in Rome on 29 October 2004. The ratification process has been effectively suspended until the first half of 2006 pending a review by the European Council of national debates on the Constitution's future following rejection of the Constitution in referenda in France and the Netherlands of 29 May 2005 and 1 June 2005 respectively.¹⁴

A central issue in any reform process, in particular when it involves establishing a constitutional bill of rights, is identifying the objectives to be achieved by a particular constitutional provision: 'When a legal norm is expressed as an article in an institutional framework, it is articulated in a particular manner for a particular purpose.'¹⁵ This Chapter critically analyses the reform of the Union's constitutional structure for the protection of fundamental rights in the Constitution in the context of assessing how far it achieves key objectives critical to the effective protection of fundamental rights in the Union's legal order:¹⁶ transparency;¹⁷ the rule of law;¹⁸ a balanced relationship between the Union and national legal orders;¹⁹ the strict control of derogations and limitations on fundamental rights;²⁰ an effective system of judicial redress, including Union accession to the ECHR; and the entrenchment of fundamental rights.

¹³ The documents presented during the 17-18 June 2004 meeting are in CIG 83/04, CIG 84/04 and CIG 85/04 of 18 June 2004. Available on the IGC website.

¹⁴ Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe of 18 June 2005: available at: <http://ue.eu.int/ueDocs/cms_Data/Docs/pressData/en/ec/85325>.

¹⁵ Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights' (2001) 12 *EJIL*, pp. 917-941, at p. 922.

¹⁶ Some of these objectives were affirmed in the Laeken Declaration of the European Council on the Future of the European Union of December 2001: <http://europa.eu.int/comm/laeken_council/index_en.htm>.

See also: Koen Lenaerts and Marlies Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means' (2002) 27 *EL Rev.*, pp. 377-407; and Andrew Williams, 'EU Human Rights Policy and the Convention on the Future of Europe: a Failure of Design?' (2003) 28 *EL Rev.*, pp. 794-813.

¹⁷ See Peter Dryberg, 'Accountability and Legitimacy: What is the Contribution of Transparency?' in Arnall and Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), pp. 81-96.

¹⁸ See Anthony Arnall, 'The Rule of Law in the European Union' in Arnall and Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), pp. 239-256.

¹⁹ See Alan Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) *CML Rev.*, pp. 355-381.

²⁰ See S. Peers, 'Taking Rights Away? Limitations and Derogations', in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 140-179.

While a number of these objectives overlap, each of the following sections focuses on one objective as a critical tool for assessing how far the fundamental rights reforms in the Constitution contribute to achievement of a constitutional structure that is robust and effective.²¹ This analysis lends strong support to incorporation of the Charter and accession by the Union to the ECHR, but concludes that other provisions in the Constitution, and in particular the retention of general principles of law as a source of fundamental rights and the amendments to the Charter, undermine respect for these objectives. In the light of these conclusions, the current impasse over the ratification of the Constitution provides an opportunity for further reflection and improvement on the current proposals in the Constitution.

5.2 SOURCES OF FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION

5.2.1 INTRODUCTION

‘If we are to have greater transparency, simplification is essential.’²² This section argues that the goal of transparency would be undermined by the complexity engendered by retention of general principles as a source of fundamental rights in the Union’s legal order in Article I-9(3) and by the amendments to the Charter in Articles II-112(4)-(7) of the Constitution. The section is divided into three sub-sections: the first sub-section addresses the problems raised by the retention of general principles in Article I-9(3); the second sub-section analyses critically the new provisions in Articles II-112(4)-(7); and the third sub-section examines the hierarchical ordering of the sources of fundamental rights law specified in Article I-9 of the Constitution.

²¹ See Chapter one for an explanation of this methodology.

²² Laeken Declaration, above n. 16. On the requirement for transparency and clarity in the Union’s instruments and procedures, see the Final Report of Working Group IX on Simplification, CONV 424/02, Brussels 29 November 2002. Available on the European Convention website

5.2.2 ARTICLE I-9(3) AND THE RETENTION OF FUNDAMENTAL RIGHTS AS GENERAL PRINCIPLES

The sources of fundamental rights norms in Union law are exceptionally fluid as a result of the development of protection by the ECJ on the basis of fundamental rights as general principles of Union law.²³ The ECJ has interpreted Article 6(2) TEU as embodying²⁴ or reaffirming²⁵ its previous case law on fundamental rights as general principles of Union law and has continued to employ its wider pre-Article 6(2) TEU formulation of the sources for general principles of Union law.²⁶ International fundamental rights instruments other than the ECHR therefore continue to provide a source for general principles of Union law notwithstanding the restrictive terms of Article 6(2) TEU.²⁷ The Charter rights and principles, although not formally incorporated into the Union's legal order, have become a further source of fundamental rights standards.²⁸

Article I-9(3) of the Constitution corresponds to Article 6(2) TEU: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'²⁹ The

²³ See Section 4.2.4 of Chapter four.

²⁴ Case C-7/98, *Krombach v. Bamberski* [2000] ECR I-1935, at para. 27.

²⁵ Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, at para. 72.

²⁶ For example, in *Grant v. South West Trains Ltd.*, decided after the entry into force of the Maastricht Treaty but before the entry into force of the Treaty of Amsterdam, the ECJ stated that the ICCPR is 'one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law': Case C-249/96 [1998] ECR I-621, at para. 44. However, in that case the ECJ did not apply the Human Rights Committee's interpretation of Article 28 ICCPR in Communication No. 488/1992 (*Toonen v Australia*).

²⁷ In practice the ECJ has mainly referred to the ECHR on the basis it is an international instrument of 'special significance': *Schmidberger*, above n. 25, at para. 71. However, Opinions of Advocates-General continue to refer to other international conventions: see, for example, the reference by AG Stix-Hackl to the preambles to the UNDHR, the ICCPR and ICESR as sources of the right to human dignity in Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*; [2005] 1 CMLR 5, at para. 82. The ECJ, while not specifically referring to those sources, in *Omega* endorsed the AG's approach: *ibid.*, at para. 34.

²⁸ See A. Ward, 'Access to Justice', in A. Ward and S. Peers (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 123-140, at pp. 126-132.

²⁹ Article I-9(3) substitutes for the obligation for the Union to 'respect' as general principles of 'Community' law fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, the stipulation that such rights shall 'constitute'

retention of the substance of Article 6(2) TEU in Article I-9(3) should provide a sufficient basis for the ECJ's continued reference to international treaties other than the ECHR. Indeed, the contrary interpretation would render the retention of Article I-9(3) largely nugatory. In any event, the existing principle established by the ECJ that international human rights treaties other than the ECHR may be used as an interpretative tool in determining the general principles of fundamental rights law applied by the ECJ would remain applicable.³⁰

The retention of the reference to the common constitutional traditions and the ECHR as sources of general principles of law in Article I-9(3) is designed to retain a dynamic element to the protection of fundamental rights in Union law.³¹ However, in the case of both the reference to the common constitutional traditions and to the ECHR it is difficult to identify any additional benefits for the protection of fundamental rights from those accruing from incorporation of the Charter and Union accession to the ECHR. The difficulty of identifying a core set of constitutional traditions in a Union with a regularly expanding membership has resulted in a paucity of such common traditions being cited.³² The ECJ has rejected the argument that each and every constitutional provision of a Member State should be guaranteed protected status under Union law³³ and the common

general principles 'of the Union's law'. However, the reference in Article I-9(3) to Union law as opposed to Community law in Article 6(2) TEU does not constitute a substantive change: see S. Peers, 'Human Rights and the Third Pillar', in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 167-186, at p. 171. The substitution of the obligation for the Union to 'respect' fundamental rights by the terminology that such rights shall 'constitute' general principles also does not seem substantive.

³⁰ See Peers, in Alston (ed.), above n. 29, at p. 171, n. 27.

³¹ While WGII made no recommendation on retention, those members in favour argued that such a reference 'could serve to complete the protection offered by the Charter and clarify that Union law is open for future evolutions in ECHR and Member States' human rights law': WGII Final Report, above n. 5, at p. 9. Available on the European Convention website.

³² Indeed, the ECJ's references to such common constitutional traditions has been described as perfunctory: 'One could even say that the Court of Justice is not genuinely interested in finding out whether there is a 'common tradition' among the Member States concerning the legal regime of a particular rule. References to specific national legal systems are perfunctory and haphazard. A national constitutional judgment has never been cited.': B. de Witte, 'The Role of the ECJ in Human Rights', in P. Alston with M. Bustelo and J. Heenan (eds.) *The EU and Human Rights* (Oxford, OUP, 1999), pp. 859-897, at p. 878.

³³ This argument was advanced by A. G. Warner in Case 7/76, *Industria Romana Carni e Affini, S. p. A. v. Amministrazione dell Finanze dello Stato* [1976] ECR 1213; but rejected in Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727. See J. Weiler and U. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in A. Slaughter, A. Stone Sweet and J. Weiler (eds.) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford, Hart Publishing, 1998), pp. 331-364, at pp.

constitutional traditions exist as a source of Union fundamental rights only insofar as recognised by the ECJ as a matter of policy.³⁴

The reference in Article I-9(3) to the ECHR is also of limited benefit following incorporation of the Charter since, even without Union accession to the ECHR, the Charter substantially recognises the rights and freedoms guaranteed by the ECHR.³⁵ WGII emphasized that Article 52(3) of the Charter, incorporated unamended as Article II-112(3), means that if Charter rights correspond to ECHR rights they shall have the same scope and meaning as laid down in the ECHR but that, in accordance with the second sentence of Article II-112(3), this does not prevent Union law providing more extensive protection if Union legislation subsequently so provides or provisions of the Charter, although based on the ECHR, provide more extensive protection.³⁶ In the light of the minimum standard of protection guaranteed by Article II-112(3), retaining ECHR rights as a source of general principles of Union law would not materially add to the same, or enhanced, rights set out in the Charter.

One argument in favor of retaining Article I-9(3) is that it could be used in conjunction with Article II-113 to recognize rights not protected under the Charter but protected under other qualifying international fundamental rights treaties.³⁷ This problem arises because of the more limited scope of application of the Charter: ‘In that sense the scope of application *ratione materiae* of the Charter is more limited than the protection offered by the present system of guaranteeing respect of fundamental rights in the EU flowing

356-357. See generally, J. Weiler, ‘Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights’ in N.A. Neuwahl and A. Rosas (eds.) *The European Union and Human Rights* (Hague, Kluwer, 1995), pp. 51-76; and L. Besselink: ‘Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union’ (1998) 35 *CML Rev.*, pp. 629-680.

³⁴ See T. Hartley, *The Foundations of European Community Law* (5th edn.) (Oxford, OUP, 2003), at pp. 138-141.

³⁵ ‘It means that, by and large, the substantive provisions of the European Convention have been incorporated [in the Charter], although not exactly in the same wording’: L. Betten, ‘Human Rights’ (2001) 50 *ICLQ*, pp. 690-701, at p. 692.

³⁶ WGII Final Report, above n. 5, at p. 7. WG II refers to Articles 47 and 50 of the Charter as examples of provisions providing more extensive protection.

³⁷ See Section 5.2.4 below for an analysis of Article II-113.

from Article 6(2) *juncto* Article 46(d) EU.’³⁸ However, it is submitted a preferable solution to this problem would be accession by the Union to the relevant international treaties.³⁹ The inclusion of Article I-9(3) in the Constitution undermines certainty and transparency in identification of the sources of the Union’s fundamental rights.⁴⁰

5.2.3 AMENDMENTS TO THE CHARTER

5.2.3.1 Introduction

WGII Final Report recommended a number of amendments to the Charter to be incorporated in the Constitution with further amendments resulting from the IGC process.⁴¹ In general WG II did not provide policy justification for the recommendations in the WGII Final Report, justifying its technical and legal approach⁴² on the grounds of its limited terms of reference.⁴³ This approach was, however, pursued selectively insofar as several recommendations in WGII Final Report were influenced by political pressure from the Member States and resulted in changes of substance, in particular as regards the Charter,⁴⁴ while in other cases it was used to avoid addressing potentially beneficial

³⁸ K. Lenaerts and E.E. de Smijter, ‘A “Bill of Rights” for the European Union’ (2001) 38 *CMLR*, pp. 273-300, at p. 281. See for an analysis of Article 46(d) TEU, Section 7.2.3 of Chapter seven.

³⁹ For a discussion of options for enhancing protection of human rights under Community law see: G. Gaja, ‘New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?’ in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 781-800, at pp. 796-800. See generally, Section 4.2.1 of Chapter four.

⁴⁰ WGII discussion paper of 18 June 2002 sets out admirably the objections to retaining an equivalent to Article 6(2) TEU: CONV 116/02, at p. 10. Available on the European Convention website. See also Engel’s recommendation to eliminate Article 6(2) TEU if the Charter were incorporated: ‘lest the Community create a ‘lawyers paradise’ on fundamental rights’: ‘The European Charter of Human Rights: A Changed Political Opportunity Structure and its Normative Consequences’ (2001) 7 *ELJ*, pp. 151-170, at p. 167.

⁴¹ The proposals of WGII are set out in the Annex to WGII Final Report, above n. 5, at p. 17. The amendments negotiated during the IGC are referred to below. For an analysis of the amendments, see Peers, in Peers and Ward (eds.), above n. 20, at pp. 171-179.

⁴² For a valuable synthesis of the arguments against a technocratic view of the lawyer’s role see: J.H.H. Weiler and A.L. Paulus, ‘The Structure of Change in International Law or is there a Hierarchy of Norms in International Law?’ (1997) 8 *EJIL*, pp. 545-565.

⁴³ The mandate of WGII is set out in CONV 72/02. Available on the European Convention website.

⁴⁴ The British Government made this explicit: ‘We and some other Member States worked hard in the Convention on the Future of Europe to help get more clarity and legal certainty into the Charter. The changes we helped pushed through have put the whole package in much better legal shape.’: *A Constitutional Treaty for the EU, The British Approach to the European Intergovernmental Conference*

reforms to fundamental rights protection in the Union. Each of the amendments to the Charter is analysed below in the context of assessing how far they contribute to achieving the objectives of transparency and simplicity in the sources of Union law. It is concluded that the amendments achieve neither of these objectives but detract from the Charter's clarity and legal certainty.

5.2.3.2 *Article II-112(4)*

Article II-112(4) provides: '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.' WGII, with two members dissenting, justified Article II-112(4) on the basis it served to emphasize the 'firm roots' of the Charter in the common constitutional traditions of the Member States and 'in the interest of smooth incorporation of the Charter as a legally binding document'.⁴⁵ This argument suggests the purpose of inserting Article II-112(4) was political expediency rather than an objective analysis of its merits. Apart from the difficulty of identifying such traditions,⁴⁶ the rule of interpretation set out in Article 112(4), if applied literally, requires an unduly restrictive interpretation of the relevant Charter articles based on the constitutional traditions of the members of the Union at the time the Charter was proclaimed on 7 December 2000.

WGII sets out how it considers Article II-112(4) should be applied: 'the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.'⁴⁷ This contradictory terminology seems to reflect academic arguments for the application of differential standards of human rights to Union and national measures,⁴⁸ although WGII claims to reject the argument that the ECJ should adopt a 'lowest common denominator' approach to Charter rights derived from the common

2003, Cm5934 (September 2003), at para. 101. Available at <http://www.fco.gov.uk/Files/kfile/FoE_IGC_Paper_cm5934_sm,0.pdf>.

⁴⁵ WGII Final Report, above n. 5, at p. 7.

⁴⁶ See Peers for an analysis of the problem of establishing a complete list of Charter rights resulting from the common constitutional traditions: in Peers and Ward (eds.), above n. 20, at pp. 173-174.

⁴⁷ WGII Final Report, above n. 5, at pp. 7-8.

⁴⁸ See Section 5.2.4 below.

constitutional traditions.⁴⁹ However, the reference to an interpretation ‘in harmony with those traditions’ is so vague that it is hard to see how the ECJ could give it any substantive effect. A further objection to Article II-112(4) is that since the Charter does not, with good cause, explicitly identify the rights derived from the common constitutional traditions nor which traditions form the source of such rights, one is obliged to refer to the Charter Explanations which weakens the authority of the Charter and risks solidifying the rights protected by it.

5.2.3.3 *Article II-112(5)*

WGII also proposed, with two members having reservations, a new provision which has been inserted in a slightly modified version as Article II-112(5):

‘The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by the institutions, bodies, offices and agencies 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.’

According to WG II Article II-112(5) would be consistent both with the case-law of the ECJ and ‘with the approach of the Member States’ constitutional systems to “principles” particularly in the field of social law’.⁵⁰ WGII argued that ‘future jurisprudence’ would be able to rule on the ‘exact attribution of articles to the two categories’ (right or principle) by referring to the wording of the respective articles of the Charter and ‘taking into account the important guidance’ provided by the Charter Explanations as supplemented by explanations in WGII Final Report.⁵¹

⁴⁹ WGII Final Report, above n. 5, at p. 7.

⁵⁰ WGII Final Report, above n. 5, at p. 8. WGII Final Report refers to Cases T-13/99, *Pfizer Animal Health SA v Council* [2002] ECR II-3305 and Case C-265/85 *Van den Bergh en Jurgens BV et Van Dijk Food Products (Lopik) BV v Commission* [1987] ECR-1155. The relevance of the cases to Article II-112(5) is difficult to discern.

⁵¹ WGII Final Report, above n. 5, at p. 8. The Charter Explanations list Articles 1, 34(1), 35, 36, 37, and 38 of the Charter as principles but, as Peers points out, this designation is not free from doubt: in Peers and Ward (eds.), above n. 20, at p. 175.

Several criticisms may be made of Article II-112(5).⁵² Firstly, the first sentence of Article II-112(5) is either an attribution of competence for the Union and Member States to adopt measures implementing the Charter principles without defining the modalities of its exercise, which is misplaced in a constitutional enumeration of rights and conflicts with Article II-111(2),⁵³ or, more plausibly, an affirmation of competences established elsewhere in the Constitution, in which case it is superfluous. Secondly, by restricting judicial cognisance of Charter principles to implementing acts it deprives the Charter principles of legal enforceability in the absence of such acts. Since the Charter principles relate to areas where Union action may be controversial and difficult to achieve, Article II-112(5) risk relegating the Charter principles to the fate of Christmas poinsettias: left to wither after due credit has been taken for their initial bloom. Thirdly, Article II-112(5) creates a rigid distinction between the legal effect of those provisions of the Charter recognizing rights and those containing principles, whereas Article II-111(1) of the Charter simply provides the Member States shall, in respect of the provisions of the Charter, ‘respect the rights, observe the principles and promote the application thereof in accordance with their respective powers ...’. Article II-112(5) therefore constitutes an unwarranted and substantive change to the structure of the Charter which undermines its transparency.

5.2.3.4 *Article II-112(6).*

Following the recommendation of WGII, Article II-112(6) provides: ‘Full account shall be taken of national laws and practices as specified in this Charter.’ WGII Report justifies this new provision by reference to the principle of subsidiarity referred to in the Charter’s Preamble, Article 51(1) of the Charter and ‘from those Charter Articles which make references to national laws and practices’.⁵⁴ It is difficult to attribute any specific meaning to this provision.⁵⁵ Firstly, the principle of subsidiarity was relevant to determining the original scope of the Charter, as made clear in Article 51(1) of the

⁵² Peers argues that the ‘most logical explanation’ for Article II-112(5) is that it ‘would rule out direct effect of the principles’: in Peers and Ward (eds.), above n. 20, at p. 175.

⁵³ See further Section 5.4.2 below.

⁵⁴ WGII Final Report, above n. 5, at p. 5.

⁵⁵ Peers construes Article 112(6) as, potentially at least, conferring substantial freedom on the Member States to derogate from the Charter articles referring to national laws and practices: in Peers and Ward (eds.), above n. 20, at pp. 176-178.

Charter, but not to the interpretation of the Charter provisions, whether or not referring to national laws and practices. Secondly, on each occasion the Charter refers to national laws and practices it is clear from the relevant article that the exercise of the right shall be determined in accordance with such national laws and practices. Article II-112(6) therefore adds nothing to the Charter's existing text, as indeed the text of Article II-112(6) itself recognises by providing that full account shall be taken of national laws and practices 'as specified in the Charter'.

5.2.3.5 *Article II-112(7).*

WG II emphasized the importance of the Charter Explanations as a tool in ensuring a 'correct understanding of the Charter' and recommended that reference should be drawn to them 'in an appropriate manner' upon incorporation of the Charter and that they should be more widely publicized.⁵⁶ Following negotiation over the status of the Charter Explanations during the IGC process,⁵⁷ this status was significantly strengthened by the addition of Article II-112(7): 'The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.' In addition, a new sentence is added at the end of the fifth recital to the Charter:

'In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.'

However, the Charter Explanations were formulated on the basis they should have 'no legal value'⁵⁸ and a change to their status undermines the transparency of the Charter as a source of fundamental rights in the Constitution and jeopardize a dynamic interpretation of the Charter rights and principles by the ECJ. As has been aptly stated: 'Good

⁵⁶ WGII Final Report, above n. 5, at p. 10. WGII also proposed the explanations contained in WGII Final Report should be 'fully integrated with the original Explanations'. This suggestion was not followed up by the IGC. The British Government endorsed the European Convention's proposal for enhancing the legal status of the Charter Explanations: in Cm5934, above n. 44, at para. 102.

⁵⁷ See Section 5.1 of this Chapter.

⁵⁸ See the Charter Explanations, above n. 7, at p. 1.

constitutions are short and enigmatic.⁵⁹ Article II-112(7) would confront the ECJ with the difficult task of reconciling the requirement to take account of the Charter Explanations with the fact that their references to ECJ case law, the Treaties, and secondary Union legislation will become outdated.⁶⁰ Similar problems will arise in respect of the Charter articles based wholly or in part on international sources referred to in the Charter Explanations since subsequent instruments will affect these sources.⁶¹ This process will increasingly undermine the transparency of the Charter as reference to the Charter Explanations will provide an increasingly confusing and incomplete guide to the Charter.

5.2.4 HIERARCHY OF SOURCES OF FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION

Article I-9 of the Constitution complicates the sources of fundamental rights in the Union legal order by providing for three overlapping streams of fundamental rights norms: the Charter, the ECHR, and general principles.⁶² The question therefore arises as to how these sources will be ordered in the case of conflict.⁶³ In general, the establishment of a hierarchy of norms in the field of fundamental rights has been opposed on the basis that prioritizing certain rights at the expense of others would threaten the indivisibility of

⁵⁹ Engel, above n. 40, at p. 151.

⁶⁰ For example in respect of Article 41 of the Charter (Right to Good Administration), the Charter Explanations refer to extensive case law of the ECJ but the principle of good administration has been subsequently developed: see K. Lenaerts, “In the Union We Trust”: Trust-Enhancing Principles of Community Law’ (2004) 41 *CML Rev.*, pp. 317-343, at pp. 336-340. As regards the reference to the TEU and the EC Treaty they may have to be read in the light of the corresponding articles in the Constitution. The Charter makes frequent references to secondary Community legislation, especially in Chapter IV (Solidarity). For example, Directive 77/187/EEC (transfers of undertakings) referred to in the explanation to Article 27 of the Charter has since been repealed by Directive 2001/23 of 12 March 2001 [2001] OJ L82/16.

⁶¹ For a list of the international sources for the Charter referred to in the Charter Explanations: see Peers, in Peers and Ward (eds.), above n. 20, at p. 172.

⁶² See Sections 4.3 and 4.4 of Chapter four for analysis of customary international law and *jus cogens* as sources of fundamental rights norms in Union law.

⁶³ The existing hierarchy between international and Community law has been characterised as follows: ‘..it is virtually unanimously agreed that international and Community law stand in the following hierarchy: international *jus cogens*, which cannot be abrogated, is *per definitionem* superior to all other law. It is followed by the EC Treaty. International norms (both general rules and treaties binding the Community) rank below the Treaty. Then follows Community legislation.’ A. Peters, ‘The Position of International Law within the Community Legal Order’ (1997) *German Yearbook of International Law*, pp. 1-77, at pp. 37-38.

fundamental rights.⁶⁴ However an ordering of fundamental rights norms according to their source would be unavoidable under the Constitution in view of the substantial overlap in the rights protected under the three sources specified in Article I-9. A clear constitutional ordering of the potentially competing norms arising from the Charter, the ECHR and fundamental rights as general principles would enhance the transparency and democratic legitimacy of fundamental rights protection under the Constitution.⁶⁵

The Constitution establishes, albeit in disparate provisions, an ordering of the sources of fundamental rights specified in Article I-9.⁶⁶ Article II-113, which is on the same terms as Article 53 of the Charter, provides specific constitutional authority for the primacy of fundamental rights recognized by Union law either as general principles or as international law obligations of the Union over Charter rights and principles in the event the latter provide a lesser standard of protection:⁶⁷

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

The Charter Explanations provide in respect of Article 53:

‘This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR. The level of protection afforded by the Charter may not in any instance be lower than that guaranteed by

⁶⁴ See Section 2.4 of Chapter two.

⁶⁵ On the relationship between transparency and democracy, see Dryberg, in Arnall and Wincott (eds.), above n. 17, at pp. 81-84.

⁶⁶ For a comparative survey of how other constitutions address this issue, see: Eileen Denza, ‘The Relationship between International law and National Law’ in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 415-442, at pp. 422-428.

⁶⁷ See for a detailed analysis of the drafting history of Article 53 of the Charter and its relationship to Article 53 ECHR and the national constitutions of the Member States: J.L. Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’ (2001) 38 *CML Rev.*, pp. 1171-1199. By reference to the ECtHR’s interpretation of Article 53 ECHR, Liisberg rejects the idea that Article 53 of the Charter could be used to resolve conflicting ‘human rights norms of different legal origins.’: *ibid.*, at pp. 1197-1198.

the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR.’⁶⁸

Article II-113 therefore provides Charter rights must not restrict or adversely affect more favorable international fundamental rights standards either as contained in the ECHR or other qualifying international agreements or that are binding on the Union as general principles of Union law.⁶⁹

The principle established by Article II-113 is subject, insofar as concerns Charter rights corresponding to ECHR rights, to Article II-112(3):⁷⁰

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

In the unlikely event a ruling of the ECtHR interpreting the ECHR fell short of a higher standard established by international law,⁷¹ then Article II-112(3) would entitle the ECJ to interpret the corresponding Charter right in line with the higher international standard. If the conflicting ECHR provision also formed part of Union law through accession by the Union to the ECHR then the more favorable international law norm would also prevail by reason of Article 53 ECHR.⁷²

⁶⁸ Liisberg points out the confusing nature of this explanation: *ibid.*, at pp. 1192-1193.

⁶⁹ It is difficult to interpret the reference in Article II-113 to the Charter not restricting or adversely affecting fundamental rights recognised by international law in its ‘field of application’. Liisberg argues that this reference should be deleted: ‘It is illogical and only causes confusion.’: *ibid.*, at p. 1199.

⁷⁰ See in support of this order of precedence based on the drafting history of the two articles, Liisberg, *ibid.*, at pp. 1192-1193. See generally on Article 112(3): Section 5.2.2 of this Chapter; and Peers, in Peers and Ward (eds.), above n. 20, at pp. 156-158.

⁷¹ ‘Its [the Court of Human Rights] starting point is that human rights law, including the Convention on Human Rights, is *part* of international law.’ R. Higgins, ‘The ICJ, the ECJ and the Integrity of International Law’ (2003) 52 *ICLQ*, pp. 1- 20, at p. 10.

⁷² The same result may be achieved under existing Union law: ‘One may therefore conclude – tentatively – that an international agreement entered into by the Community will be of no effect within the Community legal system if it is outside the capacity of the Community or if it conflicts with one of the constituent Treaties or (possibly) with a general principle of law’: Hartley, above n. 34, at pp. 185-186.

Finally there is the issue of ordering fundamental rights constituting general principles of Union law as specified in Article I-9(3).⁷³ Clearly no such general principle should be admitted by the ECJ insofar as it provided a lower standard than that established under international law and that is confirmed by Article I-3(4).⁷⁴ Further, as regards general principles resulting from the constitutional traditions common to the Member States, no such tradition should be admitted as a general principle insofar as it as it provided a lower standard than the ECHR or the Charter. The recognition of any such lower standard in the case of the Charter would conflict with Article I-9(1) and in the case of the ECHR would be incompatible both with Union accession to the ECHR mandated under Article I-9(2) and the ECHR as a source of fundamental rights under the general principles case law. Accession by the Union to the ECHR would in addition make the recognition of such a principle a breach of the Union's obligations under international law. In the event fundamental rights constituting general principle of Union law provide a higher standard than the Charter or the ECHR, Article 53 ECHR and Article II-113 respectively would provide the basis for the ECJ to recognize such principle in priority over the corresponding provision in the ECHR or Charter.

5.2.5 CONCLUSIONS

The principal conclusion to be drawn from the analysis in this section is that retention of general principles as a source of fundamental rights law under Article I-9(3) is unnecessary from the perspective of the substantive protection of fundamental rights and confusing in terms of its impact on the ordering of potentially conflicting norms arising from the various sources of fundamental rights norms under the Constitution. The great merit of the incorporation of the Charter and Union accession to the ECHR is to provide clarity and transparency in the sources of fundamental rights law in the Union's legal order. The development by the ECJ of the general principles doctrine served a valuable function in the absence of adequate fundamental rights protection in the EC Treaty and

⁷³ On the existing hierarchical relationship between general principles and the Treaties, see: T. Kyriakou, 'The impact of the EU Charter of Fundamental Rights on the EU system of protection of rights: much ado about nothing?' (2001) 5 *Web JCLI*: at < <http://webjcli.ncl.ac.uk/2001/issue5/kyriakou5.html>.> Accessed 1 September 2005.

⁷⁴ See Section 4.2.2.2 of Chapter four for an analysis of Article I-3(4) of the Constitution.

subsequently the TEU. However, the adoption of the Constitution would remove the rationale for the protection of fundamental rights as general principles. Any residual benefit from the doctrine could be better and more transparently achieved by Union accession to the European and UN Conventions. The second conclusion is that the amendments to the Charter in Articles II-112(4) to (7) add to the complexity of interpreting the Charter without any corresponding benefit from the perspective of protection of Charter rights and freedoms. The amendments undermine achievement of the objectives of simplification and transparency set for the Union by the European Council in its Laeken Declaration.

5.3 UNION FUNDAMENTAL RIGHTS AND THE RULE OF LAW

5.3.1 INTRODUCTION

‘The dominant way of safeguarding fundamental rights is the rule of law’.⁷⁵ The rule of law is an integral part of fundamental rights protection and recognition of the rule of law is embedded in the principal international conventions for the protection of fundamental rights recognized by the ECJ as sources for the general principles of Union law.⁷⁶ In *Golder* the ECtHR emphasized the importance of references to the rule of law in the Statute of the Council of Europe and the ECHR as an interpretative aid to the substantive rights conferred by the ECHR:

‘It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely “more or less rhetorical reference”, devoid of relevance for those interpreting the

⁷⁵ Armin von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) 37 *CML Rev.* pp. 1307-1338, at pp. 1311-1312. For a useful survey of legal scholarship relating to the rule of law see: David Dyzenhaus, ‘Recrafting the Rule of Law’, in David Dyzenhaus (ed.) *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing, 1999), pp. 1-14. See also: Brian Z. Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge, CUP, 2004).

⁷⁶ See, for example, Articles 6 and 7 of the UDHR and Article 16 ICCPR.

Convention. One reason why the signatory Governments decided to “take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration” was their profound belief in the rule of law.’⁷⁷

The TEU and the EC Treaty likewise affirm the importance of respecting the rule of law.⁷⁸ Recital two of the Preamble to the Charter also refers to the rule of law and the substantive Articles of the Charter enshrine a number of the basic rights constituting both the formal and substantive elements of the rule of law. The Constitution consolidates these provisions in Article I-2:

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

Article I-59, incorporating provisions relating to suspension of membership rights, retains the reference to ‘a clear risk of a serious breach by a Member State of the values referred to in Article I-2’ as the trigger for sanctions. Article I-57(1) refers to the values of the Union as the basis for developing a special relationship with neighboring countries. The incorporation of the Charter by Article I-9(1) and the obligation for the Union under Article I-9(2) to seek accession to the ECHR would strengthen the link between the protection of fundamental rights and the rule of law in the Constitution.

Although no definition of the rule of law is provided in the fundamental rights treaties where the term is employed or in the EC Treaty or TEU, the basic requirements necessary to achieve the rule of law are subject to a broad consensus among political and legal theorists: ‘... laws must be open, clear, coherent, prospective, and stable; legislation and executive action should be governed by laws with those characteristics; and there

⁷⁷ *Golder v United Kingdom* (1975) 1 EHRR 524, at para. 34.

⁷⁸ The third preamble of the TEU and Articles 6(1) TEU and 7 TEU. Article 177 EC Treaty refers to ‘developing and consolidating’ the rule of law in Community development co-operation policies and Article 220 EC Treaty provides: ‘The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed’. For an analysis of the role played by Article 220 EC Treaty in the relationship between the rule of law and fundamental rights developed by the ECJ as general principles see: T. Kyriakou, above n. 73, at pp. 3-4.

must be courts that impose the rule of law'.⁷⁹ This conception of the rule of law is the one adopted in this section. Although it has been argued that an autonomous conception of the rule of law should be developed in the context of Union law,⁸⁰ it seems undesirable and unnecessary to have a specific meaning in Union law attributed to an ideal that is shared across such a wide range of international and national instruments for the protection of fundamental rights.

5.3.2 THE UNION AND THE RULE OF LAW

One issue central to discussions on the rule of law is the respective roles of the judiciary and the legislature in the determination and protection of fundamental rights.⁸¹ In the context of the Union, the tension between the role of the judiciary and the legislature in the field of fundamental rights reflects the more general problem of democratic legitimacy.⁸² In a political structure where fundamental rights are constitutionalised, encroachment of judicial powers on those of the legislature is circumscribed, but in the case of the Union the lack of an original constitutional basis for fundamental rights protection allowed scope for judicial activism both as regards the content of fundamental rights in Union law and the scope of their application to the Member States in determining when they are acting within the field of Union law and therefore subject to Union fundamental rights standards.⁸³ The degree of autonomy asserted by the ECJ in

⁷⁹ T. Windicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies*, pp. 1-19, at p. 1. This conception of the rule of law may be classified as 'formal' in the sense described by P. Craig in: 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law*, pp. 467-487; or 'thin' in the sense adopted by J. Goldsworthy in 'Legislative Sovereignty and the Rule of Law' in T. Campbell, K.D. Ewing and A. Tomkins (eds.) *Sceptical Essays on Human Rights* (Oxford, OUP, 2001), pp. 61-78.

⁸⁰ Arnall, in Arnall and Wincott (eds.), above n. 18, at p. 240.

⁸¹ For an analysis of rights' constitutionalism in the context of the Union and the UK, see Neil Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism', in Campbell, Ewing and Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, OUP, 2001), pp. 119-141. In the Canadian context, see Allan Hutchinson, 'The Rule of Law Revisited: Democracy and Courts', in Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing, 1999), pp. 196-226. For a discussion of the arguments about 'majoritarian democracy' as the preferred system of protecting the rule of law see: Goldsworthy, 'Legislative Sovereignty and the Rule of Law', in Campbell, Ewing and Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, OUP, 2001), pp. 61-78.

⁸² See Walker, in Campbell, Ewing and Tomkins (eds.), above n. 81, at pp. 134-136. For the impact of the reforms in the Constitution on addressing the 'democratic deficit', see: Peters, 'European Democracy After the 2003 Convention' (2004) 41 *CML Rev.*, pp. 37-85.

⁸³ See on this latter point, Section 5.4 below.

developing fundamental rights as general principles of Union law was countered by the Member States through the development of the Three Pillar structure in the Maastricht Treaty whereby judicial review of Union activity in the politically sensitive areas covered by the Second and Third Pillars was severely curtailed or excluded. Although these restrictions were partially relaxed as regards the AFSJ in the Treaty of Amsterdam, the relationship between fundamental rights protection and the rule of law remains problematic in Union law in at least three critical areas.⁸⁴

Firstly, protection of fundamental rights in the Union's legal order has been developed by the ECJ on the basis of general principles of law rather than on the basis of a constitutional bill of rights.⁸⁵ As such the principles originally depended for their legitimacy on the integrity of the judicial process rather than democratic validation.⁸⁶ Secondly, the Charter recognises rather than creates the 'rights, freedoms and principles' set out in the Charter and is not as yet integrated into the Union's legal order.⁸⁷ Nevertheless, Advocates-General and the Court of First Instance (CFI) have referred to the Charter as an authoritative statement of fundamental rights standards applicable in Union law⁸⁸ raising the issue of how far such judicial activism is consistent with the principles of the rule of law.⁸⁹ Thirdly, Title IV EC Treaty and Title VI TEU provide more limited access to judicial review of Union AFSJ measures than other areas of Union law.⁹⁰

Articles I-9(1) and (2) of the Constitution significantly alter the terms of debate over the relationship between fundamental rights protection and the rule of law in the Union.

⁸⁴ See for additional concerns Arnall, in Arnall and Wincott (eds.), above n. 18, at pp. 248-252.

⁸⁵ See for a summary of the development of the ECJ's role: Bruno De Witte, in Alston (ed.), above n. 32, pp. 859-897.

⁸⁶ Article 6(2) TEU, introduced in the Maastricht Treaty as Article F(2), provided partial validation but did not resolve the problems of status and certainty.

⁸⁷ For an appraisal of the normative status of the Charter see Engel, above n. 40.

⁸⁸ See the references to the Charter by the Advocates General and the CFI as of 1 July 2003, listed in Appendix 1 to Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004).

⁸⁹ See for a summary of the position of 'democratic positivists' who contest the role of the judiciary in developing rules of law and 'liberal anti-positivists' who support such a role: D. Dyzenhaus, 'Recrafting the Rule of Law', in Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing, 1999), pp. 1-14, at pp. 2-3.

⁹⁰ See Chapter seven for analysis of the ECJ's jurisdiction over the AFSJ.

Incorporation of the Charter and Union accession to the ECHR would provide the Union with a clearly defined constitutional basis for the protection of fundamental rights. In particular, accession to the ECHR would weaken the argument that the rule of law does not apply fully to the Union on the basis of a lack of autonomy on the part of the ECJ.⁹¹ Incorporation of the Charter would alter its normative status by allowing direct judicial reference to the Charter rather than through the indirect route of the general principles case law.⁹² Finally, the ECJ has jurisdiction to review acts adopted under Chapter IV of Title III of Part III of the Constitution establishing the AFSJ on substantially the same conditions as other measures of Union secondary law, subject to the retention of an ouster of jurisdiction in Article III-377 that corresponds to Article 35(5) TEU.⁹³

5.3.3 CONCLUSIONS

An analysis of the Constitution in terms of its contribution to the enhancement of respect for the principles underlying the rule of law leads overall to a positive assessment. The unfortunate dichotomy resulting from the creation of the Three Pillar structure in terms of the level of fundamental rights protection would be removed. The Union would for the first time benefit from a constitutionally entrenched catalogue of rights both as set out in the Charter and as resulting from Union accession to the ECHR. However, Article I-9(3) and Articles II-52(4) to II-52(7) undermine these benefits from a rule of law perspective since they introduce an undesirable degree of indeterminacy and vagueness into the

⁹¹ Two views on the application of the rule of law to the Union have been identified: ‘pro-ECJ scholars’ who concluded that ‘the traditional characteristics of the rule of law are preserved at the E.U. level: along the lines of the traditional *Rechtsstaat*, independence from other institutional actors and consistency of adjudication obtains throughout the system’ and ‘juro-sceptics’ who argue ‘that a rule of law other than one confined exclusively to economic integration is unlikely to emerge in the near future’ on the basis that the ECJ ‘lacks the necessary autonomy to keep the other political institutions from enacting arbitrary and inconsistent policies’: J.P. McCormick, ‘Supranational Challenges to the Rule of Law: The Case of the European Union’ in Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing, 1999), pp. 267-282, at pp. 280-281. WGII Final Report concentrated on a different aspect of autonomy, namely whether accession of the Union to the ECHR would impact adversely ‘on the principle of autonomy of Community (or Union) law including the position and authority of the European Court of Justice’: above n. 5, at p. 12. See Chapter three for analysis of the principle of autonomy.

⁹² See Jaqueline Dutheil de la Rochère, ‘The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty’ (2004) *CML Rev.*, pp. 345-354, at p. 351.

⁹³ See Sections 7.4 of Chapter seven.

determination of the scope of fundamental rights protection by retaining general principles as a source and by qualifying the normative status of the Charter.

5.4 INCORPORATION OF THE CHARTER AND THE RELATIONSHIP BETWEEN NATIONAL AND UNION LAW

5.4.1 INTRODUCTION

Fundamental rights norms can have an integrating or destabilizing effect on the relationship between the Union's legal order and the national legal orders of the Member States.⁹⁴ The initial impetus for the development by the ECJ of fundamental rights norms within the Community legal system was provided by the decisions of the constitutional courts of Germany and Italy challenging the legitimacy of the principle of supremacy of Community law developed by the ECJ in the absence of such norms.⁹⁵ In this context the development of fundamental rights norms had an integrating function. However, the extension by the ECJ of the application of these norms to actions by the Member States both in implementing Community law⁹⁶ and in derogating from the application of Community law⁹⁷ created the potential for conflicts between the requirements of national constitutionally protected rights and those developed by the ECJ.⁹⁸ This has led some commentators to argue that different standards should be applied by the ECJ to the protection of fundamental rights for Community measures from those measures adopted by the Member States in derogation of their Community obligations in order to protect the Member State's margin of appreciation in such situations.⁹⁹ However, such an

⁹⁴ See on the integrating effect of the Charter: Engel, above n. 40, at p. 154.

⁹⁵ See de Witte, in Alston (ed.), above n. 32, at pp. 863-867.

⁹⁶ Case 5/88, *Wachauf v. Germany* [1989] ECR 2609.

⁹⁷ Case C-260/89, *ERT v DEP & Sotirios Kouvelas* [1991] ECR I-2925.

⁹⁸ An example of such conflict occurred in *Kreil v. Bundesrepublik Deutschland*, Case C-258/98 [2000] ECR I-69, where the conformity of the provision of the German Constitution prohibiting women from military service involving the use of arms with the Community equal treatment Directive 76/207/EEC of 9 February 1976, [1976] OJ L39/40, was at issue. For critical analysis of *Kreil*, see J. Schwarze, 'Judicial review in EC Law – Some reflections on the Origins and the Actual Legal Situation' (2002) 51 *ICLQ*, pp. 17-33, at pp. 28-29. *SPUC v. Grogan* is an example of a case where the ECJ avoided having to resolve such a conflict: Case C-159/90 [1991] ECR I-4685.

⁹⁹ J. Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' in N.A. Neuwahl and A. Osas (eds.) *The European Union and Human Rights* (Hague,

approach is unduly complex leading to a loss of transparency and uniformity in fundamental rights protection. A preferable approach would be for the ECJ to delimit rigorously the boundaries of Union law and reject arguments for extending the competences of the Union on the basis of differential standards of fundamental rights protection in the Member States.¹⁰⁰

5.4.2 THE CHARTER AND NATIONAL COMPETENCES

The proclamation of the Charter outside the legislative framework of the EC Treaty and the TEU reflected the tensions between conflicting national and Union perceptions as to the role of fundamental rights norms in the Union legal order. Concerns over incorporation of the Charter related both to extension of Union competence through the backdoor of fundamental rights protection and also the relationship between the Charter provisions and national fundamental rights standards.¹⁰¹ The ‘horizontal’ provisions of the Charter, and in particular Articles 51(1) and (2) and Article 53, were designed to limit the potential for such conflicts.¹⁰² WGII recommended drafting amendments to Articles 51(1) and (2) and additional ‘horizontal’ provisions in Articles II-112(4), (5) and (6) and these were adopted *verbatim* in the Constitution.¹⁰³ Despite WG II’s claim that these changes to the Charter were ‘technical *drafting adjustments*’,¹⁰⁴ an analysis of the changes shows they are potentially substantive in nature and reflect the overriding

Kluwer, 1995), pp. 51-76. However, Weiler’s thesis is challenged by Besselink who favours a ‘maximalist’ approach in Union law to fundamental rights standards, above n. 33, at pp. 670-674. See also Armin de Bogdandy’s arguments in favor of differential fundamental rights standard to be applied by the Union in the field of foreign relations, national measures implementing Union law, and acts of the Union’s institutions: above n. 75, at pp. 1318-1319.

¹⁰⁰ The most notable expression of this expansionist tendency was by AG Jacobs in *Konstantinidis v. Stadt Altensteig, Standesamt and Landesratsamt Calw, Ordnungsamt*, Case C-168/91 [1993] ECR I-1191: ‘In other words he [the Community national] is entitled to say ‘*civis europeus sum*’ and to invoke that status in order to oppose any violation of his fundamental rights.’: at pp. 1211-1212.

¹⁰¹ See generally P. Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *CML Rev.*, pp. 945-994; and Liisberg, above n. 67.

¹⁰² On Article 51 of the Charter see the detailed analysis by Eeckhout, above n. 101, at pp. 979-981. On Article 53 of the Charter see: Liisberg, above n. 67, *passim*.

¹⁰³ The proposed amendments are set out in the Annex to WGII Report. Article II-112(7) was added subsequently during the IGC. Article II-113 is on substantially the same terms as Article 53 of the Charter.

¹⁰⁴ WGII Final Report, above n. 5, at p. 4.

concern of WGII to ensure that ‘incorporation of the Charter will in no way modify the allocation of competences between the Union and the Member States’.¹⁰⁵

Article 51(1) of the Charter is modified in Article II-111(1) by the addition of ‘offices and agencies’ to the existing reference in the first sentence to ‘institutions and bodies’ of the Union as addressees of the provisions of the Charter¹⁰⁶ and the insertion at the end of the second sentence of the phrase ‘and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution’. Article 51(2) is amended in Article II-111(2) to read: ‘This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.’ The reasons that led WGII to recommend these modifications emphasizing the jurisdictional boundaries of the Charter are difficult to discern from WGII Final Report.¹⁰⁷ WGII Final Report acknowledges that the existing text of Article 51(2) of the Charter addresses the issue of allocation of competences between the Union and the Member States.¹⁰⁸ The underlying rationale for these amendments, as part of the strategy of making incorporation of the Charter more palatable to wavering Member States,¹⁰⁹ seems to have been to reinforce a restrictive interpretation of the scope of the Charter as constituting a record of existing fundamental rights protection under Union law rather than an interpretation of the Charter as a dynamic contribution to ‘strengthening EU fundamental rights protection’.¹¹⁰

Article II-111(1) also retains the provision from the first sentence of Article 51(1) of the Charter whereby the Charter provisions are addressed ‘to the Member States only when

¹⁰⁵ WGII Final Report, above n. 5, at p. 5.

¹⁰⁶ This amendment was not proposed by WGII.

¹⁰⁷ WGII Final Report does refer in support of the amendment to Article 51(2) of the Charter to the established case law of the ECJ and in particular Case C-249/96, *Grant v. South West Trains Ltd* [1998] ECR I-621. However, it is unnecessary for the Charter to be amended to confirm case law of the ECJ.

¹⁰⁸ WGII Final Report, above n. 5, at p. 5.

¹⁰⁹ The reference with approval to the amended text of Article 51(2) of the Charter by the British Government indicates the political pressure exerted on WGII in this area: *A Constitutional Treaty for the EU*, Cm5934, above n. 44, at para. 102.

¹¹⁰ Eeckhout, above n. 101, at p. 981. See also on the ‘constitutional dynamic’ introduced by the Charter, Walker, in Campbell, Ewing and Tomkins (eds.), above n. 81, at pp. 119-121.

they are implementing Union law'. WGII specifically endorsed this provision by reference to the principle of subsidiarity.¹¹¹ However, the principle of subsidiarity set out in Article I-11(3)¹¹² is 'a principle of an essentially political nature'¹¹³ relating to the allocation of legislative competence between the Union and the Member States and is not relevant to the issue of determining the scope of Charter rights. On a literal reading of Article II-111(1), the Charter will therefore not apply to the exercise of derogations by the Member States from their obligations under Union law,¹¹⁴ unless the ECJ adopts a strained interpretation of Article II-111(1) to bring it into line with its general principles case law.¹¹⁵ An alternative route would be for the ECJ to bypass the limitation under Article II-111(1) by continuing to apply the wider criteria developed in its general principles case law on the basis of Article I-9(3). Such an approach, however, would create an unfortunate dichotomy between the scope of protection for Charter rights and Article I-9(3) protected rights.

5.4.3. CONCLUSIONS

WGII Final Report contributed little of substance to the debate over the boundaries between Union protection of fundamental rights and national constitutional protection. Its proposals were of a conservative nature designed to assuage the concerns of Member States opposed to incorporation of the Charter. On this basis, it is doubtful if the changes to Articles 51(1) and (2) of the Charter in Articles II-111(1) and (2) and the new provisions incorporated in Article II-112(4), (5), and (6) would be interpreted by the ECJ as substantially altering the scope of application of the Charter. Any future renegotiation

¹¹¹ WGII Final Report, above n. 5, at p. 5.

¹¹² This principle is an amended version of Article 5 EC Treaty and resulted from the recommendations of Working Group I (WGI) on the Principle of Subsidiarity: Final Report of 23 September 2002; CONV 286/02. Available on the European Convention website.

¹¹³ Final Report of WGI, *ibid.*, at p. 2.

¹¹⁴ WGII Final Report, above n. 5, at p. 5 (n.2), states: 'It should be noted that, upon possible incorporation of the Charter into the Treaty, the current wording of Article 46(d) TEU would have to be brought in line with existing case law and Article 51 of the Charter on the (limited) application of fundamental rights to acts of Member States'. This avoids the issue of the conflict between the existing case law on the scope of the Member States obligations to comply with the Union's fundamental rights norms when derogating from Union law, discussed further at Section 5.5 below, and Article 51(1) of the Charter.

¹¹⁵ For the reported view of the Bar European Group and Professor Arnall that such an interpretation is unlikely, see the House of Lords European Union Committee, 6th Report (2002/2003), above n. 5, at para. 60.

of the Constitution should reconsider these provisions to achieve a more transparent and principled basis for incorporation of the Charter.

5.5 THE CONTROL OF DEROGATIONS FROM UNION FUNDAMENTAL RIGHTS IN THE CONSTITUTION

5.5.1 INTRODUCTION

The history of Nazi Germany, Vichy France and apartheid South Africa¹¹⁶ exemplify the dangers of a failure of judicial integrity in countering attempts to circumvent constitutional protection of fundamental rights by the expedient of derogations¹¹⁷ based on concepts such as ‘public emergency’, ‘terrorism’ or ‘state security’.¹¹⁸ The responses of governments to the events of 11 September have highlighted the contemporary need for vigilance in times of public emergency.¹¹⁹ Since the Union lacks some of the key characteristics of a sovereign state, and in particular an autonomous military capability, police force, and security service,¹²⁰ the fact that it has not developed a coherent legal framework for regulating the use of derogations from fundamental rights protection in emergency situations has not been seen as of such critical importance as in the case of the

¹¹⁶ See M. Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (trans. by Thomas Dunlap) (Chicago, University of Chicago Press, 1998) and reviewed by L. Lustgarten, ‘Taking Nazi Law Seriously’ (2000) 63 *MLR*, pp. 128-133; R. H. Weisberg, *Vichy Law and the Holocaust in France* (New York, New York University Press, 1996) and reviewed by F.C. DeCost, ‘Law/Holocaust/Academy’ (1999) 62 *MLR*, pp. 792-802; R. Abel, *Politics by other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York, Routledge, 1995) reviewed by D. Dyzenhaus (1997) 60 *MLR*, pp. 866-873. See also the contributions in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford, Hart Publishing, 1999); and Marti Koskeniemi, ‘By their Acts You Shall Know Them ... (And Not by Their Legal Theories)’ (2004) 15 *EJIL*, pp. 839-851.

¹¹⁷ Derogations, depending on the context, refer here both to formal derogation from fundamental rights obligations, as for example under Article 15 ECHR, and to restrictions and limitations on fundamental rights resulting from legislative provision or judicial interpretation.

¹¹⁸ See: Oren Gross and Fionnuala Ní Aoláin, ‘Emergency, War and International Law: Another Perspective’ 1/2 (2001) *Nordic Journal of International Law*, pp. 29-63; and, by the same authors, ‘To Know Where We Are Going, We Need To Know Where We Are: Revisiting States of Emergency’, in A. Hegarty and S. Leonard (eds.), *Human Rights: An Agenda for the Twentieth-First Century* (London, Cavendish, 1999), pp. 79-114; and C. Campbell, ‘“Wars on Terror” and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict’ (2005) 54 *ICLQ*, pp. 321-356.

¹¹⁹ See Fionnuala Ní Aoláin, ‘Balancing Human Rights: International Legal Responses to September 11’ (2003) *Israel Yearbook on Human Rights*, pp.63-84. See also Section 6.2.7 of Chapter six.

¹²⁰ But see Sections 6.2.8 and 6.2.9 of Chapter six for the provisions in the Constitution enabling an expansion of *Europol* and *Eurojust*.

national legal systems. However as the Union's powers are extended into areas prone to generate conflicts with fundamental rights, and in particular the AFSJ, the development of such a framework is critical to provide effective protection against repressive measures.¹²¹ In this section, the sources and control of the use of derogations under Union law will be examined in the context of the relevant provisions in the Constitution in order to assess how far the Constitution provides such a framework.

5.5.2 DEROGATIONS FROM FUNDAMENTAL RIGHTS UNDER UNION LAW

The principal international human rights treaties provide for derogations,¹²² but only from non-core rights which vary from treaty to treaty. However, even in respect of derogable rights, international treaties have been interpreted to restrict the freedom of states in the exercise of such derogations.¹²³ As regards derogations from fundamental rights under Union law, three scenarios are analysed here:¹²⁴ firstly, derogations which

¹²¹ The UK government's legislative proposals following the terrorist attacks in London of July 7 and July 21 2005 demonstrate the political pressures for such measures even if they conflict with international obligations: see the outline of the UK Government's anti-terrorism proposals in the Letter of Charles Clarke, Home Secretary, of 15 September 2005: *The Guardian of 16 September 2005*: <<http://image.guardian.co.uk/sys-files/Politics/documents/2005/09/15/letterplusannexe.pdf>>.

¹²² For example, Articles 4(1) and (2) ICCPR; Articles 27(1) and (2) of the American Convention of Human Rights, 9 *ILM* 673 (1970); and Articles 15(1) and (2) ECHR. See generally: J. Fitzpatrick, 'Protection against Abuse of the Concept of "Emergency"', in L. Henkin and J. Lawrence (eds.) *Human Rights: An Agenda for the Next Century* (Washington, American Society of International Law, 1993), pp. 203-227; and J. Oraá, *Human Rights in States of Emergency in International Law* (Oxford, OUP, 1992).

¹²³ On Article 27 of the American Convention on Human Rights: see *Advisory Opinion OC-8/87, Inter-American Court of Human Rights* (1987) 11 EHRR 33 on the suspension of the writ of habeas corpus in times of emergency. It has been argued that one conclusion to be drawn from this Opinion is that 'no European state should be permitted to derogate from its duties under Article 5(4) of the European Convention, even though this is not expressly excluded by Article 15(2)': M. Janis, R. Kay and A. Bradley, *European Human Rights Law* (2nd Edn.) (Oxford, 2000), at p. 401. On Article 4 ICCPR, see: 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7 HRQ, p. 3; and HRC *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001: U.N. Doc. CCPR/C/21/Rev. 1/Add. 11 (2001). In respect of derogations under Article 15(2) of the ECHR, see: *Lawless v Ireland (No 3)* (1961) 1 EHRR 15; *Brannigan and McBride v. United Kingdom* [1993] 17 EHRR 539; and *A and others and X and another v. Secretary of State for the Home Department* [2004] UKHL 56. On all three provisions, see Oren Gross, 'Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law*, pp. 437-498, at pp. 455-457.

¹²⁴ As regards derogations from *jus cogens*, Article 53 VCLT provides that one characteristic of a peremptory norm of general international law or *jus cogens* is that it is a 'a norm from which no derogation is permitted.'. As a result neither the Union nor a Member State may derogate from a rule of *jus cogens*. See generally on derogations from *jus cogens*, M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, OUP, 1997), at pp. 58-59.

form part of the Union's general principles of law as they apply either to the institutions of the Union or to the Member States implementing or derogating from their obligations under Union law; secondly, derogations from Charter rights which may be broadly subdivided into rights which result from the constitutional traditions common to the Member States, rights which correspond to ECHR rights, and rights which are based on the EC Treaty or the EU Treaty;¹²⁵ and thirdly, the specific case of the terms on which the Union could avail of the derogations provisions under Article 15 ECHR.

5.5.2.1 Derogations from Fundamental Rights as General Principles of Union Law

The ECJ has established that fundamental rights derived from the common constitutional traditions apply to the acts of the institutions and the Member States but that the rights are subject to limitations:

‘Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched.’¹²⁶

In respect of fundamental rights as general principles derived from the ECHR and capable of being subject to restriction, the ECJ has applied a similar test.¹²⁷ As regards the scope of its jurisdiction to review derogations by a Member State from its obligations under the Treaties, the ECJ initially held that it had no power to control the conformity of national law with general principles of Union law, including fundamental rights, which falls outside the scope of Union law.¹²⁸ In subsequent case law, however, the ECJ has narrowed the scope of those judgments by holding that when a Member State seeks to justify a restriction on a fundamental freedom under the Treaties by relying on a

¹²⁵ The Preamble to the Charter refers to a wider range of non-exhaustive sources for Charter rights: the constitutional traditions and international obligations common to the Member States, the TEU, the Community Treaties, the ECHR, the Social Charters adopted by the Community and by the Council of Europe, and the case law of the ECJ and ECtHR. See Peers, in Peers and Ward (eds.), for a complete list of sources for the Charter as referred to in the Charter Explanations: above n. 20, at p. 172.

¹²⁶ Case 4/73, *Nold v. Commission* [1974] ECR 491, at para.14.

¹²⁷ Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, at paras. 79 and 80. See the analysis of this case in Section 4.2.4.2 of Chapter four.

¹²⁸ Cases 60 and 61/84, *Cinéthèque v. Fédération Nationale des Cinémas Français* [1985] ECR 2605; and Case 12/86, *Demirel v. Stadt Schäbisch Gmünd* [1987] ECR 3719.

derogation provision of the Treaties that justification would be reviewed for its compatibility with the general principles of Union law, including fundamental rights.¹²⁹

5.5.2.2 *Derogations from Charter Rights*

Insofar as Charter rights are concerned, the general provision controlling the exercise of derogations is Article 52(1) of the Charter, reproduced in Article II-112(1):

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

This provision is based on the ECJ’s case law on the permitted scope of derogations.¹³⁰ Charter rights corresponding to ECHR rights have, however, also to be read subject to the first sentence of Article 52(3) of the Charter, reproduced in Article II-112(3), which provides that the ‘meaning and scope of those rights shall be the same as those laid down’ by the ECHR. WGII interpreted this provision to mean it ‘includes notably the detailed provisions in the ECHR which permit limitations of these rights’.¹³¹ WGII does not, however, clarify whether the second sentence of Article 52(3) of the Charter, retained in Article II-112(3) and which provides Article 52(3) shall ‘not prevent Union law providing more extensive protection’ than the ECHR, would mean the limitation provisions in the ECHR could also be more strictly construed by the ECJ.¹³² Such an interpretation would be welcome as permitting a higher standard of protection to be

¹²⁹ *ERT*, cited above n. 97, and Case C-368/95, *Vereinigte Familienpress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR I-3689. In such cases, the ECJ also subjects the application of a derogation to the principle of proportionality and a narrow construction of the grounds for exercising such derogations: *Krombach v. Bamberski*, cited above n. 24, at paras. 21 and 37.

¹³⁰ See the Charter Explanations, above n. 7, at 48. For a detailed analysis of Article 52(1) of the Charter and the relevant ECJ case law see Peers, in Peers and Ward (eds.), above n. 20, at pp. 154-155 and pp. 166-169.

¹³¹ WGII Final Report, above n. 5, at p. 7. The Charter Explanations, above n. 7, also follow this interpretation, although adding: ‘... without thereby adversely affecting the autonomy of Community law and that of the Court of Justice ...’, at p. 48.

¹³² WGII Final Report provides this provision serves to clarify that Article 52(3) of the Charter: ‘does not prevent more extensive protection already achieved or which may subsequently be provided for (i) in Union legislation and (ii) in some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law *acquis* had already achieved a higher level of protection (e.g., Article 47 on effective judicial protection, or Article 50 on the right not to be punished twice for the same offence)’.

developed by the ECJ.¹³³ As regards rights in the Charter that correspond to the non-derogable rights set out in the ECHR,¹³⁴ it seems reasonable to argue by analogy that they should be construed as not being capable of restriction under Article II-112(1) on the basis such restriction would breach the minimum equivalent standard of Article II-112(3).

As regards Charter rights derived from the EC Treaty or the TEU,¹³⁵ Article 52(2) of the Charter was retained substantially unamended as Article II-112(2): ‘Rights recognized by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.’ WGII recommended retention of Article 52(2), subject to the necessary technical drafting amendments to reflect the Charter’s incorporation,¹³⁶ to ensure ‘complete compatibility between the statements of the rights in the Charter and their more detailed regulation as currently found in the EC Treaty’.¹³⁷ In contrast to Article II-112(3), therefore, Charter rights which correspond to an EC or EU Treaty right pursuant to Article II-112(2) may be subject to the same restrictions and ‘do not enjoy broader protection than the original

¹³³ See in this sense, Peers, in Peers and Ward (eds.), above n. 20, at p. 170.

¹³⁴ These are, pursuant to Article 15 ECHR, the right to life (Article 2), the prohibition of torture or inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery or servitude (Article 4(1)) and the principle of non-retroactivity of criminal laws (Article 7): see J. Fitzpatrick, in Henkin and Lawrence (eds.), above n. 122, at p. 209. The corresponding Charter rights are set out in Articles 2, 4, 5 and 49 of the Charter. In *Schmidberger*, cited above at n. 127, at para. 80, the ECJ referred to the non-derogable rights in the ECHR in terms that implied that the non-derogability would be carried through into those rights as general principles. The same reasoning would no doubt apply to the corresponding Charter rights.

¹³⁵ ‘These relate to rights to freedom of movement, almost all the rights in the “citizenship” chapter of the Charter (right to vote, access to documents, right of petition, etc.) and the clauses relating to non-discrimination on grounds of nationality and equality between the sexes’: Working Document 9 of WGII of July 18, 2002, at p. 3. Available on the European Convention website. See also Peers, in Peers and Ward (eds.), above n. 20, at p. 169.

¹³⁶ Working Document 9 of WGII, *ibid.*, at p. 5. WGII Final Report, above n. 5, at p. 6, considers the issue of amending the Charter chapter on Citizens’ rights in the event of incorporation to align it with the corresponding articles in the Constitution. However, this was not considered necessary since the Charter was incorporated in a separate part of the Constitution and only minor amendments were made in Article II-101 and Article II-102.

¹³⁷ WGII Final Report, above n. 5, at p. 6.

rights'.¹³⁸ Finally, Article 54 of the Charter, which is based on Article 17 ECHR, is retained unamended as Article II-114.¹³⁹

5.5.2.3 *Union Derogation from the ECHR*

Until the Union accedes to the ECHR it obviously cannot avail of the specific derogation provisions in Article 15 ECHR.¹⁴⁰ The accession treaty of the Union to the ECHR will have to address the terms on which the Union can avail of Article 15 ECHR. Although the CDDH Report proposed that terms referring specifically to states in the ECHR should apply *mutatis mutandis* to the Union, without redefining each such term so as 'to tailor them to the EC/EU, which would be a highly complicated exercise',¹⁴¹ it is doubtful that that such a broad-brush approach could be applied to the criteria established by the ECtHR to control the exercise of derogations under Article 15.¹⁴² Rather than relying on the ECtHR to develop a new version of the *Lawless* formula to apply to the Union, it would be preferable for the accession treaty to establish separate derogation criteria appropriate for the Union.

5.5.3 CONCLUSIONS

Incorporation of the Charter and accession by the Union to the ECHR would provide substantial benefits in clarifying and strengthening the law applicable to derogations from

¹³⁸ Lenaerts and Smijter, above n. 38, at p. 283. The authors analyse the scope of application of Article 52(2) of the Charter, and in particular to those Charter rights which are derived from sources additional to the EC and EU Treaties: *ibid* at 282-290.

¹³⁹ Article II-114: 'Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.'

¹⁴⁰ A question to be resolved is whether the Charter rights derived from the ECHR or the ECHR rights forming part of the Union's general principles would also be covered by a derogation obtained by the Union under Article 15 ECHR.

¹⁴¹ *Study of Technical and Legal Issues of a Possible EC/EU Accession to the ECHR* (CDDH Report), Steering Committee for Human Rights of the Council of Europe, 25-28 June 2002; CDDH(2002)010 Addendum 2. DG-II(2002)6: at p. 15.

Available at: <<http://european-convention.eu.int/docs/wd2/1711.pdf>>.

¹⁴² 'An exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed': *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, at para. 28. The size of the territory of the enlarged Union would in itself make such a test impractical. See for analysis of the ECtHR's interpretation of Article 15 ECHR: Gross, above n. 123, at pp. 455-456.

fundamental rights in Union law.¹⁴³ Article II-112(1) would codify and entrench¹⁴⁴ the case law of the ECJ on controlling restrictions on fundamental rights in respect of Charter rights and accession to the ECHR will provide a well established control mechanism for any derogation by the Union under Article 15 ECHR from its ECHR obligations. However, the overlapping sources of fundamental rights protection provided for in Article I-9 of the Constitution and the new provisions introduced in Articles II-112(5)-(6) unnecessarily complicate the framework for the control of derogations in Union law. In the event the Constitution is not brought into force, the issue of derogations will remain one that requires addressing in any re-negotiation of the Constitution or alternative framework for the future structure of the Union.

5.6 ENFORCEABILITY OF FUNDAMENTAL RIGHTS

5.6.1 INTRODUCTION

The relationship of fundamental rights to the legal order has long been debated and in particular whether a necessary connection to effective enforcement mechanisms must exist for fundamental rights to progress beyond, in Jeremy Bentham's phrase, 'nonsense on stilts'.¹⁴⁵ In the Union's political process, however, fundamental rights discourse fulfills a number of functions, some of which are not dependent on legal enforcement mechanisms.¹⁴⁶ For example, the role played by the European Parliament in promoting a coherent fundamental rights policy in the Union also served as a means of expanding 'its powers and responsibilities to topics which did not actually fall within its normal

¹⁴³ Peers, after an exhaustive analysis of the Charter provisions on limitations, concludes that despite their complexity they represent an improvement on the current standard applied by the ECJ in its general principles case law but argues that the ECJ should apply the higher ECHR standard to ECHR rights in Union law: above n. 20, at pp. 178-179.

¹⁴⁴ On entrenchment, see section 5.8 below.

¹⁴⁵ For Bentham's downbeat assessment of human rights as set out in the 1789 French Declaration of the Rights of Man see: 'Nonsense upon Stilts, or Pandora's Box Opened, or the French Declaration of Rights Prefixed to the Constitution of 1791 Laid Open and Exposed', in Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires (eds.), *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution* (Oxford, Clarendon Press, 2002).

¹⁴⁶ F.I. Michelman finds in the Massachusetts Constitution an example of 'obligations of law, which nevertheless defy judicial enforcement': 'The Constitution, Social Rights, and Liberal Political Justification' (2003) 1 *Int. J. Constitutional Law*, pp. 13-34.

remit'.¹⁴⁷ However, it is generally agreed that effective judicial enforcement mechanisms is a key element in promoting the effective protection of fundamental rights in the Union.¹⁴⁸

5.6.2 REFORMS TO THE ENFORCEABILITY OF FUNDAMENTAL RIGHTS

5.6.2.1 The European Convention's Reform Proposals

WGII had the primary mandate from the European Convention to examine reforms to the structure of fundamental rights protection in the Union.¹⁴⁹ However, a number of proposals to improve access to justice in Union law fell outside its core remit of advising on Charter incorporation and Union accession to the ECHR. These additional reform proposals included:¹⁵⁰ relaxation of the standing requirements under Article 230(4) EC Treaty;¹⁵¹ the creation of an individual human rights complaint procedure;¹⁵² and access to the ECJ for public interest institutions.¹⁵³ WGII, in addition to its primary

¹⁴⁷ Rack and Laussegger, 'The Role of the European Parliament: Past and Future', in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 801-837, at p. 800.

¹⁴⁸ See in this sense the paper prepared for WGII by F.G. Jacobs on 'Necessary changes to the system of judicial remedies', Working Document 20, at p. 2. Available on the European Convention website. It has been argued that the Union should also improve other non-judicial mechanisms for securing protection of fundamental rights: see Alston and Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 3-66, at pp. 19-20. However, see Von Bogdandy's critique of aspects of Alston and Weiler's thesis, above n. 75, at pp. 1316-1317.

¹⁴⁹ Working Group X (WGX) established by the European Convention had the mandate to reform the jurisdictional aspects of the AFJS. See Section 6.2.8 of Chapter six for details of WGX's recommendations.

¹⁵⁰ See for an outline and analysis of the various reforms proposals prior to the European Convention: de Witte, in Alston (ed.), above n. 32, at pp. 887-897. See also the discussion papers prepared for WG II: CONV 116/02 of 18 June 2002; and Working Document 20 of 27 September 2002. Both available on the European Convention website.

¹⁵¹ See Section 6.2.8 of Chapter six.

¹⁵² See J. Schwarze, 'The Legal Protection of the Individual against Regulations in European Union Law' (2004) 10 *EPL*, pp. 285-303, at pp. 301-303.

¹⁵³ The current consultation process on extending the mandate of the European Monitoring Centre on Racism and Xenophobia in order to convert it into a Fundamental Rights Agency do not envisage the Agency having a right to bring cases before the ECJ. In any event, the Constitution would have to be amended to allow such a competence. However, this does not exclude granting the Fundamental Rights Agency a power to fund applications by individuals or intervening in ECJ proceedings: see de Witte, in Alston (ed.), above n. 32, at p. 897. However, only the NGOs currently support such an approach: see the Commission's, 'Preparatory study for impact assessment and ex-ante evaluation of Fundamental Rights Agency: analysis of responses to public consultation.' 19 January 2005. Available at: <http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/analysis_written_contributions_en.pdf>

recommendations in favor of Union accession to the ECHR and incorporation of the Charter, briefly considered these other reforms. However, it rejected the idea of creating a special procedure for the protection of fundamental rights before the ECJ¹⁵⁴ and did not address the issue of *locus standi* for public interest institutions. While it examined the issue of reform of Article 230(4) EC Treaty, it did not consider the matter fell within its remit and referred the matter to the European Convention.¹⁵⁵ WGII Final Report also briefly referred to the ‘possibility of a provision in the Treaty on the obligation of Member States, as spelt out in the recent case law, to provide for effective remedies for rights derived from Union law’.¹⁵⁶ This suggestion was incorporated as Article I-29(1).¹⁵⁷

A discussion circle on the Court of Justice (the ECJ Discussion Circle) was established to evaluate the proposals of the European Convention that affected the ECJ and to allow the ECJ to present their views on the proposals.¹⁵⁸ As regards the right of access to justice, the ECJ Discussion Circle in its final report focused on the proposals for reform of Article 230(4) EC Treaty and recommended a revised text to the European Convention.¹⁵⁹ A modified version of this proposal was adopted as Article III-365(4). In

¹⁵⁴ WGII Final Report, above n. 5, at p.15.

¹⁵⁵ *Ibid.*, at p.16. WGII referred, in n.3 on p. 16 of WGII Final Report, to the various contributions made to it on this issue, which are discussed in greater detail in Working Document 21 of 1 October 2002, by A. Vitorino: ‘*The question of effective judicial remedies and access of individuals to the European Court of Justice*’. Available on the European Convention website. See for an analysis of this document: Varju, ‘The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention’ (2004) 10 *EPL*, pp. 43-56, at pp. 48-49.

¹⁵⁶ WGII Final Report, above n. 5, at p. 16, refers to paras. 41 and 42 of the judgment in *UPA v. Council*, Case C-50/00P [2002] ECR I-6677 which read: ‘Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.’ The reference in WGII Final Report was prompted by a proposal by Mr. Söderman, the European Ombudsman: see doc. CONV. 221/02 and Working Document 21, above n. 155, at p. 7.

¹⁵⁷ See for analysis of Article I-29(1), Section 5.6.2.2.3 below.

¹⁵⁸ The final report of the ECJ Discussion Circle was published on 25 March 2003 (CONV 636/03). The final report and the ECJ Discussion Circle documents are available on the European Convention website. Varju discusses the proposals of the ECJ discussion circle and the other proceedings in the European Convention that led to the drafting of Article III-365(4): above n. 155, at pp. 48-53.

¹⁵⁹ The ECJ Discussion Circle’s discussions and recommendations relating to Article 230(4) are at pp. 6-10 of its final report. The recommended text reads: ‘Any natural or legal person may, under the same

addition, the ECJ Discussion Circle recommended extending the scope of judicial review proceedings under Article 230 EC Treaty to cover the legal acts of bodies or agencies of the Union.¹⁶⁰ This recommendation was implemented in a modified form in paragraphs (1) and (5) of Article III-365.¹⁶¹

5.6.2.2 *Constitutional Reform of Judicial Remedies*

5.6.2.2.1 *Introduction*

In the following sub-sections the principal reforms in the Constitution to the Union's system of judicial remedies are analysed in the context of their contribution to the effective protection of fundamental rights.¹⁶² The impact of the two primary reforms of Union accession to the ECHR and incorporation of the Charter is assessed in the first two sub-sections. The third sub-section assesses the reforms in Article III-365 and I-29(1) to determine how far they ameliorate the current deficiencies of Article 230 EC Treaty as a judicial review mechanism.

5.6.2.2.2 *Union Accession to the ECHR*

In the context of improved judicial redress, the most significant benefit from Union accession to the ECHR pursuant to Article I-9(2) would be the introduction of the individual right of application under Article 34 ECHR.¹⁶³ This benefit was, however, only briefly referred to in the deliberations of WGII that focused on the potential impact of Union accession on the autonomy of the ECJ. The CDDH Report limited its discussion of Article 34 ECHR to the technical aspects of the participation of the Union in proceedings before the ECtHR, and in particular the joinder of the Union and Member

conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, and against [an act of general application][a regulatory act] which is of direct concern to him without entailing implementing measures.' See also Working Document I of 26 February 2003 on the reform of Article 230(4) EC Treaty prepared by the Secretariat of the European Convention for the ECJ Discussion Circle. Available on the European Convention website.

¹⁶⁰ See the final report of ECJ Discussion Circle, above n. 158, at paras. 24-27; based on Working Document 9 of 10 March 2003.

¹⁶¹ See for analysis Section 5.6.2.2.4. below.

¹⁶² See Chapter seven for the reforms in the Constitution to the ECJ's jurisdiction over the AFSJ.

¹⁶³ The question of whether the Union should be entitled to bring inter-state cases under Article 33 ECHR, or have such cases brought against it, is considered in the CDDH Report, above n. 141, at pp. 20-21.

States as co-defendants.¹⁶⁴ In principle, subject to resolution of these procedural aspects, no amendment to Article 34 ECHR should be necessary upon Union accession.

However, certain questions of interpretation may arise in respect of the Article 35 ECHR admissibility criteria.¹⁶⁵ As regards Article 35(1) ECHR it is not clear how the exhaustion of remedies requirement will apply in the context of the Union's system of remedies.¹⁶⁶ Direct proceedings before the ECJ would clearly have to be treated as 'domestic remedies' requiring exhaustion.¹⁶⁷ However, it is less clear whether, in the absence of a direct right of action against an act of the Union, an applicant would be obliged first to institute national proceedings in order to secure a preliminary reference under Article III-369 on the validity of the Union act before instituting an Article 34 ECHR application against the Union. In *Jégo-Quéré v Commission*, the ECJ in such circumstances considered that instituting national proceedings to obtain a preliminary reference fell within the scope of the Union's 'complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions'.¹⁶⁸ The decision of the ECtHR in *Holzinger v Austria* supports the view that in such circumstances an applicant may be first obliged to institute national proceedings notwithstanding the delays and uncertainties associated with the preliminary reference procedure:

¹⁶⁴ The CDDH Report, above n. 141, at pp. 17-20. The CDDH Report includes in Appendix I a possible new Article 35bis ECHR to address this issue. See also para. 1 of the ECHR Protocol set out in Section 5.7.2. of this Chapter.

¹⁶⁵ See Section 4.2.4.5 of Chapter four for an analysis of Article 35(2)(b) ECHR both pre- and post Union accession to the ECHR.

¹⁶⁶ See para. 49 of the CDDH Report, above n. 141, for a brief analysis. See also the views of Professor Arnall on whether if the ECJ determined an ECHR point on a preliminary reference 'domestic' remedies would be exhausted by that ruling under Article 35(1) ECHR: cited in the House of Lords European Union Committee, 6th Report (2002/2003), above n. 5, at para. 131.

¹⁶⁷ Even in the absence of Union accession to the ECHR, the ECommHR indicated *obiter* that a remedy before the ECJ would form part of domestic remedies for the purposes of Article 35(1) (ex-26) ECHR: *Dufay v. European Communities*, Decision of 19 January 1989; App. No. 13258/87. This point was noted by Walter Kälin, 'The EEA Agreement and The European Convention for The Protection of Human Rights' (1992) 3 *EJIL*, pp. 341-353, at p. 349, n. 33.

¹⁶⁸ Case C-263/02P, *Jégo-Quéré et Cie SA v. Commission* [2004] ECR I-3425, at para. 30. This analysis of the effectiveness of national proceedings as a route to contest the validity of Union acts had been contested by AG Jacobs in *UPA*, above n. 156, at paras. 38-44, and by the CFI in *Jégo-Quéré v. Commission*, Case T-177/01[2002] ECR II-2365, at para. 45. See also J. Usher, 'Direct and Individual Concern – an Effective Remedy or a Conventional Solution' (2003) 28 *EL Rev.*, pp. 575-600, at pp. 586-595. See further Section 5.6.2.2.4 below for the potential impact of Article I-29 of the Constitution.

‘Thus, the effectiveness of a remedy which has to be used for the purposes of Article 35 may depend on whether it has a significant effect on the length of the proceedings as a whole. However, as the Convention organs have repeatedly held in the past, in case of doubt as to the effectiveness of a remedy, it has to be used

,¹⁶⁹
.. .

However, if an individual were to be required to institute national proceedings in such circumstances, the benefits of the introduction of right of application under Article 34 ECHR into Union law would be undermined.

A further benefit from Union accession to the ECHR as regards improved legal redress will be that the ECtHR would be able to assess the conformity of the Union’s system of remedies with Articles 6 and 13 ECHR that had been contested by the CFI in *Jégo-Quéré*.¹⁷⁰ The political sensitivity over the potential impact of Article 13 ECHR on the national system of remedies may be judged from the exclusion of Article 13 ECHR from the definition of ‘Convention rights’ incorporated by the UK’s Human Rights Act 1998.¹⁷¹ In addition, Union accession to the ECHR would enhance the normative status of the provisions of the ECHR that guarantee a right of effective legal redress, and in particular Articles 5, 6, and 13 ECHR. These provisions currently have the status of general principles of Union law whereas Union accession would confer on them the status of directly effective rights.¹⁷²

¹⁶⁹ *Holzinger v. Austria* (No. 1), App. No. 23459/94, 30 January 2001, (2001) ECHR 66, at para. 22.

¹⁷⁰ In its judgment in *Jégo-Quéré*, above n. 168, at para. 47, the CFI held that the procedures in Article 234 EC Treaty and Articles 235 and the second paragraph of 288 EC Treaty ‘can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of community measures of general application.’ The ECJ in overruling the CFI’s judgment impliedly rejected this interpretation since it expressly referred to the right to effective judicial protection of Community rights as being protected as a general principle of Union law both derived from the common constitutional traditions of the Member States and Articles 6 and 13 ECHR: above n. 168, at para. 29. It is noteworthy that in the recent case of *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, the Grand Chamber of the ECtHR in its analysis of the EC’s system of remedies was satisfied they provided ‘equivalent protection’ to that required under the ECHR: App. No. 45036/98, Judgment of 30 June 2005. See Section 3.3.2.3 of Chapter three.

¹⁷¹ 1998, c. 42. Article 1 ECHR is also excluded from the definition of ‘Convention rights’. But for a more benign view, see S. Foster: ‘The reasons for these omissions are that the passing of the Act is seen in itself as an adequate measure to ensure that everyone enjoys their Convention rights.’: *Human Rights and Civil Liberties* (Harlow, Pearson, 2003), at p. 147.

¹⁷² See further Section 5.7 below.

5.6.2.2.3 Incorporation of the Charter

The effect of incorporation of the Charter on creating justiciable rights for individuals is more problematic than ECHR accession in view of the uncertainties surrounding the scope of application of Charter rights under the Constitution.¹⁷³ However, the benefits of incorporation may prove more extensive: ‘The Charter is a first step and a positive one insofar as the remedial rights it contains are more expansive than those contained in the European Convention on Human Rights and prior EC law.’¹⁷⁴ In particular, Shelton argues that Article 47 of the Charter provides more ‘expansive’ protection than Article 13 ECHR.¹⁷⁵

Incorporation of the Charter would, according to WG II, make ‘the Union’s present system of remedies available’.¹⁷⁶ This makes the point that incorporation of the Charter would result in Charter rights being directly justiciable by the ECJ and national courts applying Union law rather than, as presently, indirectly as a source for general principles of Union law. In addition, the extension of the ECJ’s jurisdiction under the Constitution over AFSJ measures would materially enlarge the scope of the justiciability of Charter rights. However, the retention of a modified version of Article 51(1) of the Charter in Article II-111(1) retain the fundamental structure of the Charter as an instrument of judicial review rather than conferring on individuals a remedy for an alleged violation of a Charter right independently of ‘an accessory instrument which violates a rights included in the Charter’.¹⁷⁷

¹⁷³ See Section 5.2.3 above.

¹⁷⁴ Dinah Shelton, ‘Remedies and the Charter of Fundamental Rights of the European Union’ in Peers and Ward (eds.), *The EU Charter of Fundamental Rights* (Oxford, Hart Publishing, 2004), pp. 349-364, at p. 363.

¹⁷⁵ *Ibid.*, at pp. 356-357.

¹⁷⁶ WGII Final Report, above n. 5, at p. 15: ‘The Group underlines, however, the great benefit which citizens would gain from a possible incorporation of the Charter into the Constitutional Treaty architecture, thereby making the Union’s present system of remedies available.’

¹⁷⁷ Betten, above n. 35, at p. 695. See generally Betten’s perspicacious comments on the Charter as an instrument for constitutional review of Community acts: *ibid.*, at pp. 694-697.

Since the introduction of an independent remedy based on an alleged violation of fundamental rights was not incorporated in the Constitution,¹⁷⁸ applicants seeking a judicial remedy for a breach of a Charter right would still have to bring themselves within the scope of one of the judicial remedies provided for in the Constitution. The deficiencies in these remedies set out by AG Jacobs in the *UPA* case would only be partially remedied by the amendments in the Constitution.¹⁷⁹ However, the ECJ in *Jégo-Quéré* did not expressly refer to Article 47 of the Charter in its decision and thus its conclusions in that case could be open to review upon incorporation of the Charter.

5.6.2.2.4 Reforms to the Union's Existing Remedies

The principal reforms to the existing remedies in Union law in the Constitution are a relaxation of the *locus standi* rules for private applicants under Article 230(4) EC Treaty, the imposition in Article I-29(1) of an obligation on Member States to provide remedies 'sufficient to ensure effective legal protection in the fields covered by Union law', and the extension of the range of Union bodies the legal acts of which are subject to judicial review. Each of these reforms is considered in turn.

Article III-365(4) is a substantially modified version of Article 230(4) EC Treaty to take account of the change in the denomination of the Union's legal instruments¹⁸⁰ and to introduce a limited abolition of the requirement for 'individual concern':

'Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.'

¹⁷⁸ Schwarze has proposed the introduction of a free-standing 'Fundamental Rights Complaint' on the lines of the *Grundrechtsbeschwerde* in German law: 'Accordingly, the introduction of a Charter of fundamental rights of the Union would completely fulfill its purpose only if accompanied by an adequate remedy.': above n. 152, at p. 303.

¹⁷⁹ See Section 5.6.2.2.4 below. For a summary of the divergent views of Professor Papier, Professor Dutheil de la Rochère, Ms Iliopoulou, Professor Arnall and Professor Besselink on the compatibility of the Union's system of remedies with Article 47 of the Charter and Articles 6 and 13 ECHR, see: *The Future Role of the European Court of Justice*, House of Lords Select Committee on the European Union, 6th Report, HL Paper 47, Session 2003-2004, printed 2 March 2004, at paras. 133-137.

¹⁸⁰ See for analysis of the reforms in the Constitution of the Union's legal instruments: Final Report of Working Group IX on Simplification, above n. 22, and Sections 6.2.8 and 6.2.9 of Chapter six.

The drafting of Article III-365(4) reflects the most conservative option discussed by the ECJ Discussion Circle for relaxing the Article 230(4) *locus standi* requirements.¹⁸¹

The critical distinction between an ‘act’ and a ‘regulatory act’ is based on the new categories of Union instruments set out in Chapter 1 of Title V of Part I of the Constitution (Articles I-33 to I-39). The relaxation of *locus standi* is limited to a regulatory act which is not a term employed in the provisions defining the Union’s legal acts but presumably encompasses delegated European Regulations under Article I-36 and European implementing regulations under Article I-37.¹⁸² The existing requirement for ‘direct and individual’ concern therefore continues to apply under Article III-365(4) to judicial review of European laws and framework laws.¹⁸³ A further restriction on an applicant’s ability to bring Article III-365 proceedings is the new requirement that the regulatory act does not entail implementing measures.¹⁸⁴ In conclusion, the reform of Article 230(4) in Article 365(4) is conservative and does not remove the obstacles to an effective mechanism for individual applicants to challenge directly the validity of European laws. As a result the effectiveness of alternative remedies before the national courts will remain a critical issue.

The role of national courts in supplementing the direct judicial remedies is addressed in paragraph 2 of Article I-29: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’ This provision buttresses the obligation of sincere co-operation incumbent on the Member States under Article I-

¹⁸¹ See the final report of ECJ Discussion Circle, above n. 158, at p. 7.

¹⁸² See the criticism of the terminology in Article III-365(4) by Professor Toth and M. Errera: cited in *The Future Role of the European Court of Justice*, above n. 179, at para. 147.

¹⁸³ However, Article III-365(4) is an improvement on Article 230(4) EC Treaty insofar as by referring to an ‘act’ it incorporates the case law of the ECJ that any act capable of producing legal effects vis-s-vis the applicant may be challenged: Case 60/81, *IBM v. Commission* (1981) ECR-2639. This revised terminology was recommended in the final report of the ECJ Discussion Circle, above n. 158, at p. 8.

¹⁸⁴ This addition was recommended by the ECJ Discussion Circle in its final report: ‘The addition of the words “without entailing implementing measures” aims to ensure that the extension of a private individual’s right to institute proceedings would apply only to those (problematical) cases where the individual concerned must first infringe the law before he can have access to a court. This wording enables private individuals to contest before the Court (CFI) an act containing, for example, a prohibition, but no implementing measure, as the individual concerned can apply for its annulment if he can demonstrate that he is directly concerned by the regulatory act in question.’: *ibid*, at para. 21.

5(2) and codifies the existing case law of the ECJ.¹⁸⁵ Tridimas has given the following explanation to paragraph 2 of Article I-29:

‘It serves to underlie that national courts play an important role in the application and enforcement of Union rights. It also seeks to counter-balance the restrictive *locus standi* under Article 230(4). It mandates Member States to fill the remedial gap left by the strict interpretation of direct and individual concern.’¹⁸⁶

However, the monopoly of the ECJ to declare Union acts unlawful means that the preliminary reference procedure will continue to be the only available avenue to challenge European laws and framework laws before national courts and the deficiencies in that procedure have not been addressed in the Constitution.

Thirdly, the scope of a number of the Union’s judicial remedies has been extended in sub-section five of Chapter one Title VI of the Constitution in order to encompass the legal acts of bodies, offices and agencies of the Union.¹⁸⁷ These reforms go beyond the recommendations in the final report of the ECJ Discussion Circle insofar as they extend the ambit not only of actions for annulment under Article III-365 but also the remedies for failure to act under Article III-367, the plea of illegality under Article III-378, and preliminary references under Article III-369(b). However, there is no provision extending the right of action in damages under Article III-370 and the second paragraph of Article III-431 to bodies, offices and agencies of the Union. The reforms also apply to bodies, offices and agencies of the Union and not only those created under the EC Treaty.¹⁸⁸

¹⁸⁵ See references at p. 7, n. 16 in WGII Working Document 21 of 1 October 2002, above n. 155, to Case C-50/00P, *UPA v. Council* [2002] ECR I-6677 and Case T-172/98, *Salamanca v Parliament and Council* [2000] ECR II-2487.

¹⁸⁶ Cited in the *The Future Role of the European Court of Justice*, above n. 179, at para. 153. Tridimas’ analysis was based on an earlier draft of Article I-29 that referred to an obligation on Member States to provide ‘rights of appeal’ in place of ‘redress’.

¹⁸⁷ Articles III-365(1) and (5), Article III-367, III-368, III-369(b), and III-378.

¹⁸⁸ The Commission has proposed the following definition of an agency: ‘Community agency is a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task which is specified in the relevant Community act.’: at <http://europa.eu.int/agencies/index_en.htm>. The Commission lists sixteen agencies which meet that definition. Europol and Eurojust are not included in that list but are each treated as a body of the Union. Article 1 of the Council Decision establishing Eurojust specifically describes it as a ‘body of the Union’: [2003] OJ L63/2. Europol was established under the 1995 Europol Convention and Article 1 simply specifies the Member States ‘establish’ Europol. Working Group X on ‘Freedom. Security and

These reforms are significant in that they give effect to WGX's recommendation that acts of Eurojust and Europol be brought within the jurisdiction of the ECJ.¹⁸⁹

5.6.3 CONCLUSIONS

The reforms in the Constitution represent a significant improvement in the means of judicial address available in Union law for violation of fundamental rights. Accession to the ECHR will provide an effective and proven mechanism for individual applicants to establish under Article 34 ECHR the conformity of Union action with ECHR standards. In particular the adequacy of the judicial remedies available in Union and national law for a violation of ECHR fundamental rights within the scope of Union law will be subject to external scrutiny. However, the benefits of accession may be undermined if the ECtHR adopts an onerous interpretation of Article 35(1) ECHR in respect of the requirement to exhaust both Union and national remedies. Incorporation of the Charter will necessitate the ECJ examining the compatibility of the Union's system of legal remedies with Article 47 of the Charter. However, it will not provide any additional remedies to those provided for under existing Union law. The reform of the *locus standi* rules under Article III- 365(4)) falls short of what was necessary to provide an effective direct right of redress for individual applicants against Union primary legislation and it remains to be seen how far the national legislatures and courts will respond to the new obligation requirement in the second paragraph of Article I-29(1) to provide effective national remedies to make up for this deficiency.

Justice' (WGX) in its final report of 2 December 2002 recommended that the 1995 Europol Convention be converted into a regulation: CONV 424/02 of 29 November 2002, at p. 8, n. 1. Article III-276(2) of the Constitution provides European laws shall determine Europol's 'structure, operation, field of action and tasks'. The status of Europol as a body of the Union could be specified in such a European law.

¹⁸⁹ See Section 7.4.1 of Chapter Seven.

5.7 UNION ACCESSION TO THE ECHR: A CHANGE IN NORMATIVE STATUS

5.7.1. INTRODUCTION

Convergence between the institutions of the EEC, ECSC and Euratom and those of the Council of Europe had already been discussed at the time of the founding of the Communities.¹⁹⁰ Although the original EEC treaty did not incorporate any reference to the ECHR, or indeed to any fundamental rights standards, the ECJ in a series of cases beginning with *Rutili* made explicit reference to the ECHR.¹⁹¹ The European Parliament, Council and Commission issued a Joint Declaration of 5 April 1977 confirming their respect for the fundamental rights protected under the ECJ's case law on general principles, including those derived from the ECHR.¹⁹² In 1979 the Commission reversed its earlier opposition to accession to the ECHR.¹⁹³ Article F(2) TEU introduced by the 1992 Maastricht Treaty, and renumbered as Article 6(2) TEU by the 1997 Amsterdam Treaty, enshrined the fundamental rights protected by the ECHR as general principles of Community law. In November 1993 the Council submitted the issue of accession by the Community to the ECHR for an opinion under Article 300(6) EC Treaty but the ECJ concluded that the Community did not have competence to accede to the ECHR and accession would require amendment of the EC Treaty under Article 236 EC Treaty (now Article 48 TEU).¹⁹⁴ The intergovernmental conferences leading up to the Amsterdam and Nice Treaties did not, however, amend the Treaties to permit accession. The issue of

¹⁹⁰ See T. Freixes and J.C. Remotti, *Le Futur de l'Europe: Constitution et Droits Fondamentaux*, European Institute of Law, at p. 3, n. 2: <http://europa.eu.int/futurum/documents/other/oth001101bis_fr.pdf>. Accessed September 2005.

¹⁹¹ Case 36/75, *Rutili v Minister for the Interior* [1975] ECR 1219. For subsequent references see: Hartley, above n. 34, at p. 141, n. 32.

¹⁹² *Joint Declaration concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1977] OJ C103/1. See Rack and Lausegger, in Alston (ed.), above n. 147, at p. 805.

¹⁹³ *Accession of the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 April 1979, EC Bulletin, Supplement 2/79.

¹⁹⁴ Opinion 2/94, *Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759. For an analysis, see G. Gaja, 'Opinion 2/94' (1996) 33 *CML Rev.*, pp. 973-989; and Alston and Weiler, in Alston (ed.), above n. 148, at pp. 24-27.

the accession to the ECHR was raised at the Laeken European Council meeting of December 2001 and submitted for consideration by the European Convention.¹⁹⁵

5.7.2 *ARTICLE I-9(2) AND THE ECHR PROTOCOL*

The recommendation of WGII to include a constitutional authorisation enabling the Union to accede to the ECHR¹⁹⁶ was in this context hardly controversial.¹⁹⁷ The European Convention accepted this recommendation and the authorisation for the Union to accede was subsequently strengthened under the Italian Presidency of the IGC to an injunction in Article I-9(2): ‘The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not affect the Union’s competences as defined in the Constitution.’ Under Article III-325(6)(a)(ii) conclusion by the Council of the accession treaty is subject to the consent of the European Parliament. Moreover, the original requirement for unanimity in the Council was subsequently modified during the Italian Presidency of the IGC so that the Council acts under Article III-325(8) by qualified majority throughout the accession procedure.¹⁹⁸

However, political agreement to Union accession to the ECHR was made subject during the IGC process to the introduction of Protocol No. 32 (the ECHR Protocol) on Article I-9(2) to meet the concerns of Member States over the potential impact of accession on the

¹⁹⁵ See the Laeken Declaration on the Future of the European Union, above n. 16.

¹⁹⁶ WGII Final Report, above n. 5, at p. 13.

¹⁹⁷ The arguments in favour of accession are listed at pages 11-12 of WGII Final Report, above n. 5. The modalities of accession by the Union were addressed in the CDDH Report, above n. 141. Weiler and Fries have pointed out that even those Member States which voiced opposition to Union accession had done so on grounds of competence rather than the principle of accession: ‘A Human Rights Policy for the European Community and Union: The Question of Competences’, in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 147-165, at p. 150, n. 11.

¹⁹⁸ WGII had recommended that a requirement for a unanimous decision of the Council and assent of the European Parliament to the terms of accession be included in the constitutional authorization: WGII Final Report, above n. 5, at p. 13. The Commission in its comments on the Constitution has proposed the Council decision on accession be taken by Qualified Majority Voting: Section II.7 of the Commission’s Opinion on the Constitution of 17 September 2003: COM(2003)548. Available on the European Convention website.

terms of their membership of the ECHR and the potential extension of Union competence.¹⁹⁹ The ECHR Protocol provides:

‘Article 1. The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and fundamental Freedoms (hereinafter referred to as the ‘European Convention’) provided for in Article I-9(2) of the Constitution shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate. Article 2. The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof. Article 3. Nothing in the agreement referred to in Article 1 shall affect Article III-375(2) of the Constitution.’

The ECHR Protocol sets out the parameters for negotiation of the accession treaty. However, it is submitted that the limitations imposed in the ECHR Protocol on the terms of the accession treaty were unnecessary from a legal perspective. Article 1 of the ECHR Protocol addresses the issue of retaining the autonomy of Union law notwithstanding accession and in particular the technical modalities of Union participation in the ECHR political and judicial structures and procedures. However, these technical issues had already been addressed by the CDDH Report and were not considered to have raised any threat to the autonomy of Union law.²⁰⁰

Article 2 of the ECHR Protocol expands on the second sentence of Article I-9(2) specifying that Union accession ‘shall not affect the Union’s competences as defined in

¹⁹⁹ The text of the ECHR Protocol was subject to negotiation during the IGC. See Section 1 of this Chapter for references to the relevant IGC documents. In addition a Declaration on Article I-9(2) on the issue of the autonomy of the ECJ was agreed during the IGC: see Section 3.4.2 of Chapter three for details.

²⁰⁰ See Section 5.7.3 below for analysis of these issues. The technical aspects of Union participation in the Committee of Ministers for the purposes of supervising the execution of judgments of the ECtHR pursuant to Article 46(2) ECHR is considered in the CDDH Report, above note 141, at paras. 34-39.

the Constitution'. This latter provision was included on the recommendation of WGII and was one of three 'technical devices' it recommended to ensure the 'Union's accession to the ECHR does not modify the allocation of competences' between the Union and the Member States.²⁰¹ WGII was concerned to ensure that accession by the Union to the ECHR 'would thus not lead to any extension of the Union's competences, let alone to the establishment of a general competence of the Union on fundamental rights'.²⁰² However, WGII never set out how accession to the ECHR could lead to such results and indeed acknowledges that the preparatory work for accession proceeded on the opposite assumption.²⁰³ Similarly, irrespective of the ECHR Protocol, Union accession to the ECHR would not have any effect on the Member States' signature and ratification of the ECHR Protocols,²⁰⁴ derogations under Article 15 ECHR,²⁰⁵ or reservations to the ECHR.²⁰⁶

Finally, Article 3 of the ECHR Protocol prohibits the Union accession treaty from affecting Article III-375(2). Article III-375(2), which corresponds to Article 292 TEC, provides: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Constitution to any method of settlement other than those provided for therein.' This provision is designed to address concerns that Member States might utilise Article 33 ECHR as a mechanism for adjudication of a dispute with another

²⁰¹ The other two being a statement upon accession 'stressing the Union's limited competence in the area of fundamental rights' and a mechanism allowing the Union and a Member State to appear jointly as 'co-defendants' before the ECtHR to avoid any ruling by the ECtHR on the allocation of competences between the Union and the Member States: WGII Final Report, above n. 5, at pp. 13-14. See on these proposals the CDDH Report, above n. 141, at paras. 26 and 57-62 respectively.

²⁰² WGII Final Report, above n. 5, at p. 13.

²⁰³ As WGII Final Report acknowledges at p. 13, note 2. The CDDH Report states: 'The "scope" of EC/EU accession would be limited to issues in respect of which the EC/EU has competence', above n. 141, at para. 26.

²⁰⁴ The ECHR Protocols are listed in Annex two.

²⁰⁵ The UK had notified on 18 December 2001 a derogation from its obligations under Article 5(1) ECHR in respect of the detention without trial provisions of the Anti-Terrorism, Crime and Security Act 2001 pursuant to Article 15 ECHR but withdrew that derogation with effect from 16 March 2005 when those provisions were repealed as of 14 March 2005 by the Prevention of Terrorism Act 2005.

²⁰⁶ Reservations made under Article 57 ECHR are listed on the Council of Europe website at: <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=09/05/05&CL=ENG&VL=1>>. The House of Lords Committee on the European Union was also unconvinced by Government claims that the issue of existing reservations, declarations and derogations to the ECHR by the Member States might pose a problem for Union accession: 6th report (2002/2003), above n. 5, at paras. 120-123. See also in the same sense, WGII Final Report, above n. 5, at pp. 14-15.

Member State involving issues of Union law as well as a breach of the ECHR. WGII was advised that in these circumstances Article 292 EC Treaty would prohibit a Member State taking action against another Member State ‘as regards the application of Community law’.²⁰⁷ The CDDH Report considered that while proceedings under Article 33 ECHR should be available as a means of collective enforcement of the ECHR between the Union and the Member States it was unnecessary to exclude specifically cases involving Union law as this was a matter to be resolved by a special agreement between the Union and the Member States provided the agreement did not infringe Article 55 ECHR.²⁰⁸

5.7.3 THE MODALITIES, SCOPE AND NORMATIVE EFFECT OF ACCESSION

Article I-9(2) adopts the option of Union accession to the ECHR by way of accession treaty rather than by the alternative mechanism also considered in the CDDH Report involving a two-stage procedure of an amending Protocol followed by Union accession to the amended ECHR.²⁰⁹ Once the ECHR accession treaty has been concluded by decision of the Council pursuant to Article III-325(2) no additional measure of transposition should be necessary.²¹⁰ However, implementing measures may be necessary to resolve various technical issues such as the relationship of the Member States and the Union in proceedings before the ECtHR.²¹¹

Once the accession treaty is in force it is submitted that the ECHR rights and freedoms should be treated as directly effective rights. It is arguable that the ECHR would satisfy the criteria established by the ECJ for establishing the direct effect of international

²⁰⁷ CONV 116/02, above n. 40, at p. 20, n. 2. The Discussion Document also considered Article 10 EC Treaty (Article I-5(2)) prohibits the Member States and the Union referring disputes between them to the ECHR.

²⁰⁸ Above n. 141, at paras. 63-65. For an analysis of Article 55 ECHR, see Section 3.4.3 of Chapter three.

²⁰⁹ CDDH Report, above n. 141, at pp. 5-10.

²¹⁰ On the basis of existing Union practice, it is highly unlikely that the Union would adopt a similar method of ‘incorporation’ of the ECHR to that adopted by dualist states such as the UK and Ireland in, respectively, the Human Rights Act 1998 (c.42) and the European Convention on Human Rights Act 2003 (no. 20). See for an analysis of existing Union practice in respect of the conclusion of international agreements under the Article 300 EC Treaty procedure: Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, OUP, 2004), at pp. 277-278.

²¹¹ See the CDDH Report, above n. 141, at pp. 17-21.

agreements following Union accession since the ECHR is intended to confer rights on individuals and its provisions are sufficiently clear, precise and unconditional and do not require further implementation. However, even if the conditions for direct effect applied in the context of commercial international agreements are not satisfied by the ECHR it is submitted that direct effect should be recognized.²¹²

Two critical issues not addressed either in the CDDH Report or by WGII is the ECHR Protocols to which the Union will accede and whether the Union will enter any reservations under Article 57 ECHR upon signature or ratification. The Union signature of the ECHR Protocols will depend on negotiation within the Council over interpretation of the prohibition in Article I-9(2), reinforced by the ECHR Protocol, that Union accession shall not affect the Union's competences under the Constitution. It is submitted, however, that Union accession to an ECHR Protocol does not in itself extend the competences of the Union and that the preferred option would be for Union accession to all the ECHR Protocols even though in some cases the relevance to the Union's competences may be moot.²¹³ As regards reservations under Article 57 ECHR it is submitted no such reservations should be made. The ECHR Protocol only restricts the terms of the accession treaty insofar as it affects the Member States' reservations to the ECHR. The Union is thus free to accede to the ECHR and the ECHR Protocols without entering any reservations.

²¹² See for detailed analysis of the criteria for the direct effect of international agreements in Union law, and in particular the WTO agreements: Eeckhout, above n. 210, at pp. 274-324; and Uerpmann, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions' (2003), *Jean Monnet Working Paper* No. 9/03, at pp. 10-19; available at: <<http://www.jeanmonnet-program.org/papers/03/030901-02.html>>. Weiler has argued for the application of less restrictive conditions for the direct effect of fundamental rights norms in the context of the ECJ's protection of fundamental rights as general principles: 'The individual is not relying on the challenged measure for his or her rights but on the human rights norm. In relation to this norm, it is always assumed that it has direct effect in the sense of allowing the individual to rely on it. If this were not so, the whole human rights protection would practically disappear since so many of the human rights which the Court asserts do not satisfy the trilogy of conditions for direct effect.': J. Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique' (1992) 3 *EJIL*, pp. 65-91, at p. 78.

²¹³ ECHR Protocols No. 6 and 13 relating to the abolition of the death penalty are such Protocols. However, Union accession to these Protocols would send out a powerful signal of the Union's commitment to the abolition of the death penalty and be in line with its policy in respect of non-member states. See: *Declaration by the Presidency on Behalf of the European Union to Mark the Entry into Force of Protocol No. 13 to the European Convention on Human Rights, Concerning the Abolition of the Death Penalty in all Circumstances*. Brussels 14 July 2003, 11249/03, P83/03. Available on: <<http://www.eurunion.org/>>.

5.7.4 CONCLUSIONS

A number of important issues will have to be addressed in the negotiation of the accession treaty of the Union to the ECHR. The technical modalities of Union accession have been clearly and simply laid out in the CDDH Report and it is submitted that these should be followed. Union accession membership should be to all the ECHR Protocols and without any Union reservations so as to maximize the benefits of Union accession. This approach would send out a strong signal as to the Union's commitment to the protection of ECHR rights in Union law as well as its promotion of fundamental rights in its external relations.²¹⁴ Union accession to the ECHR and to the ECHR Protocols will be neutral as regards the attribution of competence between the Union and the Member States, which would be governed solely by the Constitution, and this issue should not be allowed to impact on the terms of the accession treaty at the expense of maximizing the protection of fundamental rights in the Union's legal order.

5.8 INCORPORATION OF THE CHARTER: AN ENTRENCHED BILL OF RIGHTS?

5.8.1 INTRODUCTION

The primary impetus for the development of a constitutional set of fundamental rights for the Union was provided by the European Parliament.²¹⁵ The 1984 Spinelli Report, prepared during the negotiations for the 1986 Single European Act, was adopted by the European Parliament on 10 February 1984 as a draft Treaty establishing the European Union²¹⁶ and contained references in Articles 4(3) and 7 to international fundamental rights standards.²¹⁷ The Single European Act, however, did not incorporate these

²¹⁴ For a critical analysis of the relationship between the human rights policy of the Union internally and externally and the ECHR system, see A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, OUP, 2004), at pp. 118-121.

²¹⁵ Rack and Laussegger, in Alston (ed.), above n. 147, at pp. 805-807.

²¹⁶ Resolution of the EP on the draft Treaty establishing the European Union: [1984] OJ C77/53.

²¹⁷ Rack and Laussegger, in Alston (ed.), above n. 147, at p. 805.

provisions but limited its reference to fundamental rights to the third Preamble.²¹⁸ The next significant development was the adoption on 12 April 1989 by the European Parliament of a Declaration of Fundamental Rights and Freedoms, based on the De Gucht report, which contained for the first time a detailed catalogue of rights based on the UNDHR, the ICCPR, the ICESCR, the ECHR and the European Social Charter.²¹⁹ The linkage between constitutionalism and fundamental rights was reaffirmed by the adoption by the European Parliament's Committee on Institutional Affairs on 10 February 1994 of a further draft constitution based on the Herman Report which set out in Title VIII a list of human rights guaranteed by the Union.²²⁰

The failure of the Amsterdam Treaty to incorporate a charter of fundamental rights was criticised both by the European Parliament²²¹ and the Commission which established a Group of Experts on Fundamental Rights which published a report in February 1999 recommending the inclusion of social rights in the Treaties.²²² The European Council at Cologne of 3- 4 June 1999 set out the case and parameters for the development of a charter of fundamental rights for the Union.²²³ The European Parliament passed a resolution supporting this decision and setting out proposals on the composition of the drafting authority for the Charter.²²⁴

²¹⁸ 'Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice'. [1987] OJ L169/2.

²¹⁹ Resolution of the EP adopting the Declaration of Fundamental Rights and Freedoms: [1989] OJ C120/51. The full text of the Declaration is available at: <http://www.europarl.eu.int/charter/docs/pdf/a2_0003_89_en_en.pdf>.

²²⁰ [1994] OJ C61/155. The full text is available at: <http://www.europarl.eu.int/charter/docs/pdf/a3_0064_94_en_en.pdf>. The rights listed substantially followed those set out in the 1989 Declaration, above n. 219, but in the case of social and environmental rights were listed in a truncated version.

²²¹ Resolution on the Amsterdam Treaty [1997] OJ C371/99.

²²² *Rapport du Groupe d'Experts concernant les Droits Fondamentaux. Affirmation des droits fondamentaux dans l'Union Européenne: L'heure d'agir est arrivée.* European Commission. DG Emploi et Affaires Sociales, Brussels, February 1999. ISBN 92-828-6606-8.

²²³ See Annex IV to the Presidency Conclusions at: <http://europa.eu.int/council/off/conclu/june99/annexe_en.htm#a4>.

²²⁴ [2000] OJ C54/93. See also the European Parliament resolution of 16 March 2000 on the drafting of a European Union Charter of Fundamental Rights: A5-0064/2000, C5-0058/1999 – 1999/2064(COS). Available at: <http://www.europarl.eu.int/charter/docs/text3_en.htm>.

5.8.2 THE DRAFTING AND PROCLAMATION OF THE CHARTER

At the Tampere meeting of 15-16 October 1999, the European Council specified the composition and working methods of the body entrusted with drafting the Charter.²²⁵ The Convention set up to draft the Charter (Charter Convention) was chaired by Roman Herzog and consisted of 62 members with 16 representatives of the European Parliament, 30 representatives selected by the national parliaments, 15 representatives of the governments of the Member States and a single Commission representative with observers from the other Community institutions and two representatives from the ECJ and the Council of Europe.²²⁶ The composition of the Charter Convention has been criticised for the weighting in favour of the interests of the Member States, with 45 of the members nominated by the national parliaments and the governments, and its under-representation of women.²²⁷ The applicant states were also not given any formal representation in the drafting of the Charter, although ‘an appropriate exchange of views’ was mandated by the Cologne European Council between the Charter Convention and the applicant states.²²⁸ This imbalance of representation in the Convention was reflected in a number of significant controversies over the text of the Charter.²²⁹

The final version of the Charter was approved by the European Council at Biarritz in October 2000 and subsequently solemnly proclaimed by the European Parliament, the

²²⁵ See the Annex to the Presidency Conclusions at:

<http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm#annex>.

²²⁶ Details of the representatives and consultative bodies are listed at:

<http://www.europarl.eu.int/charter/composition_en.htm>.

²²⁷ See Freixes and Remotti, above n. 190, at p. 13. However, the authors cite the wide variety of interest groups, NGOs, and other organisations who contributed to the debate over the Charter: *ibid.*, at p. 14, n. 28. See also the list of NGO contributions at: <http://www.europarl.eu.int/charter/civil/civil0_en.htm>.

²²⁸ Cologne Presidency conclusions, above n. 223.

²²⁹ See Freixes and Remotti, above n. 190, at pp. 15-18. They cite the following issues: a reference to the European religious heritage was removed at the final stage at the insistence of France and replaced by a reference to the Union’s ‘spiritual and moral heritage’ in the second preamble; the inclusion of social rights was opposed by several Member States and a number of such rights were only finally incorporated as general principles under Chapter IV headed ‘Solidarity’; Article 23 of the Charter, on equality between men and women, was only included at the final negotiating session as a result of pressure from representatives of over two hundred women’s groups; and the ‘transversal’ provision in Article 53 ensuring the Charter did not derogate from existing human rights protection was only included at the final stages of drafting.

Council and the Commission at Nice on 7 December 2000.²³⁰ The Preamble set out the parameters of the fundamental rights standards to be protected by the Charter:

‘This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.’

The limitation of the scope of the Charter to a reaffirmation of existing rights, albeit without providing an exclusive list of the sources of such rights, reflected the political boundaries set by the European Council at Cologne and Tampere.²³¹

The current legal status of the Charter has given rise to controversy, although it has been argued that notwithstanding the fact the Charter was not formally incorporated into Union law it nevertheless constitutes an ‘authoritative consolidation’ of existing Union law on fundamental rights.²³² A review of judicial references to the Charter has confirmed the ambiguous legal status of the Charter with some Advocates-General ‘stressing the democratic and substantive (added) value of the text’ and others the ‘formally legally non-binding status of the Charter’.²³³ The CFI has included the Charter as a source of ‘confirmation’ of the traditional sources of human rights drawn on by the

²³⁰ [2000] OJ C364/1 of 18 December 2000.

²³¹ The drafting of the Charter was according to the Commission to be ‘a task of revelation rather than creation, of compilation rather than innovation’: Commission Communication on the Charter of Fundamental Rights of the European Union of 13 September 2000, COM (2000) 559 Final, at p. 3. See also John Morijn, ‘Judicial Reference to the EU Fundamental Rights Charter’, at pp. 2-5: at <http://europa.eu.int/constitution/futurum/documents/other/oth000602_en.pdf>. Accessed September 2005.

²³² Agustín Menéndez, ‘Exporting rights: The Charter of Fundamental Rights, membership and foreign policy of the European Union’, Arena Working Papers, WP 18/2002, at p. 4 at: <http://www.arena.uio.no/publications/working-papers2002/papers/02_18.xml>. Accessed September 2005.

²³³ Morijn, above n. 231, at p. 28. See also Ward, in Peers and Ward (ed.), above n. 28, at pp. 126-130 and pp. 365-366 (Appendix 1) for a list of references in Opinions of the Advocates General to the Charter.

CFI.²³⁴ The Charter is also used as a benchmark by the Union's institutions for verifying the conformity of legislative proposals with Charter standards and by other bodies for assessing Union compliance.²³⁵

The future legal status of the Charter was left open by the Nice intergovernmental conference, although Declaration 23 attached to the Nice Treaty on the future of the Union provides at paragraph 5 that the European Council meeting at Laeken in December 2001 would agree on a declaration including a statement on the status of the Charter. The Laeken declaration provided that both the question of whether the Charter should be included in the constitutional treaty to be drafted by the European Convention and whether the Union should accede to the ECHR should form part of the European Convention's deliberations.²³⁶ The European Convention established WGII to report on the technical and legal aspects²³⁷ of both these issues and WGII Final Report recommended that, subject to the political decision on incorporation, the Charter should be incorporated 'in a form which would make the Charter legally binding and give it constitutional status.'²³⁸ Article I-9(1) of the Constitution gave effect to this recommendation.

²³⁴ See Morijn, above n. 231, at p. 28; and the CFI cases cited in Appendix 1 in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), at pp. 366-367.

²³⁵ See Gráinne de Búrca and Jo Beatrix Aschenbrenner, 'European Constitutionalism and the Charter', in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 3-34, at pp. 14-19. See also the references to the Charter in Union legislative measures listed in Appendix 1 of Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), at pp. 367-369. *The Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002* adopts the Charter as its reference instrument: Available at: <http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf>.

²³⁶ See Laeken Declaration, above n. 16. See also H.C. Kruger and J. Polakiewicz, 'Proposals for a coherent human rights protection system in Europe: The ECHR and the EU Charter of Fundamental Rights' (2001) 22 *HRLJ*, pp. 1-13; and P. Drzemczewski, 'The Council of Europe's position with respect to the EU Charter of Fundamental Rights' (2001) 22 *HRLJ*, pp. 14-32.

²³⁷ WGII, as mandated, left the political decision on both incorporation of the Charter and accession by the Community/Union to the ECHR to the European Convention plenary: see pp. 2 and 11 of WGII Final Report, above n. 5.

²³⁸ WGII Final Report, above n. 5, at p. 2.

5.8.3 THE INCORPORATED CHARTER: A BILL OF RIGHTS FOR THE UNION?

‘[A] bill of rights is a formal commitment to the protection of those rights which are considered, at that moment in history, to be of particular importance. It is, in principle, binding upon the government and can be overridden, if at all, only with significant difficulty. Some form of redress is provided in the event that violations occur’.²³⁹

This section evaluates whether incorporation of the Charter would provide the Union with a bill of rights according to Alston’s definition.²⁴⁰ While this assessment overlaps with issues previously discussed, it provides a useful overall test of the contribution incorporation of the Charter would make to strengthening the Union’s constitutional order from the perspective of the protection of fundamental rights.²⁴¹

The Charter satisfies Alston’s first criterion of formal commitment to rights of critical importance both in the form it was adopted in December 2000 and, *a fortiori*, if incorporated on the terms set out in the Constitution. The fourth paragraph of the Charter’s Preamble clearly affirms its claim to modernity through its mission to ‘strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter’ and the potential breadth of the rights recognized by the Charter has been acknowledged.²⁴²

²³⁹ P. Alston, ‘A Framework for the Comparative Analysis of Bills of Rights’ in P. Alston (ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford, OUP, 1999), pp. 1-14, at p. 10.

²⁴⁰ For a study of Charter rights in the context of the ECJ’s existing case law on fundamental rights, see: Lenaerts and de Smijter, above n. 38, at pp. 278-290.

²⁴¹ See de Búrca and Aschenbrenner, in Peers and Ward (eds.), above n. 235, at pp. 20-23. See also the report of the EP’s Committee on Constitutional Affairs of 12 October 2000, *On the Constitutionalisation of the Treaties: A5-0289/2000* (Final).

²⁴² See the contributions on ‘The Charter and Substantive Policy Areas of EU Regulation’ in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 183-348. On the potential impact of the Charter on the protection of economic and social rights in the Union, see: Diamond Ashiagbor, ‘Economic and Social Rights in the European Charter of Fundamental Rights’ (2004) 1 *EHRLR*, pp. 62- 72. On the relationship of Charter rights to rights protected under other international human rights instruments, see Dominic McGoldrick, ‘The Charter and United Nations Human Rights Treaties’ in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 83-122.

As regards the second criterion, the binding nature of the Charter on the Union's government, this would be achieved through the combined effect of Article I-9(1) and the reformulated version of Article 51(1) of the Charter set out in Article II-111(1). Article I-9(1) requires the Union to 'recognise the rights, freedoms and principles set out in the Charter' and the second sentence of Article II-111(1) obliges the institutions, bodies and agencies of the Union and the Member States, when implementing Union law, in respect of provisions of the Charter to 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution'.²⁴³ It is difficult to justify the differences in terminology between Article I-9(1) and II-111(1) other than by reference to the perceived political imperative of retaining and strengthening the jurisdictional elements of Article 51(1) of the Charter. Nevertheless, it is submitted that the incorporated Charter would create binding legal obligations on the Union's governing institutions and any failure to fulfill those obligations within the parameters set out in the Constitution would found an action for judicial review of acts adopted in breach of those obligations.²⁴⁴ Incorporation of the Charter on the terms of the Constitution would alter the normative status of the Charter by allowing direct judicial reference to the Charter rather than through the indirect route of the general principles case law.²⁴⁵

'So that it appeareth plainly, to my understanding, both from reason, and from Scripture, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular, and aristocratical commonwealths, is as great, as possibly men can be imagined to make it.'²⁴⁶

While Thomas Hobbes would clearly have needed some persuading of the merits of entrenching constitutional fundamental rights,²⁴⁷ incorporation of the Charter on the

²⁴³ These provisions employ less emphatic terminology than that employed in Article 1 ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention'.

²⁴⁴ See Section 5.6.2.2.3 above for analysis of the effect of incorporation on the availability of remedies.

²⁴⁵ For a less optimistic view on the clarity of the normative status of the Charter under Article I-9(1), see the editorial comments in: (2003) 28 *EL Rev.*, at p. 450.

²⁴⁶ Thomas Hobbes, *Leviathan*, ed. J.C.A. Gaskin (Oxford, OUP, 1998), at p. 138.

²⁴⁷ For an excellent discussion of the arguments for and against entrenchment of bills of rights see: M. Darrow and P. Alston, 'Bills of Rights in Comparative Perspective', in Alston (ed.), *Promoting Human*

terms of the Constitution would achieve entrenchment as defined by Alston. Article IV-443 elaborates on the current procedure for amending the TEU and EC Treaty under Article 48 TEU but retains in Article IV-443(3) the core requirements that any amendments to the Constitution require firstly the ‘common accord’ of the conference of the representatives of the governments of the Member States and secondly the ratification of the amendments by each of the Member States ‘in accordance with their respective constitutional requirements’.²⁴⁸ Both from the perspective of historical precedent and the Union’s enlargement, it would be difficult to argue against the proposition that overriding the Charter rights by amendment to the Constitution could only be done ‘with significant difficulty’.

The final characteristic of a bill of rights according to Alston’s definition, requiring some form of redress to be provided in the event that violations of rights occur, is the most problematic under the Charter’s existing status and would so remain, albeit to a more limited extent, if the Charter were to be incorporated on the terms of the Constitution.²⁴⁹ In particular, the limitation of the scope of application of Charter rights under Article 51 of the Charter, as strengthened in Article II-111 of the Constitution, would pose real problems of effective judicial redress:

Rights Through Bills of Rights: Comparative Perspectives (Oxford, OUP, 1999), pp. 465-524; and Walker, in Campbell, Ewing and Tomkins (eds.), above n. 81.

²⁴⁸ Article IV-443(4) provides a mechanism whereby if four fifths of the Member States have ratified the amending treaty and one or more have encountered difficulties the matter is referred to the European Council. This procedure has not been invoked following the rejection of the Constitution by referenda in France and the Netherlands since the necessary four-fifths threshold has not been reached. It may, however, still play a role depending on the review by the European Council of the ratification process in the first half of 2006: see *Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe* of 18 June 2005: available at: <http://ue.eu.int/ueDocs/cms_Data/Docs/pressData/en/ec/85325>. Article IV-444 provides for a simplified amendment procedure for the transition from unanimous to qualified majority voting in the Council (but not in military or defence areas) and for transition to the codecision procedure from a special legislative procedure. In both cases, Article IV-444 provides for the unanimous adoption of a European decision by the European Council after obtaining the consent of the EP. Any national parliament may block the procedure. See Denis Staunton, ‘Get ready for the passarelle: an EU power grab or a sensible reform?’, *The Irish Times*, 10 May 2005, at p. 11.

²⁴⁹ The distinction drawn between rights and principles in the Charter, which would be reinforced by Article II-112(5) of the Constitution, may also raise issues of justiciability, in particular in the context of the economic and social rights protected by the Charter. See: D. Ashiagbor, ‘Economic and Social Rights in the European Charter of Fundamental Rights’ (2004) 1 *EHRLR*, pp. 62- 72, at pp. 70-72; and Section 4.2.3.3 above.

‘Insofar as the Charter contains rights which are not based on the EC Treaty or EU Treaty, these rights can offer legal protection only to the extent that they relate to the current exercise of powers by the Community, the Union or the Member States implementing Union law. The statement of rights that cannot be linked to such an exercise of power mainly has a political function.’²⁵⁰

There may therefore be an infringement of Charter rights which, independently of the issue of the adequacy of Union remedies for breaches of fundamental rights, will not be subject to legal redress since it falls outside the competence of Union law. While it could be argued that there is no infringement, since Article II-51 of the Charter and Article II-111 define Charter rights so as to exclude their application in such a situation, such an argument is unattractive since, instead of making the Charter rights ‘more visible’,²⁵¹ incorporation threatens to make them more illusory.

In conclusion, the incorporation of the Charter on the terms of the Constitution falls at the last hurdle when measured against the criteria for a bill of rights identified by Alston. While such a restriction on the scope of the Charter rights may have been necessary to maintain the jurisdictional balance between the Union and the Member States and render the Charter politically acceptable,²⁵² the Charter rights could nevertheless have been redrafted to take account of the Union’s competences under the Constitution. However, such a task was outside the remit of WGII and never a political option in the light of the opposition of a number of key Member States to any extension of the Charter’s scope.

5.9 GENERAL CONCLUSIONS

Incorporation of the Charter and Union accession to the ECHR would provide a more transparent, principled and securely entrenched constitutional basis for the protection of

²⁵⁰ Lenaerts and de Smyter, above n. 38, at p. 289. See also Section 5.4.2 of this Chapter for an analysis of Article 51 of the Charter and Article II-111 of the Constitution.

²⁵¹ Paragraph four of the preamble to Part Two of the Constitution.

²⁵² As Schwarze points out Article 51(2) was deliberately included in the Charter to ‘increase its chance of acceptance, in particular in Germany.’: above n. 98, at p. 29.

fundamental rights in Union law.²⁵³ Accession by the Union to the ECHR would provide an autonomous system of control over the protection of fundamental rights and an important additional bulwark against any abuse of the Union's enhanced powers, particularly in the AFSJ. While incorporation of the Charter and Union accession to the ECHR had been actively promoted for many years,²⁵⁴ the continued opposition of some Member States to either or both of these measures meant that WGII adopted a conservative approach to the terms on which the Charter should be incorporated and the Union should accede to the ECHR. As a result, several of WGII's subsidiary recommendations were prompted more by a desire to smooth the passage of the primary recommendations than a principled reflection on the role of fundamental rights protection under the Constitution. In particular, the retention of general principles as a source of fundamental rights under the Constitution would undermine the benefits of having a codified system of protection in the Charter and the ECHR. In a similar vein, the drafting amendments to the Charter incorporated in the Constitution were driven by the need to assuage Member State sensibility as to the allocation of competences in the field of fundamental rights protection and detract from the existing text of the Charter.

The IGC did not focus on the detailed amendments to the Charter proposed by WGII. Indeed, the amendments were welcomed as additional 'safeguards' against an encroachment of Union competence in the protection of fundamental rights and a useful armory to deploy in the struggle to secure ratification of the Constitution. The IGC rather concentrated on strengthening the status of the Charter Explanations and ensuring through the ECHR Protocol and Declaration that the ECHR accession treaty would not affect the autonomy of Union law or the position of the Member States under the ECHR.

²⁵³ For a positive assessment of the reforms in the Constitution on fundamental rights, see: A. Young, 'The Charter, Constitution and Human Rights: is this the Beginning or the End for Human Rights Protection by Community Law?' (2005) 11 *EPL*, pp. 219-240.

²⁵⁴ 'They seem like two Loch Ness monsters of EU human rights protection: attractive to some and repulsive to others but intriguing to all, and yet so elusive': de Witte, in Alston (ed.), above n. 32, at p. 889. However, even academic support for the Charter was not universal: 'The Charter simply adds an unnecessary further tier which lacks the subtlety and flexibility of the current system of negotiation.': R. Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act', in Campbell, Ewing and Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, OUP, 2001), pp. 15-37, at p. 33. See also J.H.H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *ELJ*, pp. 95-97.

In this context, the principle of incorporation of the Charter and a mandate for the Union to accede to the ECHR were not challenged. While the ‘technical’ amendments resulting from WGII Final Report may seem of minor significance in comparison to the benefits accruing from incorporation of the Charter and ECHR accession, it is regrettable the IGC failed to take full advantage of the opportunity to establish a unified, coherent and simplified constitutional basis for the protection of fundamental rights in the Union. The stalling, and potential derailing, of the ratification process following the negative referenda results in France and the Netherlands provides an opportunity for a more principled and transparent approach to the reform of fundamental rights in the Union’s legal system. Such a process could result in reforms that could be promoted, independently of the fate of the Constitution as a whole, as a valuable contribution to the protection of fundamental rights and the strengthening of a European identity.²⁵⁵

²⁵⁵ See Chapter nine for a summary of potential reforms.

PART II

**THE ROLE OF JUSTICE IN THE UNION'S 'AREA OF
FREEDOM, SECURITY AND JUSTICE'**

6

THE AREA OF FREEDOM, SECURITY AND JUSTICE: GENESIS AND CHARACTERISTICS**6.1 INTRODUCTION**

This Chapter outlines the development of the AFSJ from a limited form of inter-governmental cooperation into a priority area of Union activity. This outline provides the necessary background for understanding the scope of the AFSJ and the constraints the Member States have imposed on the involvement of the Union's institutions.¹ In particular, it provides the framework for the analysis in Chapter seven of the restrictions on the application of fundamental rights protection in the AFSJ and the reforms in the Constitution. This Chapter also explores the development and significance of the notions of 'freedom, security and justice' in the context of Union policy in the AFSJ and questions to what extent this formula has been used to mask the underlying security agenda which has driven the development of the AFSJ.²

The selection of the AFSJ as the area of Union policy most appropriate for investigating the normative status of international fundamental rights in the Union's legal order is driven by three characteristics of the AFSJ. Firstly, the AFSJ covers criminal justice and refugee and asylum policy where the effective protection of fundamental rights is of critical importance to individuals and the maintenance of key values of the Union. Secondly, on the grounds of protecting national security interests and sovereignty, the Member States have ensured that the AFSJ has developed substantially outside the institutional and legal framework of the EC Treaty with a substantial deficit in democratic decision-making, accountability and judicial control. While the Treaty of Amsterdam partially addresses these deficiencies, the provisions on police and judicial cooperation in criminal matters in Title VI TEU (Third Pillar)

¹ For an overview of the role of the Union's institutions, see Jörg Monar, 'Decision-making in the Area of Freedom, Security and Justice', in Arnall and Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), pp. 63-80.

² 'In particular, there is a growing concern about the fact that security has been the overriding imperative, largely crowding out freedom and justice.': Hans Lidahl, 'Finding a Place for Freedom, Security and Justice: the European Union's Claim to Territorial Unity' (2004) 29 *EL Rev.*, pp. 461-484, at p. 461.

continue to be subject to restrictions on justiciability that are incompatible with the requirements of justice in the sense developed in Chapter two.

Thirdly, key Union measures adopted in the AFSJ, and in particular those adopted after the terrorist attacks of 11 September 2001, have been the object of sustained criticism for prioritising security over justice and freedom. The terrorist attacks in London of 7 July and 21 July 2005, and the consequent legislative proposals of the UK Government,³ have further highlighted the tension between these potentially competing values in a legal order. The structural characteristics of the AFSJ in this context assume a particular importance in assessing the robustness of the Union's legal order in protecting international fundamental rights standards. This Chapter investigates the genesis and structure of the AFSJ, both under the existing twin 'pillar' structure and in light of the reforms in the Constitution, in the context of these specific characteristics.

6.2 THE DEVELOPMENT OF THE AFSJ: FROM PERIPHERY TO CENTER STAGE

6.2.1 PRE-MAASTRICHT : INTERGOVERNMENTAL COOPERATION

The original EEC Treaty provided no specific legislative basis for action in the field of justice and home affairs (JHA). Particular problems which required a European response were addressed through non-EC based intergovernmental structures. In 1976 the Trevi Group was set up to deal with international terrorist threats by a decision of the Council of Justice and Interior Ministers.⁴ The Trevi Group continued to operate on an *ad hoc* basis until 1993 and initially evolved three working groups dealing with police liaison on terrorism, public order and combating organised crime.⁵ A fourth group, Trevi '92, was added in December 1988 to address issues related to the Single European Market (SEM) program following the 1986 Single European Act which came into force on 1 July 1987. In 1988 the Rhodes European Council set up a group

³ See the letter of Charles Clarke, Home Secretary, of 15 September 2005 outlining the proposals: *The Guardian* of 16 September 2005; available at: <<http://image.guardian.co.uk/sys-files/Politics/documents/2005/09/15/letterplusannexe.pdf>>.

⁴ See European Parliament Directorate General for Research, *Cooperation in the Fields of Home Affairs and Justice*, 1976 (PE162.500).

⁵ Ben Tonra, 'The Politics of Justice', in Gavin Barrett (ed.) *Justice Cooperation in the European Union* (Dublin, Institute of European Affairs, 1997), pp. 49-58.

of coordinators consisting of national representatives to address the complexities of eliminating internal frontier controls which led in 1990 to the Trevi Programme of Action which specified methods for cooperation between police and security services for the implementation of the SEM.⁶

Chancellor Kohl promoted the establishment of a European police capability at the 1991 Edinburgh Council to combat transnational organised crime and in August 1991 a special Ad Hoc Working Group on Europol was established. In December 1991, the Trevi Ministers adopted a *Report on the Development of Europol* that set out a programme for the establishment of Europol,⁷ initially concentrating on illegal drugs trafficking with the establishment of the European Drugs Intelligence Unit (EDIU).⁸ The 1992 Lisbon European Council authorised the preparation of a draft convention to provide a legal basis for Europol and the 1993 Hague European Council decided that the Hague would be the permanent location for Europol.⁹

In the field of immigration control, separate intergovernmental groups were set up, most notably the Schengen Group which followed on from the Franco-German Saarbrücken agreement of 1984 and led to the 14 June 1985 Schengen Agreement on the gradual abolition of checks at common borders and the Schengen Implementing Convention of 19 June 1990.¹⁰ The Schengen Implementing Convention addressed the relationship of the Schengen arrangements with EC law by providing in Article 134 that the provisions of the Convention only applied insofar as they were compatible with Community law.¹¹

⁶ Val Flynn 'Europol - A Watershed in EU Law Enforcement Cooperation?' in G. Barrett (ed.), *Justice Cooperation in the European Union* (Dublin, Institute of European Affairs, 1997), pp. 79-113.

⁷ See the 1995 Statewatch Pamphlet, *On the Europol Convention*, by Tony Bunyan, at p.1. Available at: <<http://www.statewatch.org/news/2005/aug/europol1.pdf>>.

⁸ Subsequently replaced in 1995 by the Europol Drugs Unit (renamed European Drugs Unit) (EDU) whose responsibilities were in turn assumed by Europol as from 1 July 1999.

⁹ See generally, Flynn, in Barrett (ed.), above n. 6, *passim*.

¹⁰ The 1985 Schengen Agreement and the 1990 Schengen Implementing Convention are published in (1991) 30 ILM 68 and (1991) 30 ILM 84 respectively.

¹¹ Diarmaid McGuinness and Eileen Barrington, 'Immigration, Visa and Border Controls in the European Union', in Barrett (ed.), *Justice Cooperation in the European Union* (Dublin, Institute of European Affairs, 1997), pp. 155-169, at p. 166.

The Dublin Convention of 15 June 1990 was another intergovernmental initiative developed outside the EC structures but to which all the Member States adhered.¹² The Dublin Convention, which establishes rules for allocating responsibility for determining asylum applications according to criteria based on a state's connection to an asylum seeker's presence in the Community, entered into force on 1 October 1997.¹³ The Dublin Convention was replaced by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.¹⁴

6.2.2 *TREATY OF MAASTRICHT: CREATION OF THE THIRD PILLAR*

The Treaty on European Union (TEU), signed at Maastricht in February 1992 and which entered into force on 1 November 1993, contained in Title VI the first wide-ranging set of provisions on justice and home affairs (JHA) which became referred to as the Third Pillar of the Union.¹⁵ No general definition is provided of the scope of the 'justice' and 'home affairs' program but instead Title VI TEU listed nine areas to be treated as of common interest. Article K.1 provided that, without prejudice to the powers of the European Community, the Member States are to regard the following nine issues as matters of common interest: asylum policy; rules governing the crossing by persons of the external borders of the member states and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in civil matters; judicial cooperation in criminal matters; customs

¹² *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities*: [1977] OJ C 254/1.

¹³ [1997] OJ C254/1. See for detail, Peers, *EU Justice and Home Affairs* (Harlow, Longman, 2000), at pp. 112-117.

¹⁴ [2003] OJ L050/1 (Dublin II Regulation). Denmark, pursuant to Protocol (No. 5) attached to the TEU, is not currently subject to the Dublin II Regulation, and remains bound by the Dublin Convention in its relations with the other Member States (recitals 18 and 19 of the Dublin II Regulation) and Norway and Iceland. However, by a Council Decision of 2 February 2005 approval was given for signature of an agreement with Denmark for its participation in the Dublin II regulation: Council Document 5949/05. Available on the register of Council documents. Ireland and the United Kingdom elected to be bound pursuant to Protocol (No. 4) attached to the TEU. Iceland and Norway, parties to the Dublin Convention, have also acceded to the system established by the Dublin II Regulation.

¹⁵ [1992] OJ C191 of 29 July 1992.

cooperation; and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.¹⁶ However, the principal instruments provided for in Title VI TEU to achieve these objectives - joint positions, joint actions and conventions- proved ill-suited to address the requirements for legal certainty in the JHA arena.¹⁷

Title VI TEU continued the pre-Maastricht pattern of confining the form of cooperation in the JHA field to intergovernmentalism but nevertheless formalised a limited role for the Union's institutions, except for the ECJ whose role 'can best be described as minimal'.¹⁸ The Council was assigned primary responsibility for implementing the Third Pillar, taking over the role previously played by intergovernmental ministerial meetings outside the EC Treaty framework. The Commission was restricted to a joint right of initiative with the Member States to propose specific measures, as opposed under the EC Treaty to an exclusive right to propose legislative measures, and in the field of customs cooperation, police cooperation and judicial cooperation in criminal matters even this right was excluded.¹⁹ The European Parliament's role was restricted under Article K.6(2) TEU to 'very limited rights to be informed, to be consulted and to have its views taken into consideration'.²⁰

The retention of an intergovernmental basis for JHA cooperation was mitigated in formal terms by Article L.9 TEU which established a '*passarelle*' procedure for the transfer of powers from the TEU to the EC Treaty in the JHA field. However, since such a transfer was dependent both on a unanimous Council vote and the adoption by the Member States of a decision in accordance with their constitutional requirements it was not exercised.²¹ The TEU also introduced or extended a number of EC powers in fields related to the JHA within the first pillar constituted by the EC Treaty.²² Since some of these areas overlapped with Union competences under the Third Pillar

¹⁶ Barrett, 'Co-operation in Justice and Home Affairs in the European Union - An Overview and Critique', in Barrett (ed.), *Justice Cooperation in the European Union* (Dublin, Institute of European Affairs, 1997), pp. 3-47, at p. 8.

¹⁷ See Peers, above n. 13, at pp. 27-30.

¹⁸ See Barrett, in Barrett (ed.), above n. 16, at p. 26.

¹⁹ Article K.3(2) TEU. See Barrett, *ibid.*, at p. 9.

²⁰ *Ibid.*, at p. 9.

²¹ *Ibid.*, at p. 10.

²² See for a summary of these changes: Barrett, *ibid.*, at p. 12.

this created the potential for conflicting jurisdictional claims.²³ However, in *Commission v. Council* (Transit Visas Case) the ECJ interpreted Article M (now Article 47) TEU combined with Article L TEU as conferring jurisdiction on it to police the boundaries between the EC Treaty and the TEU.²⁴ However, the ECJ found that a Joint Action on airport transit arrangements adopted by the Council under Article K.3 TEU did not encroach on the Commission's powers under Article 100c (ex) EC Treaty.

Article K.7 TEU formally recognised the compatibility of the Schengen system with Title VI TEU by providing:

'... the provisions of the Title shall not prevent the establishment or development of closer cooperation between two or more member states in so far as such cooperation does not conflict with, or impede, that provided for in this Title'.

Article K1(9) TEU provided further impetus to the development of Europol/EDU by referring to the organisation of a Union-wide system for the exchange of information within a European Police Office in the context of police cooperation for the purpose of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime. It was supplemented by the *Declaration on Police Cooperation* in the Final Act of the TEU setting out the activities and functions of Europol/EDU.

The Trevi Group was replaced by the K.4 Committee which operated with three steering groups in the fields of Immigration/Asylum, Police and Customs Cooperation and Judicial Cooperation and Criminal Matters under the control of the JHA Council and the Committee of Permanent Representatives (COREPER).²⁵ The

²³ *Ibid*, at p. 13; and see Peers, above n. 13, at pp. 30-33.

²⁴ Case C-170/96 [1998] ECR I-3655, at paras. 14-17. See: T. Tridimas, 'The European Court of Justice', in P. Lynch, N. Neuwahl and G. Wyn Rees (eds.), *Reforming the European Union: From Maastricht to Amsterdam* (Harlow, Longman, 2000), pp. 74-84, at p. 75; and Brendan Smith and William Wallace, 'Constitutional Deficits of EU Justice and Home Affairs: Transparency, Accountability and Judicial Control', in Jorg Monar and Wolfgang Wessels (eds.), *The European Union after the Treaty of Amsterdam* (New York, Continuum, 2001), pp. 125-149, at p. 140. This jurisdiction was reaffirmed post-Amsterdam Treaty in Case T-338/02 *Segi et al. v. Council* [2004], Order of 7 June 2004, at para. 41. Not yet reported.

²⁵ Flynn, in Barrett (ed.), above n. 6, at pp. 91-93.

K.4 Committee was entrusted with setting up Europol/EDU and preparing the related draft Europol Convention.²⁶

6.2.3 MAASTRICHT TO AMSTERDAM

The experience of application of the Title VI TEU provisions confirmed what had been widely predicted:

‘The paucity of measures adopted reflects the difficulty of making progress through the inefficient, five-layer, decision-making structure of the Third Pillar, in particular where there are fundamental differences in approach by various member states.’²⁷

In the field of asylum policy, the main measures adopted under Title VI TEU were 'soft-law' measures:²⁸ the 1992 London Resolutions *On a Harmonised Approach to Questions Concerning Host Third Countries and On Manifestly Unfounded Applications for Asylum*;²⁹ the Council Resolution of 20 June 1995 *On Minimum Guarantees for Asylum Procedures*;³⁰ the Council Resolution of 25 September 1995 *On Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis*;³¹ and the Joint Position of 4 March 1996 *On The Harmonised Application of The Definition of the Term 'Refugee' in Article 1 of The 1951 Geneva Convention*.³²

²⁶ The negotiation process of the Europol Convention was lengthy and contentious with the signature of the Convention on 26 July 1995 and a voluntary Protocol on the role of the ECJ being signed in June 1996: see Flynn, above n. 6, at pp. 91-95. On 26 July 1995 the Council signed the Act drawing up the Convention based on Article K.3 of the Treaty on European Union: [1995] OJ C316/1. The Europol Convention entered into force on 1 October 1998. The Protocol on the role of the ECJ is published in [1996] OJ C299/1. For an analysis of the Protocol, see Peers, above n. 13, at p. 26.

²⁷ Bill Shipsey, 'Asylum Policy and Title VI of the Treaty on European Union', in Barrett (ed.), *Justice Cooperation in the European Union* (Dublin, Institute of Foreign Affairs, 1997), pp. 171-180, at p. 173.

²⁸ See Hannah R. Garry, 'Harmonisation of Asylum Law and Policy within the European Union: A Human Rights Perspective' (2002) 20 *Netherlands Quarterly of Human Rights*, pp. 163-184, at 169-170. On the legal status of soft law measures adopted under Title VI TEU, see Peers, above n. 13, at pp. 30-31.

²⁹ Documents WG I 1283 and WG I 1282 REV 1; listed in the Commission's *Acquis of the European Union in the Field of JHA*; consolidated version; update December 2004: available at <http://europa.eu.int/comm/justice_home/doc_centre/intro/docs/jha_acquis_1204_en.pdf>. The two London Conventions are published in Bunyan (ed.) *Key Texts on Justice and Home Affairs in the European Union*, Vol. 1 (London, Statewatch, 1997), at p. 64.

³⁰ [1996] OJ C274/13.

³¹ [1995] OJ L63/1.

³² [1996] OJ L63/2.

The same approach was followed in the politically sensitive JHA fields of migration, which covers the admission, readmission and expulsion of third-country nationals, anti-terrorism and police cooperation.³³ The lack of accountability and transparency resulting from the Maastricht system for the JHA left both the European Parliament and the national parliaments dissatisfied with the degree of control and supervision they could exercise over this critical area.³⁴ In addition a number of external factors, notably the proposals for enlargement and the rise in refugees resulting from the Balkans conflicts and other international crises,³⁵ added urgency to the development of Union action. A number of Member States were therefore sympathetic during the 1996-1997 IGC preceding the Treaty of Amsterdam to reform proposals designed to address the ‘democratic deficit’ in the Third Pillar. These included an increased role for the ECJ, strengthening the role of the European Parliament and national parliaments in supervising JHA measures,³⁶ and transferring to the EC Treaty elements of the JHA programme.

6.2.4 TREATY OF AMSTERDAM AND CREATION OF THE AFSJ

6.2.4.1 A New Objective: An ‘Area of Freedom, Security and Justice’

In the event the Third Pillar emerged from the 1997 Treaty of Amsterdam as the most fundamentally restructured area of Union policy both in terms of being endowed with a strategic direction and in terms of a significant transfer of JHA responsibilities from the Third to the First Pillar.³⁷ Article 2 TEU, fourth indent, provided the strategic direction by including as an objective of the Union:

‘... to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’.

³³ See for detailed list of the measures adopted in each field, *Acquis of the European Union in the Field of JHA*, consolidated version; update December 2004, above n. 29. In areas such as drugs and customs cooperation, decisions and conventions were also adopted under Title VI TEU: see Peers, above n. 13, at p. 29.

³⁴ Smith and Wallace, in Monar and Wessels (eds.), above n. 24, at pp. 126-127.

³⁵ Smith and Wallace, *ibid.*, at pp. 126-127.

³⁶ Smith and Wallace, *ibid.*, at pp. 128-131.

³⁷ [1997] OJ C340/01. The Treaty of Amsterdam entered into force on 1 May 1999. See J. Monar, ‘Justice and Home Affairs after Amsterdam: The Treaty Reforms and the Challenge of their Implementation’ in Monar and Wessels (eds.), *The European Union after the Treaty of Amsterdam* (New York, Continuum, 2001), pp. 267-295.

The adoption in Article 2 TEU of the criteria ‘freedom, security, and justice’ to assess progress in the former JHA arena implicitly recognised the linkage between human rights issues and law enforcement measures in this field.³⁸ The association of the objective of assuring the free movement of persons, which was firmly entrenched as a field of exclusive EC competence, to the spheres of border controls, asylum, immigration and crime prevention, which had until then been primarily restricted to intergovernmental cooperation, established the necessary role for Community action in this field.³⁹

6.2.4.2 *Partial Communitarisation of Justice and Home Affairs*

The former JHA competences transferred to the EC Treaty were, except for customs cooperation and protection of the financial interests of the EC,⁴⁰ inserted into the new Title IV EC Treaty relating to ‘Visas, Asylum, Immigration and other Policies related to Free Movement of Persons.’ Article 61 EC Treaty sets out measures to be adopted by the Council, adopting the same objectives as Article 2 TEU, ‘in order to establish progressively an area of freedom, security and justice’. Article 61(a) EC Treaty established a five year deadline, which expired on 1 May 2004, for the implementation of measures to ensure the free movement of persons in accordance with Article 14 EC Treaty together with ‘directly related flanking measures with respect to external border controls, asylum and immigration’ in accordance with Articles 62(2) and (3) EC Treaty and Article 63(1)(a) and 2(a) EC Treaty, and ‘measures to prevent and combat crime’ in accordance with Article 31(e) TEU.⁴¹

³⁸ The connection between justice and fundamental rights is explored in Section 2.5 of Chapter two. The connection between liberty and fundamental rights is perhaps more evident and clearly stated in the 1998 Vienna Action Plan considered in Section 6.2.5 below. For a discussion of the significance of the concepts of freedom, security and justice in the AFSJ, see: Lidahl, above n. 2, *passim*. For a discussion of elements of coherence linking the issues covered by the AFSJ, see Neil Walker, ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’, in N. Walker (ed.), *Europe’s Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 3-40.

³⁹ For a contrary interpretation of Article 2 TEU, fourth indent, which argues the linkage of JHA measures to free movement of persons unduly restricts future action in the JHA field: see Monar, in Monar and Wessels (eds.), above n. 37, at pp. 269-270.

⁴⁰ Article 280 EC Treaty was amended to cover the fight against fraud affecting the Community’s financial interests and a new Title X EC Treaty on Customs Cooperation was added: see Monar, *ibid.*, at pp. 273-274.

⁴¹ The wording of paragraph (a) of Article 61 EC Treaty can be interpreted to tie only the first set of ‘directly related flanking’ measures to those ensuring the free movement of persons, but not the measures to prevent and combat crime. However, for an opposite view, see Monar, in Monar and Wessels (eds.), above n. 37, at p. 271.

The other JHA measures to be adopted pursuant to Article 61(b)-(e) TEC are not subject to a deadline nor directly linked to the free movement of persons.⁴²

Article 62 EC Treaty sets out, but without fixing a deadline for implementation, measures to be adopted by the Council relating to the crossing of internal and external Union borders. Article 63 EC Treaty establishes measures to be adopted in relation to the determination of Member State responsibility for asylum applications and minimum standards applicable to refugees and asylum seekers (Article 63(1)), measures on refugees and displaced persons (Article 63(2)), measures on specified aspects of immigration policy (Article 63(3)), and measures defining the rights and conditions under which nationals of third countries legally resident in a Member State may reside in other member States (Article 63(4)).⁴³ Article 65 EC Treaty lists a series of measures to be taken by the Council in the field of ‘judicial cooperation in civil matters having cross border implications’ and ‘insofar as necessary for the proper functioning of the internal market.’ Finally, Article 66 EC Treaty obligates the Council to take measures to ensure administrative cooperation between the Member States and the Commission in the areas covered by Title IV EC Treaty.

The Title IV EC Treaty objectives adopted at Amsterdam have been criticised, despite their individual importance, for failing to establish a common policy framework in the field of immigration and asylum.⁴⁴ This criticism, however, presupposes that such a common policy was desirable, which is doubtful given the limitations of Title IV EC Treaty in respect of democratic decision-making, transparency, accountability and judicial control.⁴⁵ Indeed, as explored in Chapter eight, the measures adopted in pursuit of the Union’s goal of achieving a Common European Asylum System, set by the European Council at its Tampere meeting in October 1999, have given rise to substantial concerns relating to compliance with international fundamental rights standards.

⁴² Although Monar argues that, as part of the AFSJ, such measures ‘remain subject to the general objective of Article 2 TEU with its emphasis on free movement related measures’: *ibid.*, at p. 271. This interpretation seems an unnecessarily restrictive interpretation of both Article 2 TEU and Article 61 EC Treaty.

⁴³ Article 63 EC Treaty measures are subject to the 1 May 2004 deadline except for those contained in Articles 63(2)(b), (3)(a) and (4).

⁴⁴ Monar, in Monar and Wessels (eds.), above n. 37, at p. 272.

⁴⁵ See on these aspects of the Treaty of Amsterdam: Smith and Wallace, in Monar and Wessels (eds.), above n. 24, *passim*.

Article 64(1) EC Treaty, as in the case of Article 33 TEU, sets the parameters for EC action under Title IV EC Treaty: 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.' This provision is buttressed by Declaration 19 of the Treaty of Amsterdam which allows the Member States to take into account foreign policy considerations 'when exercising their responsibilities under Article 64(1) of the Treaty establishing the European Community'. The second paragraph of Article 64 EC Treaty, but without prejudice to paragraph (1), provides for the Council to adopt by qualified majority on a proposal from the Commission provisional measures for up to six months in the event of an 'emergency situation characterised by a sudden inflow of nationals of third countries'. These provisions are subject to construction by the ECJ and in accordance with its established case law on other derogation provisions in the EC Treaty relating to public safety they would be subject to a restrictive interpretation.⁴⁶

Article 67 EC Treaty sets out the decision-making procedure under Title IV EC Treaty with Council unanimity required until 1 May 2004, acting on a proposal from the Commission or on the invitation of a Member State and after consulting the European Parliament.⁴⁷ This procedure is subsequently replaced under Article 67(2) EC Treaty by the standard Community procedure whereby the Commission has the sole right of legislative proposal, although it is still required to examine a request from a Member State. Article 67(2) further enables the Council, acting unanimously, to provide for all or parts of Title IV EC Treaty to be governed by the Article 251 EC Treaty co-decision procedure. Paragraphs 3 and 4 of Article 67 EC Treaty derogate from these rules by providing that rules on three-month maximum visas establishing the list of countries requiring visas and a uniform format for visas are subject to Council majority voting from 1 May 1999 and that as from 1 May 2004 measures

⁴⁶ See, in the context of the public safety derogations in the EC Treaty in Articles 30, 39, 46, 296 and 297, Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651, at para 26: '... because of their limited character those Articles do not lend themselves to a wide interpretation and it is not possible to infer from them that there is inherent in the Treaty a general proviso covering all measures taken for reasons of public safety.'

⁴⁷ See Case C-257/01 *Commission v Council*, which rules on the powers of the Council and the Member States to adopt implementing measures under Title IV EC Treaty: Judgment of 18 January 2005, not yet reported.

establishing the procedures and conditions for issuing visas by Member States and rules on a uniform visa will automatically be subject to the co-decision procedure.

6.2.4.3 Third Pillar Changes: Title VI TEU

Title VI TEU was retitled ‘Provisions on Police and Judicial Cooperation in Criminal Matters’ to reflect the transfer of powers to the EC under Title IV EC Treaty. Article 29 TEU sets out the new objective of the Union under Title VI TEU:

‘Without prejudice to the powers of the European Community, the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.’

This objective broadened the remit of Union policy in the JHA field from a defensive approach centered on addressing the security and law enforcement issues arising from the dismantling of internal borders under the Schengen arrangements to an approach that for the first time incorporated the values of freedom and justice into the policy arena and specifically identified the fight against racism and xenophobia as a priority objective of Union policy.⁴⁸

The second paragraph of Article 29 TEU sets out the necessary means for achieving the objective set out in the first paragraph:

‘That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through: closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with Articles 30 and 32; *closer cooperation between judicial and other competent authorities of the Member States in accordance with Articles*

⁴⁸ The Treaty of Amsterdam also introduced Article 13 EC Treaty which conferred powers on the EC to combat, *inter alia*, discrimination based on race or ethnic origin. See for a critique of the Union’s policies against racism post-Amsterdam: Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, OUP, 2004), at pp. 86-88; and Conor A. Gearty, ‘The Internal and External ‘Other’ in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe’ in Alston, Bustelo and Heenan (eds.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 327-358, especially at pp. 345-356.

31(a) to (d) and 32; approximation, where necessary, of rules on criminal matters in the Member States, in accordance with Article 31(e).'⁴⁹

Articles 30 and 31 TEU specify in detail the areas of common action in the field of police cooperation and judicial cooperation in criminal matters.⁵⁰ Article 30(2) TEU requires the Council to promote cooperation through Europol and set a deadline of 1 May 2004 for adopting specific measures to facilitate such cooperation, although Europol's powers under Article 30(2) TEU fall short of enabling it to carry out autonomous operational activities.⁵¹ Article 32 circumscribes the scope of operation of Articles 30 and 31 by providing: 'The Council shall lay down the conditions and limitations under which to competent authorities referred to in Articles 30 and 31 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State.' As mentioned above, Article 33 TEU further restricts the scope of Title VI TEU.⁵²

The inadequacy of the measures available for implementing JHA policy under the Treaty of Maastricht was in part remedied by the Treaty of Amsterdam whereby the full range of EC instruments was made available for JHA matters transferred to Title IV of the EC Treaty and the measures available to the Council in respect of the residual Title VI TEU competences were strengthened. Article 34(2) TEU, while retaining common positions⁵³ and conventions,⁵⁴ introduces in subparagraph (b) the

⁴⁹ Article 7 of the Treaty of Nice replaced the words in italics by the following: 'closer cooperation between judicial and other competent authorities of the Member States, including cooperation through the European Judicial Cooperation Unit ('Eurojust'), in accordance with the provisions of Articles 31 and 32.'

⁵⁰ Declaration No. 7 to the Treaty of Amsterdam provides: 'Action in the field of police co-operation under Article 30 of the Treaty on European Union, including activities of Europol, shall be subject to appropriate judicial review by the competent national authorities in accordance with rules applicable in each Member State.'

⁵¹ See on the development of Europol, Cyrille Fijnaut, 'Police Co-operation and the Area of Freedom, Security and Justice' in Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 241-282. For a list of subsequent Protocols amending the Convention on the establishment of a European Police Office ([1995] OJ C316 of 27 November 1995), see the Commission's *Acquis of the European Union in the Field of JHA*, above n. 29, at p. 12.

⁵² See further Section 7.2 of Chapter seven.

⁵³ Formerly joint positions. Article 34(2)(a) TEU states common positions define 'the approach of the Union to a particular matter'. They are neither justiciable by the ECJ (Article 35(1) TEU) nor subject to a requirement for consultation with the EP (Article 39(1) TEU) and seem designed for purely political acts: see Monar, in Monar and Wessels (eds.), above n. 37, at p. 276.

⁵⁴ Article 34(2)(d) TEU. Article 34(2)(d) TEU introduces a requirement for Member States to start the ratification process for a convention within a time limit set by the Council. The final paragraph of Article 34(2) TEU further provides that a convention may, unless it otherwise provides, enter into force as soon as it is adopted by at least half the Member States.

‘framework decision’ which has the purpose of ‘approximation of the laws and regulations of the Member States’ and which shall be ‘binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods’ and ‘shall not entail direct effect’. The joint action is replaced in subparagraph (c) by the adoption of ‘decisions for any other purpose consistent with the objectives of this Title’ and which shall be binding but again shall not entail direct effect. Article 34(2) TEU measures must be adopted by the Council acting unanimously on the initiative of the Commission or any Member State, although measures implementing decisions ‘at the level of the Union’ shall be adopted by the Council acting by a qualified majority. As a result of these innovations, the ground was laid for the development of a *corpus* of legal instruments in the JHA field both at the level of the *acquis communautaire* and at the Union level.⁵⁵

The Treaty of Amsterdam also introduced in Article 38 TEU a new power for the Union to act internationally in the JHA field by providing that international agreements referred to in Article 24 TEU in the context of a common foreign and security policy may also cover matters falling under Title VI.⁵⁶ The same procedure is therefore applicable to Title VI TEU agreements as provided for in Article 24 TEU for CFSP agreements whereby the Council unanimously authorizes the Presidency, assisted by the Commission as appropriate, to negotiate the agreement. A unanimous vote by the Council is then required for the conclusion of such an agreement. The first agreements concluded under Articles 24 and 38 TEU, on extradition and mutual legal assistance in criminal matters between the Union and the USA, demonstrate the significance of the new powers of the Union under Article 38 TEU in terms of the substantial concerns raised both by the procedures adopted for conclusion of the agreements and their content.⁵⁷

⁵⁵ See the Commission's *Consolidated Acquis* of December 2004, above n. 29, for the measures adopted in the field covered by Title VI TEU which demonstrates the rapid growth in such measures since the Treaty of Amsterdam.

⁵⁶ See generally Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, OUP, 2004), at p. 161.

⁵⁷ The agreements are annexed to Council Decision 2003/516 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters, [2003] OJ L181/25. For an analysis of the agreements see: Jan Wouters and Frederik Naert, ‘Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU’s Main Criminal Law Measures against Terrorism after “11 September”’ (2004)

Article 37 TEU requires the Member States to defend the common positions adopted under Title VI TEU within international organisations and at international conferences in which they take part. This requirement has been strengthened by the Treaty of Amsterdam through the application ‘as appropriate’ of Articles 18 and 19 TEU, which regulate the role of the Presidency in representing the Commission and co-ordination of Member States’ actions in the international arena under the CFSP, to Third Pillar matters.

Another substantial development at Amsterdam was provision in the second Protocol annexed to the TEU and the EC Treaty for the future integration of the Schengen *acquis* into the framework of the European Union (the Schengen Protocol).⁵⁸ The allocation of the legal basis for each element of this substantial *acquis*, which was listed in summary form in an Annex to the Schengen Protocol, as between the TEU and the EC Treaty was left to the Council to decide acting unanimously, ‘in conformity with the relevant provisions of the Treaties’.⁵⁹ In addition to the opt-out arrangements provided for in the Amsterdam Protocols for the UK, Ireland and Denmark,⁶⁰ the Treaty of Amsterdam introduced provision for other cases of differentiated application of Union law to a sub-set of Member States. Title VII TEU introduces provisions on closer cooperation for a group of Member States making use for this purpose of the institutions, procedures and mechanisms of the TEU and the

41 *CML Rev.*, pp. 909–935, at pp. 930-935; and Theodore Georgopoulos, ‘What kind of treaty-making power for the EU? Constitutional problems related to the conclusion of the EU-US Agreements on Extradition and Mutual Legal Assistance’ (2005) 30 *EL Rev.*, pp. 190-208.

⁵⁸ For details see: Monica den Boer, ‘The incorporation of Schengen into the TEU: a bridge too far?’, in Monar and Wessels (eds.), *The European Union after the Treaty of Amsterdam* (New York, Continuum, 2001), pp. 296-320; P. Kuiper, ‘Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Treaty of Amsterdam and the Incorporation of the Schengen Acquis’ (2000) 37 *CML Rev.*, pp. 345-366; and S. Peers, ‘Caveat Emptor?: Integrating the Schengen Acquis into the European Legal Order’ (2000) *CYELS*, pp. 87-123.

⁵⁹ Article 2(1) of the Schengen Protocol. This process was completed by Council Decision 1999/435/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*: [1999] OJ L176/1.

⁶⁰ Protocols attached to the EC Treaty and the TEU by the Treaty of Amsterdam establish specific derogations for Ireland and the United Kingdom from the application of Article 14 EC Treaty and Title IV EC Treaty (Protocols 3 and 4) and Denmark from the application of Title IV EC Treaty (Protocol 5): see Monar, in Monar and Wessels (eds.), above n. 37, at pp. 285-6; and Maria Fletcher, ‘EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum’ (2002) 9 *EPL*, pp. 544-562, at pp. 543-550.

EC Treaty.⁶¹ Article 40 TEU makes specific provision for such closer cooperation in the Title VI TEU area with the objective of ‘enabling the Union to develop more rapidly into an area of freedom, security and justice’. Finally, Belgium was granted partial exemption from the Protocol attached to the EC Treaty on asylum for nationals of the Member States.⁶² These provisions led some commentators to emphasise the Treaty of Amsterdam’s role in promoting ‘flexibility’ in the sense of ‘institutional rules whereby not all Member States have the same rights and obligations in certain policy areas’.⁶³

6.2.5 THE VIENNA ACTION PLAN: THE MEANING OF ‘FREEDOM, SECURITY AND JUSTICE’

The Justice and Home Affairs Council adopted on 3 December 1998 the Vienna Action Plan (VAP) on implementation of the Treaty of Amsterdam provisions establishing an area of freedom, security and justice.⁶⁴ Part II of the VAP sets out a list of priorities and measures to be adopted to achieve the AFSJ in the fields of asylum and immigration policy and police cooperation and judicial cooperation in criminal matters.⁶⁵ In Part I of the VAP the Union sets out for the first time to elucidate the notions of ‘freedom, security, and justice’ as employed in the Treaty of Amsterdam:

‘These three notions are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator ‘people’ and one cannot be achieved in full without the other

⁶¹ See for details Philippe de Schoutheete, ‘Closer Cooperation: Political Background and Issues in the Negotiation’, in Monar and Wessels (eds.), *The European Union after the Treaty of Amsterdam* (New York, Continuum, 2001), pp. 150-166.

⁶² See Section 8.3.3.5 of Chapter eight for an analysis of this Protocol.

⁶³ Eric Philippart and Monika Sie Dhian Ho, ‘Flexibility after Amsterdam: Comparative Analysis and Prospective Impact’, in Monar and Wessels (eds.), *The European Union after the Treaty of Amsterdam* (New York, Continuum, 2001), pp. 167-206, at p. 168.

⁶⁴ [1999] OJ C 19/1. It was based on the Commission’s Communication ‘Towards an area of freedom, security and justice’: Bulletin of the European Union 7/8, p. 152:COM (1998) 459 (1998 Commission Communication). Available at:

<<http://europa.eu.int/abc/doc/off/bull/en/9807/p202001.htm#anch0597>>. See for an analysis of the 1998 Commission Communication: Lidahl, above n. 2, especially at pp. 465-467.

⁶⁵ See for details: Monar, in Monar and Wessels (eds.), above n. 37, at pp. 286-289.

two. Maintaining the right balance between them must be the guiding thread for Union action.’⁶⁶

The subsequent discussion in the VAP of the concepts of freedom, security and justice, however, justifies the conclusion that security rather than ‘people’ was the common denominator driving the AFSJ agenda. However, the most significant connection between the three concepts is made in the preparatory 1998 Commission Communication:

‘It is in the framework of the consolidation of an area of freedom, security and justice that the concept of public order appears as a common denominator in a society based on democracy and the rule of law. With the entry into force of the Amsterdam Treaty, this concept which has hitherto been determined principally by each individual Member State will also have to be assessed in terms of the new European area. Independently of the responsibilities of Member States for maintaining public order, we will gradually have to shape a ‘European public order’ based on an assessment of shared fundamental interests.’⁶⁷

The critical issue for the purposes of this research is the significance and status attributed to international fundamental rights in this process of shaping a European public order.⁶⁸ Only if fundamental rights are guaranteed a secure and effective status in the AFSJ would a European public order emerge which could lay claim to being ‘just’ in the sense elaborated in Chapter one. In its analysis of the concept of liberty, the VAP locates ‘the full range of fundamental human rights, including protection from any form of discrimination as foreseen by Articles 12 and 13 TEC and 6 of the TEU’ as a complement to an extended concept of freedom which extends ‘beyond free movement of people across internal borders’ to embrace ‘freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that

⁶⁶ VAP, at para. 5. See for an analysis of this proposition as originally set out in the 1998 Commission Communication: Lidahl, above n. 2, at pp. 466-467.

⁶⁷ Above n. 64. This passage, somewhat surprisingly, appears in a section of the 1998 Commission Communication entitled ‘area of justice’. However, as Lidahl points out, the concept of a European public order, in the field of immigration and asylum policies at least, may be characterised rather by the deprivation of fundamental rights and suspension of the rule of law: above n. 2, at pp. 480-483.

⁶⁸ Lidahl analyses this passage in the context of the Union’s immigration and asylum policies: above n. 2, at pp. 480-483.

freedom.’⁶⁹ It is noteworthy that this notion of freedom is negative rather than positive, in terms of the classic analysis of liberty made by Isaiah Berlin, and reinforces the view that the VAP focused on the security aspects of the AFSJ.⁷⁰ The VAP gives the notion of ‘justice’ a restricted and ancillary meaning tied to the administration of justice rather than the promotion of justice as an independent value:

‘Justice must be seen as facilitating the day-to-day life of people and bringing to justice those who threaten the freedom and security of individuals and society. This includes both access to justice and full judicial cooperation among Member States. What Amsterdam provides is a conceptual and institutional framework to make sure that those values are defended throughout the Union.’⁷¹

In this conception of justice, fundamental human rights play a subordinate role limited to specific areas of implementation of the area of justice, such as procedural guarantees in criminal and civil proceedings. The restricted notions of liberty and justice adopted in the VAP, and the dominant role assigned to security, undermines the potentially radical scope of the three concepts of freedom, security and justice to anchor fundamental rights in this developing and sensitive area of Union policy. This ambivalence towards the scope and role of fundamental rights in the AFSJ has resulted in concerns as to the compatibility of anti-terrorism and asylum and refugee measures adopted by the Union with international fundamental rights standards.⁷² The notions of liberty and justice as developed by the Union institutions in the context of the AFSJ predominantly reflect the specific security agenda of the Union and the Member States.⁷³ While this approach is perhaps explicable in terms of the

⁶⁹ VAP, at para. 6.

⁷⁰ I. Berlin, ‘Two Concepts of Liberty’, in *Four Essays on Liberty* (Oxford, OUP, 1969), pp. 118-172.

⁷¹ VAP, at para. 19.

⁷² On the Union’s anti-terrorism measures, see: *The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats*, EU Network of Independent Experts in Fundamental Rights, 31 March 2003: available at: <http://europa.eu.int/comm/justice_home/cfr_cdf/doc/obs_thematique_en.pdf>. On Union measures in the asylum and immigration field, see sections 8.3 and 8.4 of Chapter eight.

⁷³ The Commission is aware of this criticism and in its final report of 2 June 2004 on the implementation of the Tampere programme placed increased emphasis on the role of fundamental rights: ‘This sensitivity to crises, such as the tragic events of 11 September 2001 and 11 March 2004, have sometimes given rise to criticism that progress is made in an unbalanced way overemphasising security aspects. While this is the impression that may be given by certain media reports, European integration in this area is based on a rigorous concept of the protection of fundamental rights, and the Commission has always been at pains to ensure balance between the freedom, security and justice aspects. In addition, the Union must guarantee a high level of security so that the freedoms can be exercised to the full.’ *Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future*

specific legislative program being developed by the Union institutions in implementation of the AFSJ, it reinforces the need for independent definitions of the notions of ‘freedom’ and ‘justice’ to assess the legitimacy of Union action in the AFSJ. It is a central contention of this study that international fundamental rights provide the most appropriate measure of justice in the AFSJ.

6.2.6 TAMPERE TO THE TREATY OF NICE

Political backing for accelerated progress in the JHA field led to the summoning of a special European Council meeting in October 1999 at Tampere to address future progress in implementing the Treaty of Amsterdam provisions on the AFSJ and the VAP. The conclusions of the Tampere European Council focused on the following areas:⁷⁴ the development of a common EU asylum and migration policy; the establishment of a ‘European Area of Justice’ with emphasis on access to justice and mutual recognition of judicial decisions; the fight against organised and transnational crime; and increased external action by the Union in the AFSJ.⁷⁵ As part of the program to fight organized crime, the decision was made to create Eurojust composed of national prosecutors, magistrates and police officers.⁷⁶ Finally, the Tampere European Council established the composition, method of work and practical arrangements for the body set up to elaborate the draft EU Charter of Fundamental Rights.⁷⁷ Under instructions from the Tampere European Council, the Commission has prepared a regularly updated scoreboard of progress on the various measures required for implementation of the Tampere conclusions.⁷⁸

orientations COM(2004) 4002 final, at p.4. Available at:

<http://europa.eu.int/comm/justice_home/doc_centre/intro/docs/bilan_tampere_en.pdf>.

⁷⁴ Council Doc. SN 200/99. Available at:

<http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm>.

⁷⁵ See Monar, in Monar and Wessels (eds.), above n. 37, at pp. 289-93.

⁷⁶ See Christine Van den Wyngaert, ‘Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?’, in Walker (ed.), *Europe’s Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 201-240.

⁷⁷ See further Section 5.4 of Chapter five.

⁷⁸ A list of the bi-annual scoreboards presented by the Commission is available at:

<http://europa.eu.int/comm/justice_home/doc_centre/wai/scoreboard_en.htm>. On 2 June 2004, the Commission presented its final report on the implementation of the Tampere programme:

Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations COM(2004) 4002 final. Available at:

<http://europa.eu.int/comm/justice_home/doc_centre/intro/docs/bilan_tampere_en.pdf>. On the basis of this Commission Communication, and a Recommendation adopted by the European Parliament on 14 October 2004 (P6_TA-PROV (2004) 0022 A6-0010/2004), the European Council adopted the

The Treaty of Nice,⁷⁹ which was agreed by the Heads of State or Government of the Member States on 11 December 2000 at the conclusion of the Intergovernmental Conference and formally signed on 26 February 2001, had a less substantial impact on the policy areas covered by AFSJ than the Treaty of Amsterdam. This is in part attributable to the success of the Treaty of Amsterdam in establishing a firm basis for Community and Union action in the AFSJ and in part to the different priorities at Nice, not least of which was the proposed enlargement of the Union. The most significant changes in the Treaty of Nice relating to the AFSJ are: the extension of qualified majority voting and the co-decision procedure to areas of Title IV of the EC Treaty;⁸⁰ the introduction of a specific reference in Article 29 EC Treaty to Eurojust and establishing a list of its principal tasks in Article 31(2) TEU; and amendment of the cooperation procedure established by the Treaty of Amsterdam and renamed 'enhanced cooperation' and regulated under Title VII TEU and Article 11 EC Treaty.⁸¹ In addition, the Charter of Fundamental Rights of the European Union (the Charter) was proclaimed by the EP, the Council and the Commission on 7 December 2000.⁸²

The Treaty of Nice did not address the deficiencies in the AFSJ structure relating to the lack of democratic accountability, transparency in decision-making and judicial control.⁸³ The Declaration (No. 23) 'On the Future of the Union' annexed to the

Hague Programme on *Strengthening Freedom, Security and Justice in The European Union* at its meeting in Brussels on 4-5 November 2004. Available as Annex 1 to the Presidency Conclusions (14292/04) (Hague Programme): available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf>.

The Commission issued a new five year Action Plan based on the Hague Programme on 10 May 2005: *The Hague Programme: Ten priorities for the next five years: The Partnership for European renewal in the field of Freedom, Security and Justice*. COM(2005) 184 final. Available at: <http://europa.eu.int/comm/justice_home/news/information_dossiers/the_hague_priorities/doc/com_2005_184_en.pdf>.

⁷⁹ [2001] OJ C/80/1. The Treaty of Nice entered into force on 1 February 2003.

⁸⁰ The rules on the application of qualified majority voting to Title IV EC Treaty and other changes made by the Treaty of Nice are discussed in Jörg Monar, 'Continuing and Building on Amsterdam: The Reforms of the Treaty of Nice' in Monar and Wessels (eds.), *The European Union after the Treaty of Amsterdam* (New York, Continuum, 2001), pp. 321-334.

⁸¹ In particular the right of veto of a single Member State was removed by the Treaty of Nice in respect of First and Third Pillar, but not Second Pillar, policy areas. See generally: John A. Usher, 'Enhanced Cooperation or Flexibility in the Post-Nice Era', in Arnall and Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), p. 98-112.

⁸² [2000] OJ C364/1. The Charter is discussed in Chapter five.

⁸³ For a succinct critique of the AFSJ, see Henri Labayle's *exposé* to Working Group X on 'Freedom, Security and Justice'; CONV 346/02 of 16 October 2002, pp. 1-6. Available on the European

Treaty of Nice recognised that further reforms were needed.⁸⁴ The Declaration proposed a public process for debating the future of the Union leading to a further IGC in 2004, with specific reference to the delimitation of powers between the Union and the Member States, the status of the Charter, a simplification of the Treaties, and the role of the national parliaments in the European architecture.⁸⁵ In this context, the Declaration recognised the ‘need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.’⁸⁶

6.2.7 SEPTEMBER 11 TO THE LAEKEN DECLARATION

Prior to the European Council meeting at Laeken in December 2001 for formalising the process for the debate on the future of the Union, the terrorist attacks of 11 September 2001 on the United States radically altered the international security context with substantial repercussions for both international law, Union law and the law of the Member States in respect of shifting the balance between the protection of fundamental rights and security in favor of security objectives.⁸⁷ The European Council met at an extraordinary session in Brussels on 21 September 2001 to discuss the Union’s response and established a Union policy to combat terrorism based on: enhancing police and judicial cooperation through accelerated implementation of the programme agreed at Tampere; developing international legal instruments to combat terrorism, and in particular supporting the drafting of a general UN Convention against terrorism;⁸⁸ measures to combat the funding of terrorism; strengthening air

Convention website. See also Cristina Polo’s Working Paper of 17 July 2002 for the European Policy Centre ‘Should Pillar III be abolished and if so how?’. Available from the European Policy Centre: <<http://www.theepc.be/home.asp>>.

⁸⁴ Available at:

<http://europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/htm/C_2001080EN.007001.html>.

⁸⁵ *Ibid*, at para. 5.

⁸⁶ *Ibid.*, at para. 6.

⁸⁷ See: Philip A. Thomas, ‘September 11th and Good Governance’ (2002) 53 *Northern Ireland Legal Quarterly*, pp. 366-390; Michael Byers, ‘Terrorism, the Use of Force and International Law after 11 September’ (2002) 51 *ICLQ*, pp. 401-414; A. Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12 *EJIL*, pp. 993-1001; and Anthea Roberts, ‘Righting Wrongs or Wronging Rights? The United States And Human Rights Post-September 11’ (2004) 15 *EJIL*, pp. 721-749.

⁸⁸ There are twelve UN Conventions and Protocols on issues directly related to terrorist activities: listed at <<http://untreaty.un.org/English/Terrorism.asp>>. In addition, *The International Convention for the Suppression of Acts of Nuclear Terrorism* was adopted at New York on 13 April 2005. It was opened for signature on 14 September 2005 and enters into force upon ratification by 22 states. A general convention on terrorism is under negotiation under the direction of the Ad Hoc

security; and coordinating the Union's response to terrorism.⁸⁹ This programme resulted in the accelerated adoption of existing proposals in the JHA field, and in particular the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States⁹⁰ and the Council Framework Decision of 13 June 2002 on Combating Terrorism,⁹¹ and the introduction of a series of new JHA measures both internally and externally.⁹²

In the context of this programme of anti-terrorism related measures, it was surprising that only a passing reference was made to September 11 in the European Council's Laeken Declaration of 15 December 2001 on the Future of the European Union and that the text followed closely the parameters set in Declaration No. 23 to the Treaty of Nice.⁹³ Indeed, the Laeken Declaration can be characterized in the context of the post-September 11 political environment as a liberal and progressive document with a strong emphasis on Europe as a continent of 'humane values' and whose 'one boundary is democracy and human rights.'⁹⁴ This separation of security issues from the process of constitutional reform was beneficial to the final outcome of the Constitution from the perspective of the protection of fundamental rights. However, in the context of the AFSJ, security re-emerged as the primary concern in the reform proposals submitted by Working Group X to the European Convention.⁹⁵ The Laeken Declaration, in addition to confirming the specific issues to be addressed, also established the composition of the European Convention, the length of its

Committee on Terrorism of the UN General Assembly, although progress is being hampered by failure to agree on a definition of terrorism.

⁸⁹ *Conclusions and Plan of Action* of the Extraordinary European Council Meeting on 21 September 2001: available at: <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/140.en.pdf>.

⁹⁰ [2002] OJ L190/1. See Section 8.3.3.6 of Chapter eight for an analysis of this Framework Decision.

⁹¹ [2002] OJ L164/3.

⁹² A list of JHA measures adopted and under negotiation is available at: <http://ue.eu.int/cms3_applications/docCenter.ASP?expandID=146&lang=en&cmsID=245>. For an analysis of the principal measures, see: S. Peers, 'EU Responses to Terrorism' [2003] 52 *ICLQ*, pp. 227-243; Wouters and Naert, above n. 57; and Sionaidh Douglas-Scott, 'The Rule of Law in the European Union – Putting the Security into the "Area of Freedom, Security and Justice"' (2004) 29 *EL Rev.*, pp. 219-241.

⁹³ The Laeken declaration is annexed to the Presidency Conclusions of the Laeken European Council meeting of 14/15 December 2001: available at:

<<http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf>>.

⁹⁴ See for an analysis of the objectives set out in the Laeken Declaration: Frank Vibert, 'Developing a Constitution for the Union', in Arnall and Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), pp. 167-182. The relationship between the objectives for the Union established in the Laeken declaration and the fundamental rights reforms in the Constitution is explored in Chapter five.

⁹⁵ See Section 6.2.8 below.

proceedings, from 1 March 2002 to 1 March 2003, and its working methods including participation of organisations representing civil society.

6.2.8 THE EUROPEAN CONVENTION: REFORM PROPOSALS

Working Group X on ‘Freedom, Security and Justice’ (WGX) was set up by the European Convention following a plenary debate on the AFSJ on 6-7 June 2002 with John Bruton as its Chair.⁹⁶ The mandate of WGX established four key areas for its deliberations on reform of the AFSJ:⁹⁷ improvements to the EC Treaty and the TEU; improvements to instruments and procedures; improved definition of Union competences in criminal law matters; and review of Union competences in the field of asylum and immigration. The mandate of WGX overlapped with other Working Groups established by the European Convention, and in particular with the work of Working Group II on ‘Incorporation of the Charter/Accession to the ECHR’ (WGII)⁹⁸ and Working Group IX on Simplification (WGIX).⁹⁹ The mandate of WGX recognized the need to ‘maintain an appropriate balance’ between security requirements and respect for fundamental rights¹⁰⁰ but the primary focus of WGX’s deliberations was on the effectiveness of the Union’s policy from a security perspective and this priority is reflected in its final report (WGX Final Report).¹⁰¹

In its introduction to WGX Final Report, WGX emphasised the equal importance of liberty, security and justice in the development of AFSJ policy and that ‘this policy

⁹⁶ John Bruton was *Taoiseach* from 1994-1997. He is currently the Union’s ambassador to the United States. A note of the plenary meeting of 6-7 June 2002 is set out in CONV 97/02 of 19 June 2002: available on the European Convention website. A general report on the JHA and its problems from the Praesidium to the Convention is set out in CONV 69/02 of 31 May 2002: available on the European Convention website.

⁹⁷ CONV 258/02 of 12 September 2002: available on the European Convention website.

⁹⁸ See Chapter five for the proposals of WGII.

⁹⁹ See: *Final Report of Working Group IX on Simplification*, CONV 424/02 of 29 November 2002: available on the European Convention website.

¹⁰⁰ CONV 426/02, at p. 4: available on the European Convention website.

¹⁰¹ *Final Report of Working Group X* of 2 December 2002: CONV 426/02: available on the European Convention website. The focus of WGX on security issues is reflected in the professional background of the majority of experts invited by WGX and the themes of the discussions at the five meetings in which they participated: see CONV 274/02 of 17 September 2002 for the agenda for the meetings of WGX (available on the European Convention website); for a list of experts appearing before WGX see the Annex to WGX Final Report. The short three month period between the setting up of WGX and its Final Report further limited its ability to undertake an in-depth reassessment of the Union’s policy in the AFSJ. These shortcomings were also identified in the 26th Report of the European Scrutiny Committee of the House of Commons on Working Group X’s Final Report: Session 2002/2003, published on 25 June 2003; available at: <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxvi/6302.htm>>.

should be rooted in a shared commitment to freedom based upon human rights, democratic institutions and rule of law'.¹⁰² It also pursued the idea of creating a 'European public order':¹⁰³

'Indeed, it is important that the citizens feel that a proper sense of "European public order" ("ordre public européen") has taken shape and is actually visible today in their daily lives. In this respect, the principles of transparency and democratic control are of utmost importance. The establishment of a European Area of Freedom, Security and Justice is also closely linked with respect of the rights of citizens and the principle of non-discrimination (Articles 12 and 13 TEC).'¹⁰⁴

However, an analysis of the concrete proposals in WGX Final Report reveals that WGX considered that the principal focus of the AFSJ should be the prioritisation of security over freedom and justice and the notion of a European public order in the progressive sense advanced was not developed.

The most fundamental reform proposed by WGX was to abolish the Third Pillar and create a single legal and institutional framework for the AFSJ.¹⁰⁵ However, WGX did not propose the full adoption of the 'Community method' but in the field of Title VI TEU policies it recommended retaining special mechanisms and procedures to take account of the 'specific features of the area of police and criminal law.'¹⁰⁶ In the area of asylum and refugee policy governed by Title IV EC Treaty, WGX recommended the following reforms to facilitate achievement of the Common European Asylum System (CEAS):¹⁰⁷ the extension of qualified majority voting and

¹⁰² WGX Final Report, *ibid.*, at p. 2.

¹⁰³ As discussed in Section 6.2.5, the concept of a European public order was introduced in the Commission's 1998 *Communication to the Council* in preparation for adopting the VAP.

¹⁰⁴ WGX Final Report, above n. 101, at p. 2.

¹⁰⁵ The relevant provisions of the Constitution which implement recommendations in WGX Final report are indicated in the footnotes to the following summary and analysis of WGX Final Report. If a recommendation was not adopted this is also stated.

¹⁰⁶ WGX Final Report, above n. 101, at p. 3. Article III-258 goes beyond this by providing the European Council shall 'define the strategic guidelines for legislative and operational planning' throughout the AFSJ whereas under Article I-21(1) the European Council's role is generally limited to defining the 'general political directions and priorities' of the Union. Article I-42 refers to the specific provisions relating to the AFSJ in Chapter IV of Part III of the Constitution. In addition to those specific references, Article III-259 provides for national parliaments to ensure measures relating to judicial cooperation in criminal matters and police cooperation comply with the principle of subsidiarity.

¹⁰⁷ WGX Final Report, above n. 101, at pp. 3-7.

co-decision to all Union legislation in the field;¹⁰⁸ the creation of a general legal base to allow for Union competence not only in respect of refugees protected by the Refugee Convention but also complementary forms of protection;¹⁰⁹ and formal recognition of the principle of solidarity and burden-sharing.¹¹⁰

In the Third Pillar area, WGX proposed replacement of the existing legislative instruments by the standard Union instruments resulting from the proposals of Working Group IX (WGIX) on Simplification and conversion of the existing Conventions concluded under Article 34 TEU into European laws.¹¹¹ WGX also recommended the broadening of the Union's competence to act in the fields of police and judicial cooperation from the current basis in Articles 30 and 31 TEU. In particular, it proposed broadening the competence for the Union to approximate both defined areas of substantive criminal law and elements of criminal procedure.¹¹² It also recommended the extension of the principle of mutual recognition of all forms of judicial decisions and a specific legal basis for the Union to support the action of the Member States in the field of crime prevention.¹¹³ While WGX recommended a significant extension of qualified majority voting and co-decision in the Third Pillar areas, it recognized that unanimity should be retained in particularly sensitive areas relating to the exercise of police powers and approximation of the substantive criminal law.¹¹⁴ On the issue of whether the Member States should retain a joint right

¹⁰⁸ Implemented, since under Article I-34 the co-decision procedure under Article III-396 applies unless otherwise provided in the Constitution and no such provision is made in Section 2 of Chapter IV of Part III of the Constitution that regulates Union policies in the CEAS.

¹⁰⁹ Implemented by Article III-266(1).

¹¹⁰ Implemented by Articles III-257 and III-268.

¹¹¹ WGX Final Report, above n. 101, at pp. 7-8. Article I-34 provides for European laws and framework laws as the only legislative acts of the Union. The Final Report of WGIX, CONV 424/02, 29 November 2002, is available on the European Convention website. A list of the Conventions concluded by the Member States in the areas covered by the Third Pillar is available at: <http://europa.eu.int/comm/justice_home/doc_centre/criminal/doc_criminal_intro_en.htm>. See generally: Peers, above n. 13, at pp. 27-28; Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?' (2004) 41 *CMLR*, pp. 5-36; and Meri Rantala, 'A Treaty Labyrinth of Legal Co-operation in Criminal Matters: Can Europe find Ariadne's Thread?', in Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (Hague, Kluwer, 2001), pp. 519-552. WGX refers specifically to the Europol Convention signed on 26 July 1995, which was based on Article K TEU, as an urgent example of a convention which needed to be converted: [1995] OJ C316/1.

¹¹² WG X Final Report, above n. 101, at pp. 9-1. Implemented by Articles III-270 and III-271.

¹¹³ *Ibid.*, at pp. 11-12. Implemented by Articles I-42(1)(b), III-269, and III-270 and by Article III-272 respectively.

¹¹⁴ *Ibid.*, at pp. 13-15. Articles III-271, III-274(1), III-275(3) and III-277 provide for unanimous voting in the Council in specified areas previously covered by the Third Pillar. Article I-23(3) provides the Council shall act by qualified majority unless otherwise provided in the Constitution.

of initiative with the Commission in legislative proposals in the Third Pillar, WGX proposed a compromise whereby a quarter of the Member States would have to support such an initiative.¹¹⁵

In the second part of its report, WGX set out proposals for reforming operational collaboration in the AFSJ mainly designed to promote increased efficiency in the security sphere rather than a substantive improvement in transparency and accountability. It recommended that the powers of the Coordinating Committee established under Article 36 TEU should be redrafted to focus on operational rather than legislative proposals but failed to set out measures to ensure the operation of the Committee is subject to transparency in its proceedings or effective control by the European Parliament and national parliaments.¹¹⁶ On the management of the Union's borders, WGX proposed a legal basis in the Constitution for the gradual development of a common European border guard.¹¹⁷

In relation to Europol and Eurojust, WGX recommended inserting in the Constitution a more extensive legal basis for developing their activities.¹¹⁸ In the case of Europol, WGX recognizes that its activities will 'need in the future to be subject to democratic accountability to the European Parliament and to the Council, as well as to judicial control by the ECJ in accordance with the normal Treaty rules'.¹¹⁹ Although WGX made no equivalent recommendation in respect of Eurojust, Article III-273(1) provides that European laws shall 'determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's actions.' WGX failed to reach a common position on the creation of a legal basis in the Constitution for a European Public Prosecutor (EPP) or the scope of such a body's

¹¹⁵ *Ibid.*, at p. 15. Recommendation adopted in Article III-264.

¹¹⁶ *Ibid.*, at pp. 16-17. Recommendation implemented by Article III-261.

¹¹⁷ *Ibid.*, at p. 17. Recommendation partially implemented by Article III-265(1)(c) which refers to an 'integrated management system for external borders'. However, Article III-265(3) provides Article III-265 shall not 'affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.'

¹¹⁸ *Ibid.*, at pp. 18-19. Implemented by Articles III-273 and III-276 respectively.

¹¹⁹ *Ibid.*, at p. 18. The current supervision mechanisms over Europol, which do not involve the ECJ, and the immunities of its staff are analysed by Fijnaut, in Walker (ed.), above n. 51, at pp. 256-257. Article 34(1) of the Europol Convention provides: 'The Council Presidency shall each year forward a special report to the European Parliament on the work of Europol. The European Parliament shall be consulted should this Convention be amended in any way.' Article III-276(2) provides that European laws 'shall lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments'.

powers.¹²⁰ However, Article III-274 allows for the creation of such a post by unanimous decision of the Council after obtaining the consent of the EP. Initially, Article III-274(1) limits the powers of the EPP to offences against the Union's financial interests but Article III-274(4) allows the European Council, after consulting the EP, to adopt by unanimity a European Decision to extend the EPP's powers to include 'serious crime having a cross-border dimension'.

The final section of WGX Final Report addresses general issues relating to the operation and control of AFSJ policy and legislation. Firstly, it proposed improved implementation by the Member States of Union policy in the AFSJ by a system of mutual evaluation¹²¹ and by extending the Commission's powers to take proceedings under the Article 226 EC Treaty mechanism if a Member State breaches an obligation under the Third Pillar.¹²² Secondly, WGX proposed measures to increase the role of national parliaments in monitoring and developing AFSJ policy and ensuring respect for the principle of subsidiarity.¹²³ Thirdly, on the respective competence of the Union and Member States to conclude international conventions in the AFSJ, WGX deferred to the recommendations of Working Group VII on External Action and left open the future role of the Member States in negotiating international agreements independently of the Union in the area of judicial cooperation.¹²⁴ Fourthly, WGX left

¹²⁰ *Ibid.*, at p. 20.

¹²¹ WGX Report, above n. 101, at p. 21. Recommendation implemented by Article III-260.

¹²² Recommendation implemented by Article III-360 which provides power for the Commission to commence the equivalent of the Article 226 EC Treaty procedure for a failure of a Member State to 'to fulfil an obligation under the Constitution'.

¹²³ WGX Final Report, above n. 101, at pp. 22-23. WGX's proposals were partially implemented in Article III-259, which requires national parliaments to ensure proposals in the field of judicial cooperation in criminal matters and police cooperation respect the principle of subsidiarity, and Article III-260. However, Article III-258, which confers on the European Council the duty to define the strategic guidelines in the AFSJ, does not follow WGX's recommendation for involvement of national parliaments in this task. Article III-276(2) follows WGX's recommendation and provides for provisions to be made in European laws for the scrutiny of Europol's activities by the EP and national parliaments. See also Article I-42(2).

¹²⁴ WGX Final Report, above n. 101, at pp. 24-25. See also the Final report of WGVII on External Action of 16 December 2002: CONV 459/02. Available on the European Convention website. WGVII recommended that international agreements in the area currently covered by the Second and Third Pillar should be concluded on a single legal basis: *ibid.* at pp. 9-10 and p. 30. The Constitution does not have an express provision equivalent to Article 38 TEU which permitted Second Pillar agreements concluded under Article 24 TEU to include matters under the Third Pillar. International agreements relating to the AFSJ will therefore generally have to be concluded under Article III-323(1) which authorises the Union to conclude an agreement where it 'is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in this Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.' However, Article III-267(3) specifically provides for the conclusion of readmission agreements with third countries. Annex 27 to the Constitution addresses the issue of continuing Member State competence:

open the future of the opting-in or opting-out arrangements in relation to the United Kingdom, Ireland and Denmark under the Treaty of Amsterdam in respect of Title IV EC Treaty and the Schengen *acquis* to the Convention.¹²⁵ Finally, the majority of WGX proposed that the current restrictions on the jurisdiction of the ECJ in Title IV EC Treaty and Title VI TEU be removed.¹²⁶

6.2.9 THE CONSTITUTION AND REFORM OF THE AFSJ

The Constitution incorporates the majority of WGX's recommendations, although detailed negotiation in the IGC continued up until the final agreement reached by the IGC on 18 June 2004 on specific issues related to judicial cooperation in criminal matters, the EPP, judicial cooperation in civil matters, Eurojust, and the negotiation and conclusion of international agreements by Member States in the AFSJ.¹²⁷ The acceptance by the IGC of WGX's principal recommendations is surprising insofar as the terms of reference for the European Convention in the Laeken declaration did not provide for such a wholesale restructuring of the AFSJ. The reforms of the AFSJ in the Constitution reflect a compromise between those Member States in favour of further substantial integration and those determined to preserve the national identity of their criminal justice system.¹²⁸ However, both sides finally agreed that the existing structure of the AFSJ, with separate rules and procedures for the Third Pillar, was indefensible both on grounds of operational efficiency and public legitimacy and that in the critical areas of immigration and asylum and anti-terrorism and organized criminality joint action at the Union level was essential.

'The Conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Sections 3, 4 and 5 of Chapter IV of Title III of Part III of the Treaty establishing a Constitution for Europe insofar as such agreements comply with Union law.'

¹²⁵ WGX Final Report, above n. 101, at p. 24. Protocols 17-20 of the Constitution set out these arrangements on substantially unchanged terms.

¹²⁶ WGX Final Report, above n. 101, at pp. 24-25. This proposal and the relevant provisions in the Constitution are analysed in Sections 7.4 of Chapter seven.

¹²⁷ See for the detailed text subject to negotiation in these areas: Annexes 23-27 of CIG 81/04 of 16 June 2004. Available on the IGC website.

¹²⁸ See for a valuable analysis of the conflicting positions on the reform of the AFSJ: Walker, in Walker (ed.), above n. 38, at pp. 28-31.

The principal issue for the purposes of this study is whether the reform of the AFSJ would create a robust and effective constitutional structure.¹²⁹ The reforms in the Constitution constitute a significant improvement over the existing structure in providing a secure legal basis for achieving this objective. In particular, the abolition of the Third Pillar and the establishment of a common legal framework for legislative and administrative action in the AFSJ would normalize the AFSJ by aligning its treatment in the Union's legal order with that of other shared Union competences.¹³⁰ Furthermore, Article III-257(1) introduces an explicit requirement for respect of fundamental rights in the AFSJ.¹³¹ When read in the context of the other reforms in the Constitution for the protection of fundamental rights, and in particular incorporation of the Charter and Union accession to the ECHR, the Constitution provides a firm constitutional basis for the effective protection of fundamental rights in the AFSJ.

However, this positive conclusion has to be counter-balanced by the effect of the provisions in the Constitution that retain or reinforce the priority accorded to security within the AFSJ. These provisions have the potential to undermine the positive aspects of the reform of the AFSJ. Article I-5, which regulates relations between the Union and the Member States, introduces a new provision which includes in paragraph (1), second sentence, the obligation for the Union to respect the 'essential State functions' of the Member States, 'including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.' In the specific context of the AFSJ, this obligation is reinforced in Article III-262 which, adopting the same wording as Article 33 TEU and Article 64(1) EC Treaty, provides that the provisions in Chapter IV of Title III of Part III of the Constitution 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

¹²⁹ See Section 1.1 of Chapter one for analysis of the criteria proposed for evaluating the robustness and effectiveness of a constitutional structure.

¹³⁰ However, differences in legislative procedure and institutional involvement are retained in specific areas as detailed in section 6.2.8 of this Chapter. For a commentary on the changes to the AFSJ as set out in the July 2003 version of the draft Constitutional Treaty, from the perspective of operational capacity and accountability, see Walker, in Walker (ed.), above n. 38, at pp. 31-35.

¹³¹ 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.'

These provisions continue the substantial uncertainty as to the respective scope of the competences of the Union and the Member States. In particular it is unclear how the notions of ‘law and order’ and ‘internal security’ and ‘national security’ would be interpreted.¹³² The fact that Article 64(1) EC Treaty was included in Title IV EC Treaty dealing with asylum and immigration policy indicates the potential for an interpretation of security extending beyond the more obvious areas of the AFSJ relating to judicial cooperation in criminal matters and police cooperation. The retention of such a broad and undefined exclusion of Union competence in the AFSJ may also give rise to jurisdictional disputes between the ECJ and the national courts in determining the boundaries between the national and Union legal order.¹³³

6.3 GENERAL CONCLUSIONS

The chequered history of the development of the AFSJ reveals the ambivalence of the Member States to ceding competences in key areas of national sovereignty to the Union institutions. The recent and somewhat unexpected consensus, most radically expressed in the reforms of the AFSJ in the Constitution, for a significant transfer of powers in such contentious areas as police cooperation and asylum and immigration policy reflects two unrelated but contemporaneous series of events: the enlargement process and the terrorist attacks of 11 September 2001. The enlargement of the Union to twenty-five members, and the potential for further enlargement, focused attention on the need to establish minimum standards at a Union level to address issues of criminal justice and immigration and asylum. The terrorist attacks of 11 September, followed by the attacks in Madrid of 11 March 2004 and in London on 7 and 21 July 2005, have created an environment where cross-border cooperation on anti-terrorism measures is accepted by the Member States as essential. In both contexts, a transfer of competences to the Union has been agreed both from a policy perspective and as a key ingredient in promoting the advantages of the Union to its citizens.

However, this political consensus has preceded a commensurate development in the democratic and legal structure of the AFJS that has remained mired in the

¹³² See further Section 7.4.2 of Chapter Seven.

¹³³ See Section 3.3 of Chapter three for the related issue of judicial *Kompetenz-Kompetenz*.

intergovernmentalism that characterised its development. In particular, the security element of the AFSJ has predominated to the detriment of justice and liberty. The reform of the AFSJ in the Constitution reflected the concerted pressure of NGOs, and the broad consensus of academic opinion, for radical improvements to the role of the institutions of the Union, and in particular that of the ECJ and the EP, in providing democratic and judicial control over AFSJ measures and their implementation. These reforms were further bolstered by the reform of fundamental rights protection in the Constitution, and in particular the incorporation of the Charter and Union accession to the ECHR. The stalling of the ratification process is therefore of particular concern as regards the AFSJ from a fundamental rights perspective since the political pressures arising from enlargement and terrorism have not abated. It is in this context that Chapter seven examines in detail the protection of fundamental rights in the AFJS and the proposed reforms in the Constitution.

FUNDAMENTAL RIGHTS IN THE AFSJ: A FLAWED SYSTEM OF JURISDICTION

7.1 INTRODUCTION

This Chapter analyses the jurisdictional basis for the protection of fundamental rights in the AFSJ in respect of Third Pillar measures and measures adopted under Title IV EC Treaty. It assesses the deficiencies of the present system from the perspective of compliance with the rule of law and argues that these deficiencies undermine the legitimacy of the Union's legal order. In particular it analyses the negative consequences for legitimacy arising from the restrictions on justiciability in respect of Third Pillar measures in light of recent case law of the ECJ and the ECtHR on the basis enforceability is a key criterion of the effectiveness of a legal system's protection of fundamental rights.¹ Finally, it assesses the genesis and effectiveness of the reforms in the Constitution.

The key issue for assessing how just is the AFSJ both under its existing split structure and under the unified regime in the Constitution is the effectiveness of the Union's legal order in providing recognition and enforcement of international fundamental rights. The deficiencies of the existing regime both with respect to the Third Pillar provisions on justiciability and, to a more limited extent, the restrictions in Title IV EC Treaty, has attracted sustained criticism from both within and outside the Union's institutions and demands that the ECJ be granted full jurisdiction over all areas of the AFSJ on the same conditions as other areas of Union law.² However, it was far from certain that the

¹ See: W. van Gerven, 'Remedies for Infringements of Fundamental Rights' (2004) 10 *EPL*, pp. 261-284; and Thomas Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *CML Rev.*, pp. 1199-1246.

² See the various submissions on the deficiencies in judicial control presented by the expert witnesses to Working Group II (WGII): listed in Working Document 21 of 1 October 2002, at p. 3, n. 7. Available on the European Convention website. See also: The Joint Submissions made to Working Group X (WGX) by: The Standing Committee of Experts on International Immigration, Refugee and Criminal Law; the Immigration Law Practitioners Association; Statewatch; and the European Council of Refugees and Exiles (ECRE), of 14 November 2002, edited by D. Curtin and S. Peers: available at: <<http://www.statewatch.org/news/2002/nov/CM02-10%20jtsub.pdf>>; and the experts cited in *The Future Role of the European Court of Justice*, Sixth Report of the House of Lords Select Committee on European

Member States would accede to such a substantial extension of the jurisdiction of the ECJ in an area where security requirements had taken precedence over access to justice and the protection of fundamental rights at the national and Union level.³ The extension of ECJ jurisdiction over the AFSJ, albeit subject to potential continuing limitations in the security domain, therefore constitutes one of the principal achievements in the Constitution.

The following analysis of fundamental rights protection in the AFSJ is divided into four sections.⁴ The first section examines the status of fundamental rights in the Third Pillar, with a particular focus on the Union, national and ECHR jurisdictional mechanisms available to challenge the validity of Third Pillar and implementing national measures. The second section analyses the restrictions on ECJ jurisdiction in Title IV EC Treaty. The third section outlines the jurisdictional provisions for review of the incorporated Schengen *acquis* for its compatibility with fundamental right. The final section analyses WGX's reform proposals in the area of ECJ control over the AFSJ and assesses the potential effectiveness of the new regime under the Constitution in remedying the deficiencies of the current structure and strengthening justice as a key component of the AFSJ.

Union, at paras. 115-127: session 2003/2004, printed on March 2004. Available at: <<http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/47/4702.htm>>.

³ In the case of the United Kingdom, for example, there was parliamentary and ministerial opposition to the reforms proposed by WGX in this area: see *Working Group X's Final Report: 26th Report of the House of Commons European Scrutiny Committee, Session 2002-2003*, printed 25 June 2003, at paras. 59-71.

⁴ The complex issues of accountability and supervision at both the political and judicial level of Eurojust, Europol, OLAF and, if established, the European Public Prosecutor (EPP) are not addressed. For a detailed analysis of the existing structures and the proposed reforms resulting from Working Group X, see: C. Van den Wyngaert, 'Eurojust and the European Public Prosecutor in the *Corpus Juris* Model: Water and Fire?', in Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 201-240; and C. Fijnaut, 'Police Co-operation and the Area of Freedom, Security and Justice' in Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 241-282.

7.2 FUNDAMENTAL RIGHTS, JURISDICTION AND THE THIRD PILLAR

7.2.1. INTRODUCTION

This section concentrates on the scope and deficiencies of the fundamental rights protection currently built into the TEU as it affects Title VI TEU measures.⁵ Since enforceability of fundamental rights is a prerequisite to their effectiveness, this inquiry is inextricably linked to the powers of the ECJ to control the legality of Title VI measures by reference to international fundamental rights standards. However, the provisions on the jurisdiction of the ECJ in respect of the Third Pillar are complex and purposively restrictive. These features reflect the policy of key Member States to prevent the ECJ from exercising effective control over measures adopted by the Union and the Member State within the scope of the Third Pillar.⁶

This approach would have been less open to criticism if Third Pillar measures were subject to effective scrutiny by national courts and the ECtHR. However, recent case law involving challenges to Union anti-terrorism measures in the immediate aftermath of September 11 2001 have cast serious doubts on the availability of such remedies. In *Segi and Gestoras Pro-Amnistía v. Germany*, the ECtHR accepted the characterization of Third Pillar measures as intergovernmental cooperation and thereby limited the scope for

⁵ This section draws on the pioneering work in this field by Steve Peers: 'Human Rights and the Third Pillar' in Alston, Bustelo and Heenan (eds.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 167-186; 'Who's Judging the Watchmen? The Judicial System of the Area of Freedom, Security and Justice' (1998) 18 *Yearbook of European Law*; and *EU Justice and Home Affairs* (Harlow, Longman, 2000). See also: Jorg Monar, 'An "area of freedom, justice, and security"? Progress and deficits in justice and home affairs' in Philip Lynch, Nanette Neuwahl and G. Wyn Rees (eds.), *Reforming the European Union: From Maastricht to Amsterdam* (Harlow, Longman, 2000), pp. 142-161, at pp 151-152.

⁶ For example, the UK Government in its submissions on the scope of the ECJ's jurisdiction under the Maastricht Treaty to review a decision refusing the applicant access to Council documents adopted under the JHA argued: 'Justice and Home Affairs fall outside the scope of the EC Treaty and are matters for inter-Governmental cooperation... It follows from Article L of the EU Treaty that the provisions of the EC Treaty concerning the powers of the Court do not apply to Title VI of the EU Treaty. Accordingly the jurisdiction of the Court is excluded as much in procedural matters as in matters of substance.': Case T-174/95, *Svenska Journalistförbundet v. Council* [1998] ECR II-2289, at para. 71. The French Government supported the UK in arguing against the applicant's action to annul the decision of refusal. The Swedish, Danish and Netherlands Governments supported the applicant.

effective control of Third Pillar measures by the ECtHR.⁷ In *Segi v. Council*, the CFI concluded that the applicants were ‘probably’ deprived of any effective remedy before the courts of the Union or the Member States in respect of their listing as a terrorist organization in a Third Pillar measure.⁸ The following sections identify the jurisdictional provisions governing judicial review of Third Pillar measures and analyses the deficiencies in the existing structure.

7.2.2 ECJ JURISDICTION OVER THIRD PILLAR MEASURES

Article L TEU of the Treaty of Maastricht had excluded the ECJ from any jurisdiction over the Third Pillar, save for Article K.3 TEU that had provided for an optional jurisdiction in respect of JHA conventions.⁹ The Treaty of Amsterdam, as part of the restructuring of the JHA into the AFSJ, introduced in Article 46 TEU provisions for limited jurisdictional powers for the ECJ over the TEU. Article 46 TEU provides that the provisions of the EC Treaty and Euratom Treaty governing the powers of the ECJ and their exercise shall apply, *inter alia*,¹⁰ only to the following listed TEU provisions:

‘... (b) provisions of Title VI, under the conditions provided for by Article 35; ... (d) Article 6(2) with regard to the action of the institutions, insofar as the Court has jurisdiction’ under the EC Treaty and the TEU; and ... (f) Articles 46 to 53.’¹¹

⁷ *Segi and Gestoras Pro-Amnistía v Germany et al.* (Application No. 9916/02), admissibility decision of 23 May 2002; English translation; not yet reported.

⁸ Case T-338/02, *Segi et al. v. Council*, Order of 7 June 2004, at para. 38. Unreported.

⁹ See for a detailed critique of ex-Article L TEU: J. Barrett, ‘Co-operation in Justice and Home Affairs in the European Union - An Overview and Critique’, in Barrett (ed.), *Justice Cooperation in the European Union* (Dublin, Institute of Foreign Affairs, 1997), pp. 3-47, at pp. 26-28.

¹⁰ Article 46(c) TEU confers jurisdiction on the ECJ in respect of the provisions on enhanced cooperation in Title VII TEU under the conditions provided for by Articles 11 and 11a of the EC Treaty. Articles 40 TEU and Article 46(e) TEU confer limited jurisdiction on the ECJ in respect of the ‘purely procedural stipulations’ in Article 7 TEU establishing a procedure for dealing with a serious breach by a Member State of the principles in Article 6(1) TEU. For an analysis of these provisions, see: T. Tridimas, ‘The European Court of Justice’, in Lynch, Neuwahl and Rees (eds.), *Reforming the European Union: From Maastricht to Amsterdam* (Harlow, Longman, 2000), pp. 74-84, at pp. 75-76. The Treaty of Nice amended Article 46 TEU in respect of these jurisdictional powers of the ECJ but not otherwise.

¹¹ The most relevant of these provisions to Third Pillar jurisdictional issues is Article 47 TEU which confers jurisdiction on the ECJ to adjudicate on the boundaries between the TEU and the TEC.

There is, however, no conferral of jurisdiction on the ECJ to interpret Article 6(1) TEU,¹² Title V TEU regulating the CFSP, or the common provisions in Title I TEU other than Article 6(2) and Article 7. The following sections analyse the scope of Article 46(d) TEU and Article 46(b) TEU respectively in determining the scope of the ECJ's powers of judicial review over Third Pillar measures on grounds of violation of fundamental rights.

7.2.3 SCOPE OF ARTICLE 46(d) TEU

The purpose of Article 46(d) TEU was to remedy the anomalous situation under the Maastricht Treaty that the ECJ was technically prevented by Article L TEU from applying Article F(2) (now Article 6(2)) TEU as a formal basis for its case law on fundamental rights as general principles.¹³ The deletion in the Treaty of Amsterdam of the former Article K.2(1) TEU reinforced the significance of Article 6(2) TEU in respect of Third Pillar measures.¹⁴ However, the terms on which Article 46(d) TEU defines the scope of application of Article 6(2) TEU substantially restricts its effectiveness as a basis for judicial review over Third Pillar measures.

Firstly, Article 46(d) TEU restricts the ECJ's jurisdiction in respect of Article 6(2) TEU to jurisdictional powers expressly conferred elsewhere in the TEU or the EC Treaty. Article 6(2) TEU cannot therefore serve as the basis for any extension of the ECJ's

¹² Article 6(1) TEU, introduced by the Treaty of Amsterdam, provides: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

¹³ See de Witte, 'The Role of the ECJ in Human Rights', in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 859-897, at p. 885. Although Article 6(2) TEU refers to 'general principles of Community law', Peers argues persuasively on the basis of Article 46(d) TEU that the reference to Community law in should be read as to Union law: 'Since the amendments to the Treaty are clearly an attempt to authorize the Court's jurisdiction over human rights principles in the first and third pillars, it is submitted that the reference to 'Community law' in Article 6(2) is vestigial, and that the Article should be read as referring to *Union law*.' in Alston (ed.), above n. 5, at p. 171. The formulation by the ECJ of fundamental rights as forming an 'integral part of the general principles of law whose observance the Court ensures' encompasses both Community and Union law: *Krombach v., Bamberski* [2000] ECR I-1935, at para. 25.

¹⁴ Article K.2(1) provided that the subject-matter of JHA co-operation listed in Article K.1 (now Article 29 TEU) shall be dealt with in compliance with the ECHR and the Refugee Convention and having regard to Member States' protection of persons persecuted on political grounds. Reference to the Refugee Convention is now contained in Article 63(1) EC Treaty. See for an analysis of Article K.2(1) TEU, Peers, in Alston (ed.), above n. 5, at p. 168.

jurisdiction over Third Pillar measures beyond those jurisdictional powers specified in Article 35 TEU. This interpretation has recently been confirmed by the CFI in *Segi v. Council*¹⁵ where the applicants sought compensation for being listed as a terrorist organization in the Annex to Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism.¹⁶ However, the CFI ruled that the claim for compensation failed on the grounds that such a cause of action was not provided for in the exhaustive list provided for in Article 35 TEU and that Article 46(d) TEU did not create an additional basis of jurisdiction.¹⁷

Secondly, Article 46(d) TEU provides that the jurisdictional provisions of the EC Treaty concerning the powers of the ECJ and their exercise apply to Article 6(2) TEU ‘with regard to action of the institutions’. The reference to ‘action of the institutions’ is open to the interpretation that the action of the Member States in implementing or derogating from Third Pillar measures is not subject to judicial review by the ECJ on grounds of violation of Article 6(2) TEU. Such an interpretation would lead to the disapplication of Article 6(2) TEU to situations where the ECJ has established that the Member States in implementing or derogating from Union law remain subject to the obligation to comply with Union fundamental rights standards.¹⁸ While such a restrictive interpretation of Article 46(d) TEU is not supported by the *travaux préparatoires* to the Treaty of Amsterdam¹⁹ and would conflict with the ECJ’s practice of expansively interpreting its jurisdictional powers,²⁰ it is supported by the general context of the Third Pillar’s

¹⁵ Above n. 8.

¹⁶ [2001] OJ L344/93.

¹⁷ *Segi v. Council*, above n. 8, at paras. 36-37.

¹⁸ ‘Where national legislation falls within the scope of Community law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the Convention - whose observance the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law.’: Case C-299/95, *Kremzow v Austrian State* [1997] ECR I-2629, at para. 15. For a summary of the ECJ’s case law see: de Witte, in Alston (ed.), above n. 13, at pp. 870-874. On this issue, Peers argues that ‘at least national implementation of Community or Union acts must still fall within the Court’s jurisdiction, because such implementation is inseparable from interpretation of the acts themselves’: in Alston (ed.), above n. 5, at p. 174.

¹⁹ De Witte, in Alston (ed.), above n. 13, at p. 885.

²⁰ Peers argues, in the context of the interpretation of pre-Amsterdam conventions, for a ‘general interpretative principle of ‘wide jurisdiction’ for the ECJ, with the effect that the ECJ’s jurisdiction can usually only be restricted or ousted by express, unambiguous wording’: in Alston (ed.), above n. 5, at p. 172.

emphasis on limiting the powers of the Union to interfere with the Member State's sovereign rights in the field of internal security.²¹

Thirdly, even in respect of Third Pillar measures over which the ECJ has jurisdiction under Article 35 TEU, the narrow formulation of Articles 6(2) TEU and 46(d) TEU has resulted in Article 6(2) TEU being treated by the ECJ as a simple affirmation of its existing case law on fundamental rights as general principles rather than providing an enhanced normative status for ECHR rights and the common constitutional principles.²² So even in the restricted circumstances in which Article 6(2) TEU applies to Third Pillar measures, the provision adds little or no substantive value to the ECJ's general principles case law.²³ Moreover, the general principles case law is itself subject to significant limitations in ensuring international fundamental rights standards are given effective recognition in Union law.²⁴

7.2.4 ECJ JURISDICTION UNDER ARTICLE 35 TEU

Article 35 TEU establishes three exhaustive categories of ECJ jurisdiction over Third Pillar measures.²⁵ The first category consists of an optional preliminary reference procedure that is significantly more restrictive than the equivalent Article 234 EC Treaty procedure. Article 35(1) TEU provides that the ECJ:

²¹ Lenaerts makes this point to underpin his view that Article 46(d) TEU was intended by the Member States to exclude application of Article 6(2) TEU to their action in implementing or derogating from Third Pillar and Title IV EC Treaty measures: 'Fundamental Rights in the European Union' (2000) 25 *EL Rev.*, pp. 575-600, at pp. 588-589.

²² For an analysis of Article 6(2) TEU, and its relationship to the general principles case law, see Section 5.2.2 of Chapter five.

²³ See in this sense, de Witte, in Alston (ed.), above n. 13, at p. 885: 'The irony, however, is that Article 6 [TEU] states that fundamental rights are protected as 'general principles' so that, in fact, nothing much will change.'

²⁴ See Section 4.2.4 of Chapter four.

²⁵ *Segi v Council*, above n. 8, at para. 36. In the same case, the CFI also rejected the applicant's submission that the CFI had a general jurisdiction to declare a violation by the Council of fundamental rights as general principles of Union law: at para. 48. In *Spain v Eurojust* the Grand Chamber confirmed that Article 35 TEU is the sole basis for ECJ jurisdiction over Title VI TEU measures: Case C-160/03 of 15 March 2005 (unreported), at para. 38. In that case, the ECJ rejected an Article 230 EC Treaty action by Spain to annul recruitment notices published by Eurojust since they constituted Title VI TEU measures and fell outside the scope of Article 230 EC Treaty. The ECJ, however, held the measures were not exempt from judicial review since an applicant could have challenged them under the relevant Staff Regulations of Officials of the European Communities.

‘shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title [Title VI] and on the validity and interpretation of the measures implementing them’.²⁶

The scope of Article 35(1) TEU is restricted since common positions adopted under Article 34(2)(b) TEU are not subject to the preliminary ruling procedure and the ECJ may only rule on the interpretation and not the validity of conventions adopted under Article 34(2)(d) TEU.²⁷ Furthermore, since Article 34(2)(b) TEU provides that framework decisions ‘shall not entail direct effect’, it will be difficult for an individual applicant to invoke a framework decision in the context of national proceedings.²⁸ As a result, the opportunities for the national courts to refer the legality of framework decisions to the ECJ will be correspondingly restricted.²⁹ Where a reference may be made, the grounds for a ruling on the legality of a qualifying Third Pillar measure under Article 35(1) TEU would include review of its conformity with Article 6(2) TEU, on the

²⁶ Tridimas points out that although Article 35(1) TEU does not explicitly confer jurisdiction on the ECJ to interpret the provisions of Title VI TEU, such a power must necessarily be implied to give effect to the ECJ’s power to interpret and rule on the validity of Third Pillar measures: in Lynch, Neuwahl and Rees (eds.), above n. 10, at p. 79. It is unclear whether the reference to measures implementing ‘them’ in Article 35(1) TEU refers to framework decisions, decisions and conventions or only conventions. It is submitted, applying the jurisdictional principle advocated by Peers (in Alston (ed.), above n. 5, at pp. 171-172), that implementing measures in respect of all three categories should be subject to reference under Article 35(1) TEU.

²⁷ This exclusion of jurisdiction to rule on the validity of Third Pillar conventions follows from, and provides support for, the proposition examined in Section 3.3 of Chapter three that the ECJ does not have jurisdiction to rule on the validity of primary Union law. See in this sense Tridimas, in Lynch, Neuwahl and Rees (eds.), above n. 10, at p. 79. Peers argues, in respect of applying fundamental rights principles to the interpretation of pre-Amsterdam Third Pillar conventions where jurisdiction was conferred on the ECJ, that, notwithstanding the absence in the Maastricht Treaty of a jurisdiction on the ECJ to interpret Articles F(2) and K.2(1) TEU, the same principles should apply as to the review of post-Amsterdam Third Pillar measures: in Alston (ed.), above n. 5, at pp. 171-2.

²⁸ The scope of the doctrine of direct effect is disputed. Prechal has given the following definition: ‘.. direct effect is the obligation of a court or another authority to apply the relevant provisions of Community law, either as a norm which governs the case or as a standard for legal review.’: ‘Does Direct Effect Still Matter?’ (2000) 37 *CML Rev.*, pp. 1047-1069, at p. 1048. See also: Craig and de Búrca, *EU Law: Text, Cases and Materials* (3rd edn.) (Oxford, OUP, 2003), at pp. 178-182; and Bruno de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’ in P. Craig and G. de Búrca (eds.) *The Evolution of EU law* (Oxford, OUP, 1999), pp. 177-213.

²⁹ The national court will by application of the principle in *Foto-Frost* be precluded from ruling a framework decision invalid: Case 314/85 [1987] ECR 4199.

basis of Article 46(d) TEU, and with the fundamental rights protected as general principles of Union law under the ECJ's case law.³⁰

Article 35(2) TEU provides that the jurisdiction will only apply to Member States who by declaration accept it and Article 35(3) TEU requires a Member State accepting the ECJ's jurisdiction under Article 35(1) to specify either that references may be made by a court of tribunal 'against whose decisions there is no judicial remedy under national law' or by any court or tribunal of the Member State.³¹ Since only twelve Member States have made a Declaration under Article 35(2) TEU,³² and within those twelve the scope of the obligation to refer varies significantly, the structure of the Article 35 TEU preliminary reference procedure has resulted in a significant variation in the standard of judicial protection.³³ This divergence significantly restricts access to justice in the Union's legal order since the preliminary reference procedure is the only means for an individual to challenge the validity of a Third Pillar measure since direct review proceedings under Article 35(6) TEU are restricted to a Member State or the Commission.

Secondly, Article 35(6) TEU provides the ECJ shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission within two months of the publication of the measure on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TEU or of any rule of law relating to its application, or misuse of powers. The grounds of

³⁰ See Peers, in Alston (ed.), above n. 5, at p. 174, n. 46. Hartley argues general principles constitute grounds of review of legality under Article 234 EC Treaty: *The Foundations of European Community Law* (5th edn.) (Oxford, OUP, 2003), at pp. 418-420.

³¹ The list of Declarations made by the Member States party to the Treaty of Amsterdam pursuant to Article 35 TEU is published in [1999] OJ C120/24. The subsequent Declaration by the Czech Republic is annexed to the Final Act to the Treaty of Accession to the EU 2003: [2003] OJ L236/98. A number of Member States in those declarations (Austria, Belgium, Czech Republic Germany, Spain, Italy, Luxembourg, and Netherlands) reserve the right to make a reference obligatory from a court against whose decisions no judicial remedy lies.

³² Austria, Belgium, Czech Republic, Finland, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden. Spain's Declaration confers jurisdiction in accordance with Article 35(3)(a) TEU and the other listed Member States in accordance with Article 35(3)(b) TEU.

³³ Although, on the assumption the doctrine of supremacy applies equally to Union as to EC law, it could be argued that a court in a Member State which has not agreed to references under Article 35(2) TEU may be bound to follow a ruling of the ECJ on a Third Pillar measure on a reference from a Member State which has so agreed.

review under Article 35(6) TEU, which replicate the grounds of review set out in the second paragraph of Article 230 EC Treaty save for the reference to infringement of the TEU in lieu of the EC Treaty, encompass the fundamental rights protected as general principles as developed by the ECJ and, by virtue of Article 46(d) TEU, as protected by Article 6(2) TEU.³⁴

The restrictions on *locus standi* in Article 35(6) TEU are particularly onerous since under Article 34(2) TEU framework decisions and decisions must be adopted unanimously by the Council acting on the initiative of any Member State or the Commission. The only realistic challenge is therefore likely to be by the Commission in the event of a proposal by a Member State. However, the failure to grant the EP *locus standi* in Article 35(6) TEU may, at least in respect of an action to protect the EP's institutional powers under the TEU,³⁵ be overridden by the ECJ by analogy to its *Chernobyl* decision granting the EP's *locus standi* in such circumstances notwithstanding the lack of any express conferral in Article 230 EC Treaty prior to the Maastricht Treaty.³⁶

An individual applicant is, however, excluded from access to the ECJ under Article 35(6) TEU.³⁷ An individual applicant's only potential redress in Union law would therefore be to seek a reference for a preliminary ruling under Article 35(1) TEU on the validity of a framework decision or decision or on the validity of measures implementing them. However, as discussed above, there are substantial obstacles to obtaining such a reference. In addition an applicant would be faced with the same general problems associated with the preliminary reference procedure under Article 234 EC Treaty.³⁸

³⁴ See Peers, in Alston (ed.), above n. 5, at p. 174. Peers argues (*ibid.*) that notwithstanding the apparently restrictive reference in Article 46(d) TEU to 'action of the institutions' the ECJ is entitled to exercise its 'offensive jurisdiction' at least to control the action of the Member States in implementing Third Pillar measures.

³⁵ Article 39 TEU establishes the role of the EP in the Third Pillar. In particular, Article 39(1) requires the council to consult the EP before adopting framework decisions, decisions and conventions.

³⁶ Case C-70/88, *European Parliament v. Council* [1990] ECR I-2041. See for this argument Tridimas, in Lynch, Neuwahl and Rees (eds.), above n. 10, at p. 80.

³⁷ Since Article 35(6) TEU is primary Union law the ECJ is precluded from ruling on its conformity with the right of access to justice guaranteed in international fundamental rights instruments for the reasons explored in Section three of Chapter two.

³⁸ For an analysis of the deficiencies of the Article 234 EC Treaty procedure, see AG Jacob's Opinion of 21 March 2002, at paras. 40-44, in *Unión de Pequeños Agricultores*: [2002] ECR I-6677.

Alternatively, an individual applicant could challenge the validity of implementing national measures, if any, or challenge the framework decision or decision in the national courts and ultimately the ECtHR for a breach of the right of access to justice guaranteed by Articles 6 and 13 ECHR.³⁹

Thirdly, Article 35(7) TEU provides the ECJ shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) TEU whenever the Council cannot settle a dispute within six months of its being referred to the Council by one of its members. Article 35(7) TEU provides the ECJ shall ‘also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d)’ TEU.⁴⁰ However, Article 35(7) TEU does not confer jurisdiction on the ECJ to rule on the validity of Third Pillar measures. Furthermore, by restricting the dispute resolution procedure to the Council and Member States, and in the case of conventions, the Commission, Article 35(7) fails to address the lack of democratic control resulting from the exclusion of the EP and does nothing to address the onerous restrictions on the individual applicant’s right of access to justice in respect of Third Pillar measures.

The jurisdiction of the ECJ under Article 35 TEU is subject to Article 35(5) TEU which provides the ECJ:

‘shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.’

³⁹ See Section 7.2.5 below for analysis of the potential remedies under the ECHR. See on the potential impact of the Charter: Angela Ward, ‘Access to Justice’ in S. Peers and A. Ward (eds.) *The European Union Charter of Fundamental Rights* (Oxford, Hart Publishing, 2004), pp. 123-140, especially at p. 137.

⁴⁰ Tridimas points out that Article 35(7) TEU grants ECJ jurisdiction to give rulings on disputes as to the interpretation or application of Third Pillar measures *in abstracto*: in Lynch, Neuwahl and Rees (eds.), above n. 10, at p. 80.

The scope of this exclusion has to be read in conjunction with the more general provision in Article 33 TEU demarcating the limits of Union competence in the Third Pillar.⁴¹

While the ouster of jurisdiction in Article 35 TEU is drafted in broad terms its scope is nevertheless subject to certain limitations. Firstly, as a provision of Title VI TEU, the ECJ has jurisdiction to interpret its scope under Article 46(b) TEU if it is relied upon in an action falling within Article 35 TEU. Secondly, as a limitation on the jurisdiction of the ECJ, Article 35(5) TEU should be interpreted restrictively.⁴² On this basis, the concept of ‘internal security’ should, for example, be given a narrower scope than that of public security.⁴³ Support for such an approach may be found in *Svenska Journalistförbundet v. Council*: ‘The case-law of the Court of Justice shows that the concept of public security does not have a single and specific meaning. Thus the concept covers both the internal security of a Member State and its external security ...’.⁴⁴ Thirdly, Article 35(5) TEU only excludes ECJ jurisdiction in respect of action undertaken by the Member States and not in respect of Third Pillar measures adopted by the Council.⁴⁵ In this respect, Article 35(5) TEU is less objectionable than Article 68(2) EC Treaty that also applies to measures adopted pursuant to Article 62(1) EC Treaty.⁴⁶

However, notwithstanding these limited control mechanisms, Article 35(5) TEU in conjunction with the other restrictions on the ECJ’s jurisdiction in Article 35 TEU substantially and detrimentally restricts the availability of judicial review proceedings to

⁴¹ Article 33 TEU provides Title VI: ‘... shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’. See, for the corresponding provisions in the Constitution, Section 7.4.2 of this Chapter.

⁴² See: Peers, in Alston (ed.), above n. 5, at p. 172; and Tridimas, in Lynch, Neuwahl and Rees (eds.), above n. 10, at p. 77.

⁴³ Public security is a basis for derogations under Articles 30, 39, 46, 296, and 297 EC Treaty. The ECJ has held in respect of these provisions that they : ‘... deal with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application ...’: Case C-285/98, *Kreil v. Bundesrepublik Deutschland* [2000] ECR I-69, at para. 16.

⁴⁴ Case T-174/95 [1988] ECR II-2289, at para. 121. The judgment was given in the context of a challenge to the refusal of the Council to disclose certain documents relating to Europol on grounds of the ‘public interest’ which was defined to include, *inter alia*, ‘public security’ in Article 4(1) of Council Decision 93/731/EC on public access to Council documents (OJ 1993 L340/43).

⁴⁵ See Peers, in Alston (ed.), above n. 5, at p. 175.

⁴⁶ See Section 7.3.2 below.

test the conformity of Third Pillar measures and implementing national action with fundamental rights standards and their legitimacy.⁴⁷ The absence of such an ouster of jurisdiction in the Constitution is therefore a positive contribution to a more effective system for the protection of fundamental rights in the AFSJ.⁴⁸

7.2.5 THE EUROPEAN COURT OF HUMAN RIGHTS AND THIRD PILLAR MEASURES

In the absence of adequate jurisdictional powers for the ECJ to review Third Pillar measures, the individual applicant seeking to challenge their validity is obliged to seek a remedy before the national courts or make an application to the ECtHR. However, recent case law of the ECtHR has cast doubts on the availability of such remedies. In *Segi and Gestoras Pro-Amnistía v. Germany*, the ECtHR declined to assume jurisdiction to control the conformity with the ECHR of anti-terrorism measures adopted by the Union following September 11 2001.⁴⁹ The ECtHR declared inadmissible the application on behalf of the Basque youth movement Segi and others in respect of the Common Position of 27 December 2001 on the application of specific measures to combat terrorism adopted under Articles 15 and 34 TEU (2001/931 Common Position)⁵⁰ for violation of Articles 6, 6(2), 10, 11 and 13 of the ECHR and Article 1 of ECHR Protocol No. 1.⁵¹ The ECtHR held that Article 4 of the 2001/931 Common Position did not affect the applicants directly and that in consequence they were not ‘victims of a violation of the Convention within the meaning of Article 34 of the Convention.’⁵² The ECtHR justified its decision on the basis that Article 4 of the 2001/931 Common Position did not in itself confer additional powers exercisable against the applicants and that national or Community

⁴⁷ ‘Proportionality is used as a *criterion* for deciding whether an interference with fundamental rights is legitimate;’ de Witte, in Alston (ed.), above n. 13, at p. 861. See also Lenaerts, above n. 21, at p. 589.

⁴⁸ See further Section 7.4 of this Chapter.

⁴⁹ Cited above n. 7.

⁵⁰ 2001/931/CFSP: [2001] OJ L344/93.

⁵¹ The critical measure was Article 4 of the 2001/931/Common Position. Articles 2 and 3 of the 2001/931 Common Position were implemented by Council Regulation (EC) 2580/2001: [2001] OJ L344/70. The applicant also unsuccessfully sought redress for the same alleged ECHR violations in respect of Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism: [2001] OJ L344/90.

⁵² *Segi and Gestoras*, cited at n. 7 above, at p. 9. Article 4 of the 2001/931 Common Position provided an obligation for Member States to employ Title VI TEU police and judicial cooperation to prevent terrorist acts and in particular in respect of enquiries and proceedings in respect of persons, groups and entities listed in the annex to the 2001/931 Common Position, which included the applicants.

measures implementing Article 4 would ‘be subject to the form of judicial review established in each legal order concerned, whether international or national.’⁵³ The ECtHR also questioned, albeit *obiter*, whether the applicants had exhausted ‘the remedies which the European Union could offer them, such as a compensation claim or even an application for annulment’ in the light of the CFI’s judgment in *Jégo-Quéré v Commission*.⁵⁴

It is submitted that the ECtHR’s judgment in *Segi and Gestoras Pro-Amnistía v. Germany* underestimates the detrimental consequences for an organisation of being listed in the Annex to the 2001/931 Common Position⁵⁵ and overestimated the potential for judicial review of implementing measures, at least as regards redress at the Union and Community level.⁵⁶ In particular, the basis for the ECtHR’s assessment of the availability of Union remedies was undermined when the ECJ reversed the CFI’s decision in *Jégo-Quéré*⁵⁷ and the CFI in *Segi v. Council* ruled there was no jurisdiction under Article 35 TEU for a compensation claim in respect of a Third Pillar measure such as Article 4 of the 2001/931 Common Position.⁵⁸ Indeed, in *Segi v. Council* the CFI expressed doubts as to whether the applicants had access to *any* effective remedy whether

⁵³ *Segi and Gestoras*, *ibid.*, at p. 9. The reference to international judicial review clearly extends to the role of the ECtHR in reviewing national measures implementing Third Pillar measures. This aspect is considered further below. For a discussion of the respective merits of pursuing judicial remedies available in Union and national law for challenging the listing of organisations under the 2001/931 Common Position: see B. Bowring and D. Korff, ‘Terrorist Designation with Regard to European and International Law: The Case of the PMOI’, Joint Opinion presented at the International Conference of Jurists on 10 November 2004; available at: <<http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf>>; and I. Cameron ‘European Union Anti-Terrorist Blacklisting’ (2003) 3 *Human Rights Law Review*, pp. 225-256.

⁵⁴ *Ibid.*, at p. 6. The ECtHR was referring to the CFI’s decision in Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365, which reformulated the test for ‘individual concern’ under paragraph four of Article 230 EC Treaty in a manner favourable to individual applicants.

⁵⁵ The decision of the ECtHR itself refers to the measures adopted three months previously by the Spanish investigating judge suspending Segi’s activities and detaining eleven of its leaders pending trial: *Segi and Gestoras*, *ibid.*, at p. 2. While these measures may or may not have had a link to the contested 2001/931 Common Decision, the ECtHR’s reference to being listed in the annex thereto as a terrorist organisation as merely ‘embarrassing’ seems unrealistic: *ibid.* at p. 9. See also on the consequences of blacklisting: Bowring and Korff, above n. 53, at pp. 15-16.

⁵⁶ The extent to which national courts directly apply Union law fundamental rights principles to control the legality of national measures implementing Union law has not been researched in detail: see de Witte, in Alston (ed.), above n. 13, at pp. 873-874. Bowring and Korff argue that a strategy based on exhausting national remedies and then applying to the ECtHR is preferable to seeking redress before the CFI or ECJ: above n. 53, at p. 31.

⁵⁷ Case C-263/02 P *Jégo-Quéré v Commission* [2004] ECR I-3425.

⁵⁸ *Segi v. Council*, cited above at n. 8.

before the Community or national jurisdictions for their listing in the Annex to the 2001 Common Position.⁵⁹ However, the CFI was effectively precluded by the ECJ decision in *Unión de Pequeños Agricultores v. Council* (UPA) from adopting its reasoning in *Jégo-Quéré* or that of AG Jacobs in UPA that such a denial of access to justice was incompatible with the guarantees in Articles 6 (1) and 13 ECHR and Article 47 of the Charter.⁶⁰ In those circumstances, the CFI stated that the only grounds on which the claim for compensation could succeed would be if it was established that Article 4 of the 2001/931 Common Position should have been adopted under the EC Treaty rather than Article 34 TEU thereby grounding a claim for compensation under Articles 235 and 288 EC Treaty. However, since no such wrongful use of legal basis was demonstrated, the application was rejected as manifestly unfounded.⁶¹

In conclusion, *Segi and Gestoras Pro-Amnistía v Germany* and *Segi v. Council* demonstrates the potential for jurisdictional ‘black holes’ in respect of Third Pillar measures in terms of effective legal redress for individuals in respect of a violation of fundamental rights both within the Union legal order, the national legal orders and under the ECHR. The absence of ECJ jurisdiction to review the legality of secondary Union law may on an extensive interpretation of the *Matthews* judgment also ground jurisdiction for the ECtHR to review the measure.⁶² It is submitted that the ECtHR should revise its conclusions in *Segi and Gestoras Pro-Amnistía v Germany* in the light of the decisions of the ECJ in *Jégo-Quéré* and the CFI in *Segi v. Council* and review the conformity with the ECHR of Third Pillar measures not subject to scrutiny by the ECJ.

⁵⁹ *Ibid.*, at para 38.

⁶⁰ Case C-50/00 P *Unión de Pequeños Agricultores (UPA) v. Council of the European Union* [2002] ECR I-6677. See generally: J. Schwarze, ‘The Legal Protection of the Individual against Regulations in European Union Law’ (2004) 10 *European Public Law*, pp. 285-303; and J. Usher, ‘Direct and individual concern – an effective remedy or a conventional solution’ (2003) 28 *EL Rev.*, pp. 575-600. See Section 5.6.2.2.4 of Chapter five for analysis of the limited reform in Article III-365(4) of the Constitution of the ‘individual concern’ test for regulatory acts. The reform proposals before the European Convention are considered by M. Varju, ‘The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention’ (2004) 10 *European Public Law*, pp. 43-56.

⁶¹ *Segi v. Council*, above n. 8, at paras. 41-47. See Section 3.2.2 of Chapter three for the jurisdiction of the ECJ to ‘police’ the boundaries of the EC Treaty and the TEU under Article 47 TEU.

⁶² See Section 3.3.2.3 of Chapter three. This point was not directly at issue in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (Grand Chamber), App. No. 45036/98. Judgment of 30 June 2005. Unreported. However, the logic of the ECtHR’s decision in *Bosphorus* supports the view that, in the absence of an effective remedy in Union law, the ECtHR will assume jurisdiction to control the legality of a Union act with the ECHR.

In the absence of jurisdiction to review directly Third Pillar measures, the scope of the ECtHR's jurisdiction to control the conformity with the ECHR of implementing measures adopted by the Member States may be critical in providing an alternative method of redress. In *Cantoni v France* the ECtHR considered the conformity with Article 7(1) ECHR of Article L. 511 of the French Public Health Code prohibiting the sale of medicinal products outside of pharmacies and which implemented Directive EEC 65/65 of 26 January 1965.⁶³ The ECtHR found no violation of Article 7(1) ECHR since the relevant provision was sufficiently clear in the light of the relevant case law of the ECJ and the French Court of Cassation.⁶⁴ Although it only ruled on the compatibility of the French legislation with Art. 7(1) ECHR and not that of the 1965 Directive, the ECtHR stated: 'The fact, pointed to by the Government, that Article L. 511 of the Public Health Code is based almost word for word on Community Directive 65/65 ... does not remove it from the ambit of Article 7 of the Convention.'⁶⁵

This reasoning has led Peers to argue on the authority of *Cantoni* that, at least in respect of third-pillar framework decisions and national measures ratifying third-pillar conventions, the ECtHR could exercise jurisdiction over national implementing measures.⁶⁶ Indeed, the ECtHR in *Segi and Gestoras Pro-Amnistía v. Germany* stated that national measures implementing the 2001 Common Position would be subject to judicial review for conformity with the ECHR.⁶⁷ The guiding principle in the AFSJ should be that the ECtHR has jurisdiction to review the compatibility with the ECHR of national measures implementing Third Pillar measures in any case where the Third Pillar measures are not themselves subject to review by the ECJ.⁶⁸

⁶³ Case 45/1995/551/637. ECHR Reports (Judgements and Decisions) 1996 V-1614. Directive 65/65 is published in OJ L369 and was subsequently amended.

⁶⁴ *Ibid.*, at para. 34. The original opinion of the ECommHR found a violation of Article 7(1) ECHR. The Opinion is reported as an annex to the judgment cited *supra*.

⁶⁵ *Ibid.*, at para. 30.

⁶⁶ Peers, in Alston (ed.), above n. 5, at p. 175. However, he considers ECtHR jurisdiction over Third Pillar decisions in the absence of national implementing measures is more problematic. *Waite and Kennedy v. Germany*, (2000) 30 EHRR 261, supports Peers' argument for ECtHR jurisdiction to control the relations of the Member States with international organisations.

⁶⁷ Above n. 7, at p. 9.

⁶⁸ See in this sense, Lenaerts, above n. 21, at p. 589.

7.3 FUNDAMENTAL RIGHTS AND TITLE IV EC TREATY

7.3.1 INTRODUCTION

The Treaty of Amsterdam transferred a number of critical policy areas relating to visas, asylum, immigration and related free movement of persons competences from the Third Pillar to Title IV TEC.⁶⁹ Judicial control over the transferred competences had been largely excluded under the Treaty of Maastricht by ex-Article L. One would have anticipated that the Treaty of Amsterdam would have substantially aligned the jurisdiction of the ECJ over Title IV EC Treaty with its jurisdiction over other EC policy areas. However, notwithstanding the transfer of competences to the First Pillar, the jurisdictional provisions set out in Article 68 EC Treaty fail not only to provide the same standard of judicial protection as under the other Titles of the EC Treaty but in certain critical respects even fall short of the enhanced but still restricted judicial protection afforded over Title VI TEU by Article 35 TEU. This failure emphasises the prominent degree to which national security interests still featured in the structuring of the AFSJ at the Treaty of Amsterdam.

7.3.2 SCOPE OF ARTICLE 68 EC TREATY

The scope of Article 68 EC Treaty is uncertain. Although Article 68 EC Treaty is headed: 'Jurisdiction of ECJ to hand down preliminary rulings', only Article 68(1) is unambiguously related to the preliminary reference procedure as set out in Article 234 EC Treaty.⁷⁰ The question therefore arises whether Article 68 EC Treaty is a form of *lex specialis* that restricts the application of the general jurisdictional clauses in the EC Treaty.⁷¹ It is submitted that Articles 68(1) and 68(3) EC Treaty should not be construed as in any way limiting or excluding the other jurisdictional powers of the ECJ in the EC

⁶⁹ See Section 6.2.4 of Chapter six.

⁷⁰ Article 35(1) TEU also establishes a preliminary ruling procedure as detailed in Section 7.2.4 of this Chapter.

⁷¹ In particular, the judicial review powers of the ECJ under Article 230 EC Treaty. This uncertainty in scope is noted by Tridimas, in Lynch, Neuwahl and Rees (eds.), above n. 10, at p. 77.

Treaty over Title IV EC Treaty, other than the restrictions on the Article 234 EC Treaty procedure specified in Article 68(1), since neither the heading to Article 68 EC Treaty nor the text of those Articles supports such an interpretation. This interpretation is supported by the ECJ's policy to facilitate access to justice in the absence of an express limitation in the EC Treaty.⁷²

However, in respect of Article 68(2) EC Treaty it is more difficult to sustain the argument that its scope should be limited to exclude ECJ jurisdiction to give a ruling requested under Article 68(1) or 68(3) EC Treaty on a measure or decision taken pursuant to Article 62(1) EC Treaty.⁷³ Article 68(2) EC Treaty restricts the scope of the ECJ's jurisdiction in relation to measures controlling the free movement of persons across internal Union borders, by providing it shall not rule 'on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security'.⁷⁴ Although Article 68(2) EC Treaty employs the term 'rule', which arguably refers to the use of the term 'ruling' in Articles 68(1) and (3) EC Treaty, the overall thrust of Article 68(2) is more general in scope since it excludes ECJ jurisdiction 'in any event' to rule on 'any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security'. Article 64(1) EC Treaty provides further support for an extensive interpretation of the scope of Article 68(2) EC Treaty.⁷⁵ If such an interpretation is confirmed by the ECJ, Article 68(2) EC Treaty creates a substantial *lacuna* in the system of judicial protection over measures adopted in a sensitive area of EC policy making.⁷⁶ Article 68(2) is more restrictive than the equivalent provision in Article 35(5) TEU since

⁷² See the cases cited by Tridimas: *ibid.*, at p. 83, n. 17.

⁷³ Tridimas argues that Article 68(2) should *not* apply to restrict the jurisdiction of the ECJ under Article 68(3) EC Treaty since a reference is less sensitive in such circumstances as it is made by a Member State, the Council or the Commission: *ibid.*, at p. 77.

⁷⁴ Article 62(1) EC Treaty provides for the adoption by the Council by 1 May 2004 of: 'measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;'

⁷⁵ Article 64(1) provides: 'This Title [IV] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

⁷⁶ Tridimas characterises the exclusion of jurisdiction in Article 68(2) as follows: 'It poses serious problems of constitutionality, sets a bad precedent, and contradicts the principles of protection of fundamental rights, the rule of law, and democracy, commitment to which is affirmed in the Treaty of Amsterdam.' : in Lynch, Neuwahl and Rees (eds.), above n. 10, at p. 77.

it excludes ECJ jurisdiction over Community measures whereas Article 35(5) TEU is limited to Member State action. *A fortiori*, the arguments for the ECtHR holding the Member States accountable apply if excluded measures adopted under Article 62(1) EC Treaty are not in conformity with the ECHR.⁷⁷

The second point is that Article 68(1) EC Treaty restricts the ECJ to giving a ruling on the validity and interpretation of acts of the institutions of the Community based on Title IV EC Treaty. The validity of acts of the Member States implementing such acts is therefore not within the jurisdictional scope of Article 68(1) EC Treaty.⁷⁸ In contrast, Article 35(1) TEU confers jurisdiction on the ECJ not only to give preliminary rulings on the validity and interpretation of framework decisions and decisions and to interpret conventions but also on the validity and interpretation of the measures implementing them.⁷⁹

7.3.3 *ECJ JURISDICTION UNDER ARTICLE 68 EC TREATY*

Article 68 EC Treaty provides, subject to Article 68(2), two grounds of jurisdiction for the ECJ. Firstly, Article 68(1) provides for a modified and more restrictive preliminary ruling procedure whereby Article 234 EC Treaty applies to Title IV EC Treaty subject to the condition that a reference for a preliminary ruling on the interpretation of Title IV or on the validity of acts of the EC institutions based on Title IV may only be made ‘in a case pending before a court or tribunal against whose decisions there is no judicial remedy under national law’.⁸⁰ Although the Article 68(1) EC Treaty reference procedure is wider than that in Article 35(1) TEU in the sense it applies to all Member States and

⁷⁷ See Lenaerts, above n. 21, at p. 589.

⁷⁸ In this sense, Article 68(1) is following Article 234(b) EC Treaty that also only confers jurisdiction on the ECJ to give preliminary rulings on the validity and interpretation of acts of institutions of the Community and the ECB. However, as Craig and de Búrca point out, the doctrine of supremacy of Union law may result in an obligation for the national court to disapply national law which conflicts with the ECJ’s interpretation of a Union measure: above n. 28, at pp. 434-435.

⁷⁹ See section 7.2.4 below.

⁸⁰ In *Magali Warbecq and Ryanair Ltd.*, The ECJ by order dated 10 June 2004 held it had no jurisdiction to rule on a reference from the Charleroi Labour Court on the interpretation of Article 19 of Regulation No 44/2001 adopted under Article 61(c) EC Treaty as it was not a final court of appeal for the purposes of Article 68(1) EC Treaty: Case C-555/03 [2004] ECR I-6041.

makes a reference from the final national court of appeal compulsory, it is more restrictive for those Member States who have made an optional declaration pursuant to Article 35(3)(b) permitting references from lower courts.⁸¹ The existing gaps and deficiencies in the scope of protection provided by the direct remedies available to a litigant under the EC Treaty often oblige an individual to rely on the Article 234 EC Treaty procedure to challenge indirectly the validity of an EC measure. It is therefore unacceptable that the existing inadequacies of the Article 234 EC Treaty procedure are compounded by the more restrictive reference procedure in Article 68 (1) EC Treaty in an area of Union policy where the protection of an individual's right to challenge the validity of Community measures for violation of fundamental rights should be paramount.⁸²

Secondly, Article 68(3) EC Treaty provides an additional ground of jurisdiction to those otherwise specified in the EC Treaty. It empowers the Council, the Commission or a Member State to request the ECJ to rule on a question of interpretation of Title IV EC Treaty or of acts of the EC institutions based on Title IV but excludes the application of such a ruling to judgments of courts or tribunals of the Member States which have become *res judicata*. Since the ECJ may not rule on the validity of Title IV EC Treaty measures under Article 68(3) EC Treaty, and neither the EP nor individual applicants have *locus standi*, Article 68(3) EC Treaty does not add significantly to the effective judicial or democratic scrutiny of Title IV EC Treaty measures.

⁸¹ See Section 7.2.4 for details.

⁸² See the Opinion of AG Jacobs in *Unión de Pequeños Agricultores* for a detailed critique of the EC's system of judicial remedies, including Article 234 EC Treaty as an alternative remedy to Article 230 EC Treaty. Tridimas heavily criticises Article 68(1) EC Treaty on both practical grounds and principle: in Lynch, Neuwahl and Rees (eds.), above n. 10, at pp. 76-77. See also *Final Report of Working Group X on 'Freedom, Security and Justice'* (WGX Final Report); CONV 424/02, 2 December 2002, at p. 25.

7.3.4 THE SCHENGEN ACQUIS AND JUDICIAL REVIEW

The Schengen *acquis* was integrated as of 1 May 1999 into the EC Treaty and TEU.⁸³ The 1997 Protocol integrating the Schengen *acquis* into Union law annexed to the TEU and the EC Treaty provides in Article 2(1) that the Council shall determine the legal basis for each of the provisions or decisions that constitute the Schengen *acquis*.⁸⁴ In the absence of a determination, Article 2(1) of the Protocol provides the relevant provisions or decisions shall be regarded as acts based on Title VI TEU.⁸⁵ The implementing 1999 Council Decision listed in Annexes, insofar as necessary, the relevant legal basis for each provision or decision. Article 2(1) of the 1997 Protocol also establishes the basis for the ECJ's jurisdiction over the incorporated Schengen *acquis* by providing that: 'With regard to such provisions and decisions and in accordance with that determination', the ECJ 'shall exercise the powers conferred upon it by the relevant applicable provisions of the Treaties.' Therefore, the ECJ's jurisdiction to review the provisions of the Schengen *acquis* is determined according to the allocation of a measure to either the EC Treaty or the TEU and is subject to the respective restrictions applicable to those treaties as analysed in the preceding sections.⁸⁶

⁸³ The Schengen *acquis* was defined by Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*: [1999] OJ L176/1. The integration of the Schengen *acquis* preserved the existing special arrangements relating to Denmark and to the UK and Ireland: Kuijper, 'Some Legal Problems associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Treaty of Amsterdam and the Incorporation of the Schengen *Acquis*' (2000) 37 *CML Rev*, pp. 345-366, at pp. 350 and 354-356.

⁸⁴ Implemented by Council Decision 1999/436/EC of 20 May 1999, allocating the Schengen *acquis*: [1999] OJ L176/17.

⁸⁵ This default mechanism was used in respect of provisions of the 1990 Schengen Implementing Convention relating to the Schengen Information System (SIS) where the Member States could not agree whether allocation should be to Title IV EC Treaty or Title VI TEU: see Kuijper, above n. 83, at p. 349.

⁸⁶ A number of references have been made pursuant to Article 35(1) TEU in respect of Articles 54-58 of the 1990 Schengen Implementing Convention regulating the *non bis in idem* principle which were allocated by Council Decision 1999/436/EC of 20 May 1999 to Articles 31 and 34 TEU: Case C-469/03 *Filomeno Mario Miraglia* of 10 March 2005 (not yet reported); and Joined Cases C-187/01 and C-385/01 *Gözütok and Brügger* [2003] ECR I-1345.

On similar terms to Article 64 TEC and Articles 33 and 35(5) TEU, Article 2 of the 1997 Protocol provides that the ECJ shall have ‘no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security’.⁸⁷ The scope of this exclusionary provision is subject to the same uncertainty and criticisms. Peers argues persuasively that the additional fundamental rights principles guaranteed by Article 6(2) TEU should apply to the incorporated Schengen *acquis*.⁸⁸ On that basis, Article 6(2) TEU applies to a measure or decision allocated by the implementing 1999 Council Decision, either expressly or by default, to Title VI TEU or expressly to Title IV EC Treaty.⁸⁹ However, the effectiveness of the protection afforded by Article 6(2) TEU is itself subject to substantially the same limitations as the ECJ’s case law on fundamental rights as general principles.⁹⁰

7.4 JURISDICTION OVER THE AFSJ UNDER THE CONSTITUTION

7.4.1 REFORM PROPOSALS OF WORKING GROUP X

In the light of the substantial deficiencies in respect of the ECJ’s jurisdiction to review Third Pillar measures and Title IV EC Treaty measures, there was substantial pressure for reform of this area of the AFSJ in the European Convention process. The mandate of WGX did not specifically refer to reform of the judicial architecture but such reform was implicit in the reference to striking a better balance ‘between security requirements and

⁸⁷ The wording of Article 2(1) of the 1997 Amsterdam Protocol is potentially wider since it refers to ‘measures or decisions’ without specifying if they are taken by the Member States or the Union authorities whereas Articles 33 and 35(5) TEU and Article 64(1) EC Treaty only refer to the actions of the Member State authorities. Preamble five to Council Decision 1999/436/EC of 20 May 1999 provides: ‘Whereas the determination of a legal basis in conformity with the relevant provisions of the Treaties for each of the provisions or decisions which constitute the Schengen *acquis* does not affect the exercise of the responsibilities incumbent upon the Member States according to Article 64 TEC and Article 33 TEU with regard to the maintenance of law and order and the safeguarding of internal security.’ See also the first Statement of the Council annexed to Council Decision 1999/436/EC.

⁸⁸ The Schengen implementing Convention of 19 June 1990 contains reference to a number of specific international fundamental rights instruments but not to the ECHR or the common constitutional principles of the Member States: see Peers, in Alston (ed.), above n. 5, at pp. 172-173.

⁸⁹ However, the ECJ did not in either *Filomeno Mario Miraglia* or *Gözütok and Brügger*, cited at n. 86 above, refer to Article 6(2) TEU or indeed to its fundamental rights case law in interpreting Article 54 of the 1990 Schengen Implementing Convention.

⁹⁰ See Section 4.2.4 of Chapter four.

respect for fundamental values’ and pursuing the Laeken objective of simplification of the ‘particularly complex institutional and legal systems’ in the JHA.⁹¹ WGX therefore concluded, after receiving expert advice,⁹² that a fundamental reform of the ECJ’s jurisdiction was necessary to remedy the defects both in respect of the Article 35 TEU jurisdictional system and the Article 68 EC Treaty preliminary reference procedure:

‘The Working Group takes the view that the limited jurisdiction of the Court is no longer acceptable concerning acts adopted in areas (e.g. police co-operation, judicial co-operation in criminal matters) which directly affect fundamental rights of the individuals. The same view applies to the limited judicial control foreseen in Article 68 TEC.’⁹³

WGX therefore recommended that the specific mechanisms in Article 35 TEU and Article 68 EC Treaty should be abolished and that ‘the general system of jurisdiction of the ECJ should be extended to the area of freedom, security and justice, including action by Union bodies in this field’.⁹⁴

On the issue of the restrictions on the ECJ’s jurisdiction under Article 35 (5) TEU and Article 68(2) EC Treaty relating to the ‘maintenance of law and order and the safeguarding of internal security’, WGX agreed that Article 68(2) should be abolished in view of the significance for fundamental rights of measures relating to the free movement of persons adopted under Article 62(1) EC Treaty. However, opinion was divided in WGX on abolishing Article 35(5) TEU, with some members arguing for its retention and others of the view that the incorporation in the Constitution of the text of Article 33 TEU was sufficient ‘to make clear that national acts taken under these responsibilities lie outside the scope of Union law, and consequently outside the jurisdiction of the Court.’⁹⁵

⁹¹ Mandate of WGX of 12 September 2002, CONV 258/02, at p. 3. Available on the European Convention website.

⁹² See in particular recommendations for reform in the presentations made by Henri Labayle, Christine van den Wyngaert and Gilles de Kerchove summarised in CONV 346/02 of 16 October 2002. Available on the European Convention website.

⁹³ WGX Final Report, above n. 82, at p. 25.

⁹⁴ *Ibid.* The reference to Union bodies is to Europol and Eurojust: see pp. 18-20 of WGX Final Report, above n. 82.

⁹⁵ *Ibid.*, at p. 19.

7.4.2 THE AFSJ JURISDICTIONAL STRUCTURE IN THE CONSTITUTION

The Constitution incorporates the principal recommendations in WGX Final Report on judicial control of the AFSJ by abolishing the special jurisdictional rules in Article 35 TEU and in Article 68 EC Treaty.⁹⁶ AFSJ measures adopted under Chapter IV of Title III of Part III of the Constitution are therefore generally subject to the same jurisdictional grounds of review as other Union policy areas.⁹⁷ The direct actions in Articles 230, 232, 235 and 288(2) EC Treaty are retained on substantially the same terms in Articles III-365, III-367 and III-431(2) and (3) respectively and will apply to AFSJ measures.⁹⁸

The general preliminary reference procedure set out in Article III-369 also applies on the same conditions to all AFSJ measures. However, the Constitution introduces an additional procedural protection in the final paragraph of Article III-369 that provides that if a question is raised ‘in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with a minimum of delay’.⁹⁹ Furthermore, a Member State that fails to fulfill an obligation under the AFSJ is subject to an enforcement action by the Commission under Article III-360 or another Member State under Article III-361.¹⁰⁰

The simplification of the Union’s legal measures in the Constitution resulting from the recommendations of WGIX on Simplification significantly contributes to the radical improvement in the justiciability of AFSJ measures adopted under the Constitution.¹⁰¹ The various types of Third Pillar measures listed in Article 34(2) TEU are eliminated and AFSJ measures adopted under the Constitution are to be the standard Union legislative

⁹⁶ See Sections 6.2.8 and 6.2.9 of Chapter six for a general analysis of the reforms of the AFSJ in the Constitution.

⁹⁷ The CFSP, however, continues to be subject to special jurisdictional rules set out in Article III-376 of the Constitution. See for analysis of an earlier draft of Article III-376: Dougan, ‘The Convention’s Draft Constitutional Treaty: bringing Europe closer to its lawyers?’ (2003) 28 *EL Rev.*, pp. 763-793, at p. 791.

⁹⁸ The reforms of these procedures consist in an improvement in the *locus standi* rules for non-privileged applicants in Article III-365(4) and the extension of remedies to ‘bodies, offices and agencies of the Union’. See further Section 5.6.2.2 of Chapter five.

⁹⁹ Dougan points out that such a procedure would ‘probably mean the expedited procedure provided for by Art. 104a Rules of Procedure of the Court of Justice’: above, n. 97, at p. 792 n. 85.

¹⁰⁰ Article 226 or 227 EC Treaty enforcement procedures do not currently apply to the Third Pillar. WGX recommended that these procedures be so extended: WGX Final Report, above n. 82, at p. 21.

¹⁰¹ See *Final Report of Working Group IX on Simplification*; CONV 424/02, 29 November 2002. For an analysis of the reform of the Union’s legal instruments, see Dougan, above n. 97, at pp. 781-787.

acts: European laws, framework laws, European decisions and delegated European regulations.¹⁰² However, existing measures adopted under the AFSJ will remain in force pursuant to the provisions on legal succession and continuity in Article IV-438 of the Constitution until they are repealed, annulled or amended in implementation of the Constitution.¹⁰³

A major concession to the security and sovereignty concerns of the Member States was Article III -377 that contains a modified version of Article 35(5) TEU:

‘In exercising its powers regarding the provisions of Sections 4 and 5 of Chapter IV of Title III relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.’¹⁰⁴

However, Article 68(2) EC Treaty was not retained. The retention of Article 35(5) divided WG X with some members arguing that Article III-262 that re-enacts the existing text in Article 64(1) EC and in Article 33 TEU would have sufficed.¹⁰⁵

¹⁰² The legal acts of the Union are set out in Articles I-33 to I-37 of the Constitution. The specific type of instrument to be adopted under the AFSJ is determined in accordance with the AFSJ provisions in Chapter IV of Title II of Part III of the Constitution.

¹⁰³ The same applies to the AFSJ Conventions adopted by the Member States under the TEU or the EC Treaty and to other measures constituting the *acquis* of the Union: Article IV-438(3) of the Constitution. Article IV-438 does not clarify how the new rules of jurisdiction in the Constitution will apply to the existing AFSJ measures pending their replacement by new measures adopted under the Constitution. Since Article IV-437(1) repeals the EC Treaty and the TEU, subject to paragraph two of that article (which is not relevant for these purposes), the solution would be to allocate the existing AFSJ measures to one of the new legal instruments by reference to the appropriate instrument specified in Chapter IV, Title IV of Part III of the Constitution. Article IV-438(5) may provide authority for this exercise: ‘Continuity in administrative and legal procedures commenced prior to the date of entry into force of this Treaty shall be ensured in compliance with the Constitution. The institutions, bodies, offices and agencies responsible for those procedures shall take all appropriate measures to that effect.’

¹⁰⁴ Sections 4 and 5 of Chapter IV cover the AFSJ matters in Title VI TEU: namely judicial cooperation in criminal matters (section 4) and police cooperation (section 5).

¹⁰⁵ Article III-262 provides: ‘This Chapter shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.’

The reforms in the Constitution to the jurisdictional powers of the ECJ over the AFSJ measures substantially address the criticisms of the existing AFSJ. When considered in conjunction with the other major reforms of the structure of fundamental rights protection in the Constitution, namely the mandate for the Union to accede to the ECHR under Article I-9(2) and the incorporation of the Charter under Article I-9(1),¹⁰⁶ the Constitution provides a significant enhancement in the level of recognition and protection of fundamental rights in the AFSJ. However, the retention in Article III-377 of an exclusion of ECJ jurisdiction over Member State action in the field of judicial cooperation in criminal matters and police cooperation has the potential to undermine the benefits of these reforms. It is therefore incumbent on the ECJ to interpret Article III-377 in a manner that ensures due respect for fundamental rights standards is guaranteed in AFSJ measures whether adopted by the Union institutions or implemented by the Member States.

7.5 GENERAL CONCLUSIONS

The complexity of the provisions introduced by the Treaty of Amsterdam on the scope of application of fundamental rights protection to the AFSJ combined with the instability created by the delayed ratification process of the Constitution has meant the AFSJ provides a confusing and ineffective legal structure for fundamental rights protection. This situation has been exacerbated by a political and security environment conditioned by terrorist attacks, including those of 11 September 2001 in the United States, 11 March 2004 in Madrid, and 7 and 21 July 2005 in London. As a result, there are serious and legitimate concerns as regards proper access to justice for individuals and effective judicial control over the raft of AFSJ measures adopted and proposed.

The recent decisions of the CFI and the ECtHR relating to Union measures adopted against *Segi* have confirmed the AFSJ deficiencies in terms of judicial protection. The reforms in the Constitution are therefore critical in providing a structure for the AFSJ that respects the rule of law and provides a coherent framework for the protection of

¹⁰⁶ See generally Chapter five for analysis of reforms in the Constitution,.

fundamental rights. The postponement, if not abandonment, of the Constitution leaves a legitimacy deficit that coincides with proposals from national governments for anti-terrorist measures that undermine basic freedoms protected under the UN and European Conventions.¹⁰⁷ While proposals for repressive anti-terrorist measures have so far principally originated at the national level, the focus may shift to the adoption of such measures at the Union level.¹⁰⁸ In the absence of implementation of the reforms in the Constitution, a more activist judicial approach to the application of international fundamental rights is required to counter-balance the political pressure for security to preempt justice as the primary objective of the AFSJ.

¹⁰⁷ UK Government proposals include expulsion of non-nationals to countries with a record of human rights abuses, including Jordan and Algeria, on the basis of memoranda of understanding that deportees would not be executed or subject to torture, and the issuing of instructions to the judiciary on interpretation of the Human Rights Act 1998 to facilitate such actions: see: Mary Riddell, 'Tony Blair's comic opera', *The Observer*, 14 August 2005, at p. 24.

¹⁰⁸ See the *Acquis of the European Union in the field of JHA*; consolidated version; update December 2004. available at: <http://europa.eu.int/comm/justice_home/doc_centre/intro/docs/jha_acquis_1204_en.pdf>. See also the *Hague Programme on Strengthening Freedom, Security and Justice in The European Union*, annexed to the European Council Presidency Conclusions of 4/5 November 2004 available at: <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf>.

THE PRINCIPLE OF *NON-REFOULEMENT*: A CASE STUDY ON JUSTICE IN THE AFSJ

8.1 INTRODUCTION

‘But of course, like some well-known theological concepts, the Community is, in some senses, its Member States; in other senses separate from them.’¹ This observation applies par excellence to the complex and shifting boundaries of the division of powers between the Member States and the Union in the area of refugee and asylum law.² The allocation of competences between the Union and the Member States in the field of asylum and refugee policy and law-making shifted substantially under the Treaty of Amsterdam in favour of the Union.³ International relations theory has identified a number of reasons for the Member States agreeing to this decisive shift from intergovernmental cooperation to communitarisation of asylum and refugee policy, albeit subject to specific restrictions on justiciability and decision-making procedures.⁴ The dynamic towards a common Union policy on immigration and asylum has strengthened since the Treaty of Amsterdam.⁵ The

¹ Weiler and Fries, ‘A Human Rights Policy for the European Community and Union: The Question of Competences’, in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 147-165, at p. 161.

² See Hannah R. Garry, ‘Harmonisation of Asylum Law and Policy within the European Union: A Human Rights Perspective’ (2002) 20 *Netherlands Quarterly of Human Rights*, pp. 163-183.

³ See Section 6.2.4. of Chapter six.

⁴ For a detailed discussion of the relative merits of neofunctionalism and intergovernmentalism as theories to explain this shift, see: Philip Myers, *European Union and Justice and Home Affairs*, Ph.D Thesis (Sussex, 1999); and Arne Niemann, *The Internal and External Dimensions of European Union Decision-making*, Ph.D Thesis (Cambridge, 2000). See also: Elspeth Guild, ‘Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures’ (2004) 29 *EL Rev.*, pp. 198-218; Kay Hailbronner, ‘Asylum law in the Context of a European Migration Policy’, in Walker (ed.), *Europe’s Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 41-88; and C. Harvey, ‘The Right to Seek Asylum in the European Union’ (2004) 1 *EHRLR*, pp. 17-36.

⁵ In October 1999 the European Council at Tampere established as a long-term goal the creation of a Common European Asylum System (CEAS), Presidency Conclusions of 15-16 October 1999, Council Doc. SN 200/99. Available at: <http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm>. See also: *Communication from the Commission to the Council and the European Parliament. Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, 22 November 2000, COM/2000/0755 final; available at: <http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2000/com2000_0755en01.pdf>; and the 2004 *Hague Programme on Strengthening Freedom, Security and Justice in The European Union*, 4-5 November 2004, Annex 1 to the Presidency Conclusions (14292/04); available at: <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf>.

Constitution reflects this process by integrating asylum and refugee measures into the mainstream of Union policy-making although as an area of shared competence.⁶

The normative consequences of the transfer of powers to the Union in refugee and asylum policy has been masked by the principal method of legal integration adopted: harmonisation by the adoption of minimum standards.⁷ However, the Union plans to replace this system based on minimum standards by a ‘common procedure and uniform status for persons benefiting from asylum or subsidiary protection before the end of 2010.’⁸ If this plan is implemented, which is to some extent dependent on the enlarged competences in this area provided in the Constitution, the role of the Union in the internal and external aspects of refugee and asylum policy will be correspondingly strengthened. In the context of this extension of Union competences, the recognition and effective implementation of international norms for the protection of refugees and asylum seekers in the Union’s legal order is critical to guaranteeing the rights of those seeking protection.

In the exercise of its refugee and asylum powers, the Union has been under sustained pressure from Member States to adopt measures restrictive of the rights both of asylum seekers and those seeking subsidiary protection.⁹ The sources and normative scope of the legal constraints under which the Union operates therefore justify careful analysis to determine how far the Union’s action is compatible not only with its rhetoric on fundamental rights protection but also international norms. This Chapter applies the methodology set out in Chapter one to a case study based on measuring the justice of the refugee and asylum component of the AFSJ by reference to the

⁶ Article I-14(2)(j) of the Constitution. See generally Sections 6.2.8 and 6.2.9 of Chapter six.

⁷ See for an analysis of the methods of legal integration in the context of migration control policy: F. Pastore, ‘Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System’, in Walker (ed.), *Europe’s Area of Freedom, Security and Justice* (Oxford, OUP, 2004), pp. 89-142, at pp. 104-107.

⁸ *The Hague Programme: Ten priorities for the next five years: The Partnership for European renewal in the field of Freedom, Security and Justice*, 10 May 2005, COM/2005/184 final, at p. 8.

⁹ See: Martin Kjørsum, ‘Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?’ (2002) 24 *Human Rights Quarterly*, pp. 513-536; and Guild, above n. 4. Subsidiary protection here refers to those who do not benefit from the protection of the Refugee Convention but may be protected under Article 3 ECHR as they face a risk of ill-treatment if returned to their home state. For detailed analysis, see Jane McAdam, ‘The European Union proposal on subsidiary protection: An Analysis and Assessment’, *New Issues in Refugee Research*, Working Paper No. 74, December 2002, UNHCR, Evaluation and Policy Analysis Unit. Available on the UNHCR website at: <<http://www.unhcr.ch>>. Documents on the UNHCR website are not further referenced.

principle of *non-refoulement*.¹⁰ The principle of *non-refoulement* as determined by international fundamental rights standards has been selected because it is an essential component of the protection of the fundamental rights of refugees and asylum seekers. In the context of the war against terrorism, the prohibition against *refoulement* provides an essential mechanism for deterring states from transferring suspected terrorists to countries where they are subject to interrogation under torture or holding them accountable for violations of the prohibition.¹¹

The Chapter is divided into three sections. The first section examines the principle of *non-refoulement* in international law with specific reference to international instruments of particular relevance to the Union and Member States. It focuses on the treatment in those instruments of five key issues which provide the basis for the subsequent assessment of the conformity of Union measures with international standards on *non-refoulement*: *non-refoulement* as an absolute principle; the ‘accountability’ or ‘protection’ theory; indirect *refoulement*; non-admittance at the frontier as *refoulement*; and *non-refoulement* and extradition. The second section examines the status of the principle of *non-refoulement* in Union law. Firstly, it analyses the protection afforded to the principle as a fundamental right in Union law by application of the general principles of law doctrine, as confirmed in Article 6(2) TEU, by Article 63(1) EC Treaty, and by Articles 4 and 18 of the Charter. Secondly, it analyses refugee and asylum measures of primary and secondary Union law for their conformity with the principle of *non-refoulement*. The third section consists of a study of the 2004 Refugee Qualification and Status Directive (RQSD)¹².

¹⁰ ‘*Non-refoulement* encompasses any measure attributable to the state that may lead to the return of the asylum seeker or refugee to the frontier of territories where his life or freedom could be threatened or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect *refoulement*.’: Dallal Stevens, *UK Asylum Law and Policy* (London, Thomson, 2004), at pp. 140-141. This definition is based on the UNHCR sponsored *Global Consultations on International Protection, Summary conclusions- the principle of non-refoulement* (Cambridge, 9-10 July 2001). Available on the UNHCR website. For a similar exercise in reviewing Council practice in applying international fundamental rights obligations in respect of JHA measures in the fields of data protection, telecommunications interception, trial rights and the *non bis in idem* principle see: Peers, in Alston (ed.), above n. 5, at pp. 175-186.

¹¹ For evidence of this practice, see Robert Fisk, ‘We are all complicit in these vile acts of torture - but what can we do about it?’, *The Independent* of 18 June 2005. Available at: <<http://news.independent.co.uk/world/fisk/story.jsp?story=647669>>.

¹² Council Directive 2004/83/EC on minimum standards for the qualification and status of refugees third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12 (RQSD).

8.2 THE PRINCIPLE OF *NON-REFOULEMENT* IN INTERNATIONAL LAW

8.2.1 INTRODUCTION

‘Non-refoulement is a concept which prohibits States from returning a refugee or asylum-seeker to territories where there is a risk his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.’¹³

While the exact scope of the principle in international law is debated,¹⁴ it is of primary importance in the protection of refugees and asylum seekers from expulsion by the state where they are seeking refuge directly or indirectly to another state where their fundamental rights are threatened with violation. In the context of the ‘war on terror’ the principle has provided an essential bulwark against the temptation for a state to rid itself of a suspected terrorist regardless of the potential harmful consequences of such expulsion on the individual concerned.¹⁵

This section analyses the scope and content of the principle of *non-refoulement* in international law. In particular, a comparative analysis is made of the following international instruments: Article 14 of the Universal Declaration of Human Rights (UDHR);¹⁶ Article 3(1) of the 1967 General Assembly Declaration on Territorial Asylum (1967 Territorial Asylum Declaration);¹⁷ Article 33 of the Refugee Convention;¹⁸ Article 7 of the International Covenant on Civil and Political Rights

¹³ Legal opinion of 20 June 2001 provided for the UNHCR by E. Lauterpacht and D. Bethlehem on *The Scope and Content of the Principle of Non-Refoulement*, at para. 2. Available on the UNHCR website and in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge, CUP, 2003), pp. 87-177.

¹⁴ See Guy Goodwin-Gill, *The Refugee in International Law* (2nd edn.) (Oxford, OUP, 1996), at pp. 134-137; J. Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991); J. Hathaway, *The Rights of Refugees Under International Law* (Cambridge, CUP, 2005); and K. Röhl, ‘Fleeing violence and poverty: non-refoulement obligations under the European Convention of Human Rights’ *New Issues in Refugee Research*, UNHCR Working Paper No. 111 of January 2005; available on the UNHCR website.

¹⁵ See R. Bruin and K. Wouters, ‘Terrorism and the Non-Derogability of Non-Refoulement’ (2003) 15 *IJRL*, pp. 5-29; and O. Okafor and P. Okoronkwo, ‘Re-configuring non-refoulement? The Suresh decision, ‘security relativism’, and the international human rights imperative’ (2003) 15 *IJRL*, pp. 30-67.

¹⁶ GA Res. 217A (III), UN Doc. A/810 at 71 (1948). Art. 14(1) UDHR: ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’ Art. 14(2) UDHR: ‘This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.’

¹⁷ Article 3(1) of the 1967 Territorial Asylum Declaration, while not in itself legally binding, contains the principle of *non-refoulement*: ‘No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks

(ICCPR);¹⁹ Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);²⁰ and Article 3 of the European Convention on Human Rights (ECHR)²¹ (collectively referred to as the International Instruments). The International Instruments are not an exhaustive list of international instruments which have provisions of relevance to the principle of *non-refoulement*.²² However, the International Instruments are considered to be of the most direct relevance to the Union on the basis of the participation of the Member States in their

asylum, expulsion or compulsory return to any state where he may be subjected to persecution.’: GA. Res. 2312 (XXI), 22 UN GAOR Supp. (No. 16) at 81, UN Doc. A/6716 (1967). ‘This ‘non-rejection’ terminology, first used in the 1933 Convention [relating to the International Status of Refugees], can be regarded as an important extension of the principle of *non-refoulement*’: Stevens, above n. 10, at p. 137.

¹⁸ 1951 Convention relating to the Status of Refugees, signed 28 July 1951, in force 22 April 1954: 189 UNTS 137 (Refugee Convention). Art. 33(1): ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

Art. 33(2): ‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’

¹⁹ International Covenant on Civil and Political Rights, adopted 16 December 1966, in force 23 March 1976: 999 UNTS 171 (ICCPR). Art. 7: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

²⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, in force 26 June 1987: 1465 UNTS 85 (CAT). Art. 3(1): ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ Art. 3(2): ‘For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’

²¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, in force 3 September 1953: ETS 5 (ECHR). Art. 3: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

²² The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed 26 November 1987, in force 1 February 1989, ETS 126, is not considered separately from the ECHR since its Preamble specifies that Article 3 ECHR is the normative standard by which the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment measures alleged violations. Article 3 of the 1989 Convention on the Rights of the Child (CRC), UN GA Res. 44/25 of 20 November 1989, in force 2 September 1990, 28 ILM 1448, and to which all Member States are signatories, requires the best interests of the child to be a ‘primary consideration’ in all actions concerning children and has been relied upon by the Swedish courts in determining refugee claims. See McAdam, above n. 9, at p. 4, n. 24. Further conventions of relevance include: the 1954 Convention relating to the Status of Stateless Persons; the 1961 Convention on the Reduction of Statelessness; the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). For references to these Conventions see Annex 1. The 1984 *Cartagena Declaration on Refugees* adopted by ten Latin American States is also an important source of international refugee law: OAS/Ser. I/V/II.66, doc. 10, rev. 1, pp. 190-193. For a list of international instruments containing standards establishing the principle of *non-refoulement*: see Lauterpacht and Bethlehem: above n. 13, at paras. 4-10. For international agreements of general relevance to refugee and asylum law, see Goodwin-Gill, above n. 14, at pp. 296-313.

drafting and adoption.²³ The status of the principle of *non-refoulement* as a rule of customary international law and as a peremptory norm is also considered.²⁴

8.2.2 THE SCOPE AND CONTENT OF NON-REFOULEMENT

8.2.2.1 Introduction

This Section analyses the scope and content of the principle of *non-refoulement* in the International Instruments in five defined areas: the absolute character of the principle; the ‘accountability’ or ‘protection’ theory as its basis; indirect expulsion; rejection at the frontier; and the relationship between extradition and *non-refoulement*. Each area has been selected on the basis that it is subject to controversy as to the scope of protection in international law and is of particular relevance to determining the legality of anti-terrorist measures adopted or proposed in the aftermath of 11 September 2001 and subsequent terrorist attacks. This analysis provides the basis for the assessment by reference to the International Instruments of the normative status of the principle of *non-refoulement* in both primary and secondary Union law in Sections 8.3 and 8.4.

8.2.2.2 Non-Refoulement as an Absolute Principle

A distinction may be drawn between the International Instruments that prohibit *refoulement* in absolute terms and those that provide for exceptions. The prohibition under Article 3 ECHR is absolute²⁵ and is not dependent on the status or conduct of the person seeking protection from expulsion, deportation or extradition.²⁶ Article 3 CAT contains an absolute prohibition on removal of a person to another state where there are substantial grounds for believing that person would be in danger of torture.²⁷

²³ Annex 1 to the Opinion of Lauterpacht and Bethlehem lists the ‘Status of Ratifications of the Key International Instruments which include a *Non-Refoulement* Component’, above n. 13. The Member States are all party to the Refugee Convention, the ICCPR, the ECHR and the CAT.

²⁴ See Section 2.3 of Chapter two for an analysis of customary international law as a source of international fundamental rights law.

²⁵ No derogation may be made from Article 3 under Article 15 ECHR and, by implication, no reservation may be made in respect of Article 3 under Article 57 ECHR. See Michael K. Addo and Nicholas Grief, ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’ (1998) 9 *EJIL*, pp. 510-524.

²⁶ See *Chahal v UK* (1996) 23 EHRR 413 and *Ahmed v Austria* (1997) 24 EHRR 278.

²⁷ Article 3 CAT only refers to the danger of being subjected to torture while Article 3 ECHR also refers to ‘inhuman or degrading treatment or punishment’. Article 7 ICCPR refers to torture or to ‘cruel, inhuman or degrading treatment or punishment’. In practice this distinction has not prevented the CAT Committee from developing a substantial case law on Article 3 in the context of protection

In *Paez v Sweden*, the CAT Committee held even if the refusal to grant asylum to the applicant was justified under Article 1F of the Refugee Convention:

‘The Committee considers that the test of article 3 of the Convention is absolute ... The nature of the activities in which the person engaged cannot be a material consideration when making a determination under article 3 of the Convention.’²⁸

Article 7 ICCPR is also absolute in the sense it is non-derogable²⁹ and no restrictions are permitted.³⁰ The procedural rights against expulsion in Article 13 ICCPR are, however, subject to exception ‘where compelling reasons of national security otherwise require’. Under Article 33(1) of the Refugee Convention, protection will be forfeited if the refugee loses their status as a refugee³¹ or is subject to Article 33(2).³² Article 14(2) of the UNDHR also removes the right to invoke the right to seek and enjoy asylum from persecution under Article 14(1) ‘in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.’ Article 1(2) of the 1967 Territorial

against *refoulement*: see J. Rehman, *International Human Rights Law: A Practical Approach* (Harlow, Longman, 2003), at pp. 416-418.

²⁸ Communication No. 39/96, CAT/C/18/D/39/1996 (1997), at para. 14.5.

²⁹ Article 4(2) ICCPR. See: HRC *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001: U.N. Doc. CCPR/C/21/Rev. 1/Add. 11 (2001). On 23 December 1988 the UK Government derogated from its obligations under Article 9 ICCPR pursuant to Article 4(3) ICCPR in respect of certain provisions of the prevention of terrorism legislation then in force. A copy of the letter of derogation is available at:

<<http://www.law.qub.ac.uk/humanrts/ehris/ni/derog/derogiccpr.htm>>. This derogation has now lapsed. The UK subsequently made a derogation in December 2001 in respect of Article 9(3) ICCPR on the grounds a public emergency existed following the events of September 11 2001: see for details: <<http://www.dca.gov.uk/hract/ngo/reviews/appendix6.pdf>>.

³⁰ UN HRC General Comment No. 24 of 4 November 1994, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*. CCPR/C/21/Rev.1/Add.6, at para. 8. Although the validity of General Comment No. 24 has been challenged, this seems unlikely to extend to its prohibition on reservations to Article 7 ICCPR on the basis that a reservation would contravene Article 19(1)(c) of the 1969 VCLT. See generally: S. Joseph, J. Schultz and M. Castan, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn.) (Oxford, OUP, 2004), at pp. 797-819.

³¹ Articles I(C), (D), (E) and (F) of the Refugee Convention list the grounds on which a refugee may be denied or lose the protection of the Convention. See for detailed analysis of Articles 1(F)(a), 1(F)(c) and 1(F)(b): J. Hathaway and C. Harvey, ‘Framing Refugee Protection in the New World Disorder’, (2001) 34 *Cornell Int’l L.J.*, pp. 257-320, at pp. 266-286.

³² Art. 33(2) provides: ‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’ See for analysis of Article 33(2), Hathaway and Harvey, above n. 31, at pp. 286-296.

Asylum Declaration expands on the grounds for non-application of Article 14(1) UNDHR by providing:

‘The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes’.

Article 3(2) of the 1967 Territorial Asylum Declaration only permits exception to the *non-refoulement* obligation in Article 3(1) ‘for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons’. In such a case, Article 3(3) requires the state availing of the exception to consider the possibility of permitting the persons concerned the opportunity of going to another state.

8.2.2.3 *The Accountability or Protection Theory*

The second area relates to the extent to which the relevant provision of the International Instruments has been construed as prohibiting *refoulement* to a territory only where the state authorities in that territory can be held accountable for a threatened violation of a protected right (the accountability theory) or as prohibiting *refoulement* to a territory in any situation where the protected right of an asylum seeker is threatened in that territory independently of state involvement or acquiescence (the protection or persecution theory).

The most controversial instance of this difference in interpretation of the basis of the principle of *non-refoulement* is in respect of Article 1A(2) of the Refugee Convention where a minority of signatory states, and notably Germany and France, have adopted the accountability theory in respect of determining refugee status whereas the majority of signatory states, including the UK, have adopted the protection theory.³³ This difference in interpretation has given rise to specific

³³ Article 1A(2) provides: ‘A. For the purposes of the present Convention, the term "refugee" shall apply to any person who ... (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’ A lucid description of the accountability and

problems in the context of the 1990 Dublin Convention³⁴ and the Dublin II Regulation³⁵ under which there may be an obligation to return an asylum seeker to another Member State which adopts a more restrictive interpretation of Article 1A(2) of the Refugee Convention than the returning state.³⁶ Indeed, one of the weaknesses of the Refugee Convention is the lack of an authoritative tribunal to settle definitively its meaning.³⁷

Article 1(1) CAT refers expressly to a requirement that the torture be inflicted ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’ In this context, Articles 1 and 3 CAT have been interpreted by the CAT Committee, referring to the ECtHR decision of *Ahmed v Austria*,³⁸ to prohibit *refoulement* to Somalia since there was a danger of the applicant being subjected to torture at the hands of militia in Mogadishu who *de facto* exercised governmental prerogatives.³⁹ However, in *G.R.B. v Sweden* the CAT Committee held Articles 1 and 3 CAT did not prohibit *refoulement* to Peru since the Peruvian state

protection theories, and countries which adopt them, is given by Lord Hope of Craighead in *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489; reproduced in (2001) 13 *IJRL*, pp. 174-201, at p. 177. The case is commented on by H el ene Lambert, ‘The Conceptualization of ‘Persecution’ by the House of Lords: *Horvath v. Secretary of State for the Home Department*’ (2001) 13 *IJRL*, pp. 16-31. See also: *R. v. Secretary of State for the Home Department, ex p. Adan* and *ex p. Aitseguer* [2001] 2 AC 477; and *Adan v Secretary of State for the Home Department* [1999] 1 AC 293. For a summary of the construction of the term ‘persecution’ in the Refugee Convention in other signatory states see the submission by UNHCR in *T.I. v. United Kingdom* (2000) 12 *IJRL* 244, at paras. 19-20.

³⁴ *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities* of 15 June 1990, in force 1 September 1997: [1997] OJ C 254/1.

³⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1.

³⁶ This situation arose in *Adan and Aitseguer*, above n. 33, where the UK authorities were seeking to return Adan to Germany and Aitseguer to France under the 1990 Dublin Convention. Under German and French asylum law this may have resulted in the return of Adan and Aitseguer to Somalia and Algeria respectively in circumstances which would have been in breach of the interpretation of Article 1(A)2 of the Refugee Convention adopted by the English courts. The House of Lords decided in those circumstances return was prohibited under Section 2(2) of the 1996 Asylum and Immigration Act which incorporated the *non-refoulement* obligations in the Refugee Convention. See Section 8.3.3.4. below for analysis of the 1990 Dublin Convention and Dublin II Regulation and *non-refoulement*.

³⁷ The UNCHR *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) to some extent fulfils this role but lacks binding authority. Article 38 of the Refugee Convention provides for a dispute between the parties to be referred to the ICJ but this jurisdiction has never been exercised. The ECtHR has specifically disclaimed such a role: ‘it is not its function to examine asylum claims or to monitor the performance of Contracting Parties with regard to their observance of their obligations under the Geneva Convention on Refugees.’ : *T.I. v UK*, above n. 33, at p. 262. See Tom Clark, ‘Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation’ (2004) 16 *IJRL*, pp. 584-608.

³⁸ Cited above n. 26.

³⁹ *Elmi v Australia*, Communication No. 120/98, CAT/C/22/D/120/1998 (1999). See Lambert, above n. 33, at p. 23.

continued to exercise effective sovereignty over the whole territory notwithstanding the actions of the ‘Shining Path’ guerrillas.⁴⁰ The construction of Article 7 ICCPR by the HRC is likely to be consistent with the case law of the CAT Committee.⁴¹ Article 3(1) of the 1967 Territorial Asylum Declaration simply refers to ‘persecution’ without imposing any restriction as to the identity of the agent of persecution.

As regards the obligation of *non-refoulement* under Article 3 ECHR, The ECtHR has adopted the protection theory:

‘The Court’s case-law further indicates that the existence of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials, or from the consequences to health from the effects of serious illness’.⁴²

However, in *HLR v France* the ECtHR qualified the scope of the protection against *refoulement* under Article 3 ECHR: ‘However, it must be shown that the risk is real and that the authorities of the receiving state are not able to obviate the risk by providing appropriate protection.’⁴³ In the case of countries, such as the UK, which have adopted the protection theory in interpreting Article 1A(2) of the Refugee Convention there is unlikely to be any substantial difference in a *non-refoulement* claim under Article 3 ECHR and under the Refugee Convention.⁴⁴

⁴⁰ Communication No. 83/97, CAT/C/20/D/83/1997 (1998). See Joseph, Schultz and Castan, above n. 30, at paras. 9.13 and 9.15.

⁴¹ See for this argument: Joseph, Schultz, and Castan, above n. 30, at para. 9.02.

⁴² *T.I. v UK*, above n. 33, at pp. 259-260.

⁴³ *HLR v France* (1997) 26 EHRR 29, at para. 40. See also *D. v UK* (1997) 24 EHRR 423; and *T.I. v UK*, above n. 33, at pp. 259-260.

⁴⁴ See in this sense *R. v. Secretary of State for the Home Department ex p. Bagdanavicius* [2005] UKHL 38, at para. 30. The only judgment, delivered by Lord Brown of Eaton-under-Heywood, contains a detailed analysis of the ECtHR’s case law on the scope of the *non-refoulement* obligation under Article 3 ECHR. In particular, Lord Brown rejects the applicant’s argument that the harm threatened on his return to Lithuania originating from non-state actors was in itself grounds for refusing expulsion under Article 3 ECHR but rather found that there had to be a risk of treatment contrary to Article 3 ECHR which required a failure by the state to provide reasonable protection against such harm: *ibid.*, at para. 24.

8.2.2.4 Indirect Refoulement

The third area of analysis is the scope of the protection against *non-refoulement* in respect of forced removal to a third party state where there is a risk of subsequent removal to a prohibited state. Article 3 ECHR, read in conjunction with Article 1 ECHR,⁴⁵ guarantees an individual protection against extradition, expulsion, or deportation from the territory of a signatory state to another state if ‘substantial grounds had been shown for believing that the person concerned, if expelled, faced a real risk of being subject to torture or to inhuman or degrading treatment or punishment in the receiving country’.⁴⁶ The ECtHR in *T.I. v UK* indicated that the scope of protection under Article 3 ECHR included the situation where a person is removed to another state, even if there is no risk of treatment contrary to Article 3 ECHR in that state, if that removal is ‘one link in a possible chain of events which might result’ in the person’s return to a state where it is alleged he would face the real risk of such treatment.⁴⁷

The CAT Committee has endorsed the view that the phrase ‘another State’ in Article 3 CAT includes reference to a transit state where a person runs a real risk of being expelled or returned to a prohibited state.⁴⁸ Article 7 ICCPR is likely to be interpreted in the same sense.⁴⁹ While Article 33(1) of the Refugee Convention does not explicitly address indirect *refoulement*, Lauterpacht and Bethlehem consider it is covered:

⁴⁵ Article 1 ECHR requires each signatory to ‘secure to everyone within their jurisdiction the rights and freedoms defined in Section of this Convention’.

⁴⁶ *Al-Adsani v UK* (2002) 34 EHRR 11, at para. 39. See also *Soering v UK* (1989) 11 EHRR 439. See generally, Ralf Alleweldt, ‘Protection against expulsion under Article 3 of the European Convention on Human Rights’ (2002) 4 *EJIL*, pp. 360-376.

⁴⁷ Cited above at n. 31, at p. 260. In *T.I.*, above n. 33, the ECtHR held the application to be manifestly unfounded since there was no likelihood of the applicant being returned by the German authorities to Sri Lanka.

⁴⁸ See CAT General Comment No. 1 of 21 November 1997: *Implementation of Article 3 of the Convention in the context of Article 22: A/53/44*, annex IX, at para. 2. Available on the UNHCR website. See also *Korban v Sweden*, Communication No. 88/97, CAT/C/21/D/88/1997 (1998), at para. 7; and *Tala v Sweden*, Communication No. 43/1996, CAT/C/17/D/43/1996 (1996), at para. 11. In *A..S. v. Sweden*, the CAT Committee stated: ‘the Committee is of the view that, in the prevailing circumstances, the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to Iran or to any other country where she runs a risk of being expelled or returned to Iran’: Communication No. 149/1999, CAT/C/25/D/149/1999 (2001), at para. 9.

⁴⁹ The HRC has, in the context of the right to life protected under Article 6 ICCPR, adopted such a formulation: ‘If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.’: *Kindler v Canada*, Communication No. 470/91, CCPR/C/48/D/470/1991 (1993), at para. 13.1.

‘Having regard to these factors, the prohibition of *refoulement* in Article 33(1) of the 1951 Convention must be construed as encompassing the expulsion, return or other transfer of a refugee or asylum-seeker both to a territory where he or she may be at risk directly and to a territory where they may be at risk of subsequent expulsion, return or transfer to another territory where they may be at risk’.⁵⁰

8.2.2.5 *Non-Admittance at the Frontier*

The extent to which a person is guaranteed a right of entry to a state if refusal to enter would result in a risk either of persecution or a risk of torture or cruel, inhuman or degrading treatment or punishment has given rise to conflicting standards under the International Instruments. Lauterpacht and Bethlehem argue Article 33(1) of the Refugee Convention encompasses at least a right to limited protection against rejection:

‘As regards rejection, or non-admittance at the frontier, the 1951 Convention and international law generally do not contain a right of asylum. This does not mean, however, that States are free to reject at the frontier, without constraint, those who have a well-founded fear of persecution. What it does mean is that, where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge. No other analysis, in our view, is consistent with the terms of Article 33(1).’⁵¹

However, the majority view is that Article 33 (1) of the Refugee Convention only applies to those asylum seekers who have entered the territory of a signatory state, whether legally or illegally and not to those rejected at the frontier.⁵²

The extent to which Article 3 ECHR offers protection against non-admittance or rejection at the frontier in the case of a risk of torture or inhuman or degrading

⁵⁰ Lauterpacht and Bethlehem, above n. 13, at para 121.

⁵¹ *Ibid.*, at para. 76. This construction of the principle of *non-refoulement* under the Refugee Convention is controversial: see Stevens, above n. 10, at pp. 138-141.

⁵² See the judgment of Lord Bingham in *R. (ex p. European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and Another* [2004] UKHL 55, at para. 17. The decision in that case was based on the narrower ground that Article 33(1) of the Refugee Convention did not apply since the applicants had not left the jurisdiction of the country of their nationality (the Czech Republic).

treatment or punishment is unresolved.⁵³ In *Jabari v Turkey* the ECtHR reiterated the right of contracting states:

‘...as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. Moreover, the right to political asylum is not contained in either the Convention or its Protocols’.⁵⁴

However, in *Jabari* itself the ECtHR held deportation of the applicant from Turkey to Iran would constitute a violation of Article 3 ECHR since there was a real risk of her being subjected to treatment contrary to Article 3 on the grounds of adultery.⁵⁵ While the case law of the ECtHR has so far been concerned with the issue of expulsion, there seems, in the light of the absolute character of Article 3 ECHR, no valid reason to distinguish between protection against expulsion and non-admittance in circumstances where the risk to the individual is the same.

As regards Article 3 CAT, the CAT Committee has determined:

‘...its authority does not extend to a determination of whether or not the claimant is entitled to asylum under the national laws of a country or can invoke the protection of the Geneva Convention relating to the Status of Refugees. Under Article 3 of the Convention, the Committee must decide whether expulsion or extradition might expose an individual to the risk of being tortured.’⁵⁶

However, although Article 3 CAT only specifically refers to expulsion, return (*refoulement*) or extradition, in *Aemei v Switzerland* the CAT Committee held that while a finding of a violation of Article 3 CAT was declaratory and did not require a state to modify its decision concerning the grant of asylum by the national authorities, it did require them to ‘take all necessary measures’ to comply with Article 3 which

⁵³ See: K. Hailbronner, ‘Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ in (1985/1986) 26 *Virginia Journal of International Law*, pp. 857-896, at p. 893; and Stevens, above n. 10, at pp. 151-153. In the *Roma* case, the House of Lords rejected a claim based on a breach of the ECHR on the basis that the applicants were not within the jurisdiction of the UK authorities within the meaning of Article 1 ECHR or, even if that were the case, there had been no violation of either Article 2 or 3 ECHR: above n. 52, at para. 73.

⁵⁴ ECHR 2000-VIII, p. 308, at para. 38.

⁵⁵ *Ibid.*, at para. 42.

⁵⁶ *X v. Spain*, Communication No. 23/1995, CAT/C/15/D/23/1995 (1995), at para. 7.3.

might include ‘a decision to admit the applicant temporarily’.⁵⁷ This reasoning indicates that Article 3 CAT may also include a right of admittance for the purpose of temporary protection.

Article 7 ICCPR, although offering in principle wider substantive protection than Article 3 CAT since it applies not only to torture but also cruel, inhuman or degrading treatment, is likely to be construed in line with the jurisprudence on Article 3 CAT. Indeed, *General Comment No. 20* of the HRC on the principle of *non-refoulement* under Article 7 ICCPR tracks Article 3 CAT insofar as it refers to the protection of individuals from the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their ‘extradition, expulsion or refoulement’.⁵⁸

Finally, it has been argued that the customary international law principle of *non-refoulement* both in the context of refugees, which corresponds largely to that under Article 33 of the Refugee Convention, and in the more general human rights context, extends to non-admittance at the frontier.⁵⁹ In *European Roma Rights Centre*,⁶⁰ the House of Lords decided that there was no customary rule of international law requiring British customs officers conducting pre-clearance operations at Prague airport on persons seeking entry to the UK to consider the merits of a claim for asylum.⁶¹ However Lord Bingham in that case did provide support for the narrower rule:

‘There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate

⁵⁷ Communication No. 34/95, CAT/C/18/D/34/1995 (1997), at para. 11.

⁵⁸ *General Comment No. 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7)*, 10 March 1992, at para. 9.

⁵⁹ Lauterpacht and Bethlehem, above n. 13, at paras. 218(b) and 252. Lauterpacht and Bethlehem’s definition of the principle of *non-refoulement* in the human rights context offers more extensive protection since it is not subject to exception: *ibid.*, at para. 252.

⁶⁰ Above n. 52.

⁶¹ The applicants in the *Roma* case relied on paragraphs 61 and 67 of the Opinion of Lauterpacht and Bethlehem, above n. 13, in support of such a customary rule of law. However, Lord Bingham concluded that their views were not supported by state practice: above n. 52, at para. 27.

enquiry into the persecution of which he claims to have a well-founded fear.’⁶²

8.2.2.6 *Non-Refoulement and Extradition*

The complex interrelationship between extradition and the principle of *non-refoulement* provides a example of an area where the International Instruments provide differing standards of protection.⁶³ It is established that notwithstanding the absence in Article 33(1) of the Refugee Convention of an express reference to extradition, the prohibition on *refoulement* extends to extradition.⁶⁴ The prohibition against *refoulement* in Article 3(1) CAT expressly refers to extradition and the case law of the HRC has established the prohibition in Article 7 ICCPR extends to extradition.⁶⁵ The ECtHR has reached the same conclusion in respect of Article 3 ECHR.⁶⁶ The principle distinction to be drawn between protection against extradition if it amounts to *refoulement* under the Refugee Convention and under the ECHR/CAT/ICCPR is that protection under the latter conventions admits of no exception.

However, the prohibition against *refoulement*, whether based on treaty or customary international law, may come into conflict with principles of international law requiring extradition. While there is no clearly established obligation to extradite under customary international law,⁶⁷ there is a growing recognition in international treaties, both bilateral and multilateral, that certain crimes require extradition:

‘With regard to certain offences, the legal basis for extradition can be found in international law. This is the case, in particular, with regard to war crimes and certain crimes against humanity, acts considered to be terrorism and other types of transnational crime.’⁶⁸

⁶² *Ibid*, at para. 26. This view was *obiter* since the applicants had not presented themselves at the frontier of the UK.

⁶³ For a detailed study see: Sibylle Kapferer, *The Interface between Extradition and Asylum*, UNHCR, Legal And Protection Policy Research Series (2003). Available on the UNHCR website.

⁶⁴ *Ibid*, at para. 223. See in support of this conclusion: Lauterpacht and Bethlehem, above n. 13, at paras. 71-75.

⁶⁵ See *Chitat Ng v. Canada*, Communication No. 469/1991, CCPR/C/49/D/469/1991 (1994), at para. 6.2. The procedural guarantees against expulsion in Article 13 ICCPR also apply to extradition: *Kindler v Canada*, above n. 49, at para. 6.6.

⁶⁶ See *Soering v UK*, above n. 46, at para. 88.

⁶⁷ ‘Customary international law will neither force nor prevent extradition, ...’: Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London, Thomson, 2003), at p. 46.

⁶⁸ Kapferer, above n. 63, at para. 21. In paras. 23-31, Kapferer details the various international instruments requiring or permitting extradition.

In the event of a conflict between the obligation to extradite under international law and the principle of *non-refoulement*, it has been persuasively argued that the principle of *non-refoulement* prevails on the basis either it is a peremptory norm of international law or by application of Article 103, in combination with Articles 55(c) and 56, of the UN Charter.⁶⁹

8.2.3 NON-REFOULEMENT AS A PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW AND *JUS COGENS*

The principle of *non-refoulement* is generally accepted to be a rule of customary international law.⁷⁰ It has been argued that the principle of *non-refoulement* has also acquired the status of a peremptory rule of international law. The UNHCR in its submission to the ECtHR in the case of *T.I. v United Kingdom* argued:

‘In view of its general widespread acceptance at both the international and regional levels, and based on the consistent practice of States with the recognition that the principle has normative character, UNCHR considers that *non-refoulement*, as part of the international system for refugee protection, constitutes a rule of international customary law which is progressively acquiring the character of a peremptory rule of international law’.⁷¹

If *non-refoulement* is established as a peremptory norm of international law, no reservations to provisions of international treaties giving effect to the principle may be permitted.⁷²

⁶⁹ Kapferer, above n. 63, at paras. 229-232.

⁷⁰ Lauterpacht and Bethlehem concluded the principle of *non-refoulement* is a principle of customary international law, above n. 13, at para. 216. However, a more restrictive view is adopted by Hailbronner, above n. 53, at pp. 866-873. For a discussion of the status of the principle of *non-refoulement* both under the Refugee Convention and the CAT as a principle of customary international law, see Goodwin-Gill, above n. 14, at pp. 134-137.

⁷¹ Above n. 33, at para. 7. The ECtHR did not rule on this issue in its judgment. Shelton refers in support of such a norm to the amendment to the Swiss Constitution prohibiting constitutional amendments violating peremptory norms of international law following a decision of the *Conseil Fédéral*, ‘International Law and “Relative Normativity”’: in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 145-172, at p. 157. As regards the prohibition against torture, the ECtHR in *Al-Adsani* accepted that the prohibition ‘has achieved the status of a peremptory norm in international law’ but that the right of immunity of a state from civil suit in the courts of another state was not overruled by an allegation of torture: above n. 46, at paras. 60-61.

⁷² In respect of the ICCPR, see HRC *General Comment No. 24* of 4 November 1994, above n. 30. For commentary see Joseph, Schultz and Castan, above n. 30, at pp. 604-621; and Konstantin Korkelia, ‘New Challenges to Reservations under the International Covenant on Civil and Political Rights’ (2002) 13 *EJIL*, pp. 437-477.

8.3 THE PRINCIPLE OF *NON-REFOULEMENT* IN UNION LAW

8.3.1 INTRODUCTION

This section examines the normative status of the principle of *non-refoulement* in Union law. In the absence of Union accession to the relevant international fundamental rights treaties,⁷³ general recognition of the principle of *non-refoulement* in Union law is effected through one of the indirect mechanisms for the recognition of international fundamental rights in Union law, and in particular the general principles doctrine,⁷⁴ as a binding rule of customary international law or *jus cogens*,⁷⁵ as a protected right under Article 63(1) EC Treaty, or under the Charter.⁷⁶ The first part of this Section examines how far these mechanisms provide effective recognition to the principle of *non-refoulement*. The second part of this Section examines measures of Union primary and secondary law which raise specific issues of recognition and conformity with different aspects of the standards set by the International Instruments.

8.3.2 *NON-REFOULEMENT AS A FUNDAMENTAL RIGHT*

8.3.2.1 *General Principles of Union Law*

The International Instruments are recognised as general principles of Union law insofar as they qualify as fundamental rights treaties on which the Members States have collaborated or of which they are signatories.⁷⁷ The ECJ has referred to the

⁷³ As discussed in Section 4.2.1 of Chapter four, Union membership of international fundamental treaties faces a number of obstacles both internal and external to the Union. However, the mandate for Union accession to the ECHR in Article I-9(2) of the Constitution shows that such technical obstacles are considered surmountable.

⁷⁴ See Section 4.2 of Chapter four. As discussed in that section neither the *International Fruit Company* doctrine nor Article 307 EC Treaty provide an effective mechanism for recognition in Union law of international fundamental rights standards based on treaties. In consequence they are not considered further in this context.

⁷⁵ See Sections 4.3 and 4.4 of Chapter four.

⁷⁶ Although the Charter rights and principles are currently recognised as a source for general principles of Union law, Article I-9(1) of the Constitution provides for their incorporation into primary Union law in Part II of the Constitution. In view of its uncertain normative status, which is explored in Section seven of Chapter four, the Charter is considered separately.

⁷⁷ Case C-7/98, *Krombach v. Bamberski* [2000] ECR I-1935, at para. 25. Article 6(2) TEU has been construed by the ECJ as confirming its existing case law: see Section 4.2.4.1 of Chapter four.

ECHR and the ICCPR.⁷⁸ Since the CAT and the Refugee Convention have been signed and ratified by all the Member States they also qualify as a source of general principles of Union law. As a result of the extension of the Union's competences in the field of asylum and refugee policy, one would anticipate that a broader range of treaties will be referred to by the ECJ. However, the general principles doctrines has a number of drawbacks as an effective mechanism for the recognition of international fundamental rights derived from treaties.⁷⁹

8.3.2.2 Customary International Law and *Jus Cogens*

The International Instruments also bind the Union insofar as they constitute principles of customary international law.⁸⁰ The principle of *non-refoulement* in the UNDHR and the 1967 Territorial Asylum Declaration, notwithstanding their formal status as non-binding instruments, therefore bind the Union insofar as they reflect rules of customary international law. The Union is also bound by the principle of *non-refoulement* insofar as it constitutes a peremptory norm of international law.⁸¹

8.3.2.3 Article 63(1) EC Treaty

Article 63(1) EC Treaty requires the asylum measures adopted under that Article be in accordance with the Refugee Convention 'and other relevant treaties'.⁸² It has been argued that the effect of Article 63(1) EC Treaty is more radical than that of Article 6(2) TEU: 'Whilst Art. 6(2) EU merely requires a more or less narrow orientation towards the ECHR, Article 63(1)(1) EC demands behaviour "in accordance with" international law. The Refugee Convention thus becomes a direct

⁷⁸ For ECJ references to the ECHR, see Section 3.4.2 of Chapter three. In Case C-249/96, *Grant v South-West Trains Ltd.* [1998] I-621, the ECJ referred to the HRC's decision in *Toonen v. Australia*, Communication No. 488/1992 (4 April 1992), U.N. Doc. CCPR/C/50/D488/1992 (1994), at paras. 44-47.

⁷⁹ See Section 4.2.4 of Chapter four.

⁸⁰ 'It is well-established that conventional principles can, and frequently do, exist side-by-side with customary principles of similar content.': Lauterpacht and Bethlehem, above n. 13, at p. 62. See generally their Opinion for a detailed analysis of the 'norm-creating character' of each of the International Instruments: *ibid.*, at pp. 196-216. See Section 2.3 of Chapter two for analysis of the status of the UDHR and the UN Charter in international law.

⁸¹ See Section 4.4 of Chapter four.

⁸² Article III-266(1) of the Constitution expands on Article 63(1) EC Treaty but retains the key requirement that Union policy on asylum, subsidiary protection and temporary protection 'must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties'.

standard of decision.’⁸³ The reference to ‘other relevant treaties’ in Article 63(1) EC Treaty has to be read in the context of the phrase ‘measures on asylum’ but as discussed the range of international treaties with relevance to asylum is extensive. Moreover, unlike conventions forming part of the general principles of Union law, there is no requirement in Article 63(1) EC Treaty for the Member States to have contributed, or been signatories, to the relevant treaties, although the ECJ may consider these facts to be of importance in determining which treaties are ‘relevant’.

The restriction of the reference in Article 63(1) EC Treaty to the Refugee Convention and other relevant treaties to asylum measures within the areas specified in Article 63(1) EC Treaty is artificial since asylum and refugee issues overlap.⁸⁴ Thus although Article 63(1) EC Treaty refers generally to the adoption of measures on asylum, Article 63(1)(c) refers to the adoption of minimum standards on the qualification of nationals of third countries as refugees and Article 63(1)(d) refers to minimum standards on procedures in Member States for granting or withdrawing refugee status. Moreover, while Article 63(2) EC Treaty refers to measures on refugees and displaced persons, measures adopted under Article 63(3) EC Treaty relating to immigration policy will often raise asylum issues. Therefore, for the sake of consistency in protection, the fundamental rights protection guaranteed under Article 63(1) EC Treaty should be construed as applying to any measure adopted under Article 63 EC Treaty.⁸⁵

8.3.2.4 *The Charter and Non-Refoulement*

Notwithstanding the current uncertain legal status of the Charter,⁸⁶ the provisions of the Charter are relevant in establishing the constraints under which the Community operates in legislating under Article 63 EC Treaty in the field of refugee and asylum policy. The Commission assesses the compatibility of all legislative proposals for

⁸³ Uerpmann, ‘International Law as an Element of European Constitutional Law: International Supplementary Constitutions’ (2003) *Jean Monnet Working Paper* No. 9/03; available at: <<http://www.jeanmonnet-program.org/papers/03/030901-02.html>>, at p. 41.

⁸⁴ ‘Asylum law deals with the stage prior to the grant of refugee status; it is a vital component of refugee law, yet distinct from it.’: Stevens, above n. 10, at p. 1.

⁸⁵ See Section 8.4.2 below for this analysis applied to the RQSD.

⁸⁶ See Section 5.8.3 of Chapter five for analysis of the current status of the Charter and the effect of incorporation under Article I-9(1) of the Constitution. See also Gráinne de Búrca and Jo Beatrix Aschenbrenner, ‘European Constitutionalism and the Charter’ in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 3-34, at pp. 14-23.

conformity with the Charter and any proposals with a specific link to fundamental rights incorporate a formal statement of compatibility with the Charter.⁸⁷ A number of Union measures with relevance to asylum and refugee issues adopted since 2001 have included such a statement of compatibility.⁸⁸ The following analysis of the Charter is limited to Articles 4 and 18 as of most direct relevance to the principle of *non-refoulement*.⁸⁹

The Preamble to the Charter lists the following non-exhaustive sources for the rights in the Charter:

‘... the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.’

There is therefore considerable overlap between the Charter rights and principles protecting refugees and asylum seekers against *refoulement* and the International Instruments.⁹⁰

Article 4 of the Charter prohibits torture or inhuman or degrading treatment or punishment on the same terms as Article 3 ECHR and therefore by virtue of Article 52(3) of the Charter its meaning and scope is the same as that laid down by the ECHR.⁹¹ According to the Charter Explanations,⁹² Article 52(3) of the Charter

⁸⁷ Communication of the Commission of 13 March 2001. SEC(2001)380/3. Available on the register of Commission documents at:

<http://europa.eu.int/comm/secretariat_general/regdoc/registre.cfm?CL=en>.

⁸⁸ See the list of references in legislation and proposals to the Charter in Appendix 1, Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), at pp. 367-368.

⁸⁹ For a more general analysis of the Charter provisions, see Elspeth Guild, ‘Citizens, Immigrants, Terrorists and Others’, in Peers and Ward (eds.), *The European Union Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart Publishing, 2004), pp. 231-246.

⁹⁰ See Section 5.8 of Chapter five for analysis of the sources and scope of the Charter.

⁹¹ Article 52(3) of the Charter also makes clear that the equivalent ECHR rights set a *minimum* standard and Union law may provide ‘more extensive protection’. See Section Chapter 5.2.4 of Chapter five for an analysis of Article 52(3) of the Charter.

⁹² *Explanations Relating to the Charter of Fundamental Rights*, 11 October 2000, as updated under the authority of the Praesidium of the European Convention, Declaration No. 12 to the Constitution: [2004] OJ C310/424-459. See Section 5.2.3.5 of Chapter five for the status of the Charter Explanations under Article II-112(7) of the Constitution.

requires account to be taken of the case law of the ECtHR and the ECJ in determining the scope of guaranteed ECHR rights. Article 19(2) of the Charter takes account of the case law of the ECtHR on Article 3 ECHR relating to *refoulement*:⁹³

‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’⁹⁴

The construction by the ECJ of Article 19(2) of the Charter will therefore be based on providing at least the same level of protection as under the ECtHR’s case law on *refoulement* under Article 3 ECHR. However, on the basis of the wording of Article 19(2) there is scope to enlarge significantly the scope of that protection.⁹⁵

Article 18 of the Charter provides:

‘The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.’

The Charter Explanations refer to Article 63 EC Treaty as the basis for Article 18 and further state that Article 18 is ‘in line with’ the 1997 Asylum Protocol.⁹⁶ The reference to Article 63 EC Treaty seems misplaced since Article 63(1), which is the only paragraph in Article 63 which refers to asylum, does not create a right to asylum but empowers the Council to adopt ‘measures on asylum’. A more appropriate reference would have been to Article 14 UDHR and Article 1 of the 1967 Territorial Asylum Declaration. Equally, the reference to Article 18 being ‘in line’ with the 1997 Protocol on Asylum is perplexing since, as discussed in Section 8.3.3.5, the

⁹³ The Charter Explanations on Article 19(2) make specific reference to *Ahmed v. Austria*, above n. 26, and *Soering v UK*, above n. 46.

⁹⁴ Article 19(1) of the Charter prohibits collective expulsions and is derived from Article 4 of Protocol No. 4 to the ECHR and Article 13 of the ICCPR: see the Charter Explanations, above n. 92, at p. 21.

⁹⁵ Article 19(2) extends the protection guaranteed by the ECHR case law on Article 3 under *Soering* since the protection against extradition in that case was based on the risk of Soering being exposed to the ‘death row’ phenomenon in the State of Virginia rather than that the death penalty *per se* violated Article 3: see para. 103 of *Soering*, above n. 46.

⁹⁶ On the 1997 Protocol on Asylum, see section 8.3.3.5 below. The Charter Explanations, above n. 92, also refer to the Amsterdam Treaty Protocols relating to the UK, Ireland and Denmark ‘to determine the extent to which those Member States implement Community law in this area and the extent to which this Article is applicable to them.’ For a summary of these Protocols and their application to Title IV EC Treaty, see Peers, *EU Justice and Home Affairs* (Harlow, Longman, 2000), at p. 55.

1997 Protocol on Asylum is restrictive of the right to asylum and may well in certain circumstances be in conflict with the Refugee Convention.⁹⁷ However, if the ECJ adopts a broader construction than the Charter Explanations, Article 18 of the Charter could provide the basis for the development of a fully-fledged right of asylum in Union law.⁹⁸ Such a development would constitute a significant improvement on the treatment of the right to asylum in existing international treaties. Neither Article 3 ECHR nor the ECHR Protocols protect the right to political asylum.⁹⁹ Nor is a right of asylum recognized under either Article 3 CAT or Article 7 ICCPR.¹⁰⁰

8.3.3 *NON-REFOULEMENT IN UNION REFUGEE AND ASYLUM LAW*

8.3.3.1 *Introduction*

This section examines measures of primary and secondary Union law which raise specific issues of conformity with the principle of *non-refoulement* as protected in the International Instruments. This examination is not an exhaustive analysis of the measures but is intended to demonstrate the utility of international fundamental rights as a standard for measuring the conformity or deficiencies of Union legislation in the field of refugee and asylum law. The paucity of judicial rulings in this area of Union law, in part arising from the constraints on the ECJ's jurisdiction under Title IV EC Treaty,¹⁰¹ places a particular onus on the legislative process to ensure conformity of Union legislation with international fundamental rights standards. The measures under analysis generally refer, either in the Preamble or the body of the text, to their compatibility with the Refugee Convention and the ECHR, and, since 2002, the Charter.

However, formulaic statements of compatibility do not necessarily correspond to actual conformity with international law and Union standards as is evidenced by the

⁹⁷ Generally, the inconsistencies arising out of the Charter Explanations on Article 18 of the Charter reinforce the argument against the legal status conferred on the Charter Explanations in the Constitution.

⁹⁸ See Rehman, above n. 27, at p. 191.

⁹⁹ *Jabari v Turkey*, 11 July 2000, (2000) 12 *IJRL* 597, at para. 38. For a summary of the relevant provisions of the ECHR and the related case law see: Stevens, above n. 10, at pp 143-150.

¹⁰⁰ 'Article 3 CAT and Article 7 ICCPR do not confer rights of asylum.': Joseph, Schultz and Castan, above n. 30, at para. 9.62.

¹⁰¹ See Section 7.3 of Chapter seven.

criticism of the measures examined both by non-governmental organizations, such as Amnesty International and the European Council on Refugees and Exiles (ECRE), and academic commentators. This gap between rhetoric and substance in the field of refugee and asylum law reflects the conflicting political pressures and legal constraints operating on the institutions of the Union. Only by applying clear and accepted standards in assessing Union legislation can the Union be held accountable for flaws and deficiencies.

The measures selected for examination in this section as of particular relevance to the principle of *non-refoulement* are: the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (2001 Temporary Protection Directive);¹⁰² the Joint Position of 4 March 1996 on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the Refugee Convention (1996 Joint Position);¹⁰³ the Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation);¹⁰⁴ the 1997 Protocol on Asylum for Nationals of Member States of the European Union adopted at the Amsterdam Treaty and annexed to the Treaty of Amsterdam (1997 Asylum Protocol); the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002 EAW Framework Decision);¹⁰⁵ and Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (2001 Mutual Recognition Directive).¹⁰⁶

¹⁰² [2001] OJ L212/12.

¹⁰³ [1996] OJ L63/2.

¹⁰⁴ [2003] OJ L50/1.

¹⁰⁵ [2002] OJ L190/1.

¹⁰⁶ [2001] OJ L149/34 .

8.3.3.2 *The 2001 Temporary Protection Directive*

The 2001 Temporary Protection Directive was adopted under Article 63(2) (a) and (b) EC Treaty in the context of the mass displacement of population consequent on the conflicts in the region of the former Yugoslavia.¹⁰⁷ The 2001 Temporary Protection Directive provides temporary protection for displaced persons for a one year period which may be extended for a maximum period of a year.¹⁰⁸ The right to lodge an application for asylum during temporary protection is guaranteed by Article 17(1) of the 2001 Temporary Protection Directive. Article 19 of the 2001 Temporary Protection Directive provides that a Member State may remove temporary protection while an asylum application is being considered but that if refugee status or another form of protection is not granted a person eligible or enjoying temporary protection is entitled to temporary protection for the remainder of the period of protection.

Article 3(2) of the 2001 Temporary Protection Directive specifically recognises the *non-refoulement* obligations of the Member States: ‘The Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement’. In addition, Article 3(1) provides that temporary protection shall not prejudice recognition of refugee status under the Refugee Convention. Article 28 lists the grounds on which a Member State may exclude an individual from temporary protection, which broadly correspond to the grounds for denial of refugee status and the right to *non-refoulement* set out in Article 1(F) and Article 33(2) of the Refugee Convention.¹⁰⁹

¹⁰⁷ The deadline for implementation of the 2001 Temporary Protection Directive was 31 December 2002 under Article 32(1). Denmark does not participate in the Directive but Ireland and the UK have opted in under the Fourth Protocol to the Treaty of Amsterdam. For an analysis of the 2001 Temporary Protection Directive, see: Hailbronner, in Walker (ed.), above n. 4, at pp. 68-70; and Guild, above n. 4, at pp. 211-213.

¹⁰⁸ Article 4(1) 2001 Temporary Protection Directive.

¹⁰⁹ Article 28(1)(a)(ii) 2001 Temporary Protection Directive elaborates on Article 1F(b) of the Refugee Convention by providing: ‘The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators;’.

However, in international law there are no permissible exceptions to the prohibition against *refoulement* in the human rights context as opposed to the refugee context.¹¹⁰ In order to comply with their obligations under international law regarding *non-refoulement*, the Member States should therefore ensure that national measures implementing Article 28 of the 2001 Temporary Protection Directive do not deny an individual temporary protection on any of the grounds under Article 28 of the 2001 Temporary Protection Directive if to do so would violate the absolute prohibition against *refoulement* in the human rights context.

8.3.3.3 *The 1996 Joint Position*

The Council adopted the 1996 Joint Position on 4 March 1996, under Article K3 TEU.¹¹¹ The objective of the 1996 Joint Position was to harmonise the application of the criteria for determining refugee status as a necessary stage in harmonisation of asylum policies in the Member States.¹¹² The 1996 Joint Position states that the guidelines set out do not ‘bind the legislative authorities or affect decisions of the judicial authorities of the Member States’. However, the 1996 Joint Position has been referred to in *Horvath* and *Adan and Aitseguer*.¹¹³

One aspect of the 1996 Joint Position of particular concern is that it proposes a restrictive version of the accountability theory of *non-refoulement*:

‘Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.’¹¹⁴

¹¹⁰ See Lauterpacht and Bethlehem, above n. 13, at para. 219(2), for the permitted exceptions in the refugee context and, at para. 252, for the absolute nature of the prohibition in the human rights context.

¹¹¹ Article K3 TEU was replaced by the Treaty of Amsterdam and asylum matters transferred to Article 63(1) EC Treaty.

¹¹² For commentary on the 1996 Joint Position, see Noll and Vedsted-Hansen, in Alston (ed.), above n. 112, at pp. 376-381. The 1996 Joint Position will be effectively superseded by 10 October 2006 which is the deadline for implementation of Council Directive 2004/83/EC of 29 April 2004. See Section 8.4 below for detailed analysis of this directive.

¹¹³ *Horvath*, at pp. 192-193 and p. 199 and *Adan*, at p. 517. Both cases are cited above at n. 33.

¹¹⁴ The 1996 Joint Position, at para. 5.2.

In contrast to the case law of the ECtHR,¹¹⁵ the 1996 Joint Position does not therefore appear to cover *inability* of the state to provide protection.¹¹⁶

8.3.3.4 *The Dublin II Regulation*

The 2003 Dublin II Regulation, adopted under Article 63(1)(a) EC Treaty, converts on modified terms into Community law the 1990 Dublin Convention determining the Member State responsible for examining applications for asylum lodged in one of the Member States.¹¹⁷ The Dublin II Regulation proceeds on the basis that transfers of asylum applicants as between Member States¹¹⁸ do not raise the issue of *non-refoulement*: ‘In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.’¹¹⁹ However, the criteria for the allocation of responsibility between the Member States for examining applications for asylum has been strongly criticised for failing to take account of the differences in the standards of protection to refugees in the Member States.¹²⁰ In particular, application of the criteria in the Dublin II Regulation may result in an applicant for asylum in one Member State being removed to another Member State responsible for examining the application under those criteria where the principle of *non-refoulement* is construed in a more restrictive manner than in the transferring Member State.

Indirect *refoulement* arose as an issue in *Adan and Aitseguer* where the UK Home Department, in application of the rules of the 1990 Dublin Convention, was seeking

¹¹⁵ See Section 8.2.2.3 above.

¹¹⁶ Clapham has commented on para. 5.2 of the 1996 Joint Position: ‘Its effect is that people fleeing persecution in countries where the State has collapsed, or people fleeing factions that have no state-like qualities, will be excluded from refugee status.’: ‘Human Rights in the Common Foreign Policy’ in Alston (ed.), *The EU and Human Rights* (Oxford, OUP, 1999), pp. 627-683, at p. 662. Clapham cites similar criticism of the 1996 Joint Position by the UNHCR and ECRE, *ibid.*, at pp. 662-663, n. 102. See also Noll and Vedsted-Hansen, in Alston (ed.), above n. 112, at pp. 378-381.

¹¹⁷ See Section 6.2.1 of Chapter six for the complex relationship between the 1990 Dublin Convention and the Dublin II Regulation.

¹¹⁸ For transfers to third countries, Article 3(3) of the Dublin II Regulation provides: ‘Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.’

¹¹⁹ Final sentence of Recital (2) of the Dublin II Regulation. This principle is not incorporated into the body of the Dublin II Regulation. The Dublin II Regulation does not provide a definition of *non-refoulement* but Recital (2) refers to the obligation under the Refugee Convention to ensure ‘nobody is sent back to persecution’, i.e. maintaining the principle of non-refoulement.’ However, as discussed in Section 8.2 above, the principal of *non-refoulement* is more extensive in international law.

¹²⁰ See Guild, above n. 4, at pp. 206-209.

to return Ms. Adan and Mr. Aitseguer to France and Germany respectively which both applied the accountability theory in interpreting Article 1A(2) of the Refugee Convention rather than the protection theory applied in the UK on the basis of the previous House of Lords case of *Adan v Secretary of State for the Home Department*.¹²¹ In the case of Ms. Adan, there was a risk that as a result of the transfer to Germany the applicant would be deported to Somalia on the basis that her fear of persecution did not satisfy the criteria applied by the German authorities since the threat of persecution emanated from a non-governmental rebel group. In the case of Mr. Aitseguer, the fear of persecution arose from the activities of Islamic fundamentalist groups outside the control of the Algerian government which again did not meet the criteria applied by the French authorities in construing Article 1A(2) of the Refugee Convention. In both cases, the House of Lords confirmed the judgment of the Court of Appeal that under the relevant UK legislation, which incorporated the standards of the Refugee Convention, the Home Secretary was not entitled to return the applicants to Germany or France notwithstanding the 1990 Dublin Convention since, in the absence of a ruling by the ICJ, the interpretation of Article 1A(2) of the Refugee Convention adopted in the earlier case of *Adan* was the ‘determinative decision.’¹²²

The ECtHR in *T.I. v UK* also established limitations on how far the Member States could avoid responsibility for their *non-refoulement* obligations under Article 3 ECHR through the mechanism of the 1990 Dublin Convention:

‘The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims.’¹²³

In *T.I.* responsibility for determining the applicant’s claim for asylum lay with Germany under the 1990 Dublin Convention but the applicant had fled to the UK

¹²¹ Cited above n. 33.

¹²² *Ibid.*, per Lord Hobhouse, at p. 529.

¹²³ Above n. 33, at p. 260.

after his application was refused by the German courts on the basis, *inter alia*, that the risk of torture and persecution if he returned to Sri Lanka emanated from a Tamil terrorist organisation outside the control of the state. However, on examination of the relevant German legislative and administrative regime the ECtHR declared his application inadmissible on the basis there was not ‘a real risk that Germany would expel the applicant to Sri Lanka’ and that in consequence the UK Government had not violated Article 3 ECHR by deciding to remove the applicant to Germany.¹²⁴

8.3.3.5 *The 1997 Asylum Protocol*

The 1997 Asylum Protocol has been characterised as ‘really an extradition measure in disguise.’¹²⁵ The first paragraph of the sole Article of the 1997 Asylum Protocol provides:

‘Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.’

The 1997 Asylum Protocol provides that only in four cases may an asylum application from a national of one Member State be taken into consideration or declared admissible for processing by another Member State: (a) if a Member State of which the applicant is a national has availed of the derogation provisions of Article 15 ECHR;¹²⁶ (b) if proceedings under Article 7(1) (ex. Art. F.1(1)) TEU have been initiated and the Council has not taken a decision in respect thereof; (c) if the Council, acting on the basis of Article 7(1) (ex. Art. F.1(1)) TEU, has determined, in respect of

¹²⁴ The case of *Adan and Aitseguer*, above n. 33, was on appeal to the House of Lords at the time of the judgment in *T.I.*, above n. 33. The decision of the Court of Appeal in *Adan and Aitseguer*, [1999] 3 WLR 1274, and the earlier judgment of the House of Lords in *Adan*, above n. 33, were cited by the ECtHR in *T.I.* and may have influenced their finding that there was no violation of Article 3 ECHR.

¹²⁵ Peers, above n. 96, at p. 129. ‘Its sole purpose was to prevent Belgium considering asylum claims by Basque nationalists whom Spain wished to try for terrorist offences.’

¹²⁶ The UK withdrew its Article 15 ECHR derogation in respect of Article 5(1) ECHR with effect from 16 March 2005 following the ruling of the House of Lords in *A and others v. Secretary of State for the Home Department* [2004] UKHL 56 which quashed the Human Rights Act 1998 (Designated Derogation) Order 2001 (S.I. 2001, No. 3644). No Member State, as of 1 September 2005, had an Article 15 ECHR derogation in place. However, UK proposals for new anti-terrorism legislation following the bombing and attempted bombing in London on 7 and 21 July 2005 respectively may lead to a further derogation: see the proposals set out in the Letter of Charles Clarke, Home Secretary, of 15 September 2005: *The Guardian of 16 September 2005*: <<http://image.guardian.co.uk/sys-files/Politics/documents/2005/09/15/letterplusannexe.pdf>>. See section 5.5.2.3 of Chapter five for an analysis of Article 15 ECHR in the context of Union accession to the ECHR.

the Member State of which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article 6(1) (ex Art. F(1)) TEU; or (d) if a Member State should so decide unilaterally in respect of the application for asylum of a national of another Member State, in which case the Council must be immediately informed and the application dealt with on the basis of the presumption it is manifestly unfounded but without ‘affecting in any way, whatever the cases may be, the decision-making power of the Member State’.¹²⁷

Declaration No. 48 to the Treaty of Amsterdam provides the 1997 Asylum Protocol: ‘does not prejudice the right of each Member State to take the organisational measures it deems necessary to fulfil its obligations under the Refugee Convention of 28 July 1951 relating to the status of refugees’. While the meaning of this Declaration is opaque, it indicates the unease with which some Member States viewed the limited grounds permitted for them to examine an asylum claim submitted by a national of another Member State.¹²⁸ Declaration No. 49 to the Treaty of Amsterdam on subparagraph (d) of the sole Article of the 1997 Asylum Protocol provides:

‘The Conference declares that, while recognising the importance of the Resolution of the Ministers of the Member States of the European Communities responsible for immigration of 30 November/ 1 December 1992 on manifestly unfounded applications for asylum and of the Resolution of the Council of 20 June 1995 on minimum guarantees for asylum procedures, the question of abuse of asylum procedures and appropriate rapid procedures to dispense with manifestly unfounded applications for asylum should be further examined with a view to introducing new improvements in order to accelerate these procedures.’

Declaration No. 49 is referring to the ‘soft law’ measures adopted to address the issue of manifestly unfounded asylum applications: the 1992 London Resolutions and the 1995 Minimum Guarantees Resolution.¹²⁹ The principal proposal for addressing

¹²⁷ The 1997 Asylum Protocol is in substance replicated in Protocol No. 22 to the Constitution.

¹²⁸ The European Council on Refugees and Exiles (ECRE) in its *Analysis of the Treaty of Amsterdam in so far as it relates to asylum policy* of 16 July 1997 provided the following interpretation of this Declaration: ‘Declaration 48 ... would therefore seem to provide a “get out clause” for those States who were unhappy with the Protocol, but were not prepared to commit themselves to a unilateral declaration, of the kind attached by Belgium’: available at: <<http://www.ecre.org/research/analysis.pdf>>.

¹²⁹ *1992 London Resolutions on a harmonised approach to questions concerning host third countries and on manifestly unfounded applications for asylum*: Bunyan (ed.) *Key Texts on Justice and Home Affairs in the European Union*, Vol. 1 (London, 1997), at p. 64. See also *The London Declaration of International Law Principles on Internally Displaced Persons* (2001) 12 IJRL, pp. 672-679. See

this issue is the proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (Refugee Procedures Proposal).¹³⁰

The circumstances in which one of the four cases listed in the 1997 Asylum Protocol as permitting a Member State to consider an asylum application from a national of another Member State would apply, other than in the case of Belgium,¹³¹ are likely to be exceptional.¹³² The aim of the 1997 Asylum Protocol, outside these circumstances, is to create an irrebuttable presumption that the standard of fundamental rights protection throughout the Union is of an adequate level for the purposes of removing a Union citizen from one Member State to another. However, the 1997 Asylum Protocol may well not be construed as achieving this goal.

Firstly, the Preamble to the 1997 Asylum Protocol refers explicitly to the Union's obligation to respect the ECHR and to the 1997 Asylum Protocol's respect for the 'finality and objectives' of the Refugee Convention. The presumption set out in paragraph one of the 1997 Asylum Protocol should therefore also be interpreted as being subject to the requirements of the ECHR and the Refugee Convention.

Secondly, there is support for the view that the principle of *non-refoulement* under Article 3 CAT and Section 33 of the Refugee Convention has acquired the status of a peremptory rule of international law and thus forms part of the Union's legal order.¹³³ While infringement of this rule would not provide the ECJ with grounds for

generally: Siobhán Mullally, *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determination* (September 2001): available at: <<http://www.refugeelawreader.org/files/pdf/470.pdf>>. ECRE, above n. 128, commented on Declaration No. 49: 'This is a very worrying footnote to the Protocol, in so far as it makes clear that a re-examination of these instruments would not involve the addition of further safeguards for individuals, but only aim to achieve acceleration.'

¹³⁰ [2002] OJ C 291E/143. The failure to meet the deadline of 1 May 2004 set by the Treaty of Amsterdam for adoption of this proposal is due primarily to political disagreement about the safe country of origin principle. Section 29 of the Refugee Procedures Proposal lists the grounds for rejecting an asylum application as manifestly unfounded.

¹³¹ Belgium, by Declaration No. 5 to the Treaty of Amsterdam, stated: 'in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol, carry out an individual examination of any asylum request made by a national of another Member State.'

¹³² Peers takes the view that in the light of the provisos to the Asylum Protocol, 'it is questionable whether the Protocol will have much effect.': above n. 96, at p. 130. Other commentators have taken a less sanguine view: see Garry, above n. 2, at pp. 176-177.

¹³³ See above Section 8.2.3.

reviewing the legality of the 1997 Asylum Protocol, since as part of the EC Treaty the 1997 Asylum Protocol falls outside the scope of reviewable acts under Article 230 EC Treaty,¹³⁴ it would provide further grounds for construing the 1997 Asylum Protocol in such a way as to require Member States to ensure compliance with the principle of *non-refoulement* notwithstanding the presumption of safe country of origin.¹³⁵

Thirdly, Article 14 ECHR is of relevance since the Asylum Protocol discriminates against Union citizens as against non-Union citizens in the standard of protection against *refoulement* guaranteed by Article 3 ECHR.¹³⁶ While Article 14 ECHR does not expressly refer to nationality as a prohibited grounds of discrimination it has been so treated in *Gaygusuz v Austria*: ‘However very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on grounds of nationality as compatible with the Convention.’¹³⁷ The House of Lords in *A and others v Secretary of State for the Home Department* considered the scope of application of Article 14 ECHR in conjunction with Article 5 ECHR in the context of non-nationals detained indefinitely without trial in the UK as suspected terrorists under the Anti-Terrorism, Crime and Security Act 2001.¹³⁸ After analysing international law on the principle of non-discrimination in the context of differential treatment of nationals and non-nationals and the case law of the ECtHR, the House of Lords concluded that the detention of non-nationals was discriminatory within the meaning of Articles 5 and 14 ECHR.¹³⁹

¹³⁴ See Section 3.3 of Chapter three. It is arguable, however, that the Community as an international organisation would be responsible for implementing the TEU or the EC Treaty in breach of applicable international law: see James Crawford and Simon Olleson, ‘The Nature and Forms of International Responsibility’, in Evans (ed.), *International Law* (Oxford, OUP, 2003), pp. 445-472, at pp. 446-447.

¹³⁵ In particular since Article 53 VCLT provides that a treaty will be void ‘if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.’

¹³⁶ Article 14 ECHR provides: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ Article 1 of Protocol 12 to the ECHR, which entered into force on 1 May 2005, replicates Article 14 ECHR but as a free standing obligation independent of any other violation of the ECHR. However, as a number of Member States have not yet signed or ratified Protocol 12 it may not yet qualify as a general principle of Union law.

¹³⁷ (1996) 23 EHRR 364, at para. 42.

¹³⁸ Cited above at n. 126.

¹³⁹ The discriminatory treatment was also found to violate Article 26 ICCPR which provides: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion,

It is unlikely Article 21 of the Charter would provide support for a broad interpretation of the grounds for processing asylum claims to include respect for the principle of *non-refoulement* on the same basis for Union citizens and non-citizens.¹⁴⁰ Article 21(1) of the Charter does not specifically include a prohibition of discrimination on grounds of nationality. The non-exhaustive list of grounds of prohibited discrimination in Article 21(1) is based on Article 13 EC Treaty, Article 14 ECHR and Article 11 of the Convention on Human Rights and Biomedicine.¹⁴¹ Insofar as Article 21(1) corresponds to Article 14 ECHR ‘it applies in compliance with it.’¹⁴² However, Article 21(1) refers to discrimination based on ‘ethnic or social origin’ rather than ‘national or social origin’ as in Article 14 ECHR. Discrimination on grounds of nationality is specifically addressed in Article 21(2) of the Charter which is based on Article 12 EC Treaty and ‘must be applied in compliance with the Treaty’.¹⁴³

In conclusion, Article 21(1) of the Charter must be read subject to the specific prohibition on discrimination on grounds of nationality in Article 21(2) and is unlikely to be interpreted as including a prohibition on discrimination on grounds of nationality. Moreover, since Article 21(2) of the Charter specifies the prohibition on discrimination on grounds of nationality is without prejudice to the special provisions of the EC Treaty and TEU it does not provide a basis for construing the provisions of the 1997 Asylum Protocol in conformity with the principle of *non-refoulement*.

8.3.3.6 *The European Arrest Warrant*

While extradition arrangements between the Member States have historically been governed by bilateral or multilateral treaties, albeit often negotiated within the

political or other opinion, national or social origin, property, birth or other status.’ See also General Recommendation No. 30 on *Discrimination against Non-Citizens* of the Committee on the Elimination of All Forms of Racial Discrimination, 1 October 2004: HRI/GEN/1/Rev.7/Add.1.

¹⁴⁰ Art. 21 of the Charter: ‘1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.’

¹⁴¹ The Charter Explanations on Article 23(1), above n. 92.

¹⁴² *Ibid.*

¹⁴³ The Charter Explanations on Article 23(2), above n. 92.

framework of the Council Europe¹⁴⁴ or other regional arrangements,¹⁴⁵ recent developments have signified a decisive shift towards Union regulation of extradition between the Member States, in substance if not in form.¹⁴⁶ This process has also been reflected in the bilateral Agreement on Extradition between the European Union and the United States of America of 25 June 2003.¹⁴⁷

The 2002 EAW Framework Decision aims to replace extradition between the Member States:

‘The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities.’¹⁴⁸

Article 31(1) of the 2002 EAW Framework Decision provides that, without prejudice to their application in relations between Member States and third states, in relations between the Member States it replaces, as from 1 January 2004, the corresponding

¹⁴⁴ The principal treaties relevant to extradition negotiated under the auspices of the Council of Europe are: the European Convention on Extradition, 13 December 1957, in force 18 April 1969: ETS No. 24, the Additional Protocol to the European Convention on Extradition, 15 November 1975, in force 20 August 1979: ETS No. 86; and the Second Additional Protocol to the European Convention on Extradition, 17 March 1978, in force 5 June 1983: ETS No. 98. In addition, the following have provisions on extradition: the European Convention on the Suppression of Terrorism, 27 January 1977, in force 4 August 1978: ETS No. 90; the Protocol Amending the European Convention on the Suppression of Terrorism, 15 May 2003, not in force: ETS No. 190; and the Council of Europe Convention on Terrorism, 16 May 2005, not in force: ETS No. 196. Article 23(1) of the 2005 Council of Europe Convention on Terrorism makes provision for the Community to sign the Convention. Council of Europe conventions are available at: <<http://conventions.coe.int/>>. For a list of instruments governing extradition between the Member States and other European states, see Kapferer, above n. 63, at pp. 5-7.

¹⁴⁵ For example, the Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters between Belgium, the Netherlands and Luxembourg, 27 June 1962, as completed and modified by the Protocol of 11 May 1974. See generally Kapferer, above n. 63, at p. 6.

¹⁴⁶ See: the Simplified Extradition Procedure between the Member States of the European Union, 10 March 1995: [1995] OJ C 78/1; and the Convention relating to Extradition between the Member States of the European Union, 27 September 1996: [1996] OJ C313/12. For the status of these Conventions, see Kapferer, above n. 63, at p. 6, n. 22.

¹⁴⁷ [2003] OJ L181/27. See the report of the EP dated 22 May 2003 on a draft version of the EU/US Extradition Treaty: Final A5-0172/2003. Available on the EP website. For a critique of the EU/US Extradition Treaty, and in particular of Article 13 of the Treaty which seeks to ensure a person being extradited to the US for a crime subject to the death penalty is not executed, see the report of Amnesty International of 31 May 2005: *Human Rights Dissolving at the Borders? Counter-terrorism and EU Criminal Law.* at para. 4.1.1. Available at:

<<http://web.amnesty.org/library/Index/ENGIOR610132005>>. On 25 June 2003 the Union also concluded an *Agreement on Mutual Legal Assistance between the European Union and the United States of America*: [2003] OJ L181/34. See on both agreements: T. Georgopoulos, ‘What kind of treaty-making power for the EU? Constitutional problems related to the conclusion of the EU-US Agreements on Extradition and Mutual Legal Assistance’ (2005) 30 *EL Rev.*, pp. 190-208.

¹⁴⁸ Fifth preamble of the 2002 EAW Framework Decision.

extradition provisions in the 1957 European Convention on Extradition, the two Additional Protocols, the 1977 European Convention on the Suppression of Terrorism, the Agreement between the Twelve Member States of the European Communities on the Simplification and Transmission of Methods of Transmitting Extradition Requests of 26 May 1989, the 1995 Convention on Simplified Extradition Procedures between the Member States, and the 1996 Convention relating to Extradition between the Member States, and Title III, Chapter IV of the 1990 Schengen Convention.¹⁴⁹ Although the deadline was 1 January 2004, implementation of the 2002 EAW Framework Decision by all Member States was only achieved on 12 April 2005.¹⁵⁰ The legality of national measures implementing the 2002 EAW Framework Decision are subject to review both under Union fundamental rights standards and national constitutional standards.¹⁵¹ National Constitutional Courts in Poland and Germany have ruled that the national measures implementing the 2002 EAW Framework Decision are unconstitutional.¹⁵²

The 2002 EAW Framework Decision, like the 1997 Asylum Protocol, is based on the principle that each Member State shall, unless proceedings have been initiated against it under Article 7(1) TEU for breach of the principles in Article 6(1) TEU, be treated by the other Member States as a safe destination for the purpose of the arrest and surrender of a requested suspect or fugitive pursuant to a European arrest warrant issued by the requesting state.¹⁵³ However, the 2002 EAW Framework Decision

¹⁴⁹ See Section 6.2.4.3 of Chapter six for analysis of the 1990 Schengen Convention.

¹⁵⁰ The date on which Italy implemented the 2002 EAW Framework Decision. The Commission issued a report on implementation of the EAW on 23 February 2005: COM(2005) 63 final. Available at: <http://www.europa.eu.int/comm/justice_home/doc_centre/criminal/doc/com_2005_063_en.pdf>.

¹⁵¹ Although Article 34(2)(b) TEU provides that framework decisions 'shall not entail direct effect', the development of the doctrine of 'indirect effect' by the ECJ means limited judicial review of framework decisions may be possible. For the doctrine of 'indirect effect', see Hartley, *The Foundations of European Community Law* (5th edn.) (Oxford, OUP, 2003), pp. 219-223. On the scope of the ECJ's jurisdiction to conduct judicial review of national legislative measures, see: Iris Canor, 'Harmonizing the European Community's Standard of Judicial Review?' (2002) 8 *EPL*, pp. 135-166.

¹⁵² A judgment of the Polish Constitutional Court of 27 April 2005 ruled that the implementation of the EAW Framework Decision violated Article 55(1) of the Polish Constitution, although the judgment was suspended for 18 months to allow for amendment of the Constitution. English version of report available at: <<http://www.statewatch.org/news/2005/apr/poland.pdf>>. In a judgment of 18 July 2005, the Second Senate of the Federal Constitutional Court in Germany declared the European Arrest Warrant Act void (*Europäische Haftbefehlgesetz*) for violation of the freedom from extradition protected by Article 16.2 of the Basic Law (*Grundgesetz*); 2 *BvR* 2236/04. An English summary of the judgment is available at: <http://www.bundesverfassungsgericht.de/bverfg_cgi/pressemitteilungen/frames/byg05-06>.

¹⁵³ See generally, Rob Blekxtoon and Wouter van Ballegooij (eds.) *Handbook on the European Arrest Warrant* (Cambridge, CUP, 2004).

applies not only to nationals of a Member State but to any person the subject of a European arrest warrant.¹⁵⁴ The offences for which a European arrest warrant may be issued are listed in Article 2 of the 2002 EAW Framework Decision. The mandatory grounds for non-execution of the European arrest warrant are listed in Article 3 and the optional grounds in Article 4 but none of the listed grounds refer to *non-refoulement*.

Protection of the principle of *non-refoulement* is to be found instead in Article 1 of the 2002 EAW Framework Decision and its Preamble. Article 1(3) of the EAW Framework Decision provides it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles in Article 6 TEU. However, since Article 6(2) TEU has been construed by the ECJ as confirmation of its general principles case law, Article 1(3) imports the limitations of that doctrine in respect of the principle of *non-refoulement*. Recital 12 of the 2002 EAW Decision, after referring to respect for the fundamental rights protected by Article 6 TEU and the Charter, and in particular the provisions in Chapter VI of the Charter relating to justice, provides in its second sentence:

‘Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons.’

The formulation in the second sentence of recital 12 is wider than the grounds of persecution in Article 1A(2) of the Refugee Convention. Similarly recital 13 of the 2002 EAW Framework Decision reflects Article 19(2) of the Charter and is a wider formulation of the principle of *non-refoulement* than that contained in Article 3 ECHR.¹⁵⁵ However, it would have been preferable for recitals 12 and 13 to have been incorporated into Article 1 of the 2002 EAW Framework Decision.

¹⁵⁴ A European arrest warrant has been issued and executed against Hamid Issac, a citizen of Ethiopia, for his return from Italy to England for his participation in the London terrorism incidents of 21 July 2005.

¹⁵⁵ Recital 13 provides: ‘No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

8.3.3.7 The 2001 Mutual Recognition Directive

The 2001 Mutual Recognition Directive, adopted under Article 63(3) EC Treaty, aims to permit the recognition of an expulsion decision issued by one Member State against a third country national present within the territory of another Member State.¹⁵⁶ The 2001 Mutual Recognition Directive may also be interpreted as applying to extradition orders.¹⁵⁷ Article 3(1)(a) of the 2001 Mutual Recognition Directive provides for recognition by a Member State of an expulsion decision taken by the authorities of another Member State in respect of a third party national based:

‘... on a serious and present threat to public order or to national security and safety, taken in the following cases: - conviction of a third country national by the issuing Member State for an offence punishable by a penalty involving deprivation of liberty of at least one year, - the existence of serious grounds for believing that a third country national has committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within the territory of a Member State.’

The 2001 Mutual Recognition Directive has to be viewed in the context of being the first concrete measure the developing Union policy on the return of illegal residents.¹⁵⁸ As such the 2001 Mutual Recognition Directive is limited in scope and non-binding in the sense that it does not impose an obligation on a Member State to

¹⁵⁶ Article 1 of the 2001 Mutual Recognition Directive. Article 2(a) defines a ‘third country national’ as anyone who is not a national of any of the Member States. Under the Protocol on the position of Denmark, annexed to the EC Treaty and the TEU, Denmark is not bound by the 2001 Mutual Recognition Directive. The UK and Ireland have opted to participate in the 2001 Mutual Recognition Directive. See for criticism of the 2001 Mutual Recognition Directive: Rehman, above n. 27, at pp. 191-192.

¹⁵⁷ Article 2(b) of the 2001 Mutual Recognition Directive defines expulsion decision as meaning: ‘any decision which orders an expulsion taken by a competent administrative authority of an issuing Member State’.

¹⁵⁸ See the *Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents* of 14 November 2002, COM(2002) 564 final. This Communication led to the adoption of a *Return Action Programme*, Justice and Home Affairs Council of 28 November 2002, Doc. 14673/02. Available at: <<http://register.consilium.eu.int/pdf/en/02/st14/14673en2.pdf>>. For a list of Community measures on return, drawn up by the Migration Policy Group, see: <<http://www.migpolgroup.com/monitors/default.asp?action=monitorindex&MonitorID=30>>. See also *European Union return policy – enhancing practical cooperation*, a report prepared by the Irish Presidency for the JHA meeting of 23-24 January 2004 which points out that without an effective system for the exchange of information ‘the mutual recognition of expulsion decisions will be impossible’: available at : <<http://www.statewatch.org/news/2004/jan/European>Returns-policy.pdf>>.

enforce an expulsion decision of another Member State.¹⁵⁹ Moreover, the 2001 Mutual Recognition Directive specifically provides in the third paragraph of Article 6 that the recognition of an expulsion decision is conditional on the enforcing Member State ensuring that neither ‘the relevant international instruments nor the national rules applicable conflict with the enforcement of the expulsion decision.’ The obligations of both the issuing and the enforcing Member State to comply with fundamental rights is further spelt out in Article 3(2): ‘Member States shall apply this Directive with due respect for human rights and fundamental freedoms.’ The fourth Recital of the 2001 Mutual Recognition Directive specifically refers to the obligation on the issuing Member State to adopt expulsion decisions in accordance with fundamental rights, as safeguarded by the ECHR, and in particular Articles 3 and 8 thereof, and the Refugee Convention and as they result from the constitutional principles common to the Member States.

In the context of protection against *refoulement*, the 2001 Mutual Recognition Directive is not based on the presumption of equivalent protection which underlies the 1997 Asylum Protocol, the 2002 EAW Framework Decision, and the Dublin II Regulation. In that sense, the 2001 Mutual Recognition Directive provides a legal framework that is more in conformity with the principle of *non-refoulement* as set out in the International Instruments. This legal framework takes due account of the difference in interpretation of the principle of *non-refoulement* under the Refugee Convention adopted by various Member States and of the grounds for subsidiary protection.¹⁶⁰ However, Union policy is to establish: ‘a legally binding framework for mutual recognition of all measures terminating a residence, in particular expulsion decisions’.¹⁶¹ Following adoption of the RQSD¹⁶² and the Asylum Reception Directive,¹⁶³ and the proposed adoption of the Refugee Procedures Directive,¹⁶⁴ the basic elements of a common asylum system will be in place. One can therefore

¹⁵⁹ Article 1(1) refers to the purpose of the Directive being to ‘make possible the recognition of an expulsion decision’. Article 1(2) reserves the right of the enforcing Member State to implement an expulsion decision according to its own legislation. See Hailbronner, in Walker (ed.), above n. 4, at pp. 86-87.

¹⁶⁰ See the Commission Report on a *Community Return Policy on Illegal Residents* of 14 November 2002, above n. 158, at para. 2.3.1.

¹⁶¹ *Ibid.*, at para 2.3.1.

¹⁶² Above n. 12.

¹⁶³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

¹⁶⁴ Above n. 130.

anticipate proposals for a ‘more binding and comprehensive system’ for the recognition of expulsion orders against non-nationals of the Member States.¹⁶⁵

8.4 THE REFUGEE QUALIFICATION AND STATUS DIRECTIVE

8.4.1 INTRODUCTION

Article 63 EC Treaty required the adoption by 1 May 2004 of measures in specified areas in the fields of visas, asylum, immigration and other policies related to free movement of persons. Key asylum measures adopted or proposed in implementation of Article 63(1) EC Treaty include the RQSD, the Refugee Procedures Proposal, and the Asylum Reception Directive.¹⁶⁶ The RQSD has been selected as a key asylum measure with direct relevance in establishing the Union’s standard of protection against *refoulement*.

An analysis of the RQSD in the context of the international standards on *non-refoulement* serves three related purposes. Firstly, it aims to determine the extent to which a key legislative measure in the field of the Union’s asylum and refugee policy complies with international standards on *non-refoulement*. Secondly, it enables an assessment to be made of the RQSD both in terms of its conformity to international justice as defined by reference to international normative standards and in terms of its conformity with Union standards. Thirdly, since the RQSD establishes minimum legal parameters which constrain the Member States in the adoption of implementing measures,¹⁶⁷ the scope of protection against *non-refoulement* in the RQSD provides a standard for assessing national implementing measures.

¹⁶⁵ Hailbronner, in Walker (ed.), above n. 4, at p. 87.

¹⁶⁶ The Asylum Reception Directive, above n. 163, is based on Article 63(1)(b) EC Treaty; the proposal for a Refugee Procedure Directive, above n. 130, is based on Article 63(1)(d) EC Treaty; and the RQSD is based on Articles 63(1)(c), 63(2)(a) and 63(3)(a) EC Treaty. The subject matter of these measures was already under discussion at the time of the Amsterdam Treaty: see Peers, above n. 96, at pp. 126-127. For a list of asylum measures adopted by the Union, see *Acquis of the European Union in the Field of the JHA*; consolidated version; update December 2004. Available at: <http://europa.eu.int/comm/justice_home/doc_centre/intro/docs/jha_acquis_1204_en.pdf>.

¹⁶⁷ The RQSD, as is the case of the Refugee Procedures Proposal and the Asylum Reception Directive, establishes minimum standards and the Member States may introduce or retain more favourable standards in so far as those standards are compatible with the relevant Directive: Article 3 RQSD, Article 4 of the Asylum Reception Directive, and Article 4 of the Refugee Procedures Proposal.

8.4.2 THE OBJECT AND SCOPE OF THE RQSD

The RQSD is the product of wide-ranging consultation by the Commission with the Member States, the UNHCR, NGOs,¹⁶⁸ and experts in refugee law through forums such as the ODYSSEUS network and the International Association of Refugee Law Judges.¹⁶⁹ After protracted negotiation and substantial modification during the legislative process, it was finally adopted at the Dublin Council meeting of 1 May 2004 by the required fifth anniversary of the entry into force of the Treaty of Amsterdam.¹⁷⁰ The legal basis for the adoption of the RQSD is Articles 63(1)(c), 63(2)(a) and 63(3)(a) EC Treaty. However notwithstanding this multiple legal basis, the obligation to comply with the Refugee Convention and other relevant treaties under Article 63(1) EC Treaty should be construed as applying to all provisions of the RQSD.¹⁷¹

Article 1 RQSD sets out its subject matter and scope:

‘The purpose of this Directive is to lay down minimum standards for the qualification for third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.’

The scope of the RQSD was extended to include subsidiary forms of international protection in line with the conclusions of the European Council in Tampere.¹⁷²

International protection is defined in Article 2(a) RQSD to include both refugee status

¹⁶⁸ Including ECRE, Amnesty International, Save the Children and the European Women’s Lobby.

¹⁶⁹ See the Commission’s *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*: COM(2001) 510 final of 12 September 2001 (the 2001 Refugee Qualification Proposal). This document includes an Explanatory Memorandum and a draft of the directive. When a provision of this proposal is referred to the corresponding Article in the RQSD is cited with the article of the proposal in brackets. Further important sources for the 2001 Refugee Qualification Proposal are: the 1996 Joint Position; a seminar on 23/24 April 2001 at Norrköping, Sweden, *International Protection within One Single Asylum Procedure*; and the UNHCR sponsored Cambridge conference from 9-10 July 2001, *Global Consultations on International Protection, Summary conclusions- the principle of non-refoulement*, above n. 10. See for a detailed analysis of the 2001 Refugee Qualification Proposal: Hailbronner, in Walker (ed.), above n. 4, at pp. 58-68.

¹⁷⁰ Ireland and the UK, but not Denmark, are bound by the RQSD.

¹⁷¹ See Section 8.3.2.3 above.

¹⁷² Tampere Presidency Conclusions of 15-16 October 1999, at para. 14, Council Doc. SN 200/99. Available at <http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm>.

as defined in Article 2(d) RQSD¹⁷³ and subsidiary protection status as defined in Article 2(f) RQSD.¹⁷⁴ The RQSD only applies to third country nationals or stateless persons and not to Union citizens. Recital 13 specifically states that it is without prejudice to the 1997 Protocol on Asylum. This exclusion of Union citizens from the RQSD has been criticised by the UNHCR.¹⁷⁵

Article 13 RQSD obliges Member States to grant refugee status to a third country national or stateless person who qualifies as a refugee under Chapters II and III of the RQSD.¹⁷⁶ Article 12 RQSD lists the grounds on which a third country national or a stateless person is excluded from being a refugee and those grounds broadly correspond to those set out in Article 1(D), (E), and (F) of the Refugee Convention.¹⁷⁷ However, Article 12(2)(b) elaborates on the notion of ‘serious non-political crime’ in Article 1F(b) of the Refugee Convention by providing ‘particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes’. Article 12(3) RQSD provides Article 12(2) ‘applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.’

Article 18 RQSD requires Member States to grant subsidiary protection status to a third country national or stateless person eligible for subsidiary protection in accordance with Chapters II and V of the RQSD. Article 2(e) defines a person as eligible for subsidiary protection who does not qualify as a refugee but:

¹⁷³ Article 2(d) RQSD: “‘refugee status’ means the recognition by a Member State of a third country national or a stateless person as a refugee.’

¹⁷⁴ Article 2(f) RQSD: “‘Subsidiary protection status’ means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection.’ Article 2(e) defines a ‘person eligible for subsidiary protection’ as ‘a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;’.

¹⁷⁵ Hailbronner, in Walker (ed.), above n. 4, at p. 59.

¹⁷⁶ Article 2(c) defines a refugee as: ‘a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;’.

¹⁷⁷ For the Commission’s interpretation of Article 14 of the 2001 Qualification Proposal, which corresponded broadly to Article 12 RQSD, see its Explanatory Memorandum, above n. 169, at pp. 24-26.

‘... in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable or, owing to such risk, is unwilling to avail himself or herself of the protection of that country.’

Since the RQSD only sets minimum standards, the relatively fluid definition of subsidiary protection status allows scope for positive feedback from more favorable standards adopted by Member States into the Union’s legal order as well as for a progressive construction of the relevant Charter rights.¹⁷⁸

Article 17 RQSD deals with exclusion from eligibility for subsidiary protection and establishes additional grounds for exclusion to those set out in Article 12(2) RQSD in respect of refugees. Article 17(1)(b) simply refers to commission of a serious crime as grounds for exclusion without the temporal or non-political crime limitation in Article 12(2)(b).¹⁷⁹ Article 17(1)(d) provides an additional ground of exclusion if the third country national or stateless person ‘constitutes a danger to the community or to the security of the Member State in which he or she is present’.¹⁸⁰ Article 17(2) RQSD provides Article 17(1) ‘applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.’ In addition, Article 17(3) permits Member States to exclude a third country national or stateless person from eligibility for subsidiary protection if, prior to admission to the Member State, the applicant:

‘... has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.’

¹⁷⁸ Preamble 10 to the RQSD affirms its respect for the Charter rights and principles, and in particular ‘full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.’ See Articles 1, 18 and 19 of the Charter and Section 8.3.2.4 above.

¹⁷⁹ As under Article 1F(b) of the Refugee Convention, Article 12(2)(b) requires the crime to be committed prior to admission as a refugee which is defined in Article 12(2)(b) as ‘the time of issuing a residence permit based on the granting of refugee status’.

¹⁸⁰ Hailbronner points out that the oddity that this provision, ‘obviously intended to cover dangers of terrorism’, only applies to a danger posed to the country of residence but not the Union as a whole: in Walker (ed.), above n. 4, at pp. 65-66.

Article 15 RQSD specifies three categories of serious harm as the basis for eligibility for subsidiary protection status:

‘(a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’¹⁸¹

Article 15(a) reflects the evolving attitude to the death penalty in international law.¹⁸² In particular, the provision reflects the obligations of the Member States to abolish the death penalty arising under Protocols No. 6 and 13 ECHR and the Second Optional Protocol to the ICCPR.¹⁸³ Article 15(b) RQSD reproduces Article 3 ECHR which opens the possibility for a dynamic and evolving interpretation of the provision.¹⁸⁴ As outlined in Section 2.2.2. above, it is established that Article 3 ECHR admits of no exception whatsoever.¹⁸⁵ It is therefore arguable that exclusion from eligibility for subsidiary protection status on one of the grounds listed in Article 17 RQSD should be interpreted as being subject to the absolute prohibition on torture imposed by

¹⁸¹ See on the definition of ‘serious and unjustified harm’, as set out in Article 15 of the 2001 Refugee Qualification Proposal, ECRE’s Recommendations to the Asylum Working Party. Available at: <<http://www.ecre.org/statements/wpcomments.shtml>>. See also the Commission’s Explanatory Memorandum, above n. 169, at pp. 26-27. See also McAdam, above n. 9, at pp. 12-13. The definition of Article 15 RQSD varies significantly from the definition in Article 15 of the 2001 Refugee Qualification Proposal, and in particular any generalised reference to a violation of human rights as a constituent of serious harm is omitted from Article 15 RQSD. See for detailed analysis of the original definition of harm in the 2001 Refugee Qualification Proposal and the definition as substantially adopted in Article 15 RQSD: Hailbronner, in Walker (ed.), above n. 4, at pp. 63-65.

¹⁸² See for a summary of international law on extradition and the right to life, Kapferer above n. 63, at pp. 50-54.

¹⁸³ See Annexes 1 and 2 for references. Protocol 13 ECHR, which came into force on 1 July 2003, abolishes the death penalty and has been signed by all the Member States but has not, as of 1 September 2005, been ratified by France, Italy, Latvia, Luxembourg, Netherlands, Poland or Spain. Protocol 6 ECHR, which abolishes the death penalty save in time of war, has been signed and ratified by all the Member States. The Second Optional Protocol to the ICCPR abolishes the death penalty but permits reservations under Article 2: ‘.. made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime’. As of 1 September 2005, all Member States had signed or acceded to the ICCPR Second Optional Protocol, except France which has not signed and Poland which had not ratified.

¹⁸⁴ See McAdam, above n. 9, at p. 12; Hailbronner, in Walker (ed.), above n. 4, at pp. 63-64; and J. Vedsted-Hansen, ‘Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law’, in Bouteillet-Paquet (ed.) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels, Bruylant, 2002), pp. 57-78, at p. 74.

¹⁸⁵ On Article 3 ECHR, and Article 3 CAT, as a basis for subsidiary protection in states practice, see: McAdam, above n. 9, at p. 8.

international law.¹⁸⁶ Article 15 (c) RQSD is an amended version of Article 15(c) of the 2001 Refugee Qualification Proposal and is based on Article 2(c) of the Temporary Protection Directive.¹⁸⁷ However, subsidiary protection is provided on a different basis from temporary protection.¹⁸⁸

While the RQSD has been characterized as being ‘not intended as a radical overhaul of protection but as a codification of existing state practice’,¹⁸⁹ an analysis of the sources of human rights norms incorporated explicitly or by implication in respect of the principle of *non-refoulement* in the RQSD is consistent with a more dynamic construction.¹⁹⁰ Thus, for example, Article 10 RQSD expands on the reasons for persecution set out in Article 1A(2) of the Refugee Convention, and in particular provides an extended definition of ‘membership of a particular social group’ in paragraph (d) to include a group based on a common characteristic of sexual orientation.¹⁹¹

8.4.3 THE RQSD AND NON-REFOULEMENT

8.4.3.1 Introduction

The following section assesses the RQSD against the principle of *non-refoulement* set out in the International Instruments in the context of the five specific issues outlined in Section 8.2. This analysis employs the principle of *non-refoulement* in the International Instruments as a comparator for measuring the justice of the RQSD. Indeed, the Preamble to the RQSD acknowledges the critical role played by

¹⁸⁶ Article 17(1)(4) of the 2001 Refugee Qualification Proposal had addressed the issue of the compatibility of the Article 17(1) reasons for exclusion with international law by providing that ‘the application of the exclusion shall not in any manner affect obligations that Member States have under international law.’ However, this provision was deleted when Article 17 was amended: see Hailbronner, above n. 4, at p. 65.

¹⁸⁷ Explanatory Memorandum, above n. 169, at p. 26.

¹⁸⁸ Hailbronner, in Walker (ed.), above n. 4, at p. 64.

¹⁸⁹ McAdam, above n. 9, at p. 2.

¹⁹⁰ A number of the international fundamental rights conventions are referred to in the RQSD by implication only: for example, Recital (12) RQSD refers to the ‘best interests of the child’ with implied reference to Article 3 of the 1989 Convention on the Rights of the Child; and Recital (11) refers to ‘instruments of international law to which they [the Member States] are party and which prohibit discrimination’.

¹⁹¹ However, acts considered criminal under the national law of the Member States are excluded from sexual orientation. Gender related aspects may be considered without creating a presumption in favour of the application of Article 10 RQSD. For a discussion of state practice on gender-based discrimination, and the relevant provisions of the 2001 Refugee Qualification Proposal, see McAdam, above n. 9, at pp.18-20.

international instruments in setting standards with which the Union and the Member States should comply in establishing and implementing the RQSD.¹⁹² The methodology adopted in this section is one which is therefore reflected in the legislative process.

8.4.3.2 *The RQSD and the Absolute Character of Non-Refoulement*

Article 21(1) RQSD, forming part of Chapter VII setting out the content of international protection, provides that the Member States ‘shall respect the principle of non-refoulement in accordance with their international obligations’.¹⁹³ The principle of *non-refoulement* is not further defined in the RQSD.¹⁹⁴ For the purposes of the RQSD its meaning is, however, a matter to be determined in accordance with the international obligations of each Member State and is not therefore a concept of Union law.¹⁹⁵ The reference in Article 21(1) to the international obligations of the Member States provides the basis for a wide interpretation of the principle to include the most extensive protection provided for under international conventions to which each Member State is party, customary international law and *jus cogens*.

Article 21(2) RQSD provides: ‘Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

¹⁹² The Refugee Convention is referred to in Recitals (2), (3), (8), (9), (10), (11) and (24) of the RQSD; Recital (11) refers, with respect to the treatment of persons falling within the scope of the RQSD, to ‘instruments of international law which prohibit discrimination’ which would include CEDAW, CERD, and the ICCPR; Recitals (12) and (20) refer to principles of protection in the 1989 Convention on the Rights of the Child; Recital (22) refers to the UN Charter and UN Resolutions in the context of measures combating terrorism; and Recital (25) refers to ‘international obligations under human rights instruments’ as a source for the criteria for recognising those eligible for subsidiary protection. Recital (10) refers to respect for the rights and principles set out in Charter, which as mentioned in Section 8.3.2.4 above, has become standard practice in Union legislation since adoption of the Charter.

¹⁹³ The earlier version of Article 21(1) RQSD in Article 19 of the 2001 Refugee Qualification Proposal provided: ‘The Member States shall respect the principle of non-refoulement and shall not expel persons enjoying international protection, otherwise than in accordance with their international obligations’. The Commission’s commentary on Article 19 conflated protection for refugees against *refoulement* under Articles 32 and 33 of the Refugee Convention with the principle of *non-refoulement* under general human rights law: above n. 169, at p. 29. However, as discussed, the scope of the principle is not the same in each case.

¹⁹⁴ However, Recital two RQSD ties the principle to the context of the Refugee Convention.

¹⁹⁵ This conclusion follows from the text of Article 21(1) RQSD and is supported by Recital (2) RQSD.

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.’ Article 21(2) RQSD, which was not contained in the 2001 Refugee Qualification Proposal, substantially incorporates the exclusion from the principle of *non-refoulement* in Article 33(2) of the Refugee Convention. Article 21(3) RQSD provides: ‘Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.’ However, the requirement in Article 21(2) for compliance with the international obligations of the Member States means that the absolute character of the principle of *non-refoulement* as recognised in Article 3 ECHR and Article 3 CAT will prevent *refoulement* of a refugee by a Member State in violation of those provisions even if permitted under Article 33(2) of the Refugee Convention.

This leaves open the question of whether the construction of the permitted grounds for *refoulement* under Article 21(2) RQSD should be treated as a matter of Union law or whether the Member States should retain the freedom to interpret the grounds in line with the prevailing construction in international law of Article 33(2) of the Refugee Convention.¹⁹⁶ Since the Member States retain the right to determine the principle of *non-refoulement* under Article 21(1) in accordance with their international obligations, and *refoulement* under Article 21(2) is also subject to such obligations, it would be preferable for reasons of consistency to adopt the latter approach. While it may be objected that permitting the Member States to develop conflicting jurisprudence on the meaning of Article 21(2) undermines the purpose of the RQSD as set out in Article 1 to lay down minimum standards, the Refugee Convention provides the internationally recognized minimum standard and the national courts should continue to be free to refer directly to it as a source rather than through the intermediation of the ECJ.¹⁹⁷

In respect of *non-refoulement* of a person eligible for subsidiary protection, Article 20(2) RQSD provides Chapter VII ‘applies equally to refugees and persons eligible for subsidiary protection unless otherwise indicated.’ Article 21(1), but not Article

¹⁹⁶ However, the scope of Article 33(2) of the Refugee Convention is disputed. See the detailed analysis of Article 33(2) by Lauterpacht and Bethlehem, above n. 13, at paras. 145-192.

¹⁹⁷ Although this conclusion does not prejudice the establishment of a mechanism for an authoritative source of interpretation of the Refugee Convention. See generally, Clark, above n. 37, at pp. 604-606.

21(2) or (3), therefore applies to a person eligible for subsidiary protection. The scope and content of the obligation of *non-refoulement* in respect of such a person is therefore determined by the international obligations of the Member States.

8.4.3.3 *The RQSD and State Accountability*

Article 6 RQSD addresses the issue of determining the required degree of state involvement in the well-founded fear of persecution or real risk of suffering serious harm by providing:

‘Actors of persecution or serious harm include: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.’

Article 7 RQSD defines the actors who can provide protection against persecution or serious harm as either (a) the State or (b) ‘parties or organizations, including international organizations, controlling the State or a substantial part of the territory of the State.’¹⁹⁸ The inclusion of non-state actors as capable of providing protection has been criticised as having no basis in international law:

‘These organizations and quasi-states authorities are not parties to international human rights treaties and therefore cannot give meaningful human rights guarantees or be held accountable for non-compliance with international refugee and human rights obligations.’¹⁹⁹

Article 6 RQSD therefore adopts the ‘protection’ theory endorsed by the ECtHR in respect of Article 3 ECHR and by the majority of signatories to the Refugee Convention²⁰⁰ and applies it both to refugees under the Refugee Convention and to applicants for subsidiary protection.

Article 9 RQSD extends the protection afforded under the 1996 Joint Position which requires proof of more direct state involvement.²⁰¹ Member States which have not

¹⁹⁸ For analysis of Article 9 of the 2001 Refugee Qualification Proposal, which was the predecessor versions of Articles 6 and 7 RQSD, see the Commission’s Explanatory Memorandum, above n. 169, at pp. 17-18.

¹⁹⁹ See McAdam, above n. 9, at p. 18.

²⁰⁰ See Section 8.2.2.3 above.

²⁰¹ See Section 8.3.3.3 above.

adopted the protection theory in respect of the Refugee Convention,²⁰² will therefore be required to conform with the standards set out in Article 6 RQSD by the deadline for transposition of 10 October 2006.

8.4.3.4 *The RQSD and Indirect Refoulement*

The RQSD does not provide an autonomous definition of *non-refoulement*.²⁰³ Article 21(1) RQSD, however, provides the Member States must respect the principle in accordance with their international obligations. The principle has therefore to be construed in line with applicable international treaty law, customary international law and *jus cogens* both in the context of refugee and asylum law and in the context of human rights law generally. Since indirect *refoulement* is prohibited under Article 3 ECHR, Article 3 CAT, Article 7 ICCPR and Article 33 of the Refugee Convention, and all the Member States are parties to those conventions, Article 21(1) RQSD also prohibits indirect *refoulement*.

8.4.3.5 *The RQSD and Non-Admittance at the Frontier*

Article 3 of the 2001 Refugee Qualification Proposal had provided that the directive would apply to all third country nationals and stateless persons who make an application for international protection ‘at the border or on the territory of a Member State’. However Article 1 RQSD, which is the successor article, does not refer to the place at which the application for international protection must be made and this omission is maintained throughout the Recitals and subsequent articles of the RQSD.

Since the scope and indeed existence of an obligation for a state to admit an asylum seeker or refugee at the frontier is uncertain under the principal international conventions,²⁰⁴ the formulation in Article 21(1) may result in divergent interpretations by national courts as to the scope and content of a Member State’s obligations to admit at the frontier. However, in the context of the other key directives adopted or proposed on asylum seekers and refugees, the RQSD should be interpreted

²⁰² See McAdam, above n. 9, at pp. 17-18. Her analysis of the varying positions in the Member States predates the enlargement to twenty-five states.

²⁰³ As mentioned, Recital (2) RQSD ties the principle to the Refugee Convention but this does not provide a basis for restricting the generality of Article 21(1) RQSD.

²⁰⁴ See Section 8.2.2.5 above.

as applying to those seeking international protection at the border. Article 3(1) of the Refugee Procedures Proposal provides: ‘This Directive shall apply to all applications for asylum made at the border, at port and airport transit zones or on the territory of Member States.’ Article 3(1) of the Asylum Reception Directive also provides that it shall apply to ‘all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State.’

8.4.3.6 *The RQSD and Extradition*

As outlined in Section 8.2.2.6, the principle of *non-refoulement* under the International Instruments and customary international law applies to extradition. Therefore, the principle of *non-refoulement* in Article 21(1) RQSD also applies to extradition. This construction of Article 21(1) is supported by Recital (10) RQSD that refers to the right to asylum recognized by the Charter.²⁰⁵ The protection against extradition in Article 21(1) RQSD is of particular significance in the context of the measures adopted by the Union which undermine the principle of *non-refoulement* by creating a presumption in favour of automatic surrender or extradition.²⁰⁶ In particular, Article 21(1) RQSD extends the scope of protection against *refoulement* in the 2001 Mutual Recognition Directive and the 2002 EAW Framework Decision respectively.²⁰⁷

Furthermore, Article 21(1) RQSD is in conflict with Article 13 of the 2003 EU/US Extradition Agreement.²⁰⁸ Article 13 provides for extradition in circumstances where ‘for procedural reasons’ the death penalty is imposed provided it is not carried out. However, this procedure is not in conformity with Article 1 of Protocol No. 13 ECHR: ‘The death penalty shall be abolished. No one shall be condemned to such

²⁰⁵ Article 19(2) of the Charter expressly includes extradition as a form of *refoulement*. See Section 8.3.2.4 above. Recital (7) of the 2001 Refugee Qualification Proposal had explicitly referred to protection in the event of ‘removal, expulsion or extradition’ in the context of Articles 1, 18 and 19 of the Charter.

²⁰⁶ However, Recital (13) RQSD provides the Directive shall be ‘without prejudice’ to the 1997 Asylum Protocol. In any event, since the 1997 Asylum Protocol only applies to nationals of a Member State and the RQSD only applies to third country nationals and stateless persons, Article 21(1) RQSD is not applicable to protect nationals of a Member State against *refoulement*.

²⁰⁷ See Sections 8.3.3.6 and 8.3.3.7 above. The 2001 EAW Framework Decision applies to both nationals of the Member States and non-nationals while the Mutual Recognition Directive only applies to non-nationals.

²⁰⁸ *Agreement between the European Union and the United States of America on Extradition of 25 June 2003*, not in force: [2003] OJ L181/27.

penalty or executed.’²⁰⁹ Article 21(1) RQSD therefore provides a basis in Union law for a Member State to refuse to extradite under the 2003 EU/US Extradition Treaty, unless condemnation to the death penalty is excluded.²¹⁰

8.5 GENERAL CONCLUSIONS

The analysis of protection against *refoulement* in international law identified a number of differences in the scope and content of protection under the International Instrument, and in particular between the Refugee Convention and the other International Instruments.²¹¹ These variations have specific normative consequences for the effective recognition of these standards in Union law since their recognition has not been by means of Union accession to the relevant convention. Instead the status of the principle of *non-refoulement* has to be distilled from analysis of the reception of the relevant provisions of the International Instruments either as general principles of Union law or as customary international law or *jus cogens* binding on the Union or as recognised in specific instruments of Union law. These differing methods for the reception of the principle of *non-refoulement* in Union law result in a complex and overlapping normative framework which is less transparent than would result from direct Union accession to the relevant UN and European Conventions. The effectiveness of protection of the principle of *non-refoulement* is as a result

²⁰⁹ Protocol No. 13 to the ECHR (ETS 187), adopted 3 May 2002, in force 1 July 2003. Protocol No. 13 has been signed by all the Member States but not, as of 1 September 2005, ratified by France, Italy, Latvia, Luxembourg, Netherlands, Poland or Spain. However, the Protocol satisfies the requirements for qualifying as a general principle of Union law as set out by the ECJ: see Section 4.2.4 of Chapter four. For a discussion of the conformity of Article 13 of the Agreement on Extradition between the European Union and the USA with Article 3 ECHR, see Georgopoulos, above n. 147, at pp. 198-199.

²¹⁰ It is generally agreed that ‘international norms (both general rules and treaties binding the EC)’ take precedence over Community legislation: Peters, ‘The Position of International Law within the Community Legal Order’ (1997) *German Yearbook of International Law*, pp. 1-77, at pp. 37-38. However, the 2003 EU-US Extradition Agreement was concluded under Articles 24 and 38 TEU and a number of questions remain unresolved, both of a procedural and substantive nature, as to the validity and effectiveness of the Agreement in Union law and the national legal orders: see Georgopoulos, above n. 147, at pp 195-206. In these circumstances, it is far from clear that a national court would accord precedence to Article 13 of the EU/US Extradition Agreement over conflicting international and constitutional norms. At the least, the court may construe Article 13 in the light of Article 21(1) RQSD so as to reach an interpretation in conformity with Protocol No. 12 ECHR.

²¹¹ For a summary of where the scope of Article 3 ECHR may be wider than Article 33 of the Refugee Convention, see Stevens, above n. 10, pp 150-153. For a comparative analysis of protection against *refoulement* under the CAT, ICCPR and the Refugee Convention, see: S. Taylor, ‘Australia’s Implementation of its Non-Refoulement Obligations under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights’ (1994) 17 *University of New South Wales Law Journal*, pp. 432-474.

primarily dependent on the robustness and integrity of the Union's judicial system.

The preceding analysis of the recognition of the principle of *non-refoulement* in specific instruments of Union law reveals variations in the degree of conformity. The 1997 Asylum Protocol, the 2002 EAW Framework Decision and the 2003 Dublin II Regulation in particular are premised on the assumption that each Member State offers equivalent protection to refugees and asylum seekers and therefore the transfer of applicants between the Member States only exceptionally raises issues of *non-refoulement*. However, significant differences in interpretation of the principle of *non-refoulement* exist between the Member States and, in the absence of common standards, these variations will persist and may be accentuated by further enlargement of the Union. A further issue is the variation in treatment as regards *non-refoulement* in the Union measures on asylum of non-nationals and Union citizens. While in most circumstances the focus of concern is on the treatment of third country nationals, the 1997 Protocol on Asylum provides less favorable treatment in respect of protection against *refoulement* for a national of a Member State than a non-national. Finally, and of most concern, is the negative potential impact of the war on terrorism on the overriding obligation for the Union to respect international norms on *non-refoulement*. Article 13 of the EU/US Extradition Treaty provides a troubling example of a provision which contravenes Article 1 of Protocol No. 13 ECHR.

On a more positive note, the analysis of Union asylum and refugee measures, and in particular the RQSD, demonstrates that the Union's institutions attach significant weight in the legislative process to respect for international norms on *non-refoulement*. Article 21(1) RQSD and Article 3(2) of the 2001 Mutual Recognition Directive provide examples of the benefits of this legislative practice in constraining the construction of other provisions so as to achieve conformity with the principle of *non-refoulement*. The comparison of the RQSD against the International Instruments also reveals a high level of compliance with international standards on *non-refoulement* which supports an assessment that the normative impact of international standards on the Union's legislative process is substantial in the field of refugee and asylum law.

The Union's institutional practice of proofing proposals in the refugee and asylum

field through the contribution of both NGOs and Union actors throughout the legislative procedure for respect both with internal fundamental rights norms and international fundamental rights norms provides the basis for the future development by the Union of a common asylum policy that is in conformity with the requirements of international justice. However, vigilance is required to ensure that short-term political expediency acting under the guise of unproven security imperatives does not undermine this progress. Implementation of the reforms in the Constitution and accession by the Union to the UN and European Conventions would significantly diminish this risk.

GENERAL CONCLUSIONS

9.1 MEASURING THE JUSTICE OF THE AFSJ: INTERNATIONAL FUNDAMENTAL RIGHTS

This study argues that international fundamental rights provide the most appropriate measure for assessing the justice of the AFSJ. This view is open to challenge on the grounds either that such a standard sets the bar too low for judging the Union or that alternative standards, such as the Charter or the common constitutional traditions of the Member States, provide a more appropriate basis. However, characteristics of international fundamental rights have been identified that confer key advantages over alternative standards. Firstly, international fundamental rights provide objectivity, neutrality and a generally recognised criterion of justice. These characteristics are not matched by the alternative standards. Secondly, international fundamental rights are widely adopted as the standard for evaluating Union measures and policies in the AFSJ both by external agencies and NGOs and the Union's institutions. Thirdly, international fundamental rights, and in particular those based on customary international law, provide flexibility in adapting standards to developing consensus in the international community on issues such as environmental protection, the right to development, democratic governance, and the duty to protect.¹

However, this conclusion should not be interpreted in the sense that international fundamental rights are being proposed as an exhaustive or maximum standard against which to measure AFSJ measures. Instead, they provide a standard which should be

¹ In the UN World Summit Outcome Document, adopted by the General Assembly on 16 September 2005, the responsibility of states and the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity was recognised : UN Doc. A/60/L.1, at para. 138-140. Available at: <http://unfccc.int/files/meetings/unfccc_calendar/application/pdf/world_summit_n0551130.pdf>.

supplemented by other sources such as the Charter and developing norms that have not as yet achieved recognition in international law. However, the characteristics of international fundamental rights identified in this study provide a robust and effective normative framework which commands recognition both from the Union's institutions and the Member States.

9.2 THE AUTONOMY OF UNION LAW: A MISGUIDED OBJECTIVE

This study has further argued that the normative status of international fundamental rights standards in Union law is undermined by the pursuit of the objective of autonomy of Union law, and in particular the autonomy of the ECJ. The research supports this hypothesis. The main characteristics of the Union's legal order, the doctrines of supremacy and direct effect, developed from judicial precedent rather than a written constitution. However, this judicial activism was mirrored in judicial conservatism in the attitude adopted by the ECJ towards international law and the national constitutional orders of the Member States. The ECJ was determined to assert the autonomy of the Union's legal order both from the infiltration of international law and the *carte blanche* acceptance of national constitutional standards. It achieved this autonomy by awarding itself a substantial discretion as to the terms on which international law was integrated into Union law through the doctrine of direct effect and by asserting the pre-eminence of Union law over national constitutional law. However, the assertion of the autonomy of Union law has had two negative consequences from the perspective of securely establishing international fundamental rights in Union law.

Firstly, the absence in the founding Treaties of fundamental rights protection led national constitutional courts to refuse to sanction the transfer of sovereignty to the Union implicit in the doctrines of supremacy and direct effect until Union law provided equivalent protection of fundamental rights to that guaranteed under the national constitution. The ECJ responded to this challenge to its autonomy by developing a Union specific doctrine of fundamental rights as general principles of law based on international treaties and common national constitutional traditions. However, this doctrine has substantial

deficiencies in terms of legal certainty, transparency and the hierarchical relationship of such principles to national and international fundamental rights standards. Except for the recognition of this doctrine in Article 6(2) TEU, the Member States failed at successive renegotiations of the Treaties to address these deficiencies. The declaration of the Charter outside the framework of the Treaties² was a compromise solution adopted in the context of the proposed enlargement of the Union to twenty-five states but its uncertain normative status and the lack of enforceability of the Charter rights and freedoms severely limits its effectiveness as a bill of rights for the Union. In this context, the reforms to the structure of fundamental rights protection in the Constitution represent a milestone insofar as it is the first occasion on which the Member States have agreed on measures designed to establish a democratic and constitutionally entrenched basis for the protection of fundamental rights in Union law.

Secondly, the ECJ in *Opinion 2/94*³ closed the door on accession by the Community to the ECHR that had long been promoted as the logical solution to the weaknesses in fundamental rights protection in Union law compared to the national legal orders. It is reasonable, and in particular in the light of the concerns over autonomy expressed in the debate on accession in the European Convention, to attribute *Opinion 2/94* and the subsequent failure by the Member States to amend the Treaties at Amsterdam or Nice at least in part to concerns over the impact of accession on the autonomy of the ECJ.

However, the mechanisms for the recognition of international fundamental rights standards in Union law, as set out in Article 307 EC Treaty and as developed by the ECJ in *International Fruit Company*⁴ and the general principles doctrine, have been shown for the reasons set out in Chapter four to be unsatisfactory. Incorporation of the Charter would not provide a comprehensive solution since it the Charter is primarily designed as an instrument of judicial review of the conformity of Union legislation and national implementing measures with Charter rights and standards. Union accession to the ECHR

² [2000] OJ C364/1.

³ *Accession to the ECHR, re* [1996] ECR I-1759.

⁴ Cases 21-24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

and the other UN and European Conventions provide the most effective mechanism for protecting the individual against infringement of fundamental rights by the Union or the Member States acting within the field of Union law.

9.3 A PARTNERSHIP TO PROMOTE THE INTEGRITY OF INTERNATIONAL LAW

The analysis of the status of international fundamental rights in Union law supports the view that pursuit of the objective of the autonomy of Union law, and in particular the autonomy of the ECJ, should be abandoned in favor of a conception of the Union legal order that is firmly anchored in the international legal order. The pursuit of autonomy may have appeared justifiable in a context where increased political and economic integration required a commensurate development in the authority of the Union's legal order. However, in the context of globalisation and the enlargement of the Union, such an inward looking objective is outdated. The development of the Union's legal order in the 21st Century should contribute to the 'integrity' of international law.⁵ International fundamental rights, whether derived from treaty or customary international law, should as a consequence be recognised in Union law independently of the doctrines of direct effect and supremacy. They should retain their status as international legal norms without precedence over fundamental rights norms protected by the national legal orders of the Member States.

A partnership model rather than the existing hierarchical relationship should be developed between the ECJ and the national courts whereby the national court refer directly to the decisions of international tribunals for the interpretation of international legal norms within the scope of Union law rather than through the intermediary of the ECJ. Problems of divergence would be limited either by reference to the decisions of the relevant international adjudicating body or, in the absence of such a body, by the development of an autonomous interpretation based on international law. An exemplary demonstration of this latter interpretative method is given in the speech of Lord Steyn in

⁵ The expression is taken from the article by R. Higgins, 'The ICJ, the ECJ and the Integrity of International Law' (2003) 52 *ICLQ*, pp. 1- 20.

R. v. Secretary of State for the Home Department, ex p. Adan and *ex p. Aitseguer* as regards the construction of the Refugee Convention:

‘The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.’⁶

This common interpretative process would be facilitated by Union accession to the ECHR and the other European and UN Conventions as such accession would institutionalize the Union’s membership of the international fundamental rights system.

9.4 THE CONSTITUTION AND BEYOND

The analysis in Chapter five of the impact of the Constitution on the normative status of fundamental rights in Union law concludes that the ratification of the Constitution would be of significant benefit in achieving improved transparency, enforceability and entrenchment of fundamental rights. Article I-9(2) of the Constitution would clear the way for Union accession to the ECHR and accession would, subject to the terms of the accession treaty, result in a significant improvement in the status and enforceability of ECHR rights in Union law. Article I-9(1) would incorporate the Charter resulting in a major improvement in the status and enforceability of the Charter rights and freedoms. However, these benefits would be off-set by the confusing and unnecessary retention in Article I-9(3) of the fundamental rights as general principles doctrine and the new restrictions on the scope and interpretation of the Charter rights and freedoms introduced in Articles II-111(1) and 111(2) and Articles II-112(4)-(7) of the Constitution.

However, the lack of constitutional legitimacy underpinning the development of the basic principles of the Union law has been exposed by the rejection of the Constitution by the French and Dutch electorate in the referenda of 29 May and 1 June 2005. While domestic

⁶ [2001] 2 AC 477, at p. 517.

political considerations no doubt played a part in these results, the attempt to constitutionalise the basic principles of the Union's legal order, and not least the doctrine of supremacy in Article I-6 of the Constitution, revealed a lack of wide-spread understanding and support for such a project.⁷ The stalling of the process of ratification of the Constitution, however, provides an opportunity for a number of the assumptions underlying the doctrines of direct effect and supremacy to be reconsidered and not least the assumption that the autonomy of Union law is an appropriate objective for the Union in an era characterized by globalisation and pluralism.⁸

If ratification of the Constitution is to be abandoned, a package of fundamental rights reform measures building on the existing text of the Constitution could provide an alternative project with greater popular resonance. The analysis in this thesis supports the inclusion of the following elements. Firstly, the Union should be provided with a broadly based competence to accede to international fundamental rights conventions, including the ECHR. Secondly, there should be added to the objectives of the Union a coherent and principled statement of the relationship of Union law to international law and national law in the field of fundamental rights based on the objective of fostering the integrity of international law.⁹ Thirdly, the terms of incorporation of the Charter should be reconsidered with less emphasis on the complex demarcation of the boundaries between Union and national law and more emphasis on the Charter as a guarantor of good governance and legislation. Fourthly, the attribution of judicial *Kompetenz-Kompetenz* and jurisdictional authority to rule on the validity of primary Union law needs to be addressed. One solution that should be explored is the establishment of a new constitutional court for the Union with representation from the judiciary of the national

⁷ In Ireland, where the proposed referendum on the Constitution has been postponed, Article I-6 gave rise to a heated debate between those who maintained it simply codified the existing doctrine of supremacy and those who argued it represented a significant extension of Union competence: see the contributions in the *The Irish Times* of 1 November 2004, 'Vote on EU constitution should not be rushed' by D. Scallan, and 'Primacy of EU law vital for citizens' rights' of 8 November 2004 by E. Regan.

⁸ See for a discussion of these issues, the contributions in J. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (Cambridge, 2003) and the review of the book by Nico Krisch, 'Review Essay: Europe's Constitutional Monstrosity' (2005) 25 *Oxford Journal of Legal Studies*, pp. 321-334. See also Daniel Thym, 'The European Constitution: Notes on the National Meeting of German Public Law Assistants' (1995) 6 *German Law Journal*, pp. 793-803.

⁹ Article I-3(4) of the Constitution could provide the basis for such a provision.

constitutional courts.¹⁰ Finally, the reforms in the Constitution to the restricted jurisdiction of the ECJ over the AFSJ should be implemented in order to provide greater legitimacy to Union law-making in this controversial area.

9.5 THE PRINCIPLE OF NON-REFOULEMENT: A CASE STUDY ON JUSTICE IN THE AFSJ

The case study in Chapter eight was designed to evaluate compliance with the international law principle of *non-refoulement* in Community measures adopted in furtherance of the Common European Asylum System, and in particular the RQSD.¹¹ As explained in the Introduction, the objective of the case study was not to establish a causal relationship between the principle of *non-refoulement* and a specific legislative provision, but rather to assess the directive force of the principle during the legislative process and by reference to the legal text adopted as a result of that process.¹² The conclusion drawn from this study is that while the principle of *non-refoulement* has had a significant normative impact on the Union's legislative process there are substantial differences between the various measures examined as to the degree of compliance with the principle. While such variance is to be expected in such a politically and socially controversial area of Union policy making, it confirms the importance of the Union developing a more secure constitutional structure for the protection of fundamental rights in the AFSJ.

In this context, the structural deficiencies of the AFSJ in terms of access to justice and democratic accountability identified in Chapters six and seven confirm the validity of the

¹⁰ See Weiler and Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz', in Slaughter, Stone Sweet and Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford, Hart Publishing, 1998), pp. 331-364, at p. 364.

¹¹ Directive 2004/83/EC of 1 May 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

¹² For a discussion of the critical literature on the use of case studies and their justification, see Roderick Copley, *Theory and Policy: The Impact of International relations Theory on the Foreign Policy of the United States during the Gulf Crisis of 1990*, PhD Thesis (University of Ulster at Magee, 2003), at pp. 2-6.

wide-spread criticisms both of the individual measures analysed in Chapter eight and the overall deficiencies in the AFSJ structure. The reforms in the Constitution of the AFSJ substantially address the principal structural criticisms through the abolition of the Third Pillar and the extension of the jurisdiction of the ECJ and the role of the EP. Failure to ratify the Constitution would therefore raise serious ongoing concerns over the legitimacy of AFSJ measures and provide grounds for opposing any further extension of Union powers until the structural deficiencies were remedied. If the ratification process is abandoned, the development of a specific package of reforms for the AFSJ based on the provisions in the Constitution would be the minimum necessary in order to secure justice in the AFSJ.

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Annex 1

Selected UN Conventions

United Nations Charter, adopted 26 June 1945, in force 24 October 1945: 59 Stat. 1031, 1 UNTS xvi; as amended by: G.A. Res. 1991 (XVIII) of 17 December 1963, in force 31 August 1965: 557 UNTS 143; G.A. Res. 2101 (XX) of 20 December 1965, in force 12 June 1968: 638 UNTS 308; and G.A. Res. 2847 (XXVI) of 20 December 1971, in force 24 September 1973: 892 UNTS 119.

Convention Relating to the Status of Refugees, signed 28 July 1951, in force 22 April 1954: 189 UNTS 137.

Protocol Relating to the Status of Refugees, signed 31 January 1967, in force 4 October 1967: 606 UNTS 267.

Convention relating to the Status of Stateless Persons, adopted 28 September 1954, in force 6 June 1960: 360 UNTS 117.

Convention on the Reduction of Statelessness, adopted 30 August 1961, in force 13 December 1975: 989 UNTS 175.

International Convention for the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, in force 4 January 1969: 660 UNTS 195.

International Covenant on Civil and Political Rights, adopted 16 December 1966, in force 23 March 1976, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966): 999 UNTS 171; 6 ILM 368 (1967).

Optional Protocol to the International Covenant on Civil and Political Rights, adopted 16 December 1966, in force 23 March 1976, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59: 999 UNTS 302, 6 ILM 383 (1967).

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International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, in force 3 January 1976: G.A. Res. 2200A (XXI), UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966): 993 UNTS 3; 6 ILM 360 (1967).

Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, in force 3 September 1981, G.A. Res. 34/180, 34 UN GAOR Supp. (No. 46), at 193, UN Doc. A/34/46 (1979): 19 ILM 33 (1980).

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Convention on the Rights of the Child, adopted 20 November 1989, in force 2 September 1990, G.A. Res. 44/25 Annex (XLIV), 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989): 28 ILM 1448 (1989).

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted 25 May 2000, in force 12 February 2002, G.A. Res. 54/263, Annex I, 54 UN GAOR Supp. (No. 49) at 7; UN Doc. A /54/49, Vol. III (2000).

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted 25 May 2000, in force 18 January 2002, G.A. Res. 54/263, Annex II, 54 UN GAOR, Supp. (No. 49) at 6; UN Doc. A/54/49, Vol. III (2000).263.

International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, adopted 18 December 1990; in force 1 July 2003, G.A. Res. 45/158, UN Doc. A/Res/45/158: 30 ILM 1517 (1991).

Annex 2

Selected European Conventions

European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, in force 3 September 1953: 213 UNTS 221; ETS 5.

Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 20 March 1952, in force 18 May 1954: ETS 9.

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Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 3 May 2002, in force 1 July 2003: ETS 187.

Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 13 May 2004; not in force: ETS 194.

European Social Charter, signed 18 October 1961, in force 26 February 1965: ETS 35.

Additional Protocol to the European Social Charter, adopted 5 May 1988, in force 4 September 1992: ETS 128.

Amending Protocol to the European Social Charter, adopted 21 October 1991, not in force: ETS 142.

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, adopted 9 November 1995, in force 1 July 1998: ETS 158.

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European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment signed 26 November 1987, in force 1 February 1989: ETS 126.

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Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted 4 November 1993, in force 1 March 2002: ETS 152.

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Convention on Action against Trafficking in Human Beings, adopted 16 May 2005, not in force: ETS 197