

# THE TREATY OF LISBON AND ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The Treaty of Lisbon, adopted in December 2009, constitutes a major step in the development of the protection of Human Rights in Europe. It requires the accession of the European Union (EU) to the European Convention of Human Rights and Fundamental Freedoms (ECHRFF) and raises fundamental questions concerning the autonomy and primacy of EU Law and the relationship between the European Court of Justice (ECJ) in Luxembourg and the European Court of Human Rights (ECHR) in Strasbourg.<sup>1</sup> Through accession, the EU would be subject to external controls through the Strasbourg process for the first time, just as the Member States are.

Further, through the Lisbon Treaty, also called the Reform Treaty or the Constitutional Treaty, the Charter of Fundamental Rights of the EU, which was proclaimed in Nice in 2000, now has legal force.<sup>2</sup> Although the Lisbon Treaty provides that “[t]he provisions of the Charter shall not extend in anyway the competences of the Union as defined in the Treaties,” its new status has not been accepted by all Member States who fear encroaching supervision from Brussels. Three Member States have “opted out” of the Charter: the United Kingdom, Poland, and the Czech Republic.<sup>3</sup> This

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1. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

2. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 20, available at <http://www.unhcr.org/refworld/docid/3ae6b3b70.html> [accessed 21 December 2011] [hereinafter Charter of Fundamental Rights].

3. CONSTITUTION COMMITTEE, EUROPEAN UNION (AMENDMENT) BILL AND THE LISBON TREATY: IMPLICATIONS FOR THE UK CONSTITUTION, 2008-6, H.L. 84, at 61 (U.K.) (noting that this “opt out” provides that the Charter does not extend the ability of the ECJ to strike down the laws of the United Kingdom and Poland). Additionally, the Protocol provides that no greater social or economic rights shall be created in the United Kingdom and Poland as a result of the Charter. There has been some debate in Europe as to whether the Protocol should be considered an “opt out.” On November 3, 2009 the Czech Republic became the last country to sign the Treaty of Lisbon. The Czech Republic conditioned ratification on being able to accede to Protocol 30 along with the United Kingdom and Poland. The protocol will apply to the Czech Republic upon the adoption of the next European Union Treaty in the same way as it currently applies to the U.K. and Poland. Thérèse Blanchet, *The Treaty of Lisbon: A Story in History or the Making of a Treaty*, 34 *FORDHAM INT’L L.J.* 1217, 1246-47 (2011).

article will discuss the issues raised by accession by the EU to the European Convention on Human Rights and assess its impact and potential application.

The European Convention on Human Rights and Fundamental Freedoms was drafted under the auspices of the Council of Europe, a regional intergovernmental organization created in 1949 by Western European nations committed to the preservation of democracy and individual freedom.<sup>4</sup> The Universal Declaration of Human Rights was adopted by the United Nation's General Assembly in 1948,<sup>5</sup> but it soon became clear that a lengthy process would be required to translate the guarantees of the Declaration into legally binding obligations through treaties on an international basis. With the havoc wrought in Europe by World War II still apparent, it was decided to draft a regional human rights convention for Europe.<sup>6</sup> The European Convention on Human Rights was adopted in 1950 and entered into force in 1953.<sup>7</sup> Thus, the Preamble to the Convention states: "Being resolved, as the governments of European countries are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."<sup>8</sup>

As originally adopted, the European Human Rights Convention guarantees the core civil and political rights, such as the right to life, freedom from torture, inhuman or degrading treatment, freedom from slavery, freedom of religion, expression and peaceful assembly, and the right to marry and found a family.<sup>9</sup> It also guarantees equality and freedom from nondiscrimination on the basis of "sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>10</sup> Additional Protocols have expanded the catalogue of rights to include rights to property, an

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

5. Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights* (2008), <http://untreaty.un.org/cod/avl/ha/udhr.html> (last visited Feb. 13, 2012).

6. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS*, FOREWORD viii (Manchester University Press, 1993).

7. *The European Human Rights System*, HUM. RTS. EDUC. ASS'N, available at [http://www.hrea.org/index.php?doc\\_id=365](http://www.hrea.org/index.php?doc_id=365) (last visited Feb. 14, 2012).

8. European Convention, *supra* note 4, at pmbl.

9. *Id.* art. 2–4, art. 9–12.

10. *Id.* art. 14.

education, and the abolition of the death penalty.<sup>11</sup> States that become parties to the Convention agree to accept and be bound by decisions of the European Court of Human Rights, sometimes called the Strasbourg Court, which has substantive responsibility for rendering decisions concerning rights guaranteed by the Convention.<sup>12</sup> Most Member States of the Council of Europe, including all EU Member States, have incorporated the Convention into their domestic legal systems.<sup>13</sup>

The Treaty of Rome, establishing what has come to be known as the European Union, was silent on the protection of fundamental rights.<sup>14</sup> Although it did contain a provision requiring equal pay for equal work based on gender, that provision was inserted as an economic measure rather than a human rights measure, because some states required equal pay by their domestic law and would be at an economic disadvantage without such a provision.<sup>15</sup> In order to ensure application of Community Law throughout the community, in 1964, the ECJ established the principle of supremacy of Community Law over the domestic law of Member States.<sup>16</sup> In part, because of concern about rights, the supremacy doctrine was met with resistance, particularly in the area of human rights.<sup>17</sup> It was unacceptable to some Member States to implement community legislation without reference to their own constitutional guarantees of fundamental rights. And indeed, the German Constitutional Court, in 1967, held that since the Community legal order lacked specific protection of human rights, the transfer of powers from the German legal system to the Community had to be measured against domestic constitutional provisions.<sup>18</sup>

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11. *Id.* Protocol 1, art. 1–2, Protocol 6, art. 1.

12. *The European Human Rights System*, *supra* note 7.

13. Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter on Fundamental Rights and the European Court of Justice: The Impact of European Union accession to the European Convention on Human Rights*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 291–92 (Ingolf Pernice, Juliane Kokott, & Cheryl Saunders eds., 2006) [hereinafter Jacobs].

14. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1957).

15. Elizabeth Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the ECHR*, 19 DICK. J. INT'L L. 301, 301–02, 309 (2001).

16. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 588.

17. Wayne Ives, *European Union Law*, CIVITAS INSTIT. FOR THE STUDY OF CIV. SOC'Y (2006), <http://www.civitas.org.uk/eufacts/download/OS.6.EU%20Law.pdf> (last visited Feb. 13, 2010).

18. Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L L.J. 1104, 1110 (2008).

In response to this challenge, the Court developed a robust jurisprudence with respect to human rights protection in a series of cases, and declared that human rights were enshrined in the general principles of Community Law and would be protected by the Court.<sup>19</sup> In 1975, the ECJ ruled that the ECHRFF had special significance when identifying the fundamental rights applicable under EU Law.<sup>20</sup> To reflect the developing human rights policy of the EU, the Preamble to the Single European Act of 1986 stated that Member States should “work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.”<sup>21</sup>

Yet, there were still no treaty provisions that specifically dealt with the general matter of fundamental rights protection. In 1992, however, the Maastricht Treaty, also called the Treaty of the European Union (TEU), in effect codified the case law and provided that the EU must respect fundamental rights in accordance with the protections afforded by the ECHRFF, as they arise from the constitutional traditions common to Member States and as general principles of Community Law.<sup>22</sup> The Maastricht Treaty states, “[c]ommunity policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.”<sup>23</sup>

Each of the founding members of the EU were signatories to the European Convention on Human Rights, and today, all forty-seven members of the Council of Europe are members.<sup>24</sup> Thus, all Member States of the EU are bound to the provisions of the ECHRFF, and for over thirty years, the accession of the EU itself to the European Convention has been discussed.<sup>25</sup> The Council of Europe requested an opinion from the ECJ concerning the legality of accession by the EU, and in 1996, the ECJ

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19. Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy*, 9 EUR. J. INT'L L. 658, 688–89 (1998).

20. Case 36/75, *Rutili v. Minister of the Interior*, 1975 E.C.R. 1219.

21. Single European Act, 1987 O.J. (L 169/1), 2 C.M.L.R. 741 (EC).

22. Treaty on European Union, Feb. 7, 1992, O.J. (C 191) 4, tit. I, art. F(2). In 1992, the TEU, also known as the Treaty of Maastricht or TEU, amended the EC Treaty and created what is now known as the EU. The Amsterdam Treaty, signed in 1997, amends the TEU.

23. *Id.* tit. XVII, art. 130u(2).

24. See European Convention, *supra* note 4.

25. See generally Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L LJ 1104, 1117 (2008).

advised that the then European Community lacked the competence to accede to the Convention without specific treaty amendment.<sup>26</sup> Even though the subsequent Amsterdam Treaty contained several provisions pertaining to human rights and expanded the scope of human rights to enable the EU to take measures aimed to integrate human rights into the formal structure of the EU, it did not provide for such accession.<sup>27</sup> Another difficulty was that the European Convention itself was not open to international organizations but only to state parties.<sup>28</sup> The original text, prior to subsequent amendments, stated “[t]his Convention shall be open to the signature of the members of the Council of Europe.”<sup>29</sup> With the entry into force of the Lisbon Treaty and Protocol 14 of the European Convention on Human Rights, which entered into force on June 1, 2010 and allows for accession by non-state parties, these two hurdles have been overcome.<sup>30</sup> Article 6(2) of the Lisbon Treaty not only gives the EU the competence to conclude an accession agreement, but also puts it under an obligation to do so.<sup>31</sup> The Treaty states that the “Union shall accede” to the European Convention.<sup>32</sup>

The European Parliament has outlined the main arguments for accession as follows:

- 1) Accession constitutes a move forward in the process of Europe’s integration and political union.
- 2) It enhances the credibility of the EU in the area of human rights.
- 3) It affords citizens’ protection against actions of the EU as well as Member States.
- 4) It contributes to the harmonious development of law in the field of human rights between the ECJ and the ECHR.<sup>33</sup>

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26. Case 2/94, Re: The Accession of the Cmty. to the Euro. Hum. Rts. Convention, 1996 E.C.R. I-1788.

27. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 1.

28. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, E.T.S. 5, available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> (last visited Feb. 28, 2012).

29. *Id.*

30. European Convention, *supra* note 4, Protocol 14.

31. Lisbon Treaty, *supra* note 1, art. 6(2).

32. *Id.*

33. European Convention, *supra* note 4, at pmb1.

In the summer of 2011, a draft agreement on the accession was published.<sup>34</sup> This draft was negotiated by the Steering Committee for Human Rights of the Council of Europe and the European Commission of the EU.<sup>35</sup> Questions concerning the difficulties and impact of the accession have been raised by legal scholars and commentators.<sup>36</sup> To a large extent, the draft agreement answers many questions and sheds some light on the rationale and substantive provisions of EU accession.<sup>37</sup>

According to the draft, the main rationale for accession “is to enforce coherence in human rights protection in Europe” and to offer individuals the right to access the ECHR in Strasbourg.<sup>38</sup> The draft provides that the EU will not accede to all substantive protocols of the Convention.<sup>39</sup> Instead, accession will be limited to the ECHRFF itself.<sup>40</sup> Its first Protocol includes the protection of possessions and the right to education, and Protocol 6 discusses abolition of the death penalty.<sup>41</sup> Abolition of the death penalty on an international basis continues to be a high profile issue and priority within the EU.<sup>42</sup>

With respect to representation on the ECHR, the draft accession agreement provides that a judge elected in respect of the EU will have the same duties and status as the other judges, will participate equally in the work of the Court, and will not be limited to cases related to the EU.<sup>43</sup> Both EU Member States and the EU can, when they so wish, ask to be involved in cases as a co-respondent party, rather than as mere third-party intervener.<sup>44</sup> Whenever the EU is co-respondent, and the ECJ has not yet

34. Council of Europe, *8th Working Meeting Of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) With the European Commission*, CDDH-UE (2011) 15 (July 19, 2011) [hereinafter Council of Europe Report].

35. Antoine Buyse, *Draft Agreement on EU Accession to ECHR*, available at <http://echrblog.blogspot.com/2011/09/draft-agreement-on-eu-acceesion-to-echr.html> (last visited Feb. 12, 2010).

36. Jacobs, *supra* note 13, at 294–95.

37. *See generally* Council of Europe Report, *supra* note 34.

38. *Id.* at pmb1.

39. Buyse, *supra* note 35.

40. *Id.*

41. European Convention, *supra* note 4, Protocol 1, art. 1–2, Protocol 6, art 1.

42. *See id.* at Protocol 6; *see also* ALAN W. CLARKE & LAURELYN WHITT, *THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY*, INTRODUCTION 7 (Northeastern University Press 2007) (noting that the death penalty is all but abolished for Member States of the Council of Europe and for war criminals in international tribunals).

43. Council of Europe Report, *supra* note 34, art. 6.

44. *Id.* art. 3.

had the opportunity to assess the compatibility of EU law with the ECHRFF in a particular situation, the Agreement provides that the ECJ may make an assessment “quickly,” that is, under the accelerated procedure of the ECJ.<sup>45</sup> Thus, it appears that the ECJ can decide a case involving a challenged practice or rule prior to the ECHR should it choose to do so.<sup>46</sup> Finally, and very important in practice, the EU will fund part of the budget of the Council of Europe’s human rights machinery.<sup>47</sup> The agreement will enter into force three months after ratification by all Council of Europe Member States and by the EU.<sup>48</sup> This unique agreement involves many states on two sides of the negotiating table. As experience with the ratification of other ECHRFF protocols shows, this whole process may take years.<sup>49</sup>

The draft accession agreement has been transmitted to the Committee of Ministers of the Council of Europe for further negotiation.<sup>50</sup> The Parliamentary Assembly of the Council of Europe, as well as the two European courts, will comment on the draft.<sup>51</sup> It must then be adopted by the Council of Ministers.<sup>52</sup>

However, even if the draft accession agreement is adopted as proposed, some difficult issues remain to be resolved.<sup>53</sup> For example, to what extent will the ECHR continue to defer to the judgment of the ECJ? In the *Bosphorus* case, the impoundment of an airplane pursuant to EU regulations implementing the U.N. Security Council’s sanctions regime, was challenged in the ECJ.<sup>54</sup> The applicant alleged that the impounding of

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45. *Id.*

46. *Id.*

47. *Id.* art. 8.

48. Council of Europe Report, *supra* note 34, art. 10.

49. Buyse, *supra* note 35.

50. Council of Europe, *8th Working Meeting Of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) With the European Commission, Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, CDDH-UE (2011) 14 (July 19, 2011).

51. *Id.*

52. *Id.*

53. See Jacobs, *supra* note 13, at 294.

54. Case C-84/95, *Bosphorus Hava Yollari Turizm v. Ireland*, 1996 E.C.R. I-3953 ¶ 4 [hereinafter Case C-84/95].

its leased aircraft by the respondent state breached its rights of respect for property.<sup>55</sup>

The ECJ determined that because of the importance of the security interest furthered by the regulation, the impoundment did not violate fundamental human rights, including the right to quiet enjoyment of property as set forth in the Convention.<sup>56</sup> When the impoundment was challenged in the ECHR as violating Protocol 1 to the Convention, the ECHR surveyed the human rights system for protection of human rights in the EU and determined that the system in the EU was equivalent to the Convention system both substantively and procedurally.<sup>57</sup> Although not identical to the Convention, the EU protections were comparable or equivalent to the Convention system, and the Court, in effect, deferred to the decision of the ECJ without further scrutiny.<sup>58</sup> The question of whether or not the ECHR will continue to defer to the decisions of the ECJ after accession is an open one.

A further and possibly divisive issue is raised by the need, as set forth in the Lisbon Treaty, to respect “the specific characteristics of the Union and Union Law” in connection with accession to the European Convention.<sup>59</sup> Since the ECJ has always maintained the position that it is the sole interpreter of EU law, the provision raises interesting questions regarding the interpretive autonomy of the ECJ.

Despite the fact that accession is a political priority for the EU, clearly the process will not be a swift one. Sufficient time and reflection will be directed towards these issues prior to final accession, and the dialog among all interested parties will continue.

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55. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, App. No. 45036/98, Eur. Ct. H.R. 17 ¶ 3 (2005), available at <https://www.suepo.org/rights/public/archive/bosphorus.pdf> (last visited Mar. 10, 2012) [hereinafter App. No. 45036/98].

56. Case C-84/95, *supra* note 54, ¶ 26.

57. App. No. 45036/98 *supra* note 55, at ¶ 155, ¶ 165.

58. *Id.*

59. Lisbon Treaty, *supra* note 1, at Protocol 8, art. 1.