The European Court of Human Rights and the courts of the High Contracting Parties – specifically regarding the consequences of the imminent accession of the European Union to the European Convention on Human Rights

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I. Introduction

The relationship between a constitutional court and the ordinary, administrative, financial, social and labour courts (courts) contains certain particularities. By establishing the European Court of Human Rights (ECHR)[1)], an international court to supervise the compliance with the European Convention on Human Rights[2)], the High Contracting Parties to the Convention set up a further court which has a special relationship with the courts of the High Contracting Parties.[3)] This relationship I undertake to develop in the following. I will pursue this in three steps: Firstly, the direction from the ECHR to the courts is considered (II.). This is followed by the opposite view from the courts to the ECHR (III.). Finally there shall be a look at the consequences of the imminent accession of the European Union (EU) to the ECHR (IV.).

II. From the ECHR to the courts

1. Judgments of the ECHR have an impact on the courts, because the ECHR revises judgments of these courts. It is competent to rule on Inter-State Cases opposing two High

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1) Art. 19 et seqq. of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. Articles without any further specification refer to the Convention.

2) S. http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG.

3) Concerning the relationship between the ECHR and the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) s. *O. Klein*, Straßburger Wolken am Karlsruher Himmel, Zum geänderten Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte seit 1998, Neue Zeitschrift für Verwaltungsrecht (NvwZ) 2010, p. 221 et seqq.

Contracting Parties[4] or on applications from any person, non-governmental organisation or group of individuals[5]. As the ECHR may only deal with a matter after all domestic remedies have been exhausted[6] and the High Contracting Parties have an obligation to provide access to a court[7], it will normally deal with judgments of the courts of the High Contracting Parties when fulfilling its duty.

Judgments of the Court are binding.[8] But they are only declaratory in nature[9] and cannot set aside the revised judgment of the courts[10]. They can only state if a violation of at least one provision of the Convention by the High Contracting Party concerned took place or not. In case a violation of the Convention was found, the High Contraction Parties have discretion in assessing how to implement the judgment.[11]

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4) Art. 33.
5) Art. 34.
6) Art. 35.
7) Art. 13.
8) Art. 46 I.
9) *J. Meyer-Ladewig*, EMRK, 3. ed., Baden-Baden 2011, Art. 46 para. 23; *Chr. Grabenwarter/K. Pabel*, Europäische Menschenrechtskonvention, 5. ed., München et al. 2012, § 16 para. 3; *K. Rohleder*, Grundrechtsschutz im europäischen Mehrebenen-System Unter besonderer Berücksichtigung des Verhältnisses zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte, Baden-Baden 2009, p. 45; *A.-Chr. Zoellner*, Das Verhältnis von Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte Unter Berücksichtigung der Rolles de EuGH, Hamburg 2009, p. 94 et seq.; *Chr. Gusy*, Wirkungen der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte in Deutschland, Juristische Arbeitsblätter (JA) 2009, p. 406, 408; *J. Meyer-Ladewig/H. Petzold*, Die Bindung deutscher Gerichte an Urteile des EGMR, Neues aus Straßburg und Karlsruhe, Neue Juristische Wochenschrift (NJW) 2005, p. 15, 16; *W. Schaller*, Das Verhältnis von EMRK und deutscher Rechtsordnung vor und nach dem Beitritt der EU zur EMRK, Europarecht (EuR) 2006, p. 656, 658; *F. Tulkens*, La protection des droits fondamentaux avant et après l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: Le point de vue de la Cour européenne des droits de l'homme, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.), Der Beitritt der Europäischen Union zur EMRK - The Accession of the European Union to the ECHR - L'adhésion de l'Union Européenne à la CEDH, Die Auswirkung auf den Schutz der Grundrechte in Europa - The impact on the protection of fundamental rights in Europe - L'impact sur la protection des droits fondamentaux en Europe, Baden-Baden 2013, p. 159, 174.
10) *J. Meyer-Ladewig* (fn. 9), Art. 46 para. 23; *Chr. Grabenwarter/K. Pabel* (fn. 9), § 16 para. 3; *I. Karper*, Reformen des Europäischen Gerichts- und Rechtsschutzsystems, Baden-Baden 2010, p. 181; *K. Rohleder* (fn. 9), p. 45; *A.-Chr. Zoellner* (fn. 9), p. 94 et seq.; *Chr. Gusy* (fn. 9), p. 408; *J. Meyer-Ladewig/H. Petzold* (fn. 9), p. 16; *R. Passos*, The Protection of Fundamental Rights in Europe before and after the Accession of the European Union to the European Convention on Human Rights: A View from the European Parliament, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 125, 156; *W. Schaller* (fn. 9), p. 658; *F. Tulkens* (fn. 9), p. 174.
11) *J. Meyer-Ladewig* (fn. 9), Art. 46 para. 25; *Chr. Grabenwarter/K. Pabel* (fn. 9), § 16 para. 3; *I. Karper* (fn. 10), p. 181; *Chr. Gusy* (fn. 9), p. 408; *F. Tulkens* (fn. 9), p. 174; *R. Uerpmann-Wittzack*, Rechtsfragen und Rechtsfolgen des Beitritts der Europäischen Union zur EMRK, EuR 2012, Beiheft, p. 167, 177. S. also *K. Rohleder* (fn. 9), p. 51 et seqq.; *A.-Chr. Zoellner* (fn. 9), p. 104 et seqq.

2. As far as Germany is concerned, the courts have to take these decisions into account, as the German Federal Constitutional has stated in its *Görgülü* decision.[12] To explain this result of only having to take it into account, this Court relies on the level of the European Convention on Human Rights within the German legal order. As an international treaty entered into by Germany, the Convention needs the consent of the federal legislative bodies which is given by a federal statute[13]. For this reason, the German Federal Constitutional Court concludes that "within the German legal system, the European Convention on Human Rights and its protocols ... have the status of a federal statute."[14] It follows that the courts – in relying on an ECHR judgment – may not violate "fundamental principles of the constitution".[15] Besides, the courts must confine themselves to the limits of their competences[16] and of "methodically justifiable interpretation".[17]

Of course, the German Federal Constitutional Court cannot reduce the binding force of an ECHR judgment *on* the Federal Republic of Germany. Based on a dualistic concept of the relationship between the international and the internal legal order[18], the Court only rules on the (possible) impact of an ECHR judgment *within* the latter one. In limiting the possible effects of an ECHR judgment there, it accepts the risk that Germany could violate its international obligations stemming from the European Convention on Human Rights it has entered into when reducing the effect of an ECHR judgment *within* the internal legal order.

3. Comparing the ECHR to a Constitutional Court, it can be found that the Court is competent for applications by any person, like the German Federal Constitutional Court is, for example[19]. It also reviews court judgments only after the exhaustion of all available

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12) BVerfGE 111, 307, 315, 323 et seqq. Thereto s. *K. Rohleder* (fn. 9), p. 164 et seqq., 196 et seqq.; *A.-Chr. Zoellner* (fn. 9), p. 179 et seqq.; *L. Hummel*, Internationales Steuerrecht (IStR) 2005, p. 35 et seq.; *J. Meyer-Ladewig/ H. Petzold* (fn. 9); *M. Sachs*, Juristische Schulung (JuS) 2005, p. 164 et seqq. An English translation of the decision can be found here: http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html.

13) Art. 59 II 2 of the Basic Law for the Federal Republic of Germany (Grundgesetz - GG). An English translation of the Basic Law (unfortunately not the current version) can be found here: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0274.

14) BVerfGE 111, 307, 315, 317; 128, 326, 367. Concerning the status of the Convention within the German legal order s. also BVerfGE 120, 180, 200; *K. Rohleder* (fn. 9), p. 51 et seqq.; *A.-Chr. Zoellner* (fn. 9), p. 136 et seqq.

15) BVerfGE 111, 307, 319, 323 et seq, 329.

16) L.c., p. 323 et seq, 326 et seq.

17) L.c., p. 323, 329.

18) L.c., p. 318.

19) Art. 93 I No. 4 a GG in connection with § 90 I of the Law on the German Federal Constitutional Court (Bundesverfassungsgerichtsgesetz – BVerfGG). An English translation of the BVerfGG (unfortunately not the current version) can be found here: http://www.iuscomp.org/gla/statutes/BVerfGG.htm.

remedies.[20] And, finally, it also limits its review to compliance with human rights.[21]

On the other hand, the ECHR cannot set aside a judgment, like the German Federal Constitutional Court can[22], for example. It also cannot claim supremacy *within* the legal order of the High Contracting Parties.

III. From the courts to the ECHR

1. As far as the opposite view – not *to* the courts, but *from* the courts – is concerned, they have the possibility to directly contact the German Federal Constitutional Court in the German federal constitutional order. By introducing a concrete judicial review, the courts can stay proceedings before them in order to obtain a decision on the constitutionality of a federal statute by the German Federal Constitutional Court in cases where they deem this statute on which they have to base their decisions to be unconstitutional.[23]

The courts also have the possibility of directly contacting the European Court of Justice (ECJ), which rules on the EU legal order. Like the German Federal Constitutional Court, it can be requested by the courts to rule on the validity of acts of the institutions, bodies, offices or agencies of the Union[24]. In addition, the courts can also ask the ECJ to give a (preliminary) ruling on the interpretation of such acts or the EU Treaties themselves.[25] This possibility is linked to the necessity of an answer to that question for the proceedings before the courts.[26] It even turns into an obligation, if the decision of the courts cannot be challenged before a higher instance.[27]

20) For the German Federal Constitutional Court s. § 93 II BVerfGG.

21) For the constitutional complaint to the German Federal Constitutional Court s. Art. 93 I No. 4 a GG in connection with § 90 I BVerfGG. For the ECHR s. Art. 33 et seq.

22) § 95 II BVerfGG.

23) Art. 100 I GG.

24) Art. 267 I lit. b 1. alternative of the Treaty on the Functioning of the European Union (TFEU). The English version of the Treaty can be found here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF.

25) Art. 267 I lit. a and b 2. alternative TFEU.

26) Art. 267 II TFEU.

27) Art. 267 III TFEU.

2. Before the ECHR there exists no such procedure at the moment[28]. This can be explained on the one hand by the fact that this court does not have the power to declare a law null and void. For this reason, a decision by the ECHR would not change the situation before the courts. Even if the ECHR were to find a violation of the Convention by a statute which the courts have to apply in the case pending before them, this statute would be valid after such a decision and therefore would have to be applied. In this context such a procedure is not compulsory.

On the other hand, there is no need for a uniform interpretation.[29] On the contrary, Art. 53 of the Convention explicitly allows the High Contracting Parties to guarantee a higher level of human rights protection. Therefore the courts do not necessarily apply the Convention. They only have to ensure that they do not go below the minimum guarantees of the Convention. Under these conditions it is not necessary to stay a procedure before a court of the High Contracting Parties in order to ask the ECHR for a preliminary ruling.

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28) After its entry into force, Protocol Nr. 16 (http://conventions.coe.int/Treaty/EN/Treaties/Html/214.htm) empowers the ECHR to give advisory opinions on request of the courts of the High Contracting Parties (Art. 1). But these opinions will not be binding (Art. 5). Which courts are competent to ask for such an opinion will be decided by the respective High Contracting Party (Art. 10). The Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten High Contracting Parties have expressed their consent to be bound by the Protocol (Art. 8 I). A chart of signatures and ratifications can be found here: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=214&CM=7&DF=22/01/2014&CL=ENG.

29) Concerning the uniform interpretation as principal aim of the preliminary ruling procedure s. ECJ, Opinion 1/09 of 8 March 2011, ECR 2011, p. I-1137, para. 83.

IV. Consequences of the accession of the EU to the ECHR[30)]

1. At the moment, the EU itself is not a High Contracting Party to the Convention, but all its Member States are. However, an accession of the EU and its predecessor has been discussed since decades. After an ECJ opinion of 28th March 1996 stating that at that moment the Treaties

30) Concerning this accession and its consequences s. *K. Rohleder* (fn. 9), p. 385 et seqq.; *Chr. Schmidt*, Grund- und Menschenrechte in Europa, Das neue System des Grund- und Menschenrechtsschutzes in der Europäischen Union nach dem Inkrafttreten des Vertrags von Lissabon und dem Beitritt der Union zur EMRK, Baden-Baden 2013, p. 63 et seqq.; *B. Schneiders*, Die Grundrechte der EU und die EMRK, Das Verhältnis zwischen ungeschriebenen Grundrechten, Grundrechtecharta und Europäischer Menschenrechtskonvention, Baden-Baden 2010, p. 248 et seqq.; *J. Spiekermann*, Die Folgen des Beitritts der EU zur EMRK für das Verhältnis des EuGH zum EGMR und den damit einhergehenden Individualrechtsschutz, 2013, p. 7 et seqq.; *J. Ph. Terhechte*, Konstitutionalisierung und Normativität der europäischen Grundrechte, Tübingen 2011, p. 81 et seqq.; *J. Vondung*, Die Architektur des europäischen Grundrechtsschutzes nach dem Beitritt der EU zur EMRK, Tübingen 2012; *A.-Chr. Zoellner* (fn. 9), p. 252 et seqq.; *H.-P. Folz*, Der Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention: das Ende einer langen Reise und die Folgen, in: Chr. Vedder (ed.), Völkerrecht 2012, Richterliche Praxis und politische Realität, Beiträge zum 37. Österreichischen Völkerrechtstag 2012, Frankfurt a.M. 2013, p. 105 et seqq.; *C. Grewe*, Beitritt der EU zur EMRK und ZP 14: Wirksame Durchsetzung einer gesamteuropäischen Grundrechteverfassung?, EuR 2012, p. 285 et seqq.; *O. J. Gstrein*, Der geeinte Menschenrechtsschutz im Europa der Vielfalt-Zum Verhältnis der Luxemburger und Straßburger Gerichtshöfe nach Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention, Zeitschrift für europarechtliche Studien (ZEuS) 2012, p. 445 et seqq.; *A. M. Guerra Martins*, A Portuguese Perspective on the Accesion of the European Union to the European Convention on Human Rights, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 201, 219 et seqq.; *G. Heißl*, Happy End einer unendlichen Geschichte?, Der Beitritt der EU zur EMRK und seine Auswirkungen auf Österreich, in: M. Holoubek/A. Martin/St. Schwarzer (ed.), Die Zukunft der Verfassung – Die Verfassung der Zukunft?, Festschrift für Karl Korinek zum 70. Geburtstag, Wien 2010, p. 129 et seqq.; *E. Klein*, Das Verhältnis des Europäischen Gerichtshofs zum Europäischen Gerichtshof für Menschenrechte, in: D. Merten/H.-J. Papier (ed.), Handbuch der Grundrechte in Deutschland und Europa, vol. VI/1, § 167, para. 65 et seqq.; *Chr. Kohler/L. Malferrari*, Um letzte und vorletzte Worte: Zum geplanten Zusammenwirken von EGMR und EuGH nach dem Beitritt der EU zur EMRK, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2011, p. 849 et seq.; *S. Leutheusser-Schnarrenberger*, Der Beitritt der EU zur EMRK: Eine schier unendliche Geschichte, in: Chr. Hohmann-Dennhardt/P. Masuch/M, Villiger (ed.), Grundrechte und Solidarität, Durchsetzung und Verfahren, Festschrift für Renate Jaeger, Kehl 2011, p. 135 et seqq.; *O. Mader*, Beitritt der EU zum Europarat, Institutionelle Aspekte der Entwicklung des europäischen Grundrechtsschutzes nach Lissabon, Archiv des Völkerrechts (AVR) 2011, p. 435 et seqq.; *W. Obwexer*, Der Beitritt der EU zur EMRK: Rechtsgrundlagen, Rechtsfragen und Rechtsfolgen, EuR 2012, p. 115 et seqq.; *E. Pache/F. Rösch*, Die neue Grundrechtsordnung der EU nach dem Vertrag von Lissabon, EuR 2009, p. 769, 779 et seqq.; *E. Pache/F. Rösch*, Die Grundrechte der EU nach Lissabon, Europäisches Wirtschafts- und Steuerrecht (EWS) 2009, p. 393, 398 et seqq.; *R. Passos* (fn. 10), p. 127 et seqq.; *O. Philipp*, EU-Beitritt zur Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten, EuZW 2010, p. 485; *F. de Quadros*, Rapport introductif: La protection des droits fondamentaux en Europe avant et après l'adhésion de l'Union européenne à la Convention européenne des droits des l'homme, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 111, 119 et seqq.; *N. Reich*, Beitritt der EU zur EMRK – Gefahr für das Verwerfungsmonopol des EuGH?, EuZW 2010, p. 641; *G. Ress*, Konsequenzen des Beitritts der EU zur EMRK, EuZW 2010, p. 841; *Th. Schilling*, Der Beitritt der EU zur EMRK, Verhandlungen und Modalitäten, Fast eine Polemik, Humboldt Forum Recht (HFR) 2011, p. 83 et seqq.; *V. Skouris*, Aspekte des Beitritts der Europäischen Union zur Europäischen Konvention für Menschenrechte, in: P.-Chr. Müller-Graff/St. Schmahl/V. Skouris (ed.), Europäisches Recht zwischen Bewährung und Wandel, Festschrift für Dieter H. Scheuing, Baden-Baden 2011, p. 208 et seqq.; *F. Tulkens* (fn. 9), p. 159 et seqq.; *R. Uerpmann-Wittzack* (fn. 11). S. also *S. Stock*, Der Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention als Gemischtes Abkommen?, Hamburg 2010.

did not provide a competence for such an accession[31], such a competence has been included in the Treaty of Lisbon, which entered into force on 1st December 2009. Art. 6 II 1 of the Treaty on European Union (TEU)[32] therefore now reads: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[33]

As an international agreement concluded by the Union, the Convention will be binding both upon the institutions of the Union and on its Member States[34]. It becomes an integral part of the EU legal order[35]. As such it takes part in the precedence of the EU legal order as compared to the legal order – including the constitutional order[36] – of the Member States[37]. [38]

This precedence has also been acknowledged by the German Federal Constitutional Court as the federal constitutional court of one of the EU Member States – but only in principle, because this court does not grant EU law precedence over the "inviolable core content of the constitutional identity of the Basic Law".[39]

After the accession of the EU to the Convention, the latter – as integral part of the EU legal order – will share this position of EU law *within* Germany. It will no longer be limited to the rank of a federal statute. This means that the basis on which the *Görgülü* decision of the German Constitutional Court[40] is founded will not – after the accession – be valid any more. The respective limitations enounced in the *Görgülü* decision will then change to those which apply to EU law.

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31) Opinion 2/94, ECR 1996, p. I-1759, para. 36.

32) The English version of the Treaty can also be found here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF.

33) For the procedure to be followed s. Art. 218 TFEU, especially para. 6 subpara. 2 s. 1 lit. a) ii) and para. 8 subpara. 2 s. 2.

34) Art. 216 II TFEU.

35) ECJ, Judgment of 30 April 1974 in the case 181/73 (Haegeman), ECR 1974, 449, para. 5.

36) ECJ, Judgment of 17 December 1970 in the case 11/70 (Internationale Handelsgesellschaft), ECR 1970, 1125, para. 3.

37) ECJ, Judgment of 15 July 1964 in the case 6/64 (Costa./.E.N.E.L.), ECR 1964, 585.

38) Equally *K. Rohleder* (fn. 9), p. 411; *B. Schneiders* (fn. 30), p. 256; *S. Stock* (fn. 30), p. 207; *S. Bartole*, The Adhesion of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms: the Italian Perspective, in J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 193, 197.; *P. Gragl*, Der rechtliche Status der EMRK innerhalb des Unionsrechts, Zu den Auswirkungen auf die Rechtsautonomie der Europäischen Union nach ihrem Beitritt zur EMRK, ZEuS 2011, p. 409, 421; *E. Klein* (fn. 30). para. 68; *W. Obwexer* (fn. 30), p. 143; *W. Weiß*, Grundrechtsquellen im Verfassungsvertrag, ZEuS 2005, p. 323, 349 et seq. Differing *I. Karper* (fn.10), p. 181.

39) BVerfGE 123, 267, 347, 353 et seq. An English translation of the judgment can be found here: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. S. also BVerfGE 37, 271, 279 et seq.; 58, 1, 40; 73, 339, 376 et seq.

40) S. above p. 121.

2. This effect could be restricted to situations within the scope of application of EU law.[41)]

a. Such a restriction would apply if the agreement on the accession of the EU to the Convention were a so-called mixed agreement. Such mixed agreements are concluded by the EU and its Member States on the one hand and a third party on the other hand if the EU does not have an external competence to enter into international obligations on each field covered by the agreement.[42)] In such a case only the provisions based on an external competence of the EU become an integral part of the EU legal order.[43)]

As already mentioned[44)], the EU – since the entry into force of the Lisbon Treaty – has an (external) competence to accede to the Convention. Therefore there is no need for a mixed agreement and consequently the draft agreement on the accession is only conceived as an agreement between the High Contracting Parties to the Convention and the European Union[45)].[46)] As a result, a restriction of the Convention becoming an integral part of the EU legal order and therefore participating in its precedence over national law cannot be based on the fact that the agreement on the accession of the EU to the Convention is a mixed agreement.

b. Another reason for a limitation of the effect of the Convention within the Member States' legal order could be that the 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, which constitute general principles of the Union's law, also only apply to the Member States within the scope of

41) Supporting this *K. Rohleder* (fn. 9), p. 398, 411 et seq.; *Chr. Schmidt* (fn. 30), p. 90; *B. Schneiders* (fn. 30), p. 256 et seqq.; *A.-Chr. Zoellner* (fn. 9), p. 255; *R. Arnold*, Der Schutz der Grundrechte in Europa vor und nach dem Beitritt der Europäischen Union zur EMRK: Auswirkungen auf Deutschland, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 179, 188; *E. Klein* (fn. 30), para. 68; *W. Obwexer* (fn. 30), p. 119, 126 et seq.; *W. Schaller* (fn. 9), p. 663 et seqq. S. also *S. Stock* (fn. 30), p. 207, and *R. Uerpmann-Wittzack* (fn. 11), p. 176, 183, who act on the assumption of a mixed agreement. Tends to differ *W. Weiß* (fn. 38), p. 350 et seqq. S. also *S. Bartole*, (fn. 38), p. 198 et seq.

42) *K. Schmalenbach*, in: Chr. Calliess/M. Ruffert (ed.), EUV/AEUV, 4th ed. 2011, Art. 216 AEUV para. 23.

43) *S. Vöneky/B. Beylage-Haarmann*, in: E. Grabitz/M. Hilf/M. Nettesheim (ed.), Das Recht der Europäischen Union, vol. I, Art. 216 AEUV para. 52. S. also *K. Schmalenbach* (fn. 42), Art. 216 AEUV para. 43.

44) S. above p. 124 et seq.

45) http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf, p. 4. Thereto *J. Polakiewicz*, Der Abkommensentwurf über den Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention, Europäische Grundrechte-Zeitschrift (EuGRZ) 2013, p. 472 et seqq.

46) Equally *H.-P. Folz* (fn. 30), p. 108; *P. Gragl* (fn. 38) p. 419; *W. Obwexer* (fn. 30), p. 144 et seq. In contrast in favour of a mixed agreement *S. Stock* (fn. 30), p. 191 et seqq., *O. Mader* (fn. 30), p. 439 et seq., and *R. Uerpmann-Wittzack* (fn. 11), p. 183.

application of EU law[47]. Enounced now in Art. 6 III TEU, fundamental rights as general principles of EU law were developed by the jurisprudence of the ECJ.[48] As a justification, the Court could rely on (the predecessor of) Art. 19 para. 1 subpara. 1 s. 2 TEU, which assigns to the Court the task of ensuring that in the interpretation and application of the Treaties the law is observed.[49] It is therefore the restricted role of the Court – to ensure the observation of the law only *in the application of the Treaties* – that causes the limitation of the binding force of fundamental rights as general principles of EU law on the Member States to the scope of application of EU law. The Convention, however, is not developed by the Court and hence not limited by the Court's responsibilities. For this reason this restriction of binding force of fundamental rights on the Member States to the scope of application of EU law does not equally apply to the Convention.

c. However the third instrument to guarantee fundamental rights on the EU level – the Charter of Fundamental Rights (CFR) – is also addressed to the Member States only when they are implementing Union law. But this is explicitly laid down in the Charter – in Art. 51 I 1 thereof. Hence, one should expect that there would be a similar provision for the Convention, if its scope of application were limited.

d. Such a limitation could derive from Art. 6 II 2 EUV, which states that the accession of the EU to the Convention shall not affect the Union's competences as defined in the Treaties.[50] But the wording of this provision – competences – causes doubts: The binding force of the Convention on the Member States constitutes an obligation by a material provision. That is not the same as giving the EU a competence to legislate. And the latter, in fact, should be avoided, as can be seen from the preparatory documents for the European Convention, which deliberated the predecessor of the aforementioned provision. By precluding the affection of the EU's competences it should be rather prevented that "a general competence of the Union on fundamental rights [would be established or that] … "positive" obligations of the Union to take action to comply with the … [Convention] would arise … [beyond] the extent … [beyond] which competences of the Union permitting such action exist under the Treaty"[51].

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47) ECJ, Judgment of 18 June 1991 in the case C-260/89 (ERT), ECR 1991, p. I-2925, para. 42.

48) Judgment of 12 November 1969 in the case 29/69 (Stauder), ECR 1969, p. 419, para. 7; Judgment of 17 December 1970 (fn. 36), para. 4; Judgment of 14 May 1974 in the case 4/73 (Nold), ECR 1974, p. 491, para. 13.

49) *F. C. Mayer*, in: E. Grabitz/M. Hilf/M. Nettesheim (ed.) (fn. 43), Grundrechtsschutz und rechtsstaatliche Grundsätze, para. 1.

50) Like this *K. Rohleder* (fn. 9), p. 398.

51) CONV 354/02, http://european-convention.eu.int/pdf/reg/en/02/cv00/cv00354.en02.pdf, p. 13. S. also *W. Obwexer* (fn. 30), p. 118.

The fact that the Treaties do not define the scope of application of a provision when they exclude the affection of the Union's competences can finally be seen when having a look on the provisions concerning the Charter of Fundamental Rights, which has the same legal value as the Treaties[52]: On the one hand, Art. 6 para. 1 subpara. 2 TEU and Art. 51 II CFR exclude – like Art. 6 II 2 TEU – the extension of the competences of the Union as defined in the Treaties. On the other hand, Art. 51 I 1 CFR indicates that the provisions of the Charter are addressed to the Member States only when they are implementing Union law. If the former provisions already restricted the scope of application of the Charter to cases where the Member States implement EU law, the latter provision would be superfluous. Therefore it must be assumed that Art. 6 para. 1 subpara. 2 TEU, Art. 51 II CFR and Art. 6 II 2 mean something different than limiting the scope of application to cases where the Member States implement EU law. Art. 6 II 2 FEU can hence not be regarded as limiting the binding force of the Convention on the Member States to cases within the scope of application of the Union's law.

e. A restriction could further derive from the Protocol (No 8) relating to Art. 6 II TEU on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, which forms an integral part of the Treaties[53]. The former's Art. 2 s. 2 states that the accession agreement 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.

To assess the question of whether this implies the limitation of the binding force of the Convention on the Member States to situations within the scope of application of EU law, it has to be questioned what "situation of Member States in relation to the European Convention" means. The first approach thereto could be to have a look on the examples added to this phrase. But, protocols to the Convention, derogations and reservations are something different from the limitation of the scope of application thereof. However, the situation of Member States in relation to the European Convention could mean their being bound in every situation. But this is already the case now, as the Member States as High Contracting Parties to the Convention are already bound by Art. 1 thereof in every case within their jurisdiction. Therefore this would not be *affected* by an accession. Only if "situation of Member States in relation to the European Convention" also meant the level of the Convention *within* the Member States' legal orders could it imply the limitation of the binding force of the Convention as an integral part of the EU legal order on the Member States to situations within the scope of application of EU law. But is this a situation *in relation to*? Does a situation in relation to the Convention

52) Art. 6 para. 1 subpara. 1 TEU.
53) Art. 51 TEU.

not mean the situation *under* public international law rather than the situation *within* the legal order of the Member States?[54] The examples which all belong to situations under public international law also point to that direction.

f. It is true that the preparatory documents for the European Convention[55] contain phrasings which could lead to a differing understanding. In one place there is said that according "to the Group's common understanding, the legal "scope" of the Union's accession to the … [Convention] would be limited to issues in respect of which the Union has competence"[56]. But after only a semicolon the sentence continues that "it would thus not lead to any extension of the Union's competences."[57] Therefore the question remains whether the Group is not only talking about the competences – which, by the way, is the only point that has been entered into the legally binding Treaties.

In another place there is the phrasing that "accession by the Union would have legal effect only insofar as Union law is concerned."[58] This part of a sentence is based within the section dealing both with reservations made by Member States and by the Union in its own name. Therefore again the question arises whether they are talking only about the situation *under* public international law rather than the situation *within* the legal order of the Member States.

Two further points are to be noted: Firstly, the binding force of the Convention on the "Member States within the scope of application of EU law" is never explicitly mentioned in the preparatory document. It only talks about the "Union's competence" and the "Union law". Secondly, Art. 216 II TFEU, which orders the binding force of an international agreement on the Member States, is also not cited therein either. Therefore there is no explanation why there should be a limitation of the binding force of an international agreement on the Member States.

g. With a view to the foregoing it could hence not convincingly be established that Art. 216 II TFEU does not constitute the binding force of the Convention on the Member States in every situation.

Of course, this time the EU only has an external competence and no related internal competence, while normally external and internal competence on the same subject belong to the same legislator: Either there is an explicit external competence which is accompanied by

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54) Concerning the distinction between the obligation by public international law and by EU law respectively s. *K. Rohleder* (fn. 9), p. 410 et seq., and *A.-Chr. Zoellner* (fn. 9), p. 253.

55) Fn. 51.

56) L.c., p. 13.

57) L.c.

58) L.c., p. 15.

an internal competence[59] or the internal competence implies an external competence – with the same result of internal and external competence belonging together.[60]

But by conferring the external competence to the EU, the Member States have agreed that the former can enter into international obligations. Its institutions will conclude the agreement which will hence be an act of the institutions and therefore form an integral part of EU law, as can be seen from the *Haegeman* judgment of the ECJ[61] . Only as far as the *implementation* is concerned, the "measures … are to be adopted, according to the state of … [EU] law for the time being in the areas affected by the provisions of the agreement, either by the ... institutions or by the Member States."[62]

Obviously, for the Court it is sufficient that at least one institution acts based on an external competence to create EU law. Only insofar as the implementation is concerned, it relies on the internal competence.[63] Therefore, the institutions will – by concluding the accession agreement – integrate the Convention into the EU legal order and therewith determine its level within the EU and the Member States' legal order. Only if there should be a necessity for an implementation – which is generally not the case for fundamental rights – the EU, if lacking internal competence, could be banned from doing so.[64]

h. As material provisions of EU law, the provisions of the Convention – as was already decided in respect of the fundamental freedoms – are to be observed always. Material provisions enounced within EU law are not limited to situations within the scope of application thereof. They themselves open the scope of application of EU law.[65] Even if the Member States act

59) Art. 79 III TFEU – Art. 79 II lit. c TFEU; Art. 186 II TFEU – Art. 180 TFEU; Art. 191 para. 4 subpara. 1 s. 2 TFEU – Art. 192 TFEU; Art. 207 III TFEU – Art. 207 II TFEU; Art. 209 para. 2 subpara. 1 TFEU – Art. 209 I TFEU; Art. 212 para. 3 subpara. 1 s. 2 TFEU – Art. 212 II TFEU; Art. 214 para. 4 subpara. 1 s. 2 TFEU – Art. 214 III TFEU; Art. 219 III TFEU – Art. 127 II, 140 III TFEU; Art. 8 II EUV – Art. 209, 212 TFEU (*K. Schmalenbach* (fn. 42), Art. 8 TEU para. 14); Art. 37 TEU – Art. 21 et seqq. TEU.

60) ECJ, Judgment of 31 March 1971 in the case 22/70 (AETR), ECR 1971, p. 263, para. 30. The jurisprudence is now incorporated in Art. 216 I 4. and 5. alternative TFEU.

61) Fn. 35, para 3 et seqq.

62) ECJ, Judgment of 26 October 1982 in the case 104/81 (Kupferberg), ECR 1982, p. 3641, para.12.

63) This approach is also advanced within the German constitutional order: When giving their consent to an international agreement pursuant to Art. 59 II GG, the German federal legislative bodies confer the status of a federal statute to the former – even if the agreement concerns matters which remain within the competences of the Länder. Only if a further implementation is needed will the question of whether the federal level or the Länder have the legislative competence arise. (*M. Nettesheim*, in: Th. Maunz/G. Dürig/R. Herzog/R. Scholz (ed.), Grundgesetz Kommentar, Art. 32 para. 70; Art. 59 para. 185).

64) In contrast *K. Rohleder* (fn. 9), p. 411 et seq., who applies the jurisprudence on the implementation on the question of binding force.

65) This could have an impact on the scope of application of the CFR (s. Art. 51 I 1 thereof) and the fundamental rights as general principles (s. above p. 126 et seq.) as well as that of the prohibition of discrimination, Art. 18 TFEU.

within their remaining competences, "it does not follow … that such decisions are bound to fall entirely outside the scope of … [EU] law."[66] Even in those situations "Member States must comply with EU law".[67] Therefore it does not form an exception if the Convention applies to the Member States in every situation – even if they act within their remaining competences.

i. The fact that, based on Art. 6 II 1 TEU and Art. 216 II TFEU, the EU can enter into legal obligations which are binding on the Member States even within their remaining competences, could finally explain why Art. 218 para. 2 subpara. 2 s. 2 TFEU was introduced into the Treaties. The necessity of the Member States' approving it in accordance with their respective constitutional requirements could be the compensation for their being bound even within their remaining competences.

3. After assessing the extent to which they are bound by the Convention, the judges of the courts have also to ascertain the status thereof within the EU legal order.

a. The fact that the Convention will become an integral part thereof after the accession of the EU thereto does not in itself reveal the status of the Convention within this legal order. On the one hand, an international treaty entered into by the EU is binding on the latter's institutions pursuant to Art. 216 II TFEU. Therefore it must rank higher than the law given by these institutions, which is the secondary law. On the other hand, such an international treaty is itself a measure of these institutions and is hence bound by primary law, which is especially shown by Art. 218 XI TFEU, which empowers the ECJ to rule on the question of whether an agreement envisaged is compatible with the Treaties. Therefore an international treaty entered into by the EU is deemed to be located between primary and secondary law.[68] For this reason, the Convention is also mostly considered to be situated between primary and secondary law.[69]

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66) ECJ, judgment of 11 January 2000 in the case C-285/98 (Kreil), ECR 2000, p. I-69, para. 15.

67) ECJ, judgment of 27 October 2011 in the case C-255/09 (COM./.Portuguese Republic), ECR 2011, p. I-10547, para. 48.

68) *S. Vöneky/B. Beylage-Haarmann* (fn. 43), Art. 216 AEUV para. 41.

69) *Th. Kingreen*, in: Chr. Calliess/M. Ruffert (ed.) (fn. 42), Art. 6 EUV para. 27; *K. Rohleder* (fn. 9), p. 410 et seq.; *B. Schneiders* (fn. 30), p. 251 et seqq.; *S. Stock*, (fn. 30), p. 201 et seq.; *A.-Chr. Zoellner* (fn. 9), p. 253; *R. Arnold* (fn. 41), p. 188; *P. Gragl* (fn. 38) p. 415 et seqq.; *C. Grewe* (fn. 30), p. 291; *O. J. Gstrein* (fn. 30), p. 459; *H. Jarass*, Zum Verhältnis von Grundrechtecharta und sonstigem Recht, EuR 2013, p. 29, 43; *B. Kizil*, EU-Grundrechtsschutz im Vertrag von Lissabon, JA 2011, p. 277, 278, 280; *E. Pache/F. Rösch*, Europäischer Grundrechtsschutz nach Lissabon – die Rolle der EMRK und der Grundrechtecharta in der EU, EuZW 2008, p. 519, 521 = *E. Pache/F. Rösch*, Die neue Grundrechtsordnung der EU nach dem Vertrag von Lissabon, EuR 2009, p. 769, 785 = *E. Pache/F. Rösch*, Die Grundrechte der EU nach Lissabon, EWS 2009, p. 393, 400; *W. Schaller* (fn. 9), p. 665; *E. Schulte-Herbrüggen*, Der Grundrechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon, ZEuS 2009, p. 343, 363; *Ch. Tsiliotis*, Das Verhältnis zwischen den Europäischen Gerichtshöfen in Luxemburg und Straßburg vor und nach dem Beitritt der Europäischen Union zur EMRK, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 51, 83 et seq.

b. Nevertheless the question is raised of whether Art. 6 II 1 TEU elevates the Convention to primary law.[70] Of course, the Convention is mentioned there, but this does not give it the status of primary law, which can be inferred from Art. 6 I TEU. This provision does not only refer to the Charter of Fundamental Rights but also states that the latter shall have the same legal value as the Treaties. Therefore a similar provision should be expected if the Convention were to be conferred the same status as the Charter.

Additionally, none of the goals to be reached by the accession of the Union to the Convention requires the latter to become primary law: This is first true for the binding force of the Convention on the EU and the possibility of a direct review of its acts and omissions by the ECHR[71], as can be seen from the German situation[72]. Also, for the enhancement of the EU's credibility concerning its human rights policy[73] – expecially with regard to the fact that it expects that every country wishing to become an EU Member State be(come) a Party to the Convention[74] – it is sufficient to just become a Party to the Convention. Finally, the coherence between the Convention and the jurisprudence of the ECHR on the one hand and especially the Charter and the ECJ on the other hand[75] cannot be guaranteed by giving both of the instruments the same legal status. It will rather be ensured by the binding force of the former's jurisprudence on the latter's[76] and by Art. 52 III 1 CFR, which states that, insofar as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the latter.[77]

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70) *St. Schmahl*, Grundrechtsschutz im Dreieck von EU, EMRK und nationalem Verfassungsrecht, EuR 2008, Beiheft 1, p. 7, 37.

71) *B. Schneiders* (fn. 30), p. 249; *S. Stock* (fn. 30), p. 169, 174, 185 et seq.; *A. Stricker*, Die Bedeutung der Europäischen Menschenrechtskonvention und der gemeinsamen Verfassungsüberlieferungen für den Grundrechtsschutz der Europäischen Union, Frankfurt a.M. 2010, p. 99; *O. J. Gstrein* (fn. 30), p. 449; *S. O. Pais*, The Protection of Fundamental Rights in Europe before and after the Accession of the European Union to the European Convention on Human Rights – Some Questions concerning the Legal Impact of the Charter of Fundamental Rights, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 95, 102; *V. Skouris* (fn. 30), p. 208; *F. Tulkens* (fn. 9), p. 165; *W. Weiß* (fn. 38), p. 348. S. also *R. Passos* (fn. 10), p. 133 et seq.

72) S. above p. 121. In contrast finding it "problematic" *C. Grewe* (fn. 30), p. 296.

73) *B. Schneiders* (fn. 30), p. 249; *S. Stock* (fn. 30), p. 184; *O. J. Gstrein* (fn. 30), p. 449 et seq.; *S. O. Pais* (fn. 71), p. 102; *R. Passos* (fn. 10), p. 132; *J. Ph. Terhechte*, Autonomie und Kohärenz – Die Eigenständigkeit der Unionsgrundrechte im Zuge des EMRK-Beitritts der Europäischen Union, in: J. Iliopoulos-Strangas/V. Pereira da Silva/M. Potacs (ed.) (fn. 9), p. 23, 41; *F. Tulkens* (fn. 9), p. 161, 165, 174.

74) *B. Schneiders* (fn. 30), p. 249; *S. Stock* (fn. 30), p. 184; *O. J. Gstrein* (fn. 30), p. 450; *S. O. Pais* (fn. 71), p. 102; *J. Polakiewicz* (fn. 45), p. 473; *F. Tulkens* (fn. 9), p. 161.

75) *B. Schneiders* (fn. 30), p. 249; *S. Stock* (fn. 30), p. 169, 185; *A. Stricker* (fn. 71), p. 92, 99; *O. J. Gstrein* (fn. 30), p. 449; *S. O. Pais* (fn. 71), p. 102; *R. Passos* (fn. 10), p. 133; *J. Ph. Terhechte* (fn. 73), p. 39, 42; *F. Tulkens* (fn. 9), p. 162, 174; *W. Weiß* (fn. 38), p. 348.

76) S. below p. 134.

77) In contrast *G. Heißl* (fn. 30), p. 132.

c. Further, the status of primary law could be conferred upon the Convention because the decision concluding the accession agreement shall only enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements[78] [79]. This condition is the same as in one of the simplified procedures to revise the Treaties[80]. Therefore it is argued that the accession of the EU to the Convention is pursued according to a Treaty revision procedure, which would lead to the conclusion that the Convention becomes part of a Treaty revision and therefore part of the Treaties.[81]

One could argue that the accession procedure differs from the revision procedure envisaged because it demands a decision by the Council[82] and not by the European Council as the said revision procedure. Additionally, it necessitates the consent of the European Parliament[83], while the said revision procedure does not. There are, however, other procedures to revise the Treaties where a decision of the Council[84] or the consent of the European Parliament[85] is needed. Therefore this cannot constitute an obstacle to the Convention becoming part of the primary law.

But, as we have already[86] seen, the necessity of the Member States' approval could also be understood as a compensation for their being bound even within their remaining competences. Also, the accession does not change the wording of the Treaties. Therefore it could be an additional part of the Treaties, but it need not to be. Even as a "regular" international agreement it will be binding on the institutions.[87] Therefore decisive regard can be held to the fact that the Treaties contain several provisions imposing conditions on the accession[88]. These conditions can only apply to the accession agreement if they are higher ranking than the aforesaid agreement.[89] Hence, the level between primary and secondary law seems to be envisaged by the Treaties for the Convention as it is for every other international agreement of the EU.

It is true that the ECJ held in its opinion on the accession of the EU to the Convention that that "would be of constitutional significance and … could be brought about only by way

78) Art. 218 para. 8 subpara. 2 s. 2 TFEU.
79) Raising the question *H.-P. Folz* (fn. 30), p. 117 et seq.
80) Art. 48 para. 6 subpara. s. 3 TEU.
81) *R. Uerpmann-Wittzack* (fn. 11), p. 173 et seq.
82) Art. 218 para. 8 subpara. 2 s. 2 TFEU.
83) Art. 218 para. 6 subpara. 2 s. 1 lit. a) ii) TFEU.
84) Art. 333 TFEU.
85) Art. 48 VII TEU.
86) S. above p. 131.
87) S. above p. 131.
88) Art. 6 II 2 TEU, Protocol (No 8).
89) Differing *R. Uerpmann-Wittzack* (fn. 11), p. 174.

of Treaty amendment"[90] [91]. But the context shows that the "constitutional significance" only means that the agreement "therefore" cannot be based on (the predecessor of) Art. 352 TFEU[92]. It does not imply that the agreement has to be a Treaty amendment itself.[93] Otherwise the Court could not have concluded that "as … [EU] law now stands, the … [Union] has no competence to accede to the Convention" [94]. If it were not only to be based on a Treaty amendment, but to be done itself by Treaty amendment, the EU could never have a competence to do so – and not only "as … [EU] law now stands". Therefore the said opinion, too, cannot lead to the Convention becoming primary law after the EU's accession thereto.

4. Finally, the fact that the Convention will become an integral part of EU law after the accession of the EU thereto entails a further consequence: The ECJ can be called upon to interpret it. Either this court is asked to verify if an act or omission of the Member States[95] or an act[96] or omission[97] of the EU institutions, bodies, offices or agencies is in compliance with EU law, which includes compliance with the Convention as its integral part. Or this court is asked by a court established in one of the EU Member States to give a preliminary ruling on the Convention as an act adopted by the institutions.[98]

Notwithstanding, the ECHR will remain competent to interpret the Convention. Such a role is also acknowledged by the ECJ: International agreement concluded by the Union can create or designate a court with jurisdiction to interpret and apply their provision.[99] The ECJ even accepts that "decisions of that court will be binding on … [EU] institutions, including" itself. [100]

As a consequence, there will be two courts which can interpret the Convention. The decisions of both of them will be binding on the courts of the High Contracting Parties. If the ECHR rules first and the ECJ accepts its interpretation and complies with it, there will be no problem for the courts. However, if the ECJ is the first to decide and the ECHR later gives a dissenting interpretation, the courts will face a contradiction between two judgments,

90) Fn. 31, para. 35.
91) Therefore pleading for the status of primary law *C. Grewe* (fn. 30), p. 296.
92) L.c.
93) Differing *S. Stock* (fn. 30), p. 223.
94) L.c., para. 36.
95) Art. 258 TFEU.
96) Art. 263 TFEU.
97) Art. 265 TFEU.
98) S. above p. 122.
99) Opinion 1/91 of 14 December 1991, ECR 1991, p. I-6079, para. 40, 70; Opinion 1/09 (fn. 29), para. 74.
100) Opinion 1/91 (fn. 99), para. 39. S. also *G. Heißl* (fn. 30), p. 132.

both of which are binding on them.

In such a situation[101], shall the courts ignore the first judgment of the ECJ on the ground that this court itself has acknowledged the binding force of a judgment of the ECHR? Or shall they introduce a (further) preliminary ruling to the ECJ in order to ask if this court will give up its former interpretation because of the ruling of the ECHR?[102] The ECJ has found another solution in cases where a change of the situation could occur: To show that its jurisprudence is based on the actual state of EU law, which can be amended in the future, it introduces in such a situation a reservation saying that something is in conformity with EU law or not "as … [EU] law now stands"[103]. Based on this, this article concludes with the suggestion that the ECJ, when interpreting the Convention, use a similar reservation, e.g., "subject to a prospective differing decision of the ECHR", when giving an interpretation of the Convention. On the one hand, this could give legal certainty to the courts which are bound by ECJ decisions, making clear that they are allowed to ignore the decision after a differing decision of the ECHR. And on the other hand, this could avoid the prolongation of legal proceedings before the courts and the enhancement of the workload of the ECJ by avoiding preliminary rulings of the ECJ where they are not really necessary because of the acknowledgement of the binding force of judgments of the ECHR by the ECJ.

101) Concerning this situation s. also *P. Gragl* (fn. 38) p. 425 et seqq.

102) Suggested by *G. Heißl* (fn. 30), p. 144, and Dr. *W. Michl* during the aforementioned symposium.

103) S. e.g. Opinion 2/94 (fn. 31), para. 36.