



ISSN Print: 2541-5298  
ISSN Online: 2541-6464

# SRIWIJAYA

Law Review

**Editorial Office:** Faculty of Law, Sriwijaya University  
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Website: <http://journal.fh.unsri.ac.id/index.php/sriwijayalawreview>

## Relationship between the Obligations from the European Convention on Human Rights and the Accession to the European Union

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Article	Abstract
<p><b>Keywords:</b> <b>Bosnia and Herzegovina; EU Law; the Rule of Law; EU Enlargement; European Convention on Human Rights.</b></p> <p><b>Article History</b> Received: Dec 8, 2022; Reviewed: Jun 20, 2023; Accepted: Jul 18, 2023; Published: Jul 31, 2023.</p> <p><b>DOI:</b> 10.28946/slrev.Vol7.Iss2.2502.pp209-227</p>	<p>Bosnia and Herzegovina (B&amp;H) has difficulty integrating and moving closer to the goal of becoming a member of the European Union (EU). From the legal perspective, the main issue is the need to fulfil the accession criteria. The article aims to examine the relationship between the obligations under the European Convention on Human Rights and Basic Freedoms (ECHR) and the obligations related to the European Union (EU) accession process, with emphasis on Bosnia and Herzegovina (B&amp;H) as an EU membership candidate country. At first sight, those two obligations are separate. However, upon close examination, a strong link between those two obligations can be established using normative research with a historical approach, statute and case-based approach. On the other hand, the constitutional system of B&amp;H has been described as discriminatory by numerous judgments of the European Court of Human Rights (ECtHR) and, most prominently, by the Sejdic-Finci case. B&amp;H has difficulties implementing those judgments. Implementing those judgments is also set as one of the requirements of EU accession. Even if the two obligations seem separate at first sight, the ECHR has a special position within the law of the EU and is especially important in the accession of new Member States, including B&amp;H. The research results show a special position of the ECHR in EU law and a link between the obligations under the ECHR and EU accession.</p>

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### INTRODUCTION

Bosnia and Herzegovina (B&H) is having a particularly difficult time progressing on its European integration path and moving closer to the goal of becoming a member of the European Union (EU). Many reasons for such a lack of progress can be identified, such as political instability, which seems to be permanent, particularly cumbersome constitutional setup ripe with veto opportunities and the lack of political will to focus on issues related to the integrations

process instead of other questions, to name a few of those possible reasons.<sup>1</sup> From the legal point of view, the reason for the lack of progression in the EU accession is the lack of fulfilment of the accession criteria, being it the overall Copenhagen criteria as set by the EU for all potential new Member States, or specific criteria relating to Bosnia and Herzegovina, like those enumerated in the list of fourteen priority points identified in the EU Commission's Opinion on Bosnia and Herzegovina's accession application.<sup>2</sup>

On the other hand, constitutional setup is not only making the country's apparatus inefficient and difficult to govern but it is also deemed discriminatory. Numerous decisions adopted by the country's Constitutional court or by the European Court of Human Rights (ECtHR) have established that rules related to the election and appointment of certain officials in the country's executive and legislative bodies are discriminating against the members of minority groups. The norms even have discriminatory effects based on the place of residence. Failure to execute the judgments of national and international courts, as one of the basic constitutional obligations and obligations stemming from the European Convention on Human Rights and Basic Freedoms (ECHR)<sup>3</sup> is seen as a situation which is contrary to the very principle of the rule of law.<sup>4</sup> Under the current constitutional setup, which originated in the Dayton peace agreement, which ended a bloody conflict in 1992-1995, the country is divided into two entities: the Federation of Bosnia and Herzegovina and the Republic of Srpska, with a separate special administrative unit of Brčko District. The entity of the Federation of Bosnia and Herzegovina is further divided into ten cantons. All those units, together with the government on the state level, comprise a complex constitutional order. Apart from that, there is a complex set of rules aimed at protecting the collective rights of three main ethnic groups (defined as "constitutive peoples": Bosniaks, Croats and Serbs), giving the representatives of these groups certain veto powers and quotas in appointment and voting procedures. For example, the country's presidency consists of three members, two of which are Bosniak and Croat members, who are elected from the Federation of Bosnia and Herzegovina, while the Serb member is from the Republic of Srpska. Members of minority groups, or persons who do not declare as members of one of the constitutive peoples, are therefore barred from being elected as members of the presidency, which is a blatant case of discrimination as decided by the case of *Sejdic Finci* (in the case of members of minorities)<sup>5</sup> or *Zornic* (case of any person not declaring as a member of one of the constitutive peoples).<sup>6</sup> Furthermore, even the members of constitutive peoples are discriminated against since Croats or Bosniaks living in the Republic of Srpska, as well as Serbs from Federation Bosnia

<sup>1</sup> David Chandler, "Bosnia: Faking Democracy After Dayton," Pluto Press, 2000, <https://doi.org/10.2307/j.ctt18fs8w9>.

<sup>2</sup> European Commission, "Commission Opinion on Bosnia and Herzegovina's Application for Membership of the European Union," 2019, [https://www.eeas.europa.eu/delegations/bosnia-and-herzegovina/opinion-bih's-application-eu-membership\\_en](https://www.eeas.europa.eu/delegations/bosnia-and-herzegovina/opinion-bih's-application-eu-membership_en).

<sup>3</sup> See further, "The European Convention on Human Rights and Basic Freedoms," 2022, <https://www.coe.int/en/web/human-rights-convention>.

<sup>4</sup> Omerdić Dženeta and Harun Halilović., "The Case of *Baralija V Bosnia and Herzegovina: A New Challenge for the State Authorities of Bosnia and Herzegovina?.*," *Društvene i Humanističke Studije* 5, no. 4 (2020): 2017–2238.

<sup>5</sup> Judgment, *Sejdić and Finci v. Bosnia and Herzegovina* [GC] - 27996/06 and 34836/06 (2009).

<sup>6</sup> Judgment, *Zornić v. Bosnia and Herzegovina* - 3681/06 (2014).

and Herzegovina, cannot be elected as members of the presidency unless they move to another entity, as described in the case of Pilav.<sup>7</sup> Those are among the most important cases decided by the European Court of Human Rights, identifying the discriminatory nature of the country's constitutional and election system. Bosnia and Herzegovina still do not execute those judgments, which is one of the basic obligations under the European Convention on Human Rights. The fulfilment of those judgments, however, requires amendments to the Constitution of B&H. The Opinion of the EU Commission singled out fourteen points needed for the country's progress towards European integration, including fulfilling the European Court of human rights decisions.<sup>8</sup>

At first sight, such a requirement seems logical. The country should fulfil the decisions of Europe's top human rights court. However, the European Court of Human Rights is not a part of the structure of the European Union. It is a separate legal entity stemming from the legal system of the Council of Europe. Its position, as well as the obligations of signatory countries of the ECHR concerning the execution of its decisions, stem from the European Convention on Human Rights and not from the European Union law, which is a separate legal order based on Treaty on EU (TEU), and Treaty on the Functioning of the EU (TFEU) as primary sources, together with the vast body of legislature adopted by member states and institutions of EU also known as *acquis communautaire*.

So why is EU Commission insisting on fulfilling obligations related to a separate legal order? Why is EU Commission dealing with the human rights of candidate countries at all, since human rights are not the primary goal of the EU, as they are a primary goal of the Council of Europe? Are those two connected at all? Is it fair to make additional requirements from Bosnia and Herzegovina when we have examples of integration processes of EU Member States which joined in earlier periods and whose accession process was focused primarily on economic and political integration and adoption of the *acquis*? The first part of the analysis will focus on examining the evolution of human rights within the system of EU Law and the position of ECHR in the law of the European Union. The latter part of the analysis will examine the position of ECHR in the integration process and Stabilisation and Association Agreement between Bosnia and Herzegovina and the European Union. The analysis will examine whether the international legal obligations stemming from the ECHR, the execution of the judgments of the ECtHR being one of the most important one of those obligations, are inseparable from the obligations a candidate country has when adopting the *acquis communautaire* of the EU law, and fulfilling other requirements as defined by the association agreement, that represents a legal basis on which the accession process is conducted.

## RESEARCH METHODS

The specific methodology that will be used throughout the article in order to conduct the analysis and form conclusions will involve normative research with the use of the historical

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<sup>7</sup> Dženeta Omerdić and Harun Halilović, "Discrimination Based on Place of Residence in Recent Jurisprudence of the European Court of Human Rights with Emphasis on Bosnia and Herzegovina," *IUS Law Journal* I, no. 1 (2022): 60–76.

<sup>8</sup> European Commission, "Commission Opinion on Bosnia and Herzegovina's Application for Membership of the European Union."

approach, statute approach and case-based approach. Historical approach: will be used to explain the evolving relationship between the different legal regimes (the EU law and ECHR) and the changes in the EU accession process. Content approach: will be used to analyse the content of relevant documents. From primary and secondary sources of EU law, the court decisions and decisions of relevant domestic and international bodies determine the legal solutions and track their changes. Case-based approach: Will be used to analyse human rights cases in front of national and international courts, with reflection and comparative analysis and reflection. The cases that will be analysed relate to human rights, the rule of law and their reflections on state responsibility.

## **ANALYSIS AND DISCUSSION**

### **The Evolution of the Position of Human Rights and the European Convention on Human Rights under the European Union Law**

#### *Human Rights in the System of European Union Law*

The position of human rights in the legal order of the European Union has gone through major changes, starting with the formation of the first Communities up to the present situation. The original founding Treaties of the European Communities did not contain any provisions or mentions of human rights issues, as they reflected primarily the understanding of the Communities and the whole European integration process as an economic project. However, it is interesting to note that the rejected draft of the European Political Community in 1953 contained a provision that would have made the European Convention on Human Rights and Fundamental Freedoms (ECHR) a part of the law of the Communities.<sup>9</sup> The European Convention on Human Rights, created within the Council of Europe, represents a different legal framework separate and different in terms of goals and mechanisms from the European Union. Nevertheless has had its place within the law of the European Union for a long time.

The position of the ECHR within EU law changed in parallel with the change in the position of human rights issues in EU law. As already mentioned, in the initial stages of European integration, the founding Treaties of the Communities were carefully formulated in order to avoid the regulation of human rights in EU law, primarily due to the lack of consensus but also due to the understanding that the issue of human rights is not one of the objectives of the European Union. It was understood that some other international organisations, such as the Council of Europe and the United Nations, are primarily responsible for human rights issues instead of the EU. The first steps towards the "introduction" of human rights into EU Community law were taken by the Court of Justice of the EU (CJEU), which, after introducing the doctrine of supremacy of the Community law over national legislation and the doctrine of direct applicability of Community law, recognised the opportunity to use those doctrines to improve the state of human rights in the European Union, primarily through the use of the principle of non-discrimination. In addition to establishing the doctrines of supremacy and the direct applicability and effect of EU law, of great importance were the activities of the EU Court of Justice on the interpretation and determination of "general principles of law".<sup>10</sup>

<sup>9</sup> Craig P. P and De Búrca Gráinne, *Text Cases and Materials*, Oxford University Press, 2015.

<sup>10</sup> Davies Karen, *Understanding European Union Law* (Routledge. Abingdon. Oxon [UK], 2013).

The general principles of law are defined as one of the sources of Community law, and the Court of Justice of the EU identifies them in the constitutional traditions common to the Member States and international legal documents signed by the vast majority of EU Member States, a prime example being the ECHR.

Among the first cases dealing with the issue of human rights within the context of EU Community law was the case of *Stauder v City of Ulm* (C-29/69).<sup>11</sup> After a long-term avoidance of dealing with human rights issues, in the *Stauder* case of 1969, the CJEU recognised the protection of fundamental human rights as one of the general principles of EU law, concluding that nothing in EU law can be contrary “...to the fundamental human rights contained in the general principles of law”. This position was further continued in the case of *Internationale Handelsgesellschaft* (C-11/70) from 1970, where the court concluded that “... respect for fundamental human rights forms an integral part of the general principles of Community law, which are protected by the European Court of Justice.” The Court further recognised the need for the protection of those rights to be incorporated into the founding EU Treaties of that time. “The protection of those rights, which is inspired by the constitutional tradition common to the member countries, must be ensured in the structure and objectives of the Community. It must therefore be clearly established.”<sup>12</sup>

Jurisprudence related to human rights, as well as the issue of human rights within EU law, was, therefore, in the first instance, closely related to the development of general principles of law as a source of European Union law. Further elaboration of the understanding of the general principles of law comes in the case of *Nold* (C-4/73)<sup>13</sup> from 1974 when the court identified two sources from which it draws “inspiration” for the recognition of the general principles of EU law, namely a) the common constitutional tradition of the Member States, b) international legal agreements in the domain of human rights, which are common to the Member States.

The explicit recognition of the ECHR as one of those sources of inspiration came in the *Rutili* case (C-36/75) from 1975, in which the Court of Justice of the EU concluded that EU regulations related to the prohibition of restrictions on the right of movement are a specific manifestation and elaboration of general principles that are already included in the European Convention on Human Rights.<sup>14</sup> By defining the ECHR as a source of inspiration, one of the principles derived from the ECHR itself was realised, namely the principle that the defined the catalogue of rights listed in the ECHR as a certain “minimum”, while encouraging and enabling the states to guarantee a higher scope of rights.<sup>15</sup>

In the case mentioned earlier of *Handelsgesellschaft*, the court expressed a view that the issue of human rights protection must be included in the primary sources of EU law, i.e. in the founding Treaties. This “call” by the CJEU to change the primary sources of EU law did not go unnoticed. In 1977, Community Institutions (Parliament, Council and Commission) began with adopting a series of joint declarations on basic human rights. These were all optional

<sup>11</sup> *Erich Stauder v City of Ulm – Sozialamt* (n.d.).

<sup>12</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (n.d.).

<sup>13</sup> *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* (n.d.).

<sup>14</sup> *Roland Rutili v Ministre de l’intérieur* (n.d.).

<sup>15</sup> *White Robin C. A Clare Ovey and Francis Geoffrey Jacobs, Jacobs White and Ovey the European Convention on Human Rights* (Oxford University Press, 2010).

documents; however, they represent the beginning of a political process and a new approach to the issue of human rights, which ended with the norms related to human rights, and the ECHR itself, eventually finding their place in the primary sources of EU law. Changes started with the Maastricht Treaty and went on in the Treaties of Amsterdam, Nice and finally, the Treaty of Lisbon.<sup>16</sup>

The Maastricht Treaty, from 1992, expressly states that "*the European Union will respect the fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, as they derive from the constitutional traditions common to the Member States, as general principles of Community law.*"<sup>17</sup> With this provision, the European Convention on Human Rights, or more precisely, the rights defined within the convention, have been expressly incorporated into the legal system of the European Union as part of the general principles of EU law, which are considered to be a source of EU law. The European Union Institutions are obliged to respect the rights contained in the ECHR. Thus, the obligation to respect human rights is determined as one of the cornerstones of the EU, thereby moving away from understanding the European Union as a purely economic project. On the other hand, it is indicative that the European Convention on Human Rights is the only international human rights document that is explicitly mentioned. However, many other international legal instruments dealing with human rights and whose signatories are members of the European Union and represent part of the common constitutional tradition of the Member States. This indicates the special status of the ECHR concerning other similar international legal instruments within the Community law of the European Union.

All of this led to initiatives for the European Union to join the European Convention on Human Rights as a signatory. However, according to the arrangements at that time and the powers of the European Union at that time, such a possibility did not exist. According to the position taken by the Court of Justice of the EU in the advisory Opinion 2/94 from 1994, there was no possibility of the EU acceding to the ECHR. Namely, according to the legal system and situation applicable at the time, the European Union had only a limited legal personality that the Member States did not expressly recognise. In addition, the EU Institutions did not have explicit authority to act in the field of human rights. According to the applicable distribution of competencies and the scope of authority that belonged to the EU level (or the Communities), there was neither an implicit authority nor the possibility of acceding to the ECHR.<sup>18</sup> The court concluded that the accession of the EU as a member of the ECHR would have significant institutional implications that go beyond the scope of the powers the EU had at the time and that these shortcomings could only be eliminated by amending the primary acts of the EU, i.e. by the amendment of the founding Treaties. After those initial attempts to accede to the ECHR, EU Institutions, as well as the Member States, received instructions from the EU Court of Justice on the steps that need to be taken in order for the EU to join the ECHR, e.g. to make the required amendments to the Treaties. However, as that step required the explicit granting of

<sup>16</sup> Craig P. P and Gráinne, *Text Cases and Materials*.

<sup>17</sup> Maastricht Treaty on EU 1992

<sup>18</sup> Opinion 2/94 (n.d.).

legal personality to the European Union and the granting of powers to deal with human rights issues to the EU Institutions, it took a long time to reach an agreement to take that step.

### **Relationship between the EU Charter of Fundamental Rights and the European Convention on Human Rights and Fundamental Freedoms**

In the meantime, in order to fill the "vacuum" left by the need for a document that would deal with the issue of human rights within the European Union and its *acquis communites*, the EU Institutions and Member States began drafting the EU Charter of Fundamental Rights (Charter). The Charter was adopted in 2000 during changes to the primary sources of EU law that resulted in the Treaty of Nice. However, its status could have been clearer for a long time, and the general understanding was that it was an optional document.<sup>19</sup> Its position was changed by the provisions of the Treaty of Lisbon in 2009, which placed it on the same (binding) level as other founding EU Treaties.

The text of the Charter and the rights listed in it, in many cases, represent rights transferred from the European Convention on Human Rights, with some additional extensions. This is certainly not accidental because the Charter itself states, in its preamble, that fulfilling obligations arising from the ECHR is one of the goals of the Charter itself. The most important link between the Charter and the ECHR is found in Articles 52 and 53. Namely, Article 52 states that "*...if the Charter contains rights that correspond to the rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights will be the same as determined by the Convention.*". This provision establishes kind of a direct link between the Charter and the ECHR in terms of the interpretive subsidiary application of the ECHR in cases of corresponding rights contained in the EU Charter of Fundamental Rights and the European Convention on Human Rights and Fundamental Freedoms<sup>20</sup>.

The list of corresponding rights is significant. Thus, Article 2 of the ECHR (Right to Life) corresponds to Article 2 of the Charter of the same name. Article 4 of the Charter (Prohibition of torture and inhuman and degrading treatment or punishment) corresponds to Article 3 of the ECHR. Article 5 of the Charter (Prohibition of slavery and forced labour) corresponds to Article 4 of the ECHR. Article 6 (Right to freedom and security) corresponds to Article 5 of the ECHR. Article 7 of the Charter (Right to private and family life) corresponds to Article 8 of the ECHR. Article 9 of the Charter (Right to marry and found a family) corresponds to Article 12 of the ECHR. In addition to rights found in these articles that appear in both documents, some even in identical text, there is a whole series of provisions that contain the same rights, only distributed in different articles. Several paragraphs in different articles of the Charter correspond in content to Articles 6 and 7 of the ECHR, which contain provisions on the right to a fair trial in civil and criminal proceedings. Some articles of the Charter correspond to articles of certain Protocols to the ECHR, such as the right to private property and the right to vote<sup>21</sup>. So, in addition to the rights that are defined, in an identical or almost identical way, in the EU Charter and

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<sup>19</sup> Craig P. P and Gráinne, *Text Cases and Materials*.

<sup>20</sup> "EU Charter on Fundamental Rights," EUR-Lex, n.d., <https://eur-lex.europa.eu/legal-content/HR/ALL/?uri=CELEX:12016P/TXT>.

<sup>21</sup> Craig P. P and Gráinne, *Text Cases and Materials*.

the ECHR, certain rights are fragmentarily defined in individual articles of the documents as elements of different rights. However, both documents contain a vast number of common rights, either as individual rights or constituent elements of other rights (e.g. different elements of the right to home and family that correspond to privacy rights or different elements of the right to access to court and a fair trial that are distinguished in several articles of the EU Charter, and the ECHR contained in the understanding and interpretation of Article 6).

Accordingly, we may say that the position of the ECHR exceeds the position of a pure “inspirational function” concerning the EU Charter of Fundamental Rights because Article 52 of the Charter establishes the indirect application of the ECHR through the application of interpretation and understanding of the content and scope of rights contained in both documents in a way defined by the ECHR.

The Charter further states that the EU Institutions can give a wider scope (but not more restrictive) to those rights than the one derived from the ECHR, which is also an understanding supported by the ECHR, determining that Member States are free to give a higher standard of rights than that specified in the convention. On the other hand, Article 53 of the Charter introduces this negative limitation in terms of the interpretation of the scope of rights, determining that the rights from the Charter cannot be interpreted narrower than those guaranteed by the common constitutional traditions of the Member States, or by the European Convention on Human Rights and Fundamental Freedoms.

According to the current state of the primary sources of EU law, after the Treaty of Lisbon, the issue of human rights and the European Convention on Human Rights is directly regulated in Articles 6 and 7 of the Treaty on the European Union (TEU) and Article 19. Treaty of the Functioning of the European Union (TFEU).

In Article 6, the TEU confirms the legally binding nature of the Charter and refers to the interpretative link between the Charter and the ECHR. Namely, the TEU determines that:

“The rights, freedoms and principles of the Charter will be interpreted under the general provisions of Chapter VII of the Charter, which determines its interpretation and application, about the explanations contained in the Charter that determine the sources of those commissions.”<sup>22</sup>

As mentioned, this provision refers to Article 52 of the Charter (found in Chapter VII of the Charter), which directly links the interpretation and application of the rights contained in the EU Charter of Fundamental Rights and the European Convention on Human Rights and Fundamental Freedoms. Significant provisions regarding the protection of human rights are contained in Article 7 of the TEU, which gives the authority to initiate proceedings against Member States that show a backlog in the protection of human rights and where there are situations that indicate serious violations of the values of the European Union, among which are the protection of human rights and the rule of law among others. Article 19 TFEU on the other hand, gives explicit powers to the EU Institutions to act in the field of combating discrimination.

Regarding the position of the European Convention on Human Rights and Fundamental Freedoms within EU law, the most significant provisions are those contained in paragraphs 2

<sup>22</sup> “Treaty on European Union,” n.d., [https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0011.01/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0011.01/DOC_2&format=PDF).



and 3 of Article 6 of the Treaty on the European Union. Namely, in paragraph 2 of Article 6 of the TEU, the obligation of the EU Institutions to accede to the ECHR is determined, stating that *"the Union will accede to the European Convention on Human Rights"*. The third paragraph of Article 6 of the TEU further discusses the position of the ECHR, repeating the essence of the provision introduced into the primary sources of EU law by the Maastricht Treaty of 1992. Namely, according to the state of the TEU after the Treaty of Lisbon, Art 6, in paragraph 3, now states that *"...fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they arise from the constitutional traditions common to the Member States, constitute the general principles of Union law."*<sup>23</sup> Therefore, the text of the provision shows progress in the position of the ECHR and the rights guaranteed by the convention compared to the original appearance of this provision in the Maastricht Treaty. That original provision established the obligation for the EU institutions to respect the fundamental rights contained in the ECHR. In the latest version of this provision, the fundamental rights guaranteed by the ECHR are defined as part of the general principles of EU law, which, as already mentioned, is one of the sources of Community law of the European Union.

### **Accession of the European Union to the European Convention on Human Rights**

Regarding the process of EU accession to the European Convention on Human Rights, since the establishment of this obligation in Article 6 of the TEU and after the entry into force of the Lisbon Treaty in 2009, there has been much activity both on the part of the EU Institutions and on the part of the Council of Europe. However, the accession itself was a more difficult task than it appeared at first sight.

The obstacle that was stated in the Opinion of the Court of Justice of the EU, Opinion 2/94 from 1994, i.e. the lack of legal personality of the EU, as a necessary precondition for approving the ECHR, has been removed by amended Article 47 of the EU Treaty, which now expressly states that *"...the Union has legal personality"*.<sup>24</sup> On the other hand, the procedural obstacles that existed on the part of the Council of Europe were also removed by the adoption of Protocol 14 to the European Convention on Human Rights, which entered into force on June 1, 2010.<sup>25</sup> Namely, Article 17 of Protocol no. 14 to the ECHR has been changed in such a way as to insert a new paragraph No. 2, which now states that *"the European Union can accede to the Convention"*.<sup>26</sup> After removing those primary obstacles, the negotiation and drafting of the Draft Treaty on Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms from 2013 (Draft Treaty on Accession) began.

However, the accession process encountered new difficulties after the Court of Justice of the EU, in its advisory Opinion 2/13 from 18 December 2014, gave a negative assessment of

<sup>23</sup> "Treaty on European Union."

<sup>24</sup> "Treaty on European Union."

<sup>25</sup> "Council of Europe, Protocol 14 to the ECHR," n.d., [https://www.ecljpcoe.int/documents/library\\_collection\\_p14\\_ets194e\\_eng.pdf](https://www.ecljpcoe.int/documents/library_collection_p14_ets194e_eng.pdf).

<sup>26</sup> "Council of Europe, Protocol 14 to the ECHR."

the Draft Accession Agreement. After that, negotiations continued and are still ongoing,<sup>27</sup> with the aim of preparing a new Draft Accession Treaty that would correct the deficiencies identified as problematic by the EU Court of Justice.

The position of the Court of Justice of the EU expressed in the advisory Opinion 2/13 has been widely criticised by the academic and professional public.<sup>28</sup> However, after analysing the court's reasoning in the Opinion, it is evident that the Court of Justice of the EU is not against the accession to the EU Convention itself, but that it pointed out certain shortcomings found in the Draft Accession Treaty, which could, indeed, produce certain problematic effects, both in terms of autonomy and special features of the structure and legal system of the European Union, as well as for the functioning of the European Court of Human Rights and the issues it would have to deal with, as a result of certain provisions of the Draft Treaty.

In its Opinion, the Court of Justice of the EU took the position that the Draft Treaty on the Accession of the EU to the European Convention on Human Rights is contrary to the TEU and the TFEU, pointing out the "systemic" shortcomings of the draft. In its Opinion, the CJEU determined that significant changes to the draft are needed to preserve the European Union's special characteristics and laws of the EU and their autonomy. Namely, the Draft Accession Treaty, as a way of resolving the special relationship between the EU Institutions and the Member States and the mutual relationship between EU law and the national law of the Member States, and as a way to avoid situations of incorrect passive identification and determine responsibility for possible human rights violations, foresaw the so-called "correspondence mechanism", which provided for the possibility that the Member State and the European Union could appear jointly in the proceedings, on the side of the "respondents".

In the case of the appearance of the European Union as a respondent before the European Court of Human Rights, the first issue is the question of which source of European Union law results in the violation of human rights. Namely, the Court of Justice of the EU pointed to the fact that if it is a provision that derives from the primary sources of EU law, i.e. norm of the founding Treaty, the European Union itself cannot be held responsible, nor are the EU Institutions able to remedy the violation, for the simple reason that the creators of the founding Treaties are the Member States, therefore they are the only ones able to remedy such a violation.<sup>29</sup> On the other hand, if the source of the violation is a norm from a secondary source of EU law, e.g. Regulations or Directives adopted by the EU Institutions, the question that arises is the one of the relationship between the law of the EU and the person whose human rights has been violated by it.<sup>30</sup> Namely, the basic question is whether it is the legislation of the European Union that directly caused the violation or whether it is an implementing measure undertaken by a Member State intending to implement the obligations of that Member State, derived from the Regulations or Directives of the European Union. The indirect influence of EU legislation is

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<sup>27</sup> "An Insight into the Work Negotiation Group," n.d., <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights>.

<sup>28</sup> Piet Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky," *Fordham International Law* 38, no. 4 (2015): 956.

<sup>29</sup> Eeckhout.

<sup>30</sup> Eeckhout.

especially visible in cases of Directives. However, as stated in the Bosphorus case, it is also possible in the case of Regulations. When determining the facts in each case, to identify the correct defendant, i.e. the responsible party (whether it is the EU or a Member State), the European Court of Human Rights would be forced to decide and consider the issue of distribution of jurisdiction and responsibilities between the EU and Member States.

According to the position of the CJEU, this would violate the autonomy of the European Union, for the reason that the only ones who have the authority to determine the issue of the distribution of competencies are the Member States and the EU Institutions, and in the final instance, the institution competent to rule on that issue is exclusive, the Court of Justice of the EU.<sup>31</sup> On the other hand, the European Court of Human Rights would be involved in constantly solving the issue of jurisdiction and responsibility, extensively dealing with the issue that is mainly dealt with by other Courts and which is not its primary task as a European Court of Human Rights, that primarily decides on human rights issues.

Due to the shortcomings mentioned earlier, among other reasons, the Court of Justice of the EU expressed a negative opinion, not on the accession of the EU to the ECHR itself, nor on the possibility of accession itself, but on the presented Draft Accession Treaty. Negotiations on the new draft were renewed in 2019, where both parties have established departmental teams and the preparation of a new draft contract is expected.<sup>32</sup> The new draft report is prepared and will be submitted to the procedure of review by EU institutions.<sup>33</sup>

### **European Convention on Human Rights in European Union Law**

Finally, it must be said that the future accession of the EU to the European Convention on Human Rights (which is defined as an obligation of the EU Institutions in Article 6 of the TEU), in a practical sense, would give the possibility for the Institutions of the European Union to appear as parties to the proceedings and possibly be declared responsible for violating human rights. On the other hand, the fact is that since the Maastricht Treaty, the Institutions of the European Union already must respect the rights guaranteed by the European Convention on Human Rights.

According to the current text of the TEU, after the changes introduced by the Lisbon Treaty, the position of the European Convention on Human Rights, i.e. the rights guaranteed by the convention, was raised to the level of general principles of European Union law, which represents one of the sources of EU law.

On the other hand, the European Convention on Human Rights is applicable indirectly through the application of the EU Charter of Fundamental Rights, through the obligation to interpret and apply complementary rights, which are found both in the EU Charter on Fundamental Rights and in the European Convention on Human Rights, and the number of which is

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<sup>31</sup> Inga Daukšienė and Simas Grigonis, “Accession of the EU to the ECHR: Issues of the Co-Respondent Mechanism,” *International Comparative Jurisprudence* 1, no. 2 (2015): 98–105, <https://doi.org/10.1016/j.icj.2016.01.001>. I, p. 101.

<sup>32</sup> “An Insight into the Work Negotiation Group.”

<sup>33</sup> “Final Consolidated Version of the Draft Instruments” n.d.

significant, following their interpretation in the case law of the ECtHR. That referral link is established in Art 6 TEU and Chapter VII of the EU Charter of Fundamental Rights.

It can be concluded that the European Convention on Human Rights represents a de-facto part of Community law, i.e. part of the *acquis* of the European Union and that the rights guaranteed by the convention are protected in the European Union as general principles of EU law, which is one of the sources of EU law (under Article 6 TEU). Also, the rights guaranteed by the convention are protected through the interpretation and the application of complementary rights contained in both the EU Charter of Fundamental Rights and the ECtHR (as provided for in the provisions of Chapter VII of the EU Charter of Fundamental Rights). The accession of the EU to the European Convention on Human Rights (which is defined as an obligation of the EU Institutions in Article 6 of the TEU), in a practical sense, will only enable the appearance of the European Union as a procedural party and responsible for the violation of the rights guaranteed by the European Convention on Human Rights, while the obligation itself is on the respect of the rights guaranteed by the ECHR by the EU Institutions established since the Maastricht Treaty in 1992.

### **The Rule of Law Requirements for Bosnia and Herzegovina**

#### ***The respect for the principle of the rule of law in the process of European enlargement and integration***

When we talk about respect for the rule of law by the EU Institutions in their cooperation with third countries, we are talking about the obligation of the EU to respect its basic principles and values as defined by the EU Treaties in its international legal relations with third countries. Those obligations are fulfilled by incorporating specific clauses and conditionality mechanisms that refer to the rule of law in international contracts of various types, such as trade agreements and, especially, association agreements with potential new Member States. Thus, as stated in the specific example of the Stability and Association Agreement (SAA) with B&H, a clause is embedded in it related to the obligation to respect the rule of law as one of the basic values of the EU.<sup>34</sup>

The development of the European Union, following the long-established goal of building an "ever closer union", is an evolutionary process that went from the initial stages of economic cooperation and the construction of communities with limited powers to the construction of a political union that introduces certain values into its foundations, in addition to purely economic interests. In addition, the European Union is a dynamic bureaucratic and political entity that creates a kind of "institutional memory" of its own, extracting from each completed process certain experiences and "lessons" that it uses in future similar situations.<sup>35</sup> These differentiation experiences signal which steps should be taken to avoid negative consequences from previous cases.

<sup>34</sup> Bartels Lorand, *Human Rights Conditionality in the Eu's International Agreements* (Oxford University Press, 2005).

<sup>35</sup> Marija Vljaković, "Rule Of Law – Eu's Common Constitutional 'Denominator' And A Crucial Membership Condition On The Changed And Evolutionary Role Of The Rule Of Law Value In The Eu Context," *EEU and Comparative Law Issues and Challenges Series (ECLIC) 4* (September):235-57, n.d., <https://doi.org/10.25234/ecllc/11903>.

Thus, after the great “Eastern enlargement”, the Institutions of the European Union saw that some of the newly admitted Member States had serious systemic deficiencies in the rule of law sector, especially in protecting minorities and the fight against corruption. Countries such as Romania and Bulgaria are constantly mentioned in the Commission's reports in the context of serious shortcomings in the fight against corruption<sup>36</sup>, while Poland and Hungary, led by political representatives who lead the ideas of “illiberal democracy”, are cited in the Commission's reports as countries with serious shortcomings in terms of the rule of law and minority rights.<sup>37</sup>

The institutions of the European Union themselves realised that the mechanisms available to strengthen the rule of law, which can be used after the state's accession as a new member, are simply insufficient to produce tangible results.<sup>38</sup> As mentioned, during the accession of the eastern European states as part of the great “Eastern enlargement”, the issues of the rule of law were one of the topics that the states had to close and fulfil in the pre-accession negotiations. However, this took place more in adopting the necessary changes to the national legislation in the given countries to adapt to the EU *acquis*. The process focused on economic and geopolitical topics, while the issue of implementation of EU standards was secondary.

Learning through a negative experience, as a part of the new approach to enlargement, which primarily refers to the Western Balkans countries, the focus is now placed precisely on issues of the rule of law. Under the new approach, when opening negotiations with a new candidate state, the process begins with issues of the rule of law, defined in chapters 22 and 23 of the negotiation process, which refer to issues of the judiciary and the rule of law.<sup>39</sup> In this way, the goal is to ensure a higher level of improvement in the state of the rule of law. At the same time, there are still mechanisms in the hands of the EU Institutions, such as the mechanisms of conditionality and gradual progress, which, although sometimes do not produce the desired results, are still much more effective mechanisms than the ones that are at the disposal of the EU Institutions after the state's entry as a new member of the European Union, which, as was shown by the example of Hungary and Poland, may prove to be completely ineffective due to the possibility of procedural abuses.<sup>40</sup>

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<sup>36</sup> F Peirone, “The Rule of Law in the EU: Between Union and Unity, Croatian Yearbook of European,” *Law and Policy* 15, no. 1 (2019): 77.

<sup>37</sup> Peirone.

<sup>38</sup> Vljaković, “Rule Of Law – Eu’s Common Constitutional ‘Denominator’ And A Crucial Membership Condition On The Changed And Evolutionary Role Of The Rule Of Law Value In The Eu Context.”

<sup>39</sup> Eda Kusku-Sönmez and Selin Türkes-Kiliç, “Dynamics of Technical Progress Towards the EU Accession: New Rules, Vetoes and Power Asymmetries,” *European Foreign Affairs Review* 23, no. 2 (2018): 263–80, <https://kluwerlawonline.com/journalarticle/European+Foreign+Affairs+Review/23.2/EERR2018024>.

<sup>40</sup> P. Pech, L., Wachowiec and D Mazur, “Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action,” *Hague J Rule Law* 13 (2021): 1–43, <https://doi.org/10.1007/s40803-021-00151-9>.

### **Obligation to respect the rule of law and obligations arising from the European Convention on Human Rights in the Stabilization and Association Agreement**

In the context of Bosnia and Herzegovina and its current status as a candidate state<sup>41</sup> the point of reference from the legal point of view is the Stabilization and Association Agreement (SAA). Namely, in the SAA, the contracting parties refer to the principles of the rule of law as the basis on which they will establish their relations. In Article 2, the SAA<sup>42</sup> defines the respect for democratic principles, the rule of law and respect for international conventions, including the European Convention on Human Rights, as fundamental values by which the parties must be guided. As a result of the above, in this context, we can label the obligations to execute the judgments of the ECtHR, as well as the obligations to harmonise the legislation of B&H with the *acquis* of the EU, both defined in the SAA, as obligations arising from European integration. In addition, Bosnia and Herzegovina undertakes to strengthen the principles of democracy and human rights and to respect international human rights instruments. Among those documents, the UN Charter and the European Convention on Human Rights,<sup>43</sup> which are common to both parties and to which both parties are signatories, are expressly mentioned.

On the other hand, the special position of the European Convention on Human Rights in the legal *acquis* of the European Union is also of great importance, to which the first section of this SAA article was devoted. Namely, as previously stated, according to the new amendments to the fundamental treaties of the EU, the EU Institutions are obligated to join the EU as a signatory to the ECHR, and the negotiation of the appropriate modality is underway.<sup>44</sup> In addition, the ECHR already enjoys a special status within the EU legal system and can be considered one of the sources of EU law.

Therefore, the obligation to respect the ECHR and, especially, the obligation to execute the judgments of the ECtHR is an obligation of a dual nature and can be considered both as arising from the necessity of harmonising the national legal system with the *acquis* of the EU and as an obligation defined in the Stabilization and Association Agreement referring to the respect of the rule of law principle. SAA is a legally binding document of international law defining the pre-accession tasks that the candidate country has in closing certain negotiation chapters.<sup>45</sup>

One of the crucial segments of the principle of the rule of law is an equal and robust approach to applying legislation, which, in addition to legislative acts, also includes court rulings. With the consistent application of court rulings, one could talk about the realisation of the principle of the rule of law.<sup>46</sup> Respecting the decisions of the ECtHR and executing ECtHR judgments in the context of the European integration process, therefore, represents an obligation of a dual nature due to the specific position of the ECtHR within the EU *acquis* and the special obligation

<sup>41</sup> "EU Candidate Status for Bosnia and Herzegovina," n.d., [https://www.eeas.europa.eu/eeas/eu-candidate-status-bosnia-and-herzegovina-message-people-and-tasking-politicians-0\\_en](https://www.eeas.europa.eu/eeas/eu-candidate-status-bosnia-and-herzegovina-message-people-and-tasking-politicians-0_en) .

<sup>42</sup> "Stabilisation and Association Agreement between European Communities and Theirs Country Member of Bosnia and Herzegovina," 2008, [www.dei.gov.ba](http://www.dei.gov.ba).

<sup>43</sup> Supra note 36

<sup>44</sup> Daukšienė and Grigonis, "Accession of the EU to the ECHR: Issues of the Co-Respondent Mechanism."

<sup>45</sup> Lorand, *Human Rights Conditionality in the Eu's International Agreements*.

<sup>46</sup> Christopher May and Adam Jeremiah Winchester, *Handbook on the Rule of Law*, 2018.

embedded in the SAA and the integration pre-accession process related to the closure of certain chapters.

Therefore, although formally speaking, the EU and the ECHR represent two separate legal frameworks; the execution of the judgments of the ECtHR represented in the past currently represents and will represent in the foreseeable future, an obligation that B&H must fulfil in carrying out its EU integration tasks. The suspension of the entry into force of the SAA itself, which lasted an atypically long period from 2008 to 2015, and which was a result of the non-implementation of ECtHR Judgment in the *Sejdić-Finci* case, actually represents a practical realisation of the principle of conditionality and a plastic example the connection between the principles of the rule of law and the EU integration process.<sup>47</sup> This obligation will remain, as a condition, for further steps of B&H, such as the opening of negotiations on EU membership and progress in closing individual chapters. On the other hand, it is certain that many other obligations related to the rule of law, respect for human and minority rights and the execution of judgments, especially judgments of the ECtHR, can potentially be defined as indicators (benchmarks) for opening, as medium-term indicators and as indicators for closing individual chapters.

Ultimately, the concept of the rule of law and the position of the principle of the rule of law in the European Union has come a long way. From its inception, when the concept of the rule of law was linked to the concept of equality before the law and the consistent application of positive law, to the modern "broad understanding" of the rule of law that includes various elements that also represent crucial elements of democracy, respect for human rights, minority rights and international standards. On the other hand, the European Union has changed from a purely economic integration in which there was no mention of certain values to a very close Union that defined in its foundation Treaties of the EU certain values such as democracy, human and minority rights, human dignity and the rule of law. The EU Institutions themselves have a special understanding of the rule of law. Although there is no hierarchy among the defined values, the rule of law is defined as a *condicio sine qua non* without which other values cannot be realised. The EU is trying to preserve and advance these values internally (in which it has difficulties due to the abuse of procedural rules) and externally, where the obligation is defined that EU Institutions in international legal relations with third countries must adhere to defined values. This expression is visible in contracts with third countries in which clauses on respect for fundamental values are incorporated, which is especially the case in contracts related to integration processes. Learning from past experiences with integration processes, the EU applies a new approach in future integrations, focusing on strengthening the rule of law.

A special position, in the context of strengthening the rule of law in the integration process, is the observance of the ECHR and the execution of the judgments of the ECtHR, which is the result of the special position of the ECHR within the EU *acquis*, and the clauses that refer to the ECHR within the SAA, which gives this obligation a double character. In the end, for B&H to progress in its EU integration process, it is necessary to implement the ECtHR's rulings so

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<sup>47</sup> Lorand, *Human Rights Conditionality in the Eu's International Agreements*.

far but also fulfil numerous obligations that will be defined in the pre-accession process necessary for the opening and closing of certain chapters of the pre-accession negotiations.

When it comes to the question of whether it is "fair" to make additional requirements from B&H in its EU accession process, i.e. to put additional conditions that are, in fact, related to the ECHR, as a legal order important to, but separate from EU law, we can approach that issue from legal and a political standpoint.

From the legal point of view, the question is whether such an obligation is legally based on norms of positive law. From a legal standpoint, as it has been discussed throughout the research, it can conclude that the B&H itself accepts, by its sovereign decision, those additional requirements relating to the implementation of ECtHR decisions, as a part of its accession process, by signing the Stabilisation and Association Agreement with the EU. Further, the ECtHR decisions (primarily in the *Sejdic-Finci* case) established the discriminatory nature of the B&H constitutional order. Therefore, from the legal point of view, such a requirement is well founded and fair since its intended result is eradicating discrimination in an EU membership candidate country, especially from its constitutional provisions.

However, this issue can be open to different conclusions from a political point of view. The EU has every right to change its approach to new candidate countries and requires more scrutiny in the rule of law and human rights, which is related primarily to chapters 22 and 23 of the accession *acquis*. However, "raising its bar" can lead to the differentiated treatment towards the new candidate countries, such as B&H, as compared to some previous ones, since the previous accession processes focused primarily on the economic integration and the adoption of the *acquis*.

Further, constitutional reforms are challenging in any country and involve a wide political discussion on topics that relate to some of the most important issues of one society. In order to fulfil the obligations under the ECtHR Judgments, Bosnia and Herzegovina would have to find a political consensus needed for the constitutional reform. Achieving a consensus on constitutional reform issues can be very difficult, especially in countries with complex decision-making processes, like the one in B&H. Therefore, having that in mind, it may be said that, from the political point of view, it would be fairer for the EU Institutions to focus on the economic and institutional reform aspects of the accession process of B&H in order to create a stable and prosperous environment within the country, that would enable for a meaningful political process of constitutional change. Such a process would be more effectively conducted within the stable environment of the EU membership than in the volatile pre-accession phase.

## CONCLUSION

The European Convention on human rights has a special position in European Union Law. It is an integral part of EU law, as a part of general principles of law, which are defined as one of the sources of EU law. The ECHR, as one of the general principles of the EU law, is not inserted at random since it is a human rights treaty common to the Member States and already well integrated into the constitutional traditions of Member States. Further. The corresponding articles of the EU Charter and the interpretative obligation, requiring the interpretation of rights common to both documents, further anchor the ECHR into EU law. The obligation to respect



the ECHR is already foreseen for the Institutions of the EU. The accession of the EU to the ECHR, defined as an obligation, will formalise the specific position of the ECHR in the EU law after the initial obstacles to its drafting are removed. ECHR and human rights, in general, have crossed a long way since the inception of the EU. In the context of EU's international relations, the EU Institutions have an obligation to abide by the values set by Treaties, among others, the rule of law and human rights. As a practical application of such an obligation, it can be identified that the insertion of the clauses focusing on the respect of the rule of law principles as one of the key conditionality ingredients of the Stabilisation and Association Agreement (SAA) between Bosnia and Herzegovina and the European Union (as well as other countries of the Western Balkans). The SAA, which is a legal basis upon which all of the integration processes are carried out and which is only replaced by the Accession Agreement once the country has fulfilled its EU membership requirements, expressly mentions ECHR as one of the key documents upon which the relations and obligations are going to be based.

Learning from previous experiences, the EU is putting respect for the rule of law and human rights in the foreground of the integration process and as one of the key conditionality requirements for the accession of new Member States. That is reflected in the EU integration path of Bosnia and Herzegovina, which has always included fulfilling the obligations stemming from the ECHR. Among other situations, that was visible in the Commission's Opinion on Bosnia's request to join the EU. On the other hand, one of the key EU integration requirements is adopting the body of EU community law known as *acquis*. Therefore, to answer the question of what the fulfilment of decisions of ECtHR and fulfilment of the obligations stemming from the ECHR in general, has to do with the EU integrations of Bosnia and Herzegovina, it can be said that the connection between the two obligations exists and that it is based both in the EU law and international law (through the SAA). The obligation of Bosnia and Herzegovina is twofold, primarily stemming from the provisions of the Stabilisation and Association Agreement, related to the protection and respect for human rights and the rule of law. Secondly, since the adoption of *acquis* is one of the key requirements of any country aspiring to become a member, the incorporation of rights contained in the ECHR and fulfilment of obligations stemming from it is one of the elements of *acquis* itself since the ECHR is recognised as one of the general principles of law, which are considered as a source of the EU law. Therefore, the requirement imposed by the EU institutions and definition of execution of the ECtHR decisions as one of the key requirements for advancing the integration process is a logical legal consequence of the relationship between the ECHR, EU law and the SAA with B&H. When it comes to whether it is "fair" to make those additional requirements to B&H, the issue can be viewed from legal and political points of view. As discussed, from a legal point of view, it may be concluded that such a requirement has been accepted by B&H itself (through the SAA). The requirement is well based on positive national and international legal norms and relates primarily to eradicating discriminatory practices (especially those enshrined in the constitutional provisions). Therefore, it can be described as fair. However, from a political point of view, the "fairness" of such a request can be questioned. The new approach of the EU, which requires from new candidate countries (including B&H) additional conditions related to the rule of law and human rights issues, differs from the approach used to previous accession processes, which

focused on economic integration and institutional reforms. Therefore, the risk of different and more stringent approaches and treatments the EU takes regarding different candidate countries exists. On the other hand, it would be more politically effective to conduct the process of constitutional reform in B&H, which is required to fulfil the obligations under the ECtHR decisions, within a more stable environment of EU membership, instead of a politically volatile pre-accession phase.

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