

Applying the Charter of Fundamental Rights of the European Union: focus on the right to a fair trial

The Relationship between the Charter and the ECHR

Prof. dr. Rick Lawson – Thursday 11 February 2021



Universiteit
Leiden



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Article 47 EU Charter ... what about Article 6 ECHR?

- differences, similarities – historic context, text
- practical use – the roles of the ECtHR and CJEU



Article 47 EU Charter ... what about Article 6 ECHR?

- differences, similarities – historic context, text
- practical use – the roles of the ECtHR and CJEU
- [the principle of equivalent protection; mutual recognition of foreign judgments]




Article 47 EU Charter ... what about Article 6 ECHR?


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historic context



Council of Europe
Strasbourg
47 Member States
human rights, democracy, rule of law
intergovernmental
treaties and recommendations
European Convention on Human Rights
European Court of Human Rights, Strasbourg



historic context

European Union

Brussels, Luxembourg, Strasbourg

27 Member States

economic integration → gradual expansion

supranational
treaties and secondary law (Regulations,
Directives, Decisions ...)

Court of Justice, Luxembourg



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historic context – underlying logic of human rights protection

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protection against the State



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and the Member States*

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Article 6 ECHR & Article 47 EU Charter FR



Preliminary remarks

Charter of Fundamental Rights of the EU (2000)

Title VII – General Provisions Governing the Interpretation and Application of the Charter

Article 52 – Scope and interpretation of rights and principles

3. In so far as this Charter contains **rights which correspond to rights guaranteed by the Convention** for the Protection of Human Rights and Fundamental Freedoms, **the meaning and scope of those rights shall be the same** as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

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Article 6 ECHR – right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 ECHR – right to a fair trial – basic structure

§ 1: guarantees applicable to both “civil” and “criminal” cases

- [everyone is entitled to] a fair ...
- and public hearing
- within a reasonable time
- by an independent
- and impartial
- tribunal established by law
- judgment pronounced publicly, unless...

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§§ 2 and 3: guarantees applicable to “criminal” cases only

- presumption of innocence
- defence rights (legal assistance etc.)

Article 6 ECHR – right to a fair trial – basic structure

§ 1: guarantees applicable to both “civil” and “criminal” cases

- [everyone is entitled to] a fair ...
- and public hearing → *Ramos Nunes de Carvalho e Sá v. Portugal* (2018, 55391/13)
- within a reasonable time → *Unión Alimentaria Sanders SA v. Spain* (1989, 11681/85)
- by an independent → *Baka v. Hungary* (2016, no. 20261/12); *Kövesi v. Romania* (2020, no. 3594/19)
- and impartial → *Kyprianou v. Cyprus* (2005, no. 73797/01)
- tribunal established by law → *Ástráðsson v. Iceland* (2020, no. 26374/18)
- judgment pronounced publicly, unless... → *Pretto a.o. v. Italy* (1983, no. 7984/77)

§§ 2 and 3: guarantees applicable to “criminal” cases only

- presumption of innocence → *Saunders v. the United Kingdom* (1996, no. 19187/91)
- defence rights (legal assistance etc.) → *Kostovski v. the Netherlands* (1990, no. 11454/841)

Article 6 ECHR – right to a fair trial – basic structure

§ 1: guarantees applicable to both “civil” and “criminal” cases

- [everyone is entitled to] a fair ... → equality of arms, adversarial proceedings, duty to state reasons...
- and public hearing → *Ramos Nunes de Carvalho e Sá v. Portugal* (2018, 55391/13)
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- judgment pronounced publicly, unless... → *Pretto a.o. v. Italy* (1983, no. 7984/77)
→ access to court, right to have a judgment enforced

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and so, *a contrario*, Article 6 ECHR does *not* apply to “administrative law” cases, that is: to disputes in the areas of

- migration law
- taxation
- hiring/promotion/dismissal of civil servants

(→ exceptions, reformulations...)

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 - (d) to examine and challenge the witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or be understood.

compensated, to some extent, by Article 13 ECHR:
“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...”

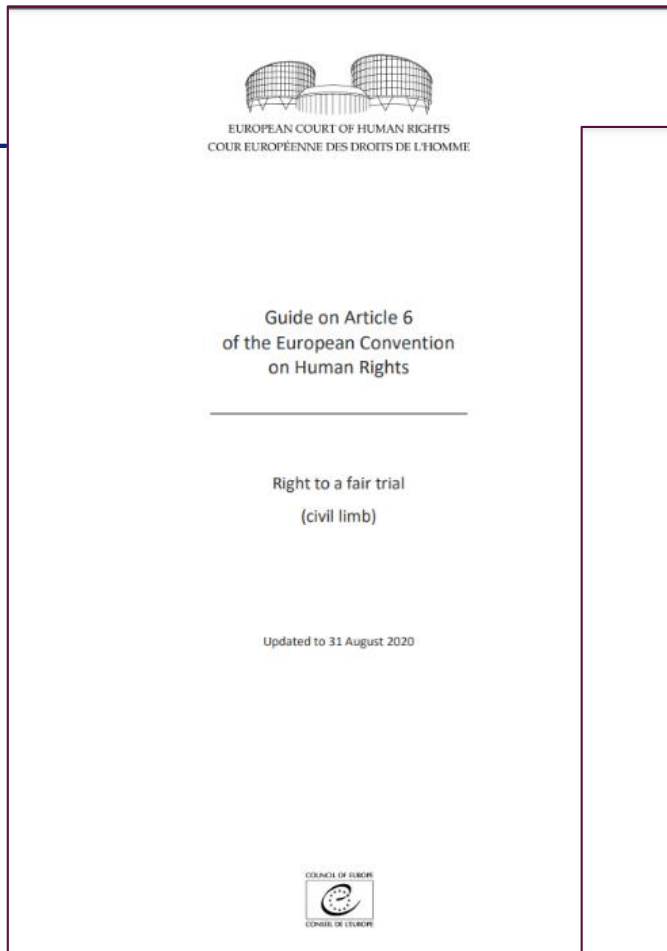
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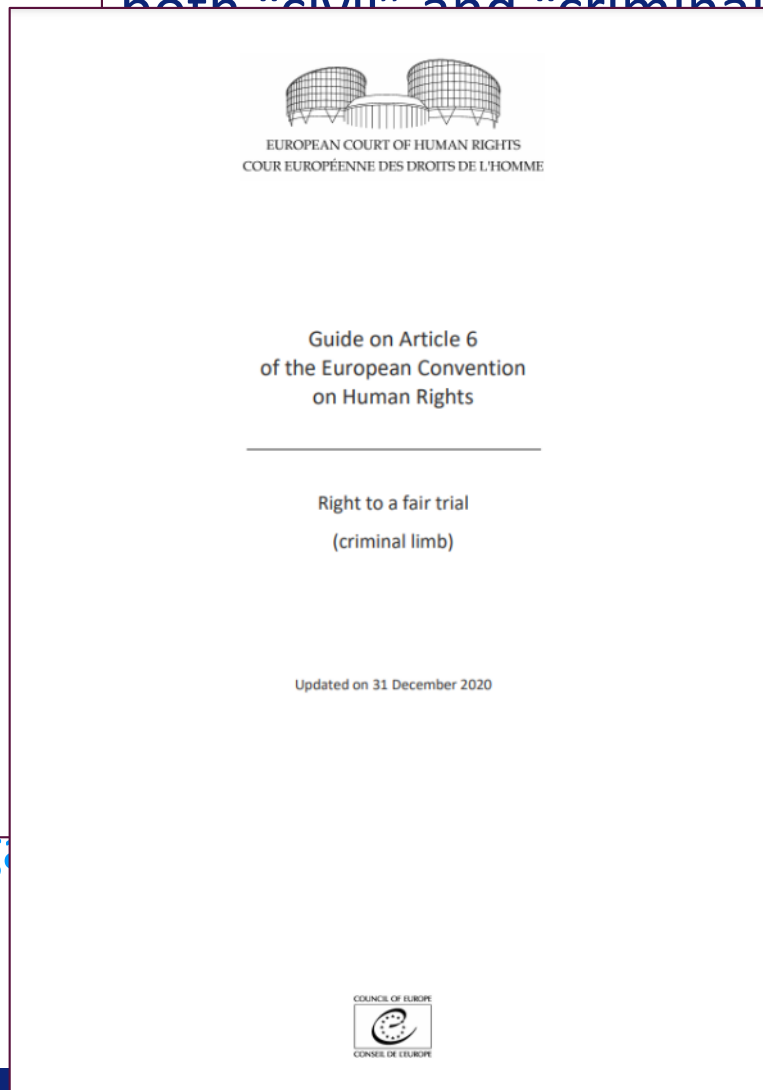
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Article 6 ECHR – right to a fair trial – basic structure

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both “civil” and “criminal” cases



Portugal (2018, 55391/13)

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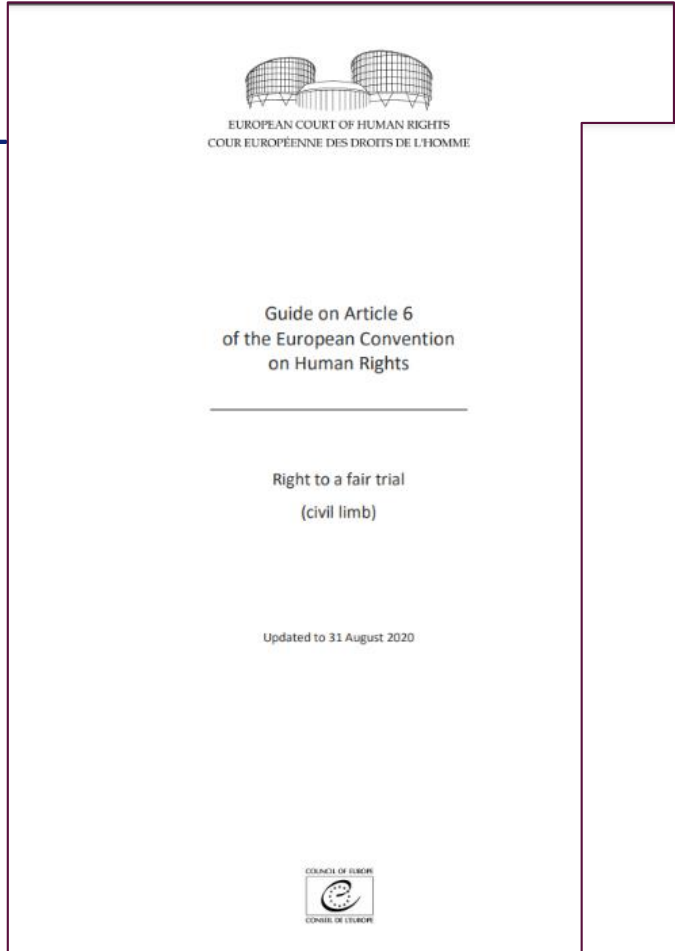
- defence rights (legi

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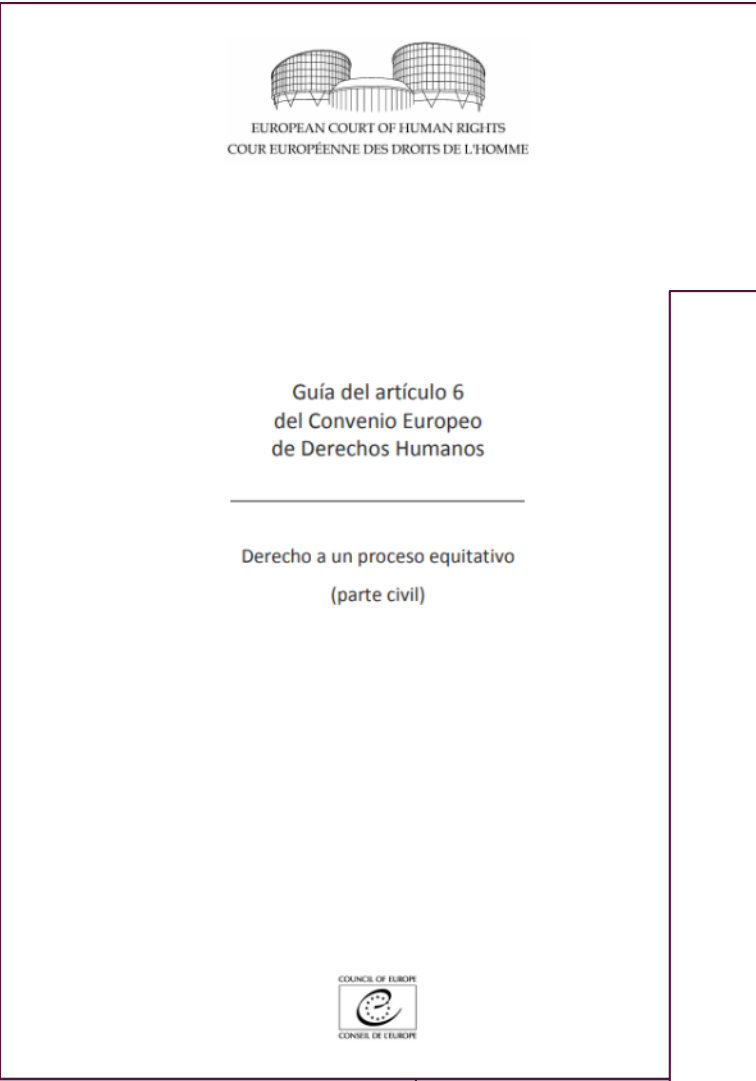
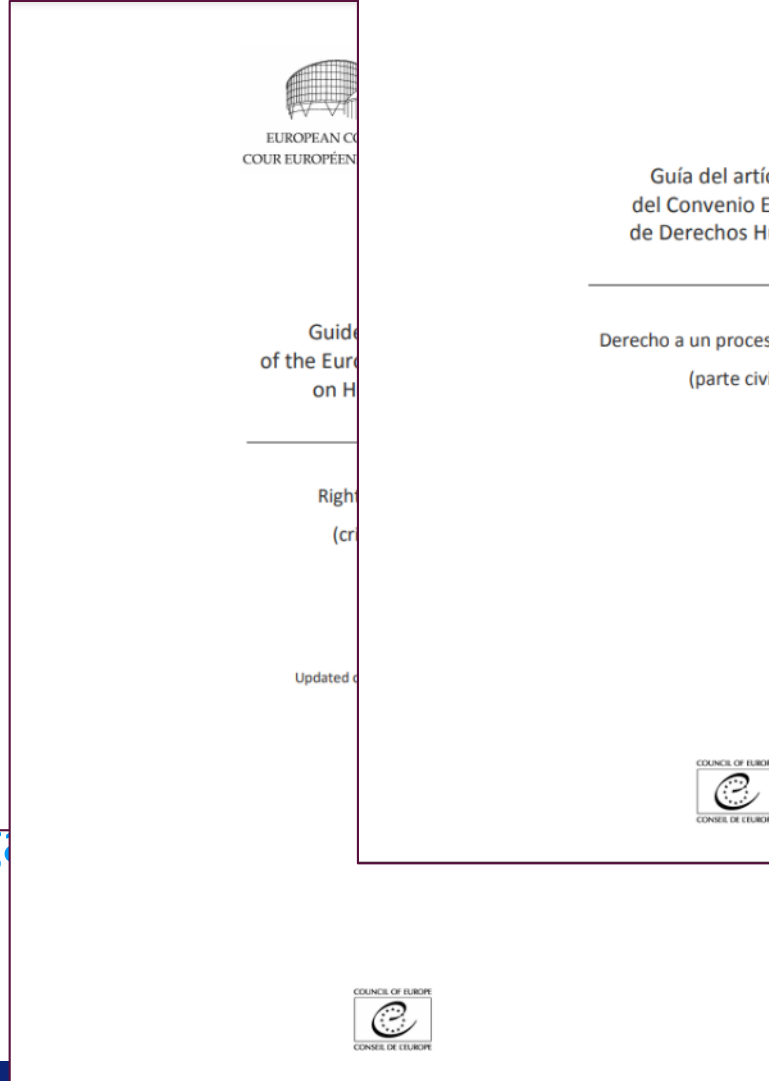
Article 6 ECHR – right to

ic structure

§ 1



both "civil



§§

- defence rights (leg

Article 6 ECHR – right to a fair trial

Organizational structure



§ 1

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Vodič kroz članak 6. Evropske konvencije o ljudskim pravima

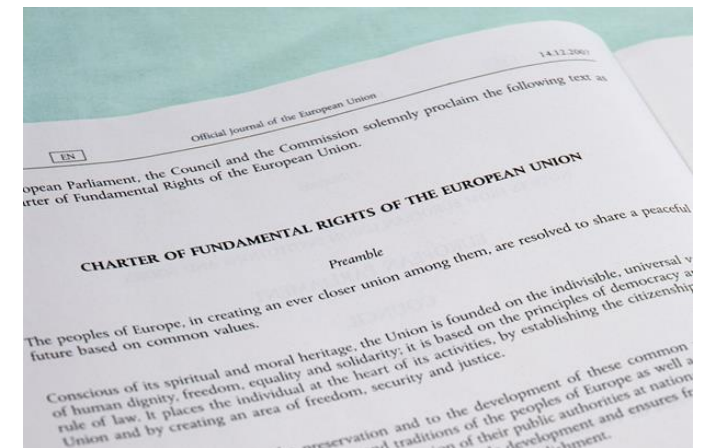
Pravni aspekt na pošteno suđenje (kazneni aspekt)

• defence

Article 47 EU Charter

Right to an effective remedy and to a fair trial

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
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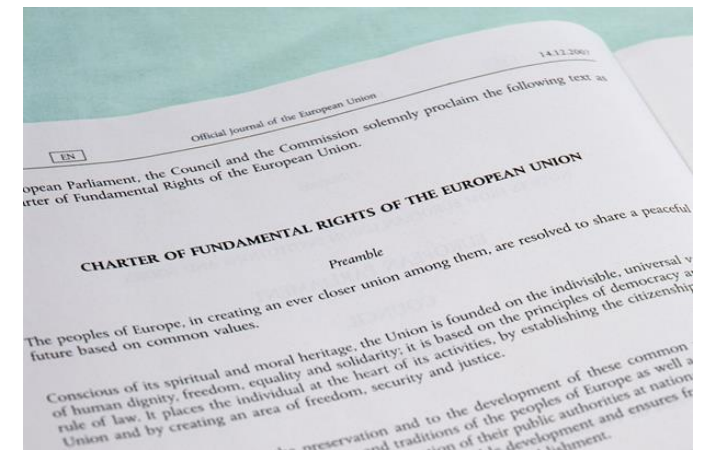
Article 48 – Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

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Explanations relating to the Charter of Fundamental Rights

The first paragraph is based on Article 13 of the ECHR:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

However, **in Union law** the protection is **more extensive** since it guarantees the right to an effective remedy **before a court**. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651 ...)

Article 47 EU Charter

next session:
Joined cases C-245/19 & C-246/19
État luxembourgeois
6 October 2020

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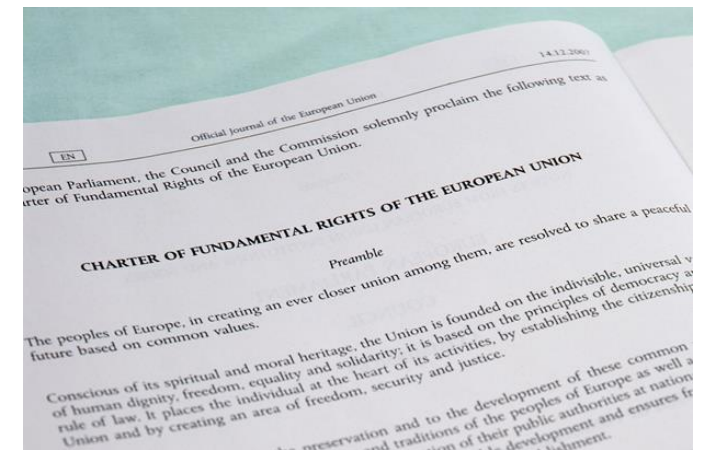
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Explanations relating to the Charter of Fundamental Rights

The second paragraph corresponds to Article 6(1) of the ECHR which reads as follows: [...]

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *'Les Verts' v European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

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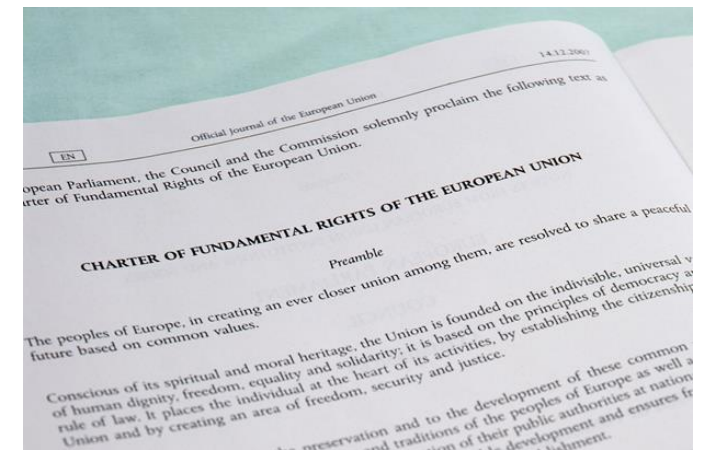
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Explanations relating to the Charter of Fundamental Rights

With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.

Article 6 ECHR & Article 47 EU Charter FR: conclusion



Article 6 ECHR & Article 47 EU Charter FR: conclusion

Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy



Article 6 ECHR & Article 47 EU Charter FR: conclusion

Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy

Article 47 Charter – right to an effective remedy and to a fair trial

Article 48 Charter – Presumption of innocence and right of defence



Article 6 ECHR & Article 47 EU Charter FR: conclusion

Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy

more or less the same guarantees

Article 47 Charter – right to an effective remedy and to a fair trial

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Article 6 ECHR & Article 47 EU Charter FR: conclusion

Article 6 ECHR – right to a fair trial

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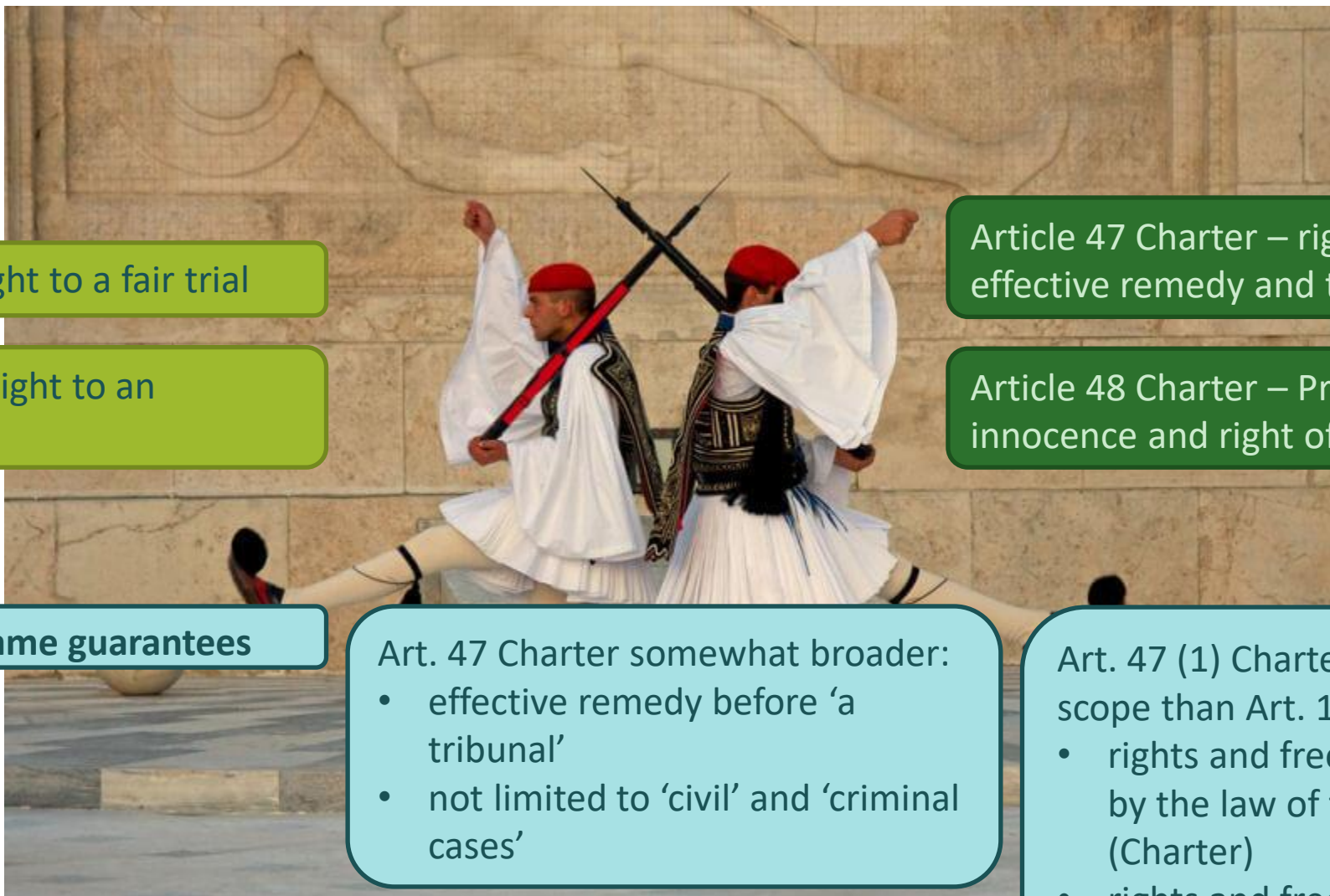
Article 48 Charter – Presumption of innocence and right of defence

Art. 47 Charter somewhat broader:

- effective remedy before ‘a tribunal’
- not limited to ‘civil’ and ‘criminal cases’



Article 6 ECHR & Article 47 EU Charter FR: conclusion



Article 6 ECHR – right to a fair trial

Article 13 ECHR – right to an effective remedy

more or less the same guarantees

Art. 47 Charter somewhat broader:

- effective remedy before ‘a tribunal’
- not limited to ‘civil’ and ‘criminal cases’

Article 47 Charter – right to an effective remedy and to a fair trial

Article 48 Charter – Presumption of innocence and right of defence

Art. 47 (1) Charter has a different scope than Art. 13 ECHR:

- rights and freedoms guaranteed by the law of the Union (Charter)
- rights and freedoms as set forth in this Convention (ECHR)

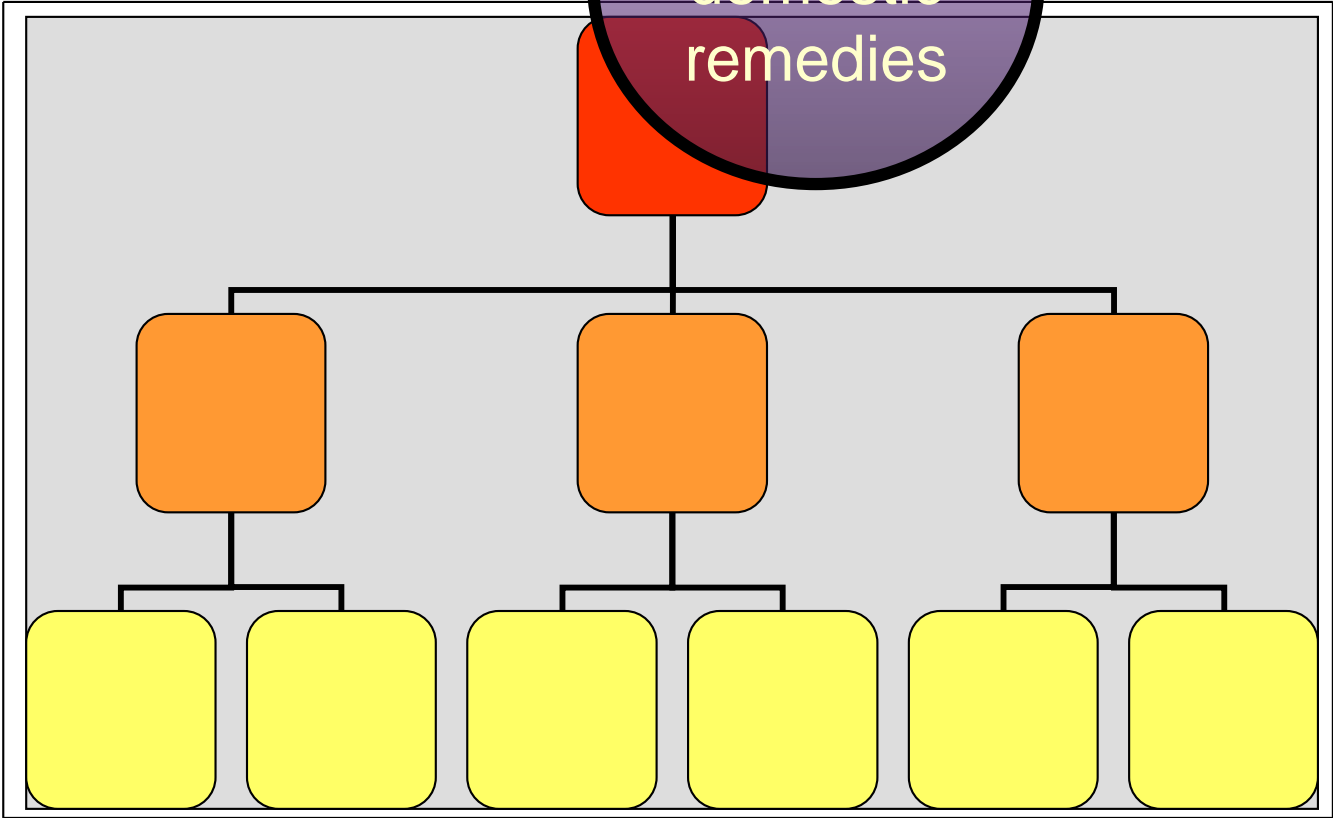
Article 47 EU Charter ... what about Article 6 ECHR?

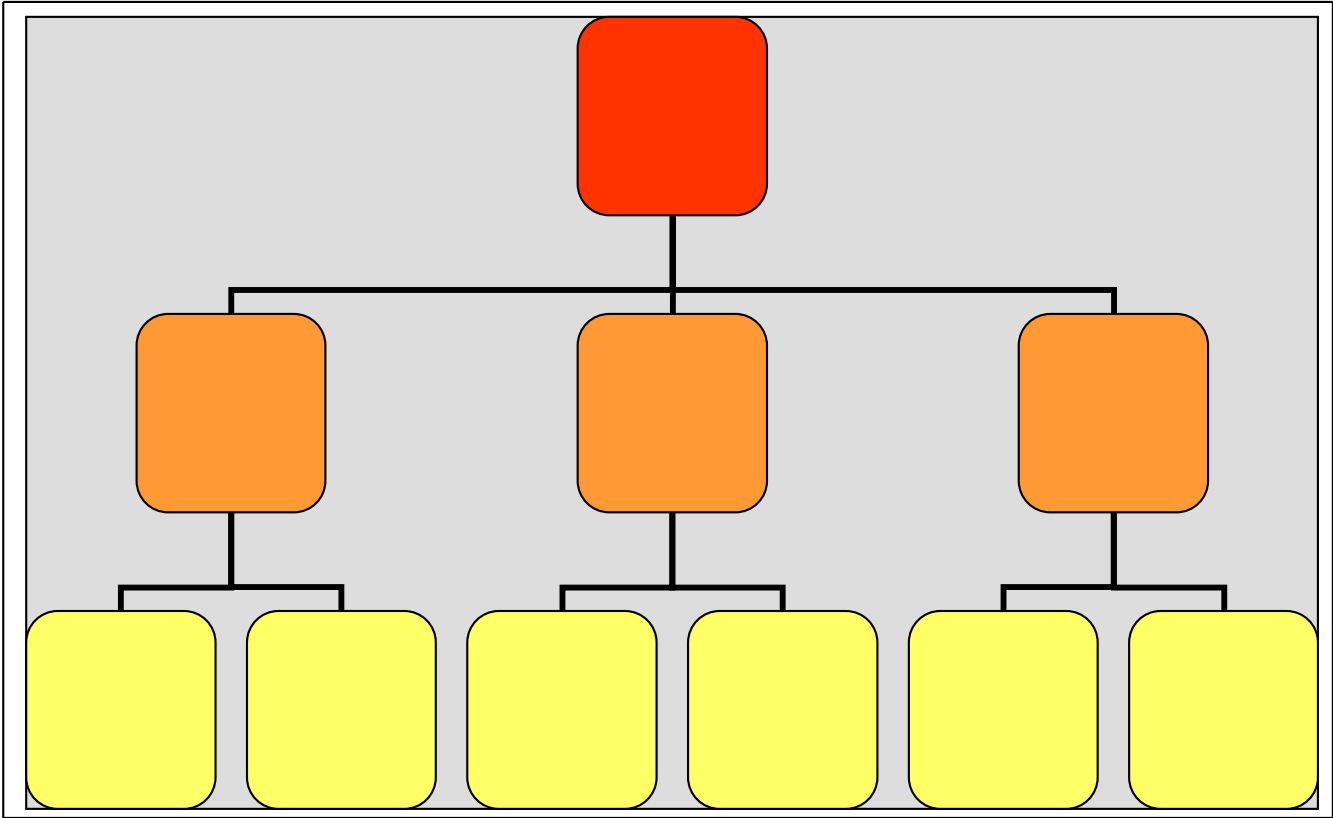
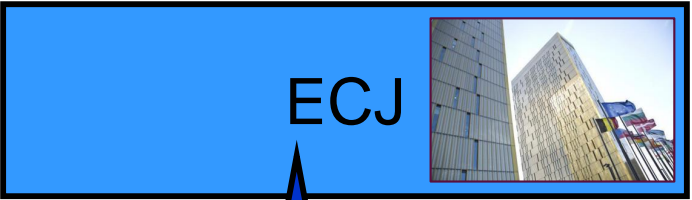
- differences, similarities – historic context, text
- practical use – the roles of the ECtHR and CJEU
- [the principle of equivalent protection; mutual recognition of foreign judgments]

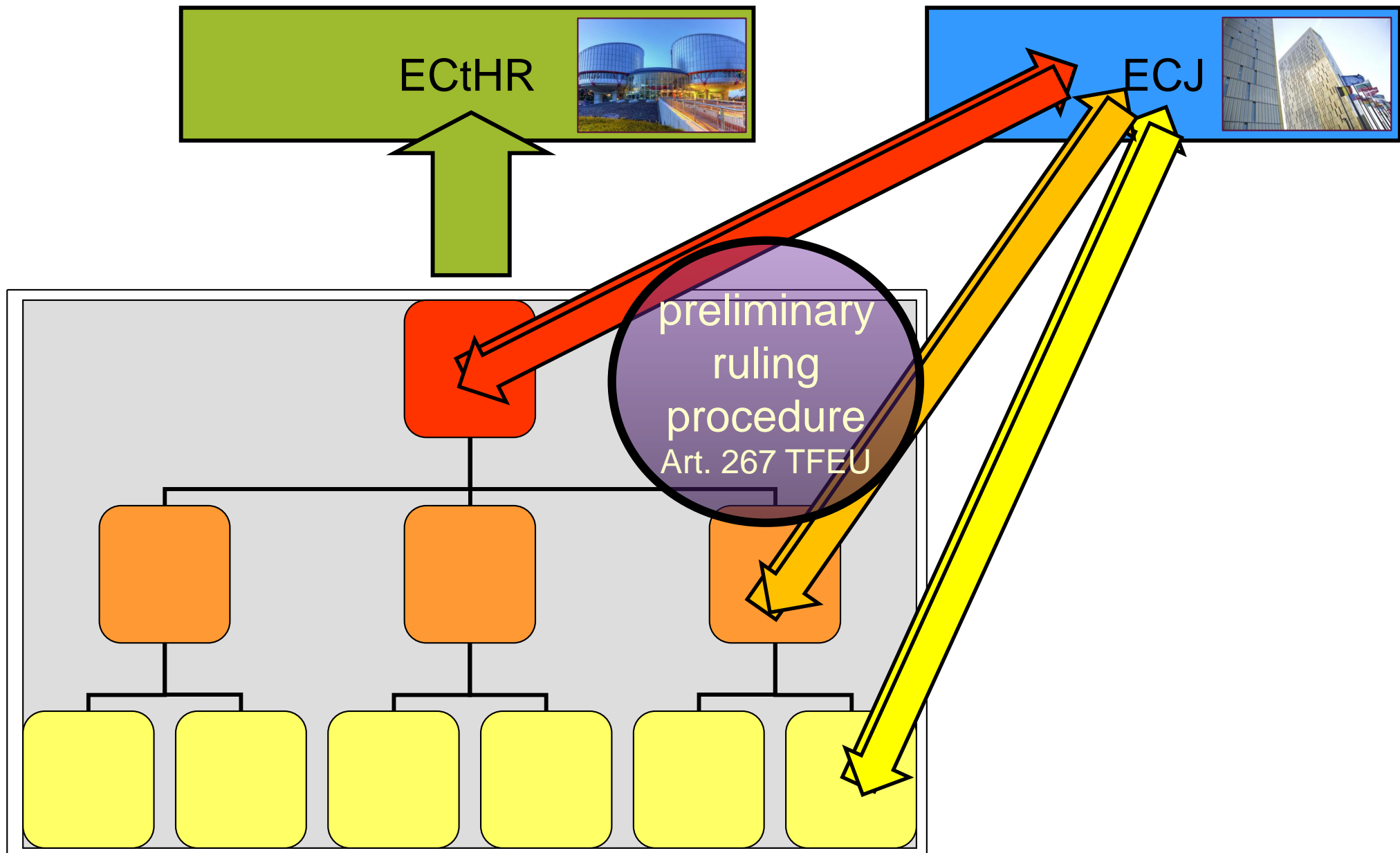




exhaustion of domestic remedies







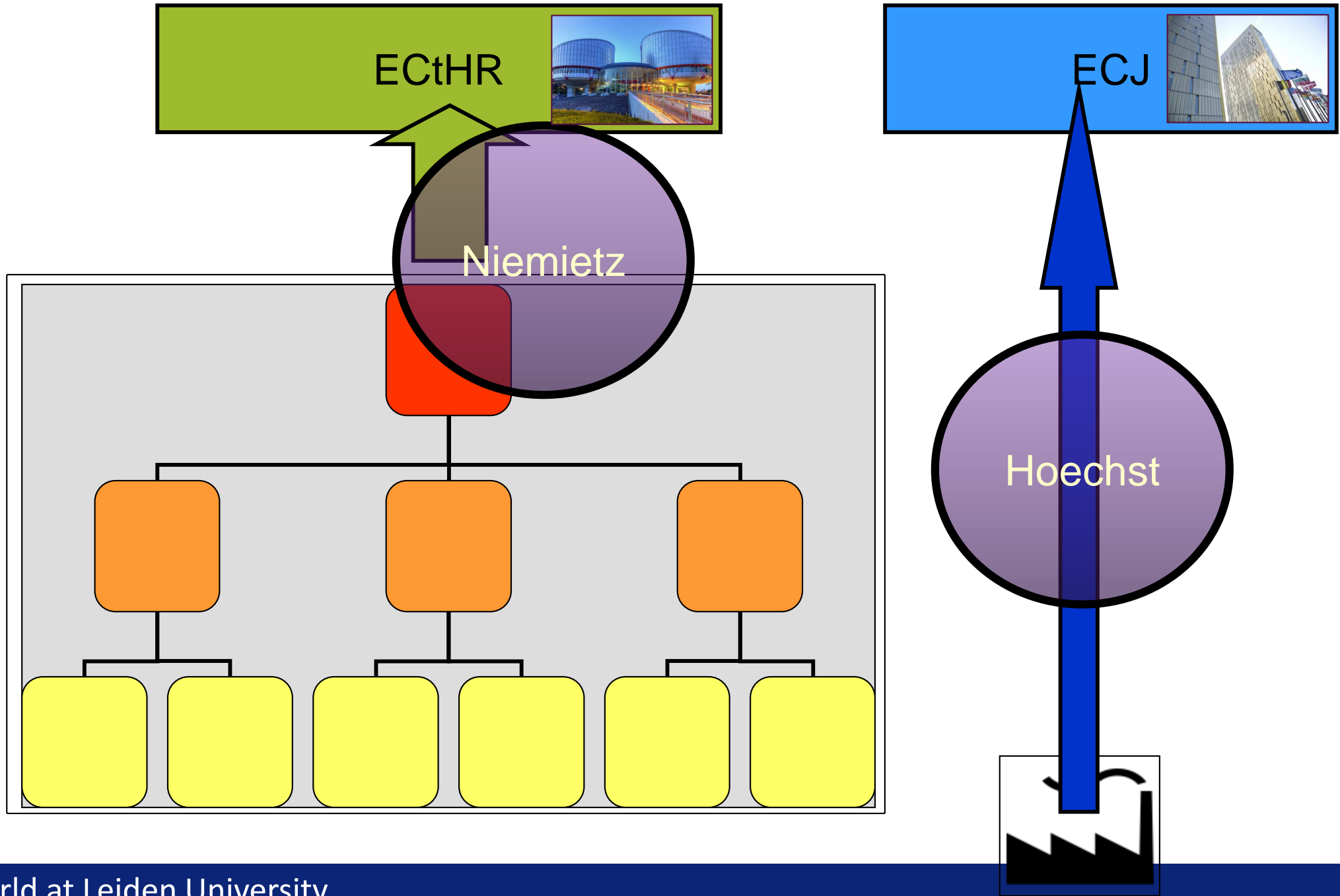
Remember ...

Charter of Fundamental Rights of the EU (2000)

Title VII – General Provisions Governing the Interpretation and Application of the Charter

Article 52 – Scope and interpretation of rights and principles

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.



'spirit of mutual recognition'

Charter of Fundamental Rights of the EU (2000)

Title VII – General Provisions Governing the Interpretation of the Charter

Article 52 – Scope and interpretation of rights

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ECtHR, *Ástráðsson v. Iceland*
(1 December 2020, no. 26374/18)
ECtHR refers to CJEU case-law

next session:
CJEU, *DB*
(Case C-481/19, 2 February 2021)
CJEU refers to ECtHR case-law

Article 47 EU Charter ... what about Article 6 ECHR?

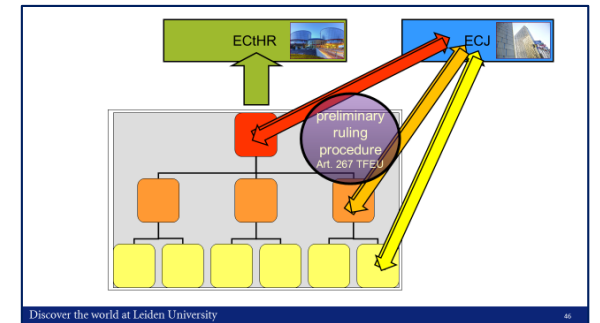
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Bosphorus v. Ireland (2005, no. 45036/98)

facts

- Bosphorus leases airliner from JAT
- civil war in Yugoslavia
- UN sanctions → EC measures → national implementation
- Irish authorities seize aircraft leased by Bosphorus
- measure challenged before Irish courts
- Irish court: preliminary question to ECJ
- ECJ: compliance with sanctions regime is necessary
- Irish court decided accordingly



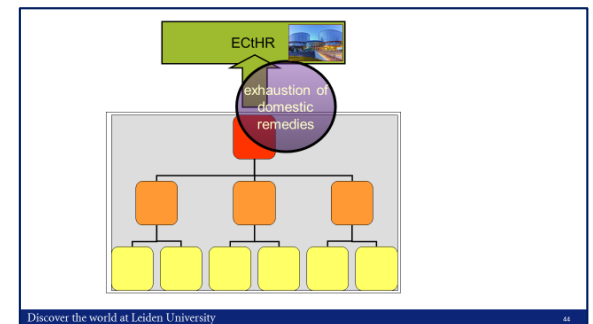
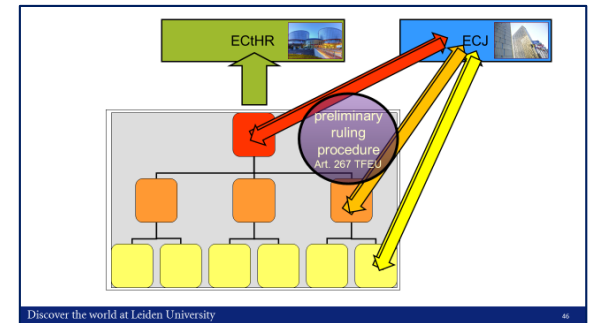
Bosphorus

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claim before ECtHR

- protection of property rights (Art.1 Prot. 1)
- complaint addressed against ...
- Ireland



Bosphorus

Essence of Court ruling:

1. international integration is important
2. but the ECHR should not be undermined
3. compromise: 'equivalent protection test'
4. if, in general, an international organisation offers equivalent protection of human rights → rebuttable presumption that the international organisation did not violate human rights in the instant case → the member state can safely implement the IO's decisions
5. EC legal order, in general, offers 'equivalent protection' (substance + procedures)
6. in this case no manifest errors
7. so Ireland could presume that EC sanctions did not violate human rights → and safely implement them



Bosphorus

155. ... State action taken in compliance with such legal obligations is justified as long as the relevant **organisation is considered to protect fundamental rights**, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least **equivalent** to that for which the Convention provides (...).

156. If such equivalent protection is considered to be provided by the organisation, the **presumption** will be that a State has **not departed from the requirements of the Convention** when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such **presumption can be rebutted** if, in the circumstances of a particular case, it is considered that the protection of Convention rights was **manifestly deficient**.

Michaud v. France (2012, no. 12323/11)

Obligation on lawyers to report suspected money laundering by clients

- EU directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
- France: implementation via Monetary and Financial Code

Mr. Michaud: violation of Article 8 ECHR

France: only implementing EU law → follow *Bosphorus* → presumption → ECtHR should not review French measures

ECtHR:

- directive leaves discretion (*Bosphorus*: “no more than implementing”)
 - no preliminary questions asked
- so *Bosphorus* presumption does not apply



ECtHR and co-operation between EU Member States

- *Avotiņš v. Latvia* (2016, no. 17502/07) – recognition of foreign judgment
- *Pirozzi v. Belgium* (2018, no. 21055/11) – execution of EAW
- *Romeo Castaño v. Belgium* (2019, no. 8351/17) – refusal of EAW

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Avotiņš v. Latvia

- judgment delivered in Cyprus in the debtor's absence
- enforcement in Latvia (Regulation 44/2001 of 22 December 2000 - Brussels I)
- ECtHR:
 - (a) Article 6 § 1 applicable
 - (b) presumption of equivalent protection: Latvian court had done no more than implement legal obligations arising out of EU membership
 - (c) manifestly deficiency? the principle of mutual recognition not to be applied automatically and mechanically to the detriment of fundamental rights – “mutual trust is not blind trust”



Adv. LLM programmes

- European and international human rights law
- European and international business law
- public international law
- law & digital technologies
- ...