

**EU Accession to the ECHR: Implications for
Judicial Review in Strasbourg**

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EU Accession to the ECHR: Implications for Judicial Review in Strasbourg

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Abstract

The accession of the European Union to the ECHR raises fundamental questions surrounding the protection of individual rights in the Strasbourg court and the autonomy of EU law. It is argued that any solution should ensure the effective protection of the individual applicant. Thus the appropriate respondent in Strasbourg should be the party which has acted in the concrete case as it can be easily identified. The European Union's autonomy can be preserved by allowing it to join as a co-respondent. Since the individual has no influence over whether a national court makes a reference under art.267 TFEU, the lack of such a reference should not lead to the inadmissibility of the complaint.

Introduction

The accession of the European Union to the European Convention on Human Rights (ECHR) has been discussed for over thirty years.¹ This discussion famously led to *Opinion 2/94*, in which the European Court of Justice (ECJ) held that the (then) European Community (EC) lacked the competence to accede.² In addition to this hurdle found in EU law, the ECHR was not open to international organisations, but only to state parties. With the entry into force of the Lisbon Treaty³ and Protocol 14 to the ECHR,⁴ these main obstacles to accession have been removed. Article 6(2) TEU not only gives the European Union the competence to conclude an accession treaty, but also puts it under an obligation to effectuate it, as it states that the “Union shall accede” to the ECHR.⁵ There are very good arguments in favour of such a development.⁶ The most important is that the European Union would be subjected to an external control

* I would like to thank the editor, Panos Koutrakos, for his helpful comments and Jennifer Hegarty-Owens for proofreading this article. All errors remain, of course, my own.

¹ Cf. e.g. H. Golsong, *Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften*, Europäische Grundrechtezeitschrift 1978, 346; European Commission, Memorandum on the accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Bulletin of the European Communities, Supplement 2/79.

² *Accession of the Community to the European Human Rights Convention, Re (Opinion 2/94) E.C.R. [1996] I-1759; [1996] 2 C.M.L.R. 265; for an excellent discussion of this Opinion cf. P. Koutrakos, EU International Relations Law (Oxford: Hart Publishing, 2006), pp.128–130.*

³ Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C83/1 (consolidated version).

⁴ That Protocol introduced a new art.59(2) ECHR, which reads: “The European Union may accede to this Convention.”

⁵ Article 6(2) reads: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.”

⁶ For an extensive discussion cf. H.C. Krüger/J. Polakiewicz, “Proposals for a Coherent Human Rights Protection System in Europe” (2001) 22 *Human Rights Law Journal* 1, 3.

by the European Court of Human Rights (ECtHR or Strasbourg Court) just like its Member States. Considering that the European Union exercises its own powers transferred by the Member States, an extension of the Strasbourg Court's control to the European Union is only logical. Furthermore, for a long time the European Union has made the protection of human rights a requirement for applicant Member States.⁷ Therefore, it is high time that the Union itself acceded in order to foster its credibility on human rights issues.

First proposals regarding the exact ramifications of an accession have been made by the Council of Europe's Steering Committee on Human Rights (CDDH) as early as 2002,⁸ as well as by experts at a hearing in the European Parliament in March 2010.⁹ As there seems to be agreement within both the Council of Europe and the European Union that the accession should take place as rapidly as possible,¹⁰ negotiations started in July 2010.¹¹ The CDDH expects a final draft to be agreed upon no later than June 30, 2011.¹² The negotiations will result in an Accession Treaty, which will have to be ratified by all 47 parties to the Convention as well as by the European Union according to the procedure set out in art.218 TFEU. According to that provision, the Council will have to decide unanimously, having obtained the consent of the European Parliament. In addition, each Member State will have to ratify the Treaty in accordance with its national constitutional provisions, a process which may prove rather time-consuming. It is not unlikely that the entry into force of the Treaty could become further delayed if one or more Member States ask the ECJ for an opinion in accordance with art.218(11) TFEU as to whether the Accession Treaty is compatible with the Treaties.¹³ Depending on the outcome of such an opinion, renegotiations might become necessary.

The main focus of the negotiators will certainly be on the effects which the accession would have on the Strasbourg Court. It seems quite clear that the European Union would have its own judge at Strasbourg and that it would be involved in the supervision of judgments by the Committee of Ministers. This article focuses on five specific, and potentially contentious, issues. First, the question of the correct respondent in each case before the ECtHR: should it be the European Union, a Member State or both? Secondly, the issue of domestic remedies where EU law is at stake: should the ECtHR have jurisdiction over cases involving EU law where the ECJ has not spoken? Thirdly, whether the ECJ should be given the possibility to make a preliminary reference to the ECtHR on the interpretation of the Convention. Fourthly, whether state complaints between the European Union and a Member State or between Member States of the European Union should be excluded in order to preserve the autonomy of EU law. Fifthly, whether the *Bosphorus* presumption,¹⁴ which privileges the European Union's legal order, ought to survive the accession.

⁷ So-called Copenhagen criteria, cf. Conclusions of the Presidency, European Council June 21–22, 1993 SN 180/1/93 REV 1.

⁸ Technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, CDDH(2002)010 Addendum 2.

⁹ Hearing before the European Parliament's Committee on Constitutional Affairs, March 18, 2010, at <http://www.europarl.europa.eu/activities/committees/hearings/Com.do?language=EN&body=AFCO> [Accessed October 27, 2010].

¹⁰ Council of the European Union, The Stockholm Programme — An open and secure Europe serving and protecting the citizens, December 2, 2009, doc. 17024/09.

¹¹ Council of Europe, press release 545(2010), 7 July 2010; the Council gave the Commission a mandate for negotiation on June 4, 2010 with negotiation directives (Document 9689/10), which remain classified.

¹² Technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights CDDH(2010)010, para 25.

¹³ Article 218(11) TFEU.

¹⁴ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 E.H.R.R. 1 at [155] and [156].

Who should be the correct respondent?

The majority of complaints in Strasbourg consist of applications made by individuals under art.34 ECHR. One question, which might prove controversial during the negotiations, is that of the correct respondent in proceedings before the ECtHR involving EU law following accession. Under the current legal arrangements, the European Union cannot be sued before the Strasbourg court and any application directed against it is inadmissible *ratione personae*.¹⁵ This does not mean, however, that a Member State can escape its responsibilities under the Convention by transferring competences to the European Union. The ECtHR made it understood in *Matthews* that:

“The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer.”¹⁶

The case concerned a violation of the right to free elections guaranteed by art.3 of Protocol 1 to the Convention. The EC Act on Direct Elections of 1976, which was part of the European Communities’ primary law, regulated the elections to the European Parliament. Since the Act only applied to the United Kingdom, it excluded citizens of Gibraltar from voting in these elections. The Court found this to violate the Convention, and held the United Kingdom responsible.

With regard to Member States’ responsibility for secondary EU law, the ECtHR re-emphasised it in *Bosphorus*.¹⁷ In that case, Ireland impounded an aircraft in pursuance of an EC regulation,¹⁸ which transposed a UN Security Council resolution,¹⁹ providing for sanctions against the Federal Republic of Yugoslavia. In particular, all aircraft in which a majority or controlling interest was held by a natural or legal person from Yugoslavia had to be impounded. As the applicant had leased the aircraft from the Yugoslav national airlines, an impoundment was necessary for Ireland to comply with the Regulation. The applicant company alleged an infringement of its right to property contained in art.1 Protocol 1 ECHR. The ECtHR held that the European Union’s legal system protected fundamental rights in a manner equivalent to the Convention. It went on to state its famous *Bosphorus*-presumption, which postulates that, where the Member State had no discretion in implementing EU secondary law, it is presumed that a State has acted in compliance with the Convention.²⁰ This presumption is, however, rebuttable, where the protection in the concrete case was manifestly deficient.²¹ In the concrete case, the ECtHR did not conclude that the presumption was rebutted and, therefore, dismissed the case.

However, a responsibility of a Member State for EU action can only be found where the Member State’s authorities have acted in some manner. Otherwise, the EU’s action is not within their jurisdiction, as is required by art.1 ECHR. This was made clear in the case of *Connolly* which concerned a labour law dispute

¹⁵ *Confédération Française Démocratique du Travail (CFDT) v European Communities* [1979] 2 C.M.L.R. 229.

¹⁶ *Matthews v United Kingdom* (1999) 28 E.H.R.R. 361 at [32].

¹⁷ *Bosphorus* (2006) 42 E.H.R.R. 1 at [153].

¹⁸ Regulation 990/93 Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14.

¹⁹ UNSC Res 820 (1993).

²⁰ *Bosphorus* (2006) 42 E.H.R.R. 1 at [155] and [156].

²¹ *Bosphorus* (2006) 42 E.H.R.R. 1 at [156].

between the European Union and one of its employees.²² In that case there had been no action by any of the respondent Member States. Thus, the application was declared inadmissible.²³

The European Union's accession to the ECHR would clearly change the result in the latter case. In such a scenario, where none of the Member States acted and which is at present not reviewable by the ECtHR, the European Union would be directly responsible in Strasbourg.

What is unclear, however, is the future of cases such as *Matthews* and *Bosphorus*. The drafters of the Lisbon Treaty foresaw the problem and provided in art.1(b) of Protocol No.8 to the Lisbon Treaty:

“The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ‘European Convention’) provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to [...] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.”²⁴

The question in such cases would, of course, be who the “appropriate” addressee is. Should the Member States remain responsible? And if so, will they remain responsible alongside the European Union or alone? Or should the European Union be the sole respondent in such cases since, after all, the alleged violations in both cases could be found in acts by the EU's institutions?

In answering these questions, I shall examine the various proposals made in the ongoing discussion on accession.

Some main assumptions

Any answer to the question of who should be the correct respondent should bear in mind the applicant's situation, and preserve the autonomy of EU law. It is further argued that the European Union's responsibility for primary law should not be excluded.

The applicant's situation: the difficulty to distinguish

This contribution argues that any solution should be primarily concerned with an individual applicant's situation. An individual applicant does not normally have a legal education and has the right to file an application without the instruction of counsel.²⁵ In order to ensure the effective protection of the applicant's human rights, any solution should thus aim to be straightforward. The problem lies in the fact that EU law is normally implemented by the authorities of the Member States. Yet at the same time, Member States also act out of their own sovereignty in situations where there is no influence of EU law. Situations like the one in *Bosphorus* provide a good example. In that case, the Irish authorities impounded an aircraft in compliance with an EC Regulation, which left them no discretion. At the same time one can imagine a scenario where a Member State has impounded an aircraft in order to enforce a judgment in a private litigation. Such a case normally has nothing to do with a Member State's obligations under EU law. For

²² *Connolly v 15 Member States of the European Union* (App. No.73274/01) (Section V), December 9, 2008, confirmed in: *Beygo v 46 Member States of the Council of Europe* (App. No.36099/06) (Section V), June 16, 2009, and *Rambus Inc. v Germany* (App. No.40382/04) (Section V), June 16, 2009.

²³ On the ECtHR's post-*Bosphorus* case law cf. T. Lock, “Beyond Bosphorus: the European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights” (2010) 10 *Human Rights Law Review* 529.

²⁴ Protocol relating to art.6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2010] OJ C83/273.

²⁵ J. A. Frowein/W. Peukert, *Europäische Menschenrechtskonvention*, 3rd edn (Kehlheim: N.P. Engel Verlag, 2009), art.34, para.66.

an applicant without a legal background, these cases are hardly distinguishable. In both cases only the Member State's authorities acted vis-à-vis the applicant resulting in the impoundment of the aircraft. For an applicant to be able to make an assessment whether the impoundment was due to an obligation under EU law or an obligation resulting solely from domestic law, it would be necessary for her to conduct considerable research into the legal background of the case, which is hardly possible without a lawyer. Thus, the best solution for an applicant would be a simple solution, which would not necessitate any distinction between Member State action prompted by EU law and action in other situations.

The autonomy of the European Union's legal order

While respect for the individual applicant's situation is necessary to ensure the effective protection of such persons' human rights, Protocol No.8 to the Treaty of Lisbon emphasises that the "specific characteristics of the Union and Union law" must be preserved.²⁶ The Protocol does not specify what these characteristics are, but it is argued that they comprise the autonomy of the European Union's legal order since in a number of cases and opinions the ECJ based its reasoning on the concept of autonomy.²⁷ All of these pronouncements concerned the relationship between the EU's legal order and the domestic legal orders of the Member States, on the one hand, and that between the EU's legal order and international law, on the other.²⁸ With regard to the former, the ECJ made it clear in its famous case of *Costa v ENEL* that the (then) EEC Treaty constituted an independent source of law.²⁹ In *Costa*, the ECJ employed the concept of autonomy as the reason why domestic legal provisions cannot override provisions of the Treaty, thereby establishing the primacy of EU law over domestic law.

With regard to the relationship between EU law and international law, which is of more relevance to this article, the ECJ used the concept of autonomy, too. The Court first mentioned it in *Opinion 1/91*, in which the ECJ struck down the first draft agreement on the European Economic Area (EEA) for its incompatibility with the autonomy of EU law. In the Opinion, one can identify three arguments based on autonomy, all of which recurred in later cases.

The first argument related to the ECJ's exclusive jurisdiction to allocate the competences between the European Union and the Member States. The draft agreement foresaw the establishment of a court (EEA Court), which was to be accorded jurisdiction to decide over conflicts between the "contracting parties". The term "contracting party" could either mean the EC, the Member States or both, depending on the internal distribution of competences between them. In light of arts 19(1) TEU (ex 220 EC) and 344 TFEU (ex 292 EC), which confer an exclusive jurisdiction on the ECJ to interpret the Treaties,³⁰ the ECJ considered the jurisdiction of the EEA Court to be incompatible with the Treaties and the autonomy of EU law.³¹

²⁶ Article 1 of the Protocol (No.8) relating to art.6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2010] OJ C83/273; repeated in Declaration on Article 6 (2) of the Treaty on European Union [2010] OJ C83/337.

²⁷ *Costa v Ente Nazionale per l'Energia Elettrica (ENEL) (6/64)* [1964] E.C.R. 585; [1964] C.M.L.R. 425; *Draft Treaty on a European Economic Area (No.1), Re (Opinion 1/91)* [1991] E.C.R. I-6079; [1992] 1 C.M.L.R. 245 at [34]; *Draft Treaty on a European Economic Area (No.2), Re (Opinion 1/92)* [1992] E.C.R. I-2821; [1992] 2 C.M.L.R. 217; *Draft Agreement on a European Common Aviation Area, Re (Opinion 1/00)* [2002] E.C.R. I-3493, [2002] 2 C.M.L.R. 35 at [11]; *Commission of the European Communities v Ireland (C-459/03)* [2006] E.C.R. I-4635; [2006] 2 C.M.L.R. 59 at [123]; *Kadi v Council of the European Union (402/05 P & 415/05 P)* [2008] E.C.R. I-6351; [2008] 3 C.M.L.R. 41 at [282].

²⁸ In light of the changes brought about by the Treaty of Lisbon, this article refers to the "EU" even where the original decision concerned the EEC or the EC.

²⁹ *Costa v ENEL* [1964] E.C.R. 585. The original French version speaks of "une source autonome"; confirmed in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (11/70)* [1970] E.C.R. 1125.

³⁰ Confirmed in *Commission v Ireland (C-459/03)* [2006] E.C.R. I-4635 (Mox Plant Case).

³¹ *Opinion 1/91* [1991] E.C.R. I-6079 at [34]-[35].

Thus, in order to preserve the latter, an agreement must not affect the ECJ's jurisdiction to decide about the allocation of responsibilities within the European Union.

The second argument was very much related to the first one. It referred to the EEA Court's jurisdiction to interpret rules on economic and trading relations contained in the EEA agreement.³² The European Union would have submitted itself to the decisions of the EEA Court and, consequently, the ECJ would have been bound by them.³³ The problem lay in the fact that many of the provisions over which the EEA Court was given jurisdiction were identical to provisions found in EU law. The autonomy of EU law, however, requires that such provisions are interpreted independently by the ECJ. Since the Draft Agreement did not ascertain that the EEA Court itself would be bound by previous interpretations of EU law rendered by the ECJ, the ECJ regarded this part of the Draft Agreement to be incompatible with the autonomy of EU law. In *Opinion I/92*, which concerned a revised version of the Draft Agreement on the EEA, the ECJ highlighted the importance of a provision which spelt out that the ECJ was not to be bound by the case law of the dispute settlement body provided for in the agreement, as an "essential safeguard which is indispensable for the autonomy of the [EU] legal order".³⁴

The third argument concerned the limits the autonomy of EU law sets to a transfer of new powers onto the EU's institutions by way of a Union agreement. While the ECJ accepted that an agreement could confer on the ECJ jurisdiction to interpret its provisions for the purpose of its application in non-Member States,³⁵ it made the point that such a transfer must not change the nature of the function of the ECJ.³⁶ The Draft Agreement foresaw that non-Member States' courts would be given the right to ask the ECJ for a preliminary reference on the interpretation of the EEA agreement. But the ECJ's answers to such references were to be purely advisory and not binding.³⁷ This was seen to be in contradiction to the very nature of the ECJ's function under the Treaties. This function could only be changed by way of a formal Treaty amendment, which follows the procedure laid down in art.48 TEU.³⁸ Thus, in the words of the ECJ, the autonomy of EU law demands that the "essential powers of the [...] institutions will remain unchanged."³⁹ It follows that the autonomy of EU law incorporates the rules on Treaty amendments.

In *Kadi* the ECJ took this argument further: not only does the autonomy of EU law prevent an agreement from affecting the allocation of powers within the EU, but an agreement must also not have the effect of prejudicing the constitutional principles of the Treaty, which include respect for fundamental rights.⁴⁰ This statement, thus, links the autonomy of EU law to its hierarchy of norms, with primary law taking priority over Union agreements and secondary law.⁴¹

From this case law one can derive the following implications for a treaty on accession to the ECHR.⁴² The agreement must not affect the essential powers of the EU's institutions and the ECtHR must not be given jurisdiction to interpret the Treaties in a binding fashion. It follows, in particular, that any solution which would allow the ECtHR to allocate responsibility according to the EU's internal distribution of competences would be incompatible with the autonomy of EU law, and it would create considerable

³² *Opinion I/91* [1991] E.C.R. I-6079 at [41].

³³ *Opinion I/91* [1991] E.C.R. I-6079 at [39].

³⁴ *Opinion I/92* [1992] E.C.R. I-2825 at [24].

³⁵ *Opinion I/91* [1991] E.C.R. I-6079 at [58].

³⁶ *Opinion I/91* [1991] E.C.R. I-6079 at [61].

³⁷ The non-Member States could choose to make them obligatory and binding, but were not obliged to do so: *Opinion I/91* [1991] E.C.R. I-6079 at [58].

³⁸ *Opinion I/92* [1992] E.C.R. I-2825 at [32].

³⁹ *Opinion I/00* [2002] E.C.R. I-3493 at [22].

⁴⁰ *Kadi* (402/05 P & 415/05 P) [2008] E.C.R. I-6351 at [282]–[285].

⁴¹ Cf. *Germany v Council of the European Union* (C-122/95) [1998] E.C.R. I-973; B. de Witte, "European Union Law: How Autonomous is its Legal Order?" (2010) 65 *Zeitschrift für Öffentliches Recht*, 141, 153.

⁴² A discussion on further implications of these statements for the relationship between EU law and public international law would go beyond the remit of this article; for an excellent discussion cf. de Witte (see fn.41).

difficulty for any individual applicant. In order to file an admissible complaint, they would have to make a decision as to who was internally responsible. In view of the ECJ's implied powers doctrine and the difficulties in interpreting the vaguely formulated arts 114 and 352 TFEU (ex 95 and 308 EC), this determination can be quite a difficult task even for trained lawyers.⁴³ Again, such a solution would usually require the instruction of a lawyer, and thus place a heavy financial burden on the applicant.

Responsibility of the Union for its primary law

Furthermore, it is argued here that the Union should generally be responsible for violations of the Convention rooted in its primary law, i.e. the Treaties or other legal documents of the same legal value, which can only be amended through a Treaty revision. The problem, of course, is that the Union itself cannot amend the Treaties. Article 48 TEU requires an amending treaty concluded and ratified by all the Member States. It could thus be maintained that the European Union should not be held responsible for violations such as the one in *Matthews*. Indeed, it has been argued that an Accession Treaty should provide for primary law to be excluded from the control exercised by Strasbourg.⁴⁴ However, there are a number of arguments against this. First, under *Matthews*, the Member States would still be responsible for such violations. Secondly, the European Union's primary law can be equated with a state's constitution.⁴⁵ It can only be amended in accordance with the procedure set out in art.48 TEU, which erects high hurdles for such an amendment, comparable with similar provisions in codified national constitutions.⁴⁶ Furthermore, similar to provisions of codified constitutions in Member States, primary law is situated at the top of the European Union's hierarchy of norms, which means that it takes priority over conflicting provisions of secondary law⁴⁷ or international agreements concluded by the European Union.⁴⁸ There is no other party to the Convention whose constitutional provisions are not reviewable by Strasbourg. The mere fact that the European Union cannot independently amend its own primary law does not appear to be good enough a reason to exclude it.⁴⁹ More importantly, such an exclusion could prove counter-productive as it might force the ECtHR to delineate violations found in primary law from violations found in secondary law. This would require the ECtHR to interpret EU law. As demonstrated above, this would endanger the autonomy of EU law and the ECJ's jurisdictional monopoly. In addition, there is no reason why the European Union should not be held responsible for its own primary law when its Member States are already answerable for EU action, which they merely implemented and where they had no discretion.

⁴³ On the "relentless" use of art.352 TFEU cf. D. Chalmers/A. Tomkins, *European Union Public Law* (Cambridge: Cambridge University Press, 2007), pp.212–219.

⁴⁴ Apparently, this is the French government's aim, cf. French Senate, Communication de M. Robert Badinter sur le mandat de négociation (E 5248) May 25, 2010, at: <http://www.senat.fr/europe/r25052010.html#toc1> [Accessed October 2, 2010]; ECtHR Tulkens J. warned of an exclusion of primary law at a hearing before the European Parliament's Committee on Constitutional Affairs, March 18, 2010 at <http://www.europarl.europa.eu/activities/committees/hearings/Com.do?language=EN&body=AFCO> [Accessed October 2, 2010].

⁴⁵ The ECJ describes the treaties as the "basic constitutional charter", *Parti Ecologiste Les Verts v European Parliament* (294/83) [1986] E.C.R. 1339; [1987] 2 C.M.L.R. 343 at [23]; on the discussion as to whether the whole of primary law constitutes the European Union's constitution or only parts of it cf. A. von Bogdandy, "Constitutional Principles", in: A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, (Oxford: Hart Publishing, 2005), pp.3–5.

⁴⁶ e.g. art.79 (2) of the German Basic Law, which requires a 2/3 majority in both the Federal Diet and the Federal Council; in *Opinion 2/94* the ECJ emphasised that an accession to the ECHR would be of "constitutional significance" and would thus necessitate an amendment to the treaties, cf. *Opinion 2/94* [1996] E.C.R. I-1759 at [35].

⁴⁷ *Germany v European Parliament* (C-376/98) [2000] E.C.R. I-8419; [2000] 3 C.M.L.R. 1175.

⁴⁸ *Kadi* (402/05 P & 415/05 P) [2008] E.C.R. I-6351 at [282]–[286].

⁴⁹ This, however, is argued by M. Köngeter, "Völkerrechtliche und innerstaatliche Probleme eines Beitritts der Europäischen Union zur EMRK" in J. Bast (ed), *Die Europäische Verfassung, Verfassungen in Europa* (Baden-Baden: Nomos-Verlag, 2005), pp.230, 245.

Moreover, the European Union's aim of enhancing its credibility in human rights questions by joining the ECHR would suffer a severe blow if the ECHR were not applicable to the highest-ranking norms of its legal system. Therefore, there is no good argument for excluding EU primary law from the Convention.

A solution based on the needs of the applicant

Under the premises outlined above, the best solution would be to hold responsible the party which has acted vis-à-vis the applicant in the concrete case. Where the European Union's institutions have acted, e.g. in competition law cases, the European Union can be held responsible. Where a Member State has acted, be it in pursuit of an EU law obligation or not, that Member State can be held responsible. For an applicant, this solution would make it easy to identify the correct respondent. In addition, the applicant would have no difficulty in finding the correct domestic remedies. Furthermore, the solution would preserve the autonomy of European Union law because the ECtHR would not have to delineate the competences between Union and Member States, and would not have to interpret the EU Treaties.

This approach has also considerable advantages over other possibilities for attributing responsibility between different entities, such as a joint or a joint and several liability of the European Union and the Member States. Admittedly, the introduction of joint liability of the European Union and the Member States would equally preserve the European Union's autonomy since the ECtHR would not need to allocate responsibility between the European Union and the Member States. However, joint liability would have a problematic side-effect: it would mean that an applicant would have to hold the European Union responsible alongside a Member State even where the violation clearly had nothing to do with EU law, e.g. in a complaint brought against family law provisions in the Member State. Politically, it would be hardly acceptable for the European Union to be drawn into such proceedings since it would run the risk of being convicted of a violation over which it had no influence. Furthermore, it would be difficult to identify the correct domestic remedy in cases which were brought against both the EU and a Member State. A canny applicant could try to avoid having to go down the national route by trying to exhaust the remedies before the EU courts. Since there is no guaranteed access for individuals to the ECJ or the General Court,⁵⁰ an applicant might hope to obtain a quicker decision by the ECtHR that way. For similar reasons, a joint and several liability would be hardly acceptable for the European Union. If the European Union and the Member States were jointly and severally liable, an applicant would have the choice to bring a complaint against a Member State or the European Union alone or against both. Such a solution would even aggravate the problem described above, since the European Union could be held solely responsible for violations of the ECHR which were not prompted by EU law but caused by the Member State alone.

A similar proposal to the solution just presented was made by the European Parliament's Committee on Constitutional Affairs,

“[...] any application by a citizen of the Union concerning an act or failure to act by an institution or body of the Union should be directed solely against the latter and that similarly any application concerning a measure by means of which a Member State implements the law of the Union should be directed solely against the Member State, without prejudice to the principle that, where the way in which responsibility for the act concerned is shared between the Union and the Member State is not clearly defined, an application may be brought simultaneously against the Union and the Member State.”⁵¹

⁵⁰ Cf. the discussion of individual access *infra*.

⁵¹ Draft Report on the institutional aspects of accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, February 2, 2010 (2009/2241 (INI)), at para.7; this report was adopted by the European Parliament on May 19, 2010, P7_TA-PROV(2010)0184.

The difference to the proposal made in this article lies in the proviso at the end of the above extract. This suggests that an application may be brought against both the European Union and the Member State in cases where responsibility is not clearly defined. This would not improve an individual applicant's situation. On the contrary, it would complicate things as the question of the correct domestic remedy in such a case would have to be clarified as well. I therefore think that the approach suggested in this article, along with the co-respondent model which is discussed below, is a clearer and better solution.

The co-respondent model

In addition to the solution just discussed, the possibility to hold the other non-acting party responsible as a co-respondent would enhance the effective protection of human rights in cases involving EU law.

The proposal

The proposal to involve the other non-respondent party as a co-respondent was first made by the Council of Europe's Steering Committee on Human Rights (CDDH) in 2002.⁵² Technically, this proposal would necessitate an amendment to the ECHR, which could be included in the accession treaty.

The French senator Robert Badinter has voiced some doubt as to whether this is desirable.⁵³ He argues that the third party intervention, which is already possible under art.36 ECHR, should be the preferred solution. Otherwise, the European Union would be convicted of human rights violations more often than it should, which according to Badinter would be worse than the conviction of a state party to the Convention, since the Union was a Union of states.⁵⁴ What he appears to imply is that any conviction of the Union would mean a conviction of all the Member States compared with the conviction of only one Member State in the absence of the European Union as a co-respondent. This argument, however, does not appreciate that the Union has its own legal personality and is precisely not merely a Union of states. Furthermore, I do not see why a conviction of more than one Member State should be considered "worse" than the conviction of one Member State. In cases such as *Bosphorus*, which concern the conduct by a Member State required by EU legislation, the ECtHR will normally be asked to find that that piece of legislation was incompatible with the Convention. The Member State would therefore be held responsible as a proxy for the Union and the other Member States so that a conviction in reality condemns the Union's conduct.

More importantly, however, I do not think that reliance on the existing third party intervention would be an adequate substitute for the introduction of the co-respondent mechanism. Article 36 (1) ECHR gives a party to the Convention the right to take part in proceedings where the applicant is one of the party's nationals. Since art.20(1) TFEU (ex 17 EC) provides for EU citizenship for every national of an EU Member State, it would make sense if, after the accession, the Union had the right set out in art.36(1) ECHR whenever an EU citizen files an application. In addition, under art.36(2) ECHR the Union could be invited to take part in proceedings by the Court where the applicant is not an EU citizen. In such cases, e.g. applications made by an asylum seeker, the European Union would not have a right to a third party intervention but that intervention would be at the discretion of the President of the Court. In the past, the ECtHR already made use of this provision to invite the European Union to intervene.⁵⁵

The third party intervention has further weaknesses compared with a co-respondent mechanism. Firstly, the third party is under no obligation to intervene. After the accession of the European Union to the ECHR, there would be cases where an obligatory involvement of the European Union in a case brought against

⁵² CDDH, fn.8, para.57 et seq; the CDDH refers to the "co-defendant"; this author prefers the designation "co-respondent".

⁵³ Badinter, see fn.44.

⁵⁴ Badinter, see fn.44.

⁵⁵ e.g. in *Bosphorus* (2006) 42 E.H.R.R. 1 at [9].

a Member State would make sense. The *Bosphorus* case would serve as a good example, since only the European Union had the power to remove the Regulation. Secondly, a third party intervener is not bound by the Court's final judgment. In contrast, if the European Union were made a co-respondent, the force of *res judicata* of a judgment would be extended to the European Union. In cases where a violation was found, this would mean that the European Union would have to abide by the judgment under art.46 ECHR. Furthermore, the European Union would be liable alongside the Member State where the ECtHR granted a just satisfaction to the applicant under art.41 ECHR.

Thus the co-respondent solution would enhance the effectiveness of the human rights protection in cases involving EU law. For these reasons, it would be a worthwhile addition to the Convention.

Who should decide?

An important practical question of course is, how exactly the co-respondent should be designated. There are essentially three possibilities: the decision could either be made by the ECtHR, or the respondent or the future co-respondent. The CDDH rightly recognised that a decision *proprio motu* by the ECtHR to designate a co-respondent would often involve a pre-judgment as to the responsibility for a violation, and is therefore not recommended.⁵⁶ As for the other two possibilities, a good argument can be made to give the respondent the right to nominate the European Union as co-respondent. The argument has to be seen in light of the above proposal, according to which the initial respondent is the party which has acted *vis-à-vis* the applicant in the concrete case. Since the Member States normally implement EU law, it is they who would be initially responsible under this approach. From the point of view of some Member States, this could lead to a harsh result since due to qualified majority voting in the Council, in extreme cases a Member State may not have approved of the EU legislation violating the Convention but still be held responsible. Therefore, there is a policy argument to be made that, in cases where the respondent Member State believes that the violation could in reality be rooted in EU law, it should be given the right to designate the European Union as its co-respondent.

Admittedly, such a solution, which provides for no further control by the ECtHR, is liable to be abused. What if a Member State designated the European Union as its co-respondent in cases which have no relationship with EU law whatsoever? Such cases will be very rare. And it is submitted that any attempt by a Member State to do so in an obvious case would constitute an abuse of process and should result in a denial of that designation by the Court. Furthermore, a designation of the European Union as a co-respondent in a case with no relationship to the European Union, would probably violate the Member State's duty of loyalty under art.4(3) TEU (ex 10 EC). Under this provision, the Union and the Member States have a duty to cooperate sincerely.⁵⁷ The provision thus sets out responsibilities of comity flowing from the membership in the Union.⁵⁸ It is contended that a designation of the European Union in such a case would constitute an abuse of rights, which is incompatible with that duty.

Another question is whether the European Union should have the right to designate itself as a co-respondent in such cases. On the one hand, the third party intervention would cover most cases brought in an EU context. However, where a non-EU citizen brings a case, no right to a third party intervention exists. Generally the ECtHR follows quite a liberal practice when it comes to allowing a third party

⁵⁶ CDDH, fn.8, para.59.

⁵⁷ This duty can be traced back to the older case law of the ECJ, e.g. *Firma Fromme v Bundesanstalt für Landwirtschaftliche Marktordnung* (54/81) [1982] E.C.R. 1449 at [5]; *Deutsche Milchkontor GmbH v Germany* (205-215/82) [1983] E.C.R. 2633; [1984] 3 C.M.L.R. 586 at [42].

⁵⁸ D. Chalmers, G. Davies and G. Monti, *European Union Law*, 2nd edn (Cambridge: Cambridge University Press, 2010), p.225.

intervention under art.36(2) ECHR.⁵⁹ But there is no reason why the European Union should not be given the right to designate itself as a co-respondent if it so wishes.

Thus, it is argued that the European Union could be designated as a co-respondent by both the respondent Member State and by itself.

Internal attribution of responsibility where compensation is awarded

In cases where the European Union was a co-respondent in proceedings against a Member State and where the ECtHR found a violation of the ECHR, there may be a need to attribute responsibility internally between the European Union and the Member State concerned. In many cases a conviction will be accepted by both and they will cooperate to remove the violation. But there may be cases in which a Member State would not be willing to accept the violation. The reasons may be political, e.g. where there is internal political pressure within the Member State not to be officially blamed in a high profile case. More importantly, where the applicant was awarded compensation under art.41 ECHR, there may be monetary interests involved. Thus it would make sense if the European Union and the Member States agreed on an internal way of attributing responsibility.⁶⁰ Two models come to mind. The first is the establishment of a committee or other permanent body, consisting of representatives from the Member States and the European Commission entrusted with this task. The second is that the European Court of Justice could be given jurisdiction to accord the blame. The latter option would necessitate the introduction of a new procedure before the ECJ, which would require an amendment to the Treaties. Such an amendment could for instance be included in a future treaty providing for the accession of one or more new Member States under art.49 TEU. A disadvantage would certainly be that such a procedure would be relatively time-consuming. However, this should not affect the applicant who was awarded the compensation. It is suggested that both respondents pay their share of the compensation to the applicant and only then do they initiate the procedure to attribute responsibility. One major advantage of a procedure before the ECJ would be that it would result in an authoritative interpretation of the allocation of responsibility and would thus contain a clarification for future reference. Thus, it is submitted that there are better arguments for the introduction of a procedure before the ECJ.

Exhaustion of domestic remedies

In order for an individual application to the ECtHR to be admissible, art.35(1) ECHR prescribes that the applicant must exhaust all domestic remedies within six months of the final decision. This provision is proof of the subsidiary character of the ECtHR's review. Under the proposal argued for above, an applicant would be entitled to bring a complaint either against the European Union or a Member State. Since the relevant domestic remedies are contained in the respondent party's legal system, a distinction would have to be drawn between cases involving EU law, which are directed against the European Union, and those which are directed against a Member State.

Complaints directed against the EU

First, the domestic remedies for cases brought against the European Union will be addressed.

⁵⁹ D. Harris, M. O'Boyle, E. Bates and C. Buckley (eds), *Law of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), p.855.

⁶⁰ This has also been proposed by S. Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention* (Baden-Baden: Nomos Verlag, 2000), p.56.

Review of Legality under article 263(4) TFEU

Individuals can only access the European Union's courts under the individual complaints procedure found in art.263(4) TFEU (ex 230(4) EC, as amended). The provision reads as follows:

“Any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

After accession, the procedure before the ECJ would no longer be considered to be an international one. Rather the ECJ would have to be regarded as a domestic court.⁶¹ It follows that Article 35 (2) (b) ECHR would not render a complaint inadmissible because it has already been submitted to “another procedure of international investigation or settlement”. Thus, an individual would have to seek a remedy before the EU's courts in order to satisfy the requirements of Article 35 (1) ECHR.

In cases where the European Union has addressed an act to the applicant, a complaint brought under art.263(4) TFEU (ex 230(4) EC, as amended) would normally be admissible. Problematic cases are those where an applicant challenges a piece of legislation or an act addressed to a third party and not to them individually. Under art.263(4) TFEU (ex 230(4) EC, as amended) a complaint against an act which is not addressed to the complainant can only be challenged where it is of direct and individual concern to them. However, the requirement of direct concern is met where the act concerned is a regulatory act, which does not entail implementing measures. That latter qualification was only added to the Treaties by the Lisbon Treaty. In the past, an applicant would have had to show “direct and individual concern” in all cases where a decision was not addressed to him or her. According to the ECJ's long-standing jurisprudence, direct concern exists where there is no discretion for the implementing authority, so that implementation is purely automatic,⁶² or where there is discretion, the possibility of it being exercised is entirely theoretical.⁶³ This will often be the case with EU secondary law, especially regulations. The crucial point for any complainant has always been to argue for individual concern. According to the Court's *Plaumann* case law, individual concern only exists where an act “affects [the applicants] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons”.⁶⁴ This case law was famously confirmed by the ECJ in the *UPA* case with the argument that the wording of that provision prevented the Court from adopting a broader definition of “individual concern.”⁶⁵

Under this case law, the question for an individual applicant, who was not individually concerned under art.263(4) TFEU (ex 230(4) EC, as amended) would have been whether the remedy provided in that provision was an effective one. There would have been reason to assume that the ECtHR would not have required an applicant to file a clearly inadmissible challenge to the ECJ. This can be concluded from the *Vagrancy* cases, where the ECtHR found that an applicant need not make use of remedies which, according to settled legal opinion, do not provide redress for his or her complaint.⁶⁶ Because of the settled case law

⁶¹ CDDH, Technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, CDDH(2002)010 Addendum 2, paras 48–49.

⁶² *NTN Toyo Bearing Co Ltd v Council of Ministers of the European Communities* (113/77) [1979] E.C.R. 1185; [1979] 2 C.M.L.R. 257 at [2].

⁶³ *Piraiiki-Patraiki Cotton Industry AE v Commission of the European Communities* (11/82) [1985] E.C.R. 207; [1985] 2 C.M.L.R. 461 at [6]-[10].

⁶⁴ *Plaumann & Co v Commission of the European Economic Community* (25/62) [1963] E.C.R. 95; [1964] C.M.L.R. 29; *Codorniu SA v Council of Ministers of the European Communities (Codorniu)* (C309/89) [1994] ECR I-1853; [1995] 2 C.M.L.R. 561 at [20].

⁶⁵ *Unión de Pequeños Agricultores v Council of the European Union* (C-50/00 P) [2002] E.C.R. I-6677; [2002] 3 C.M.L.R. 1 at [44].

⁶⁶ *Cases of de Wilde Ooms and Versyp v Belgium* (App. Nos.2832/66, 2835/66 & 2899/66) November 18, 1970 at [62].

on art.263(4) TFEU (ex 230(4) EC, as amended) an argument could have been made that an applicant would not first have had to make a futile attempt to have an act declared null and void by the ECJ.

After the reform of art.263(4) TFEU (ex 230(4) EC, as amended), this is far less certain. The provision now dispenses with the requirement of “individual concern” for regulatory acts, which entail no implementing measures. However, it is far from clear what the term “regulatory act” means under the Lisbon Treaty. This formulation could also be found in the failed Constitutional Treaty. The explanations to the provision given by the Praesidium of the European Convention, which drafted the Constitutional Treaty, suggest that “regulatory acts” are non-legislative measures.⁶⁷ However, it is uncertain what value these explanations will be given in the interpretation of the Lisbon Treaty. An argument can be made that the explanations concerning legislative action by the Union, to which the explanations relating to “regulatory acts” can be counted, are now redundant, since the Constitution introduced an entirely new terminology for different types of EU legislation. Under that new terminology, a “European regulation” was going to be a non-legislative act.⁶⁸ The Lisbon Treaty, however, retained the old terminology. Thus, it can be argued that a “regulatory act” was an act akin to a “European regulation” and therefore non-legislative. But since under the Lisbon Treaty a regulation is a legislative act, this argument is no longer valid. The wording “regulatory act” could be open enough to include all kinds of secondary legislation, or at least regulations. On the other hand, even the Constitutional Treaty did not define the term “regulatory act”. Nor is it defined in the Treaty of Lisbon.⁶⁹

Therefore, it is suggested that, until this question has definitely been resolved by the ECJ, an individual applicant alleging a violation of his or her rights under the Convention by a legislative act of the European Union must first seek to obtain a ruling by the Union’s courts. This means that the applicant will normally have to make a complaint under art.263(4) TFEU (ex 230(4) EC, as amended) to the General Court. If the General Court does not remedy the violation, the applicant will have to file an appeal to the European Court of Justice under art.256(1) TFEU (ex 225(1) EC) and art.57 of the ECJ Statute.

Complaint to the European Ombudsman

In addition to judicial remedies, art.24(3) TFEU (ex 21 EC) provides for a right of every citizen to complain to the European Ombudsman about maladministration in the European Union’s institutions, which can also concern violations of human rights contained in the ECHR. However, it is questionable whether this right to complain to the Ombudsman will need to be exercised before an individual complaint to the ECtHR can be found admissible. In contrast to the ECJ, the Ombudsman cannot remove violations. He can only conduct an inquiry and, where he finds an instance of maladministration, he refers the matter to the institution concerned and forwards a report.⁷⁰ So far, the ECtHR has considered complaints to ombudsmen to be inadequate as domestic remedies, which need not be exhausted because he cannot remove an interference with the Convention.⁷¹ Thus it is submitted that, after accession, the European Ombudsman will not be considered to be a domestic remedy which will need to be exhausted under art.35(1) ECHR.

⁶⁷ CONV 734/03, p.20.

⁶⁸ Article I-33 of the Treaty establishing a Constitution for Europe [2004] OJ C310/1; P. Craig and G. de Búrca, *EU Law*, 4th edn (Oxford: Oxford University Press, 2007), p.527 argue that a regulatory act is a regulation within the meaning of art.I-33.

⁶⁹ For a recent and more detailed discussion of this issue, see S. Balthasar, “Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU” (2010) 35 E.L. Rev. 542, who argues that regulations constitute “regulatory acts”; a different stance is taken by D. Chalmers, G. Davies and G. Monti, *European Union Law*, 2nd edn (Cambridge: Cambridge University Press, 2010), pp.414–415.

⁷⁰ Article 228(1) TFEU.

⁷¹ *Lehtinen v Finland* (App. No. 39076/97) October 14, 1999, which refers to ECommHR (App. No.9248) October 10, 1983 (*Leander v Sweden*).

Violations found in EU primary law

In addition to complaints directed against violations found in the European Union's secondary law as well as administrative decisions, an applicant might wish to claim a violation of the Convention rooted in the European Union's primary law, i.e. the Treaties. There is no remedy against such a violation at European Union level. Of course, one could consider that an applicant would have to bring a case to her national constitutional court, provided that that court offers a remedy against the violation of fundamental rights by the European Union's primary law.⁷² However, it can be argued that, where a case is brought against the European Union, a domestic remedy must be one found in EU law itself. The very recent decision of *Demopoulos* by the Grand Chamber of the ECtHR on the violation of property rights in Cyprus, however, appears to contradict this argument.⁷³ The applicants were Greek Cypriots who claimed that Turkey and the self-proclaimed Turkish Republic of Northern Cyprus (TRNC) had deprived them of their property, which was located in the northern part of Cyprus. In 2005, the TRNC passed legislation which allowed people claiming rights to property located in northern Cyprus to bring a claim for compensation, exchange or restitution before the Immovable Property Commission, a body established by that legislation. It was *inter alia* argued that the applicants were only under a duty to exhaust Turkish remedies and not the remedies of the TRNC.⁷⁴ Pointing to its case law, in which the ECtHR has consistently held Turkey responsible for acts and omissions of the TRNC, the Grand Chamber rejected this argument.

The question is whether the Court is likely to take a similar approach with regard to a complaint directed against EU primary law. Considering that the Grand Chamber expressly emphasised that it is not a court of first instance and that its jurisdiction is subsidiary, this does not seem entirely unlikely.⁷⁵ On the other hand, the situation with regard to northern Cyprus is rather special. In contrast to the European Union, the TRNC is not recognised as having international legal personality. Furthermore, after accession the European Union will be directly bound by the Convention, whereas the TRNC is not a party to it, which explains why the applicants considered it necessary to attribute the TRNC's actions and omissions to Turkey.

A further, more general point, is that the Convention States' constitutional courts do not have jurisdiction to review the validity of provisions contained in their constitution, which they are called upon to interpret. Thus, in cases where such provisions are the issue of the complaint brought to Strasbourg, the ECtHR will usually be the first court to hear the case. Considering that the EU's primary law has a similar function to national constitutional law, this might be a further argument why the ECtHR might be inclined to rule that domestic remedies need not be exhausted in such cases.

Complaints directed against a Member State

In cases of Member State action, the applicant has to direct her complaint against the Member State concerned. This means that the applicant will have to exhaust the domestic remedies provided by that Member State according to art.35(1) ECHR. Normally this involves seeking judicial review by the appropriate domestic body and the exhaustion of all possibilities of appeal. Where the alleged violation

⁷² An example would be the German Federal Constitutional Court, cf. its decision on the Lisbon Treaty, Bundesverfassungsgericht (Second Senate), Cases 2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08; 2 BvR 1259/08; 2 BvR 182/09, Decision of 30 June 2009; English version available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html [Accessed October 2, 2010].

⁷³ *Demopoulos v Turkey* (App. Nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 & 21819/04) (2010) 50 E.H.R.R. SE14.

⁷⁴ *Demopoulos v Turkey* (App. Nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 & 21819/04) (2010) 50 E.H.R.R. SE14 at [64].

⁷⁵ *Demopoulos v Turkey* (App. Nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 & 21819/04) (2010) 50 E.H.R.R. SE14 at [69].

of the Convention was triggered by the Member State's obligations under EU law, the question arises whether a preliminary ruling by the ECJ will also be necessary in order to satisfy the requirements of art.35(1) ECHR. Article 267(2) TFEU (ex 234(2) EC) gives every national court the right to make such a reference concerning the interpretation of EU law and the validity of acts of the European Union's institutions. Article 267(3) TFEU (ex 234(3) EC) postulates a duty to make a reference for a court against whose decision there is no judicial remedy under national law. Under the ECJ's case law such a duty also exists where the validity of an act of the Union's institutions is at issue.⁷⁶

A good example for cases in which a reference might be necessary would be situations like the one arising in *Bosphorus*, where Irish authorities impounded an aircraft because of a duty to that effect contained in an EU regulation. This was challenged by the airline affected, first in the Irish courts and then in the ECtHR. In *Bosphorus*, the Irish Supreme Court had made a reference to the ECJ, giving the ECJ the opportunity to review the regulation as to its conformity with the European Union's fundamental rights.⁷⁷

After accession, the question would be whether a similar complaint to the ECtHR would be admissible in the absence of a reference by a national court. In a discussion document on the European Union's accession to the ECHR, the ECJ argued against the possibility of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point.⁷⁸ The obvious concern behind this argument is the ECJ's monopoly to declare acts of the European Union invalid which includes a review of their conformity with fundamental rights.⁷⁹ This monopoly would, at first glance, be in jeopardy if the ECtHR were to decide in the absence of a previous ECJ decision on the same matter. However, the ECtHR would not be given the power to declare acts of the European Union void. The ECtHR would only find that an action by the European Union was incompatible with the Convention.

In addition, the applicant's situation needs to be considered. While a national court of last resort is usually obliged to make a reference to the ECJ under art.267(3) TFEU (ex 234(3) EC), a party to the proceedings in the national court has no means of compelling that court to do so. It is settled case law that art.267 TFEU does not constitute a means of redress for the individual.⁸⁰ It may thus well happen that the national court chooses not to make a reference, be it because it mistakenly assumes that no duty to make a reference exists or because it argues that one of the exceptions to art.267(3) TFEU (ex 234(3) EC) formulated in the famous *CILFIT*-ruling applies. In that decision, the ECJ held that a national court of last resort need not make a reference where it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.⁸¹

If a national court therefore finds that it is under no obligation to make a reference, this should not be to the applicant's disadvantage. There is a risk that a case would not be reviewed by any of the European

⁷⁶ *Firma Foto Frost v Hauptzollamt Lübeck-Ost* (314/85) [1987] E.C.R. 4199; [1988] 3 C.M.L.R. 57 at [20].

⁷⁷ *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications (Ireland)* (C84/95) [1996] E.C.R. I-3953; [1996] 3 C.M.L.R. 257.

⁷⁸ Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 5, 2010, para.9, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf [Accessed November 5, 2010].

⁷⁹ Cf. the intervention by ECJ Timmermans J., *L'adhésion de l'Union Européenne à la Convention européenne des Droits de l'homme*, at a hearing before the European Parliament's Committee on Constitutional Affairs, March 18, 2010 at <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=AFCO> [Accessed October 10, 2010].

⁸⁰ Cf. e.g. *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (283/81) [1982] E.C.R. 3415 at [9]; *R. (on the application of International Air Transport Association (IATA)) v Department of Transport* (C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20 at [28].

⁸¹ *CILFIT* (C-283/81) [1982] E.C.R. 3415 at [21].

courts, if the ECtHR found that the domestic remedies had not been exhausted in the absence of a reference. Furthermore, the applicant has no influence over the national court's denial to make a reference.

There would also be a practical problem, if a reference were required to exhaust domestic remedies. What if the questions put before the ECJ or the ECJ's decision did not address the issue of compliance with fundamental rights, i.e. the very questions which are of relevance to the ECtHR? There is evidence from the ECtHR's case law that the ECtHR would consider this as insufficient. In a case concerning a domestic appeal, an applicant had withdrawn a part of his original claim on appeal. Since that part of the claim concerned the alleged human rights violation, the Grand Chamber of the ECtHR held that the applicant had failed to exhaust the domestic remedies available.⁸² If a preliminary reference to the ECJ were to become a domestic remedy which needs to be exhausted, it would thus only be consistent to deny access to the ECtHR where the ECJ did not discuss the question of the Convention rights allegedly violated. Given that the national court enjoys complete discretion in that matter and that the applicant thus has no influence over the content of the preliminary reference,⁸³ there would be another argument against requiring such a reference.

A parallel can also be drawn to a similar type of reference which exists under Italian law, whereby a lower court can refer a case to the Italian Constitutional Court.⁸⁴ Strasbourg has consistently held that such a reference cannot be considered a remedy which needs to be exhausted.⁸⁵ Thus, it is argued here that a formal requirement that the ECJ decides in a preliminary reference prior to an action in Strasbourg would constitute an undue denial of access to the ECtHR. However, one could argue that it would be necessary for an individual applicant to formally apply to the national court to make a reference. This would ensure that the national court at least addresses the question of the relevance of EU law in the case before it, increasing the likelihood of a reference.

This contribution, therefore, argues against the requirement of a preliminary reference to the ECJ in order to gain access to the ECtHR. This solution, however, means that there may be instances in which the Strasbourg court will decide upon the compatibility of Member State action which is triggered by EU law without a prior decision by the ECJ on the issue.

Other ways of involving the ECJ

Introduction of a reference procedure between Strasbourg and Luxembourg?

The above solution is regarded by some as a problem which needs to be resolved.⁸⁶ In its discussion document, the ECJ therefore argues that,

“a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the Court of Human Rights rules on the compatibility of that act with the Convention.”⁸⁷

⁸² *Azinas v Cyprus* (App. No.56679/00) April 28, 2004 at [40].

⁸³ *Eurico Italia Srl, Viazzo Srl and F & P SpA v Ente Nazionale Risi* (C-332/92, C-333/92 & C-335/92) [1994] E.C.R. I-711 at [17]; *Criminal Proceedings against Franzén* (C-189/95) [1997] E.C.R. I-5909 at [79]; *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (C-435/97) [1999] E.C.R. I-5613 at [28]-[29].

⁸⁴ Article 134 of the Italian Constitution and legge costituzionale 9 febbraio 1948, fn.1; cf. O. de Schutter, *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation*, presented at a hearing before the European Parliament's Committee on Constitutional Affairs, March 18, 2010 at <http://www.europarl.europa.eu/activities/committees/hearings/Com.do?language=EN&body=AFCO> [Accessed October 2, 2010].

⁸⁵ *Brozicek v Italy* (1990) 12 E.H.R.R. 371; *Immobiliare Saffi v Italy* (2000) 30 E.H.R.R. 756; *De Jorio v Italy* (2005) 40 E.H.R.R. 42.

⁸⁶ See Timmermans, fn.79.

⁸⁷ Discussion document, fn.78, para.12.

As it would be hardly justifiable to declare complaints inadmissible since the individual has no influence over whether a reference by a national court is made or not, one solution would be that Strasbourg would refer the case to Luxembourg for a review of compatibility with the Convention.⁸⁸ And where Luxembourg finds no violation, the case would be referred back to Strasbourg for determination by the ECtHR.

There are a number of reasons why this approach is not recommended. Any reference by the ECtHR to the ECJ would lead to further delay in proceedings. In addition, it would lead to a privilege for the EU legal order. The highest courts of all other parties to the Convention are not given that possibility and cannot thus avoid the risk of violating the Convention by obtaining a preliminary clearance from the ECtHR. Furthermore, the situation where the ECJ has not made a pronouncement as to compatibility with fundamental rights would not be unique. Some national legal systems do not have any, or only very limited, judicial review of the constitutionality of their legislation. Thus Strasbourg is sometimes the first court to rule on the compatibility of the legislation with human rights. More importantly, it would be difficult for the Strasbourg Court to decide which cases should be referred to Luxembourg without somehow pre-judging their outcome. A Member State can be the respondent in many types of complaint, only a few of which involve European Union law. Thus, upon receipt of a reference, Strasbourg would have to make a decision as to whether a case warrants a review by the ECJ at all. This assessment can at times be difficult to make.

It will be even harder to draft a legal provision for such a reference, which would describe in an abstract manner in which cases Strasbourg must refer. For instance, should Strasbourg be under an obligation to refer a case to the ECJ, where the applicant was detained in accordance with a European Arrest Warrant (EWA),⁸⁹ and claims that during their detention they were subjected to degrading treatment, constituting a violation of art.3 ECHR? Clearly, in such a case the EWA was the ultimate cause for the violation, but, rather than authorising degrading treatment, it merely made it possible. It is submitted that this problem ought not to be resolved within the Strasbourg system but rather at the appropriate domestic level, which is the Union itself.

Reference by the European Commission to the ECJ?

Another possibility argued by Timmermans is that the European Commission should be given the right to refer cases pending before the Strasbourg Court to the ECJ, in order to give the ECJ the opportunity to rule on the compatibility of legislation with human rights.⁹⁰ In such a case, the Strasbourg Court should suspend the proceedings and wait for the ECJ to decide. In the European Union, such an action is already possible. Under art.263(2) TFEU (ex 230(2) EC) the Commission may have legislation reviewed by the ECJ as to its compatibility with the Treaties, which would also include the Charter of Fundamental Rights. The ECtHR would also have the possibility to stay proceedings out of judicial comity or after the inclusion of a specific provision in the Rules of Court. However, any review by the ECJ would then be placed at the discretion of the European Commission. What if the European Commission fails to bring a case? It is expected that the Commission would be reluctant to bring such cases, since under EU law the European Commission would always have introduced the legislation concerned itself. A further point to be decided would be whether there should be a time limit for the filing of such proceedings by the Commission. Again, I do not think that this question ought to be a problem for the Convention system to resolve. It should thus not be made part of the negotiations on accession.

⁸⁸ This proposal was made, inter alia, by Badinter, see fn.44.

⁸⁹ Council Framework Decision 2002/584/JHA [2002] OJ L190/1.

⁹⁰ Timmermans, fn.79, para.9.

Introduction of an article 267 TFEU-style reference by the ECJ to the ECtHR?

Another question which has been raised and might have to be addressed by the negotiators is the introduction of preliminary references by the ECJ to the Strasbourg Court.⁹¹ At first glance, this approach might have a number of advantages: the first would be that it might relieve court congestion, as the ECtHR would only have to answer specific points and would not need to address unfounded arguments by the parties. But this would only be the case if a later individual complaint were to be excluded. Otherwise, the ECtHR would have to address the same case twice. This would, however, hardly be an acceptable solution, because an individual would have to rely on the ECJ to ask the “right” questions.

Another advantage would be that the ECJ would receive an authoritative interpretation of the Convention, which would help to avoid divergent interpretations. However, it must be borne in mind that, after accession, the ECHR becomes an integral part of EU law.⁹² Therefore, it will also be for the ECJ to interpret the Convention. There is an argument to be made that this right of interpretation ought not to be given up. In addition, it would formally introduce a hierarchy between the ECJ and the ECtHR, which would have to be reconciled with the ECJ’s role as the highest court in the European Union. It would also be problematic if other highest courts were not given that opportunity. Moreover, this solution does not cater for situations in which a case never reaches the ECJ because a national court omits to make a reference and a reference to the ECtHR would cause a further delay to proceedings.⁹³ Already a reference to the ECJ by a national court takes a long time to be answered.⁹⁴ If the ECJ were then allowed to make a further reference to the ECtHR, which would report back to the ECJ, finally enabling it to answer the national court’s questions, there would be considerable delay, with serious consequences for the individual claimant.

A further argument against such a possibility was made by Winkler: the introduction of a preliminary reference could essentially lead to a race to the bottom in the human rights protection in the EU.⁹⁵ The function of the ECHR is to provide a minimum protection of human rights. This means that the protection granted by EU law may be higher. This is precisely the situation under the European Union’s own human rights catalogue contained in the European Union’s Charter of Fundamental Rights, which provides in art.52(3) that the ECHR is the minimum standard. Were the ECtHR to give preliminary rulings in concrete cases before the ECJ, the ECJ would be likely to adopt these rulings and only grant the protection given by the ECtHR. Furthermore, it should be noted that the assessment under EU law should be made independently by the ECJ: the Charter of Fundamental Rights, as well as the TFEU, contain additional individual rights (e.g. social rights in Title III, data protection rights in art.8, bioethical rights in art.3(2)), which are unknown to the ECHR but may nonetheless be of relevance to the interpretation of the European Union’s own fundamental rights. This will be the case particularly where a right guaranteed in both the Convention and the Charter, e.g. the freedom of speech,⁹⁶ is restricted because of another conflicting right not contained in the Convention, e.g. the freedom to choose an occupation and the right to engage in work contained in art.15 of the Charter.⁹⁷ Another example could be the case of *Schmidberger*, which required

⁹¹ Discussed by the CDDH, fn.8, paras 75–77.

⁹² *R&V Haegeman Sprl v Belgium* (181/73) [1974] E.C.R. 449; [1975] 1 C.M.L.R. 515 at [5]; *Commission v Ireland* (C-459/03) [2006] E.C.R. I-4635 (Mox Plant).

⁹³ CDDH, fn.8, para.77.

⁹⁴ On average about seventeen months, cf. ECJ, *Annual Report* 2009, p.94.

⁹⁵ Winkler, fn.60, pp.112–113.

⁹⁶ Article 10 ECHR and art.11 Charter of Fundamental Rights respectively.

⁹⁷ Instructive on the relationship between the Charter and the internal market: S. Weatherill, “The Internal Market”, in: S. Peers and A. Ward (eds), *The Charter of Fundamental Rights* (Oxford: Hart, 2004), p.183; on the scope *ratione materiae* of the Charter compared with the ECHR and fundamental rights recognised as general principles of EU law, cf. K. Lenaerts and E. de Smijter, “A ‘Bill of Rights’ for the European Union” (2001) 38 C.M.L. Rev. 273, 278; P. Lemmens, “The Relation between the Charter and the ECHR” (2001) 8 *Maastricht Journal of European and Comparative Law*, 49, where he compares each of the corresponding rights.

a balance to be struck between the right to free speech and freedom of assembly, on the one hand, and the market freedoms under the TFEU, on the other.⁹⁸ If a reference to the ECtHR were possible, that Court would only be able to answer a question on the interpretation of the Convention but not of other, conflicting rights contained in EU law. It would not be able to take these into account. Were the ECJ to follow an interpretation of the ECtHR in such a case, there is a danger that the margin of appreciation, which the ECtHR gives to domestic legal systems and their courts,⁹⁹ could remain unused.

Thus it is not advisable to introduce a possibility for the ECJ to make a preliminary reference to the ECtHR, be it in lieu of or in addition to an individual's right to make a complaint under art.34 ECHR.

Exclusion of inter-state complaints?

These remarks have so far been about only applications by individuals under art.34 ECHR. That such applications directed against the European Union will be possible after accession will be one of the main improvements in the protection of human rights in Europe. Aside from individual complaints, which account for the bulk of cases in Strasbourg, the ECHR also provides for complaints brought by state parties under art.33 ECHR:

“Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.”

The question is whether after accession such inter-state complaints should be excluded as far as the Member States and the European Union are concerned. There are two connected reasons why this might be appropriate: first, the autonomy of EU law and, second, the exclusive jurisdiction of the ECJ. As already mentioned, the ECJ regards EU law to be an autonomous legal order.¹⁰⁰ The question is whether the possibility of inter-state complaints between Member States or between a Member State and the European Union would endanger that autonomy. At first glance, it is hard to see how that should be the case when individual applicants have the right to bring cases before the Strasbourg court, which in itself is not regarded as problematic. However, there are a number of reasons why inter-state complaints could prove to be a more sensitive issue. First, a policy-based argument could be made that disputes between Member States of the European Union or even between the European Union and one or more of its Member States should not be dealt with outside of the European Union's judicial institutions. Secondly, there is a difference between the situation of an individual applicant who must show that their human rights have been violated and a Member State which files an inter-state complaint for principled reasons and not because its own rights are at stake. Thirdly, there is the possibility for Member States to seek judicial recourse within the European Union. Article 259 TFEU (ex 227 EC) gives the ECJ jurisdiction over cases between Member States for alleged failures to comply with the obligations resulting from the Treaties. And art.263(2) TFEU (ex 230(2) EC) gives the Member States the opportunity to challenge any act of the EU institutions as privileged applicants, which means that they do not have to show any violation of their rights or of their citizens' rights.

This brings us to the second reason mentioned above, namely the exclusive jurisdiction of the ECJ under art.344 TFEU (ex 292 EC). According to that provision, “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.” Article 3 of Protocol No.8 to the Lisbon Treaty explicitly provides that

⁹⁸ *Eugen Schmidberger Internationale Transporte Planzüge v Austria* (C-112/00) [2003] E.C.R. I-5659; [2003] 2 C.M.L.R. 34 at [77].

⁹⁹ *Handyside v UK* (App. No.5493/72) (1976) 1 E.H.R.R. 737 at [48].

¹⁰⁰ Cf. *supra*.

nothing in the accession treaty shall affect that provision.¹⁰¹ The object and purpose of art.344 TFEU (ex 292 EC) is to ensure the interpretation of EU law. The wording of art.344 TFEU (ex 292 EC) can be misunderstood in that it gives the ECJ exclusive jurisdiction not only over the Treaties as such but also over the whole of European Union law. Moreover, it extends to agreements concluded by the European Union as far as they constitute an “integral part” of European Union law.¹⁰² This means that, after accession, the ECHR itself will become an integral part of European Union law and thus the ECJ’s jurisdiction will extend to the ECHR. The ECJ’s exclusive jurisdiction is not limited to disputes between Member States under art.259 TFEU (ex 227 EC) as the wording of art.344 TFEU (ex 292 EC) would suggest. It is clear from *Opinion 1/91* that the ECJ only regarded the explicit formulation of art.344 TFEU (ex 292 EC) as confirming this exclusive jurisdiction, which was inherent in the Treaties.¹⁰³

For this reason, the ECJ has exclusive competence to interpret the ECHR in proceedings between Member States and the European Union. Such proceedings should thus be excluded from the jurisdiction of the ECtHR. A provision to that effect could either be included into the Accession Treaty, or it could be agreed between the European Union and its Member States, which is possible under art.55 ECHR.¹⁰⁴ The latter option would have the advantage of not requiring the consent of those parties to the Council of Europe which are not members of the European Union.

As far as proceedings between two or more Member States are concerned, it is necessary to make a distinction. After accession, the Convention will be a so-called “mixed agreement”. Mixed agreements are treaties concluded both by the Union and the Member States. Mixed agreements are usually concluded because neither the Member States nor the Union have the competence to conclude the agreement alone. It became evident in the *Mox Plant* case, decided by the ECJ in 2006, that the ECJ has exclusive jurisdiction over those parts of the agreement which fall into the legislative competence of the European Union.¹⁰⁵ It does not have jurisdiction over disputes relating to provisions which are in the exclusive competence of the Member States. However, the ECHR will not be a typical mixed agreement as the reason for its mixity cannot be attributed to the lack of competence of either the European Union or the Member States to conclude the ECHR alone. On the contrary, they all have that competence. Thus the *Mox Plant* case law is of no help in determining the exact jurisdiction of the ECJ over the ECHR after an accession. It is suggested that the jurisdiction of the ECJ only applies where a measure by a Member State fell within the scope of Union law, i.e. where that Member State implemented or restricted EU law.¹⁰⁶ Only then is the Member State bound by the ECHR as an integral part of European Union law. In all other situations, the Member State is bound by the ECHR according to its national law.

What does this imply for the question whether and, if so, to what extent inter-state complaints ought to be excluded? It is clear that the ECJ’s exclusive jurisdiction extends to all proceedings between the European Union and a Member State as parties. Thus complaints brought by or brought against the European Union must be excluded. As regards the Member States, only those complaints which deal with behaviour of Member States within the scope of EU law would have to be excluded. Complaints where

¹⁰¹ Protocol (No.8) relating to art.6 (2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2010] OJ C83/273.

¹⁰² *Haegeman* (181/73) [1974] E.C.R. 449 at [5]; *Commission v Ireland* (C-459/03) [2006] E.C.R. I-4635 (*Mox Plant*).

¹⁰³ *Opinion 1/91* [1991] E.C.R. I-6079 at [35].

¹⁰⁴ For more details on this provision cf. T. Lock, “The ECJ and the ECtHR: The Future Relationship between the Two European Courts” (2009) 8 *The Law and Practice of International Courts and Tribunals*, 375, 391-395.

¹⁰⁵ On the ECJ’s jurisdiction to interpret mixed agreements cf. P. Koutrakos, “Interpretation of Mixed Agreements” in: C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited* (Oxford: Hart, 2010), p.116; I. Govaere, “Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order” in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited* (Oxford: Hart, 2010), p.187.

¹⁰⁶ A parallel can be drawn to the applicability of the EU Charter of Fundamental Rights, cf. its art.51.

the Member States acted in exercise of their own sovereignty, i.e. where there was no involvement of EU law, would be possible. Indeed, it has been suggested by Serhiy Holovaty, a Member of the Council of Europe's Parliamentary Assembly, that the exclusion of the ECtHR's jurisdiction over such disputes ought to be formulated along the lines of the wording of art.344 TFEU (ex 292 EC).¹⁰⁷ However, considering the complexity of the ECJ's exclusive jurisdiction just described, such an approach would require the ECtHR to interpret whether the Member States' action in the concrete case was within the scope of EU law, which is the *domaine reservée* of the ECJ.

It thus seems to be the best and simplest option to exclude all inter-state complaints between the Member States of the European Union. Admittedly, this would deprive the ECtHR of some potential cases. However, when we consider the very small number of inter-state cases before the Court¹⁰⁸ and the fact that the same complaint can still be made by an individual applicant, I believe this solution is acceptable. It should be noted that this does not amount to "special treatment" of the European Union compared with other contracting parties.¹⁰⁹ First, the option to exclude inter-state complaints is open to all parties, either as part of a reservation when acceding to the ECHR or under art.55 ECHR, provided they submit the dispute to another dispute settlement mechanism. Second, the individual who is the victim of the alleged violation of the Convention will still be able to bring a case to the ECtHR.

The future of *Bosphorus*

The final question to be addressed is whether the presumption first voiced by the ECtHR in the *Bosphorus* judgment should be upheld after accession. As mentioned above, the ECtHR held in that judgment that, as long as the European Union's legal order protected fundamental rights in an equivalent manner to the Convention, it will be presumed that a Member State has acted in compliance with the Convention where it had no discretion in implementing EU secondary law.¹¹⁰ This jurisprudence clearly privileges the European Union's legal order since other legal orders, which guarantee the protection of human rights to a very high standard, are still subjected to a full scrutiny by the Court. The rationale given by the ECtHR for granting the Union's legal order this privilege is a substantive one: it is an acknowledgment that the protection of human rights in the European Union and by the ECJ is of such high quality that the ECtHR can afford to only exercise its jurisdiction where, exceptionally, the protection was manifestly deficient. After the entry into force of the Charter of Fundamental Rights, it can be argued that the protection has even become better. The Charter contains a far wider array of rights recognised and protected than the ECHR. Where Charter rights correspond to rights guaranteed in the Convention, it expressly states in art.52(3) that, while the ECHR is to be the minimum standard of protection, Union law may provide for a more extensive protection. For instance, this would be the case where political activities of foreign nationals are concerned. The Charter does not contain a possibility to restrict these to a larger extent than political activities by nationals, which is a possibility afforded under art.16 ECHR. Another example would be art.9 of the Charter, which, in contrast to the ECHR, does not restrict the right to marry to marriages between men

¹⁰⁷ Proposal made at a hearing before the European Parliament's Committee on Constitutional Affairs, March 18, 2010 at <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=AFCO> [Accessed October 2, 2010].

¹⁰⁸ According to Harris, O'Boyle and Warbrick, fn.59, p.822, only 21 such complaints have been made so far.

¹⁰⁹ This claim was made by J. Christoffersen at a hearing before the European Parliament's Committee on Constitutional Affairs, March 18, 2010 at <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=AFCO> [Accessed October 2, 2010].

¹¹⁰ *Bosphorus* (2006) 42 E.H.R.R. 1 at [155] and [156].

and women.¹¹¹ Thus, one can contend that there are even fewer reasons for the ECtHR to abandon the presumption.¹¹²

It is argued, however, that the true reasons for the presumption lie elsewhere. The first is that the ECtHR wanted to show a degree of comity towards the European Court of Justice.¹¹³ It acknowledged that the ECJ has a monopoly to declare EU action invalid and that the European Union, and with it the ECJ, are not bound by the ECHR. The ECtHR attempted to avoid a conflict with the ECJ and sent a signal of respect, in return for the ECJ's past receptiveness towards the ECtHR's human rights case law. The second reason for the *Bosphorus* presumption lies in the fact that the Member States, and not the European Union, would be held responsible for violations of the ECHR. The presumption is thus an acknowledgment of the fact that the European Union, who in such cases is the potential violator of human rights, is not bound by the ECHR.¹¹⁴

Once the European Union is formally a party to the Convention, these two reasons will no longer suffice to justify the continuation of the presumption. As for comity, the European Court of Justice's decisions will now be subject to the scrutiny by the ECtHR. By acceding to the Convention, the European Union will have agreed to have its legal system measured by the human rights standards of the ECHR. For the ECtHR, the ECJ will be a "domestic court" and therefore no longer deserve special treatment. Furthermore, the European Union can now be a party to the proceedings before the ECtHR, at least as a co-respondent. It will no longer be the case that the Member States have to act as sole respondents in lieu of the European Union. Therefore, there will no longer be a need for them to be privileged in cases currently covered by the presumption.

The continuation of the *Bosphorus* presumption would also be hard for other parties to the Convention to accept who might claim that they deserve similar treatment since their constitutional courts offer an "equivalent protection" as well.¹¹⁵ They might go so far as to request an explicit abandonment of that case law in the Accession Treaty, threatening that they will otherwise refuse to ratify it. Given that the long ratification process of Protocol 14 was delayed mainly for political reasons, this is not in anybody's interest.

Conclusion

This contribution has attempted to give an overview of the most problematic and contentious issues of the accession by the European Union to the ECHR. It is to be expected that some of these problems will occupy the negotiators to a great extent. Some, such as the question of the correct respondent, might be left open for the ECtHR to decide in the future. New problems may crop up. Whatever the final outcomes, it is to be hoped that they will not complicate proceedings before the Strasbourg Court unduly and will not make individual access so cumbersome that potential applicants are deterred from seeking judicial relief in Strasbourg. Such a development would have exactly the opposite effect from what accession intends to achieve, namely better protection of human rights in the European Union. It is therefore hoped that the negotiators would strike the right balance between the European Union's autonomous legal system and the ECJ's jurisdiction, on the one hand, and the need for an effective human rights protection for the individual, on the other.

¹¹¹ A comparison of the protection offered by the Charter and by the ECHR can be found in P. Lemmens, "The Relation between the Charter and the ECHR" (2001) 8 *Maastricht Journal of European and Comparative Law* 49.

¹¹² L. Besselink, "The European Union and the European Convention on Human Rights: From Sovereign Immunity in *Bosphorus* to Full Scrutiny Under the Reform Treaty?" in I. Boerefijn and J. Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights, Essays in Honour of Cees Flinterman* (Antwerp: Intersentia, 2008), pp.295, 305.

¹¹³ S. Douglas-Scott, "*Bosphorus v Ireland*" (2006) 43 C.M.L. Rev. 243.

¹¹⁴ Besselink, 303.

¹¹⁵ An example would be the German Federal Constitutional Court.