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EU Accession to the ECHR: Between Autonomy and Adaptation

Christina Eckes*

After the European Union's accession to the European Convention on Human Rights the EU will become subject to legally binding judicial decisions of the European Court of Human Rights (ECtHR) and participate in statutory bodies of the Council of Europe (Parliamentary Assembly; Committee of Ministers) when they act under the Convention. Convention rights and their interpretation by the ECtHR will be directly enforceable against the EU institutions and against Member States when acting within the scope of EU law. This will vest the ECHR with additional force in a number of Member States, including Germany and the UK. All Member States will further be subject to additional constraints when acting under the Convention system. The article considers the reasons for, and consequences of the EU's *primus inter pares* position under the Convention and within the Council of Europe, and the likely practical effect of the EU's accession for its Member States.

INTRODUCTION

The European Union (EU)'s accession to the European Convention on Human Rights (ECHR) is the most topical example of participation by the EU in an international legal system. Accession to the ECHR will have largely the same effects as membership in an international organisation. More significantly, the EU will become subject to legally binding judicial decisions of the European Court of Human Rights (ECtHR) and it will participate in the statutory bodies of the Council of Europe (Parliamentary Assembly; Committee of Ministers) when they act under the Convention.

The EU's accession to the ECHR has been the subject of political discussion since the 1970s.¹ The early debate culminated in 1994 with the Court of Justice terminating all accession attempts under the old Treaty framework.² The main reason for the Court of Justice giving a negative opinion was that the Court wanted to preserve the autonomy of the EU legal order and its own exclusive jurisdiction over EU law. The situation changed fundamentally on 1 December 2009 with the entry into force of the Lisbon Treaty. Accession has now become

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1 See *eg* Memorandum of the Commission of 4 April 1979, Bulletin of the European Communities, *supp.* 2/79.

2 Opinion 2/94 *ECHR Accession* [1996] ECR I-1759.

possible under EU law. Indeed, it has even become an obligation,³ which is likely to require several more years of political and legal efforts on the part of the EU, the Member States and the Council of Europe.⁴

The EU's accession to the ECHR has also attracted a considerable amount of scholarly attention. Some contributions have focussed on specific institutional questions⁵ while others deliver an analysis of recent developments.⁶ Considering more broadly human rights protection in Europe, Sionaidh Douglas-Scott drew the rather bleak conclusion that Lisbon Treaty human rights provisions and the recent case law of the Court of Justice would add to 'complexity rather than [produce] human rights protection itself'.⁷ Undoubtedly, the EU's accession to the ECHR also adds to complexity but that does not diminish the added value of an external control for those whose rights may have been violated. The aim of the present article is to build on and engage with the existing literature on this complex subject. It offers a nuanced examination of the specific steps that have recently been taken towards accession in the light of the case law of the ECtHR and the underlying broader questions of EU constitutional law, and considers also the implications of the EU's accession both for the Union and for its Member States.

Many questions remain open. Do the suggested solutions address the existing concerns? What other problems might arise? In what way do the two legal regimes have to be adapted to make the EU's accession legally possible and workable in practice? In what way is the EU's position – as it is set out in the draft accession agreement – different from the other Contracting Parties? What are the reasons for the EU's *primus inter pares* position under the Convention and within the Council of Europe? What might be the consequences? How might the relationship between the Court of Justice and the ECtHR change?

The first section sets the scene by explaining the relationship between the Council of Europe, the EU and the ECHR, then dealing with the Court of Justice's concern with its own judicial autonomy and after that going on to

3 Article 6(2) TEU 'The Union shall accede . . .' and Protocol 8. See also on the side of the ECHR: article 59(2) ECHR as amended by Protocol 14.

4 See 'Reform and Accession' below; see also: S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 645, 661.

5 T. Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *CMLRev* 1025; T. Lock, 'EU accession to the ECHR: implications for judicial review in Strasbourg' (2010) 35 *ELRev* 777. See also: J. Kokott and C. Sobotta, 'The Charter of Fundamental Rights of the European Union After Lisbon' (European University Institute, EUI Working Papers AEL 2010/6, 2010) at http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3 (last visited 20 July 2012) and M. den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (SHARES series, ACIL Research Paper No 2012-04, 2012), at <http://www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-european-court-of-human-rights/> (last visited 20 July 2012).

6 J. Králová, 'Comments on the Draft Agreement on the Accession of the European Union to the Convention For The Protection Of Human Rights And Fundamental Freedoms' (2011) 2 *CYIL*; N. O'Meara, '“A More Secure Europe of Rights?” The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 *German Law Journal* 1813; J. P. Jaqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *CMLRev* 995.

7 Douglas-Scott, n 4 above, 645, 682.

examine the recent case law of the ECtHR that deals with EU law. The second section turns to the accession discussion. It introduces the reforms of the ECtHR and the negotiations of the draft accession agreement. The third section analyses the implications of the EU's accession to the ECHR in the light of the draft accession agreement. It deals first with the Member States and then turns to the Union and the Court of Justice. The final section draws some conclusions.

SETTING THE SCENE: THE STATUS QUO

The Council of Europe, the EU, and the ECHR

Originating in the same post-World War II period, the legal systems developed by the Council of Europe and the EU are fundamentally different. The former, by contrast with the latter, has not taken the path of integration but rather operates on the basis of diplomacy. The Council of Europe's production of norms takes place through the adoption of multilateral international conventions, which cannot be seen as secondary law, but are rather an expression of the will of the Contracting Parties under international law.

This has not been an impediment to cooperation. The links between the Council of Europe and the EU have progressively been institutionalised.⁸ Co-ordination between their respective activities has consistently increased.⁹ More and more conventions adopted under the auspices of the Council of Europe are open to the EU.¹⁰ Yet, this does not in all instances mean that the EU actually becomes a signatory.¹¹ The ECHR is the most prominent and topical example of (planned) EU participation in a convention agreed under the auspices of the Council of Europe. It might have had a somewhat slow start after its entering into force in 1953,¹² but with the introduction of the ECtHR in 1959 and the growing acceptance of the right of individual petition it has undoubtedly developed into the key legal instrument of the more than 200 conventions drafted by the Council of Europe.¹³ All 47 Contracting Parties of the Council of

8 Eg the Liaison Office of the Council of Europe with the European Union; the head of the European Union delegation to the Council of Europe participates (without voting rights) in all meetings of the Committee of Ministers. See also the reference in now article 220 TFEU, which has been in the Founding Treaties since the inception of the EU.

9 See a webpage dedicated to the cooperation between the CoE and the EU, at http://www.coe.int/t/der/eu_EN.asp (last visited 20 July 2012).

10 The Complete list of the Council of Europe's treaties gives an overview of all Council of Europe conventions open to the EU (at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG> (last visited 20 July 2012); indicated in the column 'U'). Notice also the tremendous increase in recent years: 17 of 135 conventions or additional protocols signed between 1949 and 1989 are open to the EU. 34 of 76 conventions or additional protocols signed between 1990 and 2011 are open to the EU.

11 Critical: E. Cornu, 'Impact of Council of Europe Standards on the European Union' in R. Wessel and S. Blockmans (eds), *The Autonomy of the EU Legal Order from International Organizations* (The Hague: T.M.C. Asser Press / Springer, forthcoming).

12 L. Scheek, 'Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European court as a Constitutional Actor of the EU' in J. Christoffersen and M. R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford: OUP, 2011).

13 n 10 above.

Europe are required to accede to the ECHR. Indeed, the ECHR has had a tremendous influence on the development of human rights protection in Europe, including within the EU.

At its inception, human rights were the EU's Achilles heel. As is well-known, they had no place in the original Treaties and it took until the early 1970s for the Court of Justice seriously to address this constitutional weakness, and arguably it did so only under pressure from a national Constitutional Court.¹⁴ Important milestones along the way include cases such as *Internationale Handelsgesellschaft* and *Carpenter*,¹⁵ as well as (eventually) the adoption of a codified catalogue of human rights: the Charter of Fundamental Rights. The ECHR has played a great role in this part of the EU's constitutionalisation. However, a distinction needs to be made between the direct legal impact of the ECHR, before and after accession, and the indirect impact that it has had for a long time on the development of the EU's own human rights standards that originate from a variety of sources.¹⁶ Repeatedly the point has been made that accession to the EU requires states to become Contracting Parties to the ECHR.¹⁷ However, while in practice this might be true, the EU accession criteria (the so-called Copenhagen criteria) do not specifically refer to the ECHR but only to 'human rights' in general. Accession to the ECHR is neither a formal requirement for EU membership, nor does the Commission base its assessment of the state's compliance with human rights on compliance with the ECHR as the primary indicator.

Bruno de Witte and Gabriel Toggenburg point to two possible reasons for this.¹⁸ First, the Strasbourg enforcement mechanism is not capable of guaranteeing the necessary compliance with human rights, due to the increasing backlog of pending cases and due also to the defective implementation of judgments.¹⁹ Second, the substantive scope of the ECHR is too narrow. However, as is well known, the Court of Justice had acknowledged the special significance of the Convention long before any reference to the ECHR was incorporated into the Treaties.²⁰ In many cases the Court of Justice uses both general principles of EU law and the ECHR to support its argument,²¹ even though in more recent years

14 Scheek, n 12 above.

15 E. Spaventa, 'From Gebhard to Carpenter: Towards a (non-)Economic European Constitution' (2004) 41 CMLRev 3, 743.

16 Most illustrative is probably the reference in article 6(3) TEU.

17 See eg: Committee on Legal Affairs and Human Rights, The accession of the European Union/European Community to the European Convention on Human Rights, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Doc. 11533, 18 March 2008 at <http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71249/20100324ATT71249EN.pdf> (last visited 20 July 2012).

18 B. de Witte and G. Toggenburg, 'Human Rights and Membership of the EU' in S. Peers and A. Ward (eds), *The EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2004) 246, 266 et seq.

19 See on the legitimacy challenges of the Court because of its increasing inability to provide individual remedies: J. Christoffersen, 'Individual and Constitutional Justice: Can the Dynamics of ECHR Adjudication be Reversed?' in J. Christoffersen and M. R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford: OUP, 2011).

20 See the classics, Case 4/73 *Nold* [1974] ECR 491; Case 222/84 *Johnston* [1986] ECR 1651 at [18].

21 Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-112/00 *Schmidberger* [2003] ECR I-5659.

the Charter is to some extent taking over the ECHR's function.²² More recently the Court has even dropped its earlier 'general principles' or 'source of inspiration' approach, and has started to refer directly to the rights guaranteed under the ECHR.²³

EU accession to the ECHR will place the EU on the same footing as the other Contracting Parties, which are all States. In this regard, it recognises the particularities of the EU as an *integration* organisation. This will change the formal influence of the Convention on EU law and in this regard it will be an illustrative example of the influence that international adjudicative bodies may have on the EU legal order. The EU will be directly bound under international law by the ECHR and therefore by the interpretation given to it by the ECtHR. This feeds into the Court of Justice's long-standing concern with its own judicial autonomy, which is explored in the following subsection.

The Court of Justice and its concern with judicial autonomy

For many years, the Court of Justice has been careful to protect the autonomy of the EU legal order in general and its monopoly of judicial interpretation of EU law in particular. The Court's concern with its own autonomy vis-à-vis the judicial authority of other courts or tribunals has become particularly apparent in its external relations law.²⁴ It started with Opinion 1/76 on the European Laying-up Fund for Inland Waterway Vessels,²⁵ and the Court of Justice has returned to the autonomy of the EU judiciary several times: in Opinion 1/91 on the European Economic Area (EEA),²⁶ in Opinion 2/94 on the accession of the Community to the ECHR,²⁷ and in Opinion 1/00 on the European Common Aviation Area,²⁸ as well as in the case of *Mox Plant*.²⁹ These cases have been examined in much detail in the literature.³⁰ It is therefore sufficient to limit the discussion here to a few remarks about the most recent case on autonomy. In Opinion 1/09, on the creation of a unified patent litigation system,³¹ the

22 Joined Cases C-92/09 *Volker and Markus Schecke GbR* and C-93/09 *Hartmut Eifert v Land Essen*, [2010] ECR I-000, judgment of 9 November 2010. See also: O'Meara, n 6 above at 1819.

23 Case C-413/99 *Baumbast* [2002] ECR I-7091 at [72]; Case C-60/00 *Carpenter*, n 21 above at [41]–[42]; Case C-200/02 *Kunqian Catherine Zhu Chen* [2004] ECR I-9925 at [16].

24 The Court of Justice has also strongly defended the EU's autonomy and its own judicial monopoly internally vis-à-vis the Member States, but this discussion would lead beyond the scope of the present paper.

25 Opinion 1/76 *re draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741. In this case, the CoJ rejected the establishment of a fund tribunal consisting of six of its own judges. It expressed concern about the possibility of conflict of jurisdiction in the event of two parallel preliminary ruling procedures on the interpretation of the agreement (one before the fund tribunal and one before the CoJ) and on the impartiality of those judges that sit on both judicial bodies.

26 Opinion 1/91 *re EEA* [1991] ECR I-6079.

27 Opinion 2/94 *re Accession to the ECHR* [1996] ECR I-1759.

28 Opinion 1/00 *re ECAA* [2002] ECR I-3493 at [21], [23] and [26].

29 Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

30 See most recently: Wessel and Blockmans (eds), n 11 above; in particular the chapter by J. W. van Rossem, 'The Autonomy of EU Law: More is Less?'

31 Opinion 1/09 *re Unified Patent Litigation System* 8 March 2011, see in particular [73]–[89].

autonomy of the EU legal order, and in particular of the EU judiciary, was the decisive argument which led the Court to declare the draft agreement in question incompatible with EU law. The Court of Justice's main concern in this case was that the newly established European and Community Patents Court would take over the powers of the Member States, including that of making references to the Court of Justice under article 267 TFEU in disputes concerning European and Community patents.³² Hence, the case concerned not only the role of the Court of Justice but also that of the EU law functions of the courts of the Member States.

It is clear from this case that the Court of Justice continues to attach great importance to the autonomy of the EU's judicial system. In the EEA Opinion in 1991, the Court confirmed as a matter of principle that the EU can be a party to an international agreement that sets up a judicial disputes mechanism and that the Court of Justice would be bound by that judicial mechanism's interpretation of the international agreement.³³ For the present discussion two points are of importance: First, the Court of Justice has not so far accepted the legal authority of any external judicial mechanism with jurisdiction to receive actions brought by individuals.³⁴ Second, the greatest obstacle appears to have been the fear that the tasks or authority of the EU Courts, or of the courts of the Member States when exercising a function under EU law, might be changed under the influence of external judicial review. In past cases, the Court has rejected external judicial authority either because a judicial mechanism would have been placed in the position to give *binding* rulings on issues of EU law³⁵ or because the nature of the judicial cooperation between the EU Courts and the courts of the EU Member States would have been changed through the participation of external courts.³⁶

In recent years, the autonomy of domestic structures has come further under pressure with the increasing quantity and quality (impact) of cross-border activities in a globalised world. International human rights regimes are seen as having a particularly far-reaching impact on the autonomy (sovereignty if you will) of States.³⁷ The same will clearly be true for the EU after it has acceded to the ECHR as a party on the same footing as States. Furthermore, the ECHR is exceptional amongst international human rights regimes. It has developed into a

32 *ibid* at [80]–[81].

33 Opinion 1/91 *re EEA*, n 26 above at [39]–[40]: The EU's 'capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions'.

34 The WTO Dispute Settlement Mechanism, which can only be triggered by states, has given interpretations of EU law for the purpose of reviewing EU law as to its conformity with WTO law. This is an example of what international courts call 'treatment of national law as facts'. It does not concern the question of ultimate authority. Further, as is well known, the Court of Justice holds WTO law and decisions of the Dispute Settlement Mechanism at arms length by not considering them directly effective. See for both: C. Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Organizations' in R. A. Wessel and S. Blockmans (eds), *The Influence of International Organizations on the EU* (The Hague: T.M.C. Asser Press / Springer, forthcoming).

35 Opinion 1/91 *re EEA*, n 26 above at [33]–[36].

36 Opinion 1/09 *re Unified Patent Litigation System*, n 31 above.

37 C. M. Wotopka and K. Tsutsui, 'Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001' (2008) 23 *Sociological Forum* 724.

'constitutional instrument of European public order'.³⁸ In this light, the significance of any step by the Court of Justice to accept for the first time the binding force of the decisions of an external judicial authority that receives complaints of individuals can hardly be overestimated. However, the following subsection demonstrates that even at present the two legal regimes do not exist in isolation.

EU law in Strasbourg

Even before the EU's accession, the judicial bodies of the Convention, both the now superseded Commission and the Court of Human Rights itself, have been concerned with EU law on numerous occasions. They have always applied general rules of successive treaty accession. This means in principle that in the event of a conflict, the later treaty prevails (articles 30, 42 and 59 of the Vienna Convention on the Law of Treaties (VCLT)). Purely chronologically, the ECHR would be the first treaty for the EU Member States and the EU Treaties would be successive treaties. However, states remain responsible under the first treaty if the later treaty is concluded between different parties ('*res inter alios acta*'; article 30(4) (b) of the VCLT). This appears to be the approach of the ECtHR to EU law since it continues to hold the EU Member States responsible under the ECHR.³⁹ The Strasbourg bodies have also stated repeatedly that in conformity with general international law, no action could be brought against the Union (at the time, the Communities) because it was not a party to the Convention.⁴⁰

The ECtHR deals implicitly or explicitly with EU law more often than one would expect. In several cases, it has scrutinised EU law in surprising detail.⁴¹ To give the gist of the relevant case-law of the ECtHR: pre-EU-accession Member States retain responsibility for their acts, including those adopted within the context of EU law, but acts adopted by the EU institutions proper fall outside of the *ratione personae* of the Convention. For instance, as things stand at present, Member States remain responsible for primary EU law as an international treaty in the adoption of which they have been involved.⁴² Yet, the ECtHR has not so far imposed a sanction on the EU Member States collectively because they remain responsible for the international organisation to which they have delegated authority, even though it has dealt with a number of cases in which such collective responsibility has been alleged.⁴³ It is, further, possible to bring an

38 See: *Loizidou v Turkey* (Preliminary Objections) ECHR [1995] Series A No 310 at [75]; *Bosphorus Airways v Ireland* ECHR [2005] Appl No 45036/98 (*Bosphorus*); *Behrami & Behrami v France* ECHR [2007] Appl No 71412/01; *Saramati v France, Germany and Norway* (GC) ECHR [2007] Appl No 78166/01 at [145].

39 Commission, *Mr X and Mrs X v Federal Republic of Germany* ECHR [1958] Appl No 235/56, Yearbook 2, 256; Commission, *Austria v Italy* ECHR [1961] Appl No 788/60, Yearbook 4, 116.

40 Commission, *Confédération Française Démocratique du Travail v the European Communities* alternatively: their Member States a) jointly and b) severally, Appl No 8030/77.

41 Eckes, n 34 above.

42 *Mattheus v the United Kingdom* ECHR [1999] Appl No 24833/94.

43 *Soc Guérin Automobiles v 15 EU Member States* ECHR [2000] Appl No 51717/99; *Segi ea and Gestoras Pro Amnestia v 15 EU Member States* ECHR [2002] Appl No 6422/02; *Senator Lines v 15 EU Member States* ECHR [2004] Appl No 56672/00.

application against a (particular) Member State for implementing EU law, irrespective of whether that state has had any margin of discretion in implementing the EU law.⁴⁴ If the state has had no margin of discretion, a rebuttable presumption of equivalent protection applies which leads the ECtHR to exercise full judicial review only if the protection under EU law has proved in the case before it to be ‘manifestly deficient’ in the individual case (the *Bosphorus* presumption).⁴⁵ The present situation does not exclude gaps where the act is an act of the EU rather than its Member States – be it the implementation or adoption of secondary EU law. A case in point is *Connolly*, which concerned the application of an employee of the European Commission, who challenged a disciplinary procedure that had resulted in the suspension of the applicant from work.⁴⁶ The ECtHR rejected the admissibility *ratione personae* because it could not establish a link between the ‘supranational act’ and the Contracting Parties.

The decision on whether a Member State can be held responsible for an act of the EU or whether the act falls exclusively within the internal sphere of the EU and cannot therefore be attributed to the Member States requires consideration of the power division between the EU and its Member States, including the internal workings of the EU. Even at present (pre-accession), the ECtHR regularly gives judgments that are relevant for the EU.⁴⁷ To substantiate this point, it is sufficient to look at 2011 only. The Court gave four rulings which potentially required an interpretation of EU law. First, the case of *Pietro Pianese*⁴⁸ could have led to a ruling on the lawfulness of the European Arrest Warrant (EAW). The applicant had argued before the Strasbourg Court that his arrest and detention under this EU law instrument was unlawful. However, the case was declared inadmissible under article 35 ECHR because it was out of time and manifestly ill-founded. Second, in the much-discussed case of *MSS*,⁴⁹ the Strasbourg Court found *inter alia* that Belgium had violated the Convention by acting in compliance with rules of EU asylum law (*Dublin II* Regulation⁵⁰). Belgium had sent an Afghan asylum seeker back to Greece, where he had first entered the EU. This was in line with the rules of the *Dublin II* system. However, EU law did not require Belgium to act this way.⁵¹ Hence, even though the *MSS* ruling

44 Wide margin of discretion: *Cantoni v France* ECHR [1996] Appl No 17862/91 – on the merits: no violation; see however, Commission, *Etienne Tête v France* ECHR [1987] Appl No 11123/84 – manifestly ill-founded. No margin of discretion: *Bosphorus*, n 38 above; see similarly: Commission, *M & Co v Federal Republic of Germany* ECHR [1990] Appl No 13258/87.

45 *Bosphorus* *ibid*; this presumption was subsequently successfully applied, eg in *Biret v 15 EU Member States* ECHR [2008] Appl No 13762/04.

46 *Connolly v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and UK* ECHR [2008] Appl No 73274/01 (available in French only). See similarly: *Boivin v 34 Member States of the Council of Europe* ECHR [2008] Appl No 73250/01.

47 See for more examples before 2011, Eckes, n 34 above.

48 *Pietro Pianese v Italy and the Netherlands* ECHR [2011] Appl No 14929/08.

49 *M.S.S. v Belgium and Greece* ECHR [2011] Appl No 30696/09 (*MSS*). Numerous cases that raise similar allegations are pending before the court.

50 Council Regulation (EC) No 343/2003 of 18 February 2003 [2003] OJ L50/1.

51 See the general ‘first entry’ rule in Council Regulation (EC) No 343/2003, article 3(1) *ibid*, and the possibility for Belgium to derogate from that rule and take charge of the application in article 3(2) *ibid*.

questioned the blind mutual trust on which EU asylum law is built (see eg the presumption that all EU Member States are safe⁵²), it did not entail a judgment that the *Dublin II* system as such is unlawful. In any event, the Court of Justice considered the ECtHR's decision in *MSS* relevant for the interpretation of EU law.⁵³

Third, in the case of *Karoussiotis*⁵⁴ the European Commission had started infringement proceedings against Portugal before the case reached Strasbourg. This raised a new legal question of admissibility: Do EU infringement proceedings constitute 'another procedure of international investigation or settlement' within the meaning of article 35(2)(b) ECHR and therefore make an application of this sort inadmissible? The Court answered in the negative and found the application admissible. On the merits however, it did not find a violation. Fourth, the case of *Ullens de Schooten and Rezabek*⁵⁵ concerned the refusal to refer a preliminary question to the Court of Justice. The Strasbourg Court ruled that both the Belgian Conseil d'Etat and the Belgian Court de Cassation had given reasons for their refusal. It found that, in light of this and having regard to the proceedings as a whole, there had been no violation of the applicants' right to a fair hearing under article 6(1) ECHR. All four of these cases raised or potentially raised legal questions that require the Strasbourg Court to consider issues of EU law proper. Can the refusal to refer to the Court of Justice amount to a violation of article 6(1) ECHR? What is the nature of the infringement procedures conducted by the European Commission? How much discretion do Member States have to assess whether the asylum procedures of another Member State are in compliance with the ECHR? Are the procedures foreseen in the EAW Framework Directive lawful? The question addressed in the following section is how this situation will change with the EU's accession.

REFORM AND ACCESSION: HOW DO THE TWO INFLUENCE EACH OTHER?

Reform of the ECHR system

The ECHR is a living instrument not only through the dynamic interpretation deployed by the ECtHR⁵⁶ but also because it has been amended and supplemented numerous times since its adoption in 1950. Most importantly, Protocol 11, which entered into force on 1 November 1998, reinforced the judicial dimension of the Convention by abolishing the Committee of Ministers' quasi-judicial role and by making compulsory the right of individual application and

⁵² *ibid*, Recital 2.

⁵³ C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011 at [88], [89], [90] and [112].

⁵⁴ *Karoussiotis v Portugal* ECHR [2011] Appl No 23205/08.

⁵⁵ *Ullens de Schooten and Rezabek v Belgium* ECHR [2011] Appl No 3989/07 and 38353/07.

⁵⁶ Expressed for the first time: *Tyrer v UK* ECHR [1978] Appl No 5856/72. See on the interpretation of article 8 ECHR: L. Wildhaber, 'The European Court of Human Rights in action' (2004) 21 *Ritsumeikan Law Review* 83.

the jurisdiction of the single full-time Court that it created. This was when the Commission referred to earlier was abolished.

As is well known, the Convention has become a victim of its own success. On 18 September 2008, the Court delivered its 10,000th judgment. On 1 January 2012, 151,600 applications were pending, waiting to be examined by a Committee or by a Chamber of the Court.⁵⁷ In 2011, 64,547 applications were allocated to a judicial formation.⁵⁸ 52,188 applications were decided, in 1,511 of which a judgement was given.⁵⁹ Hence, if the judicial bodies continue to work at equal speed, they are looking at a pile of approximately three years of work ahead.

This is the situation *after* the efficiency changes under Protocol 14 have been put into place. It entered into force on 1 June 2010, after having been opened for signature since 2004. Protocol 14 allows, among other measures, the creation of new judicial formations for the simplest cases and introduces a new admissibility criterion (the existence of ‘significant disadvantage’). From the perspective of the EU, the single most important reform under Protocol 14 is that it opened the Convention to the EU. This naturally raises the question how this might affect the protection of individual rights in Strasbourg. While the EU’s accession will allow individuals to challenge acts of the EU institutions in Strasbourg it seems that the caseload can only increase: acts of the EU institutions will fall within the scope of the ECtHR’s jurisdiction, the ECtHR will decide on admissibility and it will have to drop the *Bosphorus* presumption. Accession may further lead to an increase of cases brought by a particular sort of complainant since disproportionately many cases are brought to the EU Courts by (big) companies rather than natural persons.

Accession negotiations and the implications of the draft agreement in Strasbourg

The Lisbon Treaty, on the side of the EU, and Protocol 14, on the side of the ECHR, have paved the way for the EU’s accession – at least on a formal institutional level. There are still many steps to take before actual accession. Official talks on the EU’s accession to the ECHR started on 7 July 2010. On the side of the Council of Europe, its Steering Committee for Human Rights (CDDH) negotiated with the Commission the necessary legal steps for the EU’s accession to the ECHR. The working group negotiating accession under the aegis both of the Council of Europe and of the European Union went on to meet eight times between July 2010 and June 2011. It was composed of Commission representatives and of delegates of 14 member states of the ECHR, seven of which were EU Member States. Observers from the Committee of Legal Advisers on Public International Law (CADHI) and from the registry of

57 The ECtHR in Facts and Figures 2011 at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/> (last visited 20 July 2012).

58 This excludes applications at the pre-judicial stage.

59 In total 1,157 judgements concerning 1,511 applications.

the ECtHR were present.⁶⁰ The delegates were chosen because of their personal expertise and did not necessarily represent the position of their country.⁶¹ The working group further consulted civil society and kept the CDDH informed. The Commission representatives likewise kept both the European Parliament and the Council up-to-date with developments.⁶² In several ways, the process bears similarities to the convention method set out in article 48(3) TEU, which is an attempt to combine political representation with expertise, while allowing for consultation with civil society. The objective could be summarised as: 'less bargaining more deliberation'.⁶³

Three draft texts were agreed in June 2011: the draft accession agreement together with its explanatory report and the draft amendment to the rules of the Committee of Ministers for the supervision of the execution of judgments of the ECtHR.⁶⁴ The Parliamentary Assembly of the Council of Europe and the two European Courts, the ECtHR and the Court of Justice, will give opinions on the three draft instruments for accession before they are adopted by the Committee of Ministers.⁶⁵ This may still cause significant delays. Finally and even though the Court of Justice was involved in the negotiations, it is likely that that Court will be asked under article 218(11) TFEU to give an opinion on the compatibility of the final agreement with EU constitutional law. On a substantive level, the draft accession agreement sets out the scope of the accession, the necessary amendments to the Convention (of articles 59, 57, 36, 33, and 29), and other technical legal issues arising as a consequence of the EU's accession, such as the EU's participation in expenditure (article 8 of the draft agreement) and the EU's rights and obligations under agreements 'strictly linked to the Convention system' (article 9). It stipulates that the European Union will accede to the Convention and to Protocols No 1 and 6; however it may make reservations pursuant to the same rules as all other Contracting Parties (articles 1 and 2). The draft agreement further introduces the possibility of the Union and its Member States becoming co-respondents to proceedings by decision of the Court in the

60 See list of participants of the working meetings of the working group, eg Appendix I of CDDH (2010)05 and (2010)10, at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/CDDH-UE_2010_05_rep_en.pdf (last visited 20 July 2012) and http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/CDDH-UE_2010_10_RAP_en.pdf (last visited 20 July 2012).

61 Králová, n 6 above.

62 The Council was informed through its Working Party on Fundamental Rights, Civil Rights and Free Movement of Persons. See Commission mandate of 4 June 2010, press release at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf (last visited 20 July 2012).

63 A. Maurer, 'Less Bargaining – More Deliberation: The Convention Method for Enhancing EU Democracy' (2003) 1 *Internationale Politik und Gesellschaft/International Politics and Society*.

64 Council of Europe, Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE (2011) 16, 19 July 2011 at http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE_2011_16_final_en.pdf (last visited 20 July 2012).

65 See a summary of the process at <http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention> (last visited 20 July 2012). See also the 'discussion document' published by the Court of Justice, May 2010 and Joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, January 2011 at http://curia.europa.eu/jcms/jcms/P_64268/ (last visited 20 July 2012).

circumstances set out in article 3 (examined in detail below). It also regulates the participation of the European Parliament in the Parliamentary Assembly (article 6) and of a representative of the EU in the Committee of Ministers (article 7).

In many ways, the EU has been privileged for many years, even without being a party to the Convention. It enjoys a privileged position within the Convention system at least since the establishment of the presumption of equivalent protection in *Bosphorus*.⁶⁶ Under *Bosphorus* as we have seen, the ECtHR does not review the compliance with the Convention of EU Member States' acts implementing EU law in the ordinary way. The accession agreement recognises the EU's special position and in a different way codifies and institutionalises it. The EU will become *primus inter pares*, having all the rights of a Convention party and more. However, this does not mean that the *Bosphorus* presumption will remain in place.⁶⁷

The first technical legal specificity of the draft accession agreement is that it modifies the Convention in order to make the EU's accession possible (amendment of article 59(2) ECHR), while the EU will become a contracting party at the moment the agreement enters into force.⁶⁸ This is unusual in the context of the Convention, where accession of a new member has not so far required amending the Convention. Up to now, amendments and accessions have taken place separately. In this regard, the accession agreement bears technical legal similarities with the accession agreements of states to the EU.⁶⁹

The Court of Justice's judicial autonomy and indeed even monopoly power to interpret EU law, discussed in Section One, were a central concern in the negotiation of the draft agreement.⁷⁰ Accommodating this concern required supplementary interpretative provisions and changes to the procedure before the Strasbourg Court.⁷¹ The core threat of EU accession for the Court of Justice's judicial autonomy to interpret EU law emanates from two situations: first, the ECtHR might determine who is the right respondent in any given case; and second, the ECtHR might attribute responsibility to and apportion that responsibility between the EU and its Member States. In both events, the ECtHR would simply not be able fully to disregard the power division between the EU and its Member States – both in law and in practice.

Attribution of conduct to a contracting Party is a requirement for finding a violation. The question as to whether an act is the act of the EU or of the Member State(s) goes to the core of EU law. It raises intricate questions of EU

66 *Bosphorus*, n 38 above.

67 See below 'Broader Implications for Human Rights Protection in the EU Legal Order'.

68 Králová, n 6 above, 131.

69 See eg for the last enlargement: the Accession Treaty with Bulgaria and Romania, OJ [2005] L157/11.

70 Lock, n 5 above. See also X. Groussot, T. Lock and L. Pech, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011' (Foundation Robert Schuman, Policy Paper European Issues n°218, 2011) at http://www.robert-schuman.eu/doc/questions_europe/qe-218-en.pdf (last visited 20 July 2012).

71 Most prominently, the co-respondent mechanism was introduced: article 3 of the Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above at [54] of the explanatory report to the agreement. See also the explanatory report to Protocol 14 at [101].

law and practice. The particular importance of attribution in the context of EU law can also be seen in the Commission's comments to the International Law Commission (ILC) during the course of the drawing up of the Draft Articles on the Responsibility of International Organisations (DARIO)⁷² and in the Commentary to DARIO as adopted in August 2011, which refer to the potential existence of a special rule on attribution to the EU of conduct of its Member States when implementing binding acts of the EU.⁷³ In the common case, the Member States are in charge of implementing and applying EU legislation. This is for instance the case where national customs authorities implement tariff agreements concluded by the EU. This issue is as to whether this act should be attributed to the Member States (which implement the act in question) or the EU (which has instigated that act and exerts different degrees of control over its Member States).⁷⁴

After accession, both the EU and its Member States will be bound under international law by the ECtHR's rulings to which they were parties. The complex and dynamic task division between the EU and its Member States could lead the ECtHR to offer an interpretation of substantive EU law binding on the Court of Justice, which could indeed impact on its judicial authority.⁷⁵ The EU is different from a State in this respect. It is a compound legal order consisting of numerous international actors. From the perspective of international law, States are, in comparison with the EU, rather monolithic. As a consequence, if the ECtHR's interpretation extends to who is responsible, the potential challenge to the judicial monopoly, and ultimately the authority, of the Court of Justice will be of a different quality than any potential challenge presented by the judicial authority of a national court. Furthermore, the authority of the Court of Justice depends very much on the support of national courts. This becomes particularly apparent in the preliminary ruling procedure (article 267 TFEU), under which most of the fundamental judicial decisions were taken that integrated the EU legal order. Ultimately, this discussion of the EU's autonomy boils down to the question of how integrated and irreversibly interlocked the EU and national legal orders and judicial systems really are in the face of an external challenge, such as confirmation by a well-respected external judicial authority that the EU breaches human rights. Will such a finding of the ECtHR lead to a flaring up of resistance towards EU law by national courts or by public opinion?

The co-respondent mechanism is aimed at avoiding this problem. It is designed to 'allow the EU to become a co-respondent to proceedings instituted against one or more of its Member States and, similarly, to allow the EU

72 United Nations, Chapter II, 'Attribution of Conduct to an International Organization. Draft Articles on the Responsibility of International Organizations' (2011) 2 *Yearbook of the International Law Commission* 2011 2; UN General Assembly, 'Responsibility of international organizations. Comments and Observations Received from international organizations' A/CN.4/545 25 June 2004 at 13; UN General Assembly, 'Responsibility of international organizations. Comments and observations received from Governments and international organizations' A/CN.4/556 12 May 2005 at 5–6.

73 See United Nations, Commentary to Draft Article 64, *ibid* at [1].

74 On responsibility before the ECtHR, see den Heijer, n 5 above.

75 See more in detail on the co-respondent mechanism and autonomy see Eckes, n 34 above.

Member States to become co-respondents to proceedings instituted against the EU.⁷⁶ The co-respondent mechanism permits the ECtHR to refrain from determining who is the correct respondent or how responsibility should be apportioned as between them. Indeed, it declares the joint responsibility of the respondent and co-respondent to be the common case. This is clearly expressed in the explanatory report stating: ‘Should the Court find [a] violation, it is expected that it would ordinarily do so jointly against the respondent and the co-respondent(s)’.⁷⁷ This will for most cases unburden the Strasbourg Court from the normative operation of attributing responsibility based on the distribution of competences between the EU and its Member States. It was feared that such a normative operation could be seen as having interpretative consequences for EU law. However, the current rules for the co-respondent mechanism do not rule out the possibility that the ECtHR may choose to apportion responsibility in the individual case. Furthermore, while no High Contracting Party may be compelled to become a co-respondent, the Strasbourg Court may terminate the participation of the co-respondent.⁷⁸ Both actions of the ECtHR imply a prior decision on how the responsibility should be apportioned or attributed. Hence, the co-respondent mechanism tries to strike a balance between not limiting the formal competences of the ECtHR but determining how these competences are usually exercised in practice. In any event, in view of the rather cautious approach of the Strasbourg Court in the past it can be expected that it will not meddle with the complex and dynamic division of powers between the EU and its Member States⁷⁹ where this is not judged absolutely necessary.

The criteria that should be met for the co-respondent mechanism to come into play are set out in the accession agreement.⁸⁰ article 3(2) of the draft accession agreement stipulates that where an application is directed against one or more EU Member States, the EU may become a co-respondent ‘if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.’ The explanation accompanying the accession agreement specifically expresses the expectation that the co-respondent mechanism will only come into play in very few cases.⁸¹ Indeed, the view was expressed that there were only three recent cases which would ‘certainly [have] required the application of the co-respondent mechanism’, ie *Matthews*, *Bosphorus*, and *Nederlandse*

76 Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above at [29].

77 *ibid* at [54].

78 *ibid* at [47] and [51].

79 See critical already in 1997: J. Weiler, ‘The Division of Competences in the European Union’ (European Parliament Directorate General for Research, Working Paper Political Series W-26, 1997) at <http://aei.pitt.edu/4907/1/4907.pdf> (last visited 20 July 2012).

80 Article 3(2) of the Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above.

81 See paragraph 44 and footnote 18 on page 17 of the explanatory report to the Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights *ibid*.

Kokkelvisserij.⁸² In light of the above discussion of the ECtHR's decisions concerning in one way or another EU law, this low estimate might appear something of a surprise. However, the explanation is formulated very carefully – note the statement is to the effect that the three listed cases 'certainly required' the co-respondent mechanism. This does not exclude the possibility that the number of cases in which the mechanism is actually applied will be much greater. Also, the three cases listed are cases in which the Member States had no discretion when implementing EU law. This might be the textbook case where the compatibility of EU law with the Convention is called into question. At the same time, other constellations are conceivable and article 3(2) of the draft accession agreement does not exclude participation of the EU in cases where the Member State had discretion.⁸³ This is apparent in the formulation of article 3(2), which states that the co-respondent mechanism comes into play 'notably' (but not exclusively) where the violation could only have been avoided if the Member State had breached EU law. *MSS* is a past case in which it can plausibly be argued that had the case arisen after accession, the EU might have chosen to become a co-respondent, notwithstanding that the Member State could have avoided violating the Convention without breaching EU law.⁸⁴ The Union would have had an interest in defending the presumption of mutual trust on which its asylum law is built.

Further, under the proposed arrangements, if the Court of Justice was not previously involved in a case in which the EU becomes a co-respondent, the ECtHR may stay the proceedings and give the Court of Justice the opportunity to scrutinise compliance with the Convention. Similar arrangements have earlier been made under the second Agreement on the European Economic Area⁸⁵ and under the Agreements Establishing the European Common Aviation Area.⁸⁶ It places the Court of Justice in the privileged position of being asked for an interpretation before the ECtHR gives its ruling. The Court's opinion is likely to have an impact on the legal discourse in Strasbourg. It may even frame the further discussion, since parties are invited to submit their observations after the Court of Justice has given its opinion on the case⁸⁷ and it would hardly be surprising were they to follow in their arguments the Court's approach. On the one hand, these special privileges given to the Court of Justice might seem surprising in the light of the continuous and high level of human rights protection exercised by authoritative constitutional courts in other High Contracting Parties. No national constitutional court is given the privilege to rule on the compliance of national law with the Convention before the Strasbourg Court

82 *ibid.* *Matthews v the United Kingdom*, n 42 above; *Bosphorus*, n 38 above; *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v the Netherlands* ECHR [2009] Appl No 13645/05.

83 Article 3(2) of the Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above refers 'notably' to the case of no discretion, but is not limited to it.

84 See *MSS*, n 49 above and the text accompanying it.

85 Accepted by the Court of Justice in Opinion 1/92, *re EEA II* [1992] ECR I-2821.

86 Opinion 1/00 *re ECAA*, n 28 above.

87 Article 3(6) of the Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above.

gives its judgment (if a complaint to the constitutional court is not part of the ordinary stages of appeal). On the other hand, the prior involvement mechanism institutionalises the particular confidence that the ECtHR has in the EU legal order – expressed already in *Bosphorus*.

This special position accorded to the Court of Justice should not only be seen as a necessary consequence of that Court's concern with its judicial autonomy and therefore as a necessary concession for EU accession. There are also substantive considerations in favour, arising out of the particularities of the EU legal order and the judicial power in the EU. First of all, the largest share of EU law is implemented or applied by national authorities. This means that it requires national support and involvement in order to become effective. Secondly, the classic division of tasks between the legislating EU and implementing Member State can also result in a situation where EU law is implicitly or explicitly challenged in Strasbourg in the context of an alleged violation through a national act of implementation before any Court at the EU level has been consulted. National constitutional courts by contrast, even though they often do not need to be consulted to meet the requirement of exhausting all national remedies, will have to rely on the decisions of ordinary national courts on the matter. This is an even stronger argument for involving a court at the EU level before ruling on the compliance of EU law with the Convention. At the same time, the fact that the Court of Justice is called in if it has not previously been involved implies that the Luxembourg Court's involvement could still fix it. However, it will force the Court of Justice to deliver in the individual case. It will not be able to rest on a general presumption of equivalent protection.⁸⁸

Two further institutional matters have raised concerns with High Contracting Parties that are not Member States of the EU. The first is the EU judge and the second is the EU's participation in the Council of Europe statutory organs whenever they exercise functions under the Convention. So far as the first of these is concerned, article 20 ECHR stipulates that each High Contracting Party of the ECHR should have one judge. The EU judge will have equal status to the other judges. She will participate in cases just as the other judges, not only in those cases in which the EU acts as a (co-)respondent. She will be elected, like the other judges, from a list of three candidates by the Parliamentary Assembly. Exclusively for the purpose of electing judges, the European Parliament will send a number of MEPs equal to the number of delegates from the largest countries to participate in the Parliamentary Assembly. From the perspective of the ECtHR, it will be the first time that two judges have the same nationality, since it can be expected that the EU judge will have the nationality of one of the EU Member States. Articles 20 and 22 ECHR provide for a number of judges equal to the number of Contracting Parties, with one judge elected by Parliamentary Assembly 'with respect to' each Contracting Party. There is hence no nationality requirement.⁸⁹ The nomination will probably be similar to the nomination

⁸⁸ See below the discussion of *Bosphorus* after accession (in the section on 'Implications for the Union and its Court of Justice').

⁸⁹ Liechtenstein has appointed Mark Villiger, a Swiss national, as the judge with respect to Liechtenstein.

procedure of judges at the Court of Justice, where nationality is not an explicit requirement.⁹⁰ One could even argue that nationality is not meant to play a role,⁹¹ but that judges are meant to be chosen on the basis of their independence and qualifications.⁹² In practice however, no judge has ever been appointed to the Court of Justice who was not a national of an EU Member State.

So far as the second issue is concerned, the EU is not a state and it will not become a member of the Council of Europe. This concerns the Committee of Ministers when it supervises the execution of judgments and the terms of friendly-settlements in accordance with articles 39 and 46 ECHR, as well as the Parliamentary Assembly of the Council of Europe when it elects the ECtHR judges pursuant to article 22 ECHR. On the one hand, the EU's participation in the statutory organs of the Council of Europe is necessary to the extent that these bodies exercise functions under the Convention in order to ensure the EU participation on an equal footing with the other Contracting Parties of the Convention. On the other hand, opening the statutory organs to the EU will for the first time allow participation of an international law actor that is not a member of the Council of Europe. This in itself requires an unprecedented institutional adaptation. Non-EU Member States demonstrated great reluctance to allow EU participation in the statutory and, if you will political, organs of the Council of Europe. The potential problem of 'block voting' was raised by representatives of civil society⁹³ and by non-EU Member States.⁹⁴ It was feared that the EU and its Member States (in total 28 out of 48 Parties) might be able to jeopardise the supervising of the execution of judgments (article 46 ECHR) by taking a co-ordinated position in the event of a vote. Indeed, the rules of the Committee of Ministers for the supervision of the execution of judgments (and of the terms of friendly settlements) had to be adapted to ensure that the exercise of combined votes by the EU and its Member States did not give rise to the risk of damaging the effective functioning of the Committee of Ministers.⁹⁵

A final technical issue lies in the fact that the EU may make reservations, declarations and derogations under the Convention when it accedes to the ECHR.⁹⁶ As has already been noted, the Convention is not *one* comprehensive

90 Article 19(2) TEU provides that the Court of Justice 'shall consist of one judge from each Member State'. This does not require that this judge must have the nationality of that Member State. See also the appointment criteria and procedure in articles 253–255 TFEU.

91 Article 18(4) of Protocol No 3 on the statute of the Court of Justice of the European Union [2010] OJ C83/210: 'A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.'

92 See articles 253(1) and 254(2) TFEU.

93 Council of Europe, Meeting report on the 8th working meeting 20 to 24 June 2011, CDDH-UE(2011)15, 24 June 2011, item 2 at [4] at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp (last visited 20 July 2012).

94 Council of Europe, Draft revised Explanatory report to the draft Agreement on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)11, 15 June 2011 at [68] at http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working_documents/CDDH-UE_2011_11%20exp%20report_en.pdf.

95 *ibid* at [71].

96 Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above at [27].

list of human rights but rather consists of multiple protocols⁹⁷ that need to be separately ratified. Contracting Parties to the ECHR, including EU Member States, have chosen not to be bound by particular provisions (reservations).⁹⁸ The accession agreement aims at placing the EU on the same footing as the other Contracting Parties. It foresees accession of the EU to the Convention together with Protocols 1 and 6 as amended by Protocols 11 and 14 (as well as the accession agreement itself).⁹⁹ All EU Member States have ratified the two protocols that are to be automatically included. The other Protocols (4, 7, 12 and 13) are open to the EU, which can ratify them through a unilateral act, which would most likely require unanimity in the Council.¹⁰⁰ The EU's reservations will determine the scope of protection under the Convention for the whole realm of EU law, including for the Member States when acting within that realm, be it by implementing EU law or even by derogating from EU law.

IMPLICATIONS OF THE EU'S ACCESSION TO THE ECHR

For the Member States

This section will examine the implications that the EU's accession to the ECHR might have for the EU Member States. It should be read against the growing resistance in several Member States towards international human rights instruments and the constraints that these place on national legislators.¹⁰¹

Ratification and Voting

The EU's external actions have an immediate impact on its Member States' legal position. A classic example is mixity. Even though under international law

97 On 1 October 2011, fifteen protocols were open for signature. Protocol 1 (property; education; elections); Protocol 4 (civil imprisonment, free movement, expulsion); Protocol 6 (restriction of death penalty); Protocol 7 (crime and family); Protocol 12 (discrimination); Protocol 13 (complete abolition of death penalty) and of course on procedural issues Protocol 14 (entered into force on 1 June 2010) as well as Protocol 11 (entered into force on 1 November 1998).

98 Article 57 ECHR; see also on the necessary clarity of reservations: *Belios v Switzerland* [1988] 10 EHRR 466. For a valid reservation see: *Jecius v Lithuania* [2002] 35 EHRR 16. For a list of all declarations and reservations by all Contracting Parties see <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=06/06/2011&CL=ENG&VL=1> (last visited 20 July 2012).

99 Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above, article 1(1).

100 Compare procedure under article 218(10) TFEU.

101 Scheek, n 12 above; UK: Lord Hoffmann, Speech on The Universality of Human Rights at the Judicial Studies Board Annual Lecture, London 19 March 2009 at <http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009> (last visited 20 July 2012); see also in the press: N. Watt, '28,000 prisoners will have right to vote' 5 January 2011 *The Guardian* at <http://www.guardian.co.uk/politics/2011/jan/05/prisoners-right-to-vote-britain?INTCMP=SRCH> (last visited 20 July 2012); D. Blaney, 'In Britain the rule of law is – and should remain – paramount' 10 February 2012 *Mail Online* at <http://blaneyblog.dailymail.co.uk/2012/02/in-britain-the-rule-of-law-is-and-should-remain-paramount.html> (last visited 20 July 2012). NL: T. Spijkerboer, 'Het Hof in Strasburg blijft cruciaal', 31 January *NRC Handelsblad* online at http://dare.uvu.vu.nl/bitstream/handle/1871/33068/NRC_20120131_1_008_article1.pdf?sequence=2 (last visited 20 July 2012).

Member States' obligations are the same irrespective of whether they are the only Contracting Parties or whether the EU is equally a party to the international agreement, the EU's participation has implications for the Member States' obligations under EU law. Mixed agreements in combination with the duty of sincere cooperation, codified in article 4(3) TEU, can severely limit the Member States' room for manoeuvre, including on the international plane.¹⁰² Even if international actors are held to act in good faith,¹⁰³ there is no equivalent of the principle of sincere cooperation under article 4(3) TEU.¹⁰⁴ The latter is seen as transforming 'the status of sovereign States into that of Member States of the European Union.'¹⁰⁵ Agreements that the EU concludes as mixed agreements bind Member States in the same way as agreements that are concluded by the Union only (article 216(2) TFEU). They become part of the EU legal order and enjoy primacy over national law. The Union further has an interest in holding Member States to account under EU law for mixed agreements in their entirety.¹⁰⁶

Mixity is effectively also what will happen when the EU accedes to the ECHR. article 218(8) TFEU stipulates that EU accession requires ratification by all Member States. In light of the fact that all Contracting Parties to the ECHR also have to ratify an accession treaty¹⁰⁷ and that all EU Member States are Contracting Parties to the ECHR – and indeed that it could be argued that being party to the ECHR has *de facto* become an accession requirement – this provision appears to add little in terms of practical value. An interesting question here is how the duty of sincere cooperation will come into play. Is it applicable to the requirement of ratification under article 218(8) TFEU? Could it also be applicable to the ratification of the accession agreement of the Member States as Contracting Parties of the ECHR?

The case of *Kramer* might offer some guidance on this issue.¹⁰⁸ It concerned the North-East Atlantic Fisheries Convention, which is an international agreement protecting fish stocks in the North-East Atlantic Ocean. In the light of the Treaties, the Accession Act and secondary EU law, the Court found the EU [then Community] to possess the internal powers to take measures for the preservation of the biological resources of the sea. In line with its earlier case law on implied powers,¹⁰⁹ this led the Court to point out that the Member States were under a duty, together with the EU institutions, to use all political and legal means at their disposal so as to ensure participation of the EU [then Community]

102 E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLRev 323.

103 Good faith is seen as 'perhaps the most important general principle, underpinning many international legal rules', M. Shaw, *International Law* (Cambridge: CUP, 2003) 97.

104 Neframi, n 102 above.

105 *ibid.*, 323.

106 See eg: Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943 at [13]–[19]; Case C-239/03 *Commission v France (Etang de Berre)* [2004] ECR I-9325 at [29]–[30]. Both discussed in Neframi, n 102 above, 333.

107 Article 59 ECHR.

108 Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

109 See in particular: Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

in the Convention and other agreements covering the same subject matter.¹¹⁰ Accession of the Community and the duties of the Council and the Member States depended in *Kramer* on the Community's competences in the specific field governed by the international convention. In the case of the ECHR, this should be the EU's competence for the protection of human rights. The EU's power to protect human rights has attracted much attention before and since the adoption of the Charter of Fundamental Rights with its horizontal provision set out in articles 51–4.¹¹¹ However, irrespective of the precise scope of the EU's competences to ensure human rights protection vis-à-vis its Member States, accession to the ECHR is, since the Treaty of Lisbon, not only *within the powers* of the EU but has become an *obligation*, one that is moreover addressed to the Union as a whole.¹¹² This has direct implications for both the EU institutions and the Member States – for the latter in combination with the duty of sincere cooperation in article 4(3) TEU. Indeed, the Court of Justice may hold that ratification of the accession agreement may at some point be required by the Member States' duties to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties . . .'¹¹³

Accession of the EU to the ECHR and its resulting participation in the bodies of the Council of Europe further raises questions as regards the exercise of voting rights. We have already glanced at this issue above. Member States might be obliged by the duty of sincere cooperation to coordinate their votes regarding cases in which the EU is a respondent.¹¹⁴ The most relevant case offering some guidance on these questions is probably *Commission v Council* on participation in the Food and Agriculture Organisation (FAO).¹¹⁵ This case concerned voting rights on an agreement negotiated within the FAO.¹¹⁶ There was no dispute on the substantive position of the EU and its Member States; they had actually coordinated a common position throughout the negotiations. The Court's ruling in the case indicates how the Union and its Member States can organise representation in an international organisation. The Council and the Commission had concluded an inter-institutional agreement that regulated the exercise of voting rights within the FAO. In the particular case, the agreement was found to be binding on the EU institutions. It is important to notice that the Court deduced the binding force of this agreement from the *intention* of the parties and

110 *Kramer*, n 108 above at [44]–[45].

111 See eg, R. A. García, 'The General Provisions of the Charter of Fundamental Rights of the European Union' (The Jean Monnet Center for International and Regional Economic Law & Justice, Jean Monnet Working Paper 4/02, 2002) at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/02/020401.pdf> (last visited 20 July 2012).

112 See n 3 above.

113 Article 4(3) TEU.

114 This is acknowledged in article 8(2) of the Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above.

115 See Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469. See also J. Heliskoski, 'Internal Struggle for International Presence: The Exercise of Voting Rights Within the FAO' in A. Dashwood and C. Hillion (eds), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000) 79.

116 An agreement to promote compliance with international conservation and management measures by vessels fishing on the high seas.

from the *duty of sincere cooperation*.¹¹⁷ It ruled that from the specific terms of the agreement, the parties had *intended* to make the agreement a binding commitment and that it was a specific expression and fulfilment of the duty of cooperation. For these reasons, the Court was prepared to enforce the arrangement.

The Court of Justice's strict interpretation of the Member States' duty of cooperation in international legal regimes has been confirmed in the *PFOS* case.¹¹⁸ Here the Court found that Sweden had breached the principle of sincere cooperation when it unilaterally proposed a new substance under the Stockholm Convention on Persistent Organic Pollutants. Even though the Convention was concluded as a mixed agreement (as will be the ECHR after accession) and the specific subject matter did not fall within the exclusive competence of the Union, Sweden had departed from a concerted EU strategy on the specific matter. *PFOS* brought the Member States' duties of cooperation in the area of shared competences very close to their duties in the area of exclusive competences.¹¹⁹ In other words, it tied their hands for any differing action. Under the ECHR, the duty of cooperation could even require the institutions to enter into a binding arrangement on the exercise of voting rights in the Committee of Ministers or in the Parliamentary Assembly when it is dealing with issues related to the EU's position under the Convention.¹²⁰ This might explain the fear of non-EU Member States, referred to earlier, that the EU and its Member States might resort to block voting. As we have seen, the rules of the Committee of Ministers have been adapted to ensure its continuous effective functioning even if the Member States are under what we can now see might be judged an EU law obligation to coordinate their votes.

It is important to stress however that any comments about the specific scope of the duty of sincere cooperation of the Member States after the EU's accession to the ECHR cannot be more than speculation. The Court's interpretation of the content of the duty of cooperation has been very much dependent on the context and circumstances of the individual case. What is certain is that the EU's accession to the ECHR is susceptible of entailing different and ongoing duties for the Member States under EU law than the Member States' own participation entails under international law.

Reception of the Strasbourg Case-Law Pre- and Post-EU-Accession

States receive decisions of the ECtHR in very different ways. The German Federal Constitutional Court (GFCC) for example has explicitly ruled that the Convention, as any other binding international law in Germany, has the same status as ordinary laws (*Gesetzesrang*) and takes effect within the framework of the

117 Case C-25/94 *Commission v Council (FAO)*, n 115 above at [49–50]. See on the relevance on intention: T. Beukers, *Law, Practice and Convention in the Constitution of the European Union* doctoral thesis, defended on 21 April 2011, 212 and 242.

118 Case C-246/07 *Commission v Sweden* [2010] ECR I-3317. M. Cremona, 'Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010 (2011) 48 CMLRev 1639.

119 Cremona, n 118 above, asks this question, at 1640.

120 With regard to the supervision of the execution of judgments of the ECtHR this might of course be less relevant.

German Constitution.¹²¹ This means that it ranks below the German Constitution,¹²² with the consequence that ordinary courts must observe and apply the Convention, while before the GFCC the ECHR (only) serves as an ‘interpretation aid’ in determining the contents and scope of fundamental rights and fundamental principles protected under the German Constitution.¹²³ Most recently, the GFCC accepted that ‘... decisions of the ... ECtHR, which contain new aspects for the interpretation of the Basic Law, are equivalent to legally relevant changes, which may lead to the final and binding effect of a Federal Constitutional Court decision being transcended.’¹²⁴ The GFCC accepts the ECHR as binding at the level of ordinary laws but uses it as an interpretation aid only for constitutional matters. Indeed, even in cases to which Germany has been a party and to which it is consequently legally bound to give effect under international law,¹²⁵ the GFCC only ‘takes account of the valuations made by the ECtHR’.¹²⁶ Indeed, the GFCC’s approach to the ECHR and the case law of the ECtHR can – as regards the outcome if not argument – be compared to the current (pre-accession) approach of the Court of Justice, which has already been discussed in the first section above.

In the UK, the European Convention is not itself part of national law and the decisions of the ECtHR are not directly legally binding under UK law. The ECHR is given domestic legal effect by the Human Rights Act 1998. However, the Human Rights Act does not require Parliament to legislate compatibly with the Convention nor does it oblige courts to disregard national laws that are incompatible with the Convention. For the UK the case of *Horncastle* is the leading authority on the relationship between the UK Supreme Court and the ECtHR.¹²⁷ In this case, the UK Supreme Court had to consider whether a conviction based ‘solely or to a decisive extent’ on the statement of a witness whom the defendant could not cross-examine infringed the defendant’s fair trial rights under article 6 ECHR.¹²⁸ The UK Supreme Court explained what was

121 GFCC, Decision of 14 October 2004, 2 BvR 1481/04 – (*Görgülü*; *ECHR decision*). See more recently: GFCC, Decision of 4 May 2011, 2 BvR 2365/09; 2 BvR 740/10; 2 BvR 2333/08; 2 BvR 1152/10; 2 BvR 571/10 – (*Preventive Detention*).

122 See explicitly, GFCC, Decision of 4 May 2011 (*Preventive Detention*) *ibid*, second headnote (*Leitsatz*): ‘Die Europäische Menschenrechtskonvention steht zwar innerstaatlich im Rang unter dem Grundgesetz.’; see also at [94] ‘... Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte auf der Ebene des einfachen Rechts ...’

123 GFCC, Decision of 4 May 2011 (*Preventive Detention*) *ibid* at [86]: ‘Auslegungshilfe’.

124 Press release no 31/3011 of 4 May 2011. See also the first headnote (*Leitsatz*) of the decision of 4 May 2011 (*Preventive Detention*) *ibid*: ‘Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, die neue Aspekte für die Auslegung des Grundgesetzes enthalten, stehen rechtserheblichen Änderungen gleich, die zu einer Überwindung der Rechtskraft einer Entscheidung des Bundesverfassungsgerichts führen können.’

125 *M v Germany* ECHR [2009] Appl No 19359/04 (on preventive detention).

126 Press release n 124 above. See also, second headnote (*Leitsatz*) of decision of 4 May 2011 (*Preventive Detention*), n 121 above: ‘Der Konventionstext und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte dienen auf der Ebene des Verfassungsrechts als Auslegungshilfen für die Bestimmung von Inhalt und Reichweite von Grundrechten und rechtsstaatlichen Grundsätzen des Grundgesetzes’.

127 *R v Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)* [2009] UKSC 14.

128 *ibid* at [5].

meant by ‘taking the Strasbourg jurisprudence into account’¹²⁹ and ruled that on ‘rare occasions where [it] has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of [the UK] domestic process’, it is in such circumstances ‘open to [the UK Supreme Court] to decline to follow the Strasbourg decision, giving reasons for adopting this course’.¹³⁰ *Horncastle* is an example of a direct judicial discourse between the ECtHR and the UK Supreme Court. The UK Supreme Court gave its ruling in 2009, between the ECtHR’s chamber ruling¹³¹ and the ECtHR’s grand chamber ruling¹³² in *Al Khawaja*. *Al Khawaja* concerned a similar issue and the ECtHR had decided in the chamber decision that if the ‘conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused had had no opportunity to examine’ this is ‘incompatible with the guarantees provided by article 6’ ECHR.¹³³ The applicant in *Horncastle* had asked the UK Supreme Court to consider *Al-Khawaja* as determinative. However, the UK Supreme Court was fundamentally critical of Strasbourg’s position and specifically stated that it ‘hope[d] that in due course the Strasbourg Court may also take account’ of its considerations.¹³⁴ On 15 December 2011, the ECtHR gave its Grand Chamber ruling and President Sir Nicolas Bratza [UK], in his concurrent opinion, specifically engaged with the UK Supreme Court’s decision in *Horncastle*, acknowledging the role of judicial discourse between national courts and the Strasbourg court in the development of the ECHR.

Horncastle is the clearest case in which the UK Supreme Court has taken issue with the Strasbourg case law and effectively declared that it is not obliged to follow it, a stance it is clearly entitled to take under domestic law.¹³⁵ However, it is neither the first nor the last case in which the UK Supreme Court (or earlier the House of Lords) has established some distance between Strasbourg and London. Most recently (in 2011), the UK Supreme Court decided in the case of *McCaughey*¹³⁶ that the principle that the Human Rights Act should mirror the ambit of the European Convention must be balanced against the (national legal) principle that the Human Rights Act cannot operate retrospectively. The case concerned the obligation to conduct investigation into controversial deaths. The UK excluded obligations under national law arising from an event that had

129 See the UK Human Rights Act 1998, s 2: ‘A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any . . . judgment . . . of the European Court of Human Rights’.

130 *R v Horncastle and others*, n 127 above at [11].

131 *Al-Khawaja & Tahery v UK Applications* ECHR [2009] Appl No 26766/05 and 22228/06 Chamber decision of 20 January 2009.

132 *Al-Khawaja & Tahery v UK Applications* ECHR [2011] Appl No 26766/05 and 22228/06, Grand Chamber decision of 15 December 2011.

133 *Al-Khawaja* Chamber decision, n 131 above at [40].

134 *R v Horncastle and others*, n 127 above at [47].

135 UK Human Rights Act, s 2(1): ‘A court or tribunal determining a question which has arisen in connection with a Convention right must *take into account* any . . . (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, . . . whenever made or given, so far as, *in the opinion of the court or tribunal*, it is relevant to the proceedings in which that question has arisen’ [emphasis added].

136 *McCaughey* [2011] UKSC 20.

occurred before the Human Rights Act had entered into force (the death of the person in question), irrespective of whether the case at hand would have had a good chance of success before the Strasbourg Court. The ECtHR had imposed obligations flowing from an event that had occurred before the State had become a contracting party to the ECHR. Hence, as a basic position, the Human Rights Act mirrors the rights under the Convention, but not under all circumstances. Precedence is given to the national understanding of the ECHR, not to the interpretations offered by the ECtHR. Again this does not amount to full incorporation but keeps the ECHR at a distance. In this sense, it allows UK courts to do the same as the Court of Justice at present (pre-accession): to give the Convention and its interpretation by the Strasbourg Court a domestic reading.

In the Netherlands, with a (moderate)¹³⁷ monist tradition, individuals can rely upon provisions of international treaties even if they are incompatible with the national constitution.¹³⁸ Decisions of the ECtHR can be directly invoked before national courts and the ECtHR *de facto* functions as the highest human rights court of the land since the Dutch *Hoge Raad* does not have the power of constitutional review. On this reading, the ECHR offers more protection under Dutch law than currently (pre-accession) under EU law. After accession the precise effects of rulings of the ECtHR under EU law remain to be determined. This explains why from the particular Dutch perspective, EU accession might potentially appear to reduce the rights of the applicant in cases where previously actions could be brought before Dutch courts and now after accession the ECtHR finds the EU to be the correct defendant.

These are just three of the states that are currently part of both the ECHR and the EU legal regimes. After accession, in cases in which the co-respondent mechanism is applied, the EU will be asked to determine the internal question of whether a/the Member State(s) and/or the EU are responsible.¹³⁹ If this determination results in responsibility of the EU and if the Court of Justice continues to keep the ECHR and the case law of the ECtHR at arm's length, eg by giving it the same status as all international agreements of the EU, including mixed agreements, which is *below* the EU Treaties (similar to the GFCC placing the Convention below the German Constitution), the protection of individuals might suffer from a Dutch perspective. At the same time, after accession the Court of Justice might be willing to give *even broader* effect to decisions of the ECtHR. It appears to do so already, for instance in the recent case of *JMcB v LE*.¹⁴⁰ This will strengthen the Convention's effects vis-à-vis Germany and the UK. Hence, it would not be justifiable simply to assume a

137 It is considered moderate because international customary law does have internal effect but does not take precedence over a conflicting rule of Dutch law (HR 6 March 1959, NJ 1962, 2 (Nyugat)).

138 Except for provisions of international agreements that are not binding on everyone ('een ieder verbindend'), see article 94 of the Dutch Constitution.

139 See co-respondent mechanism above in section headed 'Accession Negotiations and the Implications of the Draft Agreement in Strasbourg'.

140 Case C-400/10 PPU *JMcB v LE* [2010] ECR I-8965. See below 'Implications for the Union and its Court of Justice'.

general reduction of protection. The enforcement mechanisms within the EU legal order are strong.¹⁴¹ Indeed, they are much stronger than the enforcement mechanisms under the ECHR.¹⁴² The primacy of EU law is *de facto* accepted by all Member States, while not all Member States recognise the supreme force of the ECHR. In countries such as the UK and Germany, the ECHR will (within the scope of EU law) be vested with a new supreme force when the Court of Justice applies it in its case-law. This would necessarily change the approach of national courts towards the ECHR when interpreting EU law. Finally, EU accession generally will fill the gaps revealed by cases such as *Connolly*¹⁴³ and resulting from the fact that at present the rulings of the Court of Justice are not subject to review by the ECtHR.

For the union and its Court of Justice

Broader Implications for Human Rights Protection in the EU Legal Order

Rather than making the EU more of a 'human rights organisation'¹⁴⁴ comparable to the ECHR, accession will place the EU in a position similar to the other Contracting Parties, which are all states. That the EU is joining an international instrument as important in reach and influence as the Convention, and doing so moreover on an equal footing with all state parties, is in itself a success for the EU, confirming – as do many interactions with international organisations and third countries – its particularity and maturity as an *integration* organisation.

As we have seen, the pre-accession EU is not itself directly bound by the Convention, either under international law or under EU law. However, not only has the Court of Justice given great consideration to the Convention, but also the EU Treaties and the Charter of Fundamental Rights all include references to the Convention.¹⁴⁵ The Charter – after much discussion¹⁴⁶ – also specifically refers to the case law of the ECtHR – in its Preamble, albeit not in the main text.¹⁴⁷ However, the Court of Justice has ruled in *JMcB v LE* that where rights in the Charter correspond to rights in the ECHR the Court of Justice should follow the case law of the ECtHR.¹⁴⁸ In the light of article 6(3)

141 Article 260 TFEU. For case law on the strict interpretation of the old article 228 EC see eg, K. Lenaerts, D. Arts and I. Maselis, *Procedural Law of the European Union* (London: Sweet & Maxwell, 2nd ed, 2006).

142 Article 46 ECHR and Protocol 14. Implementation of rulings is monitored by the Committee of Ministers.

143 See also *Behrami v France*; *Saramati v France, Germany and Norway*, n 38 above.

144 A. Rosas, 'Is the EU a Human Rights Organisation?' (Centre for the Law of EU External Relations, CLEER Working Papers 2011/1, 2011) at http://www.asser.nl/upload/documents/4272011_112603CLEER%20WP%202011-1%20-%20ROSAS.pdf (last visited 20 July 2012).

145 See articles 6(2) and (3) TEU, article 218(6)(a)(ii) and (8) TFEU; articles 1 and 2 of Protocol 8 and Protocol 24; articles 52(3) and 53 of the Charter of Fundamental Rights.

146 Scheek, n 12 above 172.

147 Charter of Fundamental Rights, article 52(3).

148 Case C-400/10 PPU *JMcB v LE*, n 140 above at [53]. S. Douglas-Scott interprets 'correspond' as 'the same' or 'identical', n 4 above, 655–656. This seems to be an overly strict reading. Indeed, the explanations to the Charter offer a list of 'corresponding rights'. This appears to offer a good interpretation of the scope of the Court of Justice's ruling.

TEU in particular, it would be contrary to EU law to disregard the Convention. At the same time, there is an important legal difference between ‘giving due account to’ and being legally bound by the provisions of the ECHR, as authoritatively interpreted by the ECtHR. This was demonstrated most impressively by the Court of Justice’s *Kadi* ruling.¹⁴⁹ Even though before 2008 the Court had, in settled case-law, taken due account of UN Security Council Resolutions,¹⁵⁰ it chose to rely on the fact that the EU is not a member of the UN and is therefore not directly bound by its Charter or its Security Council Resolutions.¹⁵¹ Some¹⁵² have made a comparison between the Court of Justice’s ruling in *Kadi* and the US Supreme Court’s ruling in the case of *Medellin*,¹⁵³ in which the US Supreme Court held that international treaties and decisions of the International Court of Justice (ICJ), binding on the US under international law, are not enforceable under national law, absent an implementing statute.¹⁵⁴ The case was brought by a Mexican national on death row in Texas who challenged his conviction on the basis that he had not been afforded his right of consular notification under the Vienna Convention on Consular Relations, which the ICJ had confirmed in a prior ruling.¹⁵⁵ The comparison between *Kadi* and *Medellin* appears however to be somewhat misguided. In *Kadi*, the Court of Justice rejected the binding force within the domestic legal order of a resolution – arguably even an *ultra vires* decision – adopted by the Security Council, a political organ, to impose far-reaching human rights restrictions on a list of identified individuals. Additionally, the EU was not itself bound even under international law since it is not a member of the UN. In *Medellin*, the US Supreme Court rejected the binding force of a ruling of the International Court of Justice, a judicial organ, that could indeed have led to a higher level of human rights protection if it had been applied by that domestic tribunal. In the relationship between the Court of Justice and the ECtHR the situation is much closer to *Medellin*. If in a hypothetical case the Court of Justice rejected the binding force of a ruling of the ECtHR that would offer the individual better protection than EU law, the same outrage as the one expressed with regard to *Medellin* would be justified.

After accession, as we have seen the ECtHR’s decisions will be formally binding on the Union as a matter of international law. This could in an extreme case result in a finding of non-compliance if the Court of Justice rejects an interpretation of the ECtHR of internal matters of EU law. However, it seems that in most cases it will be possible to reconcile an interpretative difference in a way that does not result in non-compliance. Yet, reconciliation will become

149 Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-06351.

150 See eg, Case C-84/95 *Bosphorus* [1996] ECR I-3953; Case C-124/95 *Centro-Com* [1997] ECR I-81.

151 *Kadi and Al Barakaat*, n 149 above at [294]: ‘special importance’ not ‘binding force’.

152 See before all: G. de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’ (2010) 51 *Harvard International Law Journal* 1.

153 *Medellin v Texas* 552 U.S. 491.

154 See for more context: L. F. Damrosch, ‘*Medellin* and Sanchez-Llamas: Treaties from John Jay to John Roberts’ in D. L. Sloss, M. D. Ramsey, and W. S. Dodge, *International Law in the U.S. Supreme Court – Continuity and Change* (Cambridge: CUP, 2011) 451 et seq.

155 ICJ *Case concerning Avena and other Mexican Nationals (Mexico v United States of America)* Judgment of 31 March 2004.

slightly more difficult as the Union will logically have to lose its *Bosphorus* privilege – namely the presumption of equivalent protection.¹⁵⁶ As we have seen, *Bosphorus* set out a *general* presumption of equivalent protection. This general presumption cannot be applied to a *particular* opinion that the Court of Justice has given under the prior involvement procedure. After receiving the Court of Justice's opinion, the Strasbourg Court will scrutinise and rule whether the Convention has been breached. It can only find the specific opinion either correct or incorrect. It cannot hide behind general considerations of the human rights protection in the EU legal order.

The risk of divergent case law of the ECtHR and the Court of Justice that then leads to differences of interpretation between the ECHR and the Charter of Fundamental Rights is often raised as a further source of conflict.¹⁵⁷ The latter is, since 1 December 2009 the binding catalogue of human rights in the EU legal order.¹⁵⁸ It is enforceable before the Court of Justice, even though there is no direct procedure for individual complaints. The potential for a significant conflict in practice appears however to be low in the light of the mutual respect and deference that informs this area as a whole. First, the Charter was drawn up with an eye on potential conflicts and with the intention to avoid them. This is probably most apparent in the general provisions. Article 52(3) of the Charter links the rights under the Charter to the rights under the Convention. Article 53 specifically excludes the option that the Charter might be interpreted more restrictively than the Convention. Additionally, the Charter also substantively assimilates part of the rights' evolution brought about by the ECtHR's case law.

Second and even more importantly, the courts have demonstrated a great level of deference towards each other. It is true that even after accession, the Court of Justice will still have to determine the binding force and status of the ECtHR's rulings within the EU legal order. As with other international law, the reception of the ECHR and the rulings of the ECtHR in the domestic legal order are determined by domestic law, ie the EU Treaties. So far however, the two Courts have shown great respect for each other's decisions.¹⁵⁹ The ECtHR has had regard to the 'specific characteristics of the Union and the Union law'.¹⁶⁰

156 S. Douglas-Scott, n 4 above, 668, questions whether the *Bosphorus* presumption 'reflects the specific situation of the EU legal order' and should therefore be protected by Protocol 8 of the Lisbon Treaty. However, the Protocol does not refer to the 'specific situation' but rather to 'specific characteristics of the Union and Union law'. It seems an unduly wide interpretation to consider the deferential approach of the ECtHR to the CJEU as a 'characteristic' of Union law.

157 R. A. Lawson, 'Confusion and Conflict? Diverging interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg' in R. A. Lawson and M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe* (Leiden: Martinus Nijhoff Publishers, 1994) 219.

158 Article 6(1) TEU. See also: European Commission, Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final.

159 Both have repeatedly referred to each other's case law, see eg, *Goodwin v UK* ECHR [2002] Appl No 28957/95. See also Case C-400/10 PPU *JMcB v LE*, n 140 above. One case stands out in which, it could be argued, the Court of Justice departed from the position of the ECtHR: Case C-17/98 *Emesa Sugar* [2000] ECR I-665.

160 Article 1 of Protocol 8 relating to article 6(2) TEU dealing with the accession of the Union to the ECHR.

At present, the *Bosphorus* presumption applies to situations where the ECtHR has jurisdiction because there are national measures implementing EU law but the Member State did not have any discretion. The draft agreement equally recognises the ‘specific legal order’ of the EU.¹⁶¹ Yet, while the rules on the side of the ECtHR appear to be fairly detailed, there are no guidelines for the Court of Justice on how to deal with decisions of the ECtHR. Protocol 8 annexed to the Lisbon Treaty only stipulates that accession may affect neither the competence division between the Union and its Member States (article 2) nor the exclusive jurisdiction of the Court of Justice (article 3). However, whatever the exact status that the Court of Justice will give rulings of the ECtHR after accession it is difficult to see in practice how the Court of Justice could in a ‘Union of law’¹⁶² follow an argument or give a ruling that openly clashes with the protection of human rights given by the ECtHR. This would be problematic both before and after accession, and irrespective of whether the EU is a party to the case. At the same time, the *Rechtfertigungsdefizit*¹⁶³ would be much lower if the Court does not accept the ECtHR’s position on competence matters of internal EU law that has no substantive impact on human rights protection. We may conclude that the risk of a potential conflicting interpretation of the ECHR and the Charter would not increase through accession. With the particular mechanism agreed (co-respondent and prior involvement mechanisms) it will be lower than at present. Pre-accession it is conceivable that a national court delivers a decision based on a preliminary ruling of the Court of Justice and that this decision (after national remedies have been exhausted) is taken to the ECtHR which might decide that the country has violated the ECHR. The ECtHR’s ruling on the case could entail the conclusion that the preliminary ruling of the Court of Justice conflicts with the ECHR, without further involvement of the EU institutions.

The procedural arrangements in Strasbourg that have been agreed under the draft accession agreement may also have implications for EU constitutional law. The compatibility of both primary and secondary EU law can be challenged in Strasbourg¹⁶⁴ and the co-respondent mechanism applies to both.¹⁶⁵ Yet, an alleged violation of the Convention through primary EU law raises particular problems. The co-respondent mechanism governs and is limited to the relationship between the EU and its Member States. This means that Member States can only become co-respondent in an application alleging a Convention violation through primary EU law if the application is (also) directed against the EU.¹⁶⁶ They cannot join if only (one or several) Member States are respondent(s). This

161 Final paragraph of the preamble of the Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above.

162 The EU is committed to the rule of law: see article 2 TEU on values; for case law see eg Case 294/83 *Parti Ecologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339 at [23]; Case 314/85 *Foto-Frost* [1987] ECR 4199 at [16]; Case C-314/91 *Weber v Parliament* [1993] ECR I-1093 at [8].

163 ‘Justification deficit’ – this term is borrowed from J. Habermas, *Legitimationsprobleme im Spätkapitalismus* (Frankfurt am Main: Suhrkamp, 1973).

164 Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, n 64 above, comments on article 2 at [28].

165 *ibid.*, 17 at [42].

166 *ibid.*, 17 at [43].

might not have particular implications for the Convention and its enforcement mechanism but it does have implications for the power division between the EU institutions and the Member States. Within the context of EU constitutional law, the fact that the EU may join as a co-respondent and even the Court of Justice may be called upon when primary EU law is at stake will strengthen the position of the EU institutions vis-à-vis the Member States as the founding mothers of the EU Treaties. The Treaty amendment procedure under article 48 TEU only foresees the limited involvement of the EU institutions at the preparatory stage. The European Council is given the most important role. All Treaty amendments need to be agreed by the representative of the Member States.¹⁶⁷ As to the Court, the Court of Justice's mandate extends only to 'ensure that in the interpretation and application of the Treaties the law is observed'.¹⁶⁸ The Court does not under EU law have the power to assess the lawfulness of primary law.¹⁶⁹ However, this is precisely what will be at stake in Strasbourg if the EU Treaties allegedly stand in conflict with the Convention. Considering that the Court of Justice in *Kadi* has elevated human rights (together with other core principles of EU law) to the status of being the 'very foundations' of constitutional law that rank above 'ordinary' EU primary law,¹⁷⁰ a breach of the ECHR would logically make the EU Treaties unlawful under EU law. This is of course a rather theoretical construction.

The Potential Problem with the Common Foreign and Security Policy

A further set of practical problems could arise from the lack of jurisdiction of the Court of Justice under the Common Foreign and Security Policy (CFSP). This evaluation is different from the decision of the EU institutions to exclude the European External Action Service from the negotiations because it was argued that accession does not affect CFSP. CFSP is a policy area in which, even after Lisbon, the Court of Justice does not have the power to give preliminary rulings and can receive direct actions for review of legality (not interpretation) only as far as they are directed against a very specific measure, namely CFSP decisions providing for restrictive measures against natural or legal persons within the meaning of article 215(2) TFEU¹⁷¹ and as far as they challenge the division between the TEU and the TFEU.¹⁷² The limited jurisdiction of the Court of Justice could potentially raise problems if a CFSP case is brought to the ECtHR, which is not unlikely. First, the EU is carrying out multiple peace keeping missions under the CFSP that could lead to potential complaints before the ECtHR. This is implicitly confirmed by the ECtHR's case law on peace-

167 Article 48(4) TEU.

168 Article 19 TEU.

169 See eg article 267 TFEU: 'interpretation of the Treaties' and 'validity and interpretation of acts of the institutions'. It can be argued however that the CJEU has in individual rulings 'amended' or 'reviewed' the European Treaties, most famously *Parti Ecologiste Les Verts v European Parliament*, n 162 above. Similar tendencies can be seen in more recent case law: C-432/04 *Commission v Cresson* ECR [2006] I-6387 and C-229/05 P *PKK and KNK v Council* [2007] ECR I-439.

170 Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, n 149 above at [304].

171 See article 275 TFEU.

172 Article 40 TEU.

keeping missions, where the EU was not involved.¹⁷³ Second, CFSP decisions providing for restrictive measures, which are in fact the largest number of all CFSP acts, could give rise to questions of interpretation relating to an alleged breach of human rights that the Court of Justice cannot receive. *Segi*¹⁷⁴ is a case in point. In this case the ECtHR was asked to rule on a CFSP listing of *Segi* as a terrorist suspect. Because the applicant had not been targeted with operational measures (asset freezing) but had only been listed as a terrorist suspect, the ECtHR did not find a violation. Yet, this could be different in any new case. One could also think of different scenarios in which a case concerning sanctions against regimes or private individuals *could* reach the Court of Justice. For instance, the interpretation of ‘the funds and other financial assets or economic resources’¹⁷⁵ or whether these funds actually belong to the listed person, similar to the case of *M*.¹⁷⁶ The Court of Justice’s interpretation could then in turn be taken to the ECtHR. Third, to date, sanctions adopted under article 215(2) TFEU are still based on a pre-Lisbon common position that is governed by pre-Lisbon rules and remains consequently outside of the Court’s reach. Fourth, if counter-terrorist sanctions against individuals have taught us anything it is that the EU institutions are willing to interpret their Treaty powers creatively to adopt whatever measure they deem necessary. Hence, CFSP measures of the future could impact on the rights of individuals in ways that we cannot predict today.

The EU’s accession to the ECHR will improve the human rights protection of individuals in the EU, despite the fact that it adds to complexity. Particularly in the area of CFSP, EU accession to the ECHR could, from the perspective of the individual, make all the difference between having access to justice or not, since actions of the EU will no longer fall outside the personal scope of the Strasbourg Court’s jurisdiction.¹⁷⁷

CONCLUSIONS

The EU’s accession to the ECHR is illustrative of the great influence that the EU can have on international legal regimes. Accession requires fundamental adaptation (reform if you will) of the Convention and its enforcement mechanism and the need for this adaptation has been recognised and accepted by third countries not only in Protocol 14 but also in the negotiation of the accession agreement. The creation of the co-respondent mechanism and the possibility of involving the Court of Justice in a case pending in Strasbourg are unprecedented. Further, as a more extended consequence, it will bring changes to the

173 The best example for this is a *Behrami*-type situation. See *Behrami v France*; *Saramati v France, Germany and Norway*, n 38 above.

174 *Segi ea and Gestoras Pro Amnestia v 15 EU Member States*, n 43 above.

175 See article 2 of the Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L344/93.

176 Case C-340/08 *M and Others* [2010] ECR I-3913. This is a case concerning the question of whether the subsistence allowance of a spouse of the listed person was covered.

177 See *Behrami v France*; *Saramati v France, Germany and Norway*, n 38 above.

institutional set up of the Council of Europe by allowing the EU as a non-member to participate in its statutory bodies for Convention related activities.

EU accession will equally affect the Union and its Member States. Despite the fact that the ECHR and the rulings of the ECtHR already play an important role in the EU legal order, being legally bound and submitting to the authority of the ECtHR will bring the legal effects of the Convention fully home. The self-created 'arm length of appreciation' that the Court of Justice developed through its case law of taking inspiration from the ECHR for the general principles of EU law will come to an end. This will require the Court of Justice to take a stand on the hierarchical status of the ECHR within the EU legal order. Will the Court regard the ECHR and the case law of the ECtHR as fully part of EU constitutional law?

Accession will further advance the Union's ambitions as an international actor separate from its Member States. The EU will become a 'state-like' party to the Convention in the sense that it will be 'on equal footing with the other Contracting Parties', which are all states. At the same time, the EU and, in particular its Court of Justice have been given an exceptional position within the Convention system. This reflects the concerns about the Court of Justice's judicial autonomy, expressed in article 2 of Protocol 8: 'accession of the Union shall not affect the competences of the Union or the powers of its institutions'. From the perspective of the EU, this *primus inter pares* position appears to be the best solution: having all the duties of states, but more rights and influence – both during the negotiations and before the Strasbourg Court. This special position is a recognition of the EU's particularity and success as an integration organisation. At the same time, the discussion's focus on the EU's and the Court of Justice's autonomy raises doubts about the EU's maturity as an integration organisation. Accession will bring the test of whether the EU has reached the necessary maturity. Is it sufficiently integrated to join the ECHR on an equal footing as the other Contracting Parties, or will it become the victim of its own success because despite all integration it cannot endure the internal tensions that might result from joining an external human rights regime?

The EU Member States will also be affected by the EU's accession to the ECHR. Article 2 section 2 of Protocol 8 will not prevent this. It reads: 'nothing [in the accession agreement] affects the situation of Member States in relation to the European Convention . . .' In the light of the Court of Justice's far-reaching interpretation of the duty of cooperation and in the light of the Union's new role in Strasbourg, Member States will be subject to new European law constraints in relation to the ECHR. Furthermore, accession will substantively contribute to the on-going process in which European systems of human rights protection become increasingly interwoven and interlocked. It will allow the Court of Justice and the ECtHR to enter into a formal judicial discourse. Indeed, within the ever increasing scope of EU law, the Court of Justice will take the role of the national courts in international human rights discourse. However, it would be wrong to think that the Court of Justice and the ECtHR are the only two European courts. Both depend on the support of the national judiciary. As we have partly seen resistance towards external human rights constraints has flared

up in several EU Member States, including the UK.¹⁷⁸ Accession and the shift of the discourse from national courts to the Court of Justice is unlikely to have a calming effect. Indeed, the question of which public authority – Brussels, Strasbourg or the national capital – may decide the applicable standard will become even more controversial with accession.

The interpretation of human rights is closely interlinked with national – or European – identity and therefore ultimately with matters of sovereignty.¹⁷⁹ Concepts such as the margin of appreciation, subsidiarity, discretion and proportionality will contribute to acknowledging and preserving differences but will not be able to resolve all tensions. Recognition and defence of diversity can be witnessed in the interaction between the EU and its Member States. The Court of Justice has more recently demonstrated greater sensitivity towards the national standard of human rights protection¹⁸⁰ than in the earlier years.¹⁸¹ The Treaty of Lisbon has strengthened the concept of subsidiarity and ‘national identities’.¹⁸² And the German Constitutional Court has stressed the limits of European integration in particularly human rights sensitive areas.¹⁸³ Accession will increase the likelihood that human rights become the background for the EU’s discussion on how ‘united in diversity’ the Union should be. If any prediction is possible, asylum and counter-terrorism policy appear to be the two substantive areas where the standard of human rights protection and the relationship between the different judicial actors, the ECtHR, the Court of Justice and national courts, will be brought to the severest test.

178 Eg reactions to *Abu Qatada v UK* ECHR [2012] Appl No. 8139/09 and to prisoners’ voting rights: *Hirst v UK* (No 2) ECHR [2005] Appl No 74025/01. See also: *Scoppolla v Italy* (No 2) Appl No 10249/03, Merits, 17 September 2009, which cites the CJEU in Cases C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565.

179 In favour of some form of European identity: J. J. H. Weiler, *The Constitution of Europe ‘Do the New Clothes have an Emperor?’ and Other Essays on European Integration* (Cambridge: CUP, 1999). Stressing the central role of nationality: D. Miller, *On Nationality* (Oxford: Clarendon Press, 1995); D. Miller, *Citizenship and National Identity* (Cambridge (Mass): Polity Press, 2000).

180 Case C-112/00 *Eugen Schmidberger v Austria* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* [2004] ECR I-9609.

181 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

182 Preamble of the TEU and article 4(2) TEU.

183 GFCC, *Lisbon Treaty judgment* Decision of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09.