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EU EXTERNAL REPRESENTATION IN CONTEXT: ACCESSION TO THE ECHR AS THE FINAL STEP TOWARDS MUTUAL RECOGNITION

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1. 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. Both the EU judge in the ECtHR and the EU's participation in the Council of Europe are a form of external representation of the EU.

The EU's accession to the ECHR has been subject of discussion since the 1970s.[1] This discussion 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 possible under EU law. Indeed, it has even become an obligation.[3] The negotiation and drafting of the draft accession agreement between July 2010 and June 2011 is an example of coordinated representation of the EU. Choosing representatives on the basis of expertise rather than political affiliation allowed the Union to act externally more unified than could have been expected in the light of the internal political discrepancies.

Yet, many questions remain open. 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

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[1] See *e.g.* European Commission, *Memorandum on the accession of the European communities to the Convention for the protection of human rights and fundamental freedoms*, COM (79) 210 final, 2 May 1979, 4 April 1979, Bulletin of the European Communities, supp. 2/79.

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

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

within the Council of Europe? What might be the consequences? How might the relationship between the Court of Justice and the ECtHR change?

2. SETTING THE SCENE: THE *STATUS QUO*

2.1. **The Council of Europe, the EU, and the ECHR**

Originating in the same post-World War II period, the legal systems developed by Council of Europe and the EU are fundamentally different. The former, by contrast with the latter, has not taken the path of integration but 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 an expression of the will of the Contracting Parties under international law.

This has not been an impediment for cooperation. These links between the Council of Europe and the EU have progressively been institutionalized.[4] Coordination between their respective activities has consistently increased.[5] More and more conventions adopted under the auspices of the Council of Europe are open to the EU.[6] Yet, this does not in all instances mean that the EU actually becomes a signatory.[7] 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,[8] but with introduction of the ECtHR and the growing acceptance of individual petition, it developed into *the key legal instrument* of the more than 200 conventions drafted by the Council of Europe.[9] All 47 Contracting Parties of the Council of Europe are Contracting Parties to the ECHR. Indeed, the ECHR has had a tremendous influence on the development of human rights protection in Europe, including within the EU.

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[4] *E.g.* 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 Art. 220 TFEU, which has been in the Founding Treaties since the inception of the EU.

[5] See a webpage dedicated to the cooperation between the CoE and the EU, available at <http://www.coe.int/t/der/eu_EN.asp>.

[6] The Complete list of the Council of Europe's treaties gives an overview of all Council of Europe conventions open to the EU, available at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>; 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.

[7] Critical: E. Cornu, 'Impact of Council of Europe standards on the European Union', in R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press / Springer *forthcoming*).

[8] 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: Oxford University Press 2011).

[9] See full list of conventions, available at <http://conventions.coe.int>.

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 1970 for the Court of Justice to seriously address this constitutional weakness, and arguably it did so only under pressure from national Constitutional Court.[10] Milestones were the Court of Justice's case law in cases such as *Internationale Handelsgesellschaft* and *Carpenter,*[11] as well as the adoption of a codified catalogue of human rights: the Charter of Fundamental Rights. The ECHR has played a great role in this dimension of the EU's constitutionalisation. However, difference should 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.[12] Repeatedly the point has been made that accession to the EU requires states to become Contracting Parties to the ECHR.[13] However, while in practice this might be true, the EU accession criteria (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 the compliance with the ECHR as the primary indicator. Bruno de Witte and Gabriel Toggenburg point to two possible reasons.[14] 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 to the defective implementation of judgments.[15] Second, the substantive scope of the ECHR is too narrow. It is drafted in the spirit of the 1950s, the dynamic interpretation of the ECtHR could only do so much to incorporate social and societal changes. However, as is well known, the Court had acknowledged the special significance of the Convention long before a reference to the ECHR was incorporated into the Treaties.[16] In many cases the Court of Justice uses both general principles of EU law and the ECHR to support its argument.[17] More recently the Court has even

[10] L. Scheek, *supra* note 8.

[11] E. Spaventa, 'From Gebhard to Carpenter: Towards a (non-)Economic European Constitution', 41 *Common Market Law Review* (2004) 743.

[12] Most illustrative is probably the reference in Art. 6(3) TEU.

[13] See e.g.: 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, available at <http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71249/20100324ATT71249EN.pdf>.

[14] 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), pp. 246-273, at 266 et seq.

[15] 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: Oxford University Press 2011).

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

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

dropped its earlier 'general principles' or 'source of inspiration' approach. It has started to refer directly to the rights guaranteed under the ECHR.[18]

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 recognizes 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 directly be bound under international law by the ECHR and its interpretation by the ECtHR. At the same time, it demonstrates the implications that EU accession can have for the functioning of a convention regime and its enforcement mechanism (the ECtHR).

2.2. **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.[19] It started with Opinion 1/76 on the European Laying-up Fund for Inland Waterway Vessels,[20] 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),[21] in Opinion 2/94 on the accession of the Community to the ECHR,[22] and in Opinion 1/00 on the European Common Aviation Area,[23] as well as in the case of *Mox Plant*.[24] These cases have been examined in much detail in the literature.[25] It is therefore sufficient to limit the discussion to few remarks about the most recent case on autonomy. In Opinion 1/09, on the creation of a unified patent litigation system,[26] the autonomy of the EU legal order, and in particular of the EU judiciary, was the decisive argu-

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[18] Case C-413/99 *Baumbast* [2002] *ECR* I-7091, para. 72; Carpenter, ibid. at para. 41–42; Case C-200/02 *Kunqian Catherine Zhu Chen* [2004] *ECR* I-9925, para. 16.

[19] 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.

[20] 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.

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

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

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

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

[25] See most recently: R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press / Springer *forthcoming*); in particular the chapter by J. W. van Rossem, 'The Autonomy of EU Law: More is Less?'.

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

ment 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 powers of the Member States, including making references to the Court of Justice under Article 267 TFEU in disputes concerning European and Community patents.[27] Hence, the case concerned not only the role of the Court of Justice but also to the EU law functions of the courts of the Member States. It also demonstrated 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.[28] 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 to interpret EU law.[29] 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 influenced. In the past, this has been either because another judicial mechanism might be placed in the position to give *binding* rulings on issues of EU law[30] or because the judicial cooperation between the EU Courts and the courts of its Member States might be influenced.[31]

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 globalized world. International human rights regimes are seen as having a particularly far-reaching impact on the autonomy (sovereignty if you will) of States.[32] The same will be true for the EU after it has acceded to the ECHR as party on the same footing as States. Furthermore, the ECHR is exceptional amongst international human rights regimes. It has developed into a 'constitutional instrument of European public order'.[33] Yet, the EU's accession

[27] Ibid., paras. 80-81.

[28] See *supra* note 21, paras. 39-40: The EU's 'capacity to conclude international agreements necessarily entail 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'.

[29] The WTO Dispute Settlement Mechanism 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 arm length by not considering them directly effective. See for both: C. Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Organisations', in R. A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague: T.M.C. Asser Press / Springer *forthcoming*).

[30] Ibid., at 33-36.

[31] See *supra* note 26.

[32] C.M. Wotopka and K. Tsutsui, 'Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001', 23 *Sociological Forum* (2008) 4, 724 et seq.

[33] See: ECtHR, *Loizidou v. Turkey* (Preliminary Objections), ECHR (1995) Series A. No. 310, para. 75; ECtHR, *Bosphorus Airways v. Ireland*, ECHR (2005), Appl. No. 45036/98; ECtHR,

to the ECHR might be the first time for the Court of Justice to accept the binding internal force of the decisions of an external judicial authority.

2.3. **Strasbourg Case-Law and the European Union**

Even before the EU's accession, the judicial bodies of the Convention, the Commission and the Court, have been concerned with EU law numerous times. 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 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 alias acta*'; Article 30(4)(b) 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.[34] 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.[35]

The ECtHR deals implicitly or explicitly with EU law more often than one would expect. In several cases, it scrutinized EU law in surprising detail.[36] 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, Member States remain responsible for primary EU law as the consequences of a treaty, in the adoption of which they have been involved.[37] Yet, the ECtHR has not so far imposed a sanction on the EU Member States collectively because they remain responsible for the international organization to which they have delegated authority, even though it has dealt with a number of cases in which such collective responsibility was alleged.[38] It is further possible to bring an application against a (particular) Member State for implementing EU law, irrespective of whether that state had any margin of discretion.[39] If the state had no margin of discre-

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Behrami & Behrami v. France, ECHR (2007), Appl. No. 71412/01; ECtHR, *Saramati v. France, Germany and Norway* (GC), ECHR (2007), Appl. Nr. 78166/01, para. 145.

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

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

[36] C. Eckes, *supra* note 29.

[37] ECtHR, *Matthews v. the United Kingdom*, ECHR (1999), Appl. No. 24833/94.

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

[39] Wide margin of discretion: ECtHR, *Cantoni v. France*, ECHR (1996), Appl. No. 17862/91 – on the merits: no violation; see however: Commission, *Etienne Tête v. France*, ECHR (1987),

tion, a rebuttable presumption of equivalent protection applies which leads the ECtHR to exercise full judicial review only if the protection under EU law proved to be 'manifestly deficient' in the individual case (the *Bosphorus* presumption[40]). 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.[41] The ECtHR rejected the admissibility *ratione personae* because it could not establish a link between the 'supranational act' and the Contracting Parties.

The decision of whether a Member State can be held responsible for an act of the EU or whether the act exclusively falls 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.[42] To substantiate this point, it is sufficient to look at 2011 only. The Court gave four rulings which (might have at least) potentially required an interpretation of EU law. First, the case of *Pietro Pianese*[43] 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 well-discussed case of *MSS*,[44] the Strasbourg Court found *inter alia* that Belgium had violated the Convention by acting in compliance with rules of EU asylum law (*Dublin II* Regulation[45]). 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.[46] Hence, even though the *MSS* ruling questioned the blind mutual trust on which the EU asylum law is built (see e.g. the presumption that all EU Member States

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Appl. No. 11123/84 – manifestly ill-founded. No margin of discretion: Bosphorus Airways v. Ireland, *supra* note 33; see similarly: Commission, *M & Co. v. Federal Republic of Germany*, ECHR (1990), Appl. No. 13258/87.

[40] Bosphorus Airways v. Ireland, *supra* note 33; this presumption was subsequently successfully applied, *e.g.* in ECtHR, *Biret v 15 EU Member States*, ECHR (2008), Appl. No. 13762/04.

[41] ECtHR, *Connolly vs 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: ECtHR, *Boivin v 34 Member States of the Council of Europe*, ECHR (2008), Appl. No. 73250/01.

[42] See for more examples before 2011: C. Eckes, *supra* note 29.

[43] ECtHR, *Pietro Pianese v. Italy and the Netherlands*, ECHR (2011), Appl. No. 14929/08.

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

[45] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003 L 50/1.

[46] See the general 'first entry' rule in Art. 3(1) Council Regulation (EC) No 343/2003, ibid., and the possibility for Belgium to derogate from that rule and take charge of the application in Art. 3(2) Council Regulation (EC) No 343/2003, ibid.

are safe[47]), it did not entail a judgment that the *Dublin II* system as such is unlawful. Third, in the case of *Karoussiotis*[48] 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 the application 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*[49] 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 this light 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 these cases raised or potentially raised (first case) 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 will this situation change with the EU's accession.

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

3.1. **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 on this way until 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 that was set up to negotiate accession met 8 times between July 2010 and June 2011. It was composed of Commission representatives and of delegates of 14 member states of the ECHR, 7 of which were EU Member States. Observers from the Committee of Legal Advisers on Public International Law (CADHI) and from the registry of

[47] Ibid., recital 2.
[48] ECtHR, *Karoussiotis v. Portugal*, ECHR (2011), Appl. No. 23205/08.
[49] ECtHR, *Ullens de Schooten and Rezabek v. Belgium*, ECHR (2011), Appl. No. 3989/07 and 38353/07.

the ECtHR were present.[50] The delegates were chosen because of their personal expertise and did not necessarily represent the position of their country.[51] The working group further consulted civil society and kept the CDDH informed. The Commission representative kept both the European Parliament and the Council informed.[52] In several ways, the process bears similarities with the convention method 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 summarized as: 'less bargaining more deliberation'.[53] 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.[54] 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.[55] Finally even though the Court of Justice was involved in the negotiations, it might still be formally asked under Article 218(11) TFEU to give an opinion on the compatibility of the final agreement with EU law.

On a substantive level, the draft accession agreement sets out amendments to certain provisions of the Convention necessary to accommodate the EU's accession. In many ways, the EU has been *primus inter pares* for many years, even without being a party to the Convention. It enjoys a privileged position at least since the establishment of the presumption of equivalent protection in *Bosphorus*,[56] which limits review of acts of the Member States implementing EU law to cases, where human rights protection at the EU level was manifestly deficient. In other words, in the common case the ECtHR does not review the compliance with the Convention of EU Member States' acts implementing

[50] See list of participants of the working meetings of the working group, e.g. Annex I of CDDH (2010) 05 and 010, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_meetings_en.asp>.

[51] 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', 2 *Czech Yearbook of Public & Private International Law* (2011) 127.

[52] 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 available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf>).

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

[54] 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, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp>.

[55] See a summary of the process, available at <http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>. 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, available at <http://curia.europa.eu/jcms/jcms/P_64268/>.

[56] Bosphorus Airways v. Ireland, *supra* note 33.

EU law. The accession agreement recognises the EU's special position and in a different way codifies and institutionalises it.

The first technical legal specificity of the 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.[57] This is unusual in the context of the Convention, where accession of a new member has not so far required amending the Convention. Hence, so far amendments and accessions have taken place separately. In this regard, the accession agreement bears technical legal similarities with the accession agreements of (then member) states to the EU.[58]

The Court of Justice's judicial autonomy and indeed even monopoly to interpret EU law, discussed in Section One, were a central concern in the negotiation of the draft agreement.[59] Accommodating this concern required supplementary interpretative provisions and changes to the procedure before the Strasbourg Court.[60] 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 responsibility between the EU and its Member States. In both events, the ECtHR would simply not be able to fully 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 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 drawing up of the Draft Articles on the Responsibility of International Organisations (DARIO)[61] and in the Commentary to DARIO as adopted in August 2011, which refer to the potential existence of

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[57] J. Královà, *supra* note 51, at 131.

[58] See e.g. for the last enlargement: the Accession Treaty with Bulgaria and Romania, *OJ* 2005 L 157/11.

[59] T. Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order', 48 *Common Market Law Review* (2011) 1025. See also X. Groussot, T. Lock and Laurent 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), available at <http://www.robert-schuman.eu/doc/questions_europe/qe-218-en.pdf>.

[60] Most prominently, the co-respondent mechanism was introduced: see *supra* note 58, Art. 3; see para. 54 of the explanatory report to the agreement. See also the explanatory report to Protocol 14, para. 101.

[61] United Nations, Chapter II, 'Attribution of Conduct to an International Organization. Draft Articles on the Responsibility of International Organizations', *Yearbook of the International Law Commission 2011*, Vol. II, Part Two; 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, 5-6.

a special rule on attribution to the EU of conduct of its Member States when implementing binding acts of the EU.[62] 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. It raises intricate questions of whether this act should be attributed to the Member States (traditional view of public international law) or the EU (which is in actual fact responsible for the substance of the measure).

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.[63] This would challenge the judicial monopoly of the Court of Justice. After accession, both the EU and its Member States are bound under international law by the ECtHR's rulings to which they were parties. The binding force extends to the Court of Justice as an institution of the EU.

The co-respondent mechanism is aimed to avoid this situation. It will '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 Member States to become co-respondents to proceedings instituted against the EU.'[64] The co-respondent mechanism permits the ECtHR to refrain from determining who is the correct respondent or how responsibility should be apportioned. Indeed, it declares 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)'.[65] The respondent and the co-respondent(s) may further make joint submissions to the Court that responsibility for any given alleged violation should be attributed only to one of them.[66] This will for most cases unburden the Strasbourg Court from the task of assessing the distribution of competences between the EU and its Member States. However, it does not exclude that the ECtHR *may* choose to apportion responsibility in the individual case, which will require it also to consider attribution. 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.[67] 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 to the rather cautious approach of the Strasbourg Court in the past it can be expected that the Strasbourg Court

[62] See: Commentary to Draft Art. 64, ibid., para. 1.

[63] See more in detail on the co-respondent mechanism and autonomy: C. Eckes, *supra* note 29.

[64] Draft revised Explanatory report to draft Agreement on the Accession of the European Union to the European Convention on Human Rights, *supra* note 54, at 11, para. 31.

[65] Ibid., para. 54.

[66] Ibid.

[67] Ibid., paras. 47 and 51.

will not meddle with the complex and dynamic division of powers between the EU and its Member States[68] where this is not absolutely necessary.

The criteria that should be met for the co-respondent mechanism to come into play are set out in the accession agreement.[69] The explanations to the accession agreement specifically state the expectation that the co-respondent mechanism will only come into play in very few cases.[70] Indeed, the view was expressed that there were only three recent cases which 'certainly required the application of the co-respondent mechanism', *i.e. Matthews*, *Bosphorus*, and *Nederlandse Kokkelvisserij*.[71] In the light of the above discussion of the ECtHR's decisions concerning in one way or another EU law, this might appear as a bolt from the blue. However, the expressed expectation is formulated very carefully by stating: 'certainly required' the co-respondent mechanism. This does not exclude 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 accession agreement does not exclude participation of the EU in cases where the Member State had discretion.[72]

Further, 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 Area[73] and under the Agreements Establishing the European Common Aviation Area.[74] 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 might even frame the further discussion, since parties are invited to submit their observations after the Court of Justice has given its opinion on the case[75] and will most likely follow in their arguments the Court's approach. On the one hand, these special privileges given to the Court of Justice might surprise 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 gives its judgment. On the other hand, the prior involvement mechanism

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[68] 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), available at <http://aei.pitt.edu/4907/1/4907.pdf>.

[69] See *supra* note 58, Art. 3(2).

[70] J. Weiler, *supra* note 68, para. 44 and footnote 18 on p. 17.

[71] Ibid. Matthews v. the United Kingdom, *supra* note n 37; Bosphorus Airways v. Ireland, n 33 above; ECtHR, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v. the Netherlands*, ECHR (2009), Appl. No. 13645/05.

[72] Art. 3(2) refers '*notably*' to the case of no discretion, but is not limited to it.

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

[74] See *supra* note 23.

[75] See *supra* note 58, Art. 3(6).

institutionalizes the particular confidence that the ECtHR has in the EU legal order and that it expressed already in *Bosphorus*.

This particular confidence should not only be seen as a necessary consequence of the Court of Justice's concern with its judicial autonomy. It is not *only* a necessary concession for EU accession. There are also substantive considerations in favour, concerning 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. Even though it should be added that criteria for triggering the co-respondent mechanism, and hence the possibility of involving the Court of Justice prior to giving a ruling, require that the implementing Member State had no discretion under EU law.[76] 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.[77]

Two institutional issues 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. 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, 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

[76] J. Weiler, *supra* note 68, para. 42: '[…] if it appears that the alleged violation […] calls into question the compatibility of a provision of […] EU law with the Convention […]. This would be the case, for instance, if an alleged violation could only have been avoided by a Member State disregarding an obligation under EU law […]'.

[77] See below the discussion of *Bosphorus* after accession (in the section on 'Implications for the Union and its Court of Justice', p. 23).

Parties, with one judge elected by Parliamentary Assembly 'with respect to' each Contracting Party. There is hence no nationality requirement.[78] The nomination will probably be similar to the nomination procedure of judges at the Court of Justice, where nationality is not an explicit requirement.[79] One could even argue that nationality is not meant to play a role,[80] but that judges are meant to be chosen on the basis of their independence and qualifications.[81] In practice however, no judge has ever been appointed to the Court of Justice who was not a national of an EU Member State.

The EU is not a state and it will not become a party to 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 they 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 of the Council of Europe. This in itself requires an unprecedented institutional adaptation. Non-EU Member States demonstrate great hesitations 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 society[82] and by non-EU Member States.[83] It was feared that the EU and its Member States (in total 28 out of 48 Parties) might be able to jeopardize 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 does not affect the effective functioning of the Committee of Ministers.[84]

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

[79] Art. 19(2) of the 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 Arts. 253-255 TFEU.

[80] Art. 18(4) of Protocol No 3 on the statute of the Court of Justice of the European Union, *OJ* 2010 C 83/210: '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.'

[81] See Arts. 253(1) and 254(2) TFEU.

[82] 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 para. 4, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH-UE_2011_15_RAP_en.pdf>.

[83] 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, para. 68, available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/CDDH-UE_2011_11%20exp%20report_en.pdf>.

[84] Ibid., para. 71.

Another remaining (technical) issue, even after formal accession, remains that the EU may make reservations, declarations and derogations under the Convention when it accedes to the ECHR.[85] The Convention is not *one* comprehensive list of human rights. It consists of multiple protocols[86] 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).[87] 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 as amended by Protocols 11 and 14 (as well as the accession agreement itself) and to Protocols 1 and 6.[88] All EU Member States have ratified the latter two protocols. 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.[89] 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.

3.2. **Implications 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 they place on the national legislator.[90]

The EU's external actions have an immediate impact on its Member States' legal position. A classic example is mixity.[91] Even though under international law Member States' obligations are the same irrespective of whether they are

[85] See *supra* note 58, para. 27.

[86] 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).

[87] Art. 57 ECHR; see also on the necessary clarity of reservations: ECtHR, *Belios v Switzerland* (1988) 10 EHRR 466. For a valid reservation see: ECtHR, *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>.

[88] See *supra* note 58, Art. 1(1).

[89] Compare procedure under Art. 218(10) TFEU.

[90] L. Scheek, *supra* note 8; UK: Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009, available at <http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009>; see also in the press: N. Watt, '28,000 prisoners will have right to vote', *The Guardian*, 5 January 2011, available at <http://www.guardian.co.uk>; D. Blaney, 'In Britain the rule of law is – and should remain – paramount', *Mail Online*, 10 February 2012, available at <http://www.dailymail.co.uk>. NL: T. Spijkerboer, 'Het Hof in Strasburg blijft cruciaal', *NRC Handelsblad*, 31 January 2012.

[91] C. Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the "Duty of Cooperation"', in C. Hillion and P. Koutrakos, *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing 2010), pp. 87-115.

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.[92] 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.[93] Even if international actors are held to act in good faith[94] there is no equivalent to the principle of sincere cooperation under Article 4(3) TEU.[95] The latter is seen as transforming 'the status of sovereign States into that of Member States of the European Union.'[96] Agreements that the EU concludes as mixed agreements bind Member States in the same way as agreements 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 to hold Member States to account under EU law for mixed agreements in their entirety.[97]

Mixity is effectively also what will happen when the EU accedes the ECHR. Article 218(8) TFEU stipulates that EU accession requires ratification by all Member States. In the light of the fact that all Contracting Parties to the ECHR also have to ratify an accession treaty[98] 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 is here 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? In essence, the question is: could the duty of sincere cooperation oblige the EU Member States, which have put the accession requirement into the Treaties to make EU accession possible, i.e. oblige them to ratify the accession agreements.

The case of *Kramer* might offer some inspiration on this issue.[99] 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

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[92] Ibid.

[93] E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations', 47 *Common Market Law Review* (2010) 323.

[94] Good faith is seen as 'perhaps the most important general principle, underpinning many international legal rules' (M. Shaw, *International Law* (Cambridge: Cambridge University Press 2003), at 97).

[95] E. Neframi, *supra* note 93.

[96] E. Neframi, supra note 93, at 323.

[97] See e.g.: Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] *ECR* I-2943, paras. 13-19; Case C-239/03 *Commission v France (Etang de Berre)* [2004] *ECR* I-9325, paras. 29-30. Both discussed at: E. Neframi, *supra* note 93, at 333.

[98] Art. 59 ECHR.

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

law on implied powers,[100] 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 in order to ensure participation of the EU [then Community] in the Convention and other agreements covering the same subject matter.[101] Another case interesting to consider is *Commission v Council*, in which Court annulled in part the Council declaration of accession of the European Atomic Energy Community (EAEC or Euratom) to the Nuclear Safety Convention because it did not detail the full scope of the EAEC's competencies in the field, which was required by the Convention.[102] The Court found that the Convention covered fields that fell – at least in part – within the competencies of Euratom and annulled the Council's declaration so far. In both cases, accession of the then Community and of Euratom and the duties of the Council and the Member States depended on the extent of the Community and Euratom's powers. In the case of ECHR, this should be the EU's competence for the protection of human rights. The EU's powers to protect human rights have attracted much attention before and since the adoption of the Charter of Fundamental Rights with its horizontal clauses in Articles 51-4.[103] However irrespective of the precise scope of the EU's competencies 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*. This obligation is addressed to the Union as a whole.[104] This has direct implications for both the EU institutions and the Member States – for the latter at least in combination with the duty of sincere cooperation in Article 4(3) TEU.

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. Member States might be obliged by the duty of sincere cooperation to coordinate their votes regarding cases in which the EU is a respondent.[105] The most relevant case offering some inspiration on these questions is probably *Commission v. Council* on participation in the Food and Agriculture Organisation (FAO).[106] This case concerned the voting rights on an agreement negotiated within the FAO.[107] 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 FAO case (*Commission v. Council*) indicates how the Union and its Member States can organ-

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

[101] Ibid., paras. 44-45.

[102] Case C-29/99 *Commission v. Council* [2002] *ECR* I-11221.

[103] See e.g.: R. A. García, 'The General Provisions of the Charter of Fundamental Rights of the European Union', 4 *Jean Monnet Working Paper* (2002).

[104] See *supra* note 3.

[105] This is acknowledged in Art. 8(2) of the accession agreement.

[106] 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), at 79-99.

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

ise representation in an international organisation. The Council and the Commission had concluded an inter-institutional agreement that regulated the exercise of voting rights within 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 from the *duty of sincere cooperation*.[108] It ruled that from the specific terms of the agreement that 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 also enforced the arrangement. 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.[109] This might also explain the fear of non-EU Member States that the EU and its Member States might resort to block voting. As discussed above, the rules of the Committee of Ministers were adopted to ensure the continuous effective functioning even if the Member States are under an EU law obligation to coordinate their votes.

On a final note, it is important to stress 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 very much been dependent on the context and circumstances of the individual case.[110] However, what is certain is that the EU's accession to the ECHR is susceptible of entailing different and further-going duties for the Member States under EU law than the Member States' own participation entails under international law.

3.3. **Implications for the Union and its Court of Justice**

Rather than making the EU more of a 'human rights organization'[111] comparable to the ECHR, accession will place the EU in a position similar to the other Contracting Parties, which are all states. Hence, the EU is accepted to join on equal footing with all state parties an international instrument as important in reach and influence as the Convention. This in itself is a success for the EU, confirming – as do many interactions with international organisations and third countries – its particularity as an *integration* organisation.

Pre-accession the 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

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[108] Commission v Council (FAO), *supra* note 106, paras. 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, at 212 and 242.

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

[110] C. Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"', 2 *CLEER Working Papers* (2009), p. 8 et seq.

[111] A. Rosas, 'Is the EU a Human Rights Organisation?', 1 *CLEER Working Papers* (2011).

and the Charter of Fundamental Rights all three include references to the Convention.[112] The Charter – after much discussion[113] – also specifically refers to the case law of the ECtHR. In the light of Article 6(3) TEU in particular, it would be contrary to EU law to disregard the Convention. At the same time, 'giving due account to' and being legally bound by the provisions of the ECHR, as authoritatively interpreted by the ECtHR, remains an important legal difference. This was demonstrated most impressively by the Court of Justice's *Kadi* ruling.[114] Even though before 2008 the Court had in settled case-law given due account to UN Security Council Resolutions[115] 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.[116] However, some[117] made a comparison between the Court of Justice's ruling in the case of *Kadi* and the US Supreme Court's ruling in the case of *Medellin*.[118] This comparison appears misguided. In *Kadi*, the Court of Justice rejected within the domestic legal order the binding force 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 the US Supreme Court. 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 – particularly post-accession!

After accession 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 slightly more difficult as the Union will logically have to lose its *Bosphorus* privilege – presumption of equivalent protection. *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

[112] See Arts. 6(2) and (3) TEU, Arts. 218(6)(a)(ii) and (8) TFEU; Arts. 1 and 2 of Protocol 8 and Protocol 24. Arts. 52(3) and 53 of the Charter of Fundamental Rights.

[113] L. Scheek, *supra* note 8, at 172.

[114] Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351.

[115] See e.g.: Case C-84/95 *Bosphorus* [1996] *ECR* I-3953; Case C-124/95 *Centro-Com* [1997] *ECR* I-81.

[116] Kadi and Al Barakaat, *supra* note 114, para. 294: 'special importance' not 'binding force'.

[117] See before all: G. de Búrca, 'The European Court of Justice and the International Legal Order After Kadi', 51 *Harvard International Law Journal* (2010).

[118] US Supreme Court (2008) *Medellín v. Texas*, 552 U.S. 491.

and rule whether the Convention has been breached. It can only find the specific opinion either correct (offering equivalent protection; no violation) or incorrect (misinterpreting the Convention; violation). It cannot hide behind general considerations of the human rights protection in the EU legal order.

Further, the risk of divergent case law of the ECtHR and the Court of Justice that lead to differences of interpretation between the ECHR and the Charter of Fundamental Rights is often raised as a source of conflict. The latter is since 1 December 2009 the binding catalogue of human rights in the EU legal order.[119] 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 low. First, the Charter was drawn up with an eye on potential conflicts and with the intention to avoid them. This becomes 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 that the Charter might be interpreted more restrictively than the Convention. Additionally, the Charter also substantively assimilates part of the evolutions brought about by the ECtHR's case law. Second and even more importantly, the Court has 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, i.e. the EU Treaties. So far however, the two Courts have shown great respect for each other's decisions.[120] The ECtHR has had regard to 'specific characteristics of the Union and the Union law'.[121] In the case of *Bosphorus*, it went as far as establishing the presumption that the protection of human rights under the EU law is equivalent to the protection under the Convention, if no manifest deficiency is shown in the individual case. This 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.[122] Yet, while the rules on the side of the ECtHR appear to be fairly detailed there are no guidelines for the Court of Justice 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

[119] Art. 6(1) TEU. See also: European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM (2010) 573/4, Brussels, 19 October 2010.

[120] Both have repeatedly referred to each other's case law, see e.g.: ECtHR, *Goodwin v UK*, ECHR (2002), Appl. No. 28957/95. 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.

[121] Art. 1 of Protocol 8 relating to Art. 6 (2) TEU dealing with the accession of the Union to the ECHR.

[122] Final paragraph of the preamble of the draft agreement, see *supra* note 58.

the Court of Justice could in a 'Union of law'[123] 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 accession and after accession and irrespective of whether the EU is a party to the case. At the same time, the *Rechtfertigungsdefizit*[124] 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. In conclusion, 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.

The procedural arrangements in Strasbourg as they were agreed under the draft accession agreement may have implications for EU constitutional law. The compatibility of both primary and secondary EU law can be challenged in Strasbourg[125] and the co-respondent mechanism applies both.[126] 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.[127] They cannot join if only (one or several) Member States are respondent(s). This might not have particular implications for the Convention and its enforcement mechanism but it does have particular 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 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.[128] As to the Court, the Court of Justice's mandate extends only

[123] The EU is committed to the rule of law: see Art. 2 TEU on values; for case law see *e.g.* Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] *ECR* 1339, para. 23; Case 314/85 *Foto-Frost* [1987] *ECR* 4199, para. 16; Case C-314/91 *Weber v Parliament* [1993] *ECR* I-1093, para. 8.

[124] 'Justification deficit' – this term is borrowed from: J. Habermas, *Legitimationsprobleme im Spätkapitalismus* (Frankfurt am Main: Suhrkamp 1973).

[125] See *supra* note 58, comments on Art. 2 at para. 28.

[126] Ibid., at 17, para. 42.

[127] Ibid., at 17, para. 43.

[128] Art. 48(4) TEU.

to 'ensure that in the interpretation and application of the Treaties the law is observed'.[129] The Court does not under EU law have the power to assess the lawfulness of primary law.[130] However, this is precisely what will be at stake in Strasbourg if the EU Treaties allegedly stand it conflict with the Convention. Considering that the Court of Justice has elevated in *Kadi* human rights (together with other core principles of EU law) as the 'very foundations' to a layer of constitutional law that ranks above 'ordinary' EU primary law[131] a breach of the ECHR would logically make the EU Treaties unlawful under EU law. This is of course a rather theoretical construction.

On a final note and on a more particular area, problems could arise from the lack of jurisdiction 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) TFEU.[132] This lack of jurisdiction of the Court of Justice could potentially raise problems if a 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 keeping missions, where the EU was not involved.[133] Second, CFSP decisions providing for restrictive measures against individuals could give rise to questions of interpretation relating to an alleged breach of human rights that the Court of Justice cannot receive. *Segi*[134] is here the 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 further think of different scenarios in which a case concerning individual sanctions could reach the Court of Justice. For instance, the interpretation of 'the funds and other financial assets or economic resources'[135] or whether these funds actually belong to the listed person, similar to the case of *M*.[136] The Court of Justice's interpretation could then in turn be taken to the ECtHR. Third, as to date, sanc-

[129] Art. 19 TEU.

[130] See e.g. Art. 267 TFEU: '*interpretation* of the Treaties' and '*validity* and interpretation of acts of the institutions'.

[131] Kadi and Al Barakaat, *supra* note 114, para. 304.

[132] See Art. 275 TFEU.

[133] The best example for this is a *Behrami*-type situation. See: Behrami & Behrami v. France, *supra* note 33.

[134] Segi ea and Gestoras Pro Amnestia v 15 EU Member States, *supra* note 38.

[135] See Art. 2 of the Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, *OJ* 2001 L 344/93.

[136] 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.

tions 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. However 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.[137]

4. A STATE-LIKE PLAYER WITH SUPER-STATE-LIKE INFLUENCE: WHAT ARE THE IMPLICATIONS?

The EU's accession to the ECHR is illustrative of the great influence that the EU can have on international legal regimes. Accession required fundamental adaptation (reform if you will) of the Convention and its enforcement mechanism and the need for this adaptation has been recognized 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 brought changes to the 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. At the same time, EU accession will not leave the EU legal order unaffected either. 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.

The EU will become a party to the Convention 'on equal footing with the other Contracting Parties'. 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 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 certainly a consequence of the EU's own particularity as an integration organisation (rather than a state). One could either argue that it results from the state dominated nature of international law that is unable to account for a creature as the EU or – if one takes this traditional perspective oneself – one could

[137] See: Behrami & Behrami v. France, *supra* note 33.

argue it is a result of the '(constitutional?) weakness of the EU'. In the negotiations that led to the draft accession agreement, the Union demonstrated unity of representation. This can be seen as a success. However, the draft accession agreement is of course only the first step. The ratification process will be the next test of the Member States' uniform position on the issue of the EU's accession to the ECHR. At the same time, too much unity might also be perceived as a threat by the other Contracting Parties to the ECHR, which have expressed their concerns about block voting in the Council of Europe.

Yet, Article 2 of Protocol 8 has a second sentence, which should not be forgotten either: 'nothing therein [in the accession agreement] affects the situation of Member States in relation to the European Convention […]'. The EU's accession to the ECHR cannot fully be appreciated in isolation. It will institutionalize the cooperation between two big players in the multi-layered and compound structures of human rights protection in Europe. However, it would be wrong to think that these are the only two big players and that they are not dependent on the support of national power structures. Resistance towards external human rights constraints has flared up in several EU Member States. The EU could play an important role in lobbying for human rights beyond national boundaries without curtailing democratic self-determination to inexistence. However, it should be careful not to bite off more that it can chew.

A deeper inquiry into the arguments for and against external human rights protection and hence a uniform standard in Europe would go beyond the scope of the present paper. It suffices to say that human rights are a highly sensitive issue. The question of which public authority – the national, EU or EC(t)HR – may decide the applicable standard is not easily decided. Human rights protection differs, both between Member States and between Member States and the EU. Further, human rights are closely interlinked with identity – be it national or European, solidarity, the feeling of belonging, self-determination and ultimately with sovereignty.[138] Furthermore, the question of who has the authority to determine the appropriate standard is not new but has possibly moved more into the centre of attention. The Court of Justice has more recently demonstrated greater sensitivity towards the national standard of human rights protection[139] than in the early years.[140] Also, the German Constitutional Court has stressed the limit of European integration in particularly human rights sensitive policy areas.[141] Furthermore, the Treaty of Lisbon has strengthened the concept of subsidiarity and 'national identities'.[142] Human rights might be the test of how 'united in diversity' the European Union should be.

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[138] 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: Cambridge University Press 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).

[139] 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.

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

[141] 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.

[142] Preamble of the TEU and Art. 4(2) TEU.