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**THE EU'S ACCESSION TO THE
EUROPEAN CONVENTION ON HUMAN RIGHTS:
AN INTERNATIONAL LAW PERSPECTIVE**

Jed Odermatt

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ABSTRACT

Article 6(2) of the Treaty on European Union establishes that the Union “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” In early 2013, negotiators of the 47 Council of Europe member states and the European Union finalised a draft Accession Agreement that would allow the EU to accede to the Convention. In this article I examine the issues and challenges that EU accession poses from an international law perspective. Much of the literature on the EU accession has focused on the effect that this process will have on the EU legal order, including questions regarding its autonomy. Yet EU accession also raises important issues for international law. It is another example of an international organization taking part in a legal system designed exclusively for participation by state parties. To what extent should the EU participate on an equal footing with the other contracting parties, and when are special rules required to take into account the nature of the EU legal order? The article explores the broader issues that arise when the EU seeks to participate in its own right in the international legal order. It is submitted that the EU's accession to the ECHR is not only an important step for the EU legal order, but also a highly significant development for public international law.

KEYWORDS

International Law, International Organizations, European Union, European Convention on Human Rights, Council of Europe, ECHR Accession, EU law, Autonomy, Human Rights Law

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1 INTRODUCTION

The EU's relationship with the European Convention on Human Rights and Fundamental Freedoms (ECHR or Convention)¹ has for decades been a topic of academic discussion. This debate examined the relationship between the Court of Justice of the European Union (CJEU or Luxembourg Court) and the European Court of Human Rights (ECtHR or Strasbourg Court), and how each legal system should deal with the law emanating from the other. It also discussed how the European Union, which itself is not a state, nor an ECHR contracting party, can be held to account for its actions via the ECHR framework. As the EU Member States transferred greater competences to the Union level, this gave rise to questions regarding the extent to which the EU itself might be bound by the rights enshrined in the Convention. This led to a "gap" in human rights protection in Europe and the associated question of how this gap should be closed. The CJEU partly addressed this gap through its own case law, developing its own fundamental rights jurisprudence. The EU also addressed the gap by establishing its own human rights instruments, most importantly the Charter of Fundamental Rights and Freedoms,² which, following the entry into force of the Treaty of Lisbon, became part of EU primary law. However, in order to further close this gap in human rights protection, it was decided that the EU would become a full Contracting Party to the Convention alongside its Member States.

The decision for the EU to accede to the Convention is enshrined as an obligation under Article 6(2) of the Treaty on European Union³ (TEU) which states that "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." Upon the coming into force of the Lisbon Treaty in December 2009, Article 6(2) became a legally binding commitment upon the EU. This is more than a symbolic or political act on the part of the Union. Accession will for the first time allow for an external mechanism to review whether acts of the EU fulfill human rights standards. Accession by the EU poses numerous questions for EU law scholars, particularly regarding whether accession threatens the 'autonomy' of the EU legal order. Much of the discussion has focused, for example, on whether a balance can be struck between treating the EU in an identical manner as other Contracting Parties, and the need to take into account the specific nature of the EU legal order. Yet the EU's accession also poses numerous important questions for public international law. Kosta et al. recently noted that the accession process gives rise to issues within three key disciplines: an EU law perspective, a constitutional law perspective, and a public international law perspective.⁴ They note that, "from

¹ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14 ('ECHR').

² European Charter of Fundamental Rights of the Union, OJ 2010, C 83/02.

³ Consolidated Version of the Treaty on European Union ('TEU') (2012) OJ C 326/1. (<http://eur-lex.europa.eu/en/treaties/index.htm>).

⁴ V. Kosta, N. Skoutaris and V. Tzevelekos, *Introduction: the Accession of the European Union to the European Convention on Human Rights* 4 EUROPEAN JOURNAL OF HUMAN RIGHTS (2013) 561-564.

the perspective of *public international law*, the accession will place the EU under the jurisdiction of a regional international court that specialises in the protection of human rights.”⁵ This public international law perspective has mostly focused on the issue of responsibility. Although the topic of international responsibility has been relevant for a long time, the issue of responsibility of international organizations has received considerable attention from international law scholars in recent years.⁶ In 2011 the International Law Commission (ILC) adopted its Draft Articles on the Responsibility of International Organizations (DARIO).⁷ One of the questions faced by Special Rapporteur Gaja and the ILC during this process was whether, and to what extent, the DARIO should include specialized rules of responsibility pertaining to the EU.⁸ Although the ILC rejected explicit provisions referring to the EU or to ‘regional economic integration organisations’ (REIOs), a proposal advocated by the European Commission, the need to develop specific rules to accommodate IOs such as the EU was discussed. Moreover, the Commentary on the DARIO also discusses the case law of the European Court of Human Rights dealing with the responsibility of international organizations, including numerous cases relating to the EU.⁹ It is understandable then that international lawyers focus on the implications that EU accession will have on the law of responsibility of international organizations. EU accession has great legal significance in this regard since it is the first time that an international organization will formally submit itself to a system of external judicial human rights review.¹⁰

Beyond responsibility, EU accession gives rise to numerous other questions under public international law. First, how will the EU take part in the ECHR system? This not only includes the Strasbourg Court, but also the mechanisms for supervision within the Committee of Ministers. How will the substantive law of the Strasbourg Court have to be adapted when applied to the EU, especially when much of its case law has been developed on the basis of all Contracting Parties being states? Accession also poses wider questions regarding the relationship between the EU and international law generally. EU accession to the ECHR will be the latest step in a broader trend where the EU takes part in its own right within international organizations and fora. The draft Accession Agreement, and the choices the negotiators made on a number of legal issues, further develops state practice in this field.

⁵ Kosta *et al*, *supra* note 4, 563.

⁶ See M. Ragazzi, *Responsibility of International Organizations: Essays in memory of Sir Ian Brownlie*, (Martinus Nijhoff 2013).

⁷ International Law Commission, *Draft Articles on the Responsibility of International Organizations* (DARIO) adopted by the International Law Commission at its sixty-third session (2011).

⁸ S. Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’, in M. Ragazzi (ed.), *International Responsibility Today* (2005), 405-421. See J. Wouters and J. Odermatt, ‘Are All International Organizations Created Equal?’ 9 *INTERNATIONAL ORGANIZATIONS LAW REVIEW* (2012) 7-14.

⁹ International Law Commission, *Draft Articles on the Responsibility of International Organizations*, with commentaries, adopted by the International Law Commission at its sixty-third session (2011).

¹⁰ Although the EU became a party to the UN Convention on the Rights of Persons with Disabilities in 2010, this does not involve the same level of review and supervision as the ECHR system. The EU has not signed the Optional Protocol to the Convention on the Rights of Persons with Disabilities, which allows the Committee on the Rights of Persons with Disabilities to hear complaints from individuals and groups who claim to be victims of violations of the Convention (Art.1).

This article does not focus on the issue of international responsibility as many of these issues have been discussed extensively elsewhere by both international law¹¹ and EU specialists.¹² Rather, this contribution focuses on other public international law issues, many of which have been overlooked in the academic debate. It also aims to contribute to the debate on how the EU takes part in the wider international legal order. Does EU accession represent a departure from established practice when the EU takes part in international legal instruments or is it in line with other instances where the EU has joined multilateral conventions? It seeks to understand what implications the EU's accession may have for the evolving relationship between EU law and international law, and the effect the EU is having on the latter. It is submitted that EU's accession to the ECHR is not only an important step for the EU legal order, but also a highly significant development for public international law.

Outline

The first part of this article provides a brief sketch of the EU's place within the international legal order. It demonstrates that many of the issues faced by the drafters of the agreement on accession were in fact not entirely novel, but have been faced for decades whenever the EU seeks to take part in the international legal order in its own right. The next part then visits the main reasons for EU accession to the ECHR. EU accession, it is argued, is more than a political or symbolic act, but one that seeks to remedy some of the deficiencies in the system of human rights protection in Europe. These reasons must be borne in mind when evaluating any draft agreement, and to understand whether it actually lives up to its purpose of safeguarding human rights. The article then turns to the provisions of the draft Accession Agreement itself with an eye to the international law issues that the Agreement raises. To what extent does the Agreement resemble other international agreements where the EU is a party? In areas where the Agreement indicates a novel approach, is this justified by the specific nature of the EU and ECHR legal orders?

Two main issues are discussed. The first are "procedural," relating to how the EU will participate in the Convention system, such as appearing as a respondent in cases before the ECtHR, electing judges, and taking part in other processes. The article then turns to the question of how the substantive human rights law of the ECHR may be applied to an international organization such as the EU. The EU's accession to a Human Rights treaty poses international law issues that are not necessarily faced when the EU is a party to, for example, an agreement on trade or

¹¹ See M. Evans and P. Koutrakos (eds) *The International Responsibility of the European Union: European and International Perspectives* (Hart, 2013); J. d'Aspremont, *A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union*, V. Kosta, N. Skoutaris and V. Tzevelekos (eds.), *The EU Accession to the ECHR* (Hart, 2014); G. Conway, *Breaches of EC Law and the International Responsibility of Member States*, 13 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 3 (2002) 679; Maarten den Heijer, *Shared Responsibility Before the European Court of Human Rights*, *NETHERLANDS INTERNATIONAL LAW REVIEW*, LX (2013) 411.

¹² F. Hoffmeister, *Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?*, 21 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 3 (2010) 723; P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Union and the ILC's Project on Responsibility of International Organizations* 1 *INTERNATIONAL ORGANIZATIONS LAW REVIEW* (2004) 111; E. Paasivirta and P.J. Kuijper, *Does One Size Fit All?: The European Community and the Responsibility of International Organizations*, 36 *NETHERLANDS YEARBOOK OF INTERNATIONAL LAW* (2006).

environmental protection. One reason for this is that the Convention and the case law of the Strasbourg Court have always envisaged the state as bearing the primary responsibility to ensure human rights within its jurisdiction. Applying this body of law to an international organization, especially to the EU, poses unique legal challenges. The article concludes by discussing the broader issue of the EU's place within the international legal order, and whether and to what extent specialized rules are justified when the EU acts on the international legal plane.¹³

2 THE EU IN THE INTERNATIONAL LEGAL ORDER

Article 6(2) TEU and Protocol 8¹⁴ set out some of the basic conditions under which the EU shall accede to the ECHR. Accession by the EU is also provided for by Article 59(2) of the European Convention on Human Rights, which simply states that “the European Union may accede to this Convention.”¹⁵ This amendment came about by Protocol 14 to the ECHR, which entered into force on 1 June 2010 after ratification by the final Council of Europe member.¹⁶ However, these provisions leave many important questions unanswered, particularly regarding the modalities of EU's participation within the Convention system. The answers to these questions had to be fleshed out through a process of negotiations that were finalized in a draft Accession Agreement. Official talks between representatives of the EU and the Council of Europe began in July 2010¹⁷ and on 5 April 2013 the negotiators finalized a draft Accession Agreement (hereinafter ‘Accession Agreement’)¹⁸ and a draft explanatory report to the Agreement (hereinafter ‘Explanatory Report’).¹⁹

The drafters of the Accession Agreement were faced with numerous questions as to how the EU would accede to the ECHR, touching on the EU's membership, participation and representation, responsibility and liability, and further amendments to the Convention. All of these questions arose due to the fact that accession is being undertaken by an international organization in a body that had been originally conceived and designed for participation by

¹³ Talmon, *supra* note 8.

¹⁴ Protocol (No. 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

¹⁵ Art 59(2) ECHR.

¹⁶ ‘Reform of European Court of Human Rights: Protocol No.14 enters into force’, Press Release 437(2010), Council of Europe, 2010.

¹⁷ ‘European Commission and Council of Europe kick off joint talks on EU's accession to the Convention on Human Rights’, Press Release 545(2010), Council of Europe, 2010. The Committee of Ministers of the Council of Europe nominated the Steering Committee for Human Rights (CDDH) to enter into discussions with the European Commission on working towards a draft accession agreement. An initial agreement was reached in July 2011, and the CDDH delivered its draft agreement and explanatory report. On 13 June 2012 the Committee of Ministers instructed the CDDH to resume negotiations as part of an ad hoc group “47+1” with a view to finalizing the accession agreement.

¹⁸ Fifth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, ‘Final report to the CDDH’, 47+1(2013)008rev2, Strasbourg, 10 June 2013, Appendix I ‘Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’

¹⁹ Fifth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, ‘Final report to the CDDH’, 47+1(2013)008rev2, Strasbourg, 10 June 2013, Appendix V ‘Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’.

states. Many of these questions are posed whenever the EU seeks to take part in its own right within the international legal order.²⁰ EU accession is in many ways an exceptional act that poses its own unique legal issues. However, EU participation in international fora, even in those that involve a system of external review, is not new. Many of the legal issues facing the drafters of the Accession Agreement have been dealt with in similar circumstances. The way in which the EU participates in the international legal order has undergone change over time and may affect both the EU and other international legal orders.²¹

A recent example of the EU taking part in the international legal order is its efforts to obtain enhanced participation status within the United Nations General Assembly.²² The EU had decided that in order to bring its status at the UN General Assembly in line with the letter and spirit of the Lisbon Treaty, it should push for the status of “enhanced observer.”²³ Such a step would allow the EU to participate in the General Assembly and its associated bodies in its own right, without having to rely on the EU Member State holding the rotating Presidency. In order to achieve such status, however, the EU needed to persuade other UN members to vote for a specific UNGA resolution granting the EU greater participation rights. During negotiations for this resolution,²⁴ the EU encountered a somewhat surprising level of resistance from some UN members, some of whom were highly skeptical about allowing the world organization, founded on the sovereign equality of its member states, giving enhanced status to a regional organization. While the Resolution eventually was adopted, albeit with less extensive rights than originally sought by the EU, the language of the resolution reminds us that the EU should not be regarded as an equal participant on par with UN member states, and that the EU’s participation in such a body remains an exceptional situation.

This episode also demonstrates that the EU’s participation in the international system is not predicated solely on its own legal system; it is also subject to constraints imposed by the international legal order. For example, when the EU seeks participation within a treaty regime or international body, this often requires modifications to that system, sometimes even requiring amendment to the constitutive treaty of an IO. This was the case, for example, when the EU became a full member of the Food and Agriculture Organization (FAO).²⁵ In that case, an explicit treaty change was required to allow full membership of the EU as a regional economic integration organization. However much the EU may wish to join or upgrade its status within an

²⁰ See J. Wouters and J. Odermatt, ‘Norms Emanating from International Bodies and Their Role in the Legal Order of the European Union’ in R.W. Wessel and S. Blockmans (eds) *Between Autonomy and Independence: The EU Legal Order Under the Influence of International Organisations* (2013) TMC Asser Press, The Hague, 47.

²¹ See J. Wouters, J. Odermatt and T. Ramopoulos, ‘The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities’, in M. Smith, S. Keukeleire, S. Vanhoonacker (eds), *The Diplomatic System of the European Union: Evolution, Change and Challenges* (Routledge 2014).

²² See J. Wouters, J. Odermatt, J. Ramopoulos, ‘The Status of the European Union at the United Nations General Assembly’ in I. Govaere, E. Lannon, P. Van Elsuwege and S. Adam (eds), *The European Union in the World Essays in Honour of Marc Maresceau* (Martinus Nijhoff, 2013).

²³ P.A. Serrano de Haro, ‘Participation of the EU in the work of the UN: General Assembly Resolution 65/276’, CLEER Working Paper 2012/4, 9.

²⁴ United Nations General Assembly, Resolution A/65/276 ‘Participation of the European Union in the work of the United Nations’.

²⁵ See J.M Pedersen, ‘FAO-EU Cooperation: An Ever Stronger Partnership’, in J. Wouters, F. Hoffmeister and T. Ruys (eds) *The United Nations and the European Union: An Ever Stronger Partnership*, (Springer, 2007).

international organization, it is up to the other IO member states to agree to this. Moreover, resistance may also come from EU Member States themselves, who may view the EU's international role as a threat to their own competences and role in international affairs.²⁶

When the EU takes steps to join or upgrade its status in an international organization or body, this entails both internal legal issues for the EU as well as issues for the IO itself. For the EU, issues arise regarding external representation and competences, especially in cases where the EU enjoys membership alongside some or all of its Member States. Furthermore, EU participation in an IO gives rise to questions regarding the extent to which decisions emanating from those IOs are binding upon the EU and the Member States.²⁷ For the IO, issues arise regarding how the EU will participate in the organs of the IO alongside its Member States. In most cases, the EU does not legally “replace” the EU Member States; rather it often enjoys membership alongside them. This is the case even in bodies such as the WTO where the EU enjoys exclusive competence. Issues that arise for the IO involve voting rights, speaking rights, the right to put forward candidates for committees, and funding. While in some IOs EU participation is generally accepted, it may encounter opposition in other bodies, especially those related to the UN. Some non-EU states fear that EU participation can have a negative effect on the IO, and that participation by regional organizations threatens the rule of the sovereign equality of states, an important principle in the international legal order.²⁸ There may also be a fear that EU participation may erode the rights of other members. The EU may be seen as unfairly gaining greater voice within the organization, or it may encourage “bloc voting” that can make it more difficult for the body to function.²⁹

In cases where the IO has established a dispute resolution or similar mechanism, further questions are raised regarding the EU's involvement in that organ. Which party, either the EU or its Member States, will be responsible for implementing the provisions of an international agreement? This is especially problematic in the case of a so-called “mixed agreement” where the EU takes part alongside its Member States, and is expected to only act regarding issues relating to EU competences. How are third parties to know who has responsibility for the implementation of a certain commitment?³⁰ This can be especially problematic due to the fact that the issue of competences is politically sensitive and legally complex within the EU legal system, and evolves over time. It is not always clear to outside observers who may exercise competence in a given field and who will be responsible for implementing international legal obligations. The EU is therefore highly reluctant to make definitive declarations regarding who is competent in each field. Even where the EU is legally bound to submit and continually update a “declaration of competences” in order to help third parties identify the appropriate party in a

²⁶ See Wouters *et. al supra* note 21.

²⁷ See Wouters *et. al supra* note 20.

²⁸ The Bahamas argued that the Resolution might create “a new category of non-state observer with a unique complement of rights and privileges.” Statement by The Bahamas on behalf of CARICOM, 3 May 2011. See BBC, ‘UN Votes to Give European Union Special Rights’, 4 May 2011. <<http://www.bbc.co.uk/news/world-europe-13276053>>.

²⁹ Groussot *et. al, supra* note 90, 3.

³⁰ Hoffmeister, *supra* note 12.

given dispute, these declarations are often overly broad and vague, and are not updated over time.³¹

Many of the issues involved in the EU's accession to the ECHR are not entirely novel, and have been addressed in some way or another in the context of other organizations and treaty regimes. Yet EU accession to the ECHR gives rise to a number of unique challenges. The ECHR is not a typical convention. Similar to the EU legal order, the Convention is the foundation of a well-developed legal system, and imposes a wide range of legal obligations on its members. How will the EU, itself a highly-developed and complex legal order, interact with the ECHR system? Another unique challenge is the fact that the ECHR was designed to protect the fundamental human rights of individuals. Whereas the EU has participated in treaty bodies in the fields of trade or the environment, unique challenges arise from the ECHR's goals at protecting human rights. How should a convention originally designed to manage the relationship between the individual and the state be applied to the relationship between the individual and the EU legal order?

EU accession is also unique as it involves the EU joining another "European" body. In other multilateral fora, such as the UN, the EU often has to negotiate its position among many non-EU states. The Accession Agreement in many ways reflects the somewhat peculiar situation of the EU negotiating with another 'European' organization. In the context of ECHR accession, however, EU Member States were sitting on both sides of the table. This meant that the EU was able to attain concessions that it would not have otherwise attained had it been negotiating with another international organization with a more global membership. Had the EU been negotiating among 197 states from around the world, rather than 47 from Europe, the Union would not have been able to acquire such participation and other rights.

3 WHY ACCEDE TO THE ECHR?

The EU's accession is now a legal obligation enshrined in the TEU.³² Yet it is worth examining why it was felt necessary for the EU to pursue accession in the first place. Accession is undoubtedly an important symbolic and political act; it sends the message that the EU not only speaks about human rights, but is itself willing to assume binding obligations under Europe's key human right instrument. It could be argued, however, that EU accession is not entirely necessary. The EU already has a high level of human rights protection within its own legal order, and in some instances, these rights guarantees go even further than those protected by the ECHR.³³ The Strasbourg Court has, in its own case law, acknowledged the fact that the EU legal order provides equivalent protection to the ECHR.³⁴ Furthermore, the European Charter of

³¹ J. Heliskoski, 'EU Declarations of Competence and International Responsibility', in M. Evans and P. Koutrakos (eds) *The International Responsibility of the European Union: European and International Perspectives* (Hart, 2013) 189.

³² Art. 6(2) TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

³³ For instance, the European Charter includes protection of personal data (Art. 8), the rights of the elderly (Art. 25) and persons with disabilities (Art. 26), and generally introduces more protection of so-called 'third generation' rights.

³⁴ *Bosphorus Airways v. Ireland* (2006) 42 EHRR 1, para. 165: "the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" ... to that of the Convention system."

Fundamental Rights of the Union³⁵ (hereinafter 'Charter') became legally binding upon the EU in 2009, with the entry into force of the Treaty of Lisbon. Accession, it could be argued, is a legally complex and arduous process, one that is not justified by the potential benefits it could bring. Accession is not necessitated by any real crisis that put into focus a serious deficiency in the EU human rights protection system. Still, accession helps rectify certain gaps in the system of human rights protection in Europe. In addition to being an important symbolic act, accession provides the best solution to the incongruity of the EU's not being a party to Europe's key human rights instrument, while all its Member States are. While accession does not necessarily address all of these issues, it goes a long way to strengthening the system of human rights protection.

One of the first reasons for EU accession is symbolic rather than legal. The EU seeks to promote human rights within the EU, but also sees human rights as a core part of its own foreign policy aims. The TEU states that "[i]n its relations with the wider world, the Union shall uphold and promote its values... [and] shall contribute to ... the protection of human rights."³⁶ It may seem at the very least hypocritical if the EU were to promote human rights abroad while at the same time not subjecting its own legal order to any form of external human rights evaluation. By joining the ECHR system, the EU signifies to its own Member States and the outside world that it too is subject to international human rights, founded in international law, and supervised by an independent Court.

3.1 MIND THE GAPS

There are also legal reasons for accession. EU accession seeks to rectify two main 'gaps' that arise from the EU not being a party to the Convention.³⁷ The first gap relates to the application of human rights to EU primary law, and the situation that arose in *Matthews*, where a Member State was sued for violations that took place at the level of EU primary law.³⁸ The Strasbourg Court held that nothing prevents a State from transferring powers to an international organization such as the EU; however, the obligation to protect those rights is still incumbent on the Contracting Party. The Court stated that "[t]he Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'.³⁹ EU accession would potentially prevent this situation. Upon accession, in a similar case, the EU presumably would be the respondent or co-respondent alongside the Member State. The second gap relates to Member States implementing binding Union law, such as in the *Bosphorus* case.⁴⁰ Applicants have sought to challenge acts of the EU by bringing an action

³⁵ European Charter of Fundamental Rights of the Union, OJ 2010, C 83/02.

³⁶ Art. 3(5) TEU.

³⁷ C. Ryngaert, *The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations*, 60 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 4 (2011) 997. "Logically, this accession should signify a shift from the application of a standard of *equivalent* rights protection to a standard of *identical* rights protection, or, put differently, the closing of any remaining accountability gap in respect of the activities of the EU as an IO."

³⁸ *Matthews v United Kingdom* (1999) 28 EHRR 361.

³⁹ *Matthews v United Kingdom* (1999) 28 EHRR 361, para. 32.

⁴⁰ The case and the associated case law has been discussed extensively elsewhere. See F. Hoffmeister, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland* : App. No. 45036/98 : *European Court of Human Rights (Grand Chamber, June 30,*

against an EU Member State that was implementing Union law. The desire to bridge these gaps led to a somewhat messy line of case law from the Strasbourg Court, including the so-called 'equivalent protection' doctrine set out in *Bosphorus*.⁴¹ Accession seeks to address the problems associated with these two gaps.

These gaps are not exclusive to the EU-ECHR context. Indeed, there are many instances where all the EU Member States are party to an international treaty, but the EU is not, giving rise to inconsistent legal obligations of the EU and its Member States. This occurs even for international agreements that cover fields where the EU has come to exercise considerable competences internally.⁴² There is nothing unique, therefore, about the situation created by the EU Member States being party to the ECHR while the EU is not. In many cases, there is simply no pressing need for the EU to become a party to a treaty. For instance, the obligations under the treaty could be met exclusively or predominantly by the Member States themselves, without any need for the EU to take part as well. A problem arises, however, in cases where the Member States have transferred significant competences in an area covered by a treaty to the EU. In this case the international legal obligations continue to apply to the EU Member States as parties to the treaty, while the EU, the party that is actually capable of complying with the treaty obligations, is not. While the EU may seek to act in conformity with the treaty in order to ensure respect for the Member State's obligations under the treaty, the EU is not formally bound by those commitments. This is because the EU is regarded as a separate and distinct legal entity with its own legal personality under international law, and can only be bound by obligations it has voluntarily entered into.⁴³

This dynamic between the EU and its Member States gave rise to one of the legal problems in *Air Transport Association of America*,⁴⁴ which considered *inter alia* the EU's possible obligations under the Chicago Convention,⁴⁵ a treaty to which the EU is not a party, but all its Member States are. ATA and others argued that, since the EU Member States had transferred significant, if not full, competences to the EU in the field of air transport, and since it was the EU that was actually in a position to fulfill the obligations under the convention, the EU should be legally bound by the Chicago Convention. This argument was based on the CJEU's reasoning in *International Fruit Company*,⁴⁶ where the Luxembourg Court held that the EC was the successor to the Member States in respect of GATT since the Member States had transferred exclusive competence to it in the field of trade. The CJEU rejected the application of the succession theory in *Air Transport Association of America*, however, since the Member States had transferred many, but not *all* competences in the field of air transport to the Union. According to the case law of the CJEU, functional succession can only take place in circumstances where a "full transfer of powers" had taken place.⁴⁷ This meant that the EU, a

2005), 100 AM. J. INT. LAW 2 (2006) 442-449; T. Lock, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights*, 10 HUMAN RIGHTS LAW REVIEW 3 (2010) 529-545; . Ryngaert, *supra* note 37; O. De Schutter, *The Two Lives of Bosphorus : Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention*, 4 EUROPEAN JOURNAL OF HUMAN RIGHTS (2013) 584-264..

⁴¹ For an overview of this case law , see C. Ryngaert, *Oscillating Between Embracing and Avoiding Bosphorus: the European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the EU*, 39 EUROPEAN LAW REVIEW (2014) 176-192.

major international actor in the field of air transport, was not bound by the Chicago Convention despite the fact that all its Member States were.

The succession theory, as applied in *International Fruit Company*, was also put forward as a possible method by which the EU could be made subject to the obligations under human rights law, including the ECHR.⁴⁸ This would have allowed the EU to be bound by the obligations under the Convention without having to go through the process of officially acceding to the Convention. Under this scenario, the EU would be considered to have “succeeded” to the obligations under the Convention by virtue of the fact that all Member States are parties to the Convention and have transferred significant competences to the Union. However, the theory of functional succession has only been applied by the CJEU in very limited circumstances. In the GATT context, for example, it was clear that the EU was already acting *de facto* as a party to the treaty. Furthermore, since the EC had exclusive competence in the area of Common Commercial Policy, the CJEU found that the EU Member States had intended that the obligations under the GATT apply to the EC. The CJEU has been far more reluctant to find succession in the context of other international treaties, and has not accepted the succession theory in relation to the ECHR.⁴⁹ In the case of the ECHR, it was decided that the best way to deal with this issue was for the EU to accede as a full contracting party to the Convention.

One of the benefits of the succession theory is that it prevents gaps arising from the differing legal obligations of the Member States and the Union. It prevents the situation whereby States could escape their legal obligations under a treaty by establishing a separate international organization and transferring powers to it. Yet the functional succession approach is problematic from a public international law perspective. It seems to contradict the legal assumption that an international organization has a separate and distinct legal personality, and that legal persons

⁴² See G. De Baere and C. Ryngaert, *The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy*, 18 EUROPEAN FOREIGN AFFAIRS REVIEW 389 (2013) 395-7.

⁴³ See Jan Willem van Rossem, *Interaction between EU Law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community*, 40 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (2009), 183–227.

⁴⁴ Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* (Judgment of 21 Dec. 2011, OJ C 49/7, 18 Feb. 2012).

⁴⁵ Convention on International Civil Aviation ('Chicago Convention') (7 December 1944) 15 UNTS 295, Entered into force 4 April 1947.

⁴⁶ Joined Cases 21/72 to 24/72, *International Fruit Company and Others* (International Fruit Company) [1972] ECR 1219.

⁴⁷ Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR 4057, para. 49.

⁴⁸ “[I]t is possible to argue that, although the EU has not become party to a human rights treaty itself, the obligations incurred by its Member States by virtue of their membership of such treaties might impose obligations on the EU per se.” T. Ahmed and I. Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 4 (2006) 771, 788. “In transferring power to a newly established Community, the Member States could not grant the Community any possibility to infringe the rights guaranteed by the Convention. Any rules made by the Community contrary to the Convention are therefore void.” H.G. Schermers, *The European Communities Bound by Fundamental Human Rights* 27 (1990) CMLR 249, 251-2.

⁴⁹ [D]espite its virtual application of the ECHR as such and the reference to the ECHR in Article 6 TEU, [the CJEU] has not held that the EU is bound by the ECHR as such nor that it is a party thereto. Although some have argued that the substitution theory set out by the ECJ in respect of the GATT could be applied to the ECHR, this has clearly not been the case.” See F. Naert, ‘Binding International Organisations to Member State Treaties or Responsibility of Member States for their Own Actions in the Framework of International Organisations’ in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds) *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 129, 138.

should only be bound by international obligations that they voluntarily enter into in their own right. The succession doctrine imagines the EU as a sum of the legal obligations of its Member States, rather than as a legally separate and autonomous legal order.

Another problem with the succession approach is that it reduces legal certainty. One would not be sure when an international organization such as the EU was bound by the legal obligations of its Members in any given case. It may also have the effect of discouraging States from establishing international organizations if, upon its creation, that body was automatically encumbered by the obligations of its members. Instead, the approach under international law has been to treat international organizations as separate legal entities that are only bound by treaties to which they have voluntarily entered into, rather than as an amalgamation of the legal obligations of the various members.

3.2 EXTERNAL REVIEW

Upon accession, the EU will not only be subject to human rights obligations by virtue of its internal legal order, but also due to its obligations under *international law*. According to EU law, international treaties are binding upon the Union from the moment they enter into force.⁵⁰ The human rights obligations owed by the Union will therefore stem from international law as well as from EU law. This is a subtle, but potentially important difference in the nature of the obligations. Upon accession the EU will be subject to a system of external human rights review. This is perhaps the most important change. The EU legal system as it currently stands does not have manifest deficiencies with regard to human rights. However, the EU's overall positive human rights record is not in itself an argument against accession. There are many states within the ECHR system that have excellent human rights records and whose legal systems are designed to ensure human rights protection within their jurisdictions. The fact that these states are party to the Convention in no way implies that there is any deficiency or inadequacy in their legal systems. Similarly, the EU's accession to the ECHR is not an admission that there are deficiencies in the EU system of human rights protection. It simply means that the EU is subject to the same level of scrutiny as its Member States. Put another way, it means that a citizen's human rights are subject to the same level of protection irrespective of whether the breach stems from an act committed by the EU or an EU Member State. Moreover, while the EU may protect human rights today, it may be possible that its actions could give rise to human rights violations in the future. The EU, like its Member States, is constantly evolving and adapting, and one could imagine a situation whereby its actions could have far-reaching human rights consequences and where its internal mechanisms are unable or unwilling to address them. External review is a mechanism to help ensure that those internal legal safeguards are in place and working.

⁵⁰ Art. 216 TFEU. See Case C 286/90 *Poulsen and Diva Navigation* [1992] ECR I 6019, paras 9-10. Case C 308/06 *Intertanko and Others* [2008] ECR 4057, para. 51: "as is clear from settled case-law, the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law."

Coherence

The preamble to the draft Accession Agreement states that "... the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe." This coherence is a key reason behind EU accession. By the EU submitting its legal order to a system of external review, there is less likelihood that a divergence will emerge between the EU and ECHR legal orders with regard to the interpretation and application of human rights law. At present, fundamental human rights are to be protected by virtue of *EU law*. Under Article 6(1) TEU, the Charter of Fundamental Rights of the European Union has "the same legal value as the Treaties."⁵¹ Furthermore, Article 6(3) TEU states that

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the *Union's law*.⁵²

Under this construction, it is the EU itself that is competent to interpret and apply these rights as they find their origins in EU law. The EU Treaties provide the CJEU with the exclusive role to interpret EU law.⁵³ The issue of divergence is addressed by Article 52 of the Charter, which states that in cases where EU Charter and ECHR rights correspond, the meaning and scope of the rights shall be the same as set out by the ECHR.⁵⁴ This clause aims to prevent differing or even conflicting interpretations of human rights law by the Luxembourg and the Strasbourg Court while still allowing EU law to provide greater protection. Despite this clause, there may be instances where the CJEU takes a different approach to that of the Strasbourg Court.⁵⁵ Upon assessing the CJEU's case law since the Charter was made formally binding in 2009, de Búrca concluded that there is still a potential for divergence between EU and ECHR human rights standards:

There are still concerns, despite the 'judicial diplomacy' which has developed between the CJEU and the European Court of Human Rights, that a disparity between the approaches of the two courts – to the detriment of human rights protection – may grow if the CJEU increasingly distances itself from the jurisprudence of the Strasbourg Court and places emphasis on an autonomous EU approach to the interpretation of the Charter.⁵⁶

⁵¹ TEU, Art. 6(1).

⁵² TEU, Art. 6(3) (emphasis added).

⁵³ See B. de Witte, *European Union Law: How Autonomous is its Legal Order?*, 65 ZÖR (2010) 141-155, 150.

⁵⁴ Art. 52, European Charter of Fundamental Rights of the Union: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

⁵⁵ G. De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?* 20 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 2 (2013) 168-184.

⁵⁶ *Ibid.*, 172.

Article 344 TFEU sets out that “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”⁵⁷ This is because a decentralized system that allowed other bodies to interpret EU law could lead to differing or even conflicting legal interpretations. It is for this reason that the EU has sought to prevent other bodies being capable, even indirectly, of interpreting EU law.⁵⁸ In the same way that the CJEU is entrusted with guaranteeing the interpretation of the EU Treaties, the European Court of Human Rights is entrusted with interpreting the ECHR. Tulkens points out that “[w]ithout the accession of the EU, the Strasbourg Court will be unable to discharge this responsibility in situations where the Court of Justice interprets the Convention when applying the Charter in cases examined on the merits.”⁵⁹ With EU accession, the EU’s commitments will be binding under international law and should be therefore interpreted in accordance with the jurisprudence of the ECtHR. The rights in the Convention and Charter are not always clear-cut and are constantly being interpreted in response to new situations. Upon accession, there is less chance that the Luxembourg and Strasbourg courts will follow substantially different paths since the Convention will be directly binding upon the EU, including the CJEU.⁶⁰

Access

Accession will also potentially address the gap in the human rights system regarding the inability of individuals to challenge EU acts directly. According to EU law, individuals are only capable of directly challenging EU acts under very limited circumstances.⁶¹ As the system now stands, there is no way to bring the EU before the Strasbourg Court, since the Union is not a party to the Convention. This has led applicants to challenge EU measures indirectly by bringing cases against EU Member States, such as in cases where the state is implementing binding EU law.⁶² Once the EU becomes a party to the Convention, however, individuals will be capable of bringing cases against the EU when they believe that their rights have been affected by EU acts. Accession may also encourage the EU to reform its own legal order to make it easier for individuals to challenge EU acts before the CJEU. This could happen, for instance, if ECHR cases were to expose deficiencies in the EU’s legal system with regard to the rights of individuals to challenge acts of the EU. While these deficiencies could be dealt with potentially through the case law of the CJEU or even EU legislation, certain amendments may be required to the EU Treaties in order to bring the EU order in line with the Convention.

⁵⁷ Consolidated Version of the Treaty on the Functioning of the European Union (‘TFEU’) (2012) OJ C 326/47.

⁵⁸ See Case C-459/03 *Commission v Ireland* (Mox Plant) [2006] ECR 4635.

⁵⁹ F. Tulkens, ‘EU Accession to the European Convention on Human Rights’, European Court of Human Rights – European Judicial Training Network, Seminar on Human Rights for European Judicial Trainers, Strasbourg, 9 October 2012.

⁶⁰ See C. Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, 76 MODERN L. REV. 2 (2013) 254–285.

⁶¹ Access to judicial review depends on whether the party has standing (*locus standi*) before the CJEU. While a ‘privileged applicant’ (EU Member State or EU institution) has an automatic right to review of decisions (Art. 263 TFEU) natural and legal persons have more restricted access. They must satisfy certain conditions in, such as showing the act is of direct and individual concern to them (Art. 263 TFEU).

⁶² This was the case, for example, in *Bosphorus* (*supra* note 34) and the cases discussed in Ryngaert (*supra* note 41).

Positive obligations

EU accession may place the EU under positive obligations to protect and respect human rights. Europe's human rights instruments generally focus on negative obligations, that is, the obligation to refrain from certain conduct. Ahmed and Butler argue, for instance, that "[t]he EU's internal human rights regime is interpreted only to curtail positive acts by the EU institutions, not to mandate positive acts by them."⁶³ Under ECHR law, however, contracting parties not only have to refrain from certain behavior, but also have positive obligations to ensure the rights in the Convention.⁶⁴ It was recognized early on in the life of the Convention that in order for human rights to be secured, certain positive obligations must be imposed upon the state.⁶⁵ One question that will arise, therefore, is the extent to which the EU will be subject to greater positive obligations to prevent, deter and investigate human rights violations within its jurisdiction. This is perhaps one area where different treatment between the EU and other state parties is warranted. The state is capable of directly investigating and punishing human rights abuses within its jurisdiction, while the EU mostly relies on the Member States' authorities to implement EU law.

EU participation in the Convention System

A final argument in favour of accession to the ECHR is that, as a party to the Convention, the EU will be able to participate directly in the Convention system along with other Contracting Parties. If the EU were to be bound by the ECHR via the succession doctrine, the EU would have been bound by the ECHR obligations, but unable to participate in the wider Convention mechanisms. The way in which the EU will be able to participate in these bodies is discussed in the next section.

More than Symbolism

Some commentators emphasize the symbolic value of EU accession.⁶⁶ Klabbers, for instance, argues that one of the reasons for EU accession is "to provide [the EU] with a new foundational myth to justify the existence of the EU and help raise its input legitimacy."⁶⁷ This symbolism is undoubtedly important, and enhances the EU's credibility as a human rights actor. However, the EU's accession to the ECHR will also have a real impact on the enjoyment of human rights in Europe. In fact, Accession can have a positive effect without the EU ever appearing before the Strasbourg Court.

⁶³ T. Ahmed and I. Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 4 (2006) 771, 795.

⁶⁴ C. Stubberfield, *Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights*, 19 AUSTRALIAN INTERNATIONAL LAW JOURNAL (2012) 117-142.

⁶⁵ A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (OUP, 2004).

⁶⁶ De Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 4 AM. J. INT. LAW 105 (2011) 649-693.

⁶⁷ J. Klabbers, *On Myths and Miracles: The EU and its Possible Accession to the ECHR*, 1 HUNGARIAN YEARBOOK OF INTERNATIONAL AND EUROPEAN LAW (2013) 45-62, 58.

[T]he fact that a State is a party to a human rights treaty means that there is a legal yardstick against which its practice can be measured, while politically the issue of rights will be more prominent than might otherwise be the case ... with the State's obligations to the individual as a constant background to official deliberations, the impact of a treaty such as the European Convention is likely to be out of all proportion to the number of cases in which conduct is actually challenged.⁶⁸

By acceding to the Convention, and subjecting the EU to an external system of evaluation, human rights will be a “constant background.” ECHR Accession provides a yardstick by which EU policies and human rights protection can be measured.

The next section turns to the Draft Accession Agreement to evaluate the extent to which it is capable of fulfilling these basic aims. While much attention has focused on whether the Agreement respects the autonomy of the EU, ultimately the Agreement should be assessed according to whether it is capable of strengthening the human rights system in Europe.

4 OVERVIEW OF THE DRAFT AGREEMENT

The TEU and Protocol 8 give little guidance on the conditions under which the EU should accede to the ECHR. In addition to Article 6(2) setting out the EU's obligation to accede to the ECHR, Protocol 8⁶⁹ sets out some basic requirements for any agreement on accession. Protocol 8 states that the accession agreement “shall make provision for preserving the specific characteristics of the Union and Union law.”⁷⁰ It specifies two particular elements. First, arrangements should be made for the EU's participation in the control bodies of the Convention.⁷¹ This means that the EU should not only be subject to the Strasbourg Court's jurisdiction, but it should also be able to take part in the wider Convention machinery, such as the election of judges and enforcement of judgments. Second, it states that mechanisms should be put in place in order to ensure that applications are addressed to the correct party, either the EU or the Member States where appropriate.⁷² According to the Protocol, the agreement must also “ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions.”⁷³ The Protocol also states that nothing in the accession agreement shall affect Article 344 TFEU. It could be argued that this requirement in Protocol 8 is already found in EU law, according to which international agreements entered into by the Union must not violate provisions of EU primary law.⁷⁴ This includes the need for any Accession Agreement

⁶⁸ J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (1988) 1.

⁶⁹ Protocol 8, *supra* note 14.

⁷⁰ Article 1, Protocol 8, *supra* note 14.

⁷¹ Article 1(a), Protocol 8, *supra* note 14.

⁷² Article 1(b), Protocol 8, *supra* note 14.

⁷³ Article 2, Protocol 8, *supra* note 14.

⁷⁴ See Art. 218(11) TFEU: “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”

to respect the “autonomy” of the EU legal order.⁷⁵ This of course gives rise to the complex question of what exactly autonomy entails and requires.⁷⁶

While representatives of the Union and the CDDH discussed EU accession, parallel discussions took place between delegations from the European Court of Human Rights and the Court of Justice of the European Union. On 17 January 2011, delegations from the two Courts discussed inter alia issues regarding the EU’s accession to the ECHR, and the effects this may have on the two European Courts. A Joint Communication from Presidents Costa and Skouris was published, outlining their opinion on important issues regarding the modalities of a draft agreement. The Communication stressed above all that a procedure should be put in place to allow the CJEU to undertake its own internal review before a case is heard by the Strasbourg Court.⁷⁷ The text of this Communication has been extremely influential since it outlines the issues of key importance to both Courts. Before the Accession Agreement enters into force it will be the subject of an Opinion by the CJEU.⁷⁸ For the Agreement to survive this step in the process, it presumably must at least satisfy the requirements set out in this Joint Communication.

The drafters of the Accession Agreement had to satisfy multiple demands. In addition to the documents referred to above, the Accession Agreement must satisfy the basic requirements of EU constitutional law. The agreement also must be approved by all EU Member States as well as the European Parliament (a condition enshrined in the TFEU).⁷⁹ While much is made of whether the autonomy of the EU legal order may be threatened by accession, one may also discuss whether EU accession may have a negative effect on the ECHR legal order. The Agreement must satisfy the members of the Council of Europe, whose approval is also required for it to enter into force. To this end, the drafters were involved in a careful balancing act.⁸⁰ They needed to ensure that the EU accedes, as far as possible, under the same conditions as the other Contracting Parties. At the same time, certain provisions needed to be designed to account for the “specific characteristics” of the Union and Union law. The preamble to the Accession Agreement states that, “having regard to the specific legal order of the European Union, which is not a State, its accession requires certain adjustments to the Convention system to be made by common agreement.”⁸¹ However, these “certain adjustments” should not amount to giving the EU “special treatment.” Moreover, they should not threaten the well-functioning of the ECHR system. But what exactly are the “specific characteristics” of the EU legal order, and when can these justify specialized rules for the EU? The following section provides an overview

⁷⁵ De Witte, *supra* note 53.

⁷⁶ See Eckes, *supra* note 60; 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.

⁷⁷ Joint communication from Presidents Costa and Skouris, Strasbourg and Luxembourg, 24 January 2011.

⁷⁸ A case has been brought by the Commission under Article 218(11) TFEU in order to assess the compliance of the draft agreement with EU law. On 5-6 May 2014 the CJEU held a hearing on the Draft Accession Agreement. See ‘Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/13)’ (2013) OJ C 260/19.

⁷⁹ Art. 218(6)(a)(ii) TFEU.

⁸⁰ Lock, *supra* note 76.

⁸¹ Accession Agreement, *supra* note 18, Preamble.

of the draft Accession Agreement and examines how the drafters sought to strike a balance between specialized rules and special treatment.

4.1 EU ACCESSION CLAUSE

When the EU joins an international organization or becomes a party to a multilateral convention, a specific clause often has to be inserted to allow for EU participation. This usually takes one of two forms. First, the founding instrument may refer to the European Union specifically as a member. This is the case, for instance, in the WTO Agreement.⁸² Similarly, the Convention on the elaboration of a European Pharmacopoeia simply states that “[t]he European Economic Community may accede to the present Convention.”⁸³ The second and more common option is for the instrument to include a so-called ‘Regional Economic Integration Organization’ (REIO) or ‘Regional Integration Organization’ (RIO) clause. These clauses allow accession by organizations other than the EU, often requiring that organization to have met specific criteria, such as having transferred competences under the relevant treaty to that regional organization.⁸⁴ While REIO clauses allow for the possibility of membership by other international organizations, in reality the EU is often the only organization that joins as a full member. The REIO clause avoids the constitutive instrument of the organization referring to the EU specifically, and allows for the possibility of other regional organizations to join in the future. For instance, Article 44 of the UN Convention on the Rights of Persons with Disabilities allows for participation of “Regional integration organizations.” It employs a commonly-used definition: a REIO is an “organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.”⁸⁵ The term “State Parties” throughout the convention applies to such organizations “within the limits of their competence.”⁸⁶

In the case of the EU’s accession to the ECHR, however, there will be a specific clause mentioning the EU, rather than “regional organizations” generally. The European Convention on Human Rights was amended to include a specific clause stating that “[t]he European Union may accede to this Convention.”⁸⁷ This means that if any other organization wishes to accede to the ECHR, this would require further amendment to the Convention and a similar accession agreement. The decision to refer to the EU specifically, rather than through a REIO clause, demonstrates the exceptional nature of the EU and its place within the ECHR system. It is not envisaged that any other international organization within Europe, such as Euratom or the European Free Trade Association, would similarly be able to accede in the future.

⁸² Art. XI, Agreement establishing the World Trade Organization, signed on 15 April 1994, 1867 UNTS 154.

⁸³ Art. 12(3), Convention on the elaboration of a European Pharmacopoeia (No 50, Council of Europe).

⁸⁴ Annex IX, Art. I, United Nations Convention on the Law of the Sea.

⁸⁵ Art. 44, UN Convention on the Rights of Persons with Disabilities.

⁸⁶ Art. 44(2) UN Convention on the Rights of Persons with Disabilities.

⁸⁷ See Article 17(2) ECHR, amended by Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

4.2 PARTICIPATION IN THE CONVENTION SYSTEM

It was decided that the EU, by acceding to the ECHR, would not only be capable of appearing as a respondent before the Strasbourg Court, but that it may also take part in the wider ECHR machinery. The draft Agreement therefore had to answer questions regarding how the EU would participate in the ECHR bodies alongside the EU Member States. This issue is further complicated by the fact that, unlike the other ECHR parties, the EU will accede to the ECHR only, and will not become a member of the Council of Europe.

Article 20 ECHR states that the number of Judges shall be equal to the number of contracting parties,⁸⁸ which implies that there should also be a judge with respect to the European Union. Article 22 ECHR sets out that “judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party.”⁸⁹ This means that there is no need for a formal amendment to the Convention to allow an extra judge in respect of the EU. There was discussion about whether the “EU judge” should exercise the same rights and duties as the other judges, or whether special rules should apply in respect of this judge. For instance, the “EU judge” might only take part in cases where the EU is a party to the proceedings, or where the case involves questions of EU law. This may have prevented the appearance of “double representation” whereby the EU is represented via an EU Member State and an EU judge.

At the same time, it was argued by some that an “EU judge” is necessary in order to ensure EU representation and so that there is knowledge on how the “specific characteristics” of EU law should be taken into account.⁹⁰ The problem with this argument, however, is that while the “EU judge” will be nominated by the EU, he or she will in no way “represent” the EU in the ECHR system. It is clear from the Convention that the judges are to be independent and sit in their individual, not national, capacity.⁹¹ It is also clear from the Explanatory Report that the judge in respect of the EU will participate on an equal footing with the other judges.⁹² The concept of having a judge in respect of the EU is somewhat novel, and does not appear in other Conventions where the EU is a party. The International Tribunal for the Law of the Sea (ITLOS) is composed of 21 members, elected via secret ballot after having been nominated by a State Party.⁹³ There is no “EU judge,” and the Statute forbids more than one member of the Tribunal from the same state.⁹⁴ Within the WTO framework, there are no separate provisions to allow an EU member to take part in the Dispute Settlement Body.⁹⁵ Article 8(1) of the Dispute Settlement Understanding simply provides that “Panels shall be composed of well-qualified governmental

⁸⁸ Art. 20 ECHR.

⁸⁹ Art. 22 ECHR.

⁹⁰ 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*, 218 EUROPEAN ISSUES (2011) 3.

⁹¹ Art. 21 (2) ECHR: “Judges shall sit on the Court in their individual capacity.”

⁹² Explanatory Report, *supra* note 19, para. 77.

⁹³ Art. 2, Statute of the International Tribunal for the Law of the Sea.

⁹⁴ Art. 3, Statute of the International Tribunal for the Law of the Sea.

⁹⁵ See T. Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, 35 COMMON MARKET LAW REVIEW (1998)325, 348.

and/or non-governmental individuals.” The inclusion of a judge in respect of the EU is unique in the context of the EU joining international organizations.

The inclusion of an “EU judge” gives rise to questions regarding their nomination and election. According to Article 22 ECHR, judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates nominated by the Contracting Party.⁹⁶ The EU will also be able to take part in the election of judges in the same manner. According to the Accession Agreement, whenever the Parliamentary Assembly exercises its functions in relation to Article 22 ECHR, the European Parliament shall be entitled to participate with the right to vote. The number of representatives accorded to the European Parliament is to be equal to that of the highest number of representatives to which any State is entitled under Article 26 of the Statute of the Council of Europe, which is 18.

According to the Accession Agreement, the European Parliament’s modalities for participation in this regard are to be defined by the Parliamentary Assembly, in cooperation with the European Parliament. Judges nominated by the EU will therefore go through the same process as other judges nominated by Contracting Parties. It is not yet clear by which process the EU judge will be nominated, and who will be involved in selecting nominees. It will be up to the EU to decide on its own process of nominating a judge, in accordance with its internal legal order. The Agreement also gives the European Parliament a greater role in representing the EU internationally, a role that has generally been played by the European Commission⁹⁷ and other institutional actors.

A related issue is the extent to which the EU may participate in the Committee of Ministers of the Council of Europe. The Committee of Ministers has several responsibilities regarding the work of the ECtHR, including the monitoring of commitments by Contracting Parties and the supervision of the execution of judgments.⁹⁸ According to the Accession Agreement, the EU shall be entitled to participate in the Committee of Ministers, with the right to vote, in regard to decisions under the following articles: Article 26(2) (to reduce, at the request of the plenary Court, the number of judges of the Chambers); Article 39(4) (the execution of the terms of a friendly settlement); Article 46 (2) to (5) (execution of judgments); Article 47 (advisory opinions) and Article 54(1) (Powers of the Committee of Ministers).⁹⁹ The issue of EU voting rights in IOs is often a sensitive subject, and voting within the Committee of Ministers is no exception. During the negotiations the EU was in favour of a right to participate and vote on all issues regarding the Strasbourg Court. Once again, however, the “double representation” of EU Member States is an issue. Furthermore, non-EU states can argue that the EU Member States could vote en bloc to prevent decisions that would be unfavorable to the EU or its Member States.

⁹⁶ Art. 22 ECHR.

⁹⁷ Art. 17 TEU. “With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the European Commission] shall ensure the Union’s external representation.”

⁹⁸ Art. 46 ECHR.

⁹⁹ Accession Agreement, *supra* note 18, Art. 7.

Under EU law, EU Member States are under an obligation to act in a coordinated manner when expressing statements and voting within international fora.¹⁰⁰ While the precise nature of this obligation is still being developed in the case law of the CJEU,¹⁰¹ it is likely that the EU Member States would be under an obligation to vote in a coordinated manner. There was a concern, therefore, that the combined votes of the EU Member States and the European Union could impede the effective functioning of the Committee of Ministers, especially in cases where it exercises supervision of judgments under Articles 39 and 46 ECHR.¹⁰²

Special voting rules have been established regarding the situation where the Committee of Ministers exercises its supervisory function with regard to obligations upon the EU alone or upon the EU and one or more of its Member States jointly. The Accession Agreement includes a Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party. This rule effectively sets out different voting requirements for certain decisions to be taken. For instance, decisions by the Committee of Ministers under Rule 17 (Final Resolution) shall be adopted “if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour”¹⁰³ instead of the majority set out in Article 20.d of the Statute of the Council of Europe.¹⁰⁴ These rules do not themselves make up part of the Accession Agreement, but are intended to be adopted by the Committee of Ministers. The EU’s accession to the ECHR will introduce a more complex system of voting and participation.

This voting arrangement deviates from the established voting practice in most other international bodies where the EU is a member alongside its Member States. In international organizations where voting takes place, the IO is faced with the issue of how to reconcile the fact that the EU is a separate legal entity that should *prima facie* have the right to vote, and the fact that the EU is constituted by other Member States who will retain their right to vote. Most organizations seek to avoid the issue of ‘double representation’ that this entails. In the vast majority of cases, the EU and the EU Member States exercise voting rights alternatively, that is, when the EU exercises its right to vote the EU Member States will not be entitled to vote, and vice-versa. The decision to exercise these voting rights as the EU or as the EU Member States separately often follows the issue of competences. For instance, the Member States may exercise their right to vote on issues relating to funding of the IO.

¹⁰⁰ This stems from the “principle of sincere cooperation” under Art. 4(3) TEU. See G. De Baere, *O, Where is Faith? O, Where is Loyalty? Some Thoughts on the Duty of Loyal Co-operation and the Union’s External Environmental Competences in the light of the PFOS Case*, 36 EUROPEAN LAW REVIEW (2011) 405.

¹⁰¹ See I. Govaere, ‘Novel Issues Pertaining to EU Member States Membership of other International Organisations: the OIV case’ in I. Govaere, E. Lannon, P. Van Elsuwege and S. Adam (eds), *The European Union in the World Essays in Honour of Marc Maresceau* (Martinus Nijhoff, 2013).

¹⁰² See Explanatory Report, *supra* note 19, paras 82-89.

¹⁰³ Accession Agreement, *supra* note 18, Annex III.

¹⁰⁴ Art. 20(d) Statute of the Council of Europe: “All other resolutions of the Committee ... require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.”

This setup prevents the EU from “gaining” an extra vote through becoming a member of the IO. For example, Article 4(4) of Annex IX of the United Nations Convention on the Law of the Sea (UNCLOS) states that “Participation of ... an international organization shall in no case entail an increase of the representation to which its member States which are States Parties would otherwise be entitled, including rights in decision-making.”¹⁰⁵ The Constitution of the Food and Agriculture Organization (FAO) is a typical example of a clause that provides the voting arrangements in organizations where the EU is a member alongside its Member States:

A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Member Nations of the Organization in the areas of their respective competences and in accordance with rules set down by the Conference.¹⁰⁶

Article 9 of the Agreement Establishing the World Trade Organization states that “[w]here the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their Member States which are members of the WTO.”¹⁰⁷ The Statute of the International Renewable Energy Agency (IRENA) states that, regarding a regional economic integration organization, “[t]he organisation and its Member States shall not be entitled to exercise rights, including voting rights, under the Statute concurrently.”¹⁰⁸

The Accession Agreement is novel in that it allows the EU Member States and the European Union to exercise their voting rights concurrently. One reason for this may be the fact that it would be difficult to tell when the EU or the Member States should exercise voting rights in the ECHR system. Unlike in other multilateral fora, where either the EU or the Member States exercise voting rights depending on the field of competence at issue, both the EU and the Member States may be involved simultaneously in the Committee of Ministers. However, special arrangements are to be introduced in order to prevent the combined votes of the EU and the Member States do not prejudice the Committee of Minister’s supervisory functions.¹⁰⁹ France and the UK considered that the special voting arrangements could set a dangerous precedent, since third states may seek to curtail the voting rights of the EU and the Member States where they participate jointly in other fora.¹¹⁰ The EU’s negotiating partners were adamant to include these arrangements due to the specific nature of the Committee of Minister’s supervisory functions under the Convention.

¹⁰⁵ Article 4(4) of Annex IX, UNCLOS.

¹⁰⁶ Art. II, Constitution of the Food and Agriculture Organization.

¹⁰⁷ Art.9, Agreement establishing the World Trade Organization.

¹⁰⁸ Article XI, Statute of the International Renewable Energy Agency (IRENA).

¹⁰⁹ See Explanatory Report, *supra* note 19, para. 82.

¹¹⁰ Council of the European Union, ‘Accession of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR): - State of play’ 16385/11, Brussels, 8 November 2011. See T. Lock, *End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR* 31 YEARBOOK OF EUROPEAN LAW 1 (2012) 162.

4.3 FUNDING

The issue of funding is also raised whenever the EU seeks to participate in an international organization or body. In the context of the EU's ECHR accession, the situation is made somewhat more complex by the fact that the EU is not a member of the Council of Europe. Under Article 50 ECHR, the expenditure of the European Court of Human rights is to be borne by the Council of Europe.¹¹¹ Participation by the EU in the ECHR system will no doubt add to the expenses of the Council of Europe and the Strasbourg Court. This not only includes costs of running the ECtHR, but also expenditure related to the process of supervision of the execution of judgments, as well as expenditures related to the Parliamentary Assembly, the Committee of Ministers, and the Secretary General of the Council of Europe when they undertake work related to the Convention.

It was never disputed that the EU should contribute to this added expenditure. However, unlike the other Contracting Parties, since the EU will not become a member of the Council of Europe, it should in principle not pay assessed contributions to the overall budget of the organization. Article 8 of the Accession Agreement sets out how the EU's annual contribution shall be calculated. The EU's contribution is fixed at 34% of the highest contribution made in the previous year by any State to the budget of the Council of Europe, in addition to the contributions of the individual EU Member States. It was estimated that the increased costs imposed by the EU's participation, including IT, logistics, and administration would amount to 15%. This change will not require any amendment to the Convention itself, but is nevertheless an issue defined in the Accession Agreement. The drafters sought to ensure that the EU's contribution would be calculated in a relatively straightforward and simple manner.¹¹²

The issue of funding is also somewhat complicated whenever the EU takes part in an international organization alongside its Member States. On the one hand, since the EU shall accede on an equal footing with other Contracting Parties, the EU should contribute to the organization in the same manner. Yet on the other hand, the situation should be avoided whereby the EU Member States effectively pay twice, first via their membership in the IO, and secondly via their membership in the EU. International organizations use different rules to manage this situation. For example, in the World Trade Organization, contributions are based on each Member's share of international trade.¹¹³ It would arguably be unfair if the EU would make a contribution in addition to that of the individual Member States, so the EU itself does not

¹¹¹ Art. 50 ECHR.

¹¹² The Commission Negotiating directives stated that "Any financial contribution by the Union to ECHR related expenditure (covering the operating costs of the European Court of Human Rights and costs related to the Committee of Ministers' activities to which the Unions participates) should take the form of a fixed amount, calculated according to a pre-established formula¹ which should be proportionate to the extent of EU participation in the ECHR organs." Council of the European Union, 'Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR)', 11 May 2010., Annex II, para. 9.

¹¹³ Article 7(2), Agreement establishing the World Trade Organization "The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out: (a) the scale of contributions apportioning the expenses of the WTO among its Members." At its meeting in 1995 the General Council approved the recommendations (WT/GC/M/8) of the Joint WTO/GATT Committee on Budget, Finance and Administration on a new methodology for the calculation of the assessment of Members' contributions to the WTO budget.

directly contribute to the WTO budget. In the Food and Agriculture Organization, where the EU is a full member, the EU does not contribute to the budget in the same manner as the members that are states.¹¹⁴ Rather, Article XVIII, paragraph 6 states that “[a] Member Organization shall not be required to contribute to the budget as specified in paragraph 2 of this Article, but shall pay to the Organization a sum to be determined by the Conference to cover administrative and other expenses arising out of its membership in the Organization.”¹¹⁵ In 2011 this annual payment made to the FAO was € 270,000.¹¹⁶ A similar clause can be found in Article 9(2) of the Statute of the Hague Conference on Private International Law, to which the EU is a contracting party. The clause provides that the member organization shall not contribute to the budget of the Hague Conference on Private International Law, but shall pay a sum to be determined by the Conference, “to cover additional administrative expenses arising out of its membership.”¹¹⁷ In this vein, the Accession Agreement also requires the Union to contribute to the funding of the ECHR machinery, stating that the EU shall “pay an annual contribution dedicated to the expenditure related to the functioning of the Convention.”¹¹⁸ Generally, the way in which the Accession Agreement deals with the issue of financial contribution by the EU corresponds with the established practice associated with the EU’s involvement in other international organizations. It seeks to strike a balance between the need to fund the extra costs associated with participation by an international organization, but does not require it to pay assessed contributions in an identical manner to state Contracting Parties.

4.4 RELATIONSHIP TO OTHER AGREEMENTS

A further complication that arises from EU accession involves the EU’s relationship with other international agreements linked to the Convention system. For example, the *European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights* is a separate international agreement that requires Parties to ensure that persons participating in proceedings instituted under the ECHR enjoy immunity from legal process in respect of their acts before the Strasbourg Court.¹¹⁹ Similarly, the *Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe* relates to privileges and immunities granted to the judges of the ECtHR. The EU will not accede to these conventions as such. The General Agreement on Privileges and Immunities is only open to member States of the Council of Europe, and would have to be amended to allow the EU to accede to it. Article 9 of the Accession Agreement states that the EU will, within the limits of its competence, “respect the provisions of” the relevant articles of these treaties.¹²⁰ It also states that the Contracting Parties “shall treat the European Union as if it were a Contracting Party to that Agreement or Protocol.” While the EU will not accede to these treaties, the EU could be seen to have

¹¹⁴ FAO Constitution, Article XVIII, para. 2 (Budget and Contributions).

¹¹⁵ FAO Constitution, Article XVIII, paragraph 6.

¹¹⁶ See ‘EU financial contribution to the Food and Agriculture Organization’, <http://eeas.europa.eu/delegations/rome/eu_united_nations/work_with_fao/ec_financial_contribution_fao/index_en.htm>.

¹¹⁷ Art. 9(2) Statute of the Hague Conference on Private International Law.

¹¹⁸ Art. 8, Accession Agreement, *supra* note 18.

¹¹⁹ See European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (ETS No. 161).

¹²⁰ Art. 9 Accession Agreement, *supra* note 18.

“unilaterally assumed the obligations” under international law.¹²¹ In any event, given the nature of privileges and immunities, it will most likely be the Member States, not the EU, that will be responsible for implementing these obligations.

4.5 CO-RESPONDENT MECHANISM

Protocol 8 states that the Accession Agreement should contain provisions for “the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.”¹²² There was always a question regarding how the Strasbourg Court would ensure that proceedings are brought against the appropriate party, either against the EU, a Member State, or both. This is perhaps one of the most highly debated issues in the discussions on EU accession. As a general rule, it is for the party or parties bringing proceedings before the ECtHR to decide against whom they shall bring an application. When the EU becomes a party to the Convention, applications may potentially be brought against the EU regarding a violation of the Convention. This may include situations where a Member State is applying binding EU law (*Bosphorus* situations) or where the applicant alleges a violation of the Convention stemming from primary EU law (*Matthews* situations). The Accession Agreement seeks to avoid situations where proceedings are brought against the wrong party.

There were potentially a number of ways to address this issue. One option might have been to follow the EU’s practice where it takes part in other multilateral treaties. In many cases where the EU and its Member States take part in a multilateral treaty alongside one another, in a so-called “mixed agreement,” the Union is required to submit a “declaration of competence” that addresses the question of who has competence with respect to particular obligations under the treaty.¹²³ For example, Article 6(1) of Annex IX of the UN Convention on the Law of the Sea (UNCLOS) states that “[p]arties which have competence under article 5 of this Annex [referring to declarations of competence] shall have responsibility for failure to comply with obligations or for any other violation of this Convention.”¹²⁴ One of the assumptions behind a declaration of competence is that responsibility for breach of the convention should follow the distribution of competence.¹²⁵ In disputes arising from the Convention, it allows third parties to know whether to bring claims against the EU or an EU Member State.¹²⁶

However, in the case of the ECHR, it would not have been appropriate to require the EU to submit a declaration of competence. One reason relates to the type of rights and obligations enshrined in the ECHR. Unlike UNCLOS or other multilateral treaties, the ECHR is not limited to a specific field or activity; rather, the Convention establishes that certain human rights must be protected within the jurisdictions of the Contracting Parties. This could potentially cover anything

¹²¹ See *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, para. 27.

¹²² Protocol 8, *supra* note 14.

¹²³ See Heliskoski, *supra* note 31.

¹²⁴ Article 6(1) of Annex IX of the UN Convention on the Law of the Sea (UNCLOS).

¹²⁵ Heliskoski, *supra* note 31, 191.

¹²⁶ See Hoffmeister *supra* note 12.

from the EU's rules on competition law to actions taken under the CFSP. It would be difficult, if not impossible, to draw up a declaration of competences setting out all the potential fields which the Convention may cover. While the UN Convention on the Rights of Persons with Disabilities, a key human rights treaty to which the EU is a full contracting party, does require the EU to submit a declaration of competences,¹²⁷ this declaration is rather short, vague and open-ended in describing the competences regarding the implementation of the Convention.¹²⁸ Another reason why a declaration of competence would be inappropriate in the ECHR system is that, under ECHR law, competence is not necessarily the touchstone upon which responsibility is based. The case law of the Strasbourg Court evinces a willingness to examine issues other than competence when determining responsibility.¹²⁹

A further problem with the "declaration of competence" model is that it would ultimately require the Strasbourg Court to identify the correct respondent in a given case. This would arguably require the Strasbourg Court to make its own assessment of the division of competence within the EU legal order. This would be a clear violation of the autonomy of the EU legal order, since it would allow a Court other than the CJEU to rule on issues related to the interpretation of EU law. Another proposed option was the introduction of a special procedure whereby the Strasbourg Court could deliver its opinion on which party is the correct respondent in any given case. Again, based on the case law of the CJEU, inviting the Strasbourg Court to make such a determination would arguably violate the autonomy of the EU legal order, and the Accession Agreement would not survive an Opinion of the Court of Justice.

The option that has been chosen, and is now enshrined in the Accession Agreement, is to introduce a new "co-respondent procedure" to the Strasbourg Court. The Explanatory Report states that the co-respondent mechanism was necessary in order "to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States."¹³⁰ Under this model, it remains the prerogative of the applicant to choose the party against whom to bring proceedings. However, the co-respondent procedure allows another party (either the EU or an EU Member State or Member States) to be added as a co-respondent in certain cases. A co-respondent is not an intervening party, but a full party to a case,¹³¹ and judgments are equally binding on both the respondents. While it was generally agreed that a co-respondent mechanism was the best way to ensure cases are addressed to the appropriate party, there was disagreement regarding how such a procedure should function in practice.¹³²

¹²⁷ Art. 44(1) Convention on the Rights of Persons with Disabilities.

¹²⁸ See Declaration Concerning the Competence of the European Community with Regard to Matters Governed by the United Nations Convention on the Rights of Persons with Disabilities (Declaration made pursuant to Article 44(1) of the Convention). Available at <<http://ec.europa.eu/world/agreements/reserveText.do?treatyId=7581>>.

¹²⁹ On the ECtHR's approach to responsibility of IOs See C. Ryngaert, *The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations*, 60 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 4 (2011) 997.

¹³⁰ Explanatory Report, *supra* note 19, para. 38.

¹³¹ Art. 3(1) b Accession Agreement, *supra* note 18.

¹³² Groussot *et. al*, *supra* note 90, 7.

Article 3 of the Accession Agreement sets out the modalities of the “co-respondent mechanism” that will be introduced to the ECHR system. The Convention shall be amended to add the following passage at the end of Article 36, which is to be renamed “Third party intervention and co-respondent”:

The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.¹³³

The Accession Agreement sets out two situations where the co-respondent mechanism would apply. The first scenario allows the EU to be added as a co-respondent in cases where an application has been brought against one or more EU Member States, and the allegation against the Member State “calls into question the compatibility with the Convention rights at issue of a provision of European Union law, including decisions taken under the TEU and under the TFEU, notably where that violation could have been avoided only by disregarding an obligation under European Union law.”¹³⁴ This is designed to cover *Bosphorus* situations, where the alleged violation of the Convention rights stems from a Member State implementing binding EU law. In these cases, the violation may be found in an act of an EU Member State, but the breach can only be rectified at the EU level.

The second scenario allows EU Member States to become co-respondents where an allegation against the EU “calls into question the compatibility with the Convention rights at issue of a provision of the TEU, the TFEU or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.”¹³⁵ This provision demonstrates that the ECtHR will have jurisdiction in cases where the alleged violation stems from EU primary law. In such cases, it is not the EU as such that is capable of rectifying such a violation, since the TEU and TFEU can only be amended by the Member States. It is not entirely clear, however, whether this provision would entail *all* the EU Member States being added as co-respondents, since a change to EU primary law would require approval of all 28 Member States.

There are two ways a party can become a co-respondent: either by accepting an invitation by the Strasbourg Court to become a co-respondent or upon a request by a Contracting Party.¹³⁶ A co-respondent is a full party to the case, and the judgment of the Strasbourg Court applies to

¹³³ Art. 3 Accession Agreement, *supra* note 18.

¹³⁴ Art. 3(2) Accession Agreement, *supra* note 18.

¹³⁵ Art. 3(3) Accession Agreement, *supra* note 18.

¹³⁶ Art. 3(5) Accession Agreement, *supra* note 18. “A High Contracting Party shall become a co-respondent either by accepting an invitation by the Court or by decision of the Court upon the request of that High Contracting Party.”

both respondents.¹³⁷ Under this format, there would be joint responsibility between the EU and the Member State for the violation of the Convention, and it would be up to the respondent and co-respondent to decide how to repair any violation. The Accession Agreement addresses the issue of responsibility in cases where a co-respondent is involved. Article 3(7) states that:

If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.¹³⁸

This means that in cases where the EU or Member States appear as respondent and co-respondent, there will be a presumption in favour of joint responsibility. This presumption can be rebutted if the Strasbourg Court decides to find only one party to be responsible.

The co-respondent mechanism is another novelty in the Accession Agreement in terms of international law. Though it has been suggested that the possibility of “co-defendant” status could be used in other dispute resolution bodies, such as the WTO,¹³⁹ the mechanism introduced by the Accession Agreement is not seen in other multilateral treaties in which the EU and the Member States both participate. In those cases, it is up to the party bringing the case to decide against whom to bring legal proceedings.¹⁴⁰ The co-respondent mechanism adds a somewhat complex procedure to the ECHR system, and it is unlikely that in other organizations the EU would be afforded similar treatment. The co-respondent mechanism will likely be a special feature of the ECHR system, rather than a precedent for other international bodies in which EU participates.

4.6 PRIOR INVOLVEMENT OF THE CJEU

The Communication of the two Presidents of the Courts included a condition that any Accession Agreement allow some form of prior involvement of the Court of Justice of the European Union.¹⁴¹ It stated that “In order that the principle of subsidiarity may be respected also in that situation, a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review.” The draft Accession Agreement provides for this possibility, stating that, in cases where the EU is a co-respondent, and the CJEU has not already had the chance to assess the compatibility of Convention rights, then “sufficient time

¹³⁷ Art. 3(1) Accession Agreement, *supra* note 18.

¹³⁸ Article 3(7) Accession Agreement, *supra* note 18.

¹³⁹ See S. Griller, E. Vranes, ‘EC-Bananas Case’, in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law < <http://opil.ouplaw.com/home/epil> >: “It is particularly striking that, under the DSU, there is no co-defendant status enabling other WTO members—like the group of 77 ACP countries that were more or less directly affected by the outcome of the EC–Bananas Case—to join the respondent in a dispute in which they take an interest.”

¹⁴⁰ See Hoffmeister, *supra* note 12.

¹⁴¹ Joint Communication, *supra* note 77, 2.

shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court.”¹⁴² The Agreement also sets out that this assessment by the CJEU should be “made quickly so that the proceedings before the Court are not unduly delayed”.¹⁴³

It may be seriously questioned whether such a clause is indeed necessary. The Convention does not provide a similar procedure with respect to any of the state Contracting Parties. If the EU is to be treated in a similar manner to other contracting parties, is the EU not provided “special treatment” by allowing the CJEU to have a chance to first assess the case? One legal argument is that such a procedure is necessary due to the fact that, under the EU’s legal system, there is a possibility that a case will not reach the CJEU before it reaches Strasbourg. For instance, a court of an EU Member State may simply decide not to make a reference for a preliminary ruling, in which case, the CJEU will never have been provided the opportunity to rule on the legal issue.

However, if the CJEU is not given the opportunity to rule on a given case involving Convention rights, this is due to the rules of procedure in the EU legal order. This is not a situation that arises due to the *specific nature* of the EU legal order as such; it derives from an alleged *defect* in the procedural law within that legal order. This defect could be remedied, for example, by modifying the CJEU’s case law, or amending the EU Treaties. Jacqu , for instance, argues that a more logical solution to this issue would be reform the preliminary reference procedure “by requiring national courts to conduct a preliminary ruling in all cases in which the conflict between an act of the Union and the ECHR is invoked.”¹⁴⁴ However, in order to satisfy the CJEU, the drafters of the Accession Agreement decided instead to confer upon the EU special treatment, treatment that is not afforded to the UK Supreme Court, the French *Cour de cassation*, or any other European high court. As Lock notes, “the introduction of a specific procedure guaranteeing a prior involvement of the ECJ leads to a privileging of the EU’s legal order over the legal orders of other parties to the Convention.”¹⁴⁵ Craig argues that it is not the nature of the EU legal order that necessitates the prior involvement procedure, but the restrictive standing criteria used in the EU legal system:

It nonetheless remains paradoxical that the EU courts should be able to use Article 3(6) of the Draft Agreement in order to “pause” the case at Strasbourg in order for the CJEU to adjudicate on the substance of Convention rights, where it was the CJEU’s very own restrictive standing criteria that prevented the EU courts from doing so before the case was taken to Strasbourg.¹⁴⁶

¹⁴² Art. 3(6) Accession Agreement, *supra* note 18.

¹⁴³ Art. 3(6) Accession Agreement, *supra* note 18.

¹⁴⁴ J-P Jacqu , *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 COMMON MARKET LAW REVIEW 99 (2011) 1019.

¹⁴⁵ Lock *supra* note 110.

¹⁴⁶ P. Craig, *EU Accession to the ECHR: Competence, Procedure and Substance*, FORDAM INT’L L. J. (2013) 1131.

Such exceptional treatment is not afforded to the EU, or any other regional organization, in other multilateral treaties. The prior involvement procedure is an anomaly under international law. At the WTO Dispute Settlement Understanding, where EU measures may be challenged,¹⁴⁷ the CJEU is not afforded a special status by being given the opportunity to have first examined the EU measure at issue. Of course, there are important differences between dispute settlement procedures at the international level and procedures designed to protect human rights in the ECHR system. However, the reasoning behind the prior involvement mechanism is the same in both cases: an EU measure should not be challenged without the CJEU first having had a chance to review that measure in the light of its own legal order.

Second, the Accession Agreement is entirely silent on what procedure would be employed to allow the CJEU to make an assessment of the compatibility of an act with Convention rights. Presumably it is up to the EU itself to establish this procedure, however it is yet unclear how this would be done, and who would bring such a case before the CJEU.¹⁴⁸ The Accession Agreement simply states that the CJEU's assessment should be "made quickly."¹⁴⁹ However, there is absolutely no guarantee that the CJEU will act in an expedited manner. The Strasbourg Court already struggles with a heavy caseload,¹⁵⁰ having to wait for the CJEU to make an assessment may only add to this burden.

The procedure raises further questions. How will it apply regarding actions taken under the CFSP? In principle, the CJEU does not have jurisdiction over CFSP acts, whereas the CFSP is not excluded from the jurisdiction of the Strasbourg Court. What will be the legal consequences of a CJEU judgment under the prior involvement procedure?¹⁵¹

The prior involvement procedure is unlikely to be employed on many occasions; as the Joint Communication from Presidents Costa and Skouris puts it, "[i]n all probability, that situation should not arise often."¹⁵² However, the procedure is problematic in that it affords the EU legal order a privilege that is not necessitated by any special feature of that legal order. Moreover, the Accession Agreement fails to give any indication of how such a procedure would actually operate in practice, leaving it entirely up to the Union to establish such procedure. The hypothetical situation that would lead to the use of a prior involvement procedure, that is, where the CJEU was not given an opportunity to hear a case before it went to Strasbourg, exposes a flaw in the EU's system. This flaw in EU procedural law should be remedied within that order, rather than introducing a new procedure in the ECHR system.

¹⁴⁷ See Appellate Body Report, European Communities, Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (9 Sep 1997); Appellate Body Report, European Communities, Measures Concerning Meat and Meat Products (Hormones), WT/DS48/AB/R (16 Jan 1998).

¹⁴⁸ P. Gragl, *A Giant Leap European Human Rights? The Final Agreement on The European Union's Accession to the European Convention on Human Rights*, 51 COMMON MARKET LAW REVIEW (2014) 13–58, 47.

¹⁴⁹ Art. 3(6) Accession Agreement, *supra* note 18.

¹⁵⁰ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19-20 April 2012, para. 19: "The increasing number of cases pending before the Chambers of the Court is also a matter of serious concern."

¹⁵¹ See Gragl *supra* note 148, 49.

¹⁵² Joint Communication, *supra* note 77.

4.7 EXHAUSTION OF DOMESTIC REMEDIES

Article 35 ECHR sets out the admissibility criteria for matters before the ECtHR. It states *inter alia* that “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law.”¹⁵³ Where an EU act is directly challenged, the situation is relatively straightforward: the applicant will have had to first challenge the act at the EU level in order to exhaust “domestic” remedies in that system. According to Article 1(5) of the Accession Agreement, the term “domestic” in this context simply means “the internal legal order of the European Union.”¹⁵⁴ This raises the question of how the concept of exhaustion of domestic remedies will be applied in the context of the EU legal order. While a direct challenge before the CJEU would count as such a domestic remedy, it is doubtful whether other processes within the EU legal order, such as administrative procedures or complaints to the European Ombudsman, would be considered “remedies” since they are not of a judicial character.¹⁵⁵ The issue of effective remedies available within the EU legal order, or lack thereof, is likely to be subject to cases before the Strasbourg Court upon EU accession.

In another scenario, the EU act will be indirectly challenged through the domestic legal order of an EU Member State. In this case, it may be asked whether a reference for a preliminary ruling will be regarded as a domestic remedy that must be exhausted. The Joint Communication of the two Presidents states that a “reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before referring the matter to the ECHR.”¹⁵⁶ Similarly, the Draft Accession Agreement states that “[s]ince the parties to the proceedings before the national courts may only suggest such a reference, this procedure cannot be considered as a legal remedy that an applicant must exhaust before making an application to the Court.”¹⁵⁷ This is because it is entirely up to the national court to decide whether or not to make a reference.¹⁵⁸ The fact that a national court failed to refer a matter to the CJEU will not therefore affect the admissibility of the complaint before the Strasbourg Court. However, in this situation, the CJEU will be given the opportunity to deal with the issue via the “prior involvement procedure” discussed above.¹⁵⁹

A further question arises regarding whether, in cases where the EU and Member States are respondent and co-respondent, the applicant will need to have exhausted domestic remedies in both legal orders. The Accession Agreement states, regarding the co-respondent procedure, that “admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”¹⁶⁰ This means that in situations where the EU is a co-

¹⁵³ Article 35 ECHR.

¹⁵⁴ Article 1(5) Accession Agreement *supra* note 18.

¹⁵⁵ See *Lehtinen v Finland*, App. No. 39076/97 (1999); “the Court notes, firstly, that, as a general rule, a petition to the Ombudsman cannot be regarded as an effective remedy as required by Article 35 of the Convention”.

¹⁵⁶ *Supra* note 77, para. 6.

¹⁵⁷ Accession Agreement, *supra* note 18, para. 65.

¹⁵⁸ Craig, *supra* note 146, 1129.

¹⁵⁹ See *supra* Section 4.6.

¹⁶⁰ Art. 3, para. 1, Accession Agreement, *supra* note 18.

respondent, an application will still be admissible, even if domestic remedies have not been exhausted in the EU legal order.¹⁶¹

4.8 RESERVATIONS

Article 57 ECHR states that “[a]ny State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention.”¹⁶² The question arose during negotiations whether the EU should also be capable of making reservations to the Convention or the additional protocols. The drafters decided that, since the EU should join the Convention on the same footing as the other Contracting Parties, the EU would be capable of making reservations, declarations and derogations, either at the time of accession, or when acceding to future additional protocols. The Accession Agreement provides that the following paragraph is to be added to Article 57(1) ECHR: “The European Union may, when acceding to this Convention, make a reservation in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision.”¹⁶³

It is not clear whether the EU intends to make any reservations to the Convention at the time of accession, or what any possible reservations may relate to. The EU made a reservation to the UN Convention on the Rights of Persons with Disabilities relating to the right of EU Member States to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces.¹⁶⁴ The possible exclusion of jurisdiction over CFSP by way of reservation¹⁶⁵ was discussed during negotiations; however this proposal was not accepted. The possibility of making a reservation regarding EU primary law was also proposed but eventually rejected.¹⁶⁶ The Accession Agreement works on the assumption that EU primary law is capable of being challenged before the ECtHR. Furthermore, such a reservation may not be legally acceptable given the fact that reservations of a general character are not permitted under Art.57 ECHR. Any EU reservation must be in conformity with general international law and the rules established under the ECHR system.¹⁶⁷ Since the EU still requires non-EU states in the Council

¹⁶¹ See G. Gaja, *The ‘Co-Respondent Mechanisms’ According to the Draft Agreement for the Accession of the EU to the ECHR*, 2 ESIL REFLECTIONS 1 (2013) 6. <<http://www.esil-sedi.eu/node/266>>.

¹⁶² Art. 57 ECHR.

¹⁶³ Art. 2(2) Accession Agreement, *supra* note 18.

¹⁶⁴ Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities; OJ L23 of 27/01/2010, p.35.

Annex III Reservation by the European Community to Article 27(1) of the UN Convention on the Rights of Persons with Disabilities: “The European Community states that pursuant to Community law (notably Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), the Member States may, if appropriate, enter their own reservations to Article 27(1) of the Disabilities Convention to the extent that Article 3(4) of the said Council Directive provides them with the right to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive. Therefore, the Community states that it concludes the Convention without prejudice to the above right, conferred on its Member States by virtue of Community law.”

¹⁶⁵ See Council of the European Union *supra* note 110.

¹⁶⁶ See Gragl *supra* note 148.

¹⁶⁷ See *Belilos v Switzerland*, Admissibility, merits and just satisfaction, App. No 10328/83, Case No 20/1986/118/167, A/132, [1988] ECHR 4, (1988) 10 EHRR 466, IHRL 76 (ECHR 1988), 29th April 1988.

of Europe to approve the Agreement, reservations by the EU may risk provoking these States into not accepting the Accession Agreement.

4.9 ADDITIONAL PROTOCOLS

The jurisdiction of the Strasbourg Court extends to the interpretation and application not only of the ECHR, but also of the Additional Protocols thereto.¹⁶⁸ The EU had to decide whether it would also accede to these protocols, and if so, which ones. The commitments of the various EU Member States under the Convention are not identical since they have made various reservations and declarations. Their commitments also differ because different states have acceded to the Additional Protocols to varying extents. The Accession Agreement takes the approach that the EU shall accede only to the First Protocol to the Convention as well as Protocol No. 6.¹⁶⁹ Article 59(2) ECHR will also be amended to allow the EU to accede to the other additional protocols in the future.¹⁷⁰ As protocols are separate legal instruments under international law, the EU's accession to the further protocols would require a similar process to that of accession to the ECHR, including a separate accession agreement.¹⁷¹

The EU has decided only to accede to Protocol 1 and Protocol 6, as these are the only two protocols to which all EU Member States are parties. This raises the question whether the EU would have been permitted also to accede to other protocols. Under EU law, international agreements entered into by the Union are binding, not only on the EU institutions, but also on the EU Member States.¹⁷² It could be argued that if the EU were to accede to protocols to which some EU Member States had not joined, these Member States would be bound by international agreements to which they had not given their explicit consent. While this is an acceptable position, it seems to go against the understanding of the EU as a separate and distinct legal order. It is not immediately evident that the EU's accession to the additional protocols should be conditioned on whether or not all the Member States have acceded to them. It is submitted that there is no *legal* impediment to the EU acceding to protocols to which only some EU Member States have ratified.

Another option would have been for the EU to accede to the protocols that covered rights that were already protected under EU law, including EU Charter of Fundamental Rights. These rights are already binding upon the EU Member State by virtue of EU law, and therefore would not have posed the problem of extending obligations to the EU Member States to which they had not given their consent. Alternatively, the EU may have acceded to additional Protocols, making clear that these only apply to fields of Union competences and Union law. While some delegations were in favour of the EU acceding to all existing Protocols, it was decided that the

¹⁶⁸ Art. 32(1) ECHR: "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47."

¹⁶⁹ Art. 1(1) Accession Agreement, *supra* note 18.

¹⁷⁰ Accession Agreement, Art. 1(2) Accession Agreement, *supra* note 18.

¹⁷¹ Explanatory Report, *supra* note 19, para. 16: "Subsequent accession by the EU to other Protocols would require the deposit of separate accession instruments."

¹⁷² Art. 216(2) TFEU: "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

EU would only accede to, “at a first stage”, those that have been ratified by all EU Member States.¹⁷³

This means that there will still be a ‘gap’ in human rights protection. There will be instances where a right enshrined in one of the protocols is binding upon certain EU Member States that have ratified the protocol, but is not be binding upon the Union. There may be instances where the EU and an EU Member State are both respondents, but the legal obligations of the parties differ due to the fact that the Member State and the EU have different legal obligations. This would be legally similar to the pre-accession situation whereby the Member State is bound by a certain obligation, whereas the EU itself is not. It will be interesting to see how the Court will deal with such a scenario, and whether it will continue to apply its pre-accession case law.

4.10 SIGNATURE AND ENTRY INTO FORCE

The High Contracting Parties will be invited to give their consent to be bound by the Accession Agreement and the instruments of ratification, and acceptance or approval are to be deposited with the Secretary General of the Council of Europe.¹⁷⁴ The Agreement shall enter into force “on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention mentioned in paragraph 1 and the European Union have expressed their consent to be bound by the Agreement.”¹⁷⁵ The EU will become a Party to the Convention and relevant Protocols on the date of entry into force of the agreement.¹⁷⁶ The Secretary General of the Council of Europe will then notify the EU and the Council of Europe member States of the date when the Agreement enters into force.¹⁷⁷

The clause on signature and entry into force is similar to those of other international agreements, especially those under the Council of Europe.¹⁷⁸ It requires acceptance by all the member States of the Council of Europe, after a three-month period following the final ratification. If a state wishes to join the Council of Europe, the Accession Agreement stipulates that a condition of such membership includes the obligation “to give an unequivocal binding statement of its acceptance of the provisions of this Agreement.”¹⁷⁹ A new Council of Europe state will therefore be bound, not only by the amended Convention and Protocols, but also to the Accession Agreement, which is to have an “explicit link” with the Convention.¹⁸⁰ On the EU side, several steps are required before the EU indicates its consent to be bound. As discussed

¹⁷³ Negotiating Directives, point 5: “In the negotiations, the Union shall indicate to the Contracting Parties to the European Convention for the protection of Human Rights and Fundamental Freedoms that it will at a first stage accede, in accordance with Article 218 TFEU, only to those protocols which all Member States have ratified.” See Groussot *et. al*, *supra* note 90, 4.

¹⁷⁴ Art. 10(2) Accession Agreement, *supra* note 18.

¹⁷⁵ Art. 10(3). Accession Agreement, *supra* note 18.

¹⁷⁶ Art. 10(4). Accession Agreement, *supra* note 18.

¹⁷⁷ Art. 12(d). Accession Agreement, *supra* note 18.

¹⁷⁸ Art. 69(4) Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: “The Convention shall enter into force on the first day of the sixth month following the date on which the European Community and a Member of the European Free Trade Association deposit their instruments of ratification.”

¹⁷⁹ Explanatory Report, *supra* note 19, para. 93.

¹⁸⁰ Explanatory Report, *supra* note 19, para. 93.

above, the agreement must be approved by the EU Member States, the European Parliament, and will be subject to an Opinion of the Court of Justice.¹⁸¹

Interim Conclusion

The Accession Agreement answers many of the questions that are posed whenever the EU takes part in an international organization or treaty body, and in several respects it does so in a novel way. In contrast to its participation in other bodies, the EU does not “divide” its participation in the ECHR in terms of competences. The EU and the Member States may exercise voting rights concurrently. They both contribute to the expenditure of the Court. They may both appear as respondent and co-respondent before the Court and be held jointly liable. This deviates from much of the international practice whereby the EU and the Member States exercise these rights alternatively, based upon a declaration of competences. The Agreement also demonstrates how EU participation can justify the introduction of new procedures. The co-respondent mechanisms, for example, is an appropriate adaptation to the ECHR system, which allows the party bringing the case to decide against whom to bring proceedings. The prior involvement procedure, however, represents a kind of ‘special treatment’ afforded to the EU that is not warranted by the specific nature of the EU legal order.

5 HUMAN RIGHTS LAW AND INTERNATIONAL ORGANIZATIONS

The Accession Agreement primarily deals with institutional and procedural issues that arise from the EU taking part in the machinery of the Convention. Commentators have examined the extent to which this framework may jeopardize the autonomy of the EU legal order. There has been less emphasis, however, on the impact that the EU’s accession may have on the substantive law of the Convention, that is, on how human rights law in the Convention system may be applied to the EU. While the EU has been a respondent in cases before international bodies, these have often dealt with issues of trade, such as before the WTO Dispute Settlement Body. There is less international practice, however, of applying international human rights law to international organizations.

The ECHR was originally drafted upon the assumption that the rights enshrined therein would be protected and ensured primarily by *states*. Similarly, the jurisprudence of the Strasbourg Court has primarily developed with the assumption that the Convention rights are to be secured by state contracting parties. A clear question arises regarding EU accession: to what extent do the provisions of the ECHR and the Court’s case law have to be modified or adapted to apply to an international organization? This is not a topic that the Accession Agreement is capable of addressing fully. Many of these issues can only be tackled by the Strasbourg Court itself in specific cases once the EU accedes. Yet one can already envisage some of the issues that may arise in applying a state-based Convention to the legal order of the EU.

¹⁸¹ See ‘Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/13)’ (2013) OJ C 260/19.

Article 1 of the Accession Agreement sets out how certain terms in the Convention are to be interpreted with respect to the EU. First, the terms ‘State,’ ‘State Party,’ ‘States,’ or ‘States Parties’ in certain parts of the Convention and Protocols are to be understood as referring also to the European Union.¹⁸² For example, Article 10(1) ECHR, which refers to freedom of expression, states that “[t]his Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”¹⁸³ In these cases, the Strasbourg Court will simply replace the word ‘states’ with ‘the EU’. Similarly, the Accession Agreement sets out that the terms ‘national law,’ ‘administration of the State,’ ‘national laws,’ ‘national authority,’ or ‘domestic’ in certain parts of the Convention and Protocols are to be understood as relating “*mutatis mutandis*, to the internal legal order of the European Union as a non-State party to the Convention and to its institutions, bodies, offices or agencies.”¹⁸⁴ For instance, Article 13 of the Convention states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...”¹⁸⁵ Similarly, Article 35(1) of the Convention regarding admissibility criteria states that the Strasbourg Court may only deal with a matter when “all domestic remedies have been exhausted.”¹⁸⁶ As discussed above, this may give rise to questions regarding what an ‘effective remedy’ means within the EU legal order.

The Accession Agreement also addresses the issue of terminology in the Convention that relates to the apparatus of the state. Some of the terms used in the Convention that would require modification in relation to the EU are ‘national security,’ ‘economic well-being of the country,’ ‘territorial integrity,’ or ‘life of the nation.’ These appear in the ECHR in Article 6 (Right to a fair trial); Article 8(2) (Right to respect for private and family life); Article 10(2) (Freedom of Expression); Article 11(2) (Freedom of assembly and association); and in Article 2(3) Protocol No. 4 (Freedom of Movement); and Article 1(2) Protocol No. 7 (Procedural safeguards relating to expulsion of aliens). These articles all allow for restrictions on the Convention rights in certain cases where the interests of the state are involved. For instance, Article 10(2) ECHR sets out that “[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country.”¹⁸⁷ According to the Accession Agreement, these terms “shall be considered, in proceedings brought against the European Union or to which the European Union is a co-respondent with regard to situations relating to the Member States of the European Union, as the case may be, individually or collectively.”¹⁸⁸ With respect to the term “life of the nation,” the EU would be permitted to take measures derogating from certain Convention rights in relation to measures taken by an EU Member State during a time of war or public emergency. Upon accession, the Strasbourg Court

¹⁸² Art. 1, para. 5 Accession Agreement, *supra* note 18.

¹⁸³ Art. 10(1) ECHR.

¹⁸⁴ Art. 1, para.5 Accession Agreement, *supra* note 18.

¹⁸⁵ Art. 13. ECHR.

¹⁸⁶ Art. 35(1) ECHR.

¹⁸⁷ Article 10(2) ECHR.

¹⁸⁸ Art. 1, para. 5 Accession Agreement, *supra* note 18.

will be faced with the challenge of determining whether, and to what extent, these exceptions to Convention rights can apply with regard to the EU.

Jurisdiction

The drafters also faced questions of how rules of jurisdiction would apply regarding the EU. Article 1 ECHR sets out that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” The Convention uses the broad concept of ‘jurisdiction’ instead of ‘territory’. There is an ongoing debate about the extent to which Convention rights apply outside the territory of the Contracting Parties.¹⁸⁹ This debate will no doubt continue in the context of the EU. The drafters of the Accession Agreement had to determine how Article 1 ECHR would be applied with regard to the EU, especially the meaning to be given to the phrase “everyone within their jurisdiction.”¹⁹⁰ According to the Accession Agreement, this will be understood “as referring to persons within the territories of the member States of the European Union to which the TEU and the TFEU apply.”¹⁹¹ With regard to persons outside the territory of a Contracting Party, the term is to be understood in the context of the EU “as referring to persons which, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party.”¹⁹²

The Convention also refers to the term ‘country’ in Article 5(1) ECHR (“the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country”¹⁹³) and Article 2(2) Protocol No. 4 (“[e]veryone shall be free to leave any country, including his own.”¹⁹⁴) The term ‘territory of a State’ is mentioned in Article 2(1) Protocol No. 4 (“[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”¹⁹⁵) and Article 1(1) Protocol No. 7 (“[a]n alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law”¹⁹⁶). These terms will be understood to mean “each of the territories of the member States of the European Union to which the TEU and the TFEU apply.”¹⁹⁷ Unlike the other Contracting Parties that are states, the EU does not have its own ‘territory.’ Article 52 TEU sets out that the EU Treaties shall apply to the EU Member States, while Article 355 TFEU defines the specific territorial scope of the Treaties.

¹⁸⁹ M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, (OUP 2011). S. Ghandhi, ‘Al-Skeini and the Extra-territorial Application of the European Convention on Human Rights’ in A. Burrows, D. Johnston and R. Zimmermann (eds) *Judge and Jurist: Essays in memory of Lord Rodger of Earlsferry* (OUP 2013); M. den Heijer and R. Lawson, ‘Extraterritorial Human Rights and the Concept of “Jurisdiction”’, in M. Langford, *Global Justice, State Duties: the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013).

¹⁹⁰ Art. 1 ECHR.

¹⁹¹ Art. 1, para. 6. Accession Agreement, *supra* note 18.

¹⁹² Art. 1, para.6. Accession Agreement, *supra* note 18.

¹⁹³ Art. 5(1) ECHR.

¹⁹⁴ Art. 2(2) Protocol No. 4.

¹⁹⁵ Art. 2(1) Protocol No. 4.

¹⁹⁶ Art. 1(1) Protocol No. 7.

¹⁹⁷ Art. 1, Accession Agreement, *supra* note 18.

The Strasbourg Court might be faced with interesting legal questions regarding how concepts of jurisdiction and territory may apply to the EU, for instance when the EU is involved in CSDP missions. Under Article 41(2) TEU, the Union “may use [civilian and military assets] on missions outside the Union for peace-keeping, conflict prevention and strengthening international security.”¹⁹⁸ The Explanatory Report states that Article 1 of the Agreement “applies to acts, measures or omissions in whichever context they occur, including with regard to matters relating to the EU common foreign and security policy.”¹⁹⁹ Jacqué argues that “it is possible that substantive action committed by the Union’s missions might constitute a breach of the Convention.”²⁰⁰ Citing the *Behrami* case law, he argues that the Union would arguably be responsible for human rights violations where these missions are under the EU’s control.²⁰¹ Whereas the EU Treaties specifically exclude the Common Foreign and Security Policy (CFSP) from the remit of the Luxembourg Court,²⁰² there is no similar exception or reservation regarding the Strasbourg Court’s jurisdiction in that field. This may lead to legal complications, such as during the “prior involvement” procedure before the CJEU regarding cases involving CFSP issues. There may be cases where the CJEU is unable to rule on EU law issues regarding the CFSP due to its limited jurisdiction in the field, whereas the Strasbourg Court will be capable of examining those issues.²⁰³ How the Courts will resolve this issue is yet another challenge.

The EU-Individual Relationship

Article 1 of the draft Accession Agreement addresses the issue of how terminology in the Convention that can only be applied to states may be applied to the EU. It does this, by and large, by treating the EU as a “state.” For example, it replaces notions such as “national law” with “the internal legal order of the European Union” without much further elaboration.²⁰⁴ In many cases, this simple change in terminology may suffice and will not give rise to any legal difficulties for the Court. Yet the ECHR may face challenges in applying provisions of the Convention that have until now only applied to Contracting Parties that are *states*. The Court will be faced with questions regarding how key concepts in its case law such as the margin of appreciation and proportionality, which have been developed with states as the only Contracting Parties, are to be interpreted and applied in the context of the EU.

The Court should approach the issue by first seeing if it can treat the EU in the same manner as the other Contracting Parties. However, in certain cases, it may be justified that certain provisions are applied differently with regard to the EU. This is because there is a fundamental difference between a sovereign state and an international organization composed of sovereign states. In the former, there is a direct relationship between the state and the individual. The relationship between the individual and the EU is much more complicated, and will likely be

¹⁹⁸ Art. 41(2) TEU.

¹⁹⁹ Explanatory Report, *supra* note 19, para. 23.

²⁰⁰ Jacqué, *supra* note 144,1006.

²⁰¹ See *Behrami and Behrami v France*, App No 71412/01(2007) 45 EHRR SE10, para. 151.

²⁰² Art. 275 TFEU.

²⁰³ Jacqué, *supra* note 144,1006.

²⁰⁴ Accession Agreement, *supra* note 18, Art. 1(5).

further developed by ECtHR case law. Upon accession, the Strasbourg Court will be called upon to determine how these concepts shall be applied to an international organization, where the relationship between it and the individual is fundamentally different.

6 A TALE OF TWO COURTS: STRASBOURG AND LUXEMBOURG POST-ACCESSION

The EU's accession to the European Convention on Human Rights is a highly exceptional development. It is much more than the EU joining a treaty on trade or regulating fishing stocks; it relates to the EU becoming bound by Europe's key human rights instrument. It is therefore a significant development for both legal systems. Both the EU and the ECHR system have developed to a certain extent their own constitutional orders. Both are based on public international law foundations, yet both have developed their own specific characteristics and highly-developed internal law. EU Accession will pose legal questions to both of these legal orders, and to both "constitutional" courts. The Accession Agreement cannot resolve all of the issues that will arise from the EU participating in the ECHR system. The relationship between the two courts, a topic that has been subject to much academic debate, will continue to develop as new issues arise.

Pre-Accession Case Law

An issue that the Strasbourg Court is likely to face is the extent to which pre-accession case law relating to the EU will continue to apply. Particular attention has been paid to whether and to what extent the *Bosphorus* jurisprudence will continue to apply.²⁰⁵ In that case, while the Strasbourg Court had to acknowledge that the EU was not a party to the Convention, and therefore not directly bound by its provisions, it did not rule out indirect review of EU law. A compromise approach was developed whereby the ECtHR established an assumption of "equivalent protection." In future cases with similar facts as *Bosphorus*, the EU would be capable of appearing as a respondent or co-respondent alongside the Member State(s) implementing the binding EU legislation.

It has also been argued that EU accession would remove the legal reason for the equivalent protection assumption. It has been pointed out that a "comparable presumption of compatibility does not exist, however, in relation to any of the state parties to the ECHR regardless of whether they may possess a highly sophisticated and protective national system of protection of fundamental rights."²⁰⁶ Such an assumption of equivalent protection would no longer be legally justified upon accession. This is particularly the case since one of the goals of EU accession is to ensure the EU is treated as far as possible like the other parties to the Convention.²⁰⁷ De Schutter has argued that the *Bosphorus* doctrine may not be completely abandoned, however, and that it may be given a "second-life" after accession:

²⁰⁵ De Schutter, *supra* note 40.

²⁰⁶ Groussot *et. al.*, *supra* note 90, 4.

²⁰⁷ See Explanatory Report, *supra* note 19, para. 7: "The current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties, by making only those adaptations that are strictly necessary."

It would be neither legally justified nor politically opportune to maintain the *Bosphorus* doctrine in its current form, as a doctrine that places the European Union in a privileged position, and that, instead of treating the Court of Justice of the European Union as a constitutional court comparable to any other, somehow inexplicably defers to its assessments more generously than to similar assessments made by its national counterparts. But if, for obvious political reasons, *Bosphorus* must have a second life, then it is time perhaps to transform it into something that would be both more promising and more theoretically sound.²⁰⁸

Whether the Strasbourg Court will continue to apply *Bosphorus* in its current form is just one of the challenges the Court will face once the EU becomes a party to the Convention. It will be interesting to see whether, and to what extent, the Court will continue to apply its pre-accession case law regarding the EU, or whether it will “start afresh” and treat the EU as a new Contracting Party to the Convention.

ECHR law in the EU Legal Order

The case law of the CJEU will also likely pay greater attention to the legal order of the ECHR. The ECHR and the Strasbourg case law will no longer be a source of inspiration for the CJEU, but will be binding upon the Union as an international agreement. As the law currently stands, the EU is not bound by the ECHR under *international law*. Under Article 6(3) TEU, ECHR law can guide the CJEU, or can be a source of general principles, but is not a *direct* source of rights and obligations. As Ahmed and Butler point out, “the EU is not bound to comply with the letter of the ECHR or case law of the European Court of Human Rights (ECtHR). The acceptance of any right as part of the ‘general principles’ of Community law is taken on a case-by-case basis.”²⁰⁹ Upon accession, however, the EU will be bound by rulings in cases to which it was a party. This includes the CJEU, as an institution of the EU. The Explanatory Report states that “the decisions of the [European Court of Human Rights] in cases to which the EU is party will be binding on the EU’s institutions, including the CJEU.”²¹⁰ This development brings the relationship between the two Courts, and the two legal systems into a new era.

A final issue relates to “autonomy.” This principle, and whether the draft Accession Agreement violates it, has been one of the key issues in the debate on accession.²¹¹ A main concern in this context is whether EU accession would lead to a situation whereby an external judicial body, that is the Strasbourg Court, would be capable of interpreting EU law. The Accession Agreement goes to great lengths to ensure that this autonomy is respected. The co-respondent mechanism, for example, leaves it up to the parties themselves to determine who will be the respondent in a given case, with minimal involvement of the Strasbourg Court. This avoids the

²⁰⁸ De Schutter, *supra* note 40.

²⁰⁹ Ahmed and Butler, *supra* note 63, 774.

²¹⁰ Explanatory Report, *supra* note 19, para. 26.

²¹¹ Craig, *supra* note 146, 1142.

situation whereby the Strasbourg Court will rule on the distribution of competences between the EU and the Member States. Even when the Strasbourg Court will rule on the conformity of EU law with the Convention, the Strasbourg Court will not have the power to strike down that legislation, or to declare that it violates EU law. This remains the prerogative of the CJEU and it alone. The issue of autonomy will be the key issue facing the CJEU as it determines the validity of the Accession Agreement under EU law.

7 CONCLUSION

The EU's accession to the ECHR is more than symbolism; it is an important step in continuing to strengthen human rights protection in Europe. It poses challenges to the EU legal order, the ECHR system and to public international law. This article has examined how the Accession Agreement has addressed many of these challenges. The drafters had to strike a careful balance. The Agreement had to respect the autonomy of the EU legal order and take into account the specific features of the EU legal order. At the same time, a guiding principle was to have the EU to accede under similar conditions as the other Contracting Parties. The drafters faced numerous legal issues that were unique to the situation of EU accession to the ECHR. However, many of the legal challenges faced have been dealt with before in other situations where the EU has joined international organizations, or acceded to other international instruments. In this sense, EU accession is not only an important development in EU law, but in international law generally.

The importance of EU Accession for international law should not be understated. As Gragl puts it, "International law has never before seen the accession of an international or supranational organization as legally integrated as the EU to a human rights treaty regime with a judicial monitoring mechanism as sophisticated as that of the Strasbourg Court."²¹² It is also an example of an international organization becoming a party to a key human rights instrument originally designed exclusively for states. Should the EU continue in this vein, and join further international human rights treaties, including those that allow EU acts to be challenged? Could other IOs follow the EU's path, and similarly join international human rights treaties? This could be potentially one way to address the problems related to the lack of responsibility and accountability of international organizations under international law. EU accession will also mark a new era for the two "international" Courts. Both courts will have to find ways to deal with the law and jurisprudence emanating from the other legal order. This will further develop international practice regarding the interaction between legal orders and judicial dialogue.²¹³

The Accession Agreement further develops practice regarding how the EU participates in the international legal order. The Accession Agreement addresses many of the legal issues in a unique fashion or involves novelties not seen in other cases where the EU joins an international treaty. These include issues such as the parallel exercise of voting rights, the calculation of funding, the development of a co-respondent mechanism, and the prior involvement

²¹² See Gragl *supra* note 148, 56.

²¹³ See F. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEXAS INTERNATIONAL LAW JOURNAL (2003) 547.

mechanism. In addition to developing further the law of responsibility of international organizations, EU accession illustrates some of the international law challenges that arise whenever an IO seeks to take part in its own right within the international legal order.

EU accession may be seen by some as a one-off event, something that simply remedies a specific problem in the human rights system in Europe, or a mere symbolic gesture. But it may also be viewed as part of a wider trend, one whereby the EU seeks to take part in its own right within the international legal order. The EU will likely continue to join, or to upgrade its status within other international organizations and bodies.²¹⁴ The Accession Agreement may be seen as a precedent when the EU joins other bodies in the future. EU accession has wider significance, therefore, in the development of international legal practice, especially where the EU takes part in bodies designed exclusively for states. It demonstrates how the EU, by seeking to take part in the international legal system, may have a subtle effect on that legal order. EU accession to the ECHR is an important step for the EU legal order, but also a significant development in public international law.

²¹⁴ See Wouters et. al. *supra* note 21.

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