



**The Accession of the European Union to the  
European Convention on Human Rights;  
Accountability for Human Rights Violations before  
and after the Accession**

by

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## **Executive Summary**

The long awaited step regarding the accession of the European Union to the European Convention on Human Rights has been finally made. Article 6(2) of the Lisbon Treaty denotes that the European Union shall accede to the European Convention on Human Rights. The actual terms of accession are at the moment of writing under negotiation between the organizations.

This thesis addresses the question of how accountability for human rights violations stemming from European Union law is going to change after accession. In times when governments that agreed on the Lisbon Treaty now question the necessity of the accession it is important to see what will be the impact of such a development for human rights protection.

First, a review of international law norms regarding the distribution of accountability between international organizations and their constituent entities will outline the environment and the current trends on the topic. Subsequently, an analysis of the way that the European Court of Human Rights has dealt with the issue of accountability in cases concerning the European Union hitherto will reveal the areas where there are shortcomings in accountability for human rights violations.. Finally, focusing on the implications of the proposed co-respondent mechanism I outline how distribution of accountability may change after the accession.

The research concludes that the establishment of the co-respondent mechanism and the accession in a broader sense can address many of the existing shortcomings in human rights protection in Europe. Definitely there are still areas

of improvement however the general outcome of the accession is can be seen as highly positive and constructive.

## Introduction

Holding the right entity accountable for a violation of law is the cornerstone of a fair legal system. In all cases the victim should be able to prosecute the acting authority and get a judgment from a pertinent court. The level of human rights protection in Europe at the moment is excellent; however, the above mentioned principle is not always attained. The human rights protection system established by the Council of Europe's European Convention on Human Rights <sup>1</sup> and enforced by the European Court of Human Rights <sup>2</sup> is considered as one of the more complex and cogent ones. At the same time the European Union <sup>3</sup> has drastically transformed from an organization established to promote economic cooperation to a union of people and states built on "the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...". <sup>4</sup> The two organizations safeguard the rights and liberties of all individuals under their jurisdiction, however there are still great shortcomings that need to be addressed.

One of these shortcomings is accountability for human rights violation as a result of European Union law. At the moment all the Member states of the European Union are signatories to the European Convention on Human Rights but not the European Union itself. This means that although all member states should refrain from violating the

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5; 213 UNTS 221 (European Convention on Human Rights, as amended) Hereinafter also as ECHR or Convention

<sup>2</sup> Hereinafter also as ECtHR, Strasbourg Court

<sup>3</sup> Hereinafter also as EU

<sup>4</sup> Article 1(a) Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007/C/306/01. Hereinafter Lisbon Treaty

Convention, the European Union has no obligation to do so since the Convention has no legal effect on it. This raises two serious concerns regarding accountability. First, if an individual feels that his or her rights are violated by an act of an institution of the European Union, he has no chance to have his case heard in an independent body, the European Court of Human Rights. The European Union is not a party to the Convention, therefore the European Court of Human Rights has no jurisdiction over European institutions. Secondly, if a violation is a result of enforcement of European Union law by a member state, the member state may be held accountable for merely enforcing the legislation. This is highly problematic because in such cases the authority held accountable is neither the one responsible for the violation nor the one that can provide redress.

In both situations mentioned above the individual is helpless. It is clear that this falls well below the threshold of human rights protection that the European legal system should provide. This problem could be tackled with the forthcoming accession of the European Union to the European Convention on Human Rights. The decision that the European Union should accede was taken during the negotiations for the Treaty of Lisbon. According to Viviane Reding, Vice-President of the European Commission, responsible for Justice, Fundamental Rights and Citizenship: “The accession of the EU to the Convention will complete the EU system of protecting fundamental rights.”.<sup>5</sup> It is clear that the European Union acknowledges the problematic nature of the current situation and seeks for solutions. The actual accession is still to be realized but when it happens it is expected to contribute in the solution of many of the existing problems.

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<sup>5</sup> Viviane Reding, ‘The EU ’ s accession to the European Convention on Human Rights : Towards a stronger and more coherent protection of human rights in Europe’ Hearing of the European Parliament's Constitutional Affairs Committee, Brussels, 18 March 2010 [2010]

The main topic of this thesis is how the accession of the European Union to the European Convention on Human Rights is expected to solve this problem of who is to blame when human rights are violated as a result of European Union law. Who is responsible when the measures adopted by a state in order to fulfill their obligations under a Directive violate human rights under the ECHR? If the measures adopted under a Regulation are in breach of the Convention, should the Union or the Member State held responsible? Sometimes member states may be forced to derogate from their obligations under the European Convention on Human Rights in order to fulfill their obligations under Community law, which is also binding on them by virtue of the supremacy principle. In the pre-accession era these states would be held accountable in the European Court of Human Rights for violating the Convention even if they had taken any measure that infringes their citizen's rights. The contribution of this thesis will be to show how this accountability <sup>6</sup> will be established, and which legislative measures could be put in place to eliminate unaccountability and enhance human rights protection in Europe.

In order to do this, first it is necessary to review the general rules of international law regarding distribution of accountability for human rights violations between international organizations and their constituent entities. This will comprise the first chapter. Primary sources such as the Draft Articles on the Responsibility of International organizations <sup>7</sup> prepared by the International Law Commission and relevant landmark judgments of International Courts and Tribunals will be used in order to acquire a holistic view of the current trends regarding International Organizations' and Member States' responsibility. The work of Rosalyn Higgins, Ralph Wilde and Cendric Ryngaert will be used to underline the current tendencies regarding this topic.

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<sup>6</sup> The terms accountability and responsibility are used interchangeably. in this thesis

<sup>7</sup> International Law Commission, Report of the Law Commission on the Work of its Sixty-Third Session', UN Doc A/CN.4/L.77, UN GAOR 66th Sess (2009)



Subsequently, in the second chapter I will analyze how the European Court of Human Rights has dealt with the issue of accountability hitherto. For this chapter main source of information will be the judgments of the European Court of Human Rights, statements by the institutions of the two organizations and commentaries on them from well known experts. I will divide the relevant case law in five categories referring to the concept that each group of judgments established so as to easier to identify which concepts are problematic and need to be altered after the accession. The last part of this chapter will be a critical evaluation of the current situation, where the main problems will be highlighted.

Finally, the third chapter will outline possible ways that accountability for human rights violations will be dealt after the accession. This will be a delicate exercise for two reasons: first there is still not a final accession agreement. All the discussion will be based on the Draft legal instruments on the accession of the European Union to the European Convention on Human Rights <sup>8</sup> prepared by the CDDF Informal Working Group on the Accession of the European Union to the European Convention on Human Rights which at the moment of writing is under negotiation within the two organizations. Secondly, there is not excessive literature on the topic. The European Union is a *sui generis* organization, hardly following established norms by other organizations. Moreover, the Conditions that allow for the accession were created only in December 2009 so there are only few authors attempting to outline how the accession will transform the system of human right protection in Europe. Therefore, only speculations can be made regarding how the accession will alter distribution of accountability for Convention violations between the European Union and the member states. In this chapter special

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<sup>8</sup> Document CDDH-UE(2011) 16 available at [http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE_2011_16_final_en.pdf)

emphasis will be given to the newly proposed co-respondent mechanism which is expected to be the novelty with the greater impact on distribution of human rights accountability.

The conclusion will summarize the main findings of the thesis and assess the added value of the accession of the European Union to the European Convention on Human Rights to the problem of member states and European Union's responsibility.

# 1. International Organizations and Member States'

## Responsibility in International Law

The era when supporters of the theory of realism could claim that states were the sole actors in the international arena has long passed. Today's complex world is better described through a pluralist prism. Sovereign states tend to cooperate and establish international organizations in order to promote their interests more effectively. However, modern international organizations are far more than simple cooperation between states. Many of them possess state characteristics such as their own quasi-governments, legislative bodies and even a distinct legal order safeguarded by special courts. Furthermore, today international organizations perform tasks that were traditionally left to sovereign states such as military interventions. This shift in the international structure raised the question of responsibility. If International organizations act like states could they be held responsible as states? If responsibility occurs, how should it be distributed between the International Organization and its constituent parties?

In practice, international organizations are considered to have a legal personality distinct from that of their constituent entities. As a result such organizations can be held responsible for their internationally wrongful acts.<sup>9</sup> This practice safeguards the autonomy and the proper functioning of international organizations. Rosalyn Higgins has stated that adopting the alternative method thus holding member states responsible for the organization's acts could have noxious effects:

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<sup>9</sup> Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2006) 12 ILSA Journal of International & Comparative Law 395, 401

“ . . . if members know that they are potentially liable for contractual damages or tortuous harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership “. <sup>10</sup>

In the above scenario one can imagine that the functions of the organization would be totally frozen since member states, fearing that they may find themselves accountable due the acts of the organization, would be unable to reach a decision and take action in nearly every field.

The same view is adopted by the Institut de Droit International which states that: “there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members.” <sup>11</sup> Again, according to the Institut de Droit International, member states should not be in danger of being accused for an act carried out by an international organization that they happen to be members of.

Increased interest on this topic, due to the augmentation of international organizations in number and complexity, led the International Law Commission to establish a working group on the Responsibility of International Organizations. This

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<sup>10</sup> Rosalyn Higgins, ‘The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties’ (1995) 66 Extract from Institut of International Law – Yearbook 251 , 288

<sup>11</sup> Institut de Droit International, ‘The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Toward Third Parties’ (1996) 66-II Annuaire de L’Institut de Droit Intl 445, art 6(a)

group is currently working on the Draft Articles on the Responsibility of International Organizations. Although, this work of the International Law Commission has been criticized for failing to cite established state practice,<sup>12</sup> it seems to reach the same conclusions as the abovementioned scholars. In the Commentary of the Draft Articles it is stated that : “It is clear that... membership does not as such entail for member states international responsibility when the organization commits an internationally wrongful act”.<sup>13</sup> The International Law Commission continues that Member State’s responsibility may occur in special cases. According to the general rules of attribution member states can be held responsible in cases where they exercise direct control over the International Organization,<sup>14</sup> coerce an International Organization to commit an act,<sup>15</sup> or voluntarily accept the responsibility.<sup>16</sup> To add to this, Member State responsibility may occur in connection with the acts of an organization. A Member State is to be held responsible if it assists an International organizations in the commission of an internationally wrongful act,<sup>17</sup> if it tries to avoid compliance with its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the international organizations to commit a

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<sup>12</sup> R McCorquodale, ‘International Organizations and International Human Rights Law: one Giant Leap for Humankind’ in KH Kaikobad and M Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Nijhoff 2009) p. 148

<sup>13</sup> International Law Commission, Report of the Law Commission on the Work of its Sixty-Third Session’, UN Doc A/CN.4/L.77, UN GAOR 66th Sess (2009) art 62, Commentary no (2)

<sup>14</sup> Article 58 DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS, INTERNATIONAL LAW COMMISSION (DARIO)

<sup>15</sup> Article 59 DARIO

<sup>16</sup> Article 60 DARIO

<sup>17</sup> Article 57 DARIO

wrongful act,<sup>18</sup> or if it leads a party injured by an act of the international organization to rely on its own responsibility.<sup>19</sup>

A simplistic conclusion could be that in general international organizations are responsible for their acts, except some special cases where could be held responsible. However, at this point the matter of remedies becomes critical. Besides their legal personality and even sometimes their participation in International Treaties, it is rather difficult for an individual to bring a suit against an international organization. The competent fora are insufficient and the remedies available to individuals scarce.<sup>20</sup>

For this reason many scholars have argued that the “organizational veil” has to be lifted in order to safeguard individuals’ rights. Smita Narula argues that states, as member states of an international financial institution, could be held responsible for the institution’s economic, social and cultural rights violations.<sup>21</sup> Her opinion therefore is quite different than the above mentioned ones. From a quite similar standpoint, in one of the most cited cases concerning Members States’ responsibility concerning the collapse of the International Tin Council and the possibility of obtaining remedies from member states of the organization, Lord Justice Nourse stated that “... international law would surely presume that states which were willing to join together in such an enterprise [creating an international organization] would intend that they should bear the burdens together no less than the benefits.” Lord Justice Nourse appears to side with Smita Narula. According to him, when states form an international organization they should also accept the risks that such an activity entails.

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<sup>18</sup> Article 60 DARIO

<sup>19</sup> Article 61(1)(b) DARIO

<sup>20</sup> Karel Wellens, *Remedies against International Organisations* (Cambridge University Press 2002) 12

<sup>21</sup> Smita Narula, ‘The Right to Food: Holding Global Actors Accountable Under International Law’ (2006) 44 *Columbia Journal of Transnational Law* 691,744

It follows that it is quite difficult to strike a fair balance between preserving the autonomy and distinct legal personality of international organizations and the protecting of the rights of third parties.<sup>22</sup> By holding member states accountable one risks destroying the whole scheme of international cooperation through international organizations. By not doing so, one risks leaving individual victims dissatisfied and the fairness of the relevant legal order questioned. This is the environment where the European Court of Human Rights tries to manage to balance between the combating needs. The next chapter will discuss relevant case-law and outline the basic concepts adopted by the Strasbourg Court regarding International organizations responsibility in general and the relation with the European Union in particular. This way we will have a clear picture of what is the situation before the accession and which are the main problems that need to be addressed.

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<sup>22</sup> Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake' (n 8) 404

## **2. Basic Concepts of the Relation between the EU and the ECHR before the Accession**

“Once it seemed simple. There were two distinct “European” courts – the European Court of Justice in Luxembourg, and the Court of Human Rights in Strasbourg only one of which had a human rights jurisdiction – the Court in Strasbourg, which had been set up by the Council of Europe as an enforcement institution of the European Convention on Human Rights. The Court of Justice, set up by the six founding members of the EEC, had other matters to deal with. ”.<sup>23</sup>

This is how Sionaidh Douglas-Scott describes the situation in Europe in the first decades of the coexistence of the two European courts. Soon, however, things changed dramatically. The Luxembourg Court started dealing with human rights issues and the Strasbourg Court had to review European Union law. This development raised many questions about the relationship between the two Courts but also regarding the human rights protection in the European Union.

In this chapter I first briefly present the developments that led to the decision that the EU should accede to the ECHR. The next section analyzes the approach of the European Commission on Human Rights and the European Court of Human Rights on this topic and especially on the responsibility of the European Union and its member states for human rights violations. Landmark cases that established some “concepts” for

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<sup>23</sup> Sionaidh Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis’ (2006) 43 Common Market Law Review 629,629



the relationship between the Court and the European Union will be presented and divided in six categories referring to the legal question posed in each case and the gaps it highlights in human rights protection in Europe. This analysis will show which kind of cases are the most problematic and what mechanisms are lacking and therefore should be established with the accession. The last part of the chapter will be a critical evaluation of the current situation, where the main problems of the pre accession era will be consolidated.

## **2.1 The Accession of the European Union to the European Convention on Human Rights**

The European Convention on Human Rights is an international treaty drafted in 1950 by the Council of Europe. Its aim is to protect human rights and fundamental freedoms in Europe. Initially, some of the states establishing the European Communities sought to use the Convention as a binding bill of rights for all member states of the newly established organization. However, this did not happen due to the objections of some other potential Member States.<sup>24</sup> Till today, although all member states are obliged to sign and ratify the European Convention on Human Rights before they accede to the European Union, the Union itself is not a state party to the convention.

As the European integration process continued, the European Communities undertook several competences in different areas that touched upon human rights issues. The lack of a human rights bill for the international organization was problematic and the European Court of Justice tried to fill the gap by confirming the existence of fundamental

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<sup>24</sup> Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, vol. 2011 (Oxford University Press 2011)362

rights in Community law.<sup>25</sup> In its case law it drew inspiration from the constitutional traditions of the member states<sup>26</sup> as well as from international treaties that member states were parties.<sup>27</sup> To add to this, it started already in the 1970's to refer to the Convention as a source of general principles for EU law.<sup>28</sup>

In 1979 the European Commission introduced the idea that the European Communities should accede to the European Convention on Human Rights and highlighted the advantages of such an act.<sup>29</sup> Since then both organizations have emphasized the importance of accession. Initially, the accession of the European Union to the European Convention on Human Rights was impossible for two main reasons. On the one hand, the European Court of Justice found accession incompatible with Community law, at the state of development in which it was at the time of the opinion.<sup>30</sup> On the other hand, the text of the European Convention on Human Rights did not provide the possibility for other legal entities besides states to become parties to the Convention.

Beyond these technical difficulties the two Courts have been trying to cooperate and improve human rights protection in Europe. Both Courts have established an informal mutual recognition of case law. The ECJ is not obliged but it does follow the guidelines of the ECtHR.; at the same time the ECtHR accepts the ECJ as a human rights court by

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<sup>25</sup> Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419

<sup>26</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125

<sup>27</sup> Case 4/73 *Nold v. Commission* [1974] ECR 491

<sup>28</sup> Case 36/75 *Roland Rutili v. Ministre de l'intérieur* [1975] ECR I-1219

<sup>29</sup> Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) 210 final, 2 May 1979. Bulletin of the European Communities, Supplement 2/79

<sup>30</sup> Opinion 2/94 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 28 March 1996 [1996] ECR I-1759.

citing its case law.<sup>31</sup> This has led several scholars to talk about a *de facto* accession of the EU to the ECHR.<sup>32</sup> Parallel the Strasbourg Court has shown a great degree of reference and comity when dealing with European Union law implemented by the member states.<sup>33</sup> However this did not prove enough. Many voices were raised supporting the accession claiming that it would limit the legal gap created after the Treaties of Maastricht and Amsterdam which gave to the EU greater powers in sensitive areas such as immigration, asylum and cooperation in criminal matters.<sup>34</sup>

Today, the required legal framework for the accession of the EU to the ECHR is a reality. The Treaty of Lisbon, which came into force on 1 December 2009, reads: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.<sup>35</sup> Changes have been introduced in the European Convention of Human Rights as well. Article 59(2), as amended by Protocol 14 in June 2010, reads: “The European Union may accede to this Convention”.<sup>36</sup>

Until such time, however, as the European Union actually accedes to the European Convention of Human Rights, the Convention has no legal effect on the Union. However, because of the overlap between the two European legal orders there were numerous occasions where individuals brought cases to the Strasbourg Commission and Court

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<sup>31</sup> Sionaidh Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’ (2011) 4 Human Rights Law Review 645,657

<sup>32</sup> Pierre Drzemczewski, ‘The Council of Europe’s Position with Respect to the EU Charter of Fundamental Rights’ (2001) 22 Human Rights Law Journal 14,29

<sup>33</sup> Laurent Pech and Xavier Groussot, ‘Fundamental Rights Protection in the european union post Lisbon treaty’ [2010] Fondation Robert Schuman 10

<sup>34</sup> Jörg Polakiewicz and Hans Christian Krüger, ‘Proposals for a Coherent Human Rights Protection System in Europe/ The European Convention on Human Rights and the EU Charter of Fundamental Rights’ (2001) 22 Human Rights Law Journal 1,6

<sup>35</sup> Art. 6(2) Treaty of Lisbon

<sup>36</sup> Art. 59(2) ECHR as amended by Prot.14

concerning the European Communities and later the European Union directly or indirectly. During the years and through the case law of these bodies some basic concepts about the relationship of these two legal orders were established. These will be now presented by analyzing landmark judgments of the two pertinent bodies divided into six categories. These will be: case referring to member states responsibility; applications against the European Communities; Applications against member states of the European Union in cases where the member states have a wide or a narrow margin of discretion and cases where there is no national implementation measure.

## **2.2 Member States Responsibility**

The European Commission of Human Rights had at a very early stage to answer the question on what would happen if member states to the ECHR sign another treaty under which they would be possibly required to derogate from their Convention obligations. In its judgments it seems to go contrary to the principles established in public international law and mentioned in Chapter 1, according to which the constituent entities of international organizations cannot be held accountable for their wrongful acts, when they occurred due to their membership to the organization except in very special circumstances.

### 2.2.1. X. v. Germany

In 1958, in the *X. v. Germany*<sup>37</sup> case the European Commission of Human Rights made clear that “if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty”. In other words the European Commission of Human Rights warned states that they are still obliged to respect their Convention commitments even if latter agreements put them in a conflicting position.

### 2.2.2. Matthews v. the United Kingdom

The same question was posed again particularly for the obligations of a State that derive from its participation in the European Communities. The *Matthews v. the United Kingdom* case concerned the European Communities Act on Direct Elections of 1976 according to which residents of Gibraltar could not vote in the European Parliament elections. The applicant claimed, inter alia, that this constituted a violation of her rights under Article 3 of Protocol No. 1 of the European Convention of Human Rights. The European Commission of Human Rights reiterated its previous position that member states can transfer competences to international organizations; however they remain responsible for every violation of the Convention.<sup>38</sup> The United Kingdom violated the Convention and was obliged to compensate Mrs. Matthews as well as to take all the

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<sup>37</sup> *X. v. Germany* App no. 235/56 (Commission decision, 10 June 1958)

<sup>38</sup> *Matthews v. United Kingdom* [GC] ECHR 1999-I; para 32

necessary steps so that the violation would stop and residents of Gibraltar would be able to exercise their rights and vote for the European Elections.

The fact that the UK was condemned for something decided at European Communities level is highly problematic for two main reasons. First, the British government was not the sole actor in the decision. The European Communities Act on Direct Elections was negotiated, agreed and signed by all member states at that time. Secondly, the UK could not on its own remedy the situation as there was a need for all the other member states to agree on amending the law in question. Just as a footnote, when the UK initiated procedures so as to stop this violation it ended up in court since Spain initiated infringement procedure against it claiming that “the extension of the right to vote in European Parliament elections, as provided for by the EPRA 2003, to persons who are not United Kingdom nationals for the purposes of Community law infringes Articles 189 EC, 190 EC, 17 EC and 19 EC. By the second, it claims that the creation of a combined electoral region is contrary to the 1976 Act and to the commitments made by the United Kingdom Government in the Declaration of 18 February 2002.”<sup>39</sup> It is clear then, that in the pre accession era a member state could find itself in predicament simply due to enforcing provisions of European Union Law.

### **2.3 Applications against the European Communities**

Over the years, several cases were brought against member states for actions attributable to the European Communities and the European Union later, or their

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<sup>39</sup> Case C-145/04, *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland* [2006] ECR I-7917, para 36

institutions. Only once an applicant filled a complaint against the European Communities. The European Commission of Human Rights considered the application as inadmissible *rationae personae* as the European Communities were not a party to the Convention.

The single case in this context was *Confédération Française Démocratique du Travail v. the European Communities*.<sup>40</sup> A French worker's organization, after failing to solve their problem in the European Court of Justice,<sup>41</sup> filled a complain to the European Commission of Human Rights because the French Government had not proposed it as a candidate for the Consultative Committee attached to the High Authority of the European Coal and Steel Community. The complaint was addressed to the European Communities and to the member states jointly and severally; the applicant alleged violation of his rights under articles 11, 13 and 14 of the ECHR. The Commission held that applications against the European Communities were to be declared inadmissible as being directed against a "person" not a Party to the Convention. In other words, the Strasbourg Court made clear that it had no jurisdiction over the European Communities or their institutions. This situation led some scholars to identify a gap in the protection of human right in Europe and comment that Community acts enjoy some kind of "immunity from the Convention".<sup>42</sup> In the late 70s, it was already evident that there were serious gaps in human rights protection in Europe that needed to be addressed. It could be a coincidence, but one should not forget that it was in 1979 that for the first time the European Commission introduced the idea that the European Union should accede to the ECHR.

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<sup>40</sup> *Confédération Française Démocratique du Travail v. the European Communities, alternatively: their Member States* a) jointly and b) severally App no. 8030/77 (Commission Decision, of 10 July 1978) Decisions and Reports (DR) 13, p. 236

<sup>41</sup>Case 66/76, *Confederation Française Démocratique du Travail (CFDT) v. Council of the European Communities* [1977] ECR 305

<sup>42</sup>Nanette A. Neuwahl, *The Treaty on European Union: A Step Forward in the Protection of Human Rights?*, in *The European Union and Human Rights* (Nanette A. Neuwahl & Allan Rosas, 1995) 19

## 2.4 Applications against Member States: Cases with a Wide Margin of Discretion

The *CDFT v. the European Communities* case has been exceptional. The rule is that in cases where an individual's fundamental rights are violated by a national measure that gives effect to European Union law, it is possible for the individual to challenge the national measure and bring a case under the Convention system against a Member State of the European Union. In these cases first the European Commission of Human Rights and later the European Court of Human Rights hold the view, originally stated in *X. v. Germany*, that Member States remain responsible but went further to examine what level of discretion the states had when implementing European Union secondary law.

### 2.4.1 Etienne Tête v. France

The *Etienne Tête v. France* case<sup>43</sup> concerned the challenge by a French politician of the Law No 77-729 on the election of French representatives to the Assembly of the European Communities (European Parliament). Tête alleged that the law was discriminatory and violated his right to free elections. The European Commission of Human Rights reiterated its position first held in *X. v. Germany* that when signatories to the Convention transfer powers to international organizations, they remain responsible for their acts. Moreover, it went a step further to examine whether France had a wide margin of discretion when drafting the law in question. It concluded that France had every discretion when drafting the contested law; however, the Commission declared the

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<sup>43</sup> *Etienne Tête v. France* (App no. 11123/84) (Commission Decision of 9 December 1987), DR 54



application inadmissible as manifestly ill-founded and never examined the merits of the case.

#### 2.4.2 **Cantoni v. France**

The merits were examined in the subsequent case, *Cantoni v. France*,<sup>44</sup> by the European Court of Human Rights. Cantoni was the manager of a supermarket who was convicted for unlawfully selling pharmaceutical products. The legal basis for his conviction was Article L. 511 of the Public Health Code which was based on Community Directive 65/65. The applicant alleged that the way “medicinal products” was defined by the law in question was not foreseeable and accessible as required under Article 7 of the ECHR. Since a Directive is binding only to the results that should be achieved and not in the means that the State has to use, the European Court’s of Human Rights position is that in cases of Directives the States have a wide margin of discretion and thus they have the full responsibility for their acts. Therefore, in the specific case the European Court of Human Rights declared the application admissible and continued to the merits, however, it did not find a violation of Article 7 of the Convention.

Based on the *Tête* and *Cantoni* cases one can observe that the general rule both the European Commission of Human Rights and the European Court of Human Rights agreed on is as follows: in cases where member states of the European Union have a wide margin of discretion on how to embody and implement Community law in their domestic legal order, they are to held responsible for every Convention violation that may result from their acts. The margin of discretion however, was never defined enough. It was

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<sup>44</sup> *Cantoni v. France*, Appl. No. 45/1995/551/637 [1996] ECHR (Ser. V) 1996, p. 1614

much rather set opposite to cases that the states had a narrow one, like the ones discussed in the next section.

## **2.5 Applications against Member States – Cases without a Wide Margin of Discretion and the Doctrine of Equivalent Protection**

The European Court's of Human Rights reasoning was different in cases where the States were merely implementing European Union law, without having any discretion. It would be scandalous to hold a state accountable simply because it is following a rule created by an international organization, sometimes even without the consent of the specific state. For that reason, and also in order to avoid reviewing European Union law, the Strasbourg Court established the doctrine of equivalent protection.

### **2.5.1 M & Co. v. Federal Republic of Germany**

A landmark case in this context was *M & Co. v. Federal Republic of Germany*.<sup>45</sup> The applicant company was fined by the European Commission in anti-trust proceedings. The company brought the case at the European Court of Justice and asked for the annulment of the European Commission's decision but the Court upheld the conviction. Subsequently, the applicant initiated proceedings in German Courts in order to block the issue of a writ of execution of the decision. His attempts were not successful and he filed

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<sup>45</sup> *M & Co. v. Federal Republic of Germany* App no. 13258/87 (Commission decision of 9 February 1990) DR 64, p. 138

a complaint to the European Commission of Human Rights against Germany where he alleged that several of its rights had been breached, including the right to be presumed innocent.

The European Commission for Human Rights held that “Under Article 1 of the Convention the member states are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations”.<sup>46</sup> Even if Germany had no discretion in implementing the decisions of the European Communities Institutions, it was still to be held responsible.

However, at this point the European Commission for Human Rights introduced the notion of “equivalent protection”. Possibly influenced by the *Solange II*<sup>47</sup> case-law of the German Constitutional Court, the Commission stated that it would reject as inadmissible applications against European Communities member states concerning cases where States were purely implementing Community law without discretion “Provided that within that organization fundamental rights will receive an equivalent protection.”.<sup>48</sup> The Commission continued that the European Communities provided for a level of human rights protection that could be considered as equivalent to the one of the European Convention of Human rights. It also paid attention to the fact that it would be contrary to the very idea of transferring powers to an international organization to hold the member states responsible for examining in each individual case, before issuing a writ of execution for a judgment of the European Court of Justice, whether the right to a fair hearing within the Convention meaning had been respected in the underlying proceedings.

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<sup>46</sup> *M & Co. v. Federal Republic of Germany* (no. 13258/87) para. 144

<sup>47</sup> *Solange II*, [1986], BVerfGE 73, p. 339

<sup>48</sup> *M & Co. v. Federal Republic of Germany* (no. 13258/87) para. 138

As a result, the Commission declared the application inadmissible *ratione materiae* according to Article 27(2) of the ECHR.

### 2.5.2 Bosphorus v. Ireland

A slightly different approach was adopted by the European Court of Human Rights in the *Bosphorus v. Ireland*<sup>49</sup> case. Bosphorus was a Turkish airline which had leased two aircraft from Yugoslav Airlines, the national airline of the former Yugoslavia. One of these aircrafts was impounded in Ireland by the local authorities under EU Regulation 990/93. The Regulation was transferring in the European Union legal order the United Nations Security Council Resolution 820(1992) which imposed sanctions to the Federal Republic of Yugoslavia for the crimes against humanity it committed.

The company challenged the seizure of the aircraft before the Irish Courts and the case reached the European Court of Justice. The Court upheld the impoundment, and Bosphorus filed a complaint with the European Commission of Human Rights alleging that the seizure of the aircraft constituted a violation of the right to peaceful enjoyment of possession.<sup>50</sup> The complaint was transferred to European Court of Human Rights after the adoption of Protocol 11 of the European Convention on Human Rights.

The admissibility of the case was disputable. The applicant argued that the impoundment was a discretionary act by Ireland within its jurisdiction, consequently, Ireland was responsible. On the other hand, the Government of Ireland stated that although the impoundment occurred within its jurisdiction, it had acted as a European

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<sup>49</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* [GC] ECHR 2005-VI

<sup>50</sup> Article 1, Protocol 1 of the European Convention of Human Rights

Union agent, it has no responsibility and the complaint should be deemed inadmissible. The European Commission was allowed to intervene in the proceedings. It stated that due to the specific facts of the case, Ireland was not responsible and Bosphorus' complaint was in fact challenging the EU Regulation 990/93.

The European Court of Human Rights dealt with the case slightly differently than the European Commission of Human Rights in the *M & Co.* case. First, it stated that there was an interference with the applicant's right to peaceful enjoyment of possession occurred within the jurisdiction of Ireland. Secondly, it followed the *M & Co.* wording by saying that Regulations are "generally and directly applicable" and "binding in their entirety". So, since Regulation 990/93 was the legal basis of the impoundment, Ireland had no discretion whether to impound the aircraft or not. Following, it brought up the issue of "equivalent protection" reaffirming that the European Union provides for a human rights protection system that is "comparable" but not "identical" to the one provided from the European Convention of Human Rights. A new addition to this concept is that this presumption could be rebutted if, in a particular case, it was found that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.

At this point, after stating that Ireland had no discretion in enforcing the measures required by the EU Regulation and that European Union's human rights protection is equivalent to the one of the European Convention on Human Rights, following the *M & Co.* technique, the Court was expected to declare the application inadmissible. Surprisingly, the Court did not do so but it proceeded to the merits of the case where it found that the interference with the applicant's right to peaceful enjoyment of possession did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention since Ireland was

implementing EU Law and there was no reason for the presumption of equivalence to be rebutted.

This decision of the Court raised many questions. To begin with it is unclear whether the presumption of equivalent protection would also apply in cases where there was no action or omission by a Member State but only action by EU institutions. It was unclear what could be considered as “state act”. Could a reference for a preliminary ruling to the ECJ under Article 267 of the Treaty on the Functioning of the European Union considered to be a state act? <sup>51</sup> This question will be discussed further in this chapter. Furthermore, the Court did not sufficiently explain when the protection granted by an international organization would be considered as ‘manifestly deficient’ so that the presumption of equivalent protection will be rebutted. <sup>52</sup> This point was highlighted by Judge Ress in his concurring opinion where he stated that there was no adequate review of what would considered to be “manifestly deficient”. Another interesting point is how much discretion in implementing its legal obligations deriving from its membership in an international organization a Member State of the EU should have before the presumption will be rebutted. <sup>53</sup> In general the Bosphorus judgment of the ECtHR was not found satisfactory by many scholars. Peers characterized the decision as a “missed opportunity to establish a clear, coherent and uncompromising approach to the protection of human rights within the Community legal order”. <sup>54</sup>

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<sup>51</sup> Steve Peers, ‘Bosphorus – European Court of Human Rights’ (2006) 2 European Constitutional Law Review 443,452

<sup>52</sup> Tobias Lock, ‘Beyond Bosphorus: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights’ (2010) 10 Human Rights Law Review 529,532

<sup>53</sup> Peers, ‘Bosphorus – European Court of Human Rights’ (n 51) 453

<sup>54</sup> *ibid*

Some scholars believe that the fact that since *Bosphorus*, the Court has presumed that all international organizations involved in cases before the Strasbourg Court provide equivalent rights protection as “conspicuous”.<sup>55</sup> As the Judges that concurred in the decision had warned, the “manifestly deficient” criterion seems to establish a relatively high threshold providing again a kind of immunity for the acts of international organizations. It is evident that the concept of “equivalent protection” is again not defined clearly enough so as to provide the necessary legal certainty. The highly problematic nature of the doctrine of equivalent protection is additionally underlined by the willingness of the Court to declare applications inadmissible on other grounds, so that there will not be a need to examine it.<sup>56</sup> This is what happened in the case *Emesa Sugar v. the Netherlands* discussed below.

### 2.5.3 *Emesa Sugar v. the Netherlands*

In *Emesa Sugar v. the Netherlands*<sup>57</sup> the applicant was negatively affected by an EC Council decision. It brought the issue to the local court which referred to the European Court of Justice for a preliminary ruling.<sup>58</sup> During the proceedings the Advocate General submitted an opinion. The company asked permission to submit written observation on the Advocate General’s opinion however, as it is common practice, the request was rejected. The applicant company filed a complaint against the Netherlands claiming that

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<sup>55</sup> eg Cedric Ryngaert, ‘The European Court of Human Rights’ Approach to the Responsibility Of Member States in Connection with Acts of International Organizations’ (2011) 60 International and Comparative Law Quarterly 997,1002

<sup>56</sup> Cathryn Costello, ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 Human Rights Law Review 87,.94

<sup>57</sup> *Emesa Sugar v. The Netherlands* , Appl. No. 62023/00 EHRR, decision as to the admissibility of 13 January 2005.

<sup>58</sup> C-17/98, *Emesa Sugar v. the Netherlands* [2000] ECR I-675

their right to fair adversarial proceedings has been violated. The ECtHR smartly avoided dealing with the issue of equivalent protection by declaring the application inadmissible *ratione materiae*.

From the analyses of the two previous sections it follows that both the applicants and the member states are in a quite disadvantageous position. member states can be found guilty of violating human rights simply because they are enforcing European Union law and individual applicants can end up with no compensation due to a hazy concept of equivalent protection of human rights provided by the European Union. However, the individuals situation can be even more difficult in cases where there is no national implementation measure to be challenged. This kind of case will be discussed in the next two sections.

## **2.6 Cases with no National Implementation Measure**

Rather problematic are cases that there is no national implementation measure which the individual could contest at the European Court of Human Rights. There are two categories of such cases. First, those that concern disputes between employees of the European Union with the Union. These individuals used to have the opportunity to assert their rights in the European Court of Justice and later at the Court of First Instance. Since 2005 there is a special forum for these disputes, the Civil Service Tribunal. If the applicant is not satisfied with its decision he can appeal and the case can reach the Court of Justice. However, the decisions of the later cannot be scrutinized by any other body.



### 2.6.1 Connolly v. 15 Member States of the EU

An interesting case in this context is *Connolly v. 15 Member States of the European Union*.<sup>59</sup> Connolly was an employee of the European Commission. While in leave on personal grounds he published a book titled “*The Rotten Heart of Europe - The Dirty War for Europe's Money*” in which he exposed internal information about the European Monetary Union. This act was characterized as misconduct and he was removed from his post. Connolly contested his removal in the Court of Justice of the European Union but in all proceedings the Courts upheld the removal. He then filed a complaint with the European Court of Human Rights. Although his initial complaint against the Court of First Instance was that his removal constituted a violation of his right to freedom of expression, in his application to the Strasbourg Court he alleged a violation of Article 6 of the Convention, claiming that the fact that he could not submit written observations on the opinion of the Advocate General constituted a breach of fair trial. Since he could not file an application against the European Union or one of its Institutions, he indicated as respondents all the fifteen Members of the Union. However, the European Court of Human Rights rejected the application as inadmissible. The Court held that the complaint was directed against the decisions taken by the Courts of the European Union whereas the respondent states had neither directly nor indirectly intervened in the proceedings before it. Since there was no state action the application was declared inadmissible *ratione personae*.

It follows that according to the European Court of Human Rights the applicant needs to show that the respondent state or states have somehow intervened. Again, as in *Bosphorus*, it is not clear what could be considered as an intervention.

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<sup>59</sup> *Connolly v. 15 Member States of the European Union*, no. 73274/01, 9 December 2008

## 2.6.2 Kokkelvisserij v. the Netherlands

The answer to this question became even more complicated in the case law following *Connolly*. In *Kokkelvisserij v. the Netherlands* <sup>60</sup> the applicant association complained that their Article 6 rights were violated due to the fact that they could not submit written observations to the opinion of the Advocate General. However, the difference with *Connolly* is that the case had reached the European Court of Justice through the preliminary ruling procedure. This means that the Dutch Court asked the European Court of Justice for its interpretation on European Union Law. Surprisingly, the European Court of Human Rights held that;

“[The] intervention by the ECJ [was] actively sought by a domestic court in proceedings pending before it. It cannot therefore be found that the respondent party is in no way involved.... It is the domestic court which, finding itself faced with a question of Community law to which it requires an answer in order to decide a case pending before it, seeks the ECJ's assistance in terms of its own choosing.”

Following the *Kokkelvisserij* reasoning, merely the request for a preliminary reference from a domestic Court can be considered as “state act” and then the Member State can be held accountable if any human rights violation is found. This reasoning has been highly criticized as it appears to compromise the autonomy and separate legal personalities of an international organization and its Member States. <sup>61</sup>

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<sup>60</sup> *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (App No 13645/05)

<sup>61</sup> Ryngaert, ‘The European Court of Human Rights’ Approach to the Responsibility Of Member States in Connection with Acts of International Organizations’ (n 55) 1004

The Court reaffirmed its position that a member state must be actively involved in order to be held accountable in the later case *La société Etablissement Biret et CIE S.A. v. 15 Member States of the European Union*<sup>62</sup> but adopted a different view in the *Gasparini v. Italy and Belgium* case.<sup>63</sup>

### 2.6.3 Gasparini v. Italy and Belgium

The *Gasparini* case concerns a labor dispute between NATO and an employee. The facts of the case are quite similar to *Connolly*. The applicant complained that the NATO Appeals Board had not held its session in public when deciding his case and he alleged a violation of his right to a fair trial under article 6 of the European Convention of Human Rights. The Court claimed jurisdiction to adjudicate although neither Italy nor Belgium had been directly involved in the case. The Court distinguished this case from *Connolly*; Gasparini did not contest the decision of the NATO Appeals Board but he alleged a structural lacuna in the Organization's internal dispute-settlement mechanism. The Court held that member states of international organizations are responsible for structural lacunae in them, thus the Court has power to review the case even if Italy and Belgium have not acted.

This view of the Court is quite revolutionary as it goes beyond its established case law in *Bosphorus*, *Kokkelvisserij* and *La société Etablissement Biret et CIE S.A.* in which it required some state action in order to raise the State's responsibility under the

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<sup>62</sup> *La société Etablissement Biret et CIE S.A. v. 15 Member States of the European Union* App no. 13762/04 dec. (ECtHR, 9 December 2008)

<sup>63</sup> *Gasparini v. Italy and Belgium* App no. 10750/03 (ECtHR, 12 May 2009)

Convention.<sup>64</sup> In *Gasparini* no member state had acted; however, they appeared to be responsible for a “structural lacuna”. This decision was criticized because the Court did not explain at which point a deficit in the judicial protection within an International Organization turns into a “structural lacuna”.<sup>65</sup> It is rather questionable why the private hearings in the NATO Appeals Board are considered as such whereas the inability to respond to the Advocate General’s Comments at the European Court of Justice not.

In short, one can say that the institutions of the European Union are immune; it is only the member states that can face a predicament. According to the Parliamentary Assembly of the Council of Europe the lack of answerability of the institutions of the European Union is by far the most serious lacuna in human rights protection in Europe as these powerful institutions are “the only public authorities operating in Council of Europe member states that are outside the jurisdiction of the European Court of Human Rights”.<sup>66</sup> This is something that should definitely change with the accession of the European Union to the ECHR.

The second type of cases, where there is no national implementation measure concerns cases where a directly applicable provision of European Union law may violate someone’s rights under the Convention. In this case the individual could bring an action of annulment for the provision under Article 263 of the Treaty for the Functioning of the European Union. However, in order to do this, the individual has to satisfy very strict criteria. Article 263 has received extensive criticism; it has been said that access to the

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<sup>64</sup> Ryngaert, ‘The European Court of Human Rights’ Approach to the Responsibility Of Member States in Connection with Acts of International Organizations’ (n 55) 1005

<sup>65</sup> *ibid*

<sup>66</sup> Parliamentary Assembly Recommendation 1744 (2006) Text adopted by the Assembly on 13 April 2006 (14th Sitting), paragraph 4

Court in this kind of case is almost impossible.<sup>67</sup> Therefore, it is clear that the protection afforded within the EU by the European Court of Justice cannot be considered satisfactory. On the other hand, it is impossible for the individual to challenge the problematic provision at the European Court of Human Rights since there is no national implementation measure. The common practice in such cases is that the individual violates the provision in order to get prosecuted and then challenges the prosecution. This situation was defined and highly criticized by Advocate General Jacobs in his Opinion in the *Unión de Pequeños Agricultores v. Council of the European Union*<sup>68</sup> (UPA).

## 2.7 Critical Evaluation of the Pre-accession Era

To summarize the current situation in few words we can say: the European Union cannot be brought before the European Court of Human Rights because it is not a party to the Convention; however, its member states can be accused and under several circumstances be held responsible for implementing its law. This situation creates numerous problems. The European Court of Human Rights could potentially find a Member State responsible violating the Convention by implementing an EU act, which it may even oppose. Especially after the enforcement of the treaty of Lisbon and the expansion of qualified majority voting in areas, such as Common Foreign and Security Policy and Area of Freedom, Security and Justice it is very possible that a Member State will need to implement an EU act which it has initially voted against.<sup>69</sup>

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<sup>67</sup> Ewa Biernat, 'The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community', Jean Monnet Working Paper 12/03, 2003, 54

<sup>68</sup> Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677

<sup>69</sup> See TEU art 16(3), TFEU art. 294.

A second major problem is cases where EU organs have acted directly such as labor disputes or European Union competition law fines. In cases like *Connolly* there are no national acts to be challenged before the ECtHR. If the General Court or the European Court of Justice reject their application or decide in favor of the European Union institution, individuals end up with no protection.

A third legal gap is in cases where there were no national implementation measures. In this situation an individual has nothing to challenge. The only option is to violate the law in order to be prosecuted and then challenge the prosecution. It is clear that this situation does not come up to the high Convention standards.

However, even in case where there are national implementations measures that the individuals may challenge at the European Court of Human Rights, there are still many uncertainties. As already addressed, the *Bosphorus* case law leaves many questions unanswered. When would the “equivalent protection” presumption be rebutted? What constitutes a “state action”? It is not irrelevant that in his concurring opinion Judge Ress highlighted the importance of the accession of the EU to the ECHR in order for human rights protection in Europe to be coherent.<sup>70</sup>

Many of these problems should be addressed by the forthcoming accession of the European Union to the European Convention on Human Rights. The next chapter will outline how this would happen. The main focus will be on the newly introduced co-respondent mechanism which is expected to drastically change the existing trends in distribution of responsibility between the EU and its member states.

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<sup>70</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, Judgment of 30 June 2005, Application No. 45036/98, Concurring opinion of Judge Ress, para 2.

### 3. Developments after the Accession

As the analysis in the previous chapter shows, it is undeniable that the current situation is highly problematic. The European Union and its institutions are immune, while member states are accused for violating human rights even if they have not act and most importantly individuals are helpless. It is expected that the accession of the European Union to the European Convention on Human Rights will change this. This chapter outlines this change. Since there is no agreement signed by both parties, the discussion will be based on the “Draft legal instruments on the accession of the European Union to the European Convention on Human Rights” <sup>71</sup> (“the draft Accession Agreement”) prepared by the CDDF Informal Working Group on the Accession of the European Union to the European Convention on Human Rights. Given that at the moment of writing the draft Accession Agreement is under negotiation within the two organizations, the analysis of the this chapter may be subject to alterations. However, the probability of this is low.

#### 3.1 Who is the Appropriate Respondent?

After accession, the actions of the EU and its institutions will be scrutinized by the ECtHR since an individual could fill an application against them. The first question that arises is against whom the applicants should fill their application in case they feel that

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<sup>71</sup> Document CDDH-UE(2011) 16 available at [http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dlapil/cahdi/source/Docs%202011/CDDH-UE_2011_16_final_en.pdf)

their rights were violated as a result of enforcement of European Union law; and it will be answered in this section. According to the rules of the Court, it is for the complainant to decide who will be the respondent to the application. Before accession the individual would usually file the complaint against the state whose authorities had acted. There were also cases like *Connolly* where the individual filed the complaints against all the member states of the European Union. After the accession, when the European Union will be a signatory to the Convention, the individual could designate the Union as a respondent. The question that arises is who will be the appropriate respondent in cases where member states implement EU law. In cases of EU Treaties or regulations, which are directly applicable, should the State that executes them be held responsible for it? Will there be a difference in the case of Directives, which are binding only to the results to be achieved, so the member states have to legislate?

This question has been already raised by the drafters of the Lisbon Treaty. Article 1 (b) of the Protocol to the Lisbon Treaty on accession to the ECHR reads:

“The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [...] provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: [...] the mechanisms necessary to ensure that proceedings by non-member states and individual applications are correctly addressed to member states and/or the Union as appropriate.”<sup>72</sup>

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<sup>72</sup> 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 [2010] OJ 83/273



It is evident that the drafters of the Treaties were well aware that for the accession to prove meaningful, one should ensure that the applicants will be able to address their applications to the appropriate respondent. The European Parliament's Committee on Constitutional Affairs proposed that:

“ ... any application by a citizen of the Union concerning an act or failure to act by an institution or body of the Union should be directed solely against the latter and that similarly any application concerning a measure by means of which a Member State implements the law of the Union should be directed solely against the Member State, without prejudice to the principle that, where the way in which responsibility for the act concerned is shared between the Union and the Member State is not clearly defined, an application may be brought simultaneously against the Union and the Member State.” <sup>73</sup>

This solution appears to be reasonable: when the EU acts, application is addressed to the EU; when member state acts application is addressed against the member state; when they both act application is addressed against them both. However, studying the pre accession era, one can comment that the lines are not very clear as to who is the main actor in each case. The applicant may risk that his application is inadmissible because he did not designate the right respondent. On the other hand, filing an application against both the EU and one or more member states would mean that the applicant should have

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<sup>73</sup> Draft Report on the institutional aspects of accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2 February 2010 (2009/2241 (INI)), at para 7; report was adopted by the European Parliament on 19 May 2010, P7\_TA-PROV(2010)0184, available at [http://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_adoptes/provisoire/2010/05-19/P7\\_TA-PROV%282010%2905-19\\_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2010/05-19/P7_TA-PROV%282010%2905-19_EN.pdf)

exhausted all the domestic remedies in the relevant legal orders. This would be both time consuming and inefficient.

Currently, according to the third party intervention possibility, a signatory state to the convention whose citizen brings a case against another state has the right to intervene in the proceedings.<sup>74</sup> When the European Union joins the Convention, it should have the right to intervene as a third party since all EU member states nationals hold the European citizenship. This issue was under debate during the negotiations. French Senator Robert Badinter has strongly supported this possibility,<sup>75</sup> whereas some member states have suggested that European Union citizens should not be regarded as ‘nationals’ of the Union in that sense<sup>76</sup>.

In any case, the third party intervention mechanism has several drawbacks. To begin with, the third party is not obliged to intervene. Moreover, even when it does, the decision of the Court is not binding on it. This is highly problematic since in many cases a member state cannot correct the violation on its own; it would need the cooperation of the EU, which is not to be taken for granted if the judgment is not binding for it. Finally, the European Union could intervene only in complaints brought from European citizens. However, a great number of cases brought to the European Court of Human Rights against European Union member states come from asylum seekers who are not European citizens. This means that in a case like *MSS v. Belgium and Greece* the EU would not be able to intervene as third party because the applicants do not hold the EU citizenship.

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<sup>74</sup> Article 36 ECHR

<sup>75</sup> Communication de M. Robert Badinter sur le mandat de négociation (E 5248'), 25 May 2010, available at: <http://www.senat.fr/europe/r25052010.html#toc1>

<sup>76</sup> Summary of Discussions, Informal meeting of member states' representatives in the CDDH (4 May 2010), available at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE\\_documents/CDDH-UE%282010%2901\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/CDDH-UE%282010%2901_en.pdf)

Therefore it is clear that the third party intervention mechanism is neither inclusive nor efficient enough in the case of the EU as a party to the ECHR.

### **3.2 The Co-respondent Mechanism**

In order to overcome these problems, the Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights introduces an amendment to Article 36 and the creation of a co-respondent mechanism.<sup>77</sup> The co-respondent mechanism is similar to the third party intervention. In case that the applicant fills an application against the EU, one or more member states may ask to join as correspondents.<sup>78</sup> Similarly, if the application is filled against a member state the EU may ask to join.<sup>79</sup> Another possibility is that in case an application is filled against both the EU and one or more member states, one of them may ask to change its status as a correspondent.<sup>80</sup> In all cases, the party that wishes to become a co-respondent should provide the Court with the reasons that make such a procedure necessary. Then the Court can decide whether it accepts the party to be a correspondent. Finally, the Court may invite the EU or one or more member states to join as correspondents.<sup>81</sup> However, the party has every discretion to decide whether it wishes to join or not.

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<sup>77</sup> Article 3 “Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights” CDDH(2011)009

<sup>78</sup> Article 3 (3) CDDH(2011)009

<sup>79</sup> “Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights” CDDH(2011)009 par 36

<sup>80</sup> CDDH(2011)009 par 37

<sup>81</sup> CDDH(2011)009 par 47

The co-respondent mechanism has been characterized as “the most important modification to the Convention”.<sup>82</sup> However, as it is an innovation it would be useful to see how it could possibly work in different cases. The next subsections are an exercise on how the co-respondent mechanism could be triggered in cases concerning: EU primary law, EU secondary law and finally cases regarding omissions. This way we will have an outline of how distribution of accountability for human rights violation could possibly change after the accession.

### 3.2.1. EU Primary Law

Before accession, cases concerning EU primary law were highly problematic: the EU used to be immune, since it was not a party to the Convention; on the other hand the member states could be found guilty even when they were simply enforcing the law (eg *Matthews v. the United Kingdom*) or even when they had nothing to do with the violation in question (eg *Kokkelvisserij v. the Netherlands*). During the lengthy accession discussions, there were voices claiming that EU primary law should not in any case be reviewed by the Strasbourg Court.<sup>83</sup> In the three next subsections we will see how these three scenarios will change after accession.

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<sup>82</sup> Jana Králová, ‘Comments on the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’ (2011) 2 Czech Yearbook of Public & Private International Law 127,132

<sup>83</sup> French Senate, Communication de M. Robert Badinter sur le mandat de négociation (E 5248) May 25, 2010, available at: <http://www.senat.fr/europe/r25052010.html#toc1> accessed 12 May 2012

### 3.2.1.1. Immunity of the EU - Article 263 (4) TFEU

A provision that is highly likely to be tested for its compatibility with the ECHR after the accession is Article 263 (4) TFEU.<sup>84</sup> According to it every European citizen who feels that his or her rights were violated by an act of the European Union Institutions can bring a case to the Court of Justice of the European Union. The individual can object the legality of an institution's act and bring an action for annulment.<sup>85</sup> The basic problem is that access to the Court of Justice of the European Union is extremely hard for individuals. Individuals as opposed to the European Union's Institutions are characterized as "non-privileged applicants". This means that they have to satisfy strict criteria in order to bring an action for annulment. To add to this, the decision of the Court of Justice of the European Union is not scrutinized by any other independent body, thus adding to the feeling that the EU is immune.

There has been considerable criticism regarding this topic. Most notably, Craig and De Burca have stated that the "*Plaumann* test" made it impossible for an applicant to succeed in obtaining standing before the European courts, except in very limited cases.<sup>86</sup> However, the biggest attack came from the inside. Advocate General Jacobs who was one of the greatest opponents of this restrictive approach, delivered his opinion on the *UPA*<sup>87</sup> case. The Union de Pequeños Agricultores (UPA) was a trade association, of small Spanish agricultural businesses, who asked for the annulment of a regulation that amended the common organization of the olive markets by abolishing subsidies, which

<sup>84</sup> Tobias Lock, 'End of an epic? The draft agreement on the EU's accession to the ECHR' (2012) 31 Yearbook of European Law 162, 180

<sup>85</sup> Article 263 TFEU

<sup>86</sup> Craig and Búrca, *EU Law: Text, Cases, and Materials* (n \_\_) 512

<sup>87</sup> Case C-50/00 P Unión de Pequeños Agricultores v. Council [2002] ECR I-6677

until then had been given to small producers. The case had been already rejected as inadmissible by the Court of First Instance and at that point was to be decided by the ECJ. In his opinion, Advocate General Jacobs suggested that there is a need for a more liberal interpretation of the test of individual concern. He proposed that an individual should be regarded as individually concerned when "by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests".<sup>88</sup>

Some weeks later the Court of First Instance (now General Court) delivered its judgment in the *Jego-Quere* case. The case concerned the action for annulment of a Commission regulation imposing a minimum mesh size for fishing nets by a French fishing company. The Court of First Instance clearly influenced by Advocate General Jacobs opinion, stated that

“...a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard”.<sup>89</sup>

Furthermore, it added that the preliminary reference procedure does not reach the high threshold settled by Article 6 and 13 of the European Convention of Human Rights

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<sup>88</sup> Paragraph 60 of the Opinion

<sup>89</sup> Case T-177/01 *Jego-Quere et Cie SA v. Commission* [2002] ECR II-2365 §51

and Article 47 of the Charter for Fundamental Rights of the European Union, in order to be considered as an effective remedy and thus as providing effective judicial procedure.<sup>90</sup>

After the *Jego-Quere* decision of the CFI it was expected that the European Court of Justice would continue and adopt a more relaxed and flexible approach toward standing requirements.<sup>91</sup> However, the ECJ was not willing to make the big step. The CFI's depart from its previous case law and AG Jacob's opinion were not enough. In the *UPA* decision it acknowledged the right to effective judicial protection but did not get as far as the CFI and AG Jacobs did. The Court stated that even if the need for less strict standing requirements was there, they were the member states to decide it and enforce it through Treaty reform, not the Court.<sup>92</sup> This approach was characterized as disappointing<sup>93</sup> and a "missed opportunity".<sup>94</sup>

After accession the actions of the ECJ would fall under the supervision of the European Court of Human Rights. So far, the Strasbourg Court has exercised a high level of comity and has regarded the human rights protection offered by the European Union as equivalent to the one of the European Convention of Human Rights. However, in the *Bosphorus*<sup>95</sup> case, judge Ress in his concurring opinion warned that it is possible that the restricted access to the ECJ would be considered by the European Court of Human Rights as falling under the threshold of Article 6 of the ECHR. In this case it is possible that the

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<sup>90</sup> Case T-177/01 *Jego-Quere et Cie SA v. Commission* [2002] §47

<sup>91</sup> Marie-Pierre Granger, 'Towards a liberalisation of standing conditions for individuals seeking judicial review of Community acts: *Jégo-Quéré et Cie SA v. Commission* and *Unión de Pequeños Agricultores v. Council*' (2003) 66 *The Modern Law Review* 124,135

<sup>92</sup> Case C-50/00 P *Unión de Pequeños Agricultores v. Council*, §44-45

<sup>93</sup> Constantinos C. Kombos, 'The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution?' (2005) 9 *European Integration online Papers*, No 17

<sup>94</sup> Albertina Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' (2003) 62 *The Cambridge Law Journal* 72, 92

<sup>95</sup> *Bosphorus Hava Yollari Turizm v. Ireland* (2005) Application No. 45036/98

application will be addressed against the EU as the member states are not involved since there is no implementation measure. On the other hand, it is impossible for the European Union itself to amend the law. This will need the agreement and active involvement of the member states. Again it is still to be determined who would be the addressee or which of the parties to the Convention will join as a correspondent.

#### **3.2.1.2. Matthews v. the United Kingdom**

The European Court's of Human Rights decision in *Matthews v. the United Kingdom* showed how vulnerable member states are; the UK was found guilty for violating Mrs. Matthews right to vote merely because it followed the European Communities Act on Direct Elections of 1976. To add to this, when trying to stop the violation, it was brought to the Court of Justice of the European Union by Spain. If a similar case reaches the ECtHR after the accession, one can expect that even if the applicant files the application against a member state, the EU will still join the proceedings as a co-respondent. In this way, not only justice will be made as regards the responsibility of the violation, but also it would be easier for the violation to be stopped since the decision of the ECtHR will be binding to all acting parties.

#### **3.2.1.3. Kokkelvisserij v. the Netherlands**

In *Kokkelvisserij v. the Netherlands* the ECtHR implied that a member state could be held responsible for a violation of human rights rooted in EU primary law (the statute



of the Court of Justice of the European Union) simply because it was involved in the case through the preliminary reference procedure. The Netherlands, in the specific case, got away without a conviction simply because the applicant did not manage to prove that the fair trial guarantees available to them during the proceedings were manifestly deficient. After the accession, it is reasonably expected that a similar application would be addressed against the EU itself. The role of the member, if any, would be the one of the correspondent.

### **3.2.2. EU Secondary Law**

Cases involving EU secondary law were also complicated before the accession. The main puzzle in such cases is that the body that enacts the legislation is different than the one that implements it. The victims cannot address the EU which is the enacting body, so they fill applications against the member states which are the implementing ones. However, most of the time, the individual applicants remained without redress because the doctrine of equivalent protection protects member states. In any case, the EU which is usually in these cases the entity that enacts the law in question remains untouched.

A very characteristic case in this context is the already discussed *Bosphorus v. Ireland*. The applicant had his aircraft impounded and suffered extensive financial damages; however he never managed to receive any kind of compensation. He could not address the EU which was the enacting entity of Regulation 990/93; he addressed Ireland as the implementing authority however, the ECtHR applied the doctrine of equivalent protection and did not find any violation of the Convention. This flawed system will change after accession. When the European Union will be a party to the Convention, the

Strasbourg Court will have no reason to continue using the doctrine of equivalent protection and the presumption that the human rights protection provided by the EU is equivalent that of the ECHR. If something like this happens, it will create two categories of signatories to the Convention, one being the EU, a privileged organization that its acts do not undergo the high scrutiny that the rest of the members do.<sup>96</sup> This would be, the least, unfair and it is doubtful whether other signatories to the Convention would accept it. Therefore, assuming that the presumption of equivalence will cease to exist, in a similar case the EU should join the proceedings as a co-respondent and take the responsibility for the human rights violations that may result from its legislation.

### 3.2.3. Omissions

As early as 1968, the ECtHR made reference to states' positive obligations. States should not only refrain from violating rights set out in the Convention but also take positive measures in order to protect them. This means that a state may be held responsible not only when through its active behavior it violates Convention rights, but also when it fails to take the necessary steps so as to protect and guarantee these rights to every individual under its jurisdiction. This omission can occur when the state fails to legislate on a matter or fails to implement the relevant legislation.

In the EU context, in the case of lack of implementation, identifying the proper addressee is relatively easy. If the applicant feels that an EU institution failed to implement a certain provision, the addressee will be the EU. If a member state did not

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<sup>96</sup> Kathrin Kuhnert, 'Bosphorus – Double standards in European human rights protection?' (2006) 2 Utrecht Law Review 177,186

take the measures to give effect into a European Union law, the addressee will be the member state. However, the case of a failure to legislate will be more complex. An alleged violation of a Convention right which results from a failure to legislate in an area that the EU has exclusive competence could be safely addressed to the EU. This choice will not be so easy in a case that there is a failure to legislate in an area that the EU has shared or supporting competencies. In this case neither the EU nor the member states could be automatically held responsible for the failure to legislate. One should investigate which of them should have acted; however, if this decision is to be made by the ECtHR then the Court should decide on the division of powers in the EU. Something like this would be totally unacceptable as it would violate the autonomy of the EU legal order as it has been feared by the ECJ in its previous opinion. The co-respondent mechanism could be very useful in such a situation by ensuring that both the EU and the relevant member state will be held responsible. However, reading the current version of Article 3(2) of the Accession Agreement one can identify cases that could fall out of its scope thus creating a lacuna in the protection of human rights even after the accession.

#### **3.2.4. Strengths, Weaknesses and Questions**

Given the fact that the establishment of the co-respondent mechanism will require an amendment to the Convention, one could question its necessity. What is the added value of such a novelty considering its similarities with the third party intervention mechanism? The main difference between the third party intervention and the co-respondent mechanism is that the co-respondent is a party to the case, so, the Court's decision is also binding on it. As opposed to the situation with third party intervention,

the co-respondent may be found jointly responsible together with the respondent for a violation. This is very important because as case law showed, it is impossible sometimes for the member state found responsible for a violation to cease this violation and provide compensation to the victim without the agreement of the EU or other member states. Therefore, the co-respondent mechanism will not only remedy for the injustice regarding distribution of responsibility but also allow for the more effective execution of the judgments.<sup>97</sup>

There is an additional significant benefit of the co-respondent mechanism. As was mentioned before, a state may intervene as a third party only in cases regarding its nationals. This would mean that considering that all nationals of the 27 member states also hold the EU citizenship, EU could intervene in cases regarding them. However, this would be onerously insufficient as numerous cases involving member states and EU law are brought from third country nationals. This situation will not be a problem since an entity may join as a co-respondent regardless its relation with the applicant.

A final advantage of the co-respondent mechanism is that the applicants do not need to exhaust the domestic remedies of the party that is defined as a correspondent. This means that it would be easier from the applicant to seek redress from multiple actors without having to spend time an effort in all relevant Courts.<sup>98</sup>

On the other hand there are also many drawbacks in the co-respondent mechanism as it appears at the moment in the draft accession agreement. The voluntary character of

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<sup>97</sup> Králová, 'Comments on the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (n 82)140

<sup>98</sup> Tobias Lock, 'Sharing responsibility? The co-respondent mechanism and EU accession to the ECHR | SHARES', < <http://www.sharesproject.nl/event/shares-lecture-the-eu-accession-to-the-european-convention-on-human-rights-and-the-co-responsibility-mechanism-by-tobias-lock/> > accessed 24 November 2012

the co-respondent mechanism has been highly criticized.<sup>99</sup> In an extreme scenario, the co-respondent mechanism could prove useless if the EU or the member states simply refuse to join the proceedings. It has been also implied that the voluntary character is in breach of Protocol 8 to the Lisbon Treaty.<sup>100</sup> According to it, the accession agreement should ensure that applications are addressed to the appropriate respondent. By allowing discretion to the EU or the member states to choose whether to join as co-respondents or not, this aim is severely incommoded.

A second disadvantage of the co-respondent mechanism is that it could arguably prolong the proceedings. In a report submitted by AIRE Centre and Amnesty International it is highlighted that the requirements for triggering the co-respondent mechanism may be too complicated and therefore they may unacceptably lengthen the procedure.<sup>101</sup> Keeping in mind the huge backlog of cases in the ECtHR and the fact that proceedings were lengthy even before, it is clear that further delay would be everything but welcomed especially by the applicants.

One further thing to consider is how often the co-respondent mechanism will be used.<sup>102</sup> It is true that whether the EU may join the proceedings as a co-respondent depends also in the way the applicant filed his application. The EU may not join in cases where the law was implemented by the member states and the applicant did not question the compatibility of the law with the Convention. Such an example could be again the

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<sup>99</sup> Tobias Lock, 'Accession of the EU to the ECHR: Who Would Be Responsible in Strasbourg?' in *The European Union after the Treaty of Lisbon*. (Cambridge University Press, 2012) 127

<sup>100</sup> Lock, 'End of an epic? The draft agreement on the EU's accession to the ECHR' (n 84)

<sup>101</sup> Informal Working Group On The Accession Of The European Union To The European Convention On Human Rights (CDDH-UE) Submission by the AIRE Centre and Amnesty International available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working\\_documents/AIRE&AI\\_comments\\_March\\_2011.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working_documents/AIRE&AI_comments_March_2011.pdf)

<sup>102</sup> CDDH(2011)009 par 44

*M.S.S. v. Belgium and Greece* case.<sup>103</sup> The applicant, an Afghan asylum seeker, entered the EU territory from Greece but filled an application for asylum status only in Belgium. According to the relevant EU law, the Dublin Regulation,<sup>104</sup> it is for the country in which the asylum seeker entered the EU to examine his application and decide on his status. Following the regulation Belgium extradited the applicant in Greece where he was subjected to such appalling conditions as to constitute torture. The applicant did not at any time question the compatibility of the Dublin Regulation with the ECHR. He only accused Belgium and Greece of exposing him to inhuman and degrading treatment. In this case, even after the accession, the EU will not be able to join the proceedings as a correspondent. The only way it could be involved is through the third party intervention. Interestingly enough, according to the explanatory report the third party intervention “may often be the most appropriate way to involve the EU”.<sup>105</sup>

Finally, there are questions regarding the co-respondent mechanism that still remain unanswered. For example, could a state that is not a member of the EU but it is enforcing EU through bilateral agreements act as a correspondent?<sup>106</sup> It is expected that issues like that will be clarified in the subsequent meetings and during the negotiations between the two organizations.

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<sup>103</sup> *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011.

<sup>104</sup> Council Regulation 343/2003/EC OJ [2003] L 50/1.

<sup>105</sup> CDDH-UE(2011)16, para 40.

<sup>106</sup> CDDH-UE(2011)06, para 7.

## Conclusion

“Following the submission of a draft accession treaty to the Committee of Ministers in October 2011, the process now seems to be stalled. After some thirty years of discussion all that appears to be lacking is the political will to overcome the last obstacles. The Court would therefore urge the Member States to seize the opportunity provided by the Brighton Conference to take forward the process to completion in compliance with the Lisbon treaty.”<sup>107</sup>

The European Court of Human Rights urges the member states to proceed with the accession. Unfortunately, the current economic situation, together with the United Kingdom Chairmanship of the Council of Europe, are not expected to facilitate this procedure. This is very sad, because as shown in the analysis of chapter two, there are many imperfections in human rights protection in Europe that need to be corrected. The accession could play a great role in alleviating these imperfections.

The present thesis set out to show how this alleviation could happen. In the beginning analysis shows that striking a fair balance between safeguarding international organizations autonomy and functionality and protecting third parties rights is a rather sensitive and difficult task. Subsequently, examination of how the European Court of Human Rights is trying to strike this balance especially in case concerning the European

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<sup>107</sup> Preliminary opinion of the European Court of Human Rights in preparation for the Brighton Conference (Adopted by the Plenary Court on 20 February 2012) para. 40 available at [http://www.echr.coe.int/NR/ronlyres/BF069E9B-8EE5-4FA8-877E-2DFAA4C167BD/0/2012\\_Avis\\_Cour\\_Conf%C3%A9rence\\_de\\_Brighton\\_1820\\_avril\\_2012\\_EN.pdf](http://www.echr.coe.int/NR/ronlyres/BF069E9B-8EE5-4FA8-877E-2DFAA4C167BD/0/2012_Avis_Cour_Conf%C3%A9rence_de_Brighton_1820_avril_2012_EN.pdf)

Union, revealed that despite the legit efforts of the Strasbourg Court there were many cases where accountability was misplaced or not placed at all. Highly ambiguous are cases where there is no national implementation measure such as labor disputes or cases that individuals remain without redress due to hazy concepts such as the presumption of equivalent protection. Finally, it was discussed how the accession can tackle these problems.

The main innovation of the accession regarding distribution of accountability is the co-respondent mechanism. This novelty will allow the EU or the member states to join certain proceedings at a later state at their own initiative or invited by the Court. The co-respondent mechanism will also allow the European Court of Human Rights, among others, to hold the EU accountable for human rights violation without putting it in a position of deciding on distribution of competences within the organization. This mechanism is not perfect; Tobias Lock, an expert on this topic, has stated that it gives “sub-optimal results”.<sup>108</sup> However, most of the possible flaws of the mechanism could be overcome with a rigid stand from the ECtHR and responsible behavior from the European Union and the member states. If the European Union wishes to give a strong message regarding its devotion to human rights protection, it will be willing to subject itself to the scrutiny of the Strasbourg Court.

Certainly there are still questions. A very interesting issue that arises is liability. If accountability is established by the judgment of the ECtHR how liability should be distributed? Who should change the legislation that caused the violation in first place and who should pay just satisfaction? However, these questions are beyond the scope of this thesis.

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<sup>108</sup> Lock, ‘Sharing responsibility? The co-respondent mechanism and EU accession to the ECHR | SHARES’ (n 93)



In any case, we will only be able to see how accountability for human rights violations rooted in European Union law will change after we have the consent of both organizations on the accession agreement and the actual accession happens. What could be said at this point after the present research is that the existing ambiguities in distribution of accountability severely harm the system of human rights protection in Europe. Therefore they need to be addressed rapidly and drastically. The accession can be the first step, setting the legislative framework and sending a strong message internally and internationally regarding its strong commitment to values set out in the treaties such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

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