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PAVING THE WAY: ADJUSTMENTS OF SYSTEMS AND MUTUAL INFLUENCES BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND EUROPEAN UNION LAW BEFORE ACCESSION

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The negotiations on accession of the EU to the ECHR successfully ended on April 5, 2013. While they remain, until accession, autonomous and separate from an institutional point of view, the two European legal orders have not developed in isolation. Just as the CJEU has done vis-à-vis the Strasbourg system, the ECtHR has had to take into account the law emanating from the EU. Accession is admittedly viewed as a simplification, or at least a standardisation, of the relationship between the two European systems and the two courts. However, the pressure put on the ECtHR in this regard must not be overlooked. Having implicitly assumed a leading role in the management of the interaction of the two systems and the interdependence of the two bodies of case law before accession, the ECtHR will formally inherit that responsibility thereafter. This article seeks to contribute to the extensive literature on accession by assessing the case law on the relationship between the ECtHR and EU law prior to accession. In particular, taking stock of the reasoning of the ECtHR helps our understanding of how the court has paved the way for accession and how its EU-related case law is relevant for the further development of the European public order post-accession.

1. INTRODUCTION

The negotiations on accession of the European Union (EU) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, or Convention) successfully ended on April 5, 2013.¹ The Member States of the Council of Europe and the EU institutions, gathered in the “47+1” ad hoc group, agreed on a series of legal measures, including a final Accession Agreement, that completed the necessary steps for accession.² Accession was made a legal obligation following significant reforms to each of the European legal orders, namely, the entry into force of the Lisbon Treaty in December 2009 (art.6(2) of the Treaty on the European Union (TEU)),³ and of Protocol 14 amending the supervisory system of the ECHR in June 2010 (art.59(2) of the

¹ This article is the revised version of a paper originally presented at the workshop on *L’Union Européenne Et Les Droits Fondamentaux: Les Nouveaux Défis*, Centre De Droit Européen (CDE) and Centre De Recherches Sur Les Droits De L’Homme Et Le Droit Humanitaire (CRDH) of the University of Paris II (Paris, October 20, 2011). I am grateful to participants for comments on an earlier draft. Thanks are also expressed to Tess Crean, formerly Irish Law Administrator in the Research and Documentation Unit of the Court of Justice of the European Union, for the English translation. I am also most grateful to the reviewers for their suggestions. Any remaining errors or omissions are the author’s. The French version is available on the UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 04/2012 (SSRN: ssrn.com/abstract=2044855) [Last accessed March 23, 2014]. A version in Romanian (“Curtea Europeană a Drepturilor Omului și dreptul Uniunii Europene, în special Carta drepturilor fundamentale: o gestiune subtilă între ajustări sistemice și îmbogățiri reciproc”) is published in 2 *Revista Română De Drept European* (Romanian Review of European Law) 149 (2013).

² Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, April 5, 2013, 47+1(2013)008, www.coe.int/t/tdlapil/cahdi/Source/Docs2013/47_1_2013_008rev2_EN.pdf [Last accessed March 23, 2014].

³ Art.6(2) of the TEU states: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competencies as defined in the Treaties.”

ECHR).⁴ Accession of the EU to the ECHR means that individuals whose ECHR rights have been breached by legal acts of the EU will be able to seek redress before the Strasbourg Court. In other words, EU legal acts may be subjected to an external review under the ECHR system.

While they remain, until accession, autonomous and separate from an institutional point of view, the two European legal orders have not developed in isolation. We are now far removed from the “silence” of the Community Treaties on fundamental rights and the strict separation between ECHR law and EU law.⁵ The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have defined the relationship between the two systems of fundamental rights protection.⁶ The question of their interaction has generated an extensive literature.⁷ Judicial dialogue between the two European courts, which was not originally envisaged, has become more and more strategic as a means of filling the gaps in the protection of rights in Europe. The development of a doctrine of fundamental rights by the CJEU which, from an early stage, recognised the “special significance” of the ECHR, is well known. The Charter of Fundamental Rights of the EU (the Charter), first proclaimed in December 2000, represents the legislative embodiment of the commitment of the EU legal order to fundamental rights. Adapted and re-proclaimed in December 2007 upon the adoption of the Lisbon Treaty, the legally binding Charter is now the main, though not exclusive, source of fundamental rights in the EU.⁸ The ECHR has retained its place by operating on several levels. Firstly, fundamental rights as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, form part of EU law.⁹ Secondly, rights, freedoms and principles set out in the Charter are interpreted by taking into account the interpretation of ECHR rights.¹⁰ The ECHR will become a direct source of fundamental rights in the EU after accession when EU law will be subject to review by the ECtHR.

Initially, the ECtHR was not concerned with EU law. EU law being a simple point of fact, like national law to the international court, the ECtHR was by no means required to interpret and apply it.¹¹ Yet, just as the CJEU has done vis-à-vis the Strasbourg system,

⁴ Art.59(2) of the ECHR states: “The European Union may accede to this Convention.”

⁵ G. Quinn, “The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?” 46 McGill L.J. 849 (2001).

⁶ Academic literature specialising in EU law refers to “fundamental rights” and that specialising in ECHR law to “human rights”. It appears that the current debate, fuelled by reflections on accession, uses the two expressions interchangeably. The expression “fundamental rights” will be preferred in the following developments for the sake of coherency. The expression “EU law” will be used, even in instances which, in fact, refer to “Community law” in use before the entry into force of the Lisbon Treaty.

⁷ For references to other sources, see, among others, J.-P. Jacqué, “The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, 48 C.M.L. Rev. 995 (2011) and P. Craig, “EU Accession to the ECHR: Competence, Procedure and Substance”, 36 Fordham Int’l L.J. 1115 (2013). See also N. O’Meara, “A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR”, 12 German Law Journal 1813 (2011).

⁸ Charter of Fundamental Rights of the European Union proclaimed in the Nice Treaty (2000/C 364/01) and adapted upon the adoption of the Lisbon Treaty (2010/C 83/02). According to art.6(1) TEU: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

⁹ Art.6(3) TEU states: “Fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of Union’s law.” See *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (C-36/02) [2004] E.C.R. I-09609, para33.

¹⁰ Art.6(1)(3) TEU states: “The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.” These provisions refer to art.52(3) of the Charter, according to which, if the rights protected by the Charter correspond to rights guaranteed by the ECHR, their meaning and scope are the same as conferred upon them by that Convention. That provision does not prevent EU law from providing more extensive protection. See also the explanations relating to the Charter (2007/C 303/02).

¹¹ *Huvig v France* App. No. 11105/84 (ECtHR, April 24, 1990) Series A no 176-B, para. 28. Contra. *Matthews v United Kingdom* [GC] App. No. 24833/94 (ECtHR, February 18, 1999): assessment of the characteristics of the European Parliament as “legislature” (paras 39–54), and *Coöperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. (CNPK) v Netherlands* App. No. 13645/05 (Commission Decision, January 20, 2009): examination of the substantive provision of EU law on the right to respond to the opinion of the Advocate General.

the ECtHR has had to take into account the law emanating from the EU. The ECtHR, as opposed to the proactive approach taken by the Court of Justice which has devised, from scratch, its own effective standard of fundamental rights protection,¹² has had to proceed by reaction and indirectly vis-à-vis EU law. The ECtHR has accommodated the autonomy of the EU legal order while gradually developing the substance of its own on Convention rights. This has arguably resulted in the development of a subtle relationship between the ECtHR and EU law whereby the ECtHR has been firm on principles (regarding in particular the responsibility of Member States under the ECHR for the application of EU legal acts) while at the same time seeking to adapt to the specificities of the EU legal order by maintaining a special link with its court. Accession is admittedly viewed as a simplification, or at the least a standardisation, of the relationship between the two European systems.

The pressure put on the ECtHR in this regard must not be overlooked. Having implicitly assumed a leading role in the “management”¹³ of the interaction of the two systems and the interdependence of the two bodies of before accession, the ECtHR will formally inherit that responsibility thereafter, subject to respecting the institutional autonomy of the EU and the judicial autonomy of the CJEU. In addition to the enormous practical problem of overload, the ECtHR will now have to decide on substantive questions, given that most technical and procedural questions have been formalised in the Accession Agreement. These issues concern the deference of the ECtHR vis-à-vis the standard of rights protection offered by EU law and, in particular, the fate of the *Bosphorus* doctrine. Another issue pertains to the future of certain judicial methods used by the ECtHR, such as the shaping of European consensus by reference to the Charter.

The purpose of this article is to raise these issues by revisiting the “spontaneous solutions”¹⁴ which have emerged, before accession, between the ECtHR and EU law. There is indeed merit in taking stock at this stage of the reasoning of the ECtHR in order to understand how the court has facilitated accession through its EU-related case law by giving directions regarding post-accession case law. In other words, the author seeks to assess the case law on the relationship between the ECtHR and EU law prior to accession in order to understand its relevance for the development of the European public order post-accession.

At the risk of seeming somewhat artificial, this article distinguishes two kinds of relationship between the ECtHR and EU law. The first one describes situations where the ECtHR is *confronted* with EU law in the context of direct actions relating to the conformity of EU legal acts as applied by the Member States with ECHR rights—these are situations of a vertical nature, namely ones involving review that are directed at adjusting EU law to the ECHR system. The second kind of relationship refers to situations where the ECtHR is *inspired* by EU law, and the Charter in particular, in its interpretation of a Convention right or its justification of a reversal in its case law in order to modernise ECHR rights. These latter entail situations of a more horizontal nature, namely ones of mutual influences aimed at enriching both systems.

¹² For a critical perspective on the efficiency and completeness of the judicial protection in the EU, see D. Leczykiewicz, “Effective judicial protection of human rights after Lisbon: should national courts be empowered to review EU secondary law?” 35 E.L.Rev. 326 (2010).

¹³ For that perspective of the “management” of the interaction between the two systems of rights protection, see J. Andriantsimbozavina, “Harmonie ou disharmonie de la protection des droits de l’homme en Europe ?”, *Cahiers de droit européen* 745 (2006).

¹⁴ B. Genevois, “La Convention européenne des droits de l’homme et la Charte des droits fondamentaux de l’Union européenne : complémentarité ou concurrence ?”, *Revue française de droit administratif* 437 at 444 (2010).

2. THE EUROPEAN COURT OF HUMAN RIGHTS CONFRONTED WITH EU LAW

The EU is not (yet) a party to the ECHR. As a legal person distinct from its Member States, the EU cannot be sued before the ECtHR. Neither can it present itself as a defendant or as an applicant before the ECtHR.¹⁵ In other words, the ECtHR cannot scrutinise EU action because of what may be referred to as an inadmissibility *rationae personae* – this bit of sentence is repetitive. The ECtHR has, however, developed an indirect supervision over EU law via the review of national measures applying EU law. The development of this case law has been progressively shaped by some notable judgments, such as *Bosphorus*,¹⁶ which have formulated a number of important principles. Since then, and while not purporting to force indirect accession, the ECtHR has never relaxed its pressure on the Member States as regards their implementation of EU law. Several cases, in particular the *M.S.S. v Belgium and Greece* judgment,¹⁷ show that the court has called into question the action of the Member States in the context of key EU systems and procedures.

2.1 Indirect review of EU Acts by the European Court of Human Rights: *Bosphorus* and the case law principles

Faced with the impossibility of challenging the Acts of EU institutions for violation of ECHR rights, individuals have taken advantage of the coexistence of the two European systems by turning to the ECtHR and challenging national measures applying EU law. Confronted with these applications, the ECtHR has defined the principles governing the responsibility of the Member States which can be incurred in various situations under the ECHR.

2.1(a) Responsibility of the Member States, immunity of the EU

The old European Commission of Human Rights (ECommHR) determined the extent of the Member States' obligations under the Convention in the following terms. The ECHR allowed Contracting States to transfer competence to an international organisation with a view to putting in place mechanisms for cooperation or integration. That transfer of competence (and not of sovereignty) did not lead to the transfer of liability to the international organisation. In other words, the various Contracting Parties to the ECHR incurred responsibility where they could not perform their Convention obligations by reason of another treaty that was subsequently concluded.¹⁸ That included the ratification of the EC Treaties by the Member States at the time. In this regard the ECommHR ruled: "[I]t cannot... be accepted that by means of transfers of competence the High Contracting Parties may at the same time exclude matters normally covered by the Convention from the guarantees enshrined therein."¹⁹

¹⁵ Under the Accession Agreement, the EU can be a respondent or co-respondent before the ECtHR.

¹⁶ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v Ireland* [GC] App. No. 45036/98 (ECtHR, June 30, 2005).

¹⁷ *M.S.S. v Belgium and Greece* [GC] App. No. 30696/09 (ECtHR, January 21, 2011). For references to important ECtHR judgments, see A. Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights*, 3rd edn (Oxford: Oxford University Press, 2012)..

¹⁸ *X v Federal Republic of Germany* App. No. 235/56 (Commission Decision, June 10, 1958) Yearbook 2 256.

¹⁹ *Austria v Italy* App. No. 788/60 (Commission Decision, January 11, 1961) Yearbook 4 177 and *Etienne Tête v France* App. No. 11123/84 (Commission Decision, December 9, 1987). This is later upheld by the ECtHR in *Matthews v United Kingdom* (fn.11 above): "The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer" (para.32).

Consequently, because the EU (like the European Community before it) is not a party to the ECHR, applications that are brought against it are dismissed by reason of the principle of inadmissibility *rationae personae*. The principle derives from the general international law rule on the relative effect of treaties according to which an international Convention does not bind third parties (*pacta tertiis nocent nec prosunt*) but only those who have agreed to it.²⁰ The case law²¹ on this point is relevant as the question of the EU's responsibility has remained an issue before the Strasbourg court, particularly through the collective responsibility of the Member States.²² Individuals have indeed sought to take advantage of the coexistence of the two systems of protection given that all the Member States are parties to the Convention and have, on several occasions, sought to compensate for the probable rejection of their actions before the EU courts by bringing a complaint before the ECtHR.²³ Conceived as part of a legal strategy, the claim based on the collective responsibility of the Member States has not, however, succeeded. Without expressly rejecting it, the ECtHR has avoided the issue by invoking material inadmissibility,²⁴ despite the expectations in that respect.²⁵ The solution is logical in the sense that those Acts are pure Acts of EU secondary law in the adoption of which the Member States did not participate. While the action of the EU pursues objectives assigned to it by the Member States, secondary law is not their work. Rather, it is that of an autonomous organisation with legal personality and the action of the EU substitutes, in this respect, for that of the Member States.²⁶ However, the absence of a direct responsibility of the EU, or of a collective responsibility of the Member States by reason of EU action, has not led to total immunity of EU law before the ECtHR. The ECtHR has gradually developed a review in respect of the activities of the Union for Member States implementing EU law Acts.

²⁰ See *CFDT v European Communities, alternatively the Member States jointly and the Member States individually* App. No. 8030/77 (Commission Decision, July 10, 1978) 13 D.R. 231.

²¹ The *CFDT* case law was confirmed by several other ECommHR decisions in *Dalino v Belgium and the European Communities* App. No. 11574/85 (Commission Decision, October 5, 1987), *Dufay v European Communities, alternatively the Member States jointly and the Member States individually* App. No. 13539/88 (Commission Decision, January 19, 1989) and *M & Co v Federal Republic of Germany* App. No. 13258/87 (Commission Decision, February 9, 1990) 64 D.R. 138. Those solutions were upheld by the ECtHR. See below, judgments in *Matthews v United Kingdom* and *Bosphorus v Ireland*.

²² Judge Pescatore raised, extrajudicially, the possibility of substitution of the Community to obligations contracted by the Member States pursuant to the Convention, as was the case for GATT. See P. Pescatore, "Les droits de l'homme et l'intégration européenne", *Cahiers de droit européen* 629 (1968), and "La coopération entre la Cour communautaire, les juridictions nationales et la Cour européenne des droits de l'homme dans la protection des droits fondamentaux—Enquête sur un problème virtuel", 466 *Revue du Marché Commun et de l'Union européenne* 151 (2003). See also A. Bultrini, "L'interaction entre le système de la Convention européenne des droits de l'homme et le système communautaire", *Zeitschrift für Europarechtliche Studien* 493 at 498 (1998). According to Bultrini, the Community institutions constitute an extension of Member State actions in another guise and remain the expression of their collective cooperation.

²³ For Court of Justice/ECtHR "sagas", see e.g. the *Emesa Sugar* and *CNPK* cases below on the compatibility with the ECHR of the EU preliminary reference procedure.

²⁴ See e.g. the applications declared to be inadmissible *rationae materiae* in *Société Guérin Automobiles v 15 Member States* App. No. 51717/99 (ECtHR, July 4, 2000) where the procedure allowing for a challenge on the substance of European Commission letters before the EC courts was not covered by the protection of the ECHR; *Senator Lines* App. No. 56672/00 (ECtHR, March 10, 2004) in which the court refused to consider the applicant as a victim within the meaning of the ECHR in a challenge concerning a penalty imposed by the European Commission for infringement of competition law; *Emesa Sugar NV v Netherlands* App. No. 62023/00 (ECtHR, January 15, 2005) in which the court refused to consider the case relating to customs law as falling within the scope of art.6(1) of the ECHR; and *Segi and others and Gestoras Pro-Amnistia and others v 15 Member States* App. No. 6422/02 and no 9916/02 (ECtHR, May 23, 2002) in which the court refused to consider the applicants, Basque organisations, as victims within the meaning of the ECHR in relation to the common positions adopted by the Council of the European Union in the context of the CFSP following the "September 11" attacks.

²⁵ F. Benoît-Rohmer, "Chronique d'une décision annoncée: l'affaire Senator Lines devant la Cour européenne des droits de l'homme", 4 *L'Europe des Libertés* 2 (2001), and F. Krenc, "La décision Senator Lines ou l'ajournement d'une question délicate", 61 *Revue trimestrielle des droits de l'homme* 121 (2005).

²⁶ See, to that effect, F. Benoît-Rohmer rejecting the theory of A. Bultrini in "L'affaire Emesa Sugar: L'institution de l'avocat général de la Cour de Justice des Communautés européennes à l'épreuve de la jurisprudence Vermeulen de la Cour européenne des droits de l'homme", *Cahiers de droit européen* 403 at 422 (2001).

2.1(b) *Graduated responsibility of the Member States for Acts within the Scope of EU Law*

The scope of the review operated by the ECtHR on the conformity of EU law with the provisions of the Convention has been developed in a number of significant judgments. The net principle is that a Member State can always be brought before the ECtHR when it implements EU law that infringes Convention rights, whether or not the State in question enjoys a discretion in the implementation. Firstly, when the Act involves a discretion on the part of the Member State, the State in question remains, in principle, the only entity responsible for breach of its obligations under the Convention. The EU Act is understood in a broad sense as encompassing primary (*Matthews*)²⁷ and secondary EU law in certain cases (*Cantoni*).²⁸ The rationale behind these solutions has been widely commented upon. In the *Matthews* case,²⁹ in which the United Kingdom was found to be in breach of art.3 of Protocol 1 of the ECHR,³⁰ the EU Act in question (attached as an annex to Council Decision 76/787 of September 20, 1976) was akin to an international treaty requiring the consent of all of the Member States, including the United Kingdom, by reason of the unanimity requirement. The Act therefore fell outside the review of the Court of Justice. The *Matthews* case represents the first leading case on the adjustments between the two European systems and was followed by a number of subsequent applications relating to other Acts of primary law.³¹ Earlier, *Cantoni* upheld a Member State's responsibility in the case of national statutes implementing EU secondary law - in that case a French statute transposing a directive.³² The fact that the challenged domestic statute was based "almost word for word on [the] directive" did not have the effect, in the instant case, of excusing the Member State of its obligations under the ECHR.³³ Although inferences could be drawn, the ECtHR did not conclude, at the time, that it had competence to review EU secondary law as such.

The question of the competence to review EU secondary Acts was posed in the situation of *compétence liée* where the Member State has no discretion in the implementation of EU law while having, at the same time, to respect its obligations under the ECHR. This uncomfortable position was mitigated by the application of the "presumption of equivalent protection" as set out in the *Bosphorus* case in the following terms:

²⁷ *Matthews v United Kingdom*, fn.11 above.

²⁸ *Cantoni v France* [GC] App. No. 17862/91 (ECtHR, November 15, 1996).

²⁹ References to the *Matthews* case are numerous. See, among others, G. Cohen-Jonathan and J-F. Flauss, "A propos de l'arrêt *Matthews c. Royaume-Uni*", *Revue trimestrielle de droit européen* 637 (1999), G. Cohen-Jonathan and J-F. Flauss, "De l'office de la Cour européenne des droits de l'homme dans la protection des droits fondamentaux dans l'Union européenne: l'arrêt *Matthews contre Royaume-Uni*", *Revue universelle des droits de l'homme* 253 (1999), A. Potteau, "L'article 3 du premier protocole de la Convention et l'obligation des Etats membres de l'Union européenne de reconnaître le droit de participer aux élections du Parlement européen", *Revue trimestrielle des droits de l'homme* 873 (1999), O. De Schutter & O. L'Hoest, "La Cour européenne des droits de l'homme juge du droit communautaire: Gibraltar, l'Union européenne et la Convention européenne des droits de l'homme", *Cahiers de droit européen* 141 (2000), F. Tulkens, "L'Union européenne devant la Cour européenne des droits de l'homme" *Revue universelle des droits de l'homme* 50 (2000).

³⁰ Art.3 of Protocol 1 of the ECHR provides for the organisation at reasonable intervals of free elections by secret ballot. The UK refused to organise European elections on the territory of Gibraltar in application of the 1976 Act concerning the election of representatives of the European Parliament. In fact, the British authorities signed the Treaty of Maastricht on the EU, which included an extension of legislative competences of the European Parliament, without obtaining, at the same time an amendment to the 1976 Act, so as to include Gibraltar among the territories in which such elections must be held.

³¹ See e.g. *T.I. v United Kingdom* App. No. 43844/98 (ECtHR, March 7, 2000): decision on admissibility concerning the Dublin Convention determining the State responsible for examining applications for asylum.

³² See also *Procola v Luxembourg* App. No. 14570/89 (Commission Decision, July 1, 1993) 75 D.R. 5 concerning the compatibility with art.1 of Protocol 1 to the ECHR of a series of provisions of Luxembourgish law which applied a Community regulation on milk quotas; the discretion was reduced in that case.

³³ *Cantoni v France*, fn.28 above, para.30. In that case, French law transposed Directive 65/65 into the Public Health Code by reproducing almost word for word the disputed definition of "medicinal product" contained therein. However, the definition was held to be too vague and imprecise to serve as the basis for an order for unlawfully selling medicinal products against a supermarket manager. The application was dismissed on the merits. The ECtHR concluded that there was a non-violation of art.7 of the ECHR (no punishment without law).

“[The action of the Member State] is justified as long as the [EU] is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.”³⁴

That presumption is, however, rebuttable if, in the circumstances of a particular case, it is considered that the protection afforded by Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights.³⁵

Although much criticised,³⁶ the *Bosphorus* case is significant as much for the clarifications that it provided as for the questions that it failed to answer and the perspectives it raised at the time. Without seeking to revisit those issues,³⁷ the judgment represents a “sort of transitional regime”³⁸ decided in the context of a probable but aborted accession of the EU to the ECHR. *Bosphorus* was decided at the end of June 2005, after the French and Dutch referenda which rejected the Constitutional Treaty providing for accession to the ECHR and the incorporation of the Charter into the Treaty. The judgment has been interpreted as expressing a “legitimate concern to not interfere with national political debates or as a discreet encouragement to continue, with or without a Constitution, on the road to accession”.³⁹ In any event, the *Bosphorus* case law responds to a double imperative, namely to contribute to the constructive adjustment between the two European systems while keeping the issue of accession relevant.

The ECtHR relies on the compatibility, and not on the strict identity, of rights protection under ECHR law and EU law. This is indicated by the use of the concept of “equivalence”. In adopting a favourable approach to the treatment of EU law, which it supervises in a less probing manner than that of the Member States, the ECtHR has managed to establish a kind of “non-aggression pact”⁴⁰ between the two courts. This is arguably the result of a subtle balancing exercise on the part of the ECtHR: one that seeks to balance the procrastination involved in the European integration process on the one hand and the requirements of effective protection of fundamental rights in Europe on the other. The *Bosphorus* case represents, in this respect, a certain continuity. Like

³⁴ *Bosphorus Airways v Ireland*, fn.16 above, para.155. After an examination of EU primary law and of the case law of the Court of Justice, the ECtHR concluded that “the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, ‘equivalent’ (within the meaning of paragraph 155 above) to that of the Convention system”, that is to say not “identical” but “comparable” (para.165).

³⁵ *Bosphorus Airways v Ireland*, fn.16 above, para.156.

³⁶ See F. Benoît-Rohmer, “A propos de l’arrêt *Bosphorus Airlines* du 30 juin 2005 : l’adhésion contrainte de l’Union à la Convention”, *Revue trimestrielle des droits de l’homme* 827 (2005), V. Constantinesco, “C’est comme si c’était fait ? (Observations à propos de l’arrêt de la Cour européenne des droits de l’homme [Grande Chambre], *Bosphorus Airlines*, du 30 juin 2005)”, *Cahiers de droit européen* 363 (2006), C. Costello, “The Bosphorus Ruling of the European Court of Human Rights : Fundamental Rights and Blurred Boundaries in Europe”, 6 H.R.L.Rev. 87 (2006), C. Eckes, “Does the European Court of Human Rights Provide Protection from the European Community?—The Case of *Bosphorus Airways*”, 13 EPL 47 (2007), F. Schorkopf, “The judgment of the European Court of Human Rights in the case *Bosphorus Hava Yollari Turzim v Ireland*”, German Law Journal 1255 (2005), J.-P. Jacqué, “Droit communautaire et Convention européenne des droits de l’homme. L’arrêt *Bosphorus*, une jurisprudence ‘Solange II’ de la Cour européenne des droits de l’homme ?”, *Revue trimestrielle de droit européen* 756 (2005).

³⁷ The judgment confirmed the earlier case law on Member State’s responsibility for a national measure implementing secondary EU law by clarifying the precedent in *M. & Co. v RFA*, fn.21 above. It limited its review to an equivalence in principle on the basis of the supranationality and autonomy of the Community legal order. It declined to review, in that case, the substance of the measure in question and applied the earlier case law. Neither did the *Bosphorus* judgment resolve the concrete possibility of reversing the presumption in that case; the ECtHR did not examine whether the measure for seizing the aircraft by the Irish authorities fulfilled the proportionality requirement. As for the perspectives raised, the decision seemed to invite further litigation from the applicants in order to compel the ECtHR to clarify the meaning of “manifest deficiency”.

³⁸ Constantinesco, fn.36 above, at 374.

³⁹ Jacqué, fn.37 above, at 767. Although the hearing of the case took place, in fact, in May 2005, that is before the political results establishing the failure of the Constitutional Treaty and the envisaged accession.

⁴⁰ D. Chalmers, G. Davies & G. Monti, *European Union Law: Cases and Materials*, 2nd edn (Cambridge: Cambridge University Press, 2010), p.261.

the *Cantoni* and *Matthews* judgments, it was decided at a decisive moment in the EU integration process. *Cantoni*, decided in November 1996, was a wake-up call that responded to the opinion of the Court of Justice in which that court had decided, several months earlier, against accession by the Communities to the ECHR.⁴¹ The judgment in *Matthews* was handed down in February 1999 at a time when the process of drafting the Charter placed the “negotiators of [the Charter], as on the whole the negotiators of the future progress of the EU, under the oversight of the European Convention on Human Rights”.⁴² In that sense, the three judgments represent the expression of an adjustment of systems whereby one (ECHR) responds to the other (EU) by means of a significant decision in the form of a clarification. In this regard the *Bosphorus* decision might well be the most political decision of the ECtHR. Some were quick to interpret it, at the time, as an implied accession.⁴³ The decision has certainly put pressure on the ECtHR to keep pace with the EU integration process and, as confirmed by subsequent case law, added pressure on the Member States in respect of their implementation of EU law.

In short, the position of the ECtHR as it pertains to EU law rests on the following propositions: (i) the ECtHR does not prohibit its Contracting Parties from transferring competence to international organisations, but where the organisation is not a party to the ECHR, the ECtHR does not review its acts under the Convention; (ii) the Contracting Parties remain, however, responsible in respect of their obligations under the ECHR for all acts or omissions of the international organisations to which they are parties, whether these obligations are performed under domestic law or under international legal obligations; (iii) in the case of the EU, reference must be made to the distinction between primary law and secondary law, then to the sub-distinction between Acts which leave a discretion to the State and those which do not: (a) in the first place, responsibility shall arise strictly under national law, and (b) in the second place, responsibility shall arise within the boundaries of the presumption of equivalent protection, namely in cases of manifest deficiency of that protection (*Bosphorus* doctrine).

2.2 Challenges to EU systems: the M.S.S. case and other examples of transitional case law

Bosphorus governed the relationship between the two European systems before the formal accession of the EU to the ECHR. The doctrine set out in that case gave room to manoeuvre to the ECtHR when deciding on the adequacy of the EU protection of fundamental rights. Although the ECtHR could have engaged in the development of a coherent standard of human rights protection, the subsequent case law is arguably disappointing on this subject. On the one hand, the ECtHR extended the principle of the responsibility of Member States, and in so doing was firm on the principle, or “hard on the point”. On the other hand, the court set extremely strict conditions under which such responsibility would be incurred. It was incurred at the expense of a fully effective review and was, thereby, more tolerant in respect the EU, or “soft on the person”.⁴⁴ This apparent paradox reflects the efforts of the ECtHR to maintain a measured

⁴¹ Opinion 2/94 [1996] E.C.R. I-1759.

⁴² De Schutter & L’Hoest, fn.29 above, at 146.

⁴³ “Forced”, “compelled” or “de facto” accession are evoked. See Jacqu, fn.36 above; Benot-Rohmer, fn.36 above; and P. Drzemczewski, “The Council of Europe’s Position with respect to the EU Charter of Fundamental Rights”, HRLJ 29 (2001).

⁴⁴ In other words, a HOP–SOP (i.e. Hard On the Point–Soft On the Person) position. The terminology used here is taken from human resources management as it seems appropriate to describe the “management” operated by the ECtHR in its relations with the EU. See R. Fisher, W. Ury and B. Patton, *Getting to YES: Negotiating Agreement Without Giving In* (London: Penguin Books, 2011).

relationship with the CJEU.⁴⁵ However, it has not prevented the ECtHR from challenging, in a series of more recent cases, the actions of Member States as regards EU systems and actions. At the same time the prospect of accession prompts questions as to the future relevance of the *Bosphorus* doctrine.

2.2(a) *Post-Bosphorus case law*

In its post-*Bosphorus* case law, the ECtHR has been faced with a number of applications relating to gaps in the EU legal order and its litigation procedure. These have, in particular, been examined in the context of the right to fair procedure in the *Biret*, *Connolly* and *CPNK* cases.⁴⁶ In the examination of the criteria that are applicable to the *Bosphorus* doctrine, the ECtHR has reviewed the cases from an admissibility point of view and developed its reasoning with a two-pronged approach: firstly, in respect of the States which can incur liability; secondly, in respect of the Community which cannot. In respect of the States, the ECtHR has ruled that it has no competence to review EU law unless there has been an intervention by the defendant State. The intervention requirement is, however, of a very formal nature since the State has frequently not participated in the Act. This is especially so in the context of a direct action against the Court of Justice. If the State in question does not intervene, directly or indirectly, in the dispute it is not accountable for the breach. A strategy adopted by applicants in this context is to assert collective responsibility. In other words, the Member States, all members of the EU, must be held jointly responsible for breaches under the Convention for the application of an EU Act since the transfer of competence, on the initiative of the Member States, to an international organisation cannot relieve them of their obligations under the Convention. As for the possible responsibility of the EU, the ECtHR has invariably found an inadmissibility *rationae personae* which serves to emphasise that the EU has not (yet) acceded to the Convention. That first stage of reasoning is logical, unless the rationale of the indirect limited judicial review is to be called into question.

What is more disappointing is the lack of precision concerning the “manifest deficiency” in order to rebut the presumption of compatibility of EU law with the ECHR. The Strasbourg court has avoided *in concreto* review and has, instead, formally referred to the thorough analysis (“*analyse approfondie*”) carried out in *Bosphorus* which concluded that the protection under the doctrine of fundamental rights in the EU was presumed to be equivalent to the protection guaranteed under the Convention. And the presumption has not been rebutted in subsequent case law.⁴⁷ That limited form of review can be understood where, for example, the ECtHR faces an alleged incompatibility of the preliminary reference procedure (i.e. the right to respond to the Advocate General’s opinion) before the CJEU. Unable to sanction the EU, the ECtHR has found itself in the uncomfortable position of having to hold the State responsible. The result is that the State has to confront a “conflict of loyalties”.⁴⁸ The State has to

⁴⁵ The CJEU has also manifested its willingness to align its solutions with that of the ECtHR. See, for example, *Spain v United Kingdom* (C-145/04) [2006] E.C.R. I-7919, following the *Matthews* judgment; and *P. Bernard Connolly v Commission* (C-273/99) [2001] E.C.R. I-1575, in which the CJEU aligned its interpretation of the limitations on freedom of expression with that of the ECtHR under art.10 ECHR resulting in a higher degree of review of the EU disciplinary measure.

⁴⁶ See admissibility decisions *La société Etablissement Biret et CIE S.A. v 15 Member States* App. No. 13762/04 (ECtHR, December 9, 2008), *Bernard Connolly v 15 Member States* App. No. 73274/01 (ECtHR, December 9, 2008), and *CPNK*, fn.11 above. For further references, see F. Benoît-Rohmer, “Bienvenue aux enfants de Bosphorus: la Cour européenne des droits de l’homme et les organisations internationales”, *Revue trimestrielle des droits de l’homme* 19 (2010), and T. Lock, “Beyond Bosphorus: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights”, 10 H.R.L.Rev. 529 (2010).

⁴⁷ *La société Etablissement Biret*, fn.46 above, para. 2, *Bernard Connolly*, fn.46 above, para.4.

⁴⁸ L. Clément-Wilz, “Accord et faux-semblant entre les cours de Strasbourg et de Luxembourg: le respect des exigences du procès équitable”, *Revue des affaires européennes* 115 at 123 (2009).

abide by the judgments of the CJEU under the principle of supremacy and sincere cooperation⁴⁹ while, at the same time, refraining from referring a question for a preliminary ruling where, in that particular case, the preliminary reference procedure is held to be contrary to the requirements of a fair trial.⁵⁰ This cautious positioning of the ECtHR raises questions as to the effectiveness, or indeed the existence, of any supervision over EU law at all.

While all of this arguably expresses a degree of mutual respect between the two courts, the ECtHR has shown itself to be less indulgent in a series of other rulings. These concern the implementation of systems and procedures at the heart of EU action, such as the “Dublin system” on asylum law and the preliminary reference procedure. Within this context the ECtHR has sought to sanction the Member States as much as to guide them in their application of EU law so as to secure conformity with the requirements of the ECHR. The first point is illustrated by the leading case of *M.S.S. v Belgium and Greece*,⁵¹ which gave the ECtHR the opportunity to rule on the conformity of the “Dublin System” on asylum law with ECHR rights. That system has the objective of rationalising the treatment of asylum applications and, in particular, identifying the Member State responsible for examining an application made by a third country national on the territory of one of the EU Member States.⁵² The objective is to guarantee access to an asylum procedure to each applicant, while preventing the examination of the application by several Member States; hence the possibility for a Member State to “transfer” the applicant to another Member State identified as being responsible for the asylum claim. In *M.S.S.*, the ECtHR found that Greece and Belgium were in breach of arts.3 and 13 of the ECHR: Greece directly, by reason of the inhumane and degrading treatment suffered by asylum applicants in domestic detention centres and, in particular, by reason of the detention and living conditions in Greece, as well as systemic deficiency in the asylum procedure and reception conditions. Belgium’s breach was indirect by reason of the domestic authorities having transferred the asylum applicant back to Greece, thereby exposing him to the prohibited treatment.

The judgment is significant for several reasons. Firstly, the ruling obviously strengthened the rights of asylum seekers in the EU by confirming the primacy of the principle of non-refoulement and, in the current state of affairs, the prohibition on their transfer to Greece under penalty of breach of the ECHR.⁵³ Secondly, the judgment has implications for the relationship between the ECtHR and EU law: while the violation concerned two Member States in respect of a discretionary measure applying secondary

⁴⁹ The principle of sincere cooperation is extended to include the principle of State liability for damage caused to individuals by infringements of EU Law, in particular applicable by reason of decisions of a national court adjudicating at last instance. See *Gerhard Köbler v Austrian Republic* (C-224/01) [2003] E.C.R. I-10239.

⁵⁰ See the *CNPK* case, fn.11 above, in which the ECtHR extended the scope of the presumption of compatibility with the ECHR, and its rebuttability in the case of manifest deficiency, to the procedure before the Court of Justice. Holding that the Netherlands is liable for breach of art.6(1) of the ECHR (invoked on the basis that the national court in question sought a preliminary ruling from the Court of Justice), the ECtHR decided not to uphold the manifest deficiency: the absence of a right of response to the opinion of the Advocate General is not contrary to ECHR rights since the CJEU can reopen the oral procedure, either of its own motion or at the request of one of the parties.

⁵¹ *M.S.S. v Belgium and Greece*, fn.17 above. The case concerned an Afghan national who entered the EU via Greece, then travelled to Belgium, where he applied for asylum. Belgium then requested Greece to take charge of the application pursuant to the “Dublin System”. Considering that there was no reason to believe that the Greek authorities would not respect their obligations under asylum law, Belgium sent the applicant back to Greece. Following periods of detention in Greece in deplorable conditions, the applicant then decided to bring an action before the ECtHR.

⁵² See Regulation (CE) n°343/2003 of the Council of the European Union of February 18, 2003 (OJ 2003 L 50/1) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one Member State by a third country national. The system originated in the Dublin Convention of June 15, 1990 (OJ 1997 C 254/1).

⁵³ F. Maiani & E. Néraudau, “L’arrêt *M.S.S./Grèce et Belgique* de la Cour EDH du 21 janvier 2011—De la détermination de l’Etat responsable selon Dublin à la responsabilité des Etats membres en matière de protection des droits fondamentaux”, *Revue du droit des étrangers* 3 (2011). The ECtHR subsequently confirmed the unsatisfactory nature of detention conditions in Greek prisons in *Samaras and others v Greece* App. No. 11463/09 (ECtHR, February 28, 2012), in which it found a breach of art.3 of the ECHR.

EU law (i.e. the transfer of the applicant pursuant to the regulation),⁵⁴ what was in fact at stake were the inadequacies of the “Dublin System”. Highlighting “the limitations of the Dublin System and of the CEAS (Common European Asylum System), in its current state of development, prompting the States to develop EU asylum law”,⁵⁵ the ruling has arguably stimulated reflection on the part of the EU on the politically sensitive issue of asylum law and the need for further review of the relevant legal framework.

An opportunity for doing so soon arose in the joined *N.S* and *M.E.* cases of the CJEU.⁵⁶ Ruling on preliminary references from the Court of Appeal of England and Wales and the Irish High Court, the Luxembourg Court adopted a similar position to that of the Strasbourg Court. It expressly referred to the ECtHR case law (guided in this regard by the opinion of Advocate General Trstenjak) and used identical expressions by way of interpreting the Dublin regulation in light of the Charter of Fundamental Rights.⁵⁷ In their submissions, the national authorities—British in particular⁵⁸—sought to show that the measure applying the regulation fell outside the scope of EU law. This approach can be understood to a certain extent: while the EU is involved in the construction of a *common* asylum system, the responsibility for the protection of asylum rights remains exclusively with the Member States. Hence there is a total discretion in respect of transfer. The argument of the British Government did not, however, convince the CJEU. The court, instead, brought asylum law within its jurisdiction by means of reviewing its compatibility with the Charter. Doing so can arguably be interpreted as a fine example of the “division of tasks” achieved, before accession, between the ECtHR and the CJEU. It can also, surely, be explained by the exasperation of the ECtHR, which was inundated with asylum applications!⁵⁹

The ECtHR also seeks to support the Member States in their efforts to apply EU law in conformity with Convention rights. This second point is best illustrated by the *Ullens de Schooten and Rezabek v Belgium* case, which arose in the context of the preliminary reference procedure.⁶⁰ The ECtHR first relied on its settled case law, which holds that “the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling”.⁶¹ However, the court decided that the exercise of that procedure, a cornerstone of the EU

⁵⁴ It is not a *Bosphorus* situation in this case as the measure of transfer in dispute taken by the Belgian authorities does not strictly fall within the international legal obligations binding Belgium. The Belgian authorities could have, pursuant to the “sovereignty clause”, refrained from transferring the applicant if they had considered that Greece posed a problem (*M.S.S. v Belgium and Greece*, above, fn.17, para.340). The presumption of equivalent protection does not, therefore, apply. Another kind of presumption is suggested though, that Greece has acted in conformity with its obligations under the EC directives and under art.3 of the ECHR—in other words, a presumption that Greece is secure for asylum seekers, or a “presumption of security”.

⁵⁵ Maiani & Néraudau, fn 54 above.

⁵⁶ Joined Cases *N.S et al v Secretary of State for the Home Department* (C-411/10) [GC], and *M.E. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (C-493/10) [2011] E.C.R. I-0000. See G Mellon, *The Charter of Fundamental Rights and the Dublin Convention: An Analysis of N.S. v Secretary of State for the Home Department* (C-411/10) 18 E.P.L. 655 (2012).

⁵⁷ Fn.56, at 106:

“Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.”

⁵⁸ The British Secretary of State submitted that art.3(2) of the Dublin regulation conferred a discretionary power on the Member States that does not fall within the scope of application of EU law (*M.S.S. v Belgium and Greece*, fn.17 above, para.331).

⁵⁹ This state of affairs was deplored and denounced by the then President of the ECtHR in his declaration of February 11, 2011 concerning applications for interim measures. President Costa stated that “[it is] not for the [Strasbourg] Court to take charge of immigration [and refugee applications] from all over Europe, [but it is the task of the States] to ensure that adequate domestic judicial procedures are available to applicants for refugee status” (J.-P. Costa, “On the Legitimacy of the European Court of Human Rights’ Judgments”, 7 Eu.Const. (2011) 173 at 181).

⁶⁰ *Ullens de Schooten and Rezabek v Belgium* App. No. 3989/07 and 38353/07 (ECtHR, September 10, 2011). In that case, the applicants, administrators in a biology laboratory, had requested the Belgian Court of Cassation and Council of State to refer a preliminary question to the Court of Justice, so that it could rule on a national law that was the basis of proceedings against them in a case concerning reimbursable benefits in application of a sickness insurance scheme. The Belgian Court of Cassation and Council of State refused to refer a preliminary question to the CJEU for interpretation.

⁶¹ Fn.60, para.57.

legal system, can be reviewed having regard to the requirement of the right. Where a preliminary reference mechanism exists, the refusal of a domestic judge to refer a question for a preliminary ruling can, in certain circumstances, affect the fairness of the procedure as, for example, where the refusal appears to be arbitrary. The ECtHR places, as a consequence, the preliminary reference procedure within the remit of its supervision when Member States apply EU law. Article 6(1) of the ECHR imposes

“an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis”.⁶²

The review exercised by the ECtHR in *Ullens de Schooten and Rezabek v Belgium* is, however, disappointing. Instead of examining the substance of the reasons for the refusal by the Belgian superior courts, the court resorted to a more formal review that consisted in ensuring the existence of such reasons without “examin[ing] any errors that might have been committed by the domestic courts in interpreting or applying the relevant law”.⁶³ The scope of this ruling is by no means trivial when viewed in light of the upcoming accession: the ECtHR did not see the desirability of strengthening its supervision before the accession takes place. Some have interpreted the judgment as revealing an absence of supervision on the part of the ECtHR. In seeking to reassure the EU and the Member States, the court refrained from interfering in the relations between the Luxembourg court and national authorities.⁶⁴ Yet, the Strasbourg case law demonstrates, overall, how the ECtHR has positioned itself as the supervisory authority over the EU legal order. This includes the way in which the preliminary reference procedure is used by national courts. After accession, the ECtHR will further refine the extent of its review and, by so doing, will (re)define its role.

2.2(b) *The fate of the Bosphorus doctrine after accession: abandonment or extension?*

Putting aside the institutional and procedural questions dealt with in the Accession Agreement, one issue that needs to be addressed is the fate of the *Bosphorus* case law as regards the review of EU secondary law. While some commentators had hoped for a decisive clarification, the issue was not resolved during the negotiations on accession. It falls, then, to the ECtHR to decide whether it must continue to exercise a limited review in the case of national implementing measures. There is a logic to placing the question outside the scope of the formal agreement since it is questionable what the accession negotiations might have produced on this point: either the *Bosphorus* doctrine would have been signed away, at the risk of undermining the autonomy of the ECtHR (since it would have challenged case law that was independently developed by the court) or it would have “codified” a doctrine whose rigorous implementation had always been more or less avoided. Some brief observations may be made at this juncture on the arguments for the abandonment of that doctrine and on those which advocate its extension.

As regards the arguments in favour of abandonment, the deferential approach reserved to the EU legal order cannot easily be reconciled with the goal of treating the EU in a way that is similar to any other Party to the ECHR.⁶⁵ According to former ECtHR judge Françoise Tulkens, “the aim of the accession of the EU to the Convention

⁶² Fn.60, para.60.

⁶³ Fn.60, para.59.

⁶⁴ L. Milano, *L'absence de contrôle de la Cour européenne sur le refus de renvoi préjudiciel des juridictions nationales*, No 49 JCP G 1369 (2011).

⁶⁵ X. Groussot, T. Lock & L. Pech, *EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011*, Policy Paper, Questions d'Europe n° 218, Fondation Robert Schuman 2, 10 (2011).

has always been to subject the EU to the same external review as the states” and “equality before the Convention” [must extend] also to the EU”.⁶⁶ Non-EU States cannot take advantage of such a presumption of compatibility and, in this regard, it would not matter whether they possessed a satisfactory (equivalent) system of fundamental rights protection in their own right. This favouritism towards the EU would also be at odds as regards the margin of appreciation doctrine whose application by the ECtHR in respect of Contracting Parties is questionable.⁶⁷ Generally, such deference could be interpreted as going beyond what is strictly necessary in order to respect the autonomy of the EU legal order.⁶⁸ In other words, the *Bosphorus* doctrine seems to contradict the very point of accession and may, therefore, provide the opportunity to drop the “double standard” between the States Parties to the ECHR and the EU. What, however, does abandonment of the *Bosphorus* doctrine mean in practice?⁶⁹ Reversing the case law would imply that the ECtHR would be bound to carry out a full review in each specific case of measures of the Member States implementing EU Acts in a discretionary manner (*Cantoni* and *M.S.S.* hypotheses), measures of the Member States implementing EU law when they do not enjoy discretion and are simply fulfilling their obligations under EU law (*Bosphorus* hypothesis) or, from now on, Acts of the EU institutions. Is this a good strategy for the ECtHR? In so far as it respects the autonomy of the CJEU, why not?

The merits of abandoning the *Bosphorus* doctrine can, therefore, be questioned and its extension (i.e. application to all EU law) can be viewed, on the contrary, as a reasonable outcome. By reason of having established a less rigorous review over the EU than that exercised in respect of the Member States, the ECtHR has bestowed a singular trust on the CJEU. With accession, there is no reason that this trust should be withdrawn—quite the contrary. In a sense, the successful agreement reached on accession supports the argument that the EU offers a fundamental rights protection equivalent to that offered under the ECHR; a protection that was strengthened by the entry into force of the Lisbon Treaty. Retaining the doctrine is arguably advantageous for the ECtHR. An extension of *Bosphorus* would mean that Acts of the EU institutions (including Commission regulations and decisions) would be subjected to review (a consequence of accession). Such review would be minimal (maintenance of *Bosphorus*) and of a kind that applies to national implementing measures that derive from EU obligations. The Strasbourg court would not interfere except in serious cases of deficiencies. While this sits badly with the view of the “equality before the Convention” of the Parties, it does fit well with the view of the “specificity of the EU legal order” and, in particular, the distribution of certain tasks between the CJEU and the ECtHR.

⁶⁶ F. Tulken, “L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme—Pour et vers une organisation harmonieuse”, *Revue trimestrielle de droit européen* 27 (2011). All translations are from the author, unless otherwise stated.

⁶⁷ There is, in particular, the risk of a “double standard” in certain areas. Some have deplored this deferential attitude towards the EU in the sense that it would seem to affect the legitimacy of the EU legal order in relation to national courts. See e.g. N. Fennelly, “Human Rights and the National Judge: His Constitution; The European Union; The European Convention”, 12 *ERA-Forum* 87 at 102 (2011).

⁶⁸ For a critical analysis of the autonomy of the EU legal order in the draft accession agreement, see T. Lock, “Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order”, 48 *C.M.L. Rev.* 1025 (2011).

⁶⁹ The doctrine of the “presumption of equivalent protection subject to manifest deficiency” was denounced the very moment it was laid down. Academic commentary has wished the ECtHR would get rid of it, not only for substantive reasons, due to its application in the *Bosphorus* case, but also for more conceptual reasons. The doctrine has indeed the effect of granting a kind of “label of conformity” to the EU which contrasts with the ECtHR’s task of ensuring *effective* respect for rights guaranteed under the Convention. See e.g. the submissions of the International Commission of Jurists in the *Senator Lines* decision, pre-*Bosphorus*, which took the view that the doctrine of “equivalent protection”, applied at the time by the Commission, should be abandoned given the lack of clarity concerning the manner in which it had to be applied in a certain number of instances. The reasons for abandoning *Bosphorus* were therefore a little different then, in the sense that they were more linked to the dissatisfaction regarding its application—that the *Bosphorus* case and the later case law had not succeeded in removing—than a fear of inequality of treatment between the Parties to the Convention discussed above.

The description of the co-defendant mechanism in the draft agreement recalls the requirements that have been set down in the context of the *Bosphorus* presumption.⁷⁰

Furthermore, the former President of the ECtHR has noted that a limited review would respect both the specificity of the EU and the spirit of the principle of subsidiarity of the Strasbourg system given that the ECtHR acts as an “external auditor”⁷¹ of the EU. Given the congestion of the Strasbourg court, the maintenance of the doctrine would arguably be wise. If it is acknowledged that the *raison d’être* of the doctrine of equivalent protection is based less on a principle than on an institutional level, in that it allows the ECtHR to accommodate the autonomy of the EU legal order, while encouraging at the same time the Court of Justice to ensure conformity with ECHR standards, maintenance of the *Bosphorus* doctrine makes sense. The unsatisfactory situation that prevailed before accession, namely, depriving individuals of direct supervision of EU Acts, will no longer be so. The ECtHR will therefore be able to shape the scope of its review in cooperation with the CJEU. Moving beyond the supervisory relationship, concerns in respect of how the ECtHR has been influenced by EU law need to be assessed.

3. THE EUROPEAN COURT OF HUMAN RIGHTS INSPIRED BY EU LAW, INCLUDING THE CHARTER

As a guardian of European public order, the ECtHR plays a crucial role in ensuring consistency with the EU system. Conscious of the somewhat unsatisfactory nature of the duality of European systems of rights protection, the ECtHR has on numerous occasions aligned its case law with that of the CJEU. Based on complementarity, and not on hierarchy or competition, the relationship between the two European courts is arguably structured around an harmonious dialogue.⁷² Just as the CJEU has been inspired by the ECHR system, the ECtHR cites the case law of the CJEU and the Charter. Some issues, stemming from accession, should, however, be recognised.

3.1 *References by the ECtHR to the case law of the CJEU and the Charter*

While the European courts did not foresee the interactions between their case law, they quickly realised that direct conflicts would be counterproductive. Just as the CJEU has relied on the case law of the Strasbourg court, the ECtHR has also been inspired by EU law. Several ECtHR decisions demonstrate the strategic alignment with the case law solutions of the CJEU and the cross-references to the Charter in order to modernise the Strasbourg system.

3.1(a) *The ECtHR and the case law of the CJEU: strategic alignment*

Firstly, from the CJEU’s standpoint, it may be recalled that,

⁷⁰ Lock, fn.68 above, at 1042. See also art.3(2) of the draft legal instruments on the Accession (CDDH(2011)009) :

“Where an application is directed against one or more Member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably *where that violation could have been avoided only by disregarding an obligation under European Union law*” (emphasis added).

⁷¹ Costa, fn.59 above, at 180.

⁷² L. Scheeck, “The Relationship between the European Courts and Integration through Human Rights”, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 837 (2005). See also G. Harpaz, “The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy”, 46 *C.M.L. Rev.* 105 (2009).

“[w]ith respect more specifically to the Convention, the institutions and bodies of the Union have for a long time been seeking to ensure, under the supervision of the Court of Justice, that human rights as guaranteed by the Convention are observed, even in the absence of an express obligation to that effect. As its case-law bears witness, the Court of Justice regularly applies the Convention and refers in that connection, more and more precisely in recent years, to the case-law of the European Court of Human Rights.”⁷³

Early on, the CJEU referred to the “special significance” of the ECHR when it sought guidance, in the determination of general principles law, from various international instruments concerning the protection of human rights in respect of which Member States had collaborated or were signatories.⁷⁴ From the moment the CJEU required that the rights guaranteed under the ECHR be respected through general principles of law, the possibility emerged of a divergence of case law with that of the ECtHR. This could have been greatly accentuated as a result of the broadening of EU’s competences. In addition it could have resulted in a greater number of fundamental rights cases being brought before the Court of Justice. Those potential conflicts have to date been relatively rare and have never led to direct confrontations between the two European courts. The most frequently cited example of divergence is that relating to the right of the inviolability of the dwelling. In the *Hoechst* judgment,⁷⁵ the Court of Justice interpreted the right strictly as one not extending to commercial premises and, in this regard, even noted the absence of case law from the ECtHR. On the other hand, the ECtHR had ruled a few months earlier that commercial premises located adjacent to an entrepreneur’s private home were protected under art.8 of the ECHR on the right to respect of the home.⁷⁶ In a subsequent decision the Court of Justice revisited its position and aligned its interpretation with the more generous interpretation of the Strasbourg court.⁷⁷ The potential clash may be viewed more as a miscommunication, or undeveloped communication, between the two courts rather than a deliberate move on the part of one court to stand up against the other (in the 1980s, judgments were not immediately available to the public).

Similarly, the ECtHR has sought harmonious development with the CJEU in order to reinforce the legitimacy of its decisions, particularly in the context of a change in case law. This conciliatory approach adopted by the ECtHR may be examined from three positions. Firstly, the ECtHR attaches “particular regard” to the CJEU case law, which it has occasion to review and compares. This is evident, for example, in *Stec v United Kingdom*, a case relating to the difference between men and women as regards the legal age of retirement. After referring to the relevant case law of the CJEU, the Strasbourg court approved the decision given by that court in support of its own decision of non-violation of art.14 of the ECHR on the prohibition of discrimination in placing

⁷³ Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 5, 2010, para.I. 3, Luxembourg.

⁷⁴ The Court of Justice began to refer to the ECHR in the *Nold* case (*Nold* (C-4/73) [1974] E.C.R.-491) and to expressly mention its provisions in the *Rutili* case (*Rutili* (C-36/75) [1975] E.C.R.-1219), when all EU Member States, including France in May 1974, had ratified the ECHR. The CJEU gave the ECHR “special significance” in the *ERT* case, for instance (*Elliniki Radiophonia Tileorassi* (C-260/89) [1991] E.C.R. I-2925, at para.41) in which it summarized its judicial construction:

“... as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The ECHR has special significance in that respect.”

⁷⁵ Joined Cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] E.C.R. I-2859, para.18.

⁷⁶ *Chappell v United Kingdom* Appl no 10461/83 (ECtHR, March 30, 1989) Series A no 159. The ECtHR confirmed its position in *Niemietz v Germany* Appl no 13710/88 (ECtHR, December 16, 1992) Series A no 251-B.

⁷⁷ *Roquette Frères SA v Commission of the European Communities* (C-94/00) [2002] E.C.R. I-9011, para.29. See also the “*PVC II*” case concerning the right to remain silent and against self-incrimination (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P “*PVC II*”, [2002] E.C.R. I-8628, para.259) in which the Court of Justice referred to the *Funke* judgment of the ECtHR.

“*particular regard* ... to the strong persuasive value of the [CJEU]’s finding on this point” (emphasis added).⁷⁸

Secondly, the ECtHR went further and attached particular importance to the specificities of the EU legal order. Its case law on the meaning of “Community national” and its influence on its assessment of the application of arts.10 and 8 of the ECHR is illustrative. In *Piermont v France*, the ECtHR did not go so far as to recognise the existence of a European citizenship (undeveloped at the time). Nonetheless, the court took into account the fact that not only did the applicant belong to an EU Member State, but also that she held a political mandate as a Member of the European Parliament. The court concluded that art.16 of the ECHR relating to restrictions on the political activities of foreigners could not be used in this case against the applicant and, as a result, that France had no authority to prevent the exercise of the applicant’s right to freedom of expression guaranteed under art.10 of the ECHR.⁷⁹ In *Aristumuiño Mendizabal v France*, the ECtHR decided that a different approach must be taken when assessing the conditions of entry, residence and removal of non-nationals. In finding that a violation of art.8 had occurred, by reason of the fact that it took the French authorities over 14 years to deliver a residence permit to the applicant and that this was not provided for by the law, the court assessed the “law” in question and did so irrespective of whether it was a French law or a Community law. The court held that the respect for private and family life must be interpreted, in the circumstances of the case, *in light of Community law*.⁸⁰

Thirdly—and this refers to the deferential approach described above—the respect for the EU’s autonomy may be considered as open to challenge in so far as it leads to a too timid supervision on the part of the ECtHR over the law and procedures of the EU. In this regard the case law relating to the right to a fair trial, especially the right of parties to respond to the opinion of the Advocate General in a preliminary reference procedure before the CJEU, is instructive. The ECtHR appears to have agreed with the Court of Justice by holding that the organisation of that court, which does not provide for a right of response to an Advocate General’s opinion, does not infringe art.6(1) of the ECHR. The Strasbourg court’s position is, however, more tentative than it appears. The court in *Emesa Sugar* (handed down before *Bosphorus*) avoided tackling the issue of the institution of the Advocate General as regards the requirements of a fair trial by finding the application inadmissible on the ground that it concerned customs law, thereby falling outside the scope of art.6(1) of the ECHR.⁸¹ The court once again avoided a divergence of views with the CJEU in another finding of inadmissibility in *CNPK* (post-*Bosphorus*). In that case, the Strasbourg court found that the presumption of compatibility with the Convention was not rebutted as there was no “manifest deficiency” in the protection of the right given that the possibility existed for the CJEU to order the reopening of the oral procedure either on its own motion or at the request of one of the parties.⁸² Ultimately, both courts are more than capable, in their own way, of avoiding contradictory decisions.⁸³ The ECtHR’s approach is arguably more

⁷⁸ *Stec v United Kingdom* [GC] App n 65731/01 and 65900/01 (ECtHR, April 12, 2006), paras°39-41 and 58. See also *DH v Czech Republic* [GC] App n 573250/00 (ECtHR, November 3, 2007) concerning the schooling of Roma children in which the ECtHR took inspiration from the concepts and methods used by the Court of Justice in respect of the concept of discrimination (para.85) and method of proving discrimination (para.187).

⁷⁹ *Piermont v France* App n 15773/89 and 15774/89 (ECtHR, April 27, 1995) Series A no 314, para.64.

⁸⁰ *Aristumuiño Mendizabal v France* App. No. 51431/99 (ECtHR, January 17, 2006), paras 67, 69.

⁸¹ *Emesa Sugar v The Netherlands* App. No. 62023/00 (ECtHR, January 15, 2005). That decision echoes the decision by the Court of Justice in *Emesa Sugar (Free Zone) NV v Aruba* (Order) (C-17/98) [2000] E.C.R. I-675.

⁸² *CNPK* case, fn.11 above.

⁸³ The CJEU itself avoided ruling on the issue of the role of the Advocate General and decided the *Kaba* case on another basis (*Arben Kaba II* (C-466/00) [2003] E.C.R. I-2219).

constructive when the court invokes the Charter. All of this reveals a new dynamic in the judicial dialogue between the two European courts.

3.1(b) *The ECtHR and the Charter: necessary modernisation*

The relationship between the ECHR and the Charter may be regarded as symbiotic and one that has the effect of producing beneficial results both for instruments and for courts that interpret them. This is obvious when considering the influence of the ECHR on the Charter.⁸⁴ The Convention has been used as a model by the drafters of the Charter which, as stated in its preamble, “reaffirms ... the rights as they result, in particular, from ... the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of ... the European Court of Human Rights”. Numerous provisions of the ECHR are reproduced—some word for word—into the Charter. Identical drafting is to be found, for example, in art.4 of the Charter, which reproduces art.3 of the ECHR on the prohibition of torture and inhuman or degrading treatment or punishment, and in art.5(1) and (2) of the Charter, which reproduces art.4(1) and (2) of the Convention on the prohibition of slavery and forced labour. Approximately half of the substantive provisions of the Charter find their equivalent in the ECHR⁸⁵ or in the case law of the ECtHR.⁸⁶

The Charter has also pegged itself to the Convention by the “horizontal clause” of art.52(3) and the “no-retreat clause” of art.53. Under art.52(3), in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope shall be the same as those laid down by the Convention. It is therefore not just the literal content of the provisions originating in the ECHR that is incorporated but the interpretation of those provisions by the ECtHR. Article 53 guarantees that the level of protection of fundamental rights under the Charter cannot be less than that provided under the Convention. The ECHR is a source of inspiration and the rights contained therein, as well as the scope of their interpretation, represent a minimum standard of reference within the context of the Charter.

The other side of the relationship—the influence of the Charter on the Strasbourg system—may also be observed. The Charter has been “an instrument of rapprochement in the analysis of the two courts”.⁸⁷ The ECtHR referred to the Charter very early on even before the Court of Justice did.⁸⁸ In the meantime, the Strasbourg court has made numerous references to the Charter, giving the impression that the model has been overtaken by the copy. In reality the ECtHR draws on the Charter as a “fountain of

⁸⁴ P. Gallagher, ‘The European Convention on Human Rights and the Margin of Appreciation’, UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 52/2011, p. 6, para..21 (2011). See also S. Peers & A. Ward (eds), *The European Union Charter of Fundamental Rights* (Oxford: Hart, 2004).

⁸⁵ Arts.2, 4–7, 9, 10(1), 11(1), 12(1), 14, 17, 19(1), 21, 45, and 47–50 of the Charter.

⁸⁶ Arts.1, 3, 8, 11(2), 13, 19(2), 22–26 and 37 of the Charter. The Charter “codifies”, for example, the European case law arising from the cases of *Ahmed v Austria* App. No. 25964/94 (ECtHR December 17, 1996) and *Soering v United Kingdom* (1989) Series A no 161, in art.19(2) which states that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

⁸⁷ B. Favreau, ‘La Charte des droits fondamentaux de l’Union européenne—Pourquoi ? Comment ?’ in B. Favreau (ed.), *La Charte des droits fondamentaux après le Traité de Lisbonne* (Brussels : Bruylant 2010), p.33.

⁸⁸ See e.g. *Christine Goodwin v United Kingdom* [GC] App n 28957/95 (ECtHR, July 11, 2002). Cf. first references by the CFI in Case T-177/01 *Jégo-Quéré and Cie SA v Commission of the European Communities* [2002] E.C.R.-II 2365, and the ECJ in *European Parliament v Council of the European Union* (C-540/03) [2006] E.C.R. I-05769.

youth”.⁸⁹ For the court, the equation is simple: the ECHR is a “living instrument”, and the Charter is a modern instrument. Although only a regional instrument, the Charter is the most recent and complete generalist instrument on the protection of human rights in the world. The added value it provides is to be found in its distinct and relatively clear structure, but mostly in the innovative content of its rights. The Charter does not only contain classic fundamental rights and freedoms. It also provides for an extensive list of economic and social rights, or “emerging” rights, and in so doing goes beyond the “existing” rights flowing from the European treaties, national constitutional traditions or the case law of the CJEU, and rights “corresponding” to the rights guaranteed by the ECHR and its protocols.⁹⁰ As the ECtHR regularly proclaims, a failure to maintain a dynamic and evolutive approach would risk rendering it a bar to reform and improvement. It is of crucial importance that the ECHR be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.⁹¹ The Charter is thus used by the European judges to further the doctrine of the “living instrument”, in order to revitalise the development of fundamental rights within the Strasbourg system.⁹²

The binding status of the Charter, from the entry into force of the Lisbon Treaty, has not had an adverse impact on the relationship between the two European systems: the opposite is the case. The Charter has acquired a new centrality in the case law of the ECtHR. The court does not hesitate to refer to it by way of introducing “new solutions more adapted to the circumstances and the development of society”.⁹³ The Charter is now regularly referred to in the relevant references to EU law,⁹⁴ or in third parties’ interventions to the case.⁹⁵ The Charter is mostly used in order to identify a European consensus that is necessary to justify a change in the case law or, conversely, to find the

⁸⁹ From a quantitative point of view, references to the Charter are not, in fact, that numerous. The ECtHR cited it on 18 occasions since its adoption in 2000—13 times in the context of cases involving EU Member States and just five times in the context of cases against non-EU countries—therefore, one or twice per year for all the cases handed down over 12 years. Against the EU Member States, the relevant cases are *Schalk and Kopf v Austria*, *Sørensen and Rasmussen v Denmark*, *Vilho Eskelinen and others v Finland*, *Zontul v Greece*, *Bosphorus v Ireland*, *Hirsi Jamaa and others v Italy*, *G.N. and others v Italy*, *Jetzen v Luxembourg*, *Anheuser-Busch Inc v. Portugal*, *Milatová and others v Czech Republic*, *Linkov v Czech Republic*, *Heglas v Czech Republic* and *I v United Kingdom*. Relevant judgments in the case of non-EU States are *Bayatyan v Armenia*, *Sergueï Zolotoukhine v Russia*, *Neulinger and Shuruk v Switzerland*, *Demir and Baykara v Turkey*, *Ülke v Turkey* and *Malhous v Czech Republic* (judgment handed down before the Czech Republic joined the EU). The data was obtained by researching the HUDOC case law database with the following criteria: keywords “Charter”, dates “01/01/2000–7/04/2012”; search limited to judgments “in law” section; manual selection of the 53 results obtained by sorting between EU Member States and non-EU States, then by eliminating cases referring to other types of Charter (a search with the key expression “Charter of Fundamental Rights of the EU” does not return all the results).

⁹⁰ On this three-fold distinction between “existing”, “corresponding” and “emerging” rights, see Favreau, fn.87 above, at pp.13–18. The Charter specifies new rights in particular fields of medicine and biology (art.2), protection of personal data (art.8), right to asylum (art.18), equality before the law and the general non-discrimination clause (art.21, which anticipates the entry into force of Protocol 12 to the ECHR), equality between men and women (art.23), rights of the child (art.24), rights of the elderly (art.25) and persons with disabilities (art.26).

⁹¹ See e.g. *Bayatyan v Armenia* [GC] App. No. 23459/03 (ECtHR, July 7, 2011) on the practical and effective rights (para.98) and on the Convention as a living instrument (para.102).

⁹² The Charter is cited while non binding yet. See e.g. *Bosphorus*, above, fn.16. The concurring judges note its authority at the time (joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para.4). See also the judgments in *Christine Goodwin*, fn.88 above, *Vilho Eskelinen v Finland* [GC] App. No. 63235/00 (ECtHR April 19, 2007), paras.29–30, 60, *Sørensen and Rasmussen v Denmark* [GC] App. No. 52562/99 and 52620/99 (ECtHR January 11, 2006), para.74, and *Demir and Baykara v Turkey* [GC] App. No. 34503/97 (ECtHR November 12, 2008), para.80.

⁹³ F. Benoît-Rohmer, “Droits fondamentaux—L’Union européenne et les droits fondamentaux depuis l’entrée en vigueur du Traité de Lisbonne”, *Revue trimestrielle de droit européen* 145 at 158 (2011).

⁹⁴ For examples in which the Charter is mentioned in terms of relevant international and/or European law, see *M.S.S.*, fn.17 above, para.61, relating to the right to asylum expressly contained in the Charter. See also *Hirsi Jamaa and others v Italy* [GC] App. No. 27765/09 (ECtHR February 23, 2012). The facts, involving illegal immigrants who had arrived in Italy and had been returned to Libya, are similar to those of the *M.S.S.* case law, but do not involve the “Dublin System”. The ECtHR concluded, in this case, to a breach of arts.3 of the ECHR and 4 of Protocol No. 4 concerning the prohibition of the collective expulsions of aliens. The court held that the principle of non-refoulement was also enshrined in art.19 of the Charter (para.135). See also *Popov v France* App. No. 39472/07 and 39474/07 (ECtHR January 19, 2012) in which the Court concluded to a violation of arts.3, 5 and 8 of the ECHR concerning an administrative detention; the Charter is cited in relation to the rights of the child (para.61).

⁹⁵ See e.g. *Zontul v Greece* App. No. 12294/07 (ECtHR January 17, 2012) in which the court found a breach of art.3 for inhuman and degrading treatment suffered by an immigrant on account of the Greece coastguards who intercepted him. The Centre for Justice and Accountability (CJA) noted the recognition of the need to reinforce, at an international level, the protection of the rights of “sexual minorities”, an approach supported by several provisions of international instruments, including art.21 of the Charter (para.81).

absence thereof and reserve for the future any development of it's the ECtHR's case law. Under the first scenario (existence of a consensus), recent cases show that the ECtHR has used the Charter to distance itself from an overly strict interpretation of the Convention, or to depart from an earlier line of case law that it no longer endorses. The judgment in *Christine Goodwin v United Kingdom* is the most relevant in this regard. The ECtHR used the Charter as the *only* reference among international texts⁹⁶ in order to operate a reversal of case law. The court decided to extend the narrow meaning of art.12 of the ECHR on the right to marry by referring to the broader wording in art.9 of the Charter. By removing the reference to man and woman, that provision now allows the application of that particular right to be extended to other situations, such as the marriage of a transsexual.⁹⁷

Another example is provided by *Bayatyan v Armenia*.⁹⁸ In that case, the ECtHR revisited the combined interpretation of two related ECHR provisions in order to interpret them so that they would be more in line with current developments relating to the right of conscientious objection across Europe. That judgment gave the Strasbourg court, sitting as the Grand Chamber, the opportunity to distance itself from the interpretation once developed by the old Commission and upheld by the court in Chamber formation.⁹⁹ By finding that Armenia had breached art.9 of the ECHR on the right to freedom of thought, conscience and religion for having imprisoned a Jehovah's Witness who refused to do his obligatory military service, the ECtHR clearly ruled in favour of the recognition of the right to conscientious objection.¹⁰⁰ Beyond its substantive contribution to broadening the scope of the right in question, the judgment illustrates the justificatory approach, now well tested, whereby the ECtHR resorts to a certain number of regional and international instruments in order to build the argument for an evolutive interpretation of the ECHR based on consensus.¹⁰¹ In that particular part of the court's reasoning, the Charter appears prominently among the elements of international law that the court takes into account with the objective of identifying a quasi-general consensus on the issue of conscientious objection in Europe and beyond.¹⁰² The Charter is, in this regard, arguably pivotal in the identification of a consensus., It stands in between the individual positions of the EU States that have inscribed in stone their "common position" relative to conscientious objection, on the one hand, and, the position expressed at pan-European and international level by a number of international (i.e. United Nations Human Rights Committee) and European

⁹⁶ *Christine Goodwin*, fn.88 above, para.58.

⁹⁷ *Christine Goodwin*, fn.88 above, para.100. See also *P.B. and J.S. v Austria* App. No. 18984/02 (ECtHR July 22,2010). The ECtHR decided to include homosexual relationships in the concept of "family life" within the meaning of the ECHR given developments in society in this regard since the 2001 *Mata Estevez* case (*P.B. and J.S.*, para.30).

⁹⁸ *Bayatyan*, fn.91 above. It involved reinterpreting art.9 of the ECHR along with art.4(3)(b) which provides that "[f]or the purpose of this Article the term "forced or compulsory labour" shall not include ... any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service".

⁹⁹ *Bayatyan*, fn.91 above. That is why the expression "reversal of case law" does not seem entirely appropriate in this case as the ECtHR has never actually ruled on the particular question, namely the applicability of art.9 of the ECHR to conscientious objectors. In previous cases, the court did not find it necessary to examine the question of applicability of art.9 and decided to deal with the issue under other provisions of the Convention, namely arts.14 and 3 (para.97).

¹⁰⁰ The Commission constantly refused to find that art.9 of the ECHR could be applied to conscientious objection. Drawing a link between arts.9 and 4(3)(b) of the Convention, it found that the latter left the choice of recognising a right to conscientious objection to the Contracting Parties. Consequently, conscientious objectors were excluded from the scope of protection of art.9, which could not be read as guaranteeing freedom from prosecution for refusal to serve in the army (para.99).

¹⁰¹ The ECtHR focused first of all on the analysis of the *literal* interpretation of arts.9 and 4(3)(b) and separated the two provisions. It held that art.4(3)(b) has the aim of clarifying the meaning of "forced or compulsory labour", but neither recognises nor excludes the right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by art.9 of the ECHR (para.100).

¹⁰² "In Europe, mention should be made of the proclamation in 2000 of the Charter of Fundamental Rights of the European Union, which entered into force in 2009. While the first paragraph of Article 10 of the Charter reproduces Article 9(1) of the Convention, almost literally, its second paragraph explicitly states that '[t]he right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right' ... Such explicit addition is no doubt deliberate ... and reflects the unanimous recognition of the right to conscientious objection by the Member States of the European Union, as well as the weight attached to that right in modern European society" (para.106).

institutions (i.e. Parliamentary Assembly and Committee of Ministers of the Council of Europe) among which the Charter is cited, on the other.¹⁰³

Under the second scenario (absence of consensus) the ECtHR has, for example, refused to go further in its interpretation of the right to marry by not extending it to a homosexual couple in the case of *Schalk and Kopf v Austria*,¹⁰⁴ for the reason that there was no consensus emanating from the Member States of the Council of Europe on that question. Referring to *Christine Goodwin*, the court stopped at the threshold of a new upheaval of the institution of marriage by taking into account the full meaning of the Charter's provisions. The court referred, firstly, to the wording of art.9 of the Charter and interpreted the right to marry enshrined in art.12 of the Convention as being no longer limited, in all circumstances, to marriage between two persons of the opposite sex. That being so, the court took into consideration the second part of art.9, under which the right to marry is "guaranteed in accordance with the national laws governing the exercise of [that right]". It completed its reasoning by referring to the commentary on the Charter and concluded that art.9 of the Charter does not expressly require that national laws facilitate that type of marriage. In the result there was no violation of art.12 of the Convention in respect of the two applicants.¹⁰⁵ The Charter, along with the interpretation of its commentary, provided the ECtHR with the basis for noting the absence of consensus and arguably was the determining factor in the decision that it reached. The consensus approach is, however, not free from criticism and is one that can pose difficulty in the context of accession.

3.2 Potential conundrum around the use of the Charter after accession

Just as the question is asked about the fate of the *Bosphorus* doctrine after accession, the resort to EU law, and to the Charter in particular, to determine a consensus in the evolution of fundamental rights protection in Europe calls for reflection on the future relationship between the ECtHR and EU law. Identification of a consensus among the Member States, often reinforced by the development of higher EU standards, is a crucial method of reasoning for the ECtHR. It allows the court to ensure that the old text of the ECHR remains relevant within the context of a changing and diverse society. The search for consensus is, first and foremost, necessary for reasons of legitimacy.¹⁰⁶ Yet, the technique is not exempt from criticism. It is not so much the fact that the ECtHR uses it to develop rights; rather it is *the way* in which it uses that method. Without delving into the general debate concerning consensus within the ECtHR,¹⁰⁷ what follows are some observations on the difficulties associated with that method when it involves the Charter.

The Charter is most often cited as a relevant text of reference without, however, being decisive as to the outcome of the court's ruling. It rather finds its place "among other international instruments in support of the ... 'globalising' interpretative approach of the Court".¹⁰⁸ The Charter can, however, be determinative when it comes to identifying consensus at the international and European level. As was seen in the *Christine Goodwin* and *Bayatyan* cases, this can be relied upon to support the comparative development within the States. However, identification of consensus in

¹⁰³ *Bayatyan*, fn.91 above, paras.105–107.

¹⁰⁴ *Schalk and Kopf v Austria* App. No. 30141/04 (ECtHR June 24, 2010). The court found no breach of art.12 on the right to marry, no breach of art.14 on the prohibition of discrimination, in conjunction with art.8 on the right to respect for private and family life.

¹⁰⁵ Fn.104, paras.60–61.

¹⁰⁶ K. Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the of the European Court of Human Rights", Public Law 534 (2011).

¹⁰⁷ K. Dzehtsiarou, *European Consensus in the of the European Court of Human Rights* (PhD thesis, University College Dublin 2011).

¹⁰⁸ Benoît-Rohmer, fn.93 above, at 159.

relation to EU law, and in particular the Charter, can pose problems not only vis-à-vis the States of the Council of Europe, which are not members of the EU, but also vis-à-vis EU Member States.

Firstly, for non-EU Contracting States, the ECtHR may ground its solutions on changes occurring in the European area, in particular where the provisions of the Charter reinforces these changes. That is evident, for example, in *Bayatyan* in relation to the recognition of the right to conscientious objection for conscripts. The ECtHR identified a European consensus by reference to guidelines given by the Parliamentary Assembly and the Committee of Ministers of the Council of Europe. The latter resorted to the provisions of the Charter to call upon the States that had not yet done so to guarantee such the right to conscientious objection.¹⁰⁹ Nevertheless, the dissenting opinion of Judge Gyulumyan in *Bayatyan*, whose country was found liable, highlights the criticisms to which the ECtHR exposes itself when it adapts its case law to comply with other European and international instruments. While the evolutive interpretation of the Convention arguably allows the ECtHR to extend the scope of protected rights, it loses its legitimacy when it forces the meaning of the Convention while the Convention itself leaves the recognition of particular rights to the discretion of the Contracting Parties. In Gyulumyan's words, the "role of [the Strasbourg] Court is to protect human rights which already exist in the Convention, not to create new rights", even by means of referring to the provisions of the Charter (and the international and European case law on human rights).¹¹⁰ It is not so much a problem of the nature of interpretative choices; rather, the power of interpretation of the ECtHR is perceived as limitless if the ECtHR can ground its reasoning on rules outside the Convention system.¹¹¹

Secondly, resort to consensus can pose problems in respect of EU Member States, despite the evident approximation between the EU Charter and the Strasbourg Convention. This is the case when one considers that the Member States' own constitutional area might be "smothered" by the yoke of consensus despite the fact that some Member States have obtained undertakings to the effect that the EU itself recognizes the specificity of national law. This brings to mind the *A, B and C* case, which found that Ireland had violated art.8 of the ECHR.¹¹² Having failed to adopt national provisions establishing an accessible procedure for obtaining an abortion in Ireland, the ECtHR decided that the Irish authorities failed in their positive obligation to ensure an effective respect of the applicant's right to private life. While a detailed examination of the arguments made in that case is beyond the scope of this analysis it should, nonetheless, be noted that the Irish Government had obtained from the EU a guarantee of respect for its constitutional law on this matter at the time of the adoption of the Lisbon Treaty. According to a legally binding decision of the Heads of State and Government of the 27 Member States of the EU,

¹⁰⁹ *Bayatyan*, fn.91 above, para.107. Consensus is generally two-dimensional: the ECtHR not only must have regard to the changing conditions in Contracting States and respond to any emerging consensus as to the standards to be achieved in defining the meaning of terms and notions in the text of the ECHR (consensus based on a comparative analysis of national laws); the court also can and must take into account elements of international law other than the ECHR and the interpretation of such elements by competent organs and the consensus emerging from these specialised international instruments may constitute a relevant consideration for the court when it interprets the provisions of the ECHR in specific cases (consensus based on specific international instruments) (para.102).

¹¹⁰ See the partly dissenting opinion of the Armenian Judge Gyulumyan, para.2.

¹¹¹ That is also the case in *Scoppola N° 2 v Italy* [GC] App. No. 10249/03 (ECtHR, September 17, 2009). The partly dissenting opinion of Judge Nicolaou, joined by Judges Bratza, Lorenzen, Jočiene, Villiger and Sajó, criticised the "complete reversal of the Court's case law". In his opinion, the principle of the retrospective application of the more favourable criminal law is "a different kind of norm. It expresses a choice that reflects the development of a social process in the context of criminal law" and, not being provided for in the text of the Convention, it must "remain ... a matter of policy or choice in the discretionary area enjoyed by the State in criminal matters". Moreover, "no judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by Convention provisions ... [T]he majority ... has had [Article 7(1)] re-written in order to accord with what they consider it ought to have been. This, with respect, oversteps the limits".

¹¹² *A, B and C v Ireland* [GC] App. No. 25579/05 (ECtHR, December 16, 2010).

“[n]othing in the Treaty of Lisbon attributing legal status to the Charter of fundamental rights ... affects in any way the scope and applicability of the protection of the right to life ... provided by the Constitution of Ireland.”¹¹³

The fact that the ECtHR has, to some extent, called into question that guarantee through its approach to consensus, has been criticised in several places.¹¹⁴

A final observation must be made on the status of the Charter within the Strasbourg system after accession. While the EU will thereafter be a Contracting Party to the ECHR, it seems that the relationship between the Charter and the Convention will be similar to that between the Convention and the national constitutional provisions on fundamental rights of the States Parties. These constitutional provisions often go beyond what is provided for by the ECHR. From a formal point of view, one might speculate whether the Charter will be examined in the comparative analysis of the laws of the Contracting Parties or in the section relating to elements of international law other than the Convention. On the other hand, and from the methodological point of view of the evolutive interpretation, it is likely that the ECtHR will leave a margin of appreciation to the CJEU which will remain the supreme authority in the application and interpretation of EU law since accession cannot, in this respect, result in some sort of submission by the CJEU to the ECtHR.

In short, an alignment with EU law and, in particular, reference to the Charter gives to the case law of the ECtHR a beneficial legitimacy by emphasising the consistency of the European systems of fundamental rights protection as a whole. However, references to the Charter in the identification of a consensus must not distract the court from its effort to ground the legitimacy of its rulings. That apparent paradox can only be reconciled by refining the method of identifying a consensus. This will involve making reference to the Charter in clear and transparent reasoning; reasoning that specifies, in a more systematic fashion, the justification for having resorted to the Charter as well as the type of consensus in which it fits. This may involve, after accession, not an “international consensus” by reference to international treaties, but a “consensus arising from comparative law” after an analysis of the various laws of the Contracting Parties.

4. CONCLUSION

Accession, by which the EU becomes the 48th Party to the ECHR, is perceived from the Strasbourg side to be one of the most significant proofs of the legitimacy of the ECtHR.¹¹⁵ It will become incumbent on the court to honour the legitimacy conferred by this special Contracting Party. To return to the idea of the “management” by the ECtHR of its relationship with EU law, it can be said that the task will not be an easy one. Firstly, from a practical point of view, the ECtHR will have to take (even more) radical measures to perform its new role, as the Strasbourg system is on the point of suffocating under an ever expanding workload.¹¹⁶

¹¹³ Fn.112 above, para.102.

¹¹⁴ See the submission of the Irish Government that strongly questions the identification of a consensus on the issue of abortion (paras 180–191), as well as the concurring opinion of Judge Mary Finlay Geoghegan questioning the relevance of consensus in that case. See also the positions of the judges of the Irish Supreme Court commenting extrajudicially in J. L. Murray, “The Influence of the European Convention on Fundamental Rights on Community Law”, 33 *Fordham Int'l L.J.* 1388 (2010), and Fennelly, fn.67 above.

¹¹⁵ Costa, fn.59 above, at 175.

¹¹⁶ The number of applications pending before a judicial formation of the ECtHR was 111,350 on September 30, 2013. . However, the backlog was pushed ‘below the symbolic threshold of 100,000 applications’ at the end of 2013, reaching 99,900 pending applications (D. Spielmann, *Solemn hearing for the opening of the judicial year of the European Court of Human Rights, Opening Speech*, 31 January 2014).

Secondly, from a substantive point of view, the ECtHR has the responsibility to ensure respect for the rights contained in the ECHR: the “instrument of European public order”¹¹⁷ which has become the “common law of fundamental rights in Europe”.¹¹⁸ To this end, the court will need to continue to ensure that this minimum standard is guaranteed in all circumstances and at national and EU levels. Currently, EU law is already subject to an examination by the ECtHR but only the Member States are parties to the litigation. After accession, the EU will be placed under the direct external supervision of the ECtHR. EU law will be susceptible to challenge in the context of an individual application through two types of action: firstly, within the context of indirect actions against the Member States for implementing measures of EU law, and, secondly, in the context of direct actions against measures of the EU institutions. The ECtHR will have to work on the harmonious interpretation of its law with respect to EU law while respecting the autonomy of the EU legal order and that of the national legal orders. By so doing it will act as the efficient guarantor of fundamental rights in Europe by bringing the ECHR “to life” and by drawing inspiration from the Charter. The balance will undoubtedly be a difficult one for the ECtHR to achieve, especially since the legitimacy of its decisions and methods (e.g. that of consensus) is sometimes widely challenged.

This leads, finally, to the future role of the ECtHR in relation to both the EU and the national systems. While accession will probably deprive jurists of a favourite topic of discussion concerning the relationship between the two European legal orders,¹¹⁹ the “trans-experts” of EU and ECHR law have already been long reflecting on the type of justice that the ECtHR will hand down when both the European systems will be tied to each other. Some clearly favour a more constitutional dimension of the ECtHR’s enhanced role.¹²⁰ Indeed, the ECtHR’s position after accession entails an elevated status. The ECtHR is bound to maintain a privileged link with the Court of Justice without, however, appearing to constitute a European “judicial bloc” against national courts. This will arguably force the Strasbourg court to resolve these more “existential” questions on the nature of the justice that it hands down.

Supervision (of the Acts adopted by the EU in relation to the Convention) and *inspiration* (in the ECtHR’s attempt to frame a coherent European system of fundamental rights protection) are the two facets of the interaction between the case law of the ECtHR and EU law. These are necessarily complementary and convergent given the position of the ECtHR, which is on the whole positive, with regard to the EU system of rights protection and will continue to shape their rapport after accession for the benefit of the individual.

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¹¹⁷ *Loizidou v Turkey* [GC] App. No. 15318/89 (ECtHR, March 23, 1995 preliminary objections), para.93.

¹¹⁸ F. Tulkens & J. Callewaert, “La Cour de justice, la Cour européenne des droits de l’homme et la protection des droits fondamentaux”, in M. Dony & E. Bribosia (eds.), *L’avenir du système juridictionnel de l’Union européenne* (Editions de l’Université de Bruxelles, 2002), p.178.

¹¹⁹ Jacqué, fn.7 above, at 995.

¹²⁰ S. Greer & A. Williams, “Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?” 15 E.L.J. 462 (2009).