

## **The EU's accession to the ECHR: One giant leap for human rights protection in the EU?**

Following the entry into force of the Lisbon Treaty on 1 December 2009, the European Union is now legally obliged to accede to the European Convention on Human Rights (ECHR)<sup>1</sup>. Once accession to the ECHR has been formally ratified, the EU will become subject to the legally binding jurisdiction of the European Court of Human Rights (ECtHR). Consequently rights guaranteed under the Convention, as well as their interpretation by the ECtHR, will become enforceable against the EU institutions, and equally, against member states that are acting within the scope of EU law.

In this essay I will outline the history and development of human rights law within the EU, which has led to the EU's accession to the ECHR; address the aims of accession; discuss the relationship between the European Court of Justice (ECJ) and ECtHR, particularly in relation to the ECJ's concerns for autonomy post-accession; analyse the effects of accession; and critically decide whether accession is in fact 'one giant leap for human rights protection within the EU'.

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<sup>1</sup> Article 6(2) TEU

## **History and development of the EU as a Human Rights actor: The road to accession.**

To analyse whether accession to the ECHR could be considered a leap for human rights protection it is first necessary to understand the historical development of human rights standards within the EU.

Undoubtedly, the elaborate human rights regime envisaged by accession the ECHR stands at a stark contrast to the silence of the EU's founding treaties, on the issue of human rights. At their conception, the European Economic and Euratom Communities had intended to serve the “human ideal of brotherhood”<sup>2</sup> shared by the six founding member states. This ideational concept of fraternity did not however supersede the economic focus of deliberations that took place during the Messina Conference. Ultimately the resulting Messina Resolution, which led to the establishment of the EEC, focused on the revival of European integration through economic integration and the establishment of a common market<sup>3</sup>. These aims did not coincide with the issue of human rights recognition and consequently such provisions were not recognised under the resolution.

Grainne de Burca notes, “In sum, the silence of the 1957 treaties on human rights is best understood as no more than a consequence of a pragmatic

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<sup>2</sup> Statement of Foreign Minister Paul-Henri Spaak, EEC and CECA Treaty Negotiations, Rome, CM3/NEGO/098 (Mar. 25, 1957)

<sup>3</sup> Resolution of the Ministers of Foreign Affairs of the ECSC in Messina, CM3/NEGO/006 (June 1–3, 1955)

decision to rethink the optimal path towards closer European integration”<sup>4</sup>. Evidently this optimal path was one of purely economic integration. The ECHR system did not go completely unrecognized during this foundational period of EU development. With the gradual development and strengthening of the ECHR through the ECtHR’s application of Convention rights, the EEC developed an interest in maintaining links with the ECHR system. The question of EEC accession to the ECHR was raised, but initially only as a step towards the EEC developing it’s own human rights regime<sup>5</sup>

The initial ‘leap’ for human rights protection in the EU came in the form of a series of human rights initiatives. The first of these was the Fouchet Plan of 1961, which proposed that the aim of the EEC would be “to contribute thus in the Member States to the defence of human rights, fundamental freedoms and democracy”<sup>6</sup> The 1968 European Commission declaration on the completion of the customs union stated that their goal of developing a “Europe of the people” would be one concerned with “human problems”<sup>7</sup>. This declaration was swiftly followed by the 1970 Davignon report, asserting that “a united Europe should be based on a common heritage of respect, and the liberty and rights of man, and bring together democratic states with freely elected parliaments”<sup>8</sup>. Although these proposals had little practical legal effect, they did represent a commitment on behalf of the EEC to recognize human rights as one of their fundamental values.

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<sup>4</sup> Grainne de Burca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, *The American Journal of International Law*, Vol. 105, No. 4 (October 2011), 665

<sup>5</sup> European Commission proposal on EC accession to the ECHR, EC BULL. Supp. No. 2 1979.

<sup>6</sup> Draft Treaty—Fouchet Plan I, Art. 2 (Nov. 2, 1961)

<sup>7</sup> Declaration by the Commission on the Occasion of the Achievement of the Customs Union on 1 July 1968, EC BULL. No. 7, 1968, at 5, 5– 6

<sup>8</sup> Report by the Foreign Ministers of the Member States on the Problems of Political Unification, EC BULL., No. 11, 1970, at 9, 10.

While the EEC had begun the progressive recognition of human rights; the Court of Justice proved to be something of an Achilles heel to this progression. In early cases brought before the ECJ, human rights issues were often held at arms length. In the *Sgarlata*<sup>9</sup> case the ECJ rejected claims that (a) Domestically protected fundamental rights constrained community powers and; (b) General principles of EU law include human rights principles that guide and shape the interpretation of the EEC Treaty. The ECJ reiterated this stance in subsequent case law concerning the protection of domestic economic and liberty rights from the regulatory powers of the community<sup>10</sup>.

The 'triptych' of German cases<sup>11</sup> instigated progression towards a more holistic relationship between the ECJ and human rights. These cases questioned the regulatory powers of community law in relation to its supremacy over domestically protected constitutional rights. In these cases the ECJ agreed to define a new place for human rights within the Community's legal order. Respect for fundamental rights, originating from the common constitutional traditions of the member states, was to be recognized as a principle of Community law. The catalyst behind this move by the ECJ may not have been the desire to develop the court as a human rights actor but rather as a safety measure to maintain supremacy and autonomy. By acceding to general human rights principles of the member states, the court avoided the potential for claims that community law ought to be subordinate to national constitutional rights.

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<sup>9</sup> Case 40/64, *Sgarlata v. Commission*, 1965 ECR 215

<sup>10</sup> Case 1/58, *Stork v. High Authority*, 1959 ECR 17, Case 40/59, *Geitling v. High Authority*, 1960 ECR 423

<sup>11</sup> Case 29/69, *Stauder v. City of Ulm*, 1969 ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr*, 1970 ECR 1125; Case 4/73, *Nold v. Commission*, 1974 ECR 491.

In 1992 formal treaty recognition was given to human rights with the passing of the Treaty on European Union (TEU) in Maastricht. Declaring that the European Union was “determined to work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Social Charter, notably freedom, equality and social justice”<sup>12</sup>. However, this human rights initiative was not followed by the ECJ who, in 1996, decided that the EU could not accede to the ECHR due to a lack of competence<sup>13</sup>.

When the EU Charter of Fundamental Rights was drafted in 2000,<sup>14</sup> the overall opinion that the EU should recognise legally binding human rights standards gained political momentum. The Warsaw declaration of 2005, adopted by 46 states, called for an “early accession of the EU to the ECHR”<sup>15</sup>. Following this, the 2009 Lisbon treaty marked the maturation of human rights within the EU’s legal framework. The treaty gave the EU Charter binding status<sup>16</sup> and introduced an obligation for the EU to accede to the ECHR<sup>17</sup>. Although accession to the ECHR is now a legal obligation it has taken years, and is likely to take several more, of political effort and legal deliberation between the EU institutions, ECJ, member states, and the Council of Europe, before accession is finally implemented.

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<sup>12</sup> Single European Act of 1986, Feb. 17 & 28, 1986, 1987 O.J. (L 169) 1

<sup>13</sup> Opinion 2/94 *Accession to the ECHR* [1996] ECR - 1759

<sup>14</sup> Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1

<sup>15</sup> Third Summit of heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005). *Action Plan and Appendix I, Guidelines on the relations between the council of Europe and the European Union*.

<sup>16</sup> Article 6(1) TEU

<sup>17</sup> Article 6(2) TEU

## **The aims of accession to the ECHR**

The European Commission and Parliament outlined the principle aims of accession for the EU in their memo and draft reports on Accession to the ECHR<sup>18</sup>. The main aims proposed are as follows:

1. Accession to the ECHR will bring to completion the European Human Rights Regime – In this sense, accession has both practical and symbolic value; it provides EU citizens with a broader scope of legal remedies and, reinforces the EU's international credibility as a protector of human rights.
2. The EU and its institutions will be given member status on the same footing as other acceding states; therefore submitting itself equally to the jurisdiction of the ECtHR. This will provide EU member states with uniform protection against the EU, as against other participating member states. – At the moment European citizens cannot access the ECtHR directly with claims that the EU has violated their Convention Rights<sup>19</sup>.
3. The ECtHR will act as an independent external monitor, ensuring fundamental rights protection within the EU, providing external protection from treaty enactments that breach of convention rights –

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<sup>18</sup> European Commission MEMO/10/84, European Parliament Draft Report 2009/2241 (INI) 4

<sup>19</sup> Marie-Louise Bemelmans-Videc, *'The accession of the European Union/European Community to the European Convention on Human Rights'*, Committee on Legal Affairs and Human Rights report, Doc. 11533, (18 March 2008) 5

The ECtHR is not however recognised as a superior court to the ECJ<sup>20</sup>.

4. Accession will allow for the harmonious development of case law between the ECJ and ECtHR in relation to human rights protection. – There are currently no controls in place to ensure coherent European legal protection by the ECJ and ECtHR.

Various opinions have been put forward by prominent analysts in response to these aims of accession:

Peter Van Dijk (former judge of the ECtHR) argues that the importance of accession has been reduced by the way in which the ECJ has developed its case law, often adopting the ECtHR's measures and standards in their rulings. Van Dijk also notes that although the ECJ may apply these measures, there is no guarantee that the EU Institutions will also adhere to these standards in the same way they are interpreted and applied by the ECtHR<sup>21</sup>. Following accession, the ECtHR will have direct jurisdiction over the Institutions, allowing for the uniform application of the ECHR by all bodies of the EU

Francis G Jacobs (former Advocate General of the ECJ) states that accession, while of symbolic value, will have little effect in regard to the improvement of human rights standards. Jacobs stresses that the EU already recognizes the ECHR as a human rights standard within Europe, with both the ECJ and ECtHR and following one another's case law<sup>22</sup>. If the ECJ is to

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<sup>20</sup> *ibid.* 5

<sup>21</sup> *Ibid* p 10

<sup>22</sup> *Ibid* p 24

maintain its arm length of appreciation towards the ECHR – recognizing, but refusing to be bound by its provisions – then accession is not likely to improve or change interactions between the courts in this regard.

Florence Benoît – Rohmer (Professor at the Robert Schumann University) argues in favour of accession. She holds that need for judicial protection for individuals from acts of the EU, as well as legal certainty regarding the status of the ECHR in EU Law are the main reasons that accession is necessary<sup>23</sup>. Currently, in the pre-accession EU it is not possible for an individual to file an application in the ECtHR against the EU, only the associated member states.

Although it would appear that all parties argue in favour of (or at least do not object to) accession, there is certainly a disparity in regard to its perceived effectiveness. This is potentially due to the ECJ's trend of putting fundamental rights under the scrutiny of community law<sup>24</sup>, rather than the ECtHR having the authority to do the opposite. The two courts have undoubtedly moved closer to mutually respectful application of human rights through case law; it is however unlikely that accession to the ECHR will converge the two courts, given the interest of the ECJ to maintain its autonomy.

### **The Court of Justice and its relationship with ECtHR**

The changed relationship between the ECJ and ECtHR may potentially result in the most important 'leap' for human rights that will come about after accession. It is therefore essential to understand how their relationship has

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<sup>23</sup> Ibid p 25

<sup>24</sup> 46/87 Hoechst AG v Commission of the European Communities, ECR, 1989, 2859

developed and how it might change following accession.

### *Equivalent Protection*

Although the ECJ has progressively given more recognition to the ECtHR's judgments<sup>25</sup>, the ECtHR has always been in a subordinate position to the ECJ<sup>26</sup>. While the ECJ may, at their discretion, make reference and give effect to the rulings of the ECtHR, the ECtHR are not in a position (pre-accession) to do likewise. The ECJ has historically maintained its autonomy with regard to the interpretation of fundamental human rights. This reservation of the right to interpretation must be viewed with regard ECJ's efforts to protect to the overall objectives of the EU

Not having jurisdiction over the EU Institutions, the ECtHR was forced to create a form of indirect jurisdiction when taking the actions of the Institutions into account. The initial approach taken by the ECtHR was handed down in the case of *X v. Federal Republic of Germany*, where it was held that:

“If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty”.<sup>27</sup>

This formula was clearly an attempt at developing a mechanism whereby the ECtHR could hold EU member states responsible for the EU's breaches of the

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<sup>25</sup> The ECJ made specific reference to judgments of the ECtHR in: C – 386/95 Vereinigte Familiapress Zeitungsverlags – und vertriebs GmbH v Heinrich Bauer Verlag, ECR 1997, 3689

<sup>26</sup> “International treaties for the protection of human rights... supply guidelines which should be followed within the framework of community law” 44/79 Liselotte Hauer v Land Rheinland – Pfalz, ECR 1979, 3727

<sup>27</sup> *X v Federal Republic of Germany*, ECHR, No. 235/56, Dec. 10.6.1958, Yearbook 2, 256 (300).

ECHR, given that the EU was not party to the Convention. As Christina Eckes notes “Member States retain responsibility for their acts, including those adopted within the context of EU law, but acts adopted by the EU institutions proper fall outside of the *ratione personae* of the Convention”<sup>28</sup> The ECtHR therefore applied the principle that member states maintain responsibility for their application of primary EU Law<sup>29</sup>.

This principle was somewhat reconsidered by the ECtHR in the case of *M & Co v Federal Republic of Germany*:

“The transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection. The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance.”<sup>30</sup>

This ruling established what has now come to be known as the doctrine of equivalent protection. Undoubtedly influenced by the ECJ’s progressive application of Convention rights; *M. & Co.* emphasizes the ECtHR’s recognition that EU member states’ obligations under the ECHR will not be breached if these states transfer powers to the EU, given that equivalent protections to human rights are guaranteed by the ECJ as would be available under the ECHR system. This might appear at first instance to have been a bizarre move by the ECtHR as it essentially immunizes the EU from its

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<sup>28</sup> Christina Eckes, ‘*EU Accession to the ECHR: Between Autonomy and Adaptation*’, *The Modern Law Review* (2013) 8

<sup>29</sup> *Matthews v the United Kingdom* ECHR [1999] App No 24833/94.

<sup>30</sup> *M. & Co. v. Federal Republic of Germany*, European Commission of Human Rights, Decision on Admissibility, No. 13258/87, Dec. 9 February 1990.

control. However, as Paul De Hert notes “*M. & Co. opened the way for a mutual understanding between the Strasbourg Court and the EU human rights regime*”<sup>31</sup>. By recognizing the equivalent protection given by EU Law, the Strasbourg Court avoided a potential clash with the ECJ over its autonomy on EU Law, and opened the door for a harmonious and cooperative development of human rights law.

### *The Bosphorus Doctrine*

The closest the two courts have come to a confrontation was in the case of *Bosphorus*<sup>32</sup> - A case that was reviewed by both the ECJ and ECtHR. This case related to sanctions placed on the Republic of Yugoslavia in response to their actions in Bosnia-Herzegovina, which resulted in the seizure of aircraft from an innocent third party (Bosphorus). In the case brought against Ireland’s seizure of the aircraft on behalf of the EU; the ECJ ruled that the breaches of fundamental rights incurred were “justified by the objectives of general interest pursued by the Community”<sup>33</sup> Bosphorus therefore brought the matter before the ECtHR, who reinforced their application of the equivalent protection doctrine, concluding that “the impugned interference was not the result of an exercise of discretion by the Irish authorities... but rather amounted to compliance by the Irish State with legal obligations flowing from EC Law”. This ruling creates a broad spectrum of immunity for member states when implementing EU law, provided that they ‘do no more than implement legal

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<sup>31</sup> Paul De Hert and Fisnik Korenica, “*The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights*”, 13 German Law Journal (2012) 880

<sup>32</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* App No 45036/98

<sup>33</sup> C – 84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, 1996, 3953, para 2

obligations flowing from its membership in the organization'.<sup>34</sup> By forgoing any critical analysis of EU Law the Strasbourg court not only subordinates itself to EU Law, but also to an increasing degree, a major segment of member state laws – As was raised by the claimant in *Bosphorus*:

“The percentage of domestic law sourced in the European Community is significant and growing and the matters now covered by Community law are increasingly broad and sensitive: to accept that all State acts implementing a Community obligation fall outside its Convention responsibility would create an unacceptable lacuna of human rights protection in Europe”<sup>35</sup>.

The key concern is that having such a broad scope of immunity provided by equivalent protection; the line between domestic actions of a member state and actions implementing EU Law may become increasingly blurred. Fisnik Korenica notes, “With the steady increase of the member states’ law that is somehow – if not explicitly – aimed at implementing obligations arising from EU law, it becomes rather difficult to understand what remains outside the scope of the Doctrine at the member state level.”<sup>36</sup> The Commission also put forward the counter argument that if such an expansive exemption were not provided by the doctrine of equivalent effect; it would give member states the opportunity to challenge the direct effect and primacy of EU law, by way of

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<sup>34</sup> Luzius Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, Address by the President of the ECtHR (8 Sept. 2005).

<sup>35</sup> ECHR, *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98, 30 June 2005 (Judgement, Grand Chamber)117.

<sup>36</sup> Paul De Hert and Fisnik Korenica, “*The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights*”, 13 German Law Journal (2012) 884

first reviewing nationally the compliance of EU Law with the ECHR<sup>37</sup>.

The ECtHR did however provide for one exception to the doctrine of equivalent effect in their *Bosphorus* ruling; the doctrine may be rebutted if “in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.”<sup>38</sup> Although the Court did not elaborate on the circumstances where they might apply this doctrine of manifest deficiency, it is clearly an instrument of last resort. Although the court has never called upon the doctrine, its intention may be to have the last word on EU Human Rights Law where there has been an extensive breach on Convention rights by the EU.

*Will accession change the relationship between the two courts?*

The doctrine of equivalent protection, as defined by *Bosphorus*, continues to shape the relationship between the ECJ and ECtHR<sup>39</sup>. As a the central mechanisms that defines the development on human rights law in the EU; it is one of the most important factors that may result in a leap for human rights following accession.

Once the terms of accession have been agreed upon, the ECtHR will be empowered to take cases against the EU. It is unclear how willing the court will be to exercise their influence over the EU, considering the previously mentioned developments, and mutual respect both courts have for one another. It has been proposed that the ECtHR may only have the power to

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<sup>37</sup> *Bosphorus Hava Yollari Turizm v. Ireland*, App.No. 45036/98, 30 June 2005 (judgement, Grand Chamber), 124.

<sup>38</sup> *Ibid.* 156.

<sup>39</sup> The doctrine was reiterated in the case of: ECHR, *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011 (judgment, Grand chamber), at para. 338.

consider cases “against the European Union, if all remedies available within the legal order of the European Union have been exhausted, according to the generally recognized rules of international law.”<sup>40</sup> This reflects their pre-accession approach to the EU, to act, as suggested by their ‘manifest deficiency’ doctrine, as a court of last resort.

Although the draft accession agreement remains largely silent on the issue of the Bosphorus doctrine, it does focus on the related issue of the ECJ’s judicial autonomy.<sup>41</sup> The core concerns relating to the ECJ’s judicial autonomy, in the face of accession, emanate from two situations:

1. The ECtHR may determine who is the correct respondent in any given case
2. The ECtHR may attribute responsibility to and apportion such responsibility between the EU and its member states.<sup>42</sup>

In both these instances it is unlikely that the ECtHR would be in a position to simply disregard the division of power between the EU and its Member States – It would not be possible to come to an enforceable verdict without attributing the conduct complained of to one of the parties. The issue of whether an act is that of the EU or its member state is one that requires a complex and

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<sup>40</sup> Proposal by the Meijers Committee, *Admissibility of claims in the light of accession of the EU to the ECHR* (2011).

<sup>41</sup> X. Groussot, T. Lock and L. Pech, ‘*EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011*’ 218 *Foundation Robert Schuman*, Policy Paper European 201 [http://www.robert-schuman.eu/doc/questions\\_europe/qe-218-en.pdf](http://www.robert-schuman.eu/doc/questions_europe/qe-218-en.pdf) accessed 23 February 2015

<sup>42</sup> Christina Eckes, ‘*EU Accession to the ECHR: Between Autonomy and Adaptation*’, *The Modern Law Review* (2013) 265

dynamic analysis that goes to the core of EU Law. To assign such a task to the ECtHR would undoubtedly bring judicial autonomy the EU and ECJ into question. Furthermore, a finding by the ECtHR against the EU alone could result in an eruption of public resistance towards EU Law.

The draft accession agreement proposes a 'co-respondent mechanism', which is designed to avoid such problems. When implemented, it will "allow the EU to become a co-respondent to proceedings instituted against one or more of its Member States"<sup>43</sup> and vice versa. This allows the ECtHR to refrain from appointing a single correct respondent or apportioning responsibility between the Member State and EU. As stated: "Should the Court find a violation, it is expected that it would ordinarily do so jointly against the respondent and the co-respondent." The co-respondent mechanism will allow the ECtHR to determine how EU competences are exercised without also limiting them.

It is clear that these measures are the result of the EU and ECJ's concerns with autonomy and wishes to maintain their *primus inter partes* status with the ECtHR. Ultimately these reservations will decide the extent of protection guaranteed under the ECHR for the entire domain of EU Law. However, as Christina Eckes notes 'whatever the exact status that the Court of Justice will give rulings of the ECtHR after accession it is difficult to see in practice how the Court of Justice could in a 'Union of law' follow an argument or give a ruling that openly clashes with the protection of human rights given by the

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<sup>43</sup> Ramón Jáuregui Atondo Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, 2241, Committee on Constitutional Affairs 64

ECtHR' <sup>44</sup>. With the mechanism agreed and the concerns of autonomy settled, accession can only pave the way for further human rights recognition within the EU.

## **The Effects of Accession**

Although arguably one of the most important changes that will come from accession will be the previously discussed changes for the Union, ECJ and their relations with the ECtHR, accession will also have other far reaching implications.

### *Implications of accession for member states*

The way in which the jurisdiction of the ECtHR is received pre-accession varies dramatically from state to state:

In Germany the German Federal Constitutional Court (GFCC) held that the ECHR has the same status as ordinary laws<sup>45</sup>. This means that within the framework of German Law, the Convention ranks below the German Constitution. Therefore, while the ordinary courts must apply the Convention, it serves as little more than an interpretational aid to the GFCC when determining the spectrum of human rights protected under the Constitution. This approach is not unlike that taken by the ECJ, giving consideration to, but not being bound by the ECHR.

In the UK the ECHR has even less influence, as it is not itself part of UK

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<sup>44</sup> Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', The Modern Law Review (2013) 281

<sup>45</sup> GFCC, Decision of 14 October 2004, 2 BvR 1481/04 – (Görgülü; ECHR decision).

domestic law. The decisions of the ECtHR are therefore not legally binding under UK Law. The case of *Horncastle*<sup>46</sup> illustrates the current relationship between the UK Supreme Court and the ECtHR. When considering a claim that the applicant's right under article 6 ECHR to a fair trial had been infringed the Supreme Court stated that they are "open to decline to follow the Strasbourg decision".<sup>47</sup> The UK therefore adopts an approach similar to both the ECJ and GFCC.

In Ireland, as a dualist state, the Convention itself is not binding in domestic law. The European Convention on Human Rights Act 2003 transposes the act into domestic law. However, in doing so, the power to interpret the ECHR is vested in the Irish Courts, neither the ECtHR's jurisdiction, nor its jurisprudence is binding upon the courts<sup>48</sup>. As a Fundamental right standard, the Constitution also affords a much greater level of protection than the domestic incorporation of the ECHR.

Accession to the ECHR will strengthen the Convention's powers in these countries. The ECHR will be vested with a previously unrecognized supremacy when the court of justice applies it in case law. The ECtHR's jurisdiction will also be given vicarious effect in these countries when applying the convention through its rulings on EU Law. This certainly has the potential to result in a "leap for human rights protection" in the UK, Ireland, and Germany.

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<sup>46</sup> *R v Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)* [2009] UKSC 14.

<sup>47</sup> *ibid* 11

<sup>48</sup> Fiona De Londres, 'Using the ECHR in Irish Courts: More Whisper Than Bang' (2011) 9, <https://www.ucd.ie/t4cms/pilaechrseminar130511fde londras.pdf>, accessed 24 February 2015

However, In the Netherlands – a country of monist tradition – international treaties may be relied upon, even in cases where they may not be compatible with the national constitution.<sup>49</sup> Therefore in a pre-accession Netherlands the “ECtHR *de facto* functions as the highest human rights court of the land”.<sup>50</sup>

Contrary to the previously mentioned states, accession for the Netherlands may in fact reduce the rights of the applicant. In cases where previously actions that could be brought before the Dutch Courts, the ECtHR may find that the EU is the correct respondent. If post-accession, the EU then continue to hold the ECHR and ECtHR at arms length, this will undoubtedly have a negative impact on individuals rights within the Netherlands. This would not result in the desired leap for human rights for the Dutch, as envisaged by accession.

#### *Implications of accession for Common Foreign and Security Policy*

Common Foreign and Security Policy (CFSP) is an area over which the ECJ has only very limited jurisdiction. The Court of Justice is not vested with the power to give preliminary rulings regarding the interpretation of CFSP and may only review the legality of CFSP measures under the specific measures of Article 215(2) TFEU<sup>51</sup> and Article 40 TEU.<sup>52</sup>

This limit on the jurisdiction exercised by the ECJ could potentially cause problems if a case relating to CFSP measures is brought before the ECtHR post accession. A prospect that is not wholly unlikely – EU is carrying out

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<sup>49</sup> Article 94 *De Grondwet*, Article 94

<sup>50</sup> Christina Eckes, ‘*EU Accession to the ECHR: Between Autonomy and Adaptation*’, *The Modern Law Review* (2013) 277

<sup>51</sup> Article 215(2) TFEU

<sup>52</sup> Article 40 TEU

multiple peacekeeping missions under the CFSP that have the potential to lead to complaints before the ECtHR<sup>53</sup>. This is ostensibly confirmed by the ECtHR's previously taken cases on peacekeeping missions<sup>54</sup> (which did not involve the EU). Furthermore, CFSP decisions relating to the application of restrictive measures such as the freezing and confiscation of assets, as occurred in *Bosphorus*, could give rise to claims of a breach against the ECHR which the ECJ would not be empowered to receive, allowing the ECtHR to have sole jurisdiction over matter relating to human rights in the CFSP of the EU. Although controversially bypassing the internal jurisdiction of the EU, holding the CFSP of the EU accountable to an external monitor should, in theory, only improve the human rights standards of such policies.

### **Conclusion: Is accession one giant leap for human rights recognition?**

Will accession to the ECHR result in a substantial progression of human rights protection within the EU? Academic analysts provide a very mixed response to this issue. Sionaidh Douglas-Scott draws a somewhat bleak conclusion that accession will add to 'complexity rather than produce human rights protection itself'<sup>55</sup>. Accession will indeed bring a new layer of complexity but it cannot be argued that such complexity diminishes the potential for human rights development brought by the ECtHR's external control. Despite the added complexity, accession to the ECHR will improve human rights protection for

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<sup>53</sup> Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', *The Modern Law Review* (2013) 283

<sup>54</sup> *Behrami & Behrami v France* ECHR [2007] Appl No 71412/01; *Saramati v France, Germany and Norway* (GC) ECHR [2007] Appl No 78166/01 at [145].

<sup>55</sup> S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 645, 682.

individuals. One area where accession might be a considerable 'leap' for human rights protection is CFSP; accession could give individuals access to a previously nonexistent standard of justice, since previously unaccountable CFSP acts of the EU will fall within the jurisdiction of the ECtHR post-accession.

Accession will bring to an end the ECJ's totally autonomous 'arm length of appreciation' of the ECtHR. The Luxembourg court will be forced to take a resolve their hierarchical status on interpretation of the ECHR within the EU framework. Furthermore, accession will advance the Union's recognition as an international human rights actor. International Law has never before been acceded to by a supranational organization with a level of legal integration as developed as the EU; nor has such an organization ever subjected itself to a judicial monitoring mechanism so sophisticated as that of the ECtHR.

In Conclusion, this essay demonstrates that EU accession is, in fact, a giant leap for human rights protection and recognition. Accession is the culmination of over thirty years of political and diplomatic efforts to produce an instrument capable of resolving the human rights issues created by the EU's autonomous legal system. This event will undoubtedly be marked as a historic triumph in the EU's development. The true test of the EU's maturity as a human rights actor will come post-accession when the Strasbourg Court and the Luxembourg Court enter into a formal judicial discourse.

## Bibliography

- Grainne de Burca, '*The Road Not Taken: The European Union as a Global Human Rights Actor*', *The American Journal of International Law*, Vol. 105, No. 4 (October 2011)
- Marie-Louise Bemelmans-Videc, '*The accession of the European Union/European Community to the European Convention on Human Rights*', Committee on Legal Affairs and Human Rights report, Doc. 11533, (18 March 2008)

- Paul De Hert and Fisnik Korenica, "*The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights*", 13 German Law Journal (2012)
- Christina Eckes, '*EU Accession to the ECHR: Between Autonomy and Adaptation*', The Modern Law Review (2013)
- Luzius Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, Address by the President of the ECtHR (8 Sept. 2005).
- X. Groussot, T. Lock and L. Pech, '*EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011*' 218 Foundation Robert Schuman, Policy Paper European [http://www.robert-schuman.eu/doc/questions\\_europe/qe-218-en.pdf](http://www.robert-schuman.eu/doc/questions_europe/qe-218-en.pdf) accessed 23 February 2015
- Fiona De Londres, '*Using the ECHR in Irish Courts: More Whisper Than Bang*' (2011) 9, <https://www.ucd.ie/t4cms/pilaechrseminar130511fdelondras.pdf>, accessed 24 February 2015
- S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review*
- Third Summit of heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005). *Action Plan and Appendix 1, Guidelines on the relations between the council of Europe and the European Union*.
- Proposal by the Meijers Committee, *Admissibility of claims in the light of accession of the EU to the ECHR* (2011).

- Opinion 2/94 *Accession to the ECHR* [1996] ECR - 1759
- Declaration by the Commission on the Occasion of the Achievement of the Customs Union on 1 July 1968, EC BULL No. 7, 1968, at 5, 5– 6
- Report by the Foreign Ministers of the Member States on the Problems of Political Unification, EC BULL., No. 11, 1970, at 9, 10.

## List of Cases

Case 40/64, *Sgarlata v. Commission*, 1965 ECR 215

Case 1/58, *Stork v. High Authority*, 1959 ECR 17

Case 40/59, *Geitling v. High Authority*, 1960 ECR 423

Case 29/69, *Stauder v. City of Ulm*, 1969 ECR 419

Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr*, 1970 ECR 1125

Case 4/73, *Nold v. Commission*, 1974 ECR 491.

46/87 *Hoechst AG v Commission of the European Communities*, ECR, 1989, 2859

44/79 *Liselotte Hauer v Land Rheinland – Pfalz*, ECR 1979, 3727

C – 386/95 *Vereinigte Familiapress Zeitungsverlags – und vertriebs GmbH v Heinrich Bauer Verlag*, ECR 1997, 3689

*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* App No 45036/98

C – 84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, 1996, 3953, para 2

ECHR, *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98, 30 June 2005 (Judgement, Grand Chamber)117.

*X v Federal Republic of Germany*, ECHR, No. 235/56, Dec. 10.6.1958, Yearbook 2, 256 (300).

*Matthews v the United Kingdom* ECHR [1999] App No 24833/94.

*M. & Co. v. Federal Republic of Germany*, European Commission of Human Rights, Decision on Admissibility, No. 13258/87, Dec. 9 February 1990.

*M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011 (judgment, Grand chamber)

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

*Behrami & Behrami v France* ECHR [2007] Appl No 71412/01

*Saramati v France, Germany and Norway* (GC) ECHR [2007] Appl No 78166/01

## List of Legislation

Single European Act of 1986, Feb. 17 & 28, 1986, 1987 O.J. (L 169) 1

Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1

Article 6(2) TEU

Resolution of the Ministers of Foreign Affairs of the ECSC in Messina, CM3/NEGO/006 (June 1–3, 1955)

Draft Treaty—Fouchet Plan I, Art. 2 (Nov. 2, 1961)

Declaration by the Commission on the Occasion of the Achievement of the Customs Union on 1 July

1968, EC BULL No. 7, 1968, at 5, 5– 6

Article 6(1) TEU

Article 6(2) TEU

Article 215(2) TFEU

Article 40 TEU