

Strasbourg's External Review after the EU's Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?

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Abstract

The contribution at hand highlights a special aspect of the European Union's (EU) accession to the European Convention on Human Rights (ECHR), namely the question whether the EU's legal autonomy, which is vigilantly guarded by the Court of Justice of the EU (ECJ), might be endangered after subjecting the EU to the jurisdiction of the European Court of Human Rights (ECtHR). At the outset, this article clarifies what the term "legal autonomy" means and how the EU's legal autonomy may be jeopardised by the ECtHR's external review after accession. After that, this article examines in general whether the interpretation of EU law by the ECtHR would infringe the autonomy of EU law and the ECJ's exclusive jurisdiction, especially given the ECJ's findings in Opinion 1/91. Secondly, it explores whether judgments by the ECtHR, holding that EU law violates the Convention, would be compatible with the EU's legal autonomy, and whether there are considerable differences regarding primary and secondary law.

Keywords

European Union; European Convention on Human Rights; accession; legal autonomy; external review; primary law; secondary law; subsidiarity principle

1. Introduction

After more than thirty years of negotiations, a draft agreement between the Council of Europe and the European Union (EU) on the EU's accession to the European Convention of Human Rights (ECHR) was successfully concluded in October 2011. Since Protocol No. 14 to the Convention and Article 6 paragraph 2 of the Treaty on European Union (TEU) - although necessary to create the legal basis for accession - were not sufficient to allow for the

EU's immediate accession,¹ it was thence indispensable to draft an agreement which would allow the EU to accede to the Convention as a contracting party, with equal rights and responsibilities as the other parties, within the next couple of years. Consequently, the EU would become subject to Strasbourg's external judicial supervision, as individuals would be entitled to bring direct actions, alleging that their fundamental rights have been violated by legal acts rooted in EU law.

This contribution examines which EU acts may be challenged before the Strasbourg Court. The primary purpose and objective of the European Union's accession to the Convention is to subject the Union and its institutions to external judicial review by the European Court of Human Rights (ECtHR). The most desirable consequence of this step is to close the existing lacunae in the European system of human rights protection and thus to remedy the ECtHR's lack of jurisdiction *ratione personae* over the EU.² One might certainly argue that there is no further need for accession: first, the EU is already *indirectly* bound by the Convention, on the one hand through the ECJ's extensive case-law on human rights as 'general principles' of EU law,³ deduced, inter alia, from the Convention,⁴ and on the other hand by Article 6 paragraph 3 TEU, which generally mirrors Luxembourg's jurisprudence and explicitly refers to the ECHR, as the source of these general principles. Beyond that, after the entry into force of the Lisbon Treaty, accession seems to be obsolete, since fundamental rights within the EU are also protected by the provisions enshrined in the EU's own Charter of Fundamental Rights.

Nevertheless, accession remains necessary, as the EU cannot be currently held responsible for violations of the Convention in Strasbourg. Only after accession, the EU will be *directly* bound by the provisions enshrined in the Convention and individuals will accordingly be entitled to file applications

¹ See Council of Europe, Steering Committee for Human Rights, 'Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights' CDDH(2011)009 (14 October 2011) 15, para 3.

² See in this respect: *Confédération Française Démocratique du Travail (CFDT) v The European Communities, alternatively: their Member States a) jointly and b) severally* App no 8030/77 (Commission Decision, 10 July 1978), para 3; *Matthews v United Kingdom* App no 24833/94 (ECtHR, 18 February 1999), para 32; *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005), paras 149ff.

³ See *Internationale Handelsgesellschaft* (Case 11/70) [1970] ECR 1125.

⁴ See eg *Rutili* (Case 36/75) [1975] ECR 1219.

for infringements of the Convention against the EU, and not against another Member State for implementing or transposing Union law. Such infringements of the Convention by EU law can be found in virtually every legal act of the Union: in primary law such as the Treaties themselves; in all legal acts of secondary law under Article 288 TFEU; in executive actions or omissions and in decisions of the Union courts.⁵

Over the years, however, many objections have been raised against accession and its possible legal consequences, most notably the risks for the autonomy of the EU's specific legal system and the incompatibility of the subordination of the ECJ to the European Court of Human Rights and the implied external judicial control of the EU. Consequently, an additional provision was included in Article 6 paragraph 2 TEU, which succinctly states that '[s]uch accession shall not affect the Union's competences as defined in the Treaties.' But beyond that, it does not mention the EU's specific quality as an autonomous legal order,⁶ or how this characteristically legal trait will be upheld in the future. The only other reference to accession in the Treaties is found in Article 1 of Protocol No. 8, in which the drafters of the Lisbon Treaty readdress this topic and state that the agreement on accession 'shall make provision for preserving the specific characteristics of the Union and Union law. However, it is still doubtful whether the drafters' intention to preserve the Union's legal autonomy, particularly by constantly reiterating that the EU's powers and competences shall not be affected by the accession, will eventually be complied with in the legal reality of international courts and divided competences between the Union and its member states.

To allay scepticism regarding the legal ramifications of accession, several documents of the past have repeatedly assured us that, firstly, the ECtHR 'could not be regarded as a superior Court but rather as a specialised Court exercising external control over the international law obligations of the Union resulting from the accession to the ECHR';⁷ secondly, that 'accession

⁵ Tobias Lock, 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1025, 1034.

⁶ *Costa v ENEL* (Case 6/64) [1964] ECR 585.

⁷ European Convention, 'Final Report of Working Group II' CONV 354/02, WG II 16 (22 October 2002) 12; see also European Parliament, 'Resolution on the Institutional Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms' 2009/2241(INI) (19 May 2010) P7_TA-PROV(2010)0184, para 1 and Hans Christian Krüger, 'Reflections Concerning Accession of the European Communities to the European Convention on Human Rights' (2002) 21 *Penn State International Law Review* 89, 97.

shall not affect the Union's competences as defined in the Treaties⁸ and thirdly, the accession agreement 'shall make provision for preserving the specific characteristics of the Union and Union law'.⁹ By and large, this means that neither the procedures before, nor the judgments of the Strasbourg Court, may in any way encroach upon the autonomy of the EU's legal order. Thence, the question remains whether applications directly addressed against the Union and the subsequent judgments of the Strasbourg Court, by which the Union as a contracting party has to abide under Article 46 ECHR¹⁰ and its obligations under international law,¹¹ may violate the Union's legal autonomy. Such a violation is most likely to happen in the subsequent two scenarios. The first, more general issue to be examined is whether Strasbourg's external review and interpretation of Union law, particularly in the light of Opinion 1/91, will encroach upon the ECJ's exclusive jurisdiction over EU law under Article 19 paragraph 1 TEU and therewith upon the EU's legal autonomy. The second issue is whether concrete judgments by the ECtHR, holding that Union legislation infringes the Convention, will be compatible with the EU's legal autonomy¹² and whether there are substantive differences with regard to primary and secondary law, which would allow for the potential exclusion of any part of EU law from Strasbourg's jurisdiction.

2. The Autonomy of European Union Law

At the outset, this contribution will clarify what the somewhat abstract term 'legal autonomy' means in the context of the EU's accession to the Convention. A useful definition of this term can be found in Opinion 1/91, where the ECJ held that the conferral of the jurisdiction to rule on the division of competences between the EU and the Member States to an international court is incompatible with Union law, 'since it is likely adversely to

⁸ See Article 6, para 2 TEU.

⁹ Article 1 of Protocol 8 relating to Article 6, paragraph 2 of the Treaty on European Union on the accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (2010 OJ C 83/273).

¹⁰ See Jens Meyer-Ladewig, *Europäische Menschenrechtskonvention: Handkommentar* (3rd edn, Nomos 2011) Einleitung paras 32-34, Article 46 para 2; see also David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 862ff.

¹¹ Wolf Okresek, 'Die Umsetzung der EGMR-Urteile und ihre Überwachung' (2003) 30 EuGRZ 168.

¹² Lock (n 5) 1034.

affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164¹³ of the EEC Treaty'.¹⁴ It is therefore clear that the Luxembourg Court alone claims exclusive jurisdiction to interpret and apply EU law, not only in relation to the division of competences between the EU and the Member States, but also in general terms and in every field of Union law. Any other court interpreting EU law can thus be seen as a threat to Luxembourg's interpretative monopoly. The ECJ reconfirmed this point of view in the more recent *Kadi* case. In reference to the Charter of the United Nations, it stated that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system'.¹⁵ This means that an agreement between the Union and another international organization must not affect the EU's division of competences or allocation of powers in a twofold meaning: first, it is impermissible to interfere with the *internal* division of competences between the Union and its member states. Secondly, and more importantly in the context of this contribution, it is widely considered unacceptable¹⁶ that an international court should be enabled to encroach upon the ECJ's innermost right to observe the law in the proper interpretation and application of the Treaties, and thus, to affect the *external* allocation of powers to another international organisation, for example, by enabling another international court to interpret and apply EU law in lieu of the Luxemburg Court. The same argument applies to the Union's accession to the Convention as well.

Of course, the ECtHR will and must exercise its jurisdiction over the EU's organs to protect citizens from human rights violations by EU law. Otherwise, the coherence of human rights protection in Europe will not be fully assured and the accession would be of no avail at all. But any integration of the EU into the Convention's system of human rights protection must provide for the upholding of the EU's autonomous legal system and the special status of the ECJ, which is, according to Article 19 paragraph 1

¹³ Now Article 19, para 1 TEU.

¹⁴ Opinion 1/91 *EEA I* [1991] ECR I-6079, para 35.

¹⁵ *P Kadi and Al Barakaat* (Joined Cases C-402/05 P and C-415/05) [2008] ECR I-6351, para 282.

¹⁶ See for example, the explanatory contributions by several scholars and judges in the Council of Europe, Parliamentary Assembly, 'The Accession of the European Union/ European Community to the European Convention on Human Rights' (Doc 11533) Committee on Legal Affairs and Human Rights (18 March 2008) 10, 28, 35ff.

TEU, the ultimate authority on the interpretation of all EU law, and moreover, under Article 344 TFEU, the sole authority to settle disputes between member states or a member state and the EU's institutions concerning the interpretation or application of the Treaties. The most pressing question in this perspective is how this strong position of the ECJ can be reconciled with the EU's accession to the Convention and the ECtHR's external review of European Union law?

3. The EU's Legal Autonomy versus External Review

3.1. *Assessing Domestic Law under the Convention*

When the ECtHR is called upon to decide on an alleged violation of the Convention, it must, according to Article 1 ECHR, primarily interpret and apply the Convention, being the basic document of Strasbourg's system of human rights protection and therefore of its jurisdiction *ratione materiae*.¹⁷ The Strasbourg Court interprets the provisions of the Convention according to the international rules on the interpretation of treaties, embedded in the Vienna Convention on the Law of Treaties.¹⁸ In addition, the ECtHR must also consider pertinent domestic law in its judgments, in order to ascertain whether there has in fact been a violation of the Convention. Of course, after accession, the term 'domestic law' will also comprise of Union law. *Prima facie*, according to Opinion 1/91, an international court interpreting EU law thus seems like a serious peril to the EU's legal autonomy. In order to substantiate the objective of accession, however, one can argue at this point that it is common practice for an international court or tribunal to take into account national law provisions when dealing with issues of international law.¹⁹ The ECtHR, for instance, regards, like any other international court,²⁰ the domestic law of the parties involved as part of the facts.²¹ The Strasbourg Court confirmed this *modus operandi* in a couple of its

¹⁷ See Harris (n 10) 800ff; see also Chittharanjan F Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International 2003) 755ff.

¹⁸ *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), para 29.

¹⁹ Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 36; see also Helmut Strebler, 'Erzwingener, verkappter Monismus des Ständigen Internationalen Gerichtshofs?' (1971) 31 *ZaöRV* 855.

²⁰ *Certain German Interests in Polish Upper Silesia* Series A No. 6 (PCIJ, 25 August 1925) 19; see also Gernot Biehler, *Procedures in International Law* (Springer 2008) 312.

²¹ Lock (n 5) 1034.

judgments, especially by ruling that ‘it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (...). It is therefore not for the Court to express an opinion contrary to theirs (...).’²²

Furthermore, Strasbourg also made clear that it does not constitute a further court of appeal, namely a ‘fourth instance’ (*‘quatrième instance’*), from the decisions of national courts applying and interpreting national law,²³ holding that ‘it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.’²⁴

This means that an application merely claiming that a domestic court has made an error of fact or law in its decision, cannot be dealt with by the Strasbourg Court, ‘as it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts (...),’²⁵ and the application will accordingly be declared inadmissible *ratione materiae*. Moreover, in cases where an application alleges that domestic law is in violation of the Convention, the Strasbourg Court will in no way call into question the competence of the national courts and take their place in the interpretation of domestic law.²⁶

However, sometimes there are situations in which the ECtHR must pronounce a judgment on the provisions of domestic law and consequently on EU law after accession as well. This *modus operandi* will most undoubtedly call Luxembourg into action, which will confirm its exclusive jurisdiction in interpreting EU law.

Yet, although it is not Strasbourg’s task ‘to review the observance of domestic law by the national authorities,’²⁷ it is still not entirely barred from taking up a stance towards national law and its provisions. One of the ECtHR’s duties is, for example, to take into consideration the specific interpretation of domestic law by a national Supreme Court and the pronouncements thereof by the respective national government in Strasbourg.²⁸ Beyond that, even if assessing the facts is a quite delicate matter, the ECtHR can in no way accept the national law of the respondent party as simple

²² *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990), para 28.

²³ Harris (n 10) 14.

²⁴ *García Ruiz v Spain* App no 30544/96 (ECtHR, 21 January 1999), para 28.

²⁵ *Reiss v Austria* App no 23953/94 (Commission Decision, 6 September 1995).

²⁶ *X and Y v The Netherlands* App no 8978/80 (ECtHR, 26 March 1985), para 29.

²⁷ *Winterwerp v The Netherlands* App no 6301/73 (ECtHR, 24 October 1979), para 46.

²⁸ *Pine Valley Developments Ltd and Others v Ireland* App no 12742/87 (ECtHR, 29 November 1991), para 52.

facts at any rate.²⁹ There are undoubtedly situations in which the court's assessment of an alleged violation of the Convention necessarily forces it to interpret provisions of domestic law.³⁰

For instance, in cases where the right to liberty and security of the person under Article 5 ECHR has allegedly been violated, the Strasbourg Court maintains a supervisory role, since compliance with the domestic law is inextricably related to legal justification for detention.³¹ Therefore, as such a supervisory body, the ECtHR retains a certain power of review to interpret and apply domestic law when the Convention refers directly back to national law, 'for, in such matters, disregard of the domestic law entails breach of the Convention (...)'.³² This assumption raises the question if such interpretation of domestic law by Strasbourg might meddle into the affairs of Luxembourg and thence, into its exclusive jurisdiction in interpreting and applying EU law.

The same argument applies to the question of whether a national remedy is *effective* as set forth in Article 13 ECHR. Cases filed under this provision usually compel the court to scrutinise national laws, in order to find out whether the applicant was provided with an effective remedy³³ at the domestic level, in the sense that this remedy, if reverted to, 'could have prevented the alleged violation occurring or continuing or could have afforded the applicant appropriate redress for any violation that had already occurred.'³⁴ But even though the best legal technique for a contracting party to shield itself from infringing Article 13 ECHR in a case is to incorporate the Convention into national law, there is no requirement to do so;³⁵ they are rather 'afforded a margin of appreciation in conforming to their obligations under this provision.'³⁶ This means that the contracting parties determine

²⁹ See Olivier De Schutter, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation' European Parliament, Committee on Constitutional Affairs, Hearing on the Institutional Aspects of the European Union's Accession to the European Convention on Human Rights (18 March 2010) 11.

³⁰ Lock (n 5) 1035.

³¹ Harris (n 10) 134; see also Meyer-Ladewig (n 10) Article 5, para 12.

³² *Winterwerp* (n 27), para 46.

³³ *Martins Castro and Alves Correia de Castro v Portugal* App no 33729/06 (ECtHR, 10 June 2008) para 56.

³⁴ *Ramirez Sanchez v France* App no 59450/00 (ECtHR, 4 July 2006), para 160.

³⁵ Harris (n 10) 558ff.

³⁶ *Smith and Grady v United Kingdom* App nos 33985/96 and 33986/96 (ECtHR, 27 September 1999), para 135.

remedies at the domestic level, but the ECtHR must nevertheless review their effectiveness by examining the corresponding national law.

Lastly, the Strasbourg Court also takes a probing look at domestic law in cases where rights under Articles 8 to 11 ECHR have allegedly been violated. These four articles share some common formal features, most prominently the first paragraph defining the rights protected by the Convention, and the second paragraph setting up the conditions under which a state may interfere with these rights.³⁷ According to its consistent and settled case-law, the ECtHR uses the following formula to determine whether an interference with the exercise of these specific rights violates the Convention: an interference with the rights under Articles 8 to 11 ECHR has violated the Convention, unless the interference was '*prescribed by law or in accordance with the law*, pursued a legitimate aim and was necessary in a democratic society'.³⁸ In the context of external review of domestic law, the wording '*prescribed by law*' and '*in accordance with the law*' deserves special consideration at this point. When assessing applications alleging violations of said articles, the ECtHR must scrutinise the interference as to whether it was indeed in accordance with or prescribed by national law. The court must thus firstly examine whether the interference in question has some basis in domestic law³⁹ and secondly, it must explicitly determine whether the law was adequately accessible for the citizen and whether the law in question was formulated with sufficient precision to enable the citizen to regulate his or her conduct.⁴⁰ Hence, despite the wide margin of appreciation the contracting parties are given in interfering with rights laid down in Articles 8 to 11 ECHR,⁴¹ the Strasbourg Court usually takes a closer look at domestic provisions or legal acts being the fundamental cause for potential interferences of Convention rights.⁴²

The legal consequences of this analysis for the Union after accession are obvious. Even though the Strasbourg Court considers the national courts

³⁷ Colin Warbrick, 'The Structure of Article 8' [1998] *European Human Rights Law Review* 32 and Harris (n 10) 341. See also Jochen Frowein, 'Vorbemerkung zu Art 8-11' in Jochen Frowein and Wolfgang Peukert (eds), *EMRK-Kommentar* (NP Engel Verlag 2009), paras 1ff.

³⁸ See *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999), para 50 (emphasis added).

³⁹ See *Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 47 and *Silver and Others v United Kingdom* App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR, 25 March 1983), para 86.

⁴⁰ *Sunday Times* (n 39), para 49.

⁴¹ *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), paras 48-49.

⁴² See *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011), paras 15-28.

being the only authorities to interpret and apply national law under the subsidiarity principle, it cannot refrain from examining domestic laws in cases where the Convention itself refers to these national provisions as justifiable interferences. In the context of the EU's accession to the Convention, this means that the ECJ will, of course, remain the ultimate arbiter of Union law. In cases involving claims under Articles 5, 8-11 and 13 ECHR, however, where the sphere of domestic law is eminently affected, the ECtHR must also take a closer look at 'domestic' law, i.e. Union law, in order to determine whether an interference was prescribed by or in accordance with the law, or whether the remedies available under EU law are indeed effective. The question remains whether the Luxembourg Court can accept that the ECtHR might interfere with its role as the ultimate observer of Union law under Article 19 paragraph 1 TEU.

3.2. *Assessing Union Law: Connolly, Kokkevisserij and M.S.S.*

The preceding analysis presented the provisions of the Convention which will most likely 'invite' the Strasbourg Court to examine 'domestic' law, i.e. EU law, after accession. The following case studies will further show scenarios in which a similar review by the ECtHR was made in the past on the basis of Union law⁴³ and what this approach entails for the future and thereby the autonomy of the Union's legal order after accession.

3.2.1. *Connolly v. 15 Member States of the European Union*

In the *Connolly* case, Strasbourg had to determine whether the ECJ's decision not to accept any written statement by the applicant in reply to the Opinion of the Advocate General, violated the right to a fair trial under Article 6 EHCR. *Bernard Connolly*, a former official of the European Commission, had written a book criticising the European Union and its institutions and had published it without prior permission of his employers, i.e. the Commission. He was therefore removed from his post by a decision of the Disciplinary Board of the Commission. *Mr. Connolly* subsequently brought an action for annulment of this decision, which was eventually dismissed by the Court of First Instance,⁴⁴ as was the filing of the appeal

⁴³ Lock (n 5) 1035.

⁴⁴ *Bernard Connolly/Commission of the European Communities* (Case T-203/95) [1999] ECR II-443.

against this judgment, by the Court of Justice.⁴⁵ Before the ECJ, however, he requested permission to file a written statement to respond to the Opinion of the Advocate General, which was nevertheless denied. Consequently, he filed an application against the then fifteen Member States of the Union before the ECtHR and alleged that the ECJ's refusal to accept written statements constituted a violation of Articles 6 and 13 ECHR, respectively.⁴⁶ The Strasbourg Court then drew on the pertinent provisions of the Staff Regulation of EU Officials,⁴⁷ most notably Article 17 of the Regulation, which obliges officials to refrain from any unauthorised disclosure of information received in the line of duty. In the end, the court concluded that *Mr. Connolly* actually contested the decisions of the Court of First Instance and the Court of Justice, but not any action conducted by one of the fifteen Member States. Due to the lack of jurisdiction *ratione personae* over the Union, the ECtHR subsequently dismissed the case.⁴⁸

Of course it remains to be seen how the ECtHR will decide in similar cases after accession, once it has acquired jurisdiction *ratione personae* over the Union and its institutions. In cases similar to *Connolly*, one may assume that Strasbourg will hold the EU responsible for infringing the right to a fair trial and to an effective remedy under Article 6 and 13 ECHR, respectively, which in turn might lead to a more effective protection of procedural rights before the Union courts. Contrariwise, as the next case demonstrates, the Strasbourg Court may also content itself with the assumption that the EU's procedural provisions are equal to those enshrined in the Convention and thence in conformity with the respective Convention rights.

3.2.2. *Kokkevisserij v. The Netherlands*

In this case, the applicant, the *Kokkevisserij* association, a company engaged in mechanical cockle fishing in the Wadden Sea, had applied for a fishing licence, which was subsequently granted by the Dutch authorities.

⁴⁵ *Bernard Connolly/Commission of the European Communities* (Case C-274/99 P) [2001] ECR I-1611.

⁴⁶ Nikolaus Marsch and Anna-Catherina Sanders, 'Gibt es ein Recht der Parteien auf Stellungnahme zu den Schlussanträgen des Generalanwalts? Zur Vereinbarkeit des Verfahrens vor dem EuGH mit Art. 6 I EMRK' (2008) 43 *EuR* *Europarecht* 345ff.

⁴⁷ Regulation no 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 45/1385.

⁴⁸ *Connolly v 15 Member States of the European Union* App no 73274/01 (ECtHR, 9 December 2008).

The Wadden Sea Society, a non-governmental organisation for the protection of the environment, however, had lodged an objection against this licence. The Dutch Administrative Jurisdiction Division of the Council of State therefore felt the need to seek a preliminary ruling under Article 267 TFEU, and requested Luxembourg to interpret certain provisions of the Habitats Directive.⁴⁹ Like *Mr. Connolly*, the applicant association requested to submit written remarks in reply to the Opinion of the Advocate General. Since this request was denied,⁵⁰ the applicant filed an application before the ECtHR and complained that their right to adversarial proceedings, according to Article 6 paragraph 1 ECHR had been violated.⁵¹ In the following procedure, the ECtHR took a very close look at 'domestic' Union law and examined several provisions thereof, namely the Treaties, the Rules of Procedure of the ECJ and ECJ case-law.⁵² However, in contrast to the above-mentioned *Connolly* case, the ECtHR addressed the substantive question of this case⁵³ and accepted the ECJ's argument that, according to Article 61 of the Rules of Procedure of the ECJ, the court may order the reopening of the oral procedure after hearing the Advocate General,⁵⁴ in case it still lacked sufficient information or needed to address an argument which had not been dealt with by the parties.⁵⁵ In terms of its *Bosphorus* judgment, where the Union's substantive and procedural guarantees were considered at least equivalent to those for which the Convention provides,⁵⁶ the Strasbourg Court held that the procedure before the ECJ was therefore accompanied by guarantees which ensured equivalent protection of the applicant's rights, and thus emphasised that, particularly in the light of the Opinion of

⁴⁹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.

⁵⁰ See *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels/Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2004] ECR I-7405, para 20.

⁵¹ Marco Borraccetti, 'Fair Trial, Due Process and Rights of Defence in the EU Legal Order' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Document* (Springer 2011) 106.

⁵² Jessica Baumann, 'Auf dem Weg zu einem doppelten EMRK-Schutzstandard? Die Fortschreibung der Bosphorus-Rechtsprechung des EGMR im Fall *Nederlandse Kokkelvisserij*' (2011) 38 *EuGRZ* 1, 6.

⁵³ Lock (n 5) 1035.

⁵⁴ *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij u.a. v The Netherlands* App no 13645/05 (ECtHR, 20 January 2009).

⁵⁵ Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, OUP 2006) 18.

⁵⁶ *Bosphorus* (n 2), para 155.

Advocate General *Sharpston* in another case,⁵⁷ the possibility to reopen the oral proceedings after the Advocate General has read out his or her opinion, must explicitly be accepted as realistic and not merely theoretical.

The ECtHR was thence, to a certain extent, compelled to take a closer look at Union law in order to determine whether it could apply its *Bosphorus*-formula or not. Consequently, due to the equivalent protection of fundamental rights by the Union's legal system, the application was declared inadmissible.⁵⁸

3.2.3. *M.S.S. v. Belgium and Greece*

In this more recent case, where Strasbourg referred to European Union law, the ECtHR had to analyse the Dublin II-Regulation,⁵⁹ which determines the Member State responsible for examining asylum applications lodged on EU territory. The applicant, *Mr. M.S.S.*, an Afghan national, had entered the Union through Greece where he had not applied for asylum. He had then left the country and, after arriving in Belgium, had applied for asylum there. The Belgian authorities had expelled him from Belgium to Greece on the grounds of Article 3 paragraph 1 in conjunction with Article 10 paragraph 1 of said Regulation, providing that the Member State first entered into shall be responsible for examining the application for asylum. Given the location of Greece on the Union's external frontier, the Greek asylum system was already under particularly heavy pressure and the conditions in Greek detention camps consequently involved a high risk of ill-treatment. The applicant therefore alleged that an expulsion to Greece would constitute a violation of Articles 2 and 3 ECHR. The ECtHR examined the pertinent provisions in the Treaties and, of course, the Dublin II-Regulation itself,⁶⁰ and reiterated that the Convention did not prevent the contracting parties from transferring sovereign powers to an international organisation, i.e. the European Union, for the purposes of cooperation in certain fields of activity. However, according to the *Bosphorus*-presumption, the states nevertheless remain responsible under the Convention for all

⁵⁷ *Government of the French Community and Walloon Government/Flemish Government* (Case C-212/06) [2008] ECR I-1683, Opinion of AG Sharpston, para 157.

⁵⁸ *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij u.a.* (n 54).

⁵⁹ Council Regulation (EC) 343/2003 of 18 February 2003 establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National [2003] OJ L 50/1.

⁶⁰ See *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), paras 62-82.

actions and omissions of their bodies under their domestic law or under their international legal obligations. Conversely, a state would be entirely responsible under the Convention for all acts falling outside its strict international legal obligations vis-à-vis other organisations, most notably where it was permitted to exercise discretion.⁶¹ The court then scrutinised Article 3 paragraph 2 of the Regulation, the so-called ‘sovereignty clause’, which sets forth that, when derogating from the general rules laid down in Article 3 paragraph 1 of the Regulation, each Member State may examine an application for asylum lodged in its territory, even in cases in which the Member State is not that of first arrival, and may thence become responsible for the application under the criteria laid down in the Regulation. In such a case, the state concerned, i.e. Belgium, would become the Member State responsible for the purposes of the Regulation and take on the obligations that were associated with that responsibility.⁶² The Strasbourg Court consequently found a violation of Articles 2 and 3 ECHR by Belgium.

In concreto, the analysis of ‘domestic’ Union law, in this case the Dublin II-Regulation, was essential for the ECtHR to conclude that Belgium could have refrained under the provisions of EU law from transferring the applicant to Greece and that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium’s international legal obligations.⁶³ Moreover, by respecting the discretionary provision of Article 3 paragraph 2 of the Regulation and opting in as the Member State responsible for the asylum procedure, Belgium would have also complied with its international obligations under the Convention at the same time.

It is interesting to conjecture how the ECtHR would have decided if Belgium had had no discretion in the *M.S.S.* case. In this instance, Strasbourg might have applied its *Bosphorus*-formula in order to determine whether the Union’s legal order provided for a protection standard equivalent to that of the Convention. Yet, in this scenario, there is no telling which entity the ECtHR would have ultimately held responsible, as Strasbourg currently has no jurisdiction *ratione personae* over the EU. After accession, however, it can be assumed that the ECtHR will undoubtedly hold the EU itself (as the legislator of the Dublin II-Regulation) responsible for any human rights violation stemming from this piece of secondary law.

⁶¹ *ibid*, para 338.

⁶² *ibid*, para 339.

⁶³ *ibid*, para 340.

3.3. Analysis

These examples clearly show that Strasbourg is occasionally forced to take a closer look at provisions of national law (and, after accession, also at Union law) in order to be able to determine alleged violations of the Convention, especially in cases where the Convention itself refers to domestic law. This raises the question if the Luxembourg Court would regard such a *modus operandi* as a threat to its exclusive jurisdiction over EU law. One might object that interpreting national law and taking it as a basis for later decisions does not *per se* interfere with the legal systems of the contracting parties, let alone the legal autonomy of the Union and the exclusive jurisdiction of the Luxembourg Court under Article 19 paragraph 1 TEU. The ECJ's exclusive jurisdiction (and thus the EU's legal autonomy) would only be adversely affected if such decisions by the Strasbourg Court led to an internally binding determination of their content⁶⁴ – which would in no way be the case, since, according to Article 46 paragraph 1 ECHR, it is simply the contracting parties' duty to implement judgments by the ECtHR as how they deem the best way to do so, since these judgments do not unfold any *self-executive* character.⁶⁵ Most importantly, it is an undeniable fact that Strasbourg is not entitled to quash domestic legal acts,⁶⁶ which means that it is not authorised to invalidate Union law either.⁶⁷ This principle is not explicitly laid down in the Convention, but follows from the wording of Article 41 ECHR, which authorises the Strasbourg Court to afford just satisfaction to the injured party, if national law only allows partial reparation to be made.⁶⁸ This consequence also underlines the importance of domestic law and its role in giving full effect to Strasbourg's decisions,⁶⁹ particularly by imposing on the respondent party the legal obligation to 'put an end to the breach and make

⁶⁴ Lock (n 5) 1035.

⁶⁵ Walter Frenz, *Handbuch Europarecht: Band 4: Europäische Grundrechte* (Springer 2009) paras 83ff.

⁶⁶ Jochen Frowein, 'Article 46' in Frowein and Peukert (n 37) para 3; Meyer-Ladewig (n 10) Article 46 para 23.

⁶⁷ Kyra Strasser, *Grundrechtsschutz in Europa und der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention* (Peter Lang 2001) 128; Gerhard Baumgartner, 'EMRK und Gemeinschaftsrecht' [1996] ZfV 319, 330.

⁶⁸ Frowein (n 66) para 3.

⁶⁹ Hans-Joachim Cremer, 'Entscheidung und Entscheidungswirkung' in Rainer Grote and Thilo Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck 2006) 173ff.

reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach'.⁷⁰

In discharging its legal obligations under Article 46 ECHR, the respondent party is additionally allowed a certain measure of discretion⁷¹ in choosing the general or appropriate 'individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects'.⁷² Furthermore, Article 46 paragraph 1 ECHR does not entail a duty for national courts to disapply those domestic provisions the Strasbourg Court declared to be in violation of the Convention.⁷³ From an international law perspective, the judgments of the Strasbourg Court therefore address the respondent party as a subject of international law, hereby obliging it to fulfil its obligations under international law, *in concreto* under the Convention, and to implement decisions of the ECtHR.⁷⁴ However, an obligation under international law does not automatically imply an obligation under domestic law.⁷⁵ Thus, the European Union's obligation under international law to abide by Strasbourg's decision does not interfere with its legal autonomy.

More precisely, the ECtHR only decides whether there is a violation of the Convention in a concrete case, after all local remedies, i.e. proceedings at the national law, have been exhausted by virtue of Article 35 paragraph 1 ECHR. The ECtHR then considers the relevant provisions of domestic law and the practice of the courts in interpreting and applying these provisions.⁷⁶ In *Kemmache*, for instance, the Strasbourg Court ruled that:

[T]he words 'in accordance with a procedure prescribed by law' essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in

⁷⁰ *The Former King of Greece and Others v Greece* App no 25701/94 (ECtHR, 28 November 2002), para 72; see also *Iatridis v Greece* App no 31107/96 (ECtHR, 19 October 2000), para 32.

⁷¹ Meyer-Ladewig (n 10) Article 46 para 25; see generally Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002).

⁷² *Görgülü v Germany* App no 74969/01 (ECtHR, 26 February 2004), para 64.

⁷³ Meyer-Ladewig (n 10) Article 46, para 25.

⁷⁴ See Kai Ambos, 'Der Europäische Gerichtshof für Menschenrechte und die Verfahrensrechte: Waffengleichheit, partizipatorisches Vorverfahren und Art. 6 EMRK' (2003) 115 ZStW 583, 591.

⁷⁵ Frank Czerner, 'Inter partes- versus erga omnes-Wirkung der EGMR-Judikate in den Konventionsstaaten gemäß Art. 46 EMRK' (2008) 46 AVR 345, 354; Heiko Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (Springer 2008) 263ff.

⁷⁶ Lock (n 5) 1035.

conformity with the Convention, including the general principles expressed or implied therein [...].⁷⁷

Beyond that, it held that it is principally for the national authorities and courts to interpret and apply national law, as it is them, not the ECtHR, which are especially qualified to resolve legal issues arising in this context.⁷⁸

In a nutshell, this means that the Convention regime builds upon the principle of subsidiarity of Article 35 paragraph 1 ECHR, which entrusts primarily the domestic courts, i.e. the national courts and – after accession – the Union courts with the task of guaranteeing an effective human rights protection. Furthermore, Strasbourg is in no case the first instance to decide on the interpretation and application of domestic law.⁷⁹ In proceedings with relation to EU law, the courts of the Member States or, after a request for a preliminary ruling, the ECJ, would be – speaking in terms of the *Kemmache* case – the ‘national’ authorities which interpret and apply ‘domestic’ law, i.e. EU law, and which are particularly qualified to settle the dispute. In *Bosphorus*, Strasbourg compared the ECJ’s position with the role of national authorities and held that the ‘Community’s judicial organs are better placed to interpret and apply Community law’.⁸⁰ The domestic courts and/or the ECJ would therefore have the chance to rule on the interpretation and application of Union law before a case is submitted to the ECtHR.⁸¹ Moreover, Article 267 paragraph 3 TFEU obliges national courts of last resort to request a preliminary ruling from Luxembourg when the validity or interpretation of secondary law is challenged, which would in turn enable the ECJ to simultaneously exercise its right to declare secondary Union law invalid and thus to preserve the European Union’s legal autonomy.

This *modus operandi* is completely consistent with both the Convention system in particular and international law in general, as the rule of exhausting the local remedies is a basic principle of international law.⁸² It must be first and foremost the duty of the contracting parties to prevent or to put right the violations alleged against them, before those allegations are

⁷⁷ *Kemmache v France (No 3)* App no 17621/91 (ECtHR, 24 November 1994), para 37.

⁷⁸ *ibid*, para 37 (emphasis added).

⁷⁹ *Lock* (n 5) 1036.

⁸⁰ *Bosphorus* (n 2), para 143.

⁸¹ See Article 3, para 6 of the Draft Accession Agreement governing the prior involvement of the ECJ in EU-related cases before the ECtHR.

⁸² *Interhandel Case (Switzerland v United States of America)* (ICJ, 21 March 1959) [27].

submitted to the ECtHR. As a result, the European Union is principally exempt from answering for its actions in Strasbourg before the national and the EU authorities, most notably the ECJ, had the opportunity to remedy alleged violations through the Union's legal system.⁸³ The primary responsibility for implementing and enforcing the rights guaranteed by the Convention after accession is therefore laid on the Union's institutions and the courts of the other contracting parties, rendering the protection machinery of the Strasbourg Court subsidiary to those protection systems, as set forth in Article 35 paragraph 1 ECHR, and Article 13 ECHR.⁸⁴

Moreover, the decisions of the Strasbourg Court cannot prejudice the interpretation of Union law by the ECJ, since the ECtHR's powers of deciding are limited to two possible results: on the one hand, Strasbourg may consider the interpretative practice of a domestic provision by a domestic court as compliant with the Convention. In this case, the ECtHR would not need to interpret the national law itself but simply take it into account as a fact.⁸⁵ As a result, the interpretation of the provision in question and thus the autonomy of EU law would not be affected by Strasbourg's course of action,⁸⁶ as it would interpret and apply the Convention after national courts and the ECJ have interpreted and applied their respective laws.⁸⁷

On the other hand, the Strasbourg Court may regard the practice of the national authorities as insufficient. It might conclude that a specific measure was not prescribed by domestic law,⁸⁸ or that there was no effective remedy,⁸⁹ as ensured by Article 13 ECHR. In cases which result from a malfunctioning of legislation, the respondent party would then have to implement general measures⁹⁰ in forms of new legislation, conforming to the Convention in order to put an end to the violation. But the Strasbourg Court would neither perform an original interpretation of national or Union law in such cases, nor determine the interpretation of existing domestic law in an internally binding manner. It can thus be concluded that external review of EU legal acts by the ECtHR will not jeopardise the

⁸³ *Selmouni v France* App No 25803/94 (ECtHR, 28 July 1999), para 74.

⁸⁴ *Kudła v. Poland* App No 30210/96 (ECtHR, 26 October 2000), para 152; *Van Oosterwijk v Belgium* App no 7654/76 (ECtHR, 6 November 1980), para 34.

⁸⁵ *Certain German Interests in Polish Upper Silesia* (n 20) 19.

⁸⁶ *Lock* (n 5) 1036.

⁸⁷ *Cardot v France* App no 11069/84 (ECtHR, 19 March 1991), para 34.

⁸⁸ *Sunday Times* (n 39), para 49.

⁸⁹ *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), para 19.

⁹⁰ *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004), paras 189-193.

legal autonomy of the Union,⁹¹ since Strasbourg does not have exclusive jurisdiction in interpreting EU law.

4. European Union Law in Violation of the Convention

This chapter will examine a more specific issue of the EU's accession to the Convention, namely whether judgments by the ECtHR, holding that specific Union legislation infringed the Convention, will be compatible with the EU's legal autonomy. *In concreto*, it will enquire as to whether it is justified to exclude certain layers of Union law, especially, primary EU law, from Strasbourg's jurisdiction, since the EU itself is barred from redressing human rights violations rooted in primary law. Beyond that, this chapter will analyse whether a decision by Strasbourg finding secondary law in violation of the Convention, interferes with the autonomy of the EU's legal order.

4.1. Primary Union Law

4.1.1. Exclusion of Primary Union Law from Strasbourg's Review?

Before and during the actual negotiations on accession, proposals were made that the Union's primary law, comprising of the Treaties, the Charter, Protocols and Annexes, should be excluded from Strasbourg's external review.⁹² In particular, the French Government argued that subjecting the EU's primary law to the ECtHR's control would not be without difficulties,⁹³ especially when considering the statement in *Matthews* that certain acts of Union law, i.e. primary law, could neither be challenged before the ECJ⁹⁴ nor before national courts, which would mean that potential human right violations in primary EU law could therefore not be 'domestically' remedied. This line of reasoning stems from the fact that the Union itself lacks any '*Kompetenz-Kompetenz*' to amend its primary law, which is in fact its own constitutional basis. According to the principle of conferral laid down in

⁹¹ Lock (n 5) 1036.

⁹² *ibid* 1038.

⁹³ Sénat Français, 'Adhésion de l'Union Européenne à la Convention européenne de sauvegarde des droits de l'homme, Communication de M. Robert Badinter sur le mandat de négociation (E 5248)' (25 May 2010) <<http://www.senat.fr/europe/r25052010.html#toc1>> accessed 1 December 2011.

⁹⁴ *Matthews* (n 2), para 33.

Article 5 paragraphs 1 and 2 TEU, the European Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties. Conversely, competences not conferred upon the Union in the Treaties remain exclusively with the Member States. Since the Treaties can only be amended by virtue of Article 48 TEU, which requires an amending treaty concluded and ratified by all the Member States, they remain the ‘Masters of the Treaties’⁹⁵ and the Union should accordingly not be held responsible for the Treaties and potential violations of the Convention in them.⁹⁶

The solution to this legal problem is of paramount relevance to the Union’s standing to be sued in cases where the EU’s primary law is allegedly in violation of the Convention or where Union institutions or domestic courts cannot help infringing the Convention due to peremptory obligations under primary law, thus putting them in inevitable legal conflicts of contradicting provisions. In any case, if the Strasbourg Court held that a provision of primary law was indeed in violation of the Convention, the consequence would be a mandatory Treaty revision by the Member States on the basis of Article 48 TEU.⁹⁷

4.1.2. *Luxembourg’s Jurisdiction and Primary Law*

Another argument for excluding primary Union law from Strasbourg’s review is the fact that the Luxembourg Court itself is not authorised to invalidate primary law. When a domestic court requests a preliminary ruling from the ECJ according to Article 267 TFEU, the ECJ has jurisdiction to rule on the *interpretation* of the Treaties (lit a) or the *validity and interpretation* of acts of the institutions or bodies of the Union (lit b).⁹⁸ Due to the unambiguous wording of this provision, the ECJ is enabled to interpret primary law on the one hand and to interpret and rule on the validity of secondary Union law on the other hand, but not to invalidate or quash any provisions of primary law. Therefore, the ECJ’s competence of judicial

⁹⁵ *Lissabon-Urteil* (2 BvE 2/08) (BVerfG, 30 June 2009) [231].

⁹⁶ Matthias Köngeter, ‘Völkerrechtliche und innerstaatliche Probleme eines Beitritts der Europäischen Union zur EMRK’ in Jürgen Bast (ed), *Die Europäische Verfassung – Verfassungen in Europa* (Nomos 2005) 245.

⁹⁷ Andreas J. Kumin, ‘Die Verhandlungsvorbereitungen für den Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention – Ein Erfahrungsbericht’ in Sigmar Stadlmeier (ed), *Von Lissabon zum Raumfahrzeug: Aktuelle Herausforderung im Völkerrecht* (NWV 2011) 65, 75.

⁹⁸ Emphasis added.

review is restricted to ruling on the validity of secondary law – questions relating to the validity of primary law as the constitutional basis of all Union acts are beyond Luxembourg's judicial reach.⁹⁹

In the absence of explicit provisions allowing the ECJ to rule on the validity of primary law, one may ask whether the Luxembourg Court might be awarded such a competence via systematic or teleological interpretation. Within the context of the ECJ's establishment as a judicial supervisory body for the then-Community, however, it is very unlikely to assume that the Member States as the 'Masters of the Treaties' intended to create an organ which would in turn annul or invalidate the international treaties concluded and ratified by the Member States themselves. A teleological approach to this issue is of no avail either: neither Article 19 paragraph 1 TEU nor any other provision of Union law, for example the action for annulment under Article 263 TFEU, include a reference or provision that would authorise the Luxembourg Court to rule on the validity of primary law.¹⁰⁰ Consequently, not unlike domestic constitutions which are regularly excluded from the scrutiny of domestic constitutional courts, the EU's institutional setting exempts primary law from the ECJ's judicial review.¹⁰¹

Regarding the Union's other policy areas, one may also call into question whether *intergovernmental* policies, such as the Union's Common Foreign and Security Policy (CFSP) or the Common Security and Defence Policy (CSDP), should be subject to Strasbourg's review to the same extent as the Union's *supranational* policies.¹⁰² According to Article 24 paragraph 1 TEU, the CFSP is subject to 'special rules and procedures', which means that these policies are in fact defined and implemented by the European Council and the Council – two Union bodies that are effectively dominated by the Member States. Furthermore, whereas the CFSP shall be put into effect by both the Union's High Representative for Foreign Affairs and Security Policy and the Member States, the competences of the Union's supranational organs, such as the Parliament, are restricted to consultative tasks (Article 36 TEU). The most distinctive evidence of the CFSP's intergovernmental nature, however, lies in the fact that the ECJ shall not have

⁹⁹ Patricia Thomy, *Individualrechtsschutz durch das Vorabentscheidungsverfahren* (Nomos 2009) 60; Lukas Bauer, *Der Europäische Gerichtshof als Verfassungsgericht?* (Nomos 2008) 128.

¹⁰⁰ Bauer (n 99) 128.

¹⁰¹ Waltraud Hakenberg and Christine Stix-Hackl, *Handbuch zum Verfahren vor dem Europäischen Gerichtshof* (3rd edn, Verlag Österreich 2005) 66.

¹⁰² Kumin (n 97) 76.

jurisdiction with respect to these provisions, with minor exceptions regarding the delineation of intergovernmental and supranational competences within the Union's external policies (Article 40 TEU) and reviewing the legality of decisions providing for restrictive measures against natural or legal persons (Article 275 paragraph 2 TFEU).

As a result, most of the legal acts and measures enacted within the framework of the CFSP/CSDP are beyond Luxembourg's judicial reach, excluding the ECJ from reviewing these provisions on the grounds of an action for annulment (Article 263 TFEU), infringement proceedings (Articles 258 and 259 TFEU) or a preliminary reference procedure (Article 267 TFEU). This means that in these specific cases, the ECJ is incapable of autonomously and independently applying the standards demanded by the Convention and Strasbourg case-law, and thus, of preventing violations of the Convention on the 'domestic' plane.¹⁰³ Human rights could thus be violated by CFSP/CSDP acts without proper redress by the Luxembourg Court. In other words, contrary to the subsidiarity principle of Article 35 paragraph 1 ECHR, which ensures the involvement of domestic courts in cases relating to human rights, the ECJ is virtually 'bereft' of any opportunity to remedy human rights violations before a case is submitted to the Strasbourg Court.

4.1.3. *A Question of Legal Autonomy*

In light of the abovementioned arguments, it seems justifiable to exclude the Union's primary law from Strasbourg's review. However, when looking at the big picture of European human rights protection, it would be a profound mistake¹⁰⁴ to take this step for the following reasons: there is no other contracting party to the Convention, whose constitution or constitutional provisions are excluded from Strasbourg's external review, simply because its national Constitutional Court is barred from reviewing domestic constitutional law. The mere fact that the Union is not legally able to independently amend its own 'constitution', i.e. primary law, is not a sufficiently convincing reason to entirely exclude this area of its legal order from the

¹⁰³ *ibid* 76.

¹⁰⁴ Françoise Tulkens, 'Les aspects institutionnels de l'adhésion de l'Union européenne à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, l'audition du 18 mars 2010' European Parliament, Committee on Constitutional Affairs, Hearing on the Institutional Aspects of the European Union's Accession to the European Convention on Human Rights (18 March 2010) 4.

Convention's protection machinery.¹⁰⁵ Especially when taking Strasbourg's case-law into consideration, it does not make any sense to apply the 'equiv-*alent protection*'-formula of *Bosphorus*¹⁰⁶ and to grant the Union any judicial privileges after accession. In future comparable cases, individuals who satisfy the rather strict criteria of Article 263 paragraph 4 TFEU will presumably not apply against Member States merely implementing Union acts that leave them no room for discretion, but directly against the European Union itself, for passing legislation in violation of the Convention. Under these circumstances, there is no reason to uphold Strasbourg's *Bosphorus* presumption and to treat the Union and its institutions differently than the other contracting parties.¹⁰⁷

Beyond that, even though the Luxembourg Court is not entitled to annul or invalidate provisions of primary law, it has proved to be perfectly capable of handling legal conflicts between primary law and fundamental rights; namely by interpreting primary law *in conformity* with the Charter of Fundamental Rights¹⁰⁸ (which is also part of primary law by virtue of Article 6 paragraph 1 TEU) and in particular the Convention.¹⁰⁹ One example of such a course of action can be found in the *Defrenne* judgment, where the ECJ departed from retroactively applying the principle of equal employment conditions and payment for men and women under Article 157 TFEU,¹¹⁰ for the sake of preserving legal certainty.¹¹¹ Other examples are the

¹⁰⁵ Tobias Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 *European Law Review* 777, 783.

¹⁰⁶ *Bosphorus* (n 2), para 156.

¹⁰⁷ Jean-Paul Jacqu , 'L'adh sion   la Convention europ enne des droits de l'homme. Note   l'attention de la Commission institutionnelle en vue de l'audition du 18 mars 2010' European Parliament, Committee on Constitutional Affairs, Hearing on the Institutional Aspects of the European Union's Accession to the European Convention on Human Rights (18 March 2010) 3.

¹⁰⁸ Jean-Paul Jacqu , 'L'adh sion de l'Union europ enne   la Convention europ enne des droits de l'homme et des libert s fondamentales' in Wolfgang Benedek, Florence Beno t-Rohmer, Wolfram Karl and Manfred Nowak (eds), *European Yearbook on Human Rights 2011* (NWV 2011) 150.

¹⁰⁹ Christiaan Timmermans, 'L'adh sion de l'Union Europ enne   la Convention europ enne des Droits de l'homme, Audition organis e par la Commission des affaires constitutionnelles du 18 mars 2010' European Parliament, Committee on Constitutional Affairs, Hearing on the Institutional Aspects of the European Union's Accession to the European Convention on Human Rights (18 March 2010) 5.

¹¹⁰ Then Article 119 of the EEC Treaty.

¹¹¹ *Defrenne II* (Case 43/75) [1976] ECR 455, para 74.

ECJ's decisions in *Schmidberger*¹¹² and *Omega Spielhallen*,¹¹³ where Luxembourg managed to reconcile the application of a Treaty provision, namely the free movement of goods, with the application of fundamental rights. Even in cases where a conflict between a provision of primary law and a fundamental right could not be solved by interpreting the provisions in question concerning conformity with each other, for example in cases such as *Matthews*, the ECJ would be able to examine and assess this special circumstance. From this moment forth, it is incumbent upon the Member States, the 'Masters of the Treaties', to solve this conflict.¹¹⁴

Most importantly, however, the proposal to exclude the Union's primary law from Strasbourg's review was not included in the Draft Accession Agreement. In its Article 2 paragraph 2, the Draft Accession Agreement provides for an amendment to Article 57 paragraph 1 ECHR, which would allow the EU to only 'make a reservation in respect of any particular provision of the Convention to the extent that *any law of the European Union* then in force is not in conformity with the provision. *Reservations of a general character shall not be permitted under this Article.*¹¹⁵

The question remains whether this article allows for a general reservation excluding the EU's primary law from the ECtHR's review. The *Explanatory Report to the Draft Accession Agreement* states that the aforementioned 'expression "law of the European Union" is meant to cover the Treaty on European Union, the Treaty on the Functioning of the European Union, or any other provision having the same legal value pursuant to those instruments (the EU "primary law") (...):¹¹⁶ This, of course, would speak in favour of such a reservation on behalf of the Union.

The same Explanatory Report, however, emphasises that the EU should accede to the Convention on an equal footing with the other high contracting parties and that any reservation should be consistent with the relevant rules of international law.¹¹⁷ To be on an equal footing with the other contracting parties to the Convention, the Union should consequently not be allowed to make a reservation which would allow the exclusion of its own 'constitution'; this would be tantamount to a privilege similar to that granted by the Strasbourg Court in *Bosphorus* which, after accession,

¹¹² *Schmidberger* (Case C-112/00) [2003] ECR I-5659, para 77.

¹¹³ *Omega Spielhallen* (Case C-36/02) [2004] ECR I-9609, para 33.

¹¹⁴ Timmermans (n 109) 5.

¹¹⁵ CDDH-UE(2011)009 (n 1) 7.

¹¹⁶ *ibid* 20 para 28.

¹¹⁷ *ibid* 19 para 27.

cannot be reasonably endorsed. Moreover, if any reservation by the EU should be consistent with the relevant rules of international law, Article 2 paragraph 2 of the Draft Accession Agreement – in particular its second sentence – would make a reservation with respect to the entire primary law of the Union impermissible,¹¹⁸ especially when taking into account the identical Article 19 lit b VCLT and Article 19 lit b VCLTIO, which lay down that a state or an international organisation may, when acceding to a treaty, formulate a reservation unless the treaty provides that only specified reservations, not including the reservation in question, may be made. In fact, Article 57 paragraph 1 ECHR states that general reservations to the Convention are not permitted. Since it can be assumed that exclusion of the EU's primary law from Strasbourg's scrutiny 'in lock, stock and barrel' does amount to a 'general reservation' within the meaning of Article 57 paragraph 1 ECHR, such a course of action would be unacceptable under the Convention's protection regime. Alternatively, one may also argue that, according to Article 19 lit c VCLT and Article 19 lit c VCLTIO, a reservation made to exclude the entire 'constitutional' layer of a contracting party's legal order is incompatible with the object and purpose of the Convention, namely the effective protection of individuals against *all* legal acts in violation of the Convention, including primary Union law.

In addition, Article 3 of the Draft Accession Agreement, covering the procedural details of the so-called co-respondent mechanism, suggests that such exclusion is not intended.¹¹⁹ Article 3 paragraph 3 states that when an application is directed against the Union, a Member State may become a co-respondent to the proceedings, 'if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a *provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value (...)*'.¹²⁰ This explicit mentioning of the Union's primary law, as a potential root of human rights violations, makes it clear that an exclusion of this specific kind of law is not part of the Accession Agreement.¹²¹

In conclusion, the most convincing and – in the context of this contribution – the most important argument against the exclusion of the Union's primary law from Strasbourg's review is the potential danger to the

¹¹⁸ But see Lock (n 5) 1038, who argues that this provision would make it possible to make a reservation as regards primary law.

¹¹⁹ *ibid* 1038.

¹²⁰ CDDH-UE(2011)009 (n 1) 7 (emphasis added).

¹²¹ Lock (n 5) 1038.

autonomy of EU law. Such exclusion could even prove counter-productive, since it may compel the ECtHR to delineate violations of the Convention found in primary law (as it did in the *Matthews* case) from violations rooted in secondary law or other executive or judicial acts. This assessment would require Strasbourg to interpret EU law and to make decisions on the basis of the Treaties, thereby forcing it to identify which entity – either the European Union or one or more Member States – is in fact responsible for an alleged violation. This *modus operandi* would endanger the Union's legal autonomy and of course Luxembourg's jurisdictional monopoly, as the ECtHR would have to interpret the Treaties in a binding fashion. Moreover, the Union should not be held responsible for its own primary law when its Member States are already accountable for Union acts which they merely implemented without having any margin of discretion. Correspondingly, it is not possible to exclude the Union's primary law from the review of the ECtHR.¹²²

4.2. *Secondary Union Law*

4.2.1. *The European Union: Legislator of Secondary Law*

In contrast to primary law, secondary Union law is not created or enacted by the Member States, but by the European Union itself. As set forth in Article 289 TFEU in conjunction with Article 294 TFEU, it rests with the Union organs, namely the Commission, the Council and the Parliament, to initiate and pass legislation and legal acts as enumerated in Article 288 TFEU and thus to guarantee its subsequent conformity with fundamental rights in general and the Convention in particular. After accession, both primary law and the Convention will rank above secondary EU law, which makes them the yardstick for the lawfulness of the latter. Eventually, in case of violations of the Convention, the ECJ may be called upon to remedy these violations by interpreting secondary law in conformity with primary law,¹²³ including the Charter, or by annulling the legal acts in question. There is, consequently, no reason to argue for an exclusion of the Union's

¹²² *ibid* 1038; Lock (n 105) 783.

¹²³ See the ECJ's settled case-law in, eg *Commission/Council (Lomé Convention)* (Case 218/82) [1983] ECR 4063, para 15; *Klensch/Secrétaire d'État* (Joined Cases 201/85 and 202/85) [1986] ECR 3477, para 21; *Rauh/Hauptzollamt* (Case C-314/89) [1991] ECR I-1647, para 17; *Herbrink* (Case C-98/91) [1994] ECR I-223, para 9; *Borgmann/Hauptzollamt* (Case C-1/02) [2004] ECR I-3219, para 30.

secondary law from Strasbourg's review as it was stipulated with respect to primary law.

4.2.2. *Article 46 ECHR and Opinion 1/91*

The question remains, however, whether a finding of the Strasbourg Court that a specific piece of secondary EU law has violated the Convention, would infringe the autonomy of Union law.¹²⁴ According to Article 19 paragraph 1 TEU and its settled case-law, the Luxembourg Court has the exclusive jurisdiction on annulling or declaring EU law invalid, in order to ensure that Union law is applied uniformly. This requirement is especially crucial in cases where the validity of an EU act is called into question and divergences between the domestic courts, regarding the validity of Union acts, would thus jeopardise the very unity of the Union's legal order.¹²⁵ Since the entry into force of the Lisbon Treaty, the ECJ showed increased readiness to annul EU legislation on the basis of the Fundamental Rights Charter¹²⁶ or to declare national acts inapplicable¹²⁷ when it found them in conflict with fundamental rights protected by the Charter. Furthermore, the Luxembourg Court also demonstrated that it discharges its obligations under Article 52 paragraph 3 ChFR regarding a harmonious and coherent interpretation of the Charter with the Convention.¹²⁸

As a result, any declaration on the invalidity of Union law by a domestic or international court would be incompatible with the autonomy of the Union's legal order.¹²⁹ Nevertheless, the Strasbourg Court does not decide on the validity of domestic law in practice. Even in cases where the phrase 'in accordance with the law' requires that the impugned measure or legal act should have some basis in national law, the Strasbourg Court reiterates 'that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. More specifically, it is not for the ECtHR to rule on the validity of national laws in the hierarchy of domestic legislation'.¹³⁰ Strasbourg's decisions unfold no '*self executing*' or direct effect

¹²⁴ Lock (n 5) 1036.

¹²⁵ *Foto-Frost* (Case 314/85) [1987] ECR 4199, para 15.

¹²⁶ *Schecke and Eifert* (Joined Cases C-92/09 and C-93/09) [2010] ECR I-0000, paras 89ff.

¹²⁷ See eg *Küçükdeveci* (Case C-555/07) [2010] ECR I-365, paras 52, 54.

¹²⁸ Wolfgang Benedek, 'EU Action on Human and Fundamental Rights in 2010' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2011* (NWV 2011) 100ff.

¹²⁹ Lock (n 5) 1036.

¹³⁰ *W v The Netherlands* App no 20689/08 (ECtHR, 20 January 2009); see also *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990), para 29.

within the legal orders of the Convention's contracting parties,¹³¹ since Article 46 paragraph 1 ECHR states that '[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

Strasbourg is not authorised to quash domestic legal acts, thus making its judgments declaratory in nature and only binding under the obligations imposed by the contracting parties on themselves under international law.¹³² But even though the legal impact of these judgments, *in concreto* the parties' obligation to either put an end to violations of the Convention or to pass according legislation,¹³³ solely depends on the parties and their respective legal orders, the ECJ's own case-law in Opinion 1/91 insinuates that the decisions of an international court, i.e. the ECtHR, might become directly applicable within the Union's legal order:

Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, *the decisions of that court will be binding on the Community institutions, including the Court of Justice*. Those decisions *will also be binding* in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, *in so far as that agreement is an integral part of the Community legal order*.¹³⁴

Of course, this does not imply that a piece of secondary legislation considered to be in violation of the Convention would be automatically invalid at the precise moment of Strasbourg's judgment. This paragraph of Opinion 1/91 rather demonstrates that an applicant satisfying the respective criteria would still need to file an action for annulment under Article 263 paragraph 4 TFEU, in order to receive a declaration of invalidity by the ECJ. This declaration, however, would be bound by the precedent judgment of the Strasbourg Court. The Union's other institutions could amend or annul the provisions found to be in violation of the Convention by passing according legislation. Moreover, they would be obliged to do so pursuant to their obligations under international law in general and Article 46 ECHR in special. This step, however, cannot lead to an incompatibility with or risks for the Union's legal autonomy, since the reason for the aforementioned receptiveness towards the decisions of the Strasbourg Court

¹³¹ Lock (n 5) 1037.

¹³² Frowein (n 66) para 3.

¹³³ Meyer-Ladewig (n 10) Article 46, paras 22 ff.

¹³⁴ See Opinion 1/91, *EEA I* (n 14) para 39 (emphasis added).

can be found in the Union's own 'constitutional' foundations as interpreted by Luxembourg. This means that this quasi-monistic open-mindedness towards international law would not be imposed upon the EU by accession, but by the Union's own legal order.¹³⁵

4.2.3. *The Legal Basis for Accession*

This last statement leads to a short, but convincing argument explaining that a finding by Strasbourg, saying that certain Union actions or omissions are in violation of the Convention, would not jeopardise the autonomy of the EU's legal order law. When Article 6 paragraph 2 TEU, which provides for the legal basis of accession, was drafted by the Member States, it was the Member States' primary intention that by acceding to the Convention, the Union and its institutions would subject themselves to the jurisdiction of the Strasbourg Court, in order to close existing lacunae in the field of fundamental rights protection and to enable an external court to review the EU's legal acts. Therefore, since the legal autonomy of the Union stems from the Treaties and the ECJ's interpretation of them, provisions in the Treaties – such as Article 6 paragraph 2 TEU, governing the EU's competence to accede to the Convention – cannot be in contradiction to the Treaties themselves.¹³⁶

5. Conclusions

This contribution assessed whether and how the external review of Union law by the Strasbourg Court may interfere with the autonomy of EU law and the ECJ's exclusive jurisdiction in interpreting and applying EU law. The foregoing reasoning clarified that such a violation of autonomy is principally interrelated with two core questions. First, it must be asked, whether external review by the ECtHR of Union law would interfere with the ECJ's concept of legal autonomy and its exclusive jurisdiction, in particular, given the standards expressed in its Opinion 1/91; and second, whether a judgment by Strasbourg, finding that legal acts of the Union violated the Convention, would be compatible with the autonomy of EU law. Regarding the first question, this contribution made clear that the ECtHR primarily regards the national authorities and courts as the competent institutions to

¹³⁵ Lock (n 5) 1037.

¹³⁶ *ibid* 1037.

interpret and apply domestic law. It is therefore the ECtHR's constitutive task to interpret and apply the Convention, not national law. Strasbourg, however, must take domestic law into account in order to scrutinise whether there has been a violation of the Convention. This means that after accession, the ECtHR would also take a closer look at Union law in certain proceedings. This is especially the case when an applicant alleges that a provision was violated which refers back to domestic law, for instance Articles 5, 8-11 and 13 ECHR. Of course, an international court like the ECtHR interpreting Union law in a binding fashion, as envisioned in the ECJ's own decision in Opinion 1/91, would claim exclusive jurisdiction over Union law and thereby seriously endanger the EU's legal autonomy.

Nevertheless, the ECtHR does not interpret domestic law in an internally binding manner, since, pursuant to their obligations under international law, it is up to the contracting parties to implement Strasbourg's decisions. According to Article 41 ECHR in conjunction with Article 46 paragraph 1 ECHR, these decisions are not directly applicable and, most importantly, they cannot take precedence over, or even quash domestic legal acts, since the contracting parties' obligations under international law do not automatically entail an obligation under domestic law. Moreover, the contracting parties can freely choose how to implement the ECtHR's judgments and, by virtue of the principle of subsidiarity, set forth in Article 35 paragraph 1 ECHR, Strasbourg is in no case the first instance to decide on the interpretation and application of domestic law – in EU cases, the national courts or the ECJ would be the relevant authorities to interpret and apply Union law in the first place and thus to settle the dispute. The principal responsibility for implementing and enforcing the rights enshrined in the Convention after accession therefore lies with the Union's institutions and the courts of the other contracting parties, before Strasbourg can be called upon. As a consequence, the interpretation of the provisions in question and thence the Union's legal autonomy would not be affected by Strasbourg's decisions, since it would only interpret and apply the Convention *after* the national courts or the ECJ have interpreted and applied Union law according to the principle of subsidiarity of Article 35 paragraph 1 ECHR. It is therefore evident that Strasbourg does not interpret domestic law, including EU law, in an exclusive manner and thus, external review of EU acts by the ECtHR does in no case jeopardise the legal autonomy of the Union.

With respect to the second question, external review by the Strasbourg Court will cover all of the European Union's activities, as well as its legal acts. There have been arguments to exclude the Union's primary law from Strasbourg's scope of control, especially because the Union itself is not

entitled to amend its own 'constitutional' basis and the Luxembourg Court's jurisdiction is restricted in some areas of primary law (e.g. the CFSP). This means that the EU and its institutions are not able to remedy any violations of the Convention found in primary law, neither through legislative nor through judicial avenues. However, it would be a major mistake to exclude the EU's primary law from the ECtHR's external review for the following reasons: firstly, such exclusion is tantamount to a disproportionate privilege granted solely to the EU, but not to the other contracting parties. However, it is futile to uphold the *Bosphorus*-presumption in the future, as in comparable cases individuals will no longer apply against the Member States implementing the Union acts that leave them no room for discretion, but instead, directly against the Union itself for passing legislation in violation of the Convention. Secondly, the courts of the member states and the Luxembourg Court are highly qualified and perfectly capable of reconciling legal conflicts between primary law and fundamental rights, by interpreting the former in conformity with the Charter and the Convention. The ECJ will therefore also be able to handle conflicts between those provisions that are beyond its judicial reach. After that, it would be in the discretion of the Member States to solve this conflict by amending the Union's primary law. Lastly, the exclusion of primary law was not included in the Draft Accession Agreement. Article 3 of the Draft Accession Agreement governs the details of the co-respondent mechanism and explicitly mentions the Union's primary law as a legal basis for future applications, thus making it clear that such exclusion is not intended. Yet, the most convincing argument against exclusion is the fact that it might force the Strasbourg Court to delineate violations of the Convention found in primary law from those found in secondary law. This would in turn necessitate the ECtHR to decide upon the division of competences between the EU itself and the Member States. This course of action would in fact jeopardise the autonomy of Union law and must thence be avoided in any case.