The Accession of the EU to the European Convention of Human Rights

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List of abbreviations

AG	Advocate General
CFI	the Court of First Instance (now the General Court)
CFR	the Charter of Fundamental Rights of the European Union
ECHR	the European Convention on Human Rights
ECJ	the Court of Justice of the European Union
ECtHR	the European Court of Human Rights
NGO	non-governmental organization
EU	the European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	the United Nations
UDHR	the United Nations Universal Declaration of Human Rights
UNSC	the United Nations Security Council

Case law, the Court of Justice of the European Union

Case C-26/62 *Van Gend en Loos v Nederlandse Administrative der Belastingen* [1963] ECR 1
Case 25/62 *Plaumann & Co. v Commission* [1963] ECR 95
Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585
Case C-29/69, *Erick Stauder v. City of Ulm*, [1969], ECR 566-579
Case C-11/70, *Internationale Handelsgesällschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125
Case C-4/73 *Nold, Kohlen und Baustoffsgrohandlung v. Commission of the European Communities* [1974] ECR 491Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, at para 32.
Case C-36/75 *Rutili v Ministre de l´Intérieur* [1975] ECR 1219
Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR
Joined Cases C-60 & 61/84, *Cinetheque S.A. v. Federation Nationale Des Cinemas Francais*, [1985] ECR. 2605
Case C-5/88, *H. Wachauf v. Germany* [1989] ECR 2629
Cases C-46/78 & 222/88 *Hoechts AG v. Commission,* [1989] ECR 2859
Case C-260/89 *ERT v. DEP* [1991] ECR 1-2925
Case C-50/00 P, *Unión de Pequen˜os Agricultores v Council* (UPA) [2002] ECR I-6677
Case C-84/95 *Bosphorus v Ireland*, [1996] ECR I-3953
Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365
Case T-29/03 *BUPA and Others v Commission* [2008] ECR 207, at para 81.
T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2011] ECR II-0000

Case law, the European Court of Human Rights

Handyside v UK (1976) 1 EHRR 737
Ireland v. UK ECHR (1978) 2 EHRR 25
Tyrer v. UK (1978) 2 EHRR 1
Klass and Others versus Federal Republic of Germany, (1979-80) *2 EHRR 214*
Loizidou v. Turkey (1996) 23 EHRR 513
Chahal v United Kingdom Application No 70/1995/576/662 (1996) ECHR Series A No 697
Matthews v. United Kingdom, (1999) 28 EHRR 361
Christine Goodwin v. the UK. App No. 28957/95, ECHR 2002-VI
Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland (2006) 42 EHRR 1
Baysayeva v. Russia App. no 74237/01 (ECHR 5 April 2007)
Vilho Eskelinen and Others v. Finland App. No 63235/00, (ECHR 19 April 2007)
Bitiyeva and X v. Russia App. no 57953/00 and 37392/03 (ECHR 21 June 2007)
Saadi v Italy Application No 37201/06 ECHR (February 28 2008)
Micallef v. Malta App. no. 17056/06, (ECHR 15 October 2009)
Connolly v. 15 Member States of the European Union App no 73274/01 (ECHR 9 December 2008).

Other Case law

Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Minister for Transport, Energy and Communications and Others [1994] C.M.L.R 464 H.C. (Ir.)
Judgment of the German Constitutional Court, l Court, Solange I, BVerfG, 29.05.1974 - 2 BvL 52/71 Judgment of the Italian Constitutional Court judgment *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372.

EU Acts

Commission Memorandum, *Accession of the Communities to the European Convention on Human Rights* (Bulletin of the European Communities, Supplement 2/79 1979).
Council Directive 2004/13/EC [2004] of 13. December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods of services, OJ L 373/37
Council Regulation 881/2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, [2002] O.J. (L 139) 9
Council Regulation (EEC) 990/93 concerning trade between the EEC and FRY [1993] O.J. 1993
Directive 2006/54/EC [2006] of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204.
Draft Treaty establishing a Constitution for Europe, CONV 820/03
European Parliament Resolution of 18 January 1994 on Community accession to the ECHR (adopted on the basis of a report of the Committee on Legal Affairs and Citizen's rights) OJ 1994 C44/32
Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights of 5 April 1977 Concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms OJ 103
Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I-1759
The Charter of Fundamental Rights of the European Union [2000] OJ C 36
The Single European Act [1987] OJ L 169
The Treaty of Lisbon [2007] OJ C 306
The Treaty on the European Union [2002] OJ C 325/5
Treaty of Amsterdam [1997] OJ C 340
Treaty of Lisbon, [2007] O.J. C 306
Treaty of Maastricht [1992] OJ C 191
Treaty of Nice [2001] OJ C 80

Council of Europe Acts

European Convention on Human Rights and Fundamental Freedoms Nov 4. 1950, 213 U.N.T.S. 221
Protocol No 14 to the European Convention on Human Rights, CETS No. 194
Protocol No 11 to the European Convention on Human Rights, E.T.S. 155
Statute of the Council of Europe, CETS No.: 001.

United Nations Acts

UNSC Resolution 820, 24 U.N. Doc S/RES/820 (April 1993)
United Nations Security Council Resolution 1333, U.N. Doc. S/RES/1333 (Dec. 13, 2000)

Table of contents

The Accession of the European Union to the European Convention of Human Rights – The Future of Human Rights Protection in Europe

Abstract

The EU has evolved from an economic community to a political Union with extended competences into areas which are sensitive to violations of human rights. The Union is also in possession of powers which are traditionally exercised by states and which the Member States have transferred to the Union. Since the EU has not acceded to the European Convention on Human rights (ECHR), this means that more decisions and legislative acts are falling outside the scope of the Convention and cannot be challenged directly by individuals. The exercise of that power by the EU can further interfere with the obligations of the Member States under the ECHR, but the EU cannot be held accountable since the European Court of Human Rights has no jurisdiction. It also seems logical that the EU should be bound by the same human rights obligations as its Member States and an accession, even though legally and technically complicated, would serve to close the gap in the legally binding status of the ECHR in Europe. The limited access of private parties to Union courts is a European human rights concern and the accession would provide a remedy for that. Accession will further introduce an external accountability on human rights within the EU and will thus add creditibility to the Union wich continues to profile itself as a worldwide protector of human rights. The accession will therefore close certain gaps in the protection of human rights within the EU and will provide the citizens of Europe with a more uniform system of rights protection.

Aðild Evrópusambandsins að Mannréttindasáttmála Evrópu – Framtíð mannréttindaverndar í Evrópu

Úrdráttur

Evrópusambandið hefur þróast frá því að vera efnahagslegt bandalag í að vera pólítískt samband með aukið vald á hinum ýmsu sviðum sem eru viðkvæm fyrir mannréttindabrotum. Evrópusambandið fer einnig með vald sem ríki fara yfirleitt með og sem aðildarríki hafa framselt sambandinu. Þar sem Evrópusambandið er ekki aðili að Mannréttindasáttmála Evrópu (MSE) þýðir það að sífellt fleiri ákvarðanir og ýmis löggjöf falla utan gildissviðs MSE og án þess að einstaklingar geti látið reyna á rétt sinn. Valdbeiting Evrópusambandsins getur haft neikvæð áhrif á skyldur aðildarríkja þess samkvæmt MSE, en ESB en ber ekki ábyrgð samkvæmt því þar sem sambandið fellur utan lögsögu Mannréttindadómstóls Evrópu. Það virðist rökrétt að ESB sé bundið af sömu skyldum á sviði mannréttindi og aðildarríki þess og þrátt fyrir að aðild sambandsins að MSE sé lagalega og tæknilega flókin, mun aðild verða til þess að MSE gildi nánast alls staðar í Evrópu. Takmörkuð aðild einkaaðila að dómstólum innan ESB er áhyggjuefni hvað varðar mannréttindi og í aðild ESB að MSE felst úrræði sem leysir úr því. Aðild mun veita utanaðkomandi aðhald og eftirlit með mannréttindum innan ESB og mun einnig auka trúverðugleika ESB sem hefur verið að vinna sér sess sem verndari mannréttinda á alþjóðavísu. Aðild mun einnig styrkja vernd mannréttinda innan ESB gera hana heildstæðari.

"The image of a peaceful co-operative Europe, open toward other cultures and capable of dialogue, floats like a mirage before all of us"[1]

Formáli

Ritgerð þessi markar lok á laganámi mínu og því langar mig til þess að nota tækifærið og þakka þeim sem hafa hvatt og stutt mig á meðan á því stóð. Hjartans þakkir fær eiginmaður minn Haraldur Ársælsson fyrir að hafa hvatt mig til þess að láta æskudrauminn rætast og fyrir að hafa staðið þétt við bakið á mér á meðan á því verkefni stóð. Einnig vil ég þakka foreldrum mínum, Bolla Eiðssyni og Klöru Sigvaldadóttur fyrir hvatningu og stuðning og fyrir að hafa minnt mig reglulega á yfirlýsingu þá sem ég gaf þegar ég var sex ára um að ég ætlaði að verða lögfræðingur þegar ég yrði fullorðin. Þetta hlýtur þá að þýða að ég sé loksi ns orðin fullorðin. Þá kann ég leiðbeinanda mínum, Davíð Þór Björgvinssyni einnig bestu þakkir fyrir góða og vandaða leiðsögn við ritgerðarsmíðina. Ritgerð þessi fjallar um framtíð mannréttindaverndar í Evrópu og mig langar að tileinka hana nokkrum af Evrópubúum framtíðarinnar: börnunum mínum þremur, þeim Emblu Eiri, Huga Tór og Hrafndísi Tinnu Haraldsbörnum með ástarþökkum fyrir innblásturinn.

Introduction

It has often been argued that Europe is the cradle of human rights and for that reason; it is often assumed that the enjoyment of those rights by the almost 800 million[2] people now living in Europe is closely safeguarded. It can certainly be stated that Europe has one of the most extensive judicial systems for rights protection in the world today, with two major legal institutions dedicated to the protection of human rights, the Council of Europe and the European Union. Two major courts are operated in the regime of each institution; the Council of Europe set up the Court of Human Rights in Strasbourg France in 1953,[3] an institution dedicated to the enforcement of the provisions of the European Convention on Human Rights and Fundamental Freedoms and the Court of Justice of the European Union was set up by the founding members[4] of the European Coal and Steel Community (The ECSC, the predecessor of the EU), in the year 1952. From the onset the Court of Human

[1] J. Habernas and J. Derrida, 'February 15 or what binds Europe together' *Frankfurter Allgemeine Zeitung and Libération", (May 31, 2003).*

[2] The Department of Economic and Social Affairs of the United Nations, 'Population Estimates from 2010'<http://esa.un.org/unpd/wpp/unpp/panel_population.htm> accessed 23 October 2012

[3] The European Court of Human Rights Website, 'Facts and Figures 1' <http://www.echr.coe.int/NR/rdonlyres/ACF07093-1937-49AF-8BE6-36FE0FEE1759/0/FactsAndFiguresENG10ansNov.pdf> accessed 15 January 2013

[4] Chalmers Damian, Davies Gareth, Monti Giorgio, *European Union Law* (2nd ed, Cambridge University Press, Cambridge 2010) 10

Rights had a human rights jurisdiction, while the Court of Justice only dealt with matters related to the internal market of the EU and its predecessors.[5] The Court of Justice was not meant to deal with matters related to human rights issues, since the European Union was originally established as a purely economic community and human rights were not recognized in the treaties of the Union until the Treaty on European Union[6] (TEU) was signed in Maastricht in 1992,[7] nor is the EU a party to the ECHR or any other human rights treaty. Due to the limited scope of the original Treaty of the EEC, conflicts with human rights were not likely. In the unlikely case of such a conflict, the Member States relied on their own constitutions as providing appropriate basis for protection of human rights.[8] The building of a Union without a human rights law foundation of its own was however possible because of the existence of two major human rights instruments, namely the United Nations Universal Declaration of Human Rights and the European Convention on Human Rights, which was inspired by and drafted on the basis of the Universal Declaration.[9]

Soon after the founding of the economic community which was to become the EU, it became obvious that maintaining a clear division between economic matters and human rights issues is complicated, since these areas tend to overlap and purely economic matters can have human rights implications and vice versa. Economic interests have therefore been balanced against individual human rights on many occasions before the ECJ, which has often been criticized for prioritizing the function of the internal market and allowing it to prevail over human rights interests.[10] In its attempt to balance individual human rights against economic interests, the ECJ stated already in the 1970s, that it relies on the common constitutional standards of the Member States, and in the pursuit of those common standards, it looks to the treaties and conventions entered into by the Member States of the EU, in particular

[5] Sionaidh Douglas-Scott, 'A TALE OF TWO COURTS: LUXEMBOURG, STRASBOURG AND THE GROWING EUROPEAN HUMAN RIGHTS ACQUIS', (2006) 43 Common Market Law Review 629.
[6] The Treaty of the European Union, [2010] OJ C 83/13
[7] J.H.H. Weiler and Philip Alston, 'An "Ever Closer Union" in Need of a Human Rights Policy', The European Union and Human Rights, Harvard Jean Monnet Working Paper 1/22, <http://centers.law.nyu.edu/jeanmonnet/archive/papers/99/990113.html> accessed on 17 October 2012
[8] Damian Chalmers, Gareth Davies and Giorgio Monti (n 4) 232.
[9] J.H.H. Weiler and Philip Alston (n 8).
[10] Brown, Christopher 'Eugen Schmidberger, Internationale Transporte und Planzuge v. Austria Judgment of 12 June 2003',(2003) 40 Common Market Law Review 1499.

the European Convention on Human Rights.[11] The extensive reliance of the ECJ on the case law of the ECtHR of course means that there is a certain consensus between the two courts and accordingly, the risk for diverging judgments is rather small. The fact remains however that there are no formal mechanisms in place which guarantee uniformity in the application and interpretation of the ECHR. During the last decade, human rights issues within the EU have grown in importance and have become a matter of great concern, since the former economic community has now evolved into a political Union with extended competences into the areas of justice and judicial cooperation,[12] areas which are sensitive to violations of human rights.[13] This also means that more decisions and legislative acts are falling outside the scope of the European Convention and cannot be challenged directly by individuals. The EU is in possession of powers which are traditionally exercised by states and which the Member States have transferred to the Union. The exercise of that power by the EU can interfere with the obligations of the Member States under the ECHR, while the EU cannot be held accountable since the ECtHR has no jurisdiction in such cases.[14]Therefore the ECtHR is forced to mediate between the treaties of the EU and the provisions of the ECHR while EU member states can in certain cases hide behind their Union obligations in order to justify breaches of the ECHR. [15]

The EU now has its own legally binding instrument on human rights, the EU Charter of Fundamental Rights. The Charter imposes obligations on the EU institutions and not the Member states, which are already bound by other treaties, such as the ECHR.[16] Accordingly there are two main sources of European human rights laws, the ECHR and the Charter of Fundamental Rights, which are being enforced by two separate legal institutions, the ECJ and the ECtHR with a partly overlapping territorial jurisdiction. The two courts are the highest courts within their respective legal orders, but the relationship between the courts has so far been unresolved,

[11] Case 4/73 *Nold* [1974] ECR 491, para 13. Case 36/75 *Rutili* [1975] ECR 1219, para 32.
[12] Damian Chalmers, Garerh Davies and Giorgio Monti Giorgio (n 4) 583.
[13] Chava Eva Landau 'A New Regime of Human Rights in the EU?' (2008) 10 European Journal of Law Reform 557.
[14] Peter Van Dijk, 'On the Accession of the European Union/European Community to the European Convention on Human Right' (from October 12, 2007) <http://www.venice.coe.int/docs/2007/CDL(2007)096-e.pdf>accessed 1 November 2012
[15] Chalmers, Damian, Davies, Gareth & Monti, Giorgio(n 4) 262
[16]Lord Goldsmith, 'The Charter of Human Rights – A Brake Not an Accelerator' (2004) European Human Rights Law Review 473.

although it seems to be based on mutual respect and recognition of the role each court plays in the protection of human rights within their jurisdiction.[17]

Accession of the EU to the ECHR has repeatedly been suggested and denied and the debate has been going on for decades or since it was first suggested[18] by the European Commission in the year 1979.[19] As of December 1, 2009, Article 6(2) of the Treaty on the European Union[20] requires that the EU shall accede to the ECHR. The Union has thereby undertaken the legal obligation to accede to the European Convention on Human Rights. There is undeniably a political aspect of the accession which does seem to support the notion of a federal EU, since the accession of the Union to a Treaty, which previously has only been acceded to by states, does support the idea of a federal Union, where the Charter of Fundamental Rights has the status of a national constitution.[21] This would certainly appeal to those who are in favour of an even stronger European integration. The accession introduces an external accountability on human rights within the EU and possibly adds some credibility to the Union, which the EU certainly needs while struggling with the aftermath of the financial crisis in the Euro zone and growing criticism from Member States such as the UK as well as external parties.[22] An accession would allow for the Union to be represented in the ECtHR and in proceedings before the ECtHR which involve measures of the EU institutions, the voice of the Union will be heard.

The question is whether the accession itself is merely symbolic and designed to serve a political purpose or whether it will have a real effect on the protection of human rights in Europe. It is clear that the accession will create a connection between the human rights protection of the Council of Europe and the legal framework of the Union. Since the EU has gained power which can be compared to

[17] Tobias Lock,'EU Accession to the ECHR: Consequnces for the European Court of Justice' (2011) 20 <http://www.law.ox.ac.uk/published/OSCOLA_4th_edn_Hart_2012.pdf> accessed 12 May 2013
[18] Commission Memorandum, *Accession of the Communities to the European Convention on Human Rights* (Bulletin of the European Communities, Supplement 2/79 1979).
[19] Martin Kuijer, 'THE ACCESSION OF THE EUROPEAN UNION TO THE ECHR: A GIFT FOR THE ECHR´S 60TH ANNIVERSARY OR AN UNWELCOME INTRUDER AT THE PARTY?' (2011) Amsterdam Lawforum 20.
[20] Treaty of Lisbon [2007] O.J C 306
[21] Council of Europe, 'The accession of the EU' <www.coe.int/t/DC/Files/Source/SF,EUAccessiontoECHRen.doc > accessed 13 October 2012
[22] (--) 'Cameron criticizes EU insurance shake-up' *Financial Times* (London March 7 2012) <http://www.ft.com/cms/s/0/a57f5788-6878-11e1-a6cc-00144feabdc0.html#axzz282TM9XDv> accessed September 27 2012; (--) 'Cameron vows to reshape EU role' *Financial Times* (London March 7 2012) <http://www.ft.com/cms/s/0/b77d3850-08ce-11e2-9176-00144feabdc0.html#axzz282W66Dbb> accessed September 27 2012.

that of a state, it seems logical that it should be bound by the same human rights obligations as its Member States by acceding to the main treaty on human rights in Europe, the ECHR. This could also serve to close the gap in the legally binding status of the ECHR in Europe, which exists since the Member States of the EU are also members of the Council of Europe and have all acceded to and ratified the ECHR, while the Union itself has not.[23] It certainly seems quite logical since accession to the ECHR and therefore the compulsory jurisdiction of the ECtHR is one of the main conditions for a membership of the EU.[24]

There has been much scholarly debate over whether the current situation of human rights protection in Europe should be changed,[25] in order to enhance the effectiveness of it, since the current system means subjecting the 27 states which are members of the EU as well as Council of Europe to dual treaty obligations which could possibly be contradictory. Since the two courts in question have different functions and mandates and their jurisdictions are only overlapping in part, this means that the treaty obligations in question cannot be uniformly applied or interpreted.[26]

The accession is quite complicated and only time will tell whether it will create a modernized system of human rights protection with two integrated legal instruments and a cooperation between the two courts of Luxembourg and Strasbourg.[27] On the other hand, the future of rights protection in Europe could be burdened by a legal confusion and an unclear division in the jurisdiction of the two courts.[28]

The accession also has to be considered in the light of the current state of human rights in Europe today. There are critical voices being heard which claim that human rights in Europe are now at risk and that the descendants of the people who stormed

[23] Michael R Ribble 'I don´t Trust Your Judgment: The European Convention on Human Rights Meets the European Union on new Grounds?' (2010) 29 Penn State International Law Review 211.
[24] European Council 'Conclusions of the Presidency' (1993) SN 180/1/93 REV 1*;* M. Novak, 'Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU', Ph. Alston (ed.), *The EU and Human Rights (*Oxford University Press 1999) 687; Tobias Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 6 European Law Review 778.
[25] Iris Canor, 'Primus inter Pares. Who is the ultimate guardian of fundamental rights in Europe?' (2000) European Law Review 2.
[26] Thomas Pavone, 'The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis' (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042867> accessed 1 May 2013.
[27] Van Doreen, Inge Machteld, 'The European Union and Human Rights: Past, Present, Future' (2009) 26 Merkourious: Utrecht Journal of International and European Law 47
[28] Chava Eva Landau (n 15) 573.

the Bastille and tore down the Berlin wall in the name of liberty and equality, are now facing limitations of those very rights.[29] These critics claim that civil liberties in Europe are being limited in the name of the war against terrorism and the growing number of extremist parties in European politics has also been highlighted as a major concern. Another critical human rights issue in Europe and in the EU today is the situation of minorities such as the Roma and Muslims as well as certain controversial practices in the treatment of immigrants and asylum seekers in some member states of the EU.

Just how controversial human rights issues are becoming within the EU and how relevant these issues are for the future integration and cooperation within the Union can be high-lighted by some recent examples. In October 2010, the European Commission decided not to take legal action against France, for the very controversial expulsion of a large group of Roma, originating from Romania and Bulgaria. Another controversial decision of the Commission with human rights aspects was the decision not to take action against[30] Hungary over a media law which was widely criticized as limiting press freedom and the fundamental right of free expression.[31] The Commission has further not taken any action against Greece regarding the Greek migration and asylum system, which is probably one of the most controversial issues regarding human rights within the EU today.

These decisions have been criticized as a failure of the duty of the European Commission[32] to enforce fundamental rights within the EU.[33] The Commission has so far published two reports on fundamental rights in the EU, in the year 2010[34] and

[29] Human Rights Watch, 'World Report 2012, Events in 2011' <http://www.hrw.org/world-report-2012/world-report-2012-european-union> accessed 20 October 2012.
[30] Europa , 'Media: Commission Vice-President Kroes welcomes amendments to Hungarian Media Law' (Press release 16 February 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/89> accessed 1 November 2012.
[31] Human Rights Watch, 'Memorandum to the European Union on Media Freedom in Hungary' <http://www.hrw.org/news/2012/02/16/memorandum-european-union-media-freedom-hungary> accessed 1 November 2012; Council of Europe, 'Opinion of the Council of Europe´s Commissioner for Human Rights' (February 25, 2011) <https://wcd.coe.int/ViewDoc.jsp?id=1751289> accessed 1 November 2012.
[32] European Union, 'How The EU Works' <http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm > accessed 12 November 2012.
[33]Human Rights Watch 'World Report Chapter 2012, the European Union' <http://www.hrw.org/sites/default/files/related_material/eu_2012.pdf> accessed 12 November 2012.
[34] The European Commission, '2010 Report on the Application of the EU Charter of Fundamental Rights' <http://ec.europa.eu/justice/policies/rights/docs/report_EU_charter_FR_2010_en.pdf (last visited)> accessed 12 November 2012

2011,[35] but in the reports there is no criticism against the Member States to be found, in spite of the controversy regarding the issues mentioned above. The fact that in the first report from 2010, the EU Fundamental Rights Commissioner, Ms Viviane Reding specifically mentions that the EU Charter should be looked upon as a "compass" having previously stated that the Commission would apply a "Zero Tolerance Policy" [36] on violations of the Charter. This certainly does raise some questions as regards the provisions of the Charter and how forcefully it will be applied by the institutions of the Union, as well as questions regarding the EU and its approach on human rights in general.

It is obvious at this point, that with the accession of the EU to the ECHR, human rights protection in Europe is entering a new phase. It remains to be seen whether a new system of rights protection will emerge which will rise to the challenges ahead and satisfy the critics.

Purpose, delimitations and research questions

The purpose of the thesis is to provide a general picture of what the future accession of the European Union to the European Convention of Human Rights will mean for individuals. In particular, to examine whether the accession will provide the citizens of Europe with a more uniform system of rights protection with the possibility of a forum shopping for litigants and what could prove in certain cases to be a better protection of rights.

For that purpose, the key role played by the Court of Justice of the European Union and the European Court of Human Rights will be highlighted and the extensive case law of the two Courts is therefore shown considerable attention, in particular certain landmark cases which are relevant for this topic. This is necessary since the emergence of a human rights policy in the EU and the Unions future accession to the Convention, are in part due to a development which took place in the courtrooms in Luxembourg and Strasbourg. The development of a human rights policy within the

[35] The European Commission, '2011 Report on the Application of the EU Charter of Fundamental Rights' <http://ec.europa.eu/justice/fundamental-rights/files/charter-brochure-report_en.pdf (last visited)> accessed 13 November 2012.
[36] Ms Viviane Reding, *Proceedings High Level Conference on the Future of the European Court of Human Rights* (Council of Europe 2010) 24

EU is covered rather extensively, in order to decide whether that development has made the accession to the ECHR unavoidable.

The right to an individual petition and the access to court form the very basis of a society based on the rule of law. Since the focus here is on the rights of individuals, a comparison is made between the procedural rules of the two Courts on *locus standi,* the types of applications which are accepted at each of the Courts and the remedies available to individuals. This is done in order to show the limitations and advantages of both systems of supervision and enforcement. This is also necessary since the debate on an EU accession has often been focused on the limited *locus standi* before Union courts, and it has often been held that an accession will provide a remedy for those shortcomings. Another issue concerning the accession and its effect on individual rights protection in Europe is the fact that the Strasbourg Court is already overburdened by the enormous backlog of pending cases.[37] Therefore it is necessary to consider whether the additional review of actions before the ECtHR against EU institutions could result in an increase in pending cases with further delays and possible implications on legal certainty.

The thesis will focus on the effect accession will have on the protection of human rights of the citizens of Europe and whether that can be considered to be an improvement from the current system where certain gaps in the protection of human rights within the Union will be closed. The highly relevant and interesting issue of the on-going negotiations between the EU and the state parties of the Council of Europe regarding the accession itself will not be covered here to any extent, but at the moment the outcome of the negotiations is quite unclear. It remains clear however, that the EU has undertaken the legal obligation to accede although the negotiators have to clarify some very complex legal and technical issues as well as the reservations and objections of several states before an accession agreement can be finalized.

As of October 2010, a draft legal instrument for the accession has been transmitted to the Committee of Ministers of Council of Europe and negotiations are on-going

[37] Council of Europe, 'Reform of European Court of Human Rights: Protocol No.14 enters into force' (Council of Europe 31 May 2010) <https://wcd.coe.int/ViewDoc.jsp?id=1628875&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE> accessed 20 November 2012.

between the EU and the Steering Committee for Human Rights (CDDH) of the Council of Europe, which has been given the mandate to negotiate on behalf of the Council of Europe. The Parliamentary Assembly of the Council of Europe and the two European Courts will also have to give their opinion on the draft, which then requires the adoption of the Committee of Ministers of the Council of Europe. The accession will become a fact once the accession agreement enters into force and has been ratified by the EU and all states party to the ECHR. After five negotiation meetings between the CDDH and the European Commission the parties agreed on a draft instrument on April 5, 2013.

Apart from textbooks and academic articles, the thesis relies on the examination and analysis of the relevant EU and ECtHR case law and to a limited extent, other material from the institutions of the EU and the Council of Europe. For the purpose of clarity, the relevant institutions of the European Union and the Council of Europe and the relevant legal provisions of both institutions will be referred to by their names and numbers as of September 2012. No distinction is made between the concepts of "fundamental rights" or "human rights".

1. The emergence of a modern human rights law in Europe

Since the 1950s, human rights protection in Europe is mainly based on two different supranational legal foundations, one in the regime of the Council of Europe and the other in the regime of the European Union.

1.1 The Council of Europe

After the Second World War, European statesmen were intent on founding an organisation which would promote reconciliation among the European nations after the war, safeguard future peace and guard fundamental rights. This led to the founding of the Council of Europe with the Treaty of St. James's on May 5. 1949.[38] The main goal of the Council of Europe which is described in its Statue is to pursue peace in Europe and to promote justice and international co-operation, based on the

[38] Council of Europe, 'Key dates in the history of the Council of Europe' <http://cingo-strasbourg.eu/Archive/Site_web_en/coe_en.html> accessed 15 September 2013

common values which according to the Statute form the basis of all genuine democracy; individual freedom, political liberty and the rule of law.[39]

1.2 The European Convention on Human Rights and Fundamental Freedoms

The most important contribution of the Council towards safeguarding human rights in Europe is the European Convention on Human Rights and Fundamental Freedoms[40] which entered into force in 1950. The signing of the Convention was a very significant event; since it marked the emergence of the first international legal instrument designed to guarantee the protection of human rights and could therefore be described as the first steps towards an international, modern human rights law.

Alleged violations of the Convention by any of the member states of the Council of Europe[41] are heard and settled by an international court of final instance, the European Court of Human Rights in Strasbourg, France (hereafter referred to as the ECtHR). Signing and ratifying the Convention is a precondition for states wishing to become members of the Council of Europe. The Convention was adopted in 1950 and entered into force in 1953. The Convention reflects certain rights and freedoms which are found in the United Nations Universal Declaration of Human Rights (the UDHR),[42] and provides a list of guaranteed rights such as the right to life, the prohibition of torture, slavery and forced labour, the right to liberty and security, the right to a fair trial, respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, the right to an effective remedy and the prohibition of discrimination.

States which have ratified the Convention have thereby undertaken the legal obligation to guarantee to individuals of any nationality within their jurisdiction certain civil and political rights and the right to apply to the ECtHR if they consider the State

[39] Statute of the Council of Europe, CETS No.: 001.
[40] European Convention on Human Rights and Fundamental Freedoms Nov 4. 1950, 213 U.N.T.S. 221
[41] Council of Europe 'List of the member states of the Council of Europe' <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> accessed 28 September 2013
[42] The European Convention on Human Rights and Fundamental Freedoms preamble, Nov. 4, 1950, 213 U.N.T.S. 221

in question to have failed to guarantee fully the enjoyment of any of the rights protected by the Convention.[43]

The Convention was originally meant to be "an alarm that would bring … large-scale violations of human rights to the attention of other Western European States in time for action to be taken to suppress them".[44] It is quite obvious that at the time of the drafting of the Convention, the war torn European nations were mostly concerned with preventing genocide and mass atrocities such as the acts committed by the Nazi regime during the Second World War and were less concerned with protecting individual civil and political rights from interference. Over time however, the Convention has evolved and proven to be a living instrument and while continuing to prevent large-scale violations as intended, it has also provided for a remedy for individuals. This is done through the supervisory system provided for by the Convention, which compels states to abide by their Convention obligations and ensures that alleged violations are considered. The Court's judgments are binding, and the parties to each case are under the obligation to undertake all the measures required to comply with them. It has been argued that the Convention is a success and represents the most effective system of human rights protection existing today.[45]

The ECtHR has referred to the Convention in the following manner:

> …unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual and bilateral undertakings, objective obligations, which in the words of the preamble, benefit from a "collective enforcement".[46]

Further, the Court has also referred to the special nature of the Convention and stating that it is a "constitutional instrument of European public order".[47]

Although any final judgment of the ECtHR is considered binding,[48] the Court has no mechanism for enforcement. Instead, the Committee of Ministers of the Council of

[43] I Cameron, *An Introduction to the European Convention on Human Rights* (4th edn Iustus Förlag, Uppsala 2002) 30 - 31
[44] D Harris and M O'Boyle, and C Warbrick, *Law of the European Convention on Human Rights* (2nd edn Oxford University Press, New York 2002) 5
[45] E Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press Oxford 2010) 2
[46] *Ireland v. UK* ECHR 1978 2 EHRR 25
[47] *Loizidou v. Turkey* (1996) 23 EHRR 513
[48] The European Convention on Human Rights and Fundamental Freedoms, articles 32 and 46.

Europe is responsible for the enforcement of the Court´s judgments, and supervises the execution of judgments by ensuring that monetary awards are in fact paid out and that all parties abide by the terms of the judgment in question.[49]

In cases where the ECtHR has found a breach of the Convention, the respondent State has traditionally made amendments to the relevant domestic law and therefore the Convention and the Court´s interpretation thereof have had a major impact on domestic law in all the member states of the Council of Europe.[50] The ECtHR however does not have the authority to annul any domestic laws or to overrule any rulings of domestic courts. Therefore a situation might arise where an individual is awarded damages by the ECtHR, but would still have to abide by the decision by a domestic court or adhere to a domestic legislation which gave rise to the damages.[51]

2. The development of an EU Human Rights Policy and the first links to ECHR

In the early days of the EU, human rights were merely recognized as a part of the general principles of law which the Union was obligated to respect.[52] When the EEC was established in 1957, there was not a Bill of Rights among the establishing treaties, which in part can be explained by the fact that all the member states of the EU were also parties to the ECHR which had just entered into force.[53]

The two supranational institutions of the EU and the Council of Europe were from the onset meant to co-exist as two autonomous legal systems. Both institutions are a part of European integration, have a geographical connection and a partly overlapping jurisdiction. The founders of the two institutions did not foresee the events which took place in the 1970s, where an unexpected link was suddenly created between the two main courts being operated in each regime, the ECJ and the ECtHR. Suddenly faced with a two-sided system of human rights protection in Europe, where neither of the courts had the formal competence to protect human rights within the EU, the two courts needed to find a middle-ground of co-existence and coherence.

[49] The European Convention on Human Rights and Fundamental Freedoms, article 46
[50] D Harris and M O'Boyle, and C Warbrick (n 46) 31
[51] Ribble, Michael R, (n 25) 213
[52] Chava Eva Landau (n 15) 557
[53] Egbert Myjer ‘Can the EU join the ECHR – General Conditions and Practical Arrangements‘ in I Pernice, J Kokott and C Saunders (eds)*THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* (Nomos Verlag Berlin 2006)

With the EU becoming increasingly powerful, the impact of Union law on national level in the Member States grew as well. Since the member states of EU are all members of the Council of Europe as well, it became obvious that the Strasbourg court needed to act in order not to be side-lined by the ECJ. The Luxembourg court on the other hand, needed to ensure the protection of human rights within the framework of the Union, since the national constitutional courts would not accept the principle of the supremacy of EU law without adequate protection of human rights. Such an acceptance was therefore a precondition for the future integration and growth within the Union.[54] Both courts were eager to defend their own status within the legal order in Europe and wished to maintain their separate functions, while protecting human rights within their respective jurisdictions. The courts have achieved a certain level of success in that pursuit, by monitoring each other´s case law and attempting to balance various standards of rights while trying to avoid a divergence in interpretation. This is by no means an easy task, considering the differences in mandate, function and jurisdiction and there have been conflicting judgments and differences in the interpretation and application of the ECHR which have caused confusion and conflict. However, this informal co-operation has been on-going for almost forty years and it can be stated with some certainty that it has paved the way for the upcoming accession. This process was initiated by the ECJ who introduced the concept of human rights protection in EU law. This chapter will look closely at the development of human rights law within the legal framework of the EU and how the ECJ gradually introduced the concepts of the ECHR to EU law.

2.1 The EU: from economic objectives to the protection of human rights

Human rights may not have been included in the original treaty of the EU, the Treaty of Rome; but became a part of the main principles of EU law when the ECJ started filling certain gaps in the Union legislation by applying and respecting human rights.[55] Accordingly, the institutions of the Union had to address the issue of human rights as well.[56] In the year 1986 the EU adopted the Single European Act[57] to revive the

[54] Laurent Scheeck 'The Relationship between the European Courts and Integration through Human Rights (2005) 65 Heidelberg Journal of International Law 837
[55] Chava Eva Landau (n 15) 558
[56] E Myjer (n 55) 297
[57] The Single European Act [1987] OJ L 169

Treaty of Rome and a reference to human rights is found in its Preamble, where it states that the signatories are

> DETERMINED to work together to promote democracy on the basis of the 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,

Since then, all the basic treaties of the EU have provisions regarding human rights, the first one being the Treaty of Maastricht,[58] where the notion of human rights in the Preamble of the Single European Act was dealt with in Article F(2) which provided that:

> The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the Constitutional traditions common to the Member States, as general principles for Union Law.

The drafters of the Treaty of Amsterdam[59] from 1997 took further steps to give a formal recognition to human rights and reaffirmed the principle of respect for human rights and fundamental freedoms by proclaiming in the amended Article 6(1) TEU that the "Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms.[60] Adding Article 7 to the TEU further provided for a process for Union sanctions against Member States guilty of serious and repeated breaches of the human rights principles stated in Article 6(1).[61] The ECJ was now formally required to apply human rights standards to the acts of the Union institutions, provided the Court had jurisdiction.[62] The next basic treaty, the Treaty of

[58] Treaty of Maastricht [1992] OJ C 191

[59] Treaty of Amsterdam [1997] OJ C 340

[60] The European Union 'The Amsterdam Treaty: a comprehensive guide' <http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a10000_en.htm> accessed 4 October 2012

[61] Andrew Williams, *EU Human Rights Policies A Study in Irony* (Oxford University Press, 2004) 2

[62] Egbert Myjer (n 55) 297

Nice[63] from 2000 had provisions which guaranteed the protection of human rights, but also for the first time provided for a catalogue of such rights.[64]

The expansion of the human rights jurisdiction of the EU has since then continued, and a major milestone in that process was the declaration of the Charter of Fundamental Rights in December 2000. Human rights have also influenced policy areas and had an impact on EU secondary legislation, with several non-discrimination directives[65] being adopted under Article 2 TEU, which states that the EU is founded on the values of a "society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Even so, there are still areas of EU law which cause concern regarding human rights, such as the area of competition law and justice and home affairs as well as the widely criticized limited access to Union courts which will be dealt with further in Chapter five.

2.2 ECJ case law on human rights - introducing the ECHR in Union law

As stated earlier, the initiative to recognize human rights within the legal framework of the EU did not come from any Union institutions in the possession of executive or legislative powers, but originates in the creative and innovative development of the case-law of the ECJ.[66] In the following chapter, a closer look is cast at that development starting with the very first case were the Court recognized human rights as a part of the legal framework of the Union. Assessing the protection of human rights in the European Union according to the current system is necessary since it demonstrates the inadequacies of the protection which can possibly be amended by an accession to the ECHR. Further, a study of the ECJ case law demonstrates how the Court gradually introduced the concepts and the provisions of the ECHR to the framework of Union law, a process which has led up the upcoming accession of the EU to the Convention It is therefore necessary to take a closer look at the development of the human rights case law of the ECJ and the growing reliance on

[63] Treaty of Nice [2001] OJ C 80

[64] Chava Eva Landau (n 15) 558

[65] Council Directive 2004/13/EC [2004] implementing the principle of equal treatment between men and women in the access to and supply of goods of services, OJ L 373/37 & Directive 2006/54/EC [2006] of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204.

[66] Antoine Jacobs, *"The European Constitution. How it was created. What will change"*, (Wolf Legal Publishers 2005) 119

the ECHR in spite of the controversy as regards the legal status of the Convention within the legal order of the EU. Examining as well the issues and the problems which have arisen in the application and interpretation of the Convention by the Court will therefore help to provide some answers when examining the accession, in order to conclude whether it will indeed provide for a better protection of human rights in Europe or not.

2.3.1 Recognizing human rights as a part of Union law

The first case where the ECJ recognized human rights as a part of Union law was in the judgment in the so called *Stauder*[67] case in 1969 where the ECJ stated that each Member State had discretion in choosing a method to fulfil the conditions of the secondary legislation in question.[68] In its judgment, the ECJ declared that the Treaty of Rome did indeed offer fundamental rights protection and stated that human rights were "enshrined in the general principles of Union law and protected by the Court".[69]

Before *Stauder* the ECJ seemed hesitant to expand its jurisdiction into the domain of human rights, but the Court was at the time of the *Stauder* judgment being pressured by the domestic courts of the Member States to apply human rights protection to EU law.[70] This pressure became apparent after the judgments of the ECJ in two landmark cases where the court established two of the core principles of EU law; the doctrine of direct effect and the principle of primacy. The former judgment is the case of *Van Gend en Loos*[71] where the ECJ ruled that the EU was a "new legal order of international law for the benefit of which the states have limited their sovereign rights"[72] thereby creating the doctrine of the direct effect of EU law. The latter judgment was in the case of *Costa v. Enel*[73] in 1964, where the ECJ created the doctrine of supremacy, according to which in the case of a conflict between EU law and national law, EU law will prevail.[74] Accordingly, it has been stated that the early use of human rights protection in the judgments of the ECJ was primarily a defence

[67] Case C-29/69, *Erick Stauder v. City of Ulm*, [1969], ECR 566-579
[68] Case C-29/69, *Erick Stauder v. City of Ulm*, [1969], ECR 566-579, at para 6
[69] Case C-29/69, *Erick Stauder v. City of Ulm*, [1969], ECR 566-579, at para 7
[70] Tommaso Pavone (n 28) 12
[71] Case C-26/62 *Van Gend en Loos v Nederlandse Administrative der Belastingen* [1963] ECR 1
[72] Case C-26/62 *Van Gend en Loos v Nederlandse Administrative der Belastingen* [1963] ECR 1 ,at para 3
[73] Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585
[74] Damian Chalmers, Gareth Davies, Giorgio Monti (n 4) 185-187

of the supremacy of Union law rather than the extension of the protection of the actual rights.[75]

2.3.2 Clarifying the status of human rights within the EU legal order

Even though the *Stauder* doctrine provided for recognition of human rights within the EU, these rights were still secondary to the economic freedoms. The relatively new principles of EU law; supremacy and direct effect meant that the Member States could no longer rely on their own constitutions to protect human rights. The Member States could therefore be left with a choice between refusing to apply EU law or to apply EU law by neglecting the fundamental human rights which are protected in the provisions of the national constitutions.[76] The Member States therefore feared that the level of rights protection was being lowered and these concerns were expressed in several judgments of the Courts in Germany and Italy.[77]

The year after the *Stauder* judgment, the Court had to deal with the complex case of *Internationale Handelsgesellschaft,*[78] another landmark case for human rights in the EU. Despite finding no violation of human rights in the case, the ECJ used the opportunity to highlight the importance of human rights within the EU legal order and stated as follows:

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Union.[79]

The ECJ continued with the line of reasoning from *Stauder,* claiming that respect for human rights is a principle of EU law and went even further in saying that even though this protection may originate from the Member States it has to be ensured within the framework of the EU.

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[75] Jason Coppel & Aidan O´Neill 'The European Court of Justice: Taking Rights Seriously?' [1992] CMLR 670

[76] Chalmers Damian, Davies Gareth, Monti Giorgio (n 4) 233

[77] Judgment of the German Constitutional Court, l Court, Solange I, BVerfG, 29.05.1974 - 2 BvL 52/71 & judgment of the Italian Constitutional Court judgment *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372.

[78] Case C-11/70, *Internationale Handelsgesällschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125

[79] Case C-11/70, *Internationale Handelsgesällschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, at para 4

2.3.3 A bold step forward

In the absence of an EU catalogue of human rights, the ECJ in the *Stauder* judgment claimed that human rights are none the less an integral part of EU law. In *Internationale Handelsgesellschaft* the Court stated that the human rights protection which must exist within the framework of the Union originates from the domestic constitutions of the Member States. In the year 1973 the Court took yet another bold step forward in its judgment in the *Nold*[80] case. In its judgment the ECJ repeated the arguments for the recognition of human rights within the Union from *Stauder* and *Internationale Handelsgesellschaft,* but added that in addition to the domestic constitutions of the Member States, international human rights treaties are also the source of human rights in the EU. Although the ECHR is not mentioned specifically in the judgment, there can be no doubt that the ECJ was first and foremost referring to the main treaty on human rights in Europe: the ECHR. In its judgment the ECJ stated that:

> As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Union law[81]

The *Nold* judgment was ground breaking and can be considered as the ECJ paving the way for the accession of the Union to the ECHR, which is now about to become a reality, almost forty years later. The main importance of the *Nold* judgment however lies in the fact that the ECJ for the first time claimed jurisdiction over the ECHR and has from that point been interpreting and applying the Convention when resolving disputes over EU law. It became obvious from *Stauder* and onward that the ECJ would now be taking human rights issues in consideration and this way the ECJ avoided the risk of diverging judgments of the Court in comparison with the ECtHR. There was of course still the possibility that the ECJ would be interpreting

[80]Case C-4/73 *Nold, Kohlen und Baustoffsgrohandlung v. Commission of the European Communities* [1974] ECR 491
[81]Case C-4/73 *Nold, Kohlen und Baustoffsgrohandlung v. Commission of the European Communities* [1974] ECR 491, at para 13.

the ECHR in a different way compared to the ECtHR, but the ECJ has on numerous occasions solved this dilemma by specifically referring to the case law of the ECtHR.[82] Further judicial activism on behalf of the ECJ as concerns the ECHR took place in the year 1975 in the judgment in the so called *Rutili*[83] case.

2.3.4 Widening the jurisdiction over human rights issues

In the case the French authorities tried to restrict the movements of Mr Rutili, an Italian citizen living in France, on the grounds of his political activities. This, Mr Rutili claimed, was a breach of his right to a free movement within the EU as a worker and a breach of the EU principle of non-discrimination. The French government relied on derogation from this fundamental freedom on the grounds of public policy, one of the three grounds of derogation provided for in EU law: public policy, public security and public health. The ECJ ruled that the scope of the derogation of public policy was a matter of Union law, not to be determined solely by the Member States.[84]

The Court held that:

> Member States continue to be, in principle free to determine the requirements of public policy in the light of their national needs.[85] Nevertheless, the concept of public policy must, in the community context and where, in particular, it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly, so that its scope cannot be determined unilaterally by each member state without being subject to control by the institutions of the Union[86]

Once again the ECJ widened its jurisdiction over human rights issues to include not only measures where Member States are implementing Union law but also cases where Member States are derogating from Union rules.[87]

> Taken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principles, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all

[82] Tobias Lock, 'The Future Relationship between the Two European Courts' [2009]The Law and Practice of International Courts and Tribunals 380
[83] Case C-36/75 *Rutili v Ministre de l´Intérieur* [1975] ECR 1219
[84] Sionaidh Douglas-Scott, *Constitutional Law of the European Union*, (Pearson Education 2002) 442-443
[85] Case C-36/75 *Rutili v Ministre de l´Intérieur* [1975] ECR 1219, at para 26
[86] Case C-36/75 *Rutili v Ministre de l´Intérieur* [1975] ECR 1219*,* at para 27
[87] Sionaidh Douglas-Scott, (n 86) 443

> the Member States, and in Article 2 of Protocol No 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests "In a democratic society"[88]

This is quite an important statement, since the ECJ for the first time formally recognized the provisions of the ECHR not only as a guidance as in the *Nold* judgment. The Court referred to specific articles of the ECHR as a *lex specialis* in matters which are by their nature at the discretion of Union courts and institutions.[89]

2.3.5 Quoting the ECHR for the first time

In the so called *Hauer*[90] case the ECJ referred to its judgments in the *Nold* and *Internationale Handelsgesellschaft* cases. The Court stated again that fundamental rights form an integral part of the general principles of the law to be observed and in safeguarding those rights the court draws inspiration from the constitutional traditions of the Member States. Accordingly, measures which are incompatible with human rights as recognized in the domestic constitutions and international human rights treaties, which the Member States have collaborated on or signed, can supply guidelines.[91] The ECJ once again introduced a new element in its case law with human rights aspects, when the Court directly quoted provisions of the ECHR relating to the right to property and held that:

> The right to property is guaranteed in the Union legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the protection of Human Rights.
>
> Article 1 of that Protocol provides as follows:
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law

[88] Case C-36/75 *Rutili v Ministre de l´Intérieur* [1975] ECR 1219, at para 32
[89] Konstantinos G. Margaritis 'European Union accession to the European Convention on Human Rights: an institutional "marriage"', [2011] Human rights and human welfare, working paper no. 65, <http://www.du.edu/korbel/hrhw/workingpapers/2011/65-margaritis-2011.pdf> accessed 15 January 2013
[90] Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR
[91] Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR, at para 15

Ever since the *Hauer* judgment the ECJ has repeatedly referred to the ECHR and the case law of the ECtHR. The Court has further stated the special significance of the ECHR[92]which has had an impact on the relationship between the ECJ and the ECtHR, which is described in Chapter 3. The ECJ has referred to the ECHR and the case law of the ECtHR, more than it has ever relied on the case law of any court, domestic or international and has used the case law of the ECtHR as a tool when deciding on the lawfulness of the acts or omissions of Union institutions.[93]

2.3.6 Reviewing Member States acts when applying Union law

In the development of its human rights case law he ECJ only reviewed the validity of Union acts, based on the general assumption at the time, that the competence of the ECJ was limited to Union acts and did not extend itself to the review of Member State actions.[94] The Court was soon to take this development further to review the acts of the Member States when applying Union law,[95] a development which can be described through the words of Advocate General Jacobs in the Wachauf case:

> (…) it appears to me self-evident that when acting in pursuance of powers granted under Union law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for human rights, as the Union legislator[96]

To the AG in the case, this may have appeared to be "self-evident", but it was in fact quite revolutionary. The ECJ originally introduced human rights as a principle of Union law which derived from the Member States and with the *Wachauf* judgment the Court was proclaiming an extended competence to review the acts of Member States when applying Union law instead of limiting such review to the acts of the Union institutions. With the *Wachauf* judgment the human rights protection in the EU

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[92] Cases C-46/78 & 222/88 *Hoechts AG v. Commission,* [1989] ECR 2859, at para 13 and Case C-260/89 *ERT v. DEP* [1991], at para 41

[93] Guy Harpaz, 'The European Court of Justice and its relations with the European Court of Human Rights: The Quest for enhanced reliance, coherence and legitimacy' CMLR [2009] 109

[94] Darcy S. Binder, 'The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action',[1995] No 4/95 Jean Monnet Working Paper <http://centers.law.nyu.edu/jeanmonnet/archive/papers/95/9504ind.html> accessed on February 15 2013

[95] Rick Lawson,'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg' in Rick Lawson and Matthijs de Blois (eds), *The dynamics of the protection of human rights in Europe : essays in honour of Henry G. Schermers* (Nijhoff 1994) 224

[96] Case C-5/88, *H. Wachauf v. Germany* [1989] ECR 2629

can be said to have evolved from being bound to "respect" human rights to be duty-bound to ensure these rights.[97]

2.3.7 Treaty derogations and applying the ECHR

The *Wachauf* judgment however did not clarify the extent to which actions of the Member States can be reviewed by the ECJ, in particular cases where the Member States are not applying Union law.[98] The ECJ clarified this to a certain extent in the joined cases of *Cinéthéque.*[99] The Advocate General in the case argued that any exceptions from the fundamental freedom as provided for by Article 36 of the Treaty of European Union should be interpreted in the light of the ECHR. The European Commission went even further and stated its claim that all derogations from the fundamental freedoms provided for by the basic treaties of the EU should be interpreted in the light of the ECHR. The ECJ however refused to accept the argument that ECHR standards should be applied to Member States actions, when derogating from the Treaties. Instead, the Court maintained that the French law was not in breach of Article 30, since it was a law justified by the derogation of public interest provided for by Article 36. The ECJ stated as follows:

> Although it is the duty of the Court to ensure observance of fundamental rights in the field of Union law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Union law[100]

It has been stated that the ECJ was simply afraid of the consequences of adopting the standpoint of the Advocate General and the Commission since it would mean that the Court would have to review any national measure which directly or indirectly hinders trade within the Union against the standards of the ECHR.[101] This view has however been rejected and it has been held that according to standpoint of the Advocate General and the Commission in the *Cinetheque* case, ECJ would not have

[97] Rick Lawson (n 97) 224
[98] Rick Lawson (n 97) 225
[99] Joined Cases C-60 & 61/84, Cinetheque S.A. v. Federation Nationale Des Cinemas Francais, 1985 ECR. 2605, [1986]
[100] Joined Cases C-60 & 61/84, Cinetheque S.A. v. Federation Nationale Des Cinemas Francais, 1985 ECR. 2605, [1986]
[101] Darcy S. Binder, (n 97)

to review any exception from the Treaty freedoms, only in cases where there was a "recognized ex ception to a fundamental Union prohibition".[102]

As concerns the development of human rights in the case law of the ECJ, the Court has continued to expand its human rights jurisdiction into areas of law previously at the discretion of the Member States. This judicial activism has been described as an "offensive use"[103] of human rights" opposed to the defensive use of human rights in the *Stauder* case. This development high lights just how far the ECJ has ventured in its quest for a human rights doctrine within the legal framework of the EU and how the ECHR has emerged as the prime source of fundamental rights in Europe. The development of the case law of the ECJ which created a Union version of human rights protection is still on going. The debate on whether the framework of EU law now provides for a satisfactory protection of human rights however continues and there are still several issues which raise concerns. The Union now has expanded powers in relation to Justice and Home Affairs, areas which are sensitive to human rights violations. The EU has grown geographically with the increased number of Member States and is no longer a Union consisting only of western European states with the same constitutional traditions which have recognized and protected human rights within their respective jurisdictions. It is a paradox that while the EU has been profiling itself internationally as a firm protector of human rights worldwide there are critical voices claiming that the EU does not provide a satisfactory protection of those very rights within the Union itself.

2.4 The Charter of Fundamental Rights

The Lisbon Treaty[104] was designed to implement the principles of respect for human dignity, freedom, equality and human rights into the basic founding values of the EU.[105] With its entry into force, two important human rights innovations were introduced in the legal order of the EU; the future accession to the ECHR and the binding legal force[106] of the EU Charter of Fundamental Rights,[107] which now has

[102] Joseph H.H. Weiler,'Methods of Protection: Towards a Second and Third Generation of Protection' in Antonio Cassese (ed) *EUROPEAN UNION - THE HUMAN RIGHTS CHALLENGE* (Nomos 1996)
[103] Jason Coppel & Aidan O´Neill (n 77) 669
[104] The Treaty of Lisbon [2007] OJ C 306
[105] Article 2 TEU
[106] Article 6(1) TEU

the same legal status as the basic EU Treaties.[108] The Charter was first proclimed in 2000 and subsequently adopted by the European Parliament, the Council and Commission It was later amended and readopted in 2007. The Charter imposes obligations on the EU institutions and not the Member states[109] and is based on the existing human rights *acquis* in Europe; the constitutional traditions of the Member States and the case law of the ECJ as well as the ECtHR. The scope of the CFR is enlarged and modernized compared to that of the ECHR, since the Charter not only includes traditional human rights provisions but has also introduced new rights to the category, such as the right to protection of personal data and the freedom of the arts and scientific research. Therefore, the Charter can certainly be seen as a means for „strengthening the protection of fundamental rights in the light of changes in society."[110] Since some Charter rights overlap with the ECHR while others do not, the EU and its institutions will be accountable to the ECtHR for issues concerning the ECHR and not for violations under the Charter, a system which could cause confusion and a somewhat unclear division in the jurisdiction of the two courts.[111]
The Charter is an attempt to clarify and formalize the interaction between the EU and the ECtHR and does in fact require the ECJ to rely in certain situations on the case law of the ECtHR.[112] The emergence of the Carter may have added new dimensions to human rights protection in Europe, but it is certainly not flawless. The Charter is limited in scope and only deals with matters in the context of EU law and the Member States will therefore be subject to a dual system of obligations. The new distinction introduced by the Charter between rights and principles is also unclear[113] while some rights are merely recognized in accordance with EU or domestic law and will therefore have to be defined by the national courts.[114]

The Charter has also provided the ECtHR with a new, international human rights instrument to rely on and the broader scope of the Charter compared to that of the ECHR is of value to the ECtHR. The ECtHR has been referring to the Charter from

[107] The Charter of Fundamental Rights of the European Union [2000] OJ C 36
[108] Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts', in CMLR [2007] 662.
[109] Lord Goldsmith, (n 18) 473
[110] The Charter of Fundamental Rights of the European Union, Preamble, [2000] OJ C 36
[111] Chava Eva Landau (n 15) 573
[112] Guy Harpaz, (n 95) 114
[113] Diamond Ashiagbor 'Economic and Social Rights in the European Charter of Fundamental Rights' [2004] European Human Rights Law Rev, 69
[114] Damian Chalmers, Gareth Davies and Giorgio Monti (n 4) 240

the onset and was in fact the first court ever to refer to it in a judgment.[115]The ECtHR has further relied on the Charter in order to expand the application of ECHR articles.[116]The CFR therefore has strengthened the accession process and has shown itself to provide yet another method for the EU and for the ECHR system to interact and cooperate through their respective courts, in order to achieve coherence in the protection of human rights in Europe, a project which will be finalized with an EU accession to the ECHR.

3. The relationship between the ECJ and the ECtHR

As stated in Chapter 2, the ECJ took the initiative in introducing human rights protection into the legal framework of the EU. This development was soon to direct the attention to the unresolved relationship between the ECJ and the ECtHR in several cases which were brought before each of the two courts.[117] In the aftermath of the judgment in the *Nold* case where the ECJ stated that international human rights treaties are one of the main sources of human rights law within the framework of the EU, citizens of the Member States of the EU wanted to challenge the judicial system of the EU and the Council of Europe and to explore whether the ECHR could now be applied at Union level. Attempts were made to bring cases before the ECHR against the institutions of the EU as well as against Member States of the Union for acts where EU legislation was being adopted or applied. These cases were however rejected by the ECtHR on the grounds that the jurisdiction of the Court did not extend to cases involving the EU, since the Union had not signed the Convention.[118] This caused great concern among some of the Member States of the EU, which at that time had already expressed some scepticism regarding the level of human rights protection in the EU.[119] These concerns were what prompted the original scholarly debate among academics and officials of the EU on the possibility of an EU accession to the ECHR.

[115] *Christine Goodwin v. the UK.* [GC], no. 28957/95, ECHR 2002-VI
[116] *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007 and *Micallef v. Malta* [GC], no. 17056/06, 15 October 2009
[117] Joseph Wetzel, 'Improving Fundamental Rights protection in the European Union: Resolving the conflict and confusion between the Luxembourg and Strasbourg Courts' [2003] Fordham Law Review 2823
[118] Joseph Wetzel (n 120) 2823
[119] Judgment of the German Constitutional Court, I Court, Solange I, BVerfG, 29.05.1974 - 2 BvL 52/71

3.1 Accession, the background

The first formal steps towards a Union accession to the ECHR were taken by the institutions of the EU in 1974, when the European Council decided to examine the conditions under which citizens of the Member States could be given certain rights as members of the EU. This resulted in a report[120] published in 1976 where the Commission rejected the idea of an accession and stated that the development of the protection of human rights in the EU should continue as it had done up to that point, through the case law of the ECJ. The Commission argued in favour of the current system and stated in the report that it was a flexible system by nature which was better suited to address the ever changing circumstances and needs which arise in the area of human rights law.

In 1977 the European Parliament, the European Council and the European Commission published a mutual declaration[121] where they stressed the importance these institutions place on the protection of human rights. Further did these institutions state that in performing their duties and in pursuing the aims of the Union, they would respect human rights and in particular those rights which derive from the ECHR and the domestic constitutions of the Member States. The declaration is of course only soft law and therefore has no binding effect, but even though its value was first and foremost symbolic, it was none the less an important message to the Member States and its citizens, meant to calm the sceptics and proclaim that human rights would be respected within the main institutions of the Union.

The declaration was soon to be followed by the first formal suggestion of an accession, put forward in a memorandum[122] by the European Commission in 1979. In the Memorandum, the Commission claims that the best way to protect human rights within the framework of the Union would be to draft a Union Bill of Rights. The Commission however considered the drafting of such an instrument to be unrealistic

[120] The European Commission 'The protection of fundamental rights as Community law is created and refined', (*Report submitted to the European Parliament and the Council, Bulletin of the European Communities, Supplement 5/76* February 4 1976) <http://aei.pitt.edu/5377/1/5377.pdf> accessed 28 March 2013

[121] Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights of 5 April 1977 Concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms OJ 103

[122] Memorandum on the Accession of the Communities to the European Convention on the Protection of Human Rights and Fundamental Freedoms, adopted by the Commission on 4 April 1979, Bulletin of the European Communities, Supplement 2/79, COM (79) final

at the time, because of the vast difference in the opinions of the Member States when it came to economic and social rights. The Commission stated further that:

> It should be clearly stated from the outset that accession of the European Union to the ECHR does not form an obstacle to the preparation of a special Union catalogue, nor does it prevent in any way the Court of Justice of the European Union from further developing its exemplary case law on the protection of fundamental rights[123]

In the three years which had passed since the Commission published the report on the protection of rights within the Union framework, rejecting the idea of an accession, the Commission had reconsidered radically and was now formally recommending the European Council to move towards a Union accession to the ECHR, instead of drafting a Union Bill of Rights. The Commission also stated in the report that accession was a complicated matter which needed thorough discussion.

In 1982 the Commission received a request from the European Parliament to draft a formal proposal to the Council regarding accession. The Commission was quite reluctant at that time, since the Member States were generally not in favour of an EU accession. The matter rested for three years, until 1985, when the Parliament brought it up and wondered whether the Member States would reconsider and support an accession. Again, the Commission claimed a lack of Member State support and rejected the idea. The Parliament however seemed intent on pushing the matter forward despite the lack of support and published a resolution on the possibility of an accession.[124]

In 1990 the Commission seemed to consider that the support for an accession had grown, and issued a proposal for an accession to the Council, which it did not adopt. In the endeavour of finding a resolution to the procedural and legal complications regarding the accession itself, the Commission submitted a request for an Opinion by the ECJ in 1994, which the ECJ responded to with the Opinion 2/94.[125]

[123] Memorandum (n 125), at para 2
[124] European Parliament Resolution of 18 January 1994 on Community accession to the ECHR (adopted on the basis of a report of the Committee on Legal Affairs and Citizen's rights) OJ 1994 C44/32
[125] Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I-1759

3.2 Opinion 2/94

The Opinion of the ECJ when delivered was a disappointing event for those in favour of the accession. The Commission asked the Court to determine, whether the Union was at the time of the request, competent to accede to the ECHR and if so, whether the Convention itself was in compliance with Union law.[126]

As regards the competence of the EU to accede to the ECHR, the ECJ stated that accession at that time was not possible and responded in the following manner:

> [s]uch a modification of the system for the protection of human rights in the Union, with equally fundamental institutional implications for the Union and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.[127]

The opinion has been widely discussed and debated, mainly on the grounds of the questions which the ECJ did not answer and the issues regarding accession which it did not address, many of whom were raised by the EU Member States and EU institutions in the extensive comments given on the matter. Among the issues which were not addressed by the ECJ, are the crucial issues regarding the relationship between the two courts as well and the ECHR requirement to exhaust all domestic remedies.[128] The arguments of the ECJ, stating that a Union accession demanded treaty amendments, have been criticised and it has been stated that its reasoning was unpersuasive since the changes involved in an accession are not that constitutionally significant as to require a Treaty amendment. Further, at the time, the EU had already acceded to a number of international treaties, without any prior treaty amendments.[129]

3.3 The Lisbon Treaty and Article 6

In 2002, the matter of accession was raised once again and somewhat surprisingly by the President of the ECJ at the time, Mr Gil Carlos Rodriguez Iglesias.[130] In a speech given at the opening of the judicial year of the ECHR on January 31 2002, Mr

[126] Ane Maria Roddik Christensen, *Judicial accomodation of human rights in the European Union* (1. Ed. Djoef Publishing 2007) 226
[127] Opinion 2/94, (n128), at para 35
[128] Ane Maria Roddik Christensen (n 129) 226
[129] Joseph Wetzel (n 120)
[130] Martin Kuijer (n 21) 23

Iglesias seemed to stress that an accession did not seem a realistic option at the time, not because the ECJ was reluctant, but because there was no political will at the time to make the institutional changes required for an accession. In the speech Mr Iglesias expressed himself favourably towards an accession, stating that "Although the Court of Justice has always avoided adopting a position on the desirability of acceding to the Convention… accession… would reinforce the uniformity of the system for the protection of fundamental rights in Europe.[131]

After the speech, the accession was placed on the agenda of the European leaders for the Draft Treaty establishing a Constitution for Europe[132] which was proposed in 2003. Accession was proposed in Article 1-7 of the Draft, stating that: "The Union **shall seek accession**[133] to the European Convention on Human Rights". The European Convention never became a reality, but the negotiators of the subsequent Lisbon Treaty kept the provision on accession, later to emerge as Article 6, paragraph 2 of the Treaty on European Union where it is stated even firmer than before that "The Union **shall accede**[134] to the European Convention on Human Rights".[135]

3.4 Protocol 14 and the beginning of the accession negotiations

Despite the very firm statement put forward in Article 6, the matter of accession depends not only on the EU, since the Member States of the Council of Europe need to approve the accession.[136] The Council of Europe has reacted as well and the first proposal regarding an EU accession was made by the Council´s Steering Committee on Human Rights (CDDH) in the year 2002.[137] A report was published on the technical issues which need to be addressed before an accession can become a reality. A working group was put together consisting of 14 member states, seven of those member states are EU states as well. As stated earlier, the negotiation

[131] Gil Carlos Rodríguez Iglesias 'Speech on the occasion of the opening of the judicial year Strasbourg, 31 January 2002) <http://www.echr.coe.int/NR/rdonlyres/5192043B-33AC-4803-80AC-0D99EDF57FEF/0/Annual_Report_2001.pdf> accessed 1 April 2013
[132] Draft Treaty establishing a Constitution for Europe, CONV 820/03
[133] Added emphasis by the present author
[134] Added emphasis by the present author
[135] Martin Kuijer, (n 21) 23
[136] Martin Kuijer, (n 21) 23
[137] Council of Europe, 'Technical and legal issues of a possible EU accession to the European Convention on Human Rights', CDDH(2002)010 Addendum 2, <http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/53rd_en.pdf> accessed on 20 April 2023

meetings have taken place and a final report has been delivered. Further preparations have been done by the Council of Europe. Protocol 14 has been ratified by all the Member States of the Council after a very long and complicated process. The Protocol includes an article which provides for the possibility of an EU accession. The Explanatory Report of the Article in question clearly shows that although the EU seems to consider the matter of accession as being merely formalistic, the Council of Europe seems to disagree. The wording of the Explanatory Report is rather careful with an emphasis on unresolved matters and technical issues, stating that further modifications to the Convention are necessary and that the EU is still lacking the competence to conclude an agreement on accession.

3.5 Accession made unnecessary?

During the last decade, the reliance of the ECJ on the case law of the ECtHR has changed in nature and could be described as the ECJ "following" the case law (in particular in high profile cases) of the ECtHR rather than "relying" on it.[138] This has given rise to the theory that the domestic courts of the Member States of the EU are under the obligation to give effect to the ECHR as interpreted by the ECJ for any issue which falls under EU law, meaning that the ECHR is now a part of the legal order of the EU, thus making the accession in fact, unnecessary. The judgments of the ECJ in several landmark cases have further strengthened the accession process and shown that there still exists a need to clarify the relationship between the two courts and the accession needs to be finalized.

3.5.1 The *Kadi* case

After the 9/11 attacks, the UNSC adopted a resolution,[139] bringing about economic sanctions against individuals, requiring states to freeze the assets of individuals with a connection to the Taliban. The UNSC instructed the Committee responsible for the sanctions to maintain an updated list of individuals and entities associated with Osama bin Laden whose financial assets were to be frozen. In order to implement the resolution, the Council of EU adopted the Council Regulation 881/2002.[140]

[138] Sionaidh Douglas-Scott (n 6) 650
[139] United Nations Security Council Resolution 1333, U.N. Doc. S/RES/1333 (Dec. 13, 2000)
[140] Council Regulation 881/2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods

Mr *Yassin Abdullab Kadi* and the *Al Barakkat* International Foundation, who were on the list brought actions and sought the annulment of the Regulation, claiming breaches of the right to be heard, the right to respect for property and the right to effective judicial review in the so called *Kadi* case.[141] The CFI dismissed the actions, stating that the Court could not review the contested Regulation, since the sole purpose of it was to implement the UNSC Resolution and therefore the Council was acting without discretion and the CFI could not review the measure in question. The ECJ however set aside the judgment of the CFI, annulled Council Regulation 881/2002 and held that:

> The Union judicature must . . . ensure … in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the general principles of Union law, including review of Union measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council

It is the opinion of some scholars that with the *Kadi* judgment, the ECJ changed the structure of the international legal order by stating that an objection to the validity of an UN Resolution can be based on the grounds of the legal principles of EU law. It is the opinion of the present author that the ECJ did not venture that far and was not intending to change the international legal order. By stating that the judicial review of the Court covers all Union acts, including acts with the sole purpose of implementing UNSC resolutions, the ECJ did in fact state that in the case of a conflict between obligations originating from the UN Charter and EU, human rights as "principles that form part of the very foundations of the Union legal order" – human rights within the EU would prevail. Therefore, the *Kadi* judgment symbolizes a strong commitment to human rights and the general principles of EU law, which the ECJ now seems determined to defend.

3.5.2 The *SPUC v Grogan* case

According the ECJ in the *Cinéthéque* cases, a measure will not be assessed for compliance with the Treaties, unless the activities involved are brought within the

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and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, [2002] O.J. (L 139) 9

[141] Albert Posch, 'The Kadi Case: Rethinking the Relationship between EU law and international law?' [2009] Vol15/2 The Columbia Journal of European Law Online <http://www.cjel.net/wp-content/uploads/2009/03/albertposch-the-kadi-case.pdf> accessed 29 April 2013

ambit of EU law. Once a national legislation however is within the scope of Union law, the failure of such legislation to comply with the ECHR could mean that the legislation would be found to violate Union law.[142] This was among the issues dealt with in the rather controversial ruling of the ECJ in the case of *SPUC v. Grogan*. In 1983, an amendment to the Irish Constitution made it a criminal offence to assist women in the procurement of an abortion in Ireland. A number of Irish student unions provided information to Irish women on abortion clinics abroad, information which was provided for free. In 1986, the Society for the Protection of the Unborn Child (SPUC) sought and was granted an injunction to force the students to stop providing Irish women with information on abortion clinics abroad. Before the Irish High Court, the students challenged the injunction, claiming that their right to a free expression had been breached but they also, somewhat more surprisingly, invoked EU law, arguing that the provisions which guarantee the free movement of services also apply to medical services such as lawfully provided abortions. The students further claimed that the right to receive information regarding this service is linked to the effective enjoyment of this right and therefore any acts prohibiting or limiting the right to provide such information will infringe Union law and the freedom to provide services.[143]

The SPUC on the other hand, argued that the issue fell without the area of EU law, and did not constitute a restriction on the freedom to provide services under Article 56 TFEU, since no service was being provided. The Irish Supreme Court referred the case to ECJ, which meant that the Court had to decide on a case which not only dealt with the very sensitive issue of abortion but also involved a balancing of the fundamental economic freedoms and human rights. The ECJ had in the previous land mark cases of *Stauder v. City of Ulm, Internationale Handelsgesellschaft and Nold v. Commission* (see Chapter 2), acknowledged the importance of the general principles of law and human rights in the EU legal order. Therefore, the ECJ had to rule on the compatibility of the Irish ban with Union law, including human rights provisions. There were two main issues to be resolved by the ECJ. The first one being whether to distinguish between providing information on services and the

[142] Brian Wilkinson, 'Abortion, the Irish Constitution and the EEC', in: *Public Law* [1992] 20-30.
[143] Rick Lawson 'The Irish Abortion Cases: European Limits to National Sovereignty?' in European Journal of Health Law [1994] 171-172.

actual services in question and the latter one being whether abortion services should be considered in the same light as other, less controversial services.

In its ruling, the ECJ rejected the arguments of the SPUC that abortions were immoral and should therefore not be regarded as a "service" and recognized that performing abortions was a service according to EU law. However, the court held the prohibition on abortion information to be acceptable under EU law, since the students were not cooperating with the clinics abroad, nor were they being paid for the distribution of the information. Since there was not a commercial relationship between the students and the clinics, there was not a link with Union law to be relied upon. The prohibition therefore was not overruled, since the ECJ considered that Ireland had valid reasons under Union law, on the grounds of public policy, to derogate from the right to information regarding abortion services. The ruling has been criticised as allowing for genuine human rights before the Court to be treated as merely exceptions to the fundamental market freedoms, and as such they will not be allowed to impede or restrict the economic freedoms without a justification.[144]

The judgment raised questions regarding the status of human rights within the legal order of the Union and whether the function of the internal market would always be allowed to prevail over human rights interests in the courtroom of the ECJ.

4. Gaps in the rights protection and supervision

Despite the differences in jurisdiction, function and mandate the ECJ and the ECtHR are mutually engaged in the project of European integration, although through different means. Both courts draw on the principles of law which derive from their European Member States thus making it easier to transpose the case law of the other court into their own. With the current situation and the very large number of ECHR member states, it seems to make perfect sense for the ECtHR to consider the human rights case law of the ECJ rather than to attempt the impossible in trying to find common values among the very diverse legal cultures of its Contracting States.[145] Using such a comparative approach towards the case law of the ECJ does also seem to be in line with the reasoning of the ECtHR, which on numerous

[144] D.R. Phelan 'Right to Life v Promotion of Trade in Services' in Modern Law Review [1992] 670
[145] Sionaidh Douglas-Scott (n 6) 653

occasions has referred to the Convention as being a "living instrument"[146] which has to be interpreted "dynamically". Further, in its previous case law, the ECtHR has looked for the prevailing ideas as well as the common standards and values of European society,[147] the very same ideas and values which form the basis of the EU. Up to this point, the relationship between the two courts has mainly been described through the reliance of the ECJ on the case law of the ECtHR and not the other way around. The relationship between the two courts is however far from being completely one-sided. The ECtHR has also relied on the case law of the ECJ, although the latter court´s reliance on the former one is more extensive. Human rights protection within the EU has a history of more than 40 years and that commitment has deepened and broadened with each new Treaty being adopted. However, while the EU is not a party to the ECHR, the Union cannot be held directly responsible before the Strasbourg Court and subsequently, there is a gap in the external supervision of the EU. The following chapter will look into three landmark cases of the Strasbourg court where the Court dealt with matters of EU law and the unresolved matters of accession and the relationship between the two courts.

4.1 The *Matthews* case

For any international organization, the issue of power and the division of competences is a complicated one. This certainly applies for the interplay between the EU, its institutions and the Member States.[148]

According to the traditional view of public international law, members of international organizations cannot be held responsible for acts or omissions by such organizations, since the members have a separate legal personality from that of the organization of which they are members.[149] For a long time, the relationship between the two international and supranational legal orders of the ECtHR and the EU seemed to be based on a mutual consent, where both legal orders regarded themselves as equal but very separate regimes. This relationship however changed

[146] *Tyrer v. UK* (1978) 2 EHRR 1
[147] *Handyside v UK* (1976) 1 EHRR 737
[148] Iris Canor (n 27) 1
[149] Ralph Wilde 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake' in *ILSA* Journal of International & Comparative Law[2006] 7-10

in the year 1999, when the ECtHR had to consider the issue of a possible Member State responsibility for Union law, which violated the ECHR.

In the Matthews case[150] the complaint was made against the UK and concerned the elections to the European Parliament. The violation was based on the provisions of a primary EU legislation, the Act on Direct Elections which applied to all Member States at the time. Ms Matthews was a UK citizen, living in Gibraltar which is a dependent territory of the UK. Ms Matthews tried to register to vote, but was refused on the grounds that the EU act in question did not include Gibraltar for the election. Before the ECtHR, Ms Matthews claimed the refusal violated her rights under Article 3 of Protocol 1 on free elections.[151] The ECtHR held that the UK was responsible for respecting and securing the rights in Article 3 of Protocol 1 when implementing Union law. The Matthews case was the first case in which the ECtHR held an EU Member State responsible for a violation of a Convention right.[152] The ECtHR seems to have taken into consideration the fact that primary EU law, unlike secondary law is not open to review by the ECJ: "Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Union, but is a treaty within the Union legal order." [153]

The ECtHR further stated expressly:

> The Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be "secured". Member States´ responsibility therefore continues even after such a transfer.[154]

It now had become clear, that EU Member States remain in principle bound by their obligations as Contracting States to the ECHR, and are therefore fully accountable for violations which occur in the implementation and the enforcement of EU law in their legal systems. This also reflects on the pre-accession situation of the Union. Although the contested legal act in the case was found to be violating the ECHR, the legislator, the EU, was not accountable before the ECtHR. An accession would

[150] *Matthews v. United Kingdom,* (1999) 28 EHRR 361.
[151] Francis GeoffreyJacobs and Robin C.A White, *The European Convention on Human Rights* (4th ed. Oxford University Press 2002) 30
[152] Tobias Lock 'Beyond Bosphorus : The European Court of Human Rights' in Human Rights Law Review [2010] 2
[153] *Matthews v. United Kingdom,* (1999) 28 EHRR 361, at para 33
[154] *Matthews v. United Kingdom,* (1999) 28 EHRR 361, at para 32

change this scenario and make the Union fully accountable in Strasbourg. As the Union has now become an international organization, exercising extensive powers in many different contexts and is getting involved as a major actor on the international scene, it does seem to be required that it should be held accountable in Strasbourg alongside its Member States.

4.2 The *Bosphorus* case

Among the many issues which concern the unresolved relationship between the ECtHR and the ECJ, the most debated one is probably how to resolve cases where an applicant claims that an EU measure has infringed her or his right under the ECHR. This was dealt with in the landmark case of *Bosphorus*[155] related to the situation of former Yugoslavia in the early 1990s and the sanctions imposed by the United Nations. The case was dealt with by several courts and involved litigation before Irish courts, the ECJ and finally the ECtHR in 2005.[156] In contrast to the Matthews case, the violation in the *Bosphorus* case was not found in EU primary legislation, but in a secondary regulation and could therefore be challenged before the ECJ.[157]

Bosphorus was a Turkish airline which leased two aircrafts from the national Yugoslav airline in the year 1992. The Irish authorities impounded one of these aircrafts on May 28, 1993, on the basis of the EU Regulation 990/93,[158] issued in order to implement at Union level the sanctions imposed by the UN[159] on the Federal Republic of Yugoslavia, Serbia and Montenegro (FRY). According to Article 8 of the Regulation, the Union Member States could impound aircrafts which were owned or controlled by a person or undertaking which operated in the FRY.[160] *Bosphorus* challenged the impoundment of the aircraft and went before the High Court in Dublin, claiming that the decision had infringed its fundamental right to respect for property as guaranteed by the ECHR. On June 21, 1994 the High Court overruled the

[155] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland* (2006) 42 EHRR 1
[156] Sionaidh Douglas-Scott, '*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland*, application No. 45036/98, judgment of the ECHR (Grand Chamber) of 30 June 2005' in CMLR [2006] 243
[157] Tobias Lock (n 155) 3
[158] Council Regulation (EEC) 990/93 concerning trade between the EEC and FRY [1993] O.J. 1993
[159] UNSC Resolution 820, 24 U.N. Doc S/RES/820 (April 1993)
[160] Sionaidh Douglas-Scott (n 159) 243

decision[161] on the grounds that Article 8 did not apply to the aircraft in question since The High Court held that the regulation did not apply to Bosphorus since the company had no link to the FRY. The Irish Minister for Transport, Energy and Communications, appealed to the Irish Supreme Court which referred the matter to the ECJ. In its ruling, the ECJ held that the aircraft of Bosphorus did fall within the scope of the application of the Regulation in question, but the applicant's right to respect of property had not been breached since the impounding was "justified by the importance of the aims pursued", the aim which was intended by the UN Resolution which was being implemented at Union level was to force the FRY to refrain from further violations against the Republic of Bosnia-Herzegovina. Accordingly, the ECJ rejected the claim of *Bosphorus* based on human rights while stressing that respect for fundamental rights was a condition for the lawfulness of any Union act. The ECJ stated that:

> it is settled case law that fundamental rights are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Union, and that the interference with fundamental rights invoked by *Bosphorus* is proportionate in the light of the important aims pursued by the sanctions, namely bringing about an end to the state of war and human rights violations in the relevant area.[162]

The Advocate General Jacobs in the case went quite far in stressing the importance of the provisions of the ECHR for Union law and said:

> Although The Union itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of the Treaty, and although the Convention may not be formally binding upon the Union, nevertheless for practical purposes the Convention can be regarded as part of Union law and can be invoked as such both in this Court and in national courts[163]

On March 25, 1997 *Bosphorus* lodged an application against Ireland in Strasbourg under the ECHR, claiming that the impoundment of the aircraft by the Irish authorities had breached its rights under Article 1 Protocol 1 of the Convention, which holds parties to the ECHR responsible for violations of the Convention rights which are committed within their jurisdiction. The Irish government, the EU

[161] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Minister for Transport, Energy and Communications and Others* [1994] C.M.L.R 464 H.C. (Ir.)
[162] Case C-84/95, Bosphorus, [1996] ECR I-3953, at para. 21.
[163] Case C-84/95 Bosphorus, [1996] ECR I-3953, AG Jacobs Opinion para 53.

Commission and the UK and the Italian governments contested the jurisdiction of the ECtHR in the case, since the issue at hand was the application of an EU measure while the EU was not a party to the ECHR. The applicant on the other hand argued that the implementation of the Regulation by Ireland constituted a reviewable exercise of discretion within the meaning of Article 1 ECHR and accordingly a violation of Article 1 Protocol 1 ECHR. Further, the Court held that since the impoundment was implemented by the Irish authorities on its territory after the decision of the Irish Minister for Transport, thereby fulfilling the condition of "jurisdiction" according to Article 1 of the ECHR. [164]

The ECHR held that:

> For these reasons, the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EU or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EU law and, in particular, Article 8 of Regulation 990/03.[165]

This is the main point of the judgment and is what the finding of a non-violation of Article 1 of Protocol No 1 of the ECHR by the Irish state was based on. The Court held that the Irish authorities considered themselves to be under the obligation to impound any aircraft under Article 8 of the Regulation. Further, the Court pointed out that the principle of sincere cooperation as provided by Article 4.3 TEU required the Irish State to appeal to the Supreme Court to clarify the interpretation of the Regulation. The ECHR further held that the Irish Supreme Court had not enjoyed any real discretion either, since it was under the obligation to make a reference to the ECJ and the ruling of the ECJ was then binding on the Supreme Court. As regards whether the impoundment could be deemed justified, the ECtHR stated that there must be a reasonable relationship between the means chosen and the aim to be pursued. Further, a fair balance has to be struck between the demands of a general interest and the interests of the private party in question, in this case the company of *Bosphorus.*[166]

[164] Davíð Þór Björgvinsson, 'EC law EEA Law and the ECHR', in Martin Johansson, Nils Wahl and Ulf Bernitz (eds), *Liber Amoricum In honour of Sven Norberg*, (Bruylant 2006) 90
[165] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland* (2006) 42 EHRR 1, at para 148
[166] Davíð Þór Björgvinsson (n 167) 92

4.2.1 The doctrine of "equivalent protection"

The ECtHR then stated that the Convention does not prevent the contracting parties from transferring sovereign power to international or supranational organizations.[167] The Court however stressed that contracting parties could not be absolved from their responsibilities according the Convention in areas where the parties have transferred power to international organizations such as the EU, since that would be incompatible with the purpose and the object of the Convention.[168] The Court then moved on to say, that such actions taken by Contracting States in order to meet international obligations was justified "as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[169] The doctrine of equivalent protection is however not final and absolute since the Court stated that it would have to be reviewed in the light of any relevant changes in the fundamental rights protection.

The Court found that the protection of *Bosphorus'* ECHR rights was not "manifestly deficient" and therefore the presumption of ECHR compliance had not been rebutted. Therefore, the Court found that the impoundment of the aircraft was not a violation of Article 1 of Protocol No. 1 to the ECHR. It should be considered that in its previous case law, the ECtHR has stated that according to Article 1 of the ECHR, Contracting States have to answer for any infringements of the rights and freedoms protected by the ECHR which are committed against individuals placed under their "jurisdiction". In the *Bosphorus* case it was undisputed that the contested act was implemented by the Irish authorities on its territory or "jurisdiction".[170] The conclusion however implies that the Court seems to be willing to accept that when a decision which is based on the implementation of an EU law is being disputed before the Court, the powers of the ECtHR to assess compliance with the ECHR are limited. This is due to some of the unique features of the legal order of the EU; the direct

[167] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland* (2006) 42 EHRR 1, at para 152.
[168] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland* (2006) 42 EHRR 1, at para 152
[169] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland* (2006) 42 EHRR 1, at para 155
[170] Davíð Þór Björgvinsson (n 167) 92

effect of EU legislation in the domestic law of the Member States, the general applicability of EU Regulations without specific implementation in the national system, the existence of an independent enforcement mechanism with the binding nature of preliminary rulings and the lack of discretion of the Member States when enforcing and interpreting EU law. [171] The European Commission acted as an intervener in the case and in its oral argument in the case argued that if the ECtHR expanded its jurisdiction to include the scrutiny of ordinary Union acts, it would endanger the future accession of the EU, that statement can possibly have had an impact on the judgment and the approach of the Court.[172]

Six of the *Bosphorus* judges gave a joint concurring opinion, even if they agreed with the finding of the majority of there being no violation of Article 1 of Protocol No 1 in the case. The concurring opinion however disagrees with the approach of the majority in presuming that the protection of human rights in the EU was equivalent to that of the ECHR. The concurring opinion questioned the method and the fact that there was no concrete examination of whether the chosen means were proportionate to the aim being pursued and there was no consideration of whether a fair balance was reached between the general interest at stake and the interests of *Bosphorus*. The judges further question the finding itself and whether the EU protection of human rights could be considered equivalent to that of offered by the ECHR, when considering the strict standing rules of the ECJ and the limited access of individuals. [173] The judges specifically referred to the preliminary ruling procedure which they described as being merely an "internal review" which in their view could not replace the external supervision of the ECtHR.[174] The judges stated that the danger of double standards needs to be avoided and different ECHR obligations for different Contracting Parties, depending on whether they have acceded to other international conventions or not would lead to inequality between the Contracting States, which would "run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights". The issue of standing before the Union courts will be dealt with further in Chapter 5.

[171] Davíð Þór page Björgvinsson (n 167) 93
[172] Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: fundamental Rights and Blurred Boundaries in Europe' in Human Rights Law Review [2006] 87
[173] Davíð Þór Björgvinsson, (n 167) 97
[174] Kathrin Kuhnert, 'Bosphorus – Double standards in European human rights protection?' in UTR. L. REV. [2006] 185

4.2.2 *Bosphorus* considered in the light of an accession

Some scholars have considered the Bosphorus decision in the light of an EU accession to the ECHR and the potentially overlapping jurisdiction between the ECtHR and the ECJ. The Matthews case confirmed that EU member states are generally responsible for human rights violations caused by provisions of EU law, that presumption was further defined in the Bosphorus decision which has been seen as an attempt on behalf of the ECtHR to accommodate the autonomy of EU law with the Matthews doctrine, with the aim of enabling the future accession of the EU.[175]

The Bosphorus decision however left a number of questions still unanswered. The main question was whether the Bosphorus presumption would apply in cases where an EU institution had acted solely but there was no action or omission by a Member State. Further, it was also uncertain when a protection granted by an international organization could be considered to be "manifestly deficient" and how the ECtHR would examine that in each case.[176] Even before the decision of the ECtHR in *Bosphorus* was presented, it was obvious that the lack of a definition of a "manifestly deficient" protection of human rights was bound to create a legal uncertainty. This is clearly indicated in the decision itself because even though the final decision was unanimous, there were seven judges who provided concurring opinions, all of them trying to demonstrate the legal shortcomings which could fall under the definition of a "manifestly deficient" protection of human rights.[177]

4.3 The *Connolly* case

The *Bosphorus* case clarified that the Member States of the EU can be held responsible under the ECHR even if they are merely implementing EU measures and have no discretion in doing so. Even after the *Bosphorus* judgment, certain questions still remained unanswered as regards the responsibility of the EU Member States for Union acts and how far reaching it is. In particular the issue of whether the Member States can be held responsible for Union actions which are not designed to be executed or implemented by the Member States but are solely dealt with by the Union institutions, was unresolved.

[175] Cathryn Costello, (n 176)
[176] Tobias Lock, (n) 4
[177] Kathrin Kuhnert, (n 178) 185

Another question left unanswered was concerning the range of EU actions which could be scrutinized by the ECtHR and which areas which would fall exclusively within the area of internal EU affairs. The ECtHR dealt with these issues in the case of Mr *Connolly,* an employee of the European Commission who challenged a disciplinary procedure which resulted in his suspension from work.[178] Mr Connolly's case[179] went before the Court of First Instance after he instigated labour proceedings challenging the dismissal, and on appeal before the ECJ. Mr Connolly requested to submit written observations to be added to the Opinion of the AG, but was denied by the ECJ. Mr Connolly argued that the denial was a breach of his right to a fair trial which was guaranteed by the provisions of Article 6 of the ECHR. The ECtHR rejected the admissibility of the applicant on the grounds that the alleged violation did not occur within the jurisdiction of a Member State (as in the *Bosphorus* case) and therefore such a responsibility did not exist.[180] The Court stated that the complaint was directed against the decisions by the courts of the EU and that the respondent states at no time directly or indirectly intervened.[181] The Court therefore took a firm stand and clarified that it would not consider cases where there was no action by a Contracting State. When a Contracting state is implementing an act by an international organization such as in the Bosphorus case, but a reference by a domestic court would also be looked upon as an action by a Contracting state.[182] In cases where only the international organization in question has acted and none of the Contracting states have acted, a case against the Contracting state in question will not be admissible before the ECtHR. Accordingly, the judgment of the ECtHR in the Connolly case was obviously designed to clarify the *Bosphorus* doctrine. The Connolly judgment clearly demonstrates that there is a gap in the human rights protection in the EU. An accession of the EU to the ECHR would close this gap by allowing applicants in Mr Connolly's position to hold the EU directly responsible.

[178] Christina Eckes, 'EU Autonomy and Decisions of (Quasi-) Judicial Bodies: How Much Differentness is Needed?' [2011] (Amsterdam Law School Research Paper No. 2011-50; Amsterdam Centre for European Law and Governance Research Paper No. 2011-10. December 21, 2011). <http://ssrn.com/abstract=1975250 or http://dx.doi.org/10.2139/ssrn.1975250> accessed on 12 April 2013

[179] *Connolly v. 15 Member States of the European Union* (App no 73274/01) (Section V), 9 December 2008.

[180] Tobias Lock, 'EU Accession to the ECHR: Consequences for the European Court of Justice' <http://euce.org/eusa/2011/papers/1b_lock.pdf> accessed on April 29 2013, 6

[181] Tobias Lock (n 184) 6

[182] Tobias Lock (n 184) 8

5. The *Locus standi* of private parties in Europe – Justice for all?

The protection of human rights within any legal order depends on two basic foundations; the existence of legal provisions designed to protect such rights and more importantly the access to justice through a court which is competent to monitor compliance and has a proper mechanism for the enforcement of judgments.[183]

The debate on the possibility of an EU accession has often focused on the somewhat limited *locus standi* of individuals within the EU legal order and the question of the democratic legitimacy of the Union. Since the institutional system of the EU only allows for one main institution to be directly elected, namely the European Parliament, it has been stated that there exists a significant democratic deficit within the Union, which requires an effective system of judicial review designed to control the power of the Union institutions in order to prevent the misuse thereof.[184] Allowing for more private parties to d irectly challenge the legality of Union acts would perhaps not bridge the deficit but could certainly reduce it. The system at present means that national judges have no power in ruling that EU measures are invalid, but merely have the power to issue provisional measures

One of the main arguments in favour of an accession is that it would open up the possibility of remedies for private parties within the EU which are not available under the current system. It has further been claimed that in comparison to the access to justice provided for by the EU legal order, Article 34 ECHR provides for a generous definition of the conditions for anyone claiming to have suffered a violation of a right or a freedom which is recognized and protected by the ECHR. Accordingly, an accession would provide individuals with the access to a competent court, the ECtHR, in order to challenge any act adopted by the EU to determine whether that particular act has in fact infringed the rights of that particular individual or legal person.[185]

[183] Ane Maria Roddik Christensen (n 129) 76
[184] Megan Campbell, 'The Democratic Deficit in the European Union' (*Claremont-UC Undergraduate Research Conference on the European Union*: Vol. 2009) <http://scholarship.claremont.edu/urceu/vol2009/iss1/5> accessed on 12 January 2013
[185] Olivier De Schutter 'ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS' <http://www.statewatch.org/news/2007/sep/decchutte-contributin-eu-echr.pdf> accessed on 15 March 2013

5.1 Access to justice according to the ECHR

The ECHR could be described as the most recognized international human rights legal instruments in the world today. The system is however not without flaws and the accession of the EU is bound to present new challenges. As stated earlier the Convention reflects certain rights and freedoms which are found in the UDHR. However, compared to the articles of the UDHR, the Convention has a broader scope of human rights and allows for more applications by private parties, since Article 34 provides for the possibility of applications from non-governmental organizations (NGOs) to be considered as individual applications, since the requirements for individual applicants are the same, regardless of whether the applicant in question is an individual, belongs to a group of individuals or is an NGO.[186]

The ECtHR accepts individual applications which are filed within a period of six months of the final judgment of a Contracting state, for alleged violations of the Convention or one of its Protocols which have occurred within the jurisdiction of that particular state. The Court has innovatively interpreted the concept of “jurisdiction” and has clarified and expanded the concept. This can clearly be seen in cases where the ECtHR has applied the ECtHR in order to protect non-European refugees and asylum-seeker being deported to countries where they risk being tortured.[187]

For an application to be accepted, there are several criteria to be met. Even if an application fulfils the basic criteria, the issue of admission remains open, since the Court may find any application inadmissible at any time during the proceedings.[188]

An application will not be accepted unless the applicant has exhausted all available remedies within the concerned state, or at least has attempted to do so, but been denied access to the applicable domestic remedies.[189] This requirement is in line with the principle rule in international law that the state being accused must have had the opportunity to address and remedy the complaint on a national level before it can be made responsible before an international court. The requirement to exhaust all

[186] European Convention on Human Rights and Fundamental Freedoms, Article 34.
[187] *Chahal v United Kingdom* Application No 70/1995/576/662 (1996) ECHR Series A No 697 and *Saadi v Italy* Application No 37201/06 ECHR (February 28 2008
[188] European Convention on Human Rights and Fundamental Freedoms, Article 35 4
[189] European Convention on Human Rights and Fundamental Freedoms, Article 35.

domestic remedies is also in accordance with the role of the ECtHR as being subsidiary to the national judicial systems.[190]

Further, the individual applicant must claim to have been personally and directly the victim of an alleged violation of the Convention. Accordingly, an individual cannot file an application which is based on the notion that a contracting state *may* be violating a right protected by the ECHR. General complaints about a particular domestic law would further not be accepted, since the condition of being personally and directly a victim of an alleged violation would not be fulfilled.[191] An application cannot be filed on behalf of others, unless the individual applicant is acting as the official representative for a group of individuals which all fulfil the condition of being directly and personally victims of the alleged violation. The ECtHR has broadened and deepened the concept of being a "victim" to be able to address systematic and large scale human rights violations and has thereby provided remedies for thousands of people who have been the victims of torture, disappearances and arbitrary killings or who would have been the victims of such acts if the Court had not acted. The judgments of the Court have prevented further acts of that kind by informing the world of the fact that they have occurred which has prompted the civil society to act by adding political pressure and demanding justice and reforms.[192]

The ECtHR has from its early days recognized the right to an individual petition, having expressly stated that it is "one of the keystones in the machinery for the enforcement of the protected rights under the Convention".[193] The original provision providing for such a right, the former Article 25 was originally constructed as an optional clause but with the entry into force of Protocol No. 11 in November 1998, the right of individual petition became mandatory to all Contracting parties.[194] The right to an individual petition is fiercely protected and guarded by the ECtHR and the Court has expanded and defined the concept and clarified the level of obligation it imposes on the Contracting States of the Convention. The Court has stated that the Contracting States are required not to hinder the effective exercise of the right to pursue a complaint before the ECtHR and must refrain from "any interference".

[190] Kevin Boyle The European Experience, 'The European Convention on Human Rights' in Victoria University of Wellington Law Review, [2009], 171
[191] Michael R. Ribble (n 25) 214
[192] Kevin Boyle (n 194) 172
[193] *Klass and Others versus Federal Republic of Germany,* (1979-80) 2 EHRR 214
[194] Protocol No 11 to the European Convention on Human Rights, E.T.S. 155

Article 38 further allows the ECtHR to examine a case and when undertaking such an investigation, the Contracting States are obliged to cooperate and must submit any information which is crucial in order to establish the facts of the case.[195]

The right of an individual petition under the ECtHR which is exercised daily by individuals and organizations alike has made the rights in the ECHR become effective, by providing a remedy for those who have been denied justice at a national level. This has firmly established the ECtHR as the most successful system in the world, providing for the protection of human rights. What could be described as the backside of the success story is the fact that providing direct access to justice for over 800 million citizens has shown itself to be an enormous challenge and the backlog of cases is now up to the staggering number of 140.000.[196] This threatens the very foundation of the Court and the right to an individual petition is losing some of its value because applications which take years to be processed are simply ineffective and will never have the required deterrent effect on violating states.

The backlog can partly be explained by the enlargement of Council of Europe and new human rights issues which have become before the Court originating from the new Contracting States in Central and East Europe. This has resulted in a massive number of applications. Some of these cases concern serious human rights issues while others concern procedural issues such as the access to justice. These nations have little experience in applying international human rights law within their respective jurisdictions and have been struggling with the concept of rule of law. However, there has also been an increase in the number of applications originating from states which are not new to the Convention system. This is probably due to the publicity surrounding certain ECtHR judgments and is indicative of the fact the human rights awareness in Europe has grown and further shows that the citizens of Europe recognize and acknowledge the part the ECtHR plays in making sure that human rights are respected by European governments and institutions.[197]

[195] *Baysayeva v. Russia* App. no 74237/01 (ECHR 5 April 2007) at para 163 and *Bitiyeva and X v. Russia* App. no 57953/00 and 37392/03 (ECHR 21 June 2007) at para 163
[196] The European Court of Human Rights (*Annual Report for 2012 of the Registry of the ECtHR*), <http://www.echr.coe.int/NR/rdonlyres/9A8CE219-E94F-47AE-983C-B4F6E4FCE03C/0/Annual_report_2012_ENG.pdf>accessed on 1 May 2013, 8
[197] Marie-Aude Beernaert, 'Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price?' [2004] European Human Rights Law Review, 1

Another issue which has contributed to the backlog are the many repetitive cases. These cases do not contribute anything new to the jurisprudence of the Court. It has to be kept in mind that the ECtHR has the very important task of supervising that the Contracting States operate their administrative and legal systems in such a way that human rights are protected and upheld. The principle of subsidiarity further means that the ECtHR has a secondary role to that of the national courts and the Convention is first and foremost being implemented in the domestic legal systems. Therefore it is obvious, that the overburdening of the ECtHR is mainly because not enough is being done at the domestic level and the capacity of the national authorities to protect ECHR rights or at least to offer an effective remedy for human rights complaints is simply inadequate. Accordingly, no reforms of the ECHR system will ever be able to solve the backlog issue unless the implementation of the ECHR is the Contracting States is strengthened. This means preventing violations from occurring in the first place by making sure that all legal practitioners and public officials are fully aware of the protection provided to individuals by the ECHR. Further, it requires the verification of the compatibility of any administrative practice or national legislation with the ECHR, before entering into force.[198] It has to be considered that even though the backlog is of course a major challenge, it is just a practical problem which requires a practical solution and more funds to the system of the ECtHR.

On June 1 2010, Protocol No. 14 to the ECHR, designed to guarantee the long-term efficiency of the Court by filtering and processing applications, entered into force.[199] Among the changes brought about by the Protocol is an amendment of Article 35 para. 3 which now states that: “The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the applicant has not suffered a “significant disadvantage”, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits. It is not entirely clear what the concept of “significant disadvantage” covers and the Court has yet to fully clarify that through its case law. It is clear though that the Court is attempting to address the problem of the backlog of cases and is trying to move from being what could be described as a “small claims court”

[198] Marie-Aude Beernaert, (n 201) 2
[199] Protocol 14 to the European Convention on Human Rights, CETS No. 194

for the whole of Europe to become more of a constitutional court, concerning itself with the principles and standards of human rights. The effects this will have on individual petitions remains to be seen.

The backlog could of course be dealt with by adopting even stricter rules for admission where the Court would only be dealing with legal principle issues and would not be dealing with the merits and facts of individual cases. This would however reduce the access of individuals to ECtHR and they would be denied the very rights protected by the ECHR.

It should be kept in mind that the mere existence of individual applications before a court is not sufficient to guarantee the protection of rights. The available remedies need to offer a real and effective judicial protection within a reasonable time in order to have a deterrent effect on the party responsible for the violation. Unless the backlog is dealt with promptly and effectively, the ECtHR will not be able to provide individuals with that protection.

5.2 Judicial review within the EU

The power of judicial review within the legal framework of the EU is held by two independent judicial bodies, entrusted with the task of reviewing all administrative and legislative acts of the Union institutions[200] the ECJ and the CFI.

Judicial review within the legal order of the EU is mainly based on two provisions, Article 263 and 267 TFEU. According to Article 267, the ECJ has the competence to rule on the validity of administrative and legislative acts of the institutions. The normal procedure in an Article 267 case starts with a procedure before a national court, where a private party challenges a national measure implementing an EU act. The national court then refers the question of whether the EU measure in question is lawful or not, to the ECJ.[201] The national courts are therefore a part of the judicial review within the EU and are duty bound to allow individuals within their own legal order to challenge EU acts before them.[202] The national courts are then also considered to be under the obligation to refer the matter in question to the Union

[200]Ewa Biernat, 'The *Locus Standi* of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community' (*Jean Monnet Working Paper no. 12/03*) <http://222.jeanmonnetprogram.org/papers/03/031201.html> accessed 23 April 2013
[201] Damian Chalmers, Gareth Davies, Giorgio Monti (n 4) 158-159
[202]Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, at para 32.

courts, according to the principle of sincere cooperation. There is however no provision explicitly requiring the national courts to do so and there are no sanctions for the failure to refer do so. The ECJ will not take action in order to grant access to private parties which have been denied the right by a national court. The access of private parties through the preliminary procedure as described above is further limited by the fact that it cannot be used if a party had standing, but failed to challenge an act within the appropriate time limit[203] which is two months, according to Article 263(5) TFEU.

The main issue concerning the process is that the applicant has no saying in whether a reference is made to the ECJ by a domestic court or not, or if so; which measures are referred and on what grounds. The national courts may further refuse to refer a question of the validity of a certain EU measure. The courts might even error in their assessment of any given EU measure and decline to refer it because of that. Should a reference however be made, the domestic court in question formulates the question itself, the applicant has no influence on that and therefore the claims of the applicant might simply be redefined or limited. As a result, private parties are dependent upon the domestic courts to a high degree and may in some instances be forced to willingly not abide by EU rules in order to obtain an implementing act by a national authority which could then be challenged before a national court, with the aim of having the case referred to the ECJ.

5.2.1 Privileged and non-privileged applicants before Union Courts

Article 263(1) TFEU provides the so-called privileged applicants, the Commission, the Council and the European Parliament with the general and unrestrained power to seek judicial review of any act of an EU institution. By contrast, private parties when seeking judicial review of EU acts are referred to as non-privileged applicants, according to the provisions of Article 263(4) TFEU, which provides that any natural or legal person may challenge an EU act, provided it is either addressed directly to them or is of a direct and individual concern to them.[204] Accordingly, the threshold for the *locus standi* of private parties before the Union courts is rather high and there are several conditions to be met. Firstly, any applicant needs to by directly concerned by

[203] Damian Chalmers, Gareth Davies, Giorgio Monti (n 4) 159-160
[204] Case T-29/03 *BUPA and Others v Commission* [2008] ECR 207, at para 81.

the EU act in question, there has to exist a direct link between the act being challenged and the damage inflicted upon the applicant. Further, the act must have a direct and adverse effect on the legal situation of the applicant. This means that if some discretion is left to the Member States in implementing the act in question, the applicant might not be able to claim that the damage suffered to his legal interests, has the direct link to an EU act as required by Article 263(4).[205] Therefore, the already high threshold for private parties wishing to challenge EU acts before the Union courts is raised even further.

Even if an applicant is directly affected by an EU act which has had an effect on his legal situation, the condition of individual concern also needs to be fulfilled, the so called *Plaumann* formula. In the so called *Plaumann*[206] case, the leading case on the criteria of individual concern, the German authorities wished to suspend customs duty on the importation of clementine but were denied the permission to do so by the Commission. Mr *Plaumann*, a German clementine importer tried to challenge the Decision and maintained that he was individually concerned by the decision. The ECJ held that:

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementine that is to say, by reason of a commercial activity which may at any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.

From the above it is obvious that the *Plaumann* formula is quite strict when applied by the ECJ, since a decision concerning the financial aspects of the importation of clementine in Germany should be considered as not being of an individual concern to a person who had as his sole livelihood the importation of clementine into Germany. Mr Plaumann was obviously concerned by the decision since it had an impact on the financial outcome of his business, but according to the ECJ his

[205] Chalmers Damian, Davies Gareth, Monti Giorgio (n 4) 415-416
[206] Case 25/62 *Plaumann & Co. v Commission* [1963] ECR 95

circumstances were not such as to differentiate him from all other persons. Interpreted literally, the judgment entails that any given person might at any time take up the occupation of importing fruit and therefore anyone could potentially by affected by the Decision in question, which means that Mr *Plaumann* was in no way differentiated from every other person residing in Germany.

It is the opinion of the present author that the interpretation of the ECJ was simply too strict and the Courts application of the individual concern criteria was too narrow. The date of the measure in question should have been a major concern and instead of considering the whole of the population of EUs largest state as potential fruit importers, the Court should have considered the number of persons who were importing clementine at the time of the Decision as having individual concern and thus being differentiated from all other persons in Germany.

The somewhat infamous Plaumann judgment has been criticized and used to demonstrate the difficulties private parties face when challenging EU measures. The original provision providing for *locus standi* of private parties, Article 230 EC was consequently amended with the entry into force of the Treaty of Lisbon. Certain scholars have claimed that with that amendment, the *locus standi* of private parties was improved and now satisfies the requirements of judicial protection.

According to the original wording of Article 230 EC, it provided that;

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them.

As amended by the Lisbon Treaty, Article 263 TFEU now provides that:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and **against a regulatory act which is of direct concern to them and does not entail implementing measures.**[207]

[207] The added emphasis is by the present author

5.2.2 The system being challenged from within

The EU courts have been criticised for their strict interpretation of the conditions for the *locus standi* of private parties and many a scholar has suggested an accession to the ECHR as a means of broadening the concept to increase the access of private parties to the Union courts. There are critical voices which claim that the amendment of Article 236 and the broadening of the *Plaumann* formula have indeed provided for a better access to justice. However, there is no definition to be found as to which acts are to be considered as "regulatory" according to Article 236, not in the Article itself or anywhere else in the EU Treaties. The formulation of Article 236 has been criticized and it has been stated that a certain terminological confusion is unavoidable, since the EU Treaties only refer to acts as being legislative, non-legislative or not binding, but this is the only Treaty article which refers to EU acts as being "regulatory".[208] It has to be emphasized that the principle of effective judicial protection does not only require the access to justice, but also requires that information regarding available remedies should be accessible. It follows that when the rights and remedies in question are those of private parties, the provisions in question should be accessible and clear, and Article 236 cannot be said to fulfil those conditions.

As regards the term "regulatory" and which EU acts are to be considered as such, the General Court provided some clues in a recent Order from 2011.[209] The Court stated that:

> It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also
>
> (i) against a legislative or regulatory act of general application which is of direct and individual concern to them and

[208] House of Lords, Select Committee on the European Union (*The Future Role of the European Court of Justice*) <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/47/47we01.htm> accessed on 27 January 2013
[209] T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*

(ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures

The current situation therefore is that the condition of the individual and direct concern still needs to be fulfilled if an applicant wishes to challenge legislative or regulatory measures. Applicants wishing to challenge any other measure of a general nature however do not have to satisfy the *Plaumann* criteria and therefore it can certainly be stated that the rules on private party *locus standi* have been somewhat broadened, depending on the type of measure being challenged. However, the reformed provision cannot be said to have provided a real remedy for the gap which still exist in the effective judicial protection and it does not address the need for reforming the conditions for direct and individual concern.

Since the group of non-privileged applicants before the Union courts consists of both legal and natural persons, a comparison between the two groups is called for, in order to conclude whether individuals are in fact facing difficulties when challenging the validity of Union measures and acts. Statistical data from the Union courts show that legal persons account for the majority of actions brought before the CFI. During the period of the years 2001 – 2005 a total 87% of the actions were brought by legal persons. Not only are legal persons lodging a majority of the actions, but are also more likely to succeed in their pursuit compared to natural persons, since the success rate of legal persons was 35% and considerably higher compared to that of natural persons which was only 10%.[210]

Looking at the statistics the conclusion is inevitably that it is quite difficult for individuals to succeed when trying to challenge the validity of a Union measure, although it has to be considered that the available statistics are only from a period of five years and are therefore not conclusive but should be looked upon as an indication. It also has to be taken into account that although the EU now has activities which touch upon most areas in the daily lives of the citizens of the Member States, cases are more likely to be brought before the Union courts

[210] Takis Tridimas and Gabriel Gari, *Winners and losers in Luxembourg: A statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)*, (Sweet & Maxwell 2010) 34

which concern the four freedoms which in part explains why the majority of private party applicants are in fact legal persons. Even so, it appears that access to justice for individuals within the legal framework of the EU still leaves a lot be desired and it has been argued that

> "it flies in the face of the simplest notions of procedural fairness and of justice to deny judicial review to plaintiffs who often do not have other means of self-defence while granting the right to litigate to parties who enjoy powerful alternatives means of influencing Union law making".[211]

5.2.3 The UPA case and the Opinion of AG Jacobs

The Union courts have responded to the criticism raised against their strict interpretation of Article 236 and have made some attempts to reform the system from within. The first initiative came from Advocate General Jacobs in his Opinion in the case of *UPA*[212] from 1999. The applicant, *UPA*, was a trade association which represented the interests of small agricultural businesses in Spain which challenged a Council regulation concerning the Union market for olive oil before the CFI. The CFI applied the *Plaumann* test and held the action inadmissible due to the lack of individual concern. The applicant appealed the Order of the CFI to the ECJ on the grounds that the measure being challenged was a regulation which meant that it was therefore directly applicable without an implementation in all the Member States. The applicant therefore did not have the possibility of a standing before the ECJ through the preliminary ruling procedure. The applicant further argued that if the ECJ would confirm the ruling of the CFI of an inadmissible action due to lack of individual concern, then the association would be without a legal remedy and therefore denied effective judicial protection.[213]

In his Opinion,[214] AG Jacobs listed several objections to the rules on standing and suggested reforms claiming that the right to judicial access in the legal order of the Union is compromised due to the limitations in private party standing. AG Jacobs proposed a solution, designed to address the shortcomings of the current

[211] Hjalte Rasmussen, *European Court of Justice,(* GadJura Copenhagen 1998) 175.
[212] C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR 1-6677
[213] C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR 1-6677, at para 18
[214] The Opinion of AG Jacobs in C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR 1-6677

system, a new interpretation of the concept of individual concern. He suggested that applicants should only have to prove that the Union measure being contested, has or is likely to have a substantial adverse effect on his interests.[215] AG Jacobs further supported his suggestion by stating that it did not go against the existing case law of the Union courts, since that very case law was unstable, too diverse and complex and incoherent with the case law of the Member States. AG Jacobs also rejected the idea that relaxed conditions for standing would not lead to an overload of cases before the ECJ, since the General Court, would be accepting most of the cases brought. Also, Jacobs claims that the strict time limit to bring annulment procedures (two months) and the unchanged condition of direct concern would serve to limit the number of cases being brought.

Further development in this area was to take place in the court room of the CFI while the *UPA* appeal case before the ECJ was still pending and before the Court could act on the suggestion of AG Jacobs in his Opinion. Once again the matter of the *locus standi* of private parties and the incomplete judicial protection these parties enjoy was raised before a Union court, this time in the case of *Jégo-Quére*.[216] In the case a French fishing company challenged a Commission regulation regarding the rules on fishing nets in the EU. It was obvious that the company did not fulfil the requirements of the *Plaumann* test of direct and individual concern and would therefore according to previous case law be denied standing before the CFI. As in the case of *UPA*, there were no domestic implementing measures which meant the company in question had no legal remedies before the national courts. In its Order, the CFI followed the Opinion of AG Jacobs in *UPA,* claiming that the test of individual concern simply had to be less strict in order to provide for an effective judicial protection of private party interests in the legal order of the Union.[217] The CFI further developed this concept and stated that an individual should be considered to be individually concerned "if the provision in question affects his legal position in a definite and immediate

[215] N Head, 'Court of Justice reaffirms rules on individual actions for annulment' [2002] 106 EU Focus 2.
[216] Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365
[217] A Albors-Llorens *Private parties in European Community Law. Challenging Community Measures*. (Clarendon Press, Oxford, 1996) 83

manner by restricting his rights or imposing obligations on him".[218] The company was considered to have satisfied this test of individual concern and was therefore granted standing before the CFI.[219]

The ECJ however rejected the proposals of AG Jacobs and refused to accept the reasoning of the CFI and chose not to reconsider its previous case on the standing of private applicants concerning generally applicable EU acts. The Court argued[220] that the EU treaties provide for a complete system of judicial remedies, which allow for the review of all EU acts through either direct action or through the preliminary reference procedure. As stated earlier, this does not apply for directly applicable EU acts which do not require a national implementation. Further, the ECJ stated that the Member States are responsible for the proper functioning of the system and therefore are also responsible for any reforms which are called for. As regards the need for reforms of the system the Court held that:

> it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles…it is for the Member States, if necessary…to reform the system currently in force[221]

Further, the judges do not deny that there is a gap in the judicial protection but they do seem to consider that the Member States are responsible for the existence of such a gap and have chosen not to take action to bridge that gap:

> "[I]t is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. In that context, in accordance with the principle of sincere cooperation…national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the Courts the legality of any decision or other

[218] Case T-177/01, *Jégo-Quéré v Commission* [2002] ECR II-2365, para 51.
[219] Mariolina Eliantonio, 'Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?' [2010] 3 Journal of Politics and Law <http://www.ccsenet.org/journal/index.php/jpl/article/view/7194> accessed 2 September 2012.
[220] Dominik Hanf, 'Kicking the ball into the Member States' field: the Court's response to Jégo-Quéré (Case C-50/00 P Unión de Pequeños Agricultores, Judgment of 25 July 2002)', [2002] 3 German Law Journal <http://www.germanlawjournal.com/index.php?pageID=11&artID=171> accessed 3 September 2012
[221] Case C-50/00 P, *Unión de Pequen˜os Agricultores v Council* (UPA) [2002] ECR I-6677, para 45

> national measure relative to the application to them of a Union act of general application[222]

The Court quite firmly refused to admit an exception to its traditionally narrow interpretation of Article 236 for EU measures with direct applicability, which cannot be challenged directly by individuals before national courts,[223] claiming that:

> [s]uch an interpretation would require the Union Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Union measures.[224]

The end result was that the attempts of AG Jacobs and the General Court were in vain and the ECJ refused to reconsider its previous case law on the *locus standi* of private parties. The ECJ has since delivered yet another judgment where it places the responsibility of providing judicial access on the Member States. In a judgment, delivered on March 13 2007 in the *Unibet* [225] case, the ECJ noted that:

> Although the EU Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Union Court, it was not intended to create new remedies in the national courts to ensure the observance of Union law other than those already laid down by national law...Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Union law nevertheless requires that the national legislation does not undermine the right to effective judicial protection...It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right

By this statement, the ECJ is in fact claiming that Union measures should rather be challenged through indirect actions in national courts as opposed to direct legal remedies before the Union Courts.[226] This could certainly be questioned as being

[222] Case C-50/00 P, *Unión de Pequen˜os Agricultores v Council* (UPA) [2002] ECR I-6677, para 41 & 42
[223] Dominik Hanf (n 238)
[224] Case C-50/00 P, *Unión de Pequen˜os Agricultores v Council* (UPA) [2002] ECR I-6677, para 43
[225] Case C-432/05 [2007] *Unibet v. Justitiekanslern ECR I 2271*
[226] Mariolina Eliantonio, 'Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?' [2010] 3 Journal of Politics and Law <http://www.ccsenet.org/journal/index.php/jpl/article/view/7194> accessed 2 September 2012.

contrary to the principle of judicial efficiency[227] although there are undeniable advantages with such a system, since it would reduce the workload of the ECJ and would mean that national judges would be more involved in the application and interpretation of EU law, in accordance with the principle of subsidiarity.[228] This is of course an echo of the statement of the ECJ which the court has repeated on several occasions, namely that the right to effective judicial protection is a general principle of Union law stemming from the constitutional traditions which the Member States have in common. However, the Member States have different civil and procedural rules which may derive from different legal backgrounds and therefore it is the opinion of the present author that it should not be left to the domestic courts to provide for remedies for private parties, wishing to challenge EU measures. It is quite unlikely that all the Member States would adopt similar rules and provide an equal access for applicants to the national courts when challenging EU measures. Therefore, applicants would perhaps be provided with better access in some instances, but applicants would not be equal and the degree of access would vary depending on the national law in question.[229]

It follows therefore, that the only way to guarantee the judicial protection of private parties within the legal framework of the EU it through a uniform application of standing rules and the conditions not only need to be relaxed but they also need to be clarified. Easy access to remedies which allow for private parties to challenge EU measures which affect them in an adverse way is the only way to achieve direct justice, thus making the EU rules and principles on human rights issues relevant for the citizens of the Union. Since the ECJ has proven to be unwilling to reconsider its previous case law to any extent, the *locus standi* of private parties still remains rather limited in scope and judicial protection within the legal framework of the EU is therefore in jeopardy. As stated by AG Jacobs in his Opinion in the *UPA* case, the applicant has no saying in whether a reference is made to the ECJ by a domestic

[227] F. De Witte 'The European Judiciary after Lisbon' [2008] 15 Maastricht Journal of European and Comparative Law 1, 52.
[228] L Heffernan, 'Effective Judicial Remedies: The Limits of Direct and Indirect Access to the European Community Courts' [2006] 5 The Law and Practice of International Courts and Tribunals 2, 296.
[229] C Koch, 'European Community - Challenge of Community Fisheries Regulation – Admissibility of Individual Applicants under Art 230(4)' [2004] 98 The American Journal of International Law 4, 819.

court or not, or if so; which measures are referred and on what grounds.[230] Due to the limitations in the preliminary reference procedure it cannot be considered as guaranteeing an effective remedy to applicants.[231]

Even though the Treaty of Lisbon and the changes made to Article 236 have to be taken into consideration and the fact that these measures have provided for an easier access to court when applicants are challenging regulatory acts which do not require implementation. However, looked upon as a whole, the basic policy of judicial review before Union courts, reformed as it may be remains as restrictive as ever and the interpretation of these rules by the ECJ continues to be narrow. Therefore, the changes are rather insignificant and for most applicants, the high threshold of standing will remain unchanged. The ultimate solution to this dilemma would of course be for the EU to provide for new rules on *locus standi* for private parties with more generous rules allowing for a greater number of cases to be brought before the Union courts.

The *Plaumann* formula could be widened by allowing individuals whose rights have been breached by an EU measure to challenge the measure if their rights have been adversely affected, even if they are not individually concerned in such a way to be distinguished from every other citizen in the EU in accordance with the stricter interpretation of the *Plaumann* criteria. This would mean that the EU would be respecting the principle of an effective remedy, which the ECJ has repeatedly stated is grounded in the constitutional traditions if the Member States, in Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of fundamental rights of the European Union stating that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'. This would provide the citizens of the EU with the right to an effective remedy, in all circumstances when their rights have been infringed by the decision-makers and would enable them to contest the legality of a Union measure of general application which directly affects their legal situation and infringes on their rights. This rights-based approach would remove the need for

[230] Case C-50/00 P, *Unión de Pequen˜os Agricultores v Council (UPA)* [2002] ECR I-6677 at para 102.
[231] C Koch, 'Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' rights to an effective remedy' [2005] 30 European Law Review 4, 515.

applicants to accommodate the restrictive criteria of individual concern. Under the reasoning of both the Advocate General and the CFI in the *UPA* case, once the applicant has established a right, it is the duty of the Court to protect that right, even if the applicant cannot prove that he or she belongs to a closed group of persons who are "individually concerned". Opening up the procedure provided by Article 236 TEU is preferable for individuals whose rights have been breached compared to the reference proceedings under Article 234 TEU, since the institution which adopted the measure being challenged is a party to the proceedings and because such a direct action involves a full exchange of pleadings and not just a single round of observations before the Court. The public is aware of the existence of such an action for a notice is published in the Official Journal thus allowing for third parties to intervene in accordance with the rules of the Statute of the ECJ, if they are able to establish a sufficient interest, as opposed to the reference proceedings where interested individuals cannot submit observations, unless they have intervened in the action before the national court.[232] The principle of legal certainty certainly also requires that any challenges to the validity of EU acts should be brought as soon as possible after their adoption, and direct access to the EU courts as compared to the reference procedures is certainly closer in time to the adoption. A modification of the Treaties in order to allow citizens to protect and safeguard their rights through such direct actions would fill the gap in the judicial system of the EU.

The ECJ has resisted such measures and has mainly based the resistance on the "flood-gate" argument, namely that the efficiency of the Union courts would be in danger due to enormous number of frivolous litigations which would be brought. There would of course be an increase in cases brought, but there would still be certain requirements to be fulfilled which would prevent unfounded litigations and justice delayed for all is preferable to justice denied for the many.

In the absence of such a measure, an accession to the ECHR does seem to be the best solution to the problem. In particular since the Member States have chosen not

[232] J.H.H. Weiler & Martina Kocjan, 'THE COMMUNITY SYSTEM OF JUDICIAL REMEDIES: ARTICLES 230 AND 232' [2004/5] NYU School of Law <http://centers.law.nyu.edu/jeanmonnet/courses/eu/docs/UNIT2-4-EU-2004-05.pdf> accessed 15 February 2013.

to act politically in order to improve judicial protection in the EU and therefore seem satisfied with the restrictive conditions for the *locus standi* of its citizens and businesses before Union courts. The ECJ has left the matter in the hands of the Member States with its ruling in the *UPA* case. The Court is therefore unlikely to venture further in the quest for improved *locus standi* of private parties, unless prompted to by either political Member State action or legislative Union acts.

The relevant question at this point is how a Union accession to the ECHR will have a positive effect on the standing requirements before the Union courts and whether it will serve to close the existing gap in the judicial protection. It has to be taken into consideration, that the ECHR already has a binding effect on the institutions of the Union, so an accession will not mean that the provisions of the ECHR on the right to a judicial remedy will be granted a new status within the EU legal order. At this stage of the on-going accession negotiations, no finals steps have been taken by the negotiating parties to the effect of changing or relaxing the standing requirements. However, an accession will provide for a very important remedy for applicants. Should the ECJ choose to dismiss a claim before the court on the ground of the applicant's failure to fulfil the standing requirements of individual concern, an accession opens up the possibility of a claim before the ECtHR, based on the notion that the applicants right to a fair trial as provided by Article 6 ECHR, has been infringed.[233] It should also be taken into account that the Strasbourg Court has on numerous occasions argued, that not only does Article 6 ECHR provide for a fair trial but also guarantees the access to justice, since the Court considers that a fair trial cannot be held if access to court is being limited at a domestic level. This certainly raises questions as regards the *Plaumann* test and the condition of individual concern and its coherence with Article 6 ECHR, questions which however remain unanswered. The ECtHR has dealt with the issue of standing requirements before the Union courts in previous cases, most notably in the *Bosphorus* case. In its judgment, the ECtHR gave certain recognition to the judicial remedies within the

[233] Mariolina Eliantonio, Chris Backes, Remco van Rhee, Taru Spronken, Anna Berlee, 'Standing up for your right(s) in Europe. A comparative study on legal standing (locus standi) before the EU and Member States' courts' (European Parliament) <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=756> accessed 21 March 2013.

legal order of the EU,[234] when it stated that "the protection of fundamental rights by EU law can be considered to be "equivalent" to that of the Convention system".[235] However, a judge in the *Bosphorus* case did not agree with the majority vote and therefore presented a concurring opinion. Judge Ress referred to the cases of *UPA* and *Jego-Quéré* before the ECJ and stressed that the ECtHR did not address "the question of whether this limited access is really in accordance with Article 6 of the Convention". Further, Judge Ress stated that "one should not infer from…the judgment…that the Court accepts that Article 6 does not call for a more extensive interpretation."[236] Accordingly, it can be stated with some certainty that the ECtHR could well in the foreseeable future, rule on the incompatibility of the standing requirements before the Union courts with Article 6 of the ECHR. The conclusion is therefore, that in a post accession EU, Mr *Plaumann* would probably have had standing before the EU courts and would be able to challenge the measure which affected his business adversely. It is the opinion of the present author that according to the above, the limitations of the EU rules on *locus standi* provide for the strongest arguments in favour of a Union accession to the ECHR. The accession will not close entirely the gap in the judicial protection of private parties, but it will certainly reduce it, thus enhancing the credibility of the EU which has now become a major political actor on the international scene and continues to promote itself as a preserver of peace and democracy and a worldwide protector of human rights. The Union has obviously been successful in its efforts, since it is now a Nobel Peace Prize winner and was granted the award as a recognition of what the Nobel Committee chose to call the EU´s "most important result: "the successful struggle for peace and reconciliation and for democracy and human rights."[237] The debate on the protection of basic human rights within the EU however continues and many issues remain unresolved.

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[234] Mariolina Eliantonio, Chris Backes, Remco van Rhee, Taru Spronken, Anna Berlee, 'Standing up for your right(s) in Europe. A comparative study on legal standing (locus standi) before the EU and Member States' courts' (European Parliament) <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=756> accessed 21 March 2013.

[235] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland* (2006) 42 EHRR 1, paras 162 and 165.

[236] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi V. Ireland* (2006) 42 EHRR 1,Concurrent opinion Judge Ress, para. 2.

[237] Thorbjoern Jagland (The Nobel Piece Price award, 12 October 2012) <http://www.reuters.com/article/2012/10/12/us-nobel-peace-idUSBRE89A1N820121012> accessed 30 April 2013.

6. Concluding comments

The EU has become a major actor on the international stage and takes pride in its human rights policy which has earned the Union recognition and a Nobel Peace Prize. However, the protection of human rights within the EU has flaws and gaps, the access of private parties to the Union courts is far too limited and certain areas of EU law raise human rights concerns, such as competition law and the field of Justice and Home Affairs "in which a balance has been struck in favour of security over justice.[238] One of the main conditions for an EU membership is the respect for human rights and the fact that the EU is not a signatory to an external human rights instrument undermines the credibility of the Union as an international preserver of human rights. By acceding to the ECHR, the EU would not only be subjecting itself to the external control of the most recognized human rights court in the world but the Union would finally be fulfilling the human rights efforts it requires of its own Member States.

The issue of an EU accession has been proposed, debated and rejected for almost forty years now and even now, when it is clear that it is finally about to become a reality, the debate continues. It has been claimed that the only value in an accession would be political and symbolic with no concrete effect on the observance of human rights standards.[239] Further, it has been held that an accession to the ECHR is not guaranteed to provide the highest standard of human rights protection available, since the legal order of EU has been known to offer a higher level of protection in some cases.[240]

Previous chapters have dealt with the development of a human rights policy within the EU, the introduction of the ECHR in the legal order of the Union and the interplay between the Council of Europe and the EU. It has been stated that an accession is not required at present since the two courts have found a mutual consensus and frequently rely on each other case law and respective legal instruments on human

[238]Sionaidh Douglas-Scott, 'A TALE OF TWO COURTS: LUXEMBOURG, STRASBOURG AND THE GROWING EUROPEAN HUMAN RIGHTS *ACQUIS'* [2006] 43 Common Market Law Review 630.
[239]F Jacobs,'The accession of the European Union/European Community to the European Convention on Human Rights' (Doc. 11533 of March 18. 2008) <http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71249/20100324ATT71249EN.pdf> accessed 30 April 2013.
[240] Leonard Besselink, 'Case C-145/04 Spain v United Kingdom and Case C-300/04 Eman and Sevinger' [2008] 45 Common Market Law 3, 787.

rights. However, when looking at the way the two courts cite each other's case law, there is incoherence and inconsistency due to the fact that this is not mandatory. This has resulted in a rather confusing jurisdictional overlap which has lessened the importance of these references. Further, when citing each other case law, the courts have usually made a very short reference without providing an extensive analysis. In some cases, it is not even clear why there is such a reference in the first place, making it insignificant and limiting the precedent. Therefore, the relationship between the two legal orders, even if based on mutual respect and recognition, needs to be clarified further and formalized through an accession.

It has also been argued that an EU accession would prevent diverging interpretations of the ECHR and thus provide for uniformity in judgments which would ultimately serve to strengthen the protection of human rights in Europe. It is the opinion of the present author that these arguments are not convincing, since the ECHR is already being interpreted by numerous domestic courts as well as the ECJ and minor differences in the interpretation are simply a part of the Convention system and have up to now not hindered its efficiency. It has further been held that the fact that the Contracting States are permitted a certain degree of discretion in taking judicial, administrative or legislative action in the area of an ECHR right undermines the authority of the case law of the ECtHR and therefore its importance to the EU. This is also unconvincing since the principle of the margin of appreciation is one of the strongest features of the Convention system, for it allows the Contracting States to choose how to uphold the standards provided by the Convention under the supervision of the ECtHR. This method ensures that there is a balance between the sovereignty of the Contracting States and their Convention obligations and gives due regard to their legal and cultural differences. In fact, this is one of the very reasons that the ECHR system has a long standing reputation as the most recognized system for human rights protection in the world today.

The ECtHR is currently facing enormous challenges in the form of the constantly growing backlog of cases, which is threatening the function and the efficiency of the court. An accession would allow for the EU to be represented in the ECtHR as well as on the Committee of Ministers of the Council of Europe, the body responsible for the enforcement of the judgments of the Court. This could also prove beneficial to the ECtHR since the EU with its strong enforcement mechanism and enormous

economic power could help improve the compliance with judgments of the ECtHR.[241] Further, as suggested earlier, the ECtHR needs more funds in order to solve the issue of the backlog, and the financial superpower that is the EU, could certainly be a part of that solution. An EU accession could therefore be beneficial in more than one way and help improve the overall protection of human rights in Europe and not just within the Union.

The ECtHR is unique in its role as a final authority in delivering individual justice and providing remedies for the victims of human rights violations. The strong mechanism for individual protection provided for by the Convention, is why the system is such a success and is why the citizens of Europe trust the system provided for by the Convention. That trust is also based on the fact that no political interference is allowed to influence the proceedings before the ECtHR since the Contracting States are before the Court simply treated as parties which have to defend itself from allegations of wrong doings against individuals within their jurisdiction. Even when considering the difficulties which the ECtHR is currently facing and the major challenges ahead, the Court has made a difference to thousands of Europeans who have been the victims of human rights breaches and has prevented such breaches by providing the states with a diagnosis of what went wrong and what needs to be changed in the national systems. By exposing major violations of human rights the Court has had a powerful influence on politics in Europe and the world as a whole.

The limited *locus standi* for private parties in the legal order of the EU provide for the strongest arguments in favour of a Union accession to the ECHR. When studying the human rights case law of the ECJ it becomes clear that the Court has been quite unpredictable in its interpretation of human rights. Such arbitrary judgments propose an obvious threat to human rights. Further, the basic principle of legal certainty requires that the citizens of the Union should be able to rely on some level of predictability of legal decisions, in order to know their rights and to be able to act accordingly.[242] The history of the ECJ also reveals that the court has actively sought to promote further integration within the Union and has shown itself to be quite

[241] Martin Kuijer, 'THE ACCESSION OF THE EUROPEAN UNION TO THE ECHR: A GIFT FOR THE ECHR´S 60TH ANNIVERSARY OR AN UNWELCOME INTRUDER AT THE PARTY?' [2011] Amsterdam Lawforum 28.
[242] Rick Lawson (n 97) 228

supportive of the Union and its institutions.[243] When economic measures and political issues are taken into consideration by a court dealing with human rights issues, concerns need to be raised. The ECJ has repeatedly demonstrated its willingness towards prioritizing the function of the internal market at the expense of human rights. These issues combined do certainly present convincing arguments in favour of an accession and show the need for external judicial control by an independent body.

It has to be taken into consideration that the accession means adding an additional judicial layer to a legal process to which is already complicated and time consuming. It is the opinion of the present author that the balancing influence an accession will have on the case law of the ECJ and on the Union institutions will outweigh any delays and complexities involved in the process.

An accession is not the best way forward for the EU; it is only way forward. The EU should be bound by the same human rights obligations as its Member States; any other solution seems to defy all logic. Further, the gap in the legally binding status of the ECHR in Europe needs to be closed in order for it to maintain its status as the main legal instrument on human rights in the world today. With an accession, the EU and its institutions can be held accountable before the ECtHR and the Court will no longer have to mediate between the Union Treaties and the ECHR, since it will be able to treat the EU as any other Contracting party and the EU Member States will no longer be able to hide behind Union obligations when violating Convention rights.[244] The accession will therefore allow the EU to address the weaknesses and inconsistences which undeniably exist in its human rights policy.[245] The accession will create a modernized and uniform system of human rights protection in Europe, provided by the two courts of Luxembourg and Strasbourg. The overall positive effect will not only be felt within the Union, but in the whole of Europe. With the accession of the EU to the ECHR, human rights protection in Europe is entering a new exciting phase and that future looks bright.

[243] Kim Economides & Joseph H.H. Weiler, 'Accession Of The Communities To The European Convention On Human Rights: Commission Memorandum' [1979] 42 The Modern Law Review 6, 687.
[244] Damian Chalmers, Gareth Davies & Giorgio Monti (n 4) 262
[245] Jean Paul Jacpué, 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' [2011] 48 Common Market Law Review 4, 995.

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