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"THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF JUSTICE"

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LL.B First Class Honours (University of Dundee) LL.M Candidate (Harvard Law School) This paper was written as part of my LL.B at the University of Dundee, under the guidance of Professor Alan C. Page, Head of the Department of Law. Any errors are the sole responsibility of the author

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Any errors in content or style in either section are the responsibility of the author

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INTRODUCTION

"Europe will not be made all at once, or according to a single plan." Schuman Declaration, May 9, 1950.

When one looks back at the developments that have taken place since 1950, it is clear that Schuman was right; Rome was not built in a day, nor was the European Union. The once purely economic focus of European integration no longer exists, as the transformation of a model of market integration to one of social citizenship[1] has brought with it social and humanistic considerations that have resulted in the protection of human rights. Two of the central components to the "explicit"[2] protection of human rights within the Community legal order have been the Court of Justice (hereafter the 'ECJ') and the European Convention on Human Rights (hereafter the 'Convention'). The focus of this paper is to examine the application of this Convention by the ECJ.

The development of human rights within the Community and the ECJ's role in advancing the protection of such rights and the Convention, are already well known. Several academics[3] have already addressed this history and there is little that has not already been said. Instead, the purpose of this paper is to provide a critical analysis of the ECJ's application of the Convention, in order to contribute to "the all too small corpus of critical academic writing about the Court." [4] It must be stressed that the aim of this critical paper is not to question the "integrity of the Court and its judges"[5], but, rather, to identify some[6] of the problems that arise in relation to the ECJ's application

[1] Bell, M., *Anti-Discrimination Law and the European Union* (Oxford OUP 2002) Chapter 1. Other terms have been used, inlcuding the transformation of an 'economic constitution' to a 'political constitution'- Neuwahl, N., "The Treaty on European Union: A step forward in the protection of Human Rights?" in Neuwahl, N., and Rosas, A., (eds) *The European Union and Human Rights*.

[2] Williams, A., *The EU Human Rights Policy*, p.144: "It was the ECJ that began to make *explicit* the re-interpretation of original intents as regards human rights."

[3] See Bibliography

[4] Weiler, J.H.H, and Lockhart, N.J.S., "'Taking Rights seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence" (1995) 32 *C.M.L.Rev* 51 (Part I), at p.54

[5] *Ibid*., at p.56

[6] The author does not discuss all the problems that exist in relation to the ECJ's application of the Convention or the protection of human rights. Various problems, such as the alleged double standards of the ECJ's use of human rights in relation to the institution and the Member States, have been discussed by other academics in great detail already (Coppel, J., and O'Neill, A., "The European Court

of the Convention. The purpose of highlighting these problems is to contribute to the discussion concerning the ways in which the current inadequacies can be rectified in order to allow for the improved application of the Convention in the future. As the Community and the Union approach an important crossroads for the future of Europe (including the prospects of a Constitution, a binding written Bill of rights and Union accession to the Convention), it is important that the past and present problems of the ECJ's application of the Convention do not plague the future.

The critical analysis of this paper is divided into four chapters. The first chapter is relatively short and presents a succinct discussion of how the Convention is currently applied by the ECJ. The purpose of this chapter is to provide the basis for the more critical chapters that follow. The following chapters build on this basis by discussing the problems of both the current and future application of the Convention by the ECJ. The second and third chapters will respectively question the adequacy and effectiveness of the ECJ's application of the Convention. The second chapter will examine the conflicting interpretations of the Convention by the two courts, examining how and when conflicts arise, rather than discussing the already well-known conflicts themselves. The third chapter provides the second main critique, questioning whether the ECJ's application of the Convention is effective. This will involve assessing the contribution of the lack of any Community Bill of Rights and the difficulties of accessing the Court under Articles 230 and 234 EC to the effectiveness of the application of the Convention. In both chapters, the discussion of the current problems is followed by proposals as to how the application of the Convention could be improved. This prospective focus continues into chapter four, where the discussion addresses whether the Convention is adequate for the ECJ to continue applying. This chapter questions whether the Convention's limited focus on first generation human rights effectively acts as a ceiling for the ECJ to develop its protection for second and third generation rights.

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of Justice: Taking rights seriously" (1995) 29 *C.M.L.Rev* 669; Weiler, J.H.H and Lockhart, N.J.S., n.3 above).

CHAPTER 1- THE CURRENT APPLICATION OF THE CONVENTION BY THE COURT OF JUSTICE

1.1 Introduction

The purpose of this chapter is to provide a succinct discussion of how the ECJ is currently applying the Convention to the Community legal order. The reason for this is to examine the legal status of the Convention when it is applied by the ECJ and also to discuss the relationship between the ECJ and the ECtHR. This brief chapter therefore provides an overview and understanding of how the Convention is currently applied, in order to set the foundations for the critical discussion in the following chapters.

1.2 Legal status of the Convention when it is applied by the Court of Justice

Although neither the Community nor the Union are party to the Convention, the ECJ has considered that the Convention has "special significance"[7], which "must be taken into consideration in Community law"[8] when it is applied. Rather than directly applying the Convention, the ECJ uses this instrument as "a point of orientation"[9] to "inspire"[10] the Community protection of human rights. The ECJ therefore indirectly applies the Convention by extrapolating the general principles of this instrument and applying them as Community principles on an "incremental"[11] case by case basis. Therefore, although the "substance"[12] of the principles is generally the same, jurisdictionally they are entirely separate[13]. The text of the Convention is used to

[7] C-260/89, *ERT* [1991] ECR I-2925 para. 41; *Opinion 2/94* [1996] ECR I-1759, para. 33; and C-299/95, *Kremzow* v *Austria* [1997] ECR I-2629, para. 14; C-17/98, *Emesa Sugar (Free Zone) NV* v *Aruba*, [2000] E.C.R I-675, para. 8

[8] C-222/84, *Johnston* v *Chief Constable of the R U C*, [1986] ECR 1651, 1682

[9] Dauses, M., "The protection of fundamental rights in the community legal order" (1985) 10 E.L.Rev 398, at p.401

[10] C-4/73, *J Nold Kohlen- und Baustoffgrosshandlung* v *Commission*, [1974] E.C.R 491, at p. 507

[11] Douglas-Scott, S., *Constitutional Law of the European Union*, at p.434

[12] Schermers, H.G., "European Remedies in the Field of Human Rights" Kilpatrick, C., Novitz, N., and Skidmore. P., *The Future of Remedies in Europe*, at p.211

[13] Weiler, J.H.H., "Eurocracy and Distrust: some questions concerning the role of the European Court of Justice in the protection of fundamental rights within the legal order of the European Communities""61 *Washington Law Review* 1103 (1986), at p.1126: "It is unlikely that the Court will in *substance* ever allow a Community measure to violate a provision of the ECHR, but *jurisdictionally* it insists on interpreting the instrument itself."

"help determine the content of general principles of [Community] law"[14] and to inspire the ECJ's interpretation of the Charter of Fundamental Rights. The ECJ's indirect application of the Convention through the substance of the Community's autonomous general principles has been suggested by various Advocates-General over the years, including Advocate-General Darmon:

> "Finally, and most importantly, I must not fail to remind the Court that, according to its case law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument"[15]

According to Advocate-General Cosmas in the case of *Van Der Wal*:

> "The Court of Justice and the Court of First Instance do not apply the ECHR, but rather the general principles of Community law"[16]

It is therefore through the general principles of Community law that the Convention is indirectly applied. This indirect application of the Convention has been confirmed by the Treaties which state that "The Union shall respect fundamental rights, as guaranteed by the European Convention…as general principles of Community law."

1.3 The relationship between the Court of Justice and the Court of Human Rights

As with the Community and the Convention, there is no "formal linking"[17] between the ECJ and the ECtHR. However, in the absence of such a link, the Courts have built up a relationship based on informal comity and "co-operation"[18]. In recent years the ECJ has increasingly referred to the case law of the ECtHR[19], following this case law

[14] Betten, L., and Grief, N., *EU Law and Human Rights*, at p. 62
[15] C-374/87, *Orkem* v *Commission*, [1989] ECR 3283, Advocate General Darmon at para. 139. Advocate General Cruz Vilaça in C-257/85 *Dufay* v *Parliament*, [1987] E.C.R 1561, para. 17: "Moreover, that Convention does not form part of Community law but supplies 'guidelines' which should be followed' in connection with the protection of fundamental rights in the Community."
[16] C-174/98P *Van Der Wal* v *Commission* [2000] E.C.R I-1, AG para. 26
[17] Douglas-Scott, n.11 above, at p.467
[18] Tridimas, T., *The General Principles of EC law*, at p.240
[19] C-13/94 *P* v *S and Cornwall County Council* [1996] ECR I-2143, para. 16; C-74 and 129/95 *Criminal Proceedings against X* [1996] ECR I-6609, para 25; C-368/95 *Bauer Verlag* [1997] ECR I-3689, para. 26; C-249/96 *Grant* v *South West Trains* [1998] ECR I-621, para. 34; C-185/95

where it exists[20] or explicitly noting "the lack of case law on a particular subject"[21]. This is an important development from the previous conduct of the Court, in which the ECJ would look at the text of the Convention but make little reference to the ECtHR's case law. The ECJ has been criticised[22] for this and following *Opinion 2/94*, the Court has demonstrated a greater willingness to follow the ECtHR's interpretation. This informal relationship means that the ECJ has applied the principles of Community law in a manner that corresponds to the substance of the Convention as interpreted by the ECtHR. Therefore, by following the ECtHR's case law the ECJ indirectly applies the Convention to the same standard as the ECtHR.

There are a number of problems with the current application of the Convention by the ECJ. The following chapters will dissect this brief overview by critically analysing the adequacy and effectiveness of the Court's application, and the appropriateness of the Convention.

Baustahgewebe [1998] ECR I-8417, para. 29; C94/00 *Roquette Freres SA* v *Directeur General de la Concurrence, de la Consommation et de la Repression des Fraudes* [2002] E.C.R. I-9011 para. 29; *Bernard Connolly* [2001] ECR I-1611, paras. 39-49; C-7/98 *Krombach* v *Bamberksi* [2000] E.C.R I-1935, para. 39

[20] Schermers, n.12 above, at p.206

[21] Weatherill, S and Beaumont, P., EU Law, at pp.285-286; C-46/87 and 227/88 *Hoechst A G* v *Commission* [1989] ECR 2859 para. 18; C-85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, para. 29; Cases 97-98/87 *Dow Chemical Iberica* v *Commission* [1989] ECR 3165 para. 15: "Furthermore, it should be noted that there is no caselaw of the European Court of Rights on that subject." In the case of *Orkem*, n.15 above, Advocate-General Darmon notes in para. 132: "no judgment of the European Court of Human Rights has upheld the existence of that right under any provision of the Convention."

[22] Clapham, A., "Human Rights and the European Community: A critical overview" in Cassese, A., Clapham, A., and Weiler, J.H.H., *European Union- The Human Rights Challenge* Volume 1, p.60: "if, however, the Court of Justice is serious about protecting human rights in the community legal order then it should show more deference to the Strasbourg case-law."

CHAPTER 2- DOES THE COURT OF JUSTICE APPLY THE CONVENTION TO AN ADEQUATE STANDARD?

2.1 Introduction

Section I of the Convention contains a list of human rights that have been described as "rather vague"[23]. The vague text is transformed into more "detailed law"[24] by the ECtHR, which substantiates the Convention by interpreting and applying it to cases that appear before the Court. The Court's interpretation then constitutes the "flesh and blood of the Convention"[25], clarifying "the scope, nature and content of each right"[26] as well as setting the "minimum standard"[27] of protection that the High Contracting Parties must "secure"[28].

The combination of the absence of any real protection for human rights in the Treaties[29] and the threats to the supremacy and uniformity of Community law[30], means that the ECJ has and continues to use the general principles of the Convention to inspire and guide the autonomous Community protection of rights. The ECJ, therefore, has also interpreted the 'vague' text of the Convention to develop its own autonomous protection of rights. The ECJ has tended to follow the interpretations of the Convention by the ECtHR where such guidance exists[31], or, when none exists it usually notes the lack of guidance[32]. However, this informal relationship of comity between the two courts has not ensured that the Courts adopt the same interpretation

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[23] Schermers, n. 12 above, at p.205
[24] *Ibid*., at p.205
[25] De Witte, B "The Past and Future Role of the European Court of Justice in the Protection of Human Rights" in Alston, P., Bustelo, M., and Heenan, J. (eds.), *The EU and Human Rights*, at p.859
[26] Murdoch, J., "Human Rights", a Reissue of the entry on Human Rights in the *Stair Memorial Encyclopaedia of the Laws of Scotland*, para. 7
[27] Weiler, J.H.H., *The constitution of Europe: "Do the new clothes have an emperor? and other essays on European Integration*, at p.105
[28] Article 1 ECHR
[29] Weiler, n.27 above, p.107: "neither the Treaty of Paris nor the Treaty of Rome contained any allusion to the protection of fundamental human rights." Article 6(2) TEU says "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 of Community law."
[30] The decision by the Bundesverfassungsgericht known as *'Solange I'* [1974] 2 CMLR 540, at p.550: "In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism."
[31] See chapter 1
[32] See chapter 1

and subsequent application of the Convention, as a number of diverging and conflicting interpretations have occurred.

The vagueness of the text, which has been interpreted by the two separate courts with no formal links between them, means that there is a risk of diverging interpretations of the Convention. However, different interpretations of the Convention by the two Courts should be classified into two groups: one which should be viewed positively and the other negatively. In the positive diverging interpretations, there is no problem as "the ECJ applies higher standards than the ECtHR."[33] The ECtHR's interpretation sets the detailed 'minimum standards', but there is nothing to prevent the ECJ or national courts from adopting higher standards. An example of this positive divergence is the case of *X* v *Commission*[34], where the ECJ interpreted Article 8 ECHR to include the refusal to undergo an Aids test for pre-recruitment procedures by the Commission. This case has been described as "a major contribution to the jurisprudence on Article 8 of the Convention"[35], thus demonstrating that not all divergences should be negatively perceived.

The second group of diverging interpretations is negative, as it results in the ECJ failing to achieve the 'minimum standard' of protection. The purpose of this chapter is to question whether these negative divergences mean that the ECJ is failing to adequately apply the substance of the Convention. Rather than discussing the already well known cases in which these conflicts have arisen[36], the focus will be on how conflicting interpretations can occur and when they actually happen[37]. Once this has

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[33] Lawson, R (2000) 37 *C.M.L.Rev.* 983 at p.990

[34] C-404/92P, *X* v *Commission*, [1994] ECR I-4737

[35] Spielmann, D., "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementaries" in Alston, n.25 above, at p.775

[36] The main conflicts are the cases of *Informationsverein Lentia* v *Austria* (A/276), Judgment of 28 November 2002, (1994) 17 E.H.R.R. 93 (ECHR)/ C-260/89, *ERT*, 18 June 1991, [1991] ECR I-2925; C-46 and 227/88 *Hoechst AG* v *Commission*, 21 September 1989, [1989] E.C.R 2859/ *Niemetz* v *Germany*, Judgment of 16 December 1992, Series A No. 251-B; (1993) 16 E.H.R.R 97 and *Societe Cola Est* v *France*, Judgment of 16 April 2002, (2004) 39 E.H.R.R. 17; C-374/87, *Orkem* v *Commission*, 18 October 1989, [1989] E.C.R 3283/ *Funke and Others* v *France*, Judgment of 25 February 1993, Series A No. 256-A; (1993) 16 E.H.R.R 297. Like the history of fundamental rights, these cases are well known and not much else is left to be said about them. The main works on the conflicting cases are Lawson, R., "Confusion and conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg", in Lawson, R., and de Bloijs, M., (eds.) *"The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers"* (1994) Volume III; Spielmann, n.35 above.

[37] The discussion does not comment on 'why' the ECJ adopts conflicting interpretations. The reason for this is that that would involve analysing the Court's motivation. Weiler and Lockhart, n.4 above, at

been established, the discussion will then focus on what can be done to improve the application of the Convention by the ECJ.

2.2 How do conflicting interpretations occur?

It is not surprising that the ECJ has, on occasion, adopted conflicting interpretations of the Convention that fail to meet the 'minimum standards' set by the ECtHR. The ECJ and the ECtHR are entirely different courts with no formal link between them to ensure harmonious and complementary interpretations. Instead, the two courts are interpreting the vague text of the Convention with the "same teleological method"[38] of interpretation. The ECtHR therefore interprets and applies the Convention with the sole consideration of human rights; whereas, the ECJ, in "furthering the objectives of the Community"[39], interprets this text in conjunction with a variety of other considerations, including those of an economic[40] and social[41] nature. The Court's different 'yardsticks' for adjudicating cases means that the same issue may appear before both courts, but their respective approaches and objectives will result in the Courts arriving at different conclusions.

The above point can be seen from the cases of *Grogan*[42] (ECJ) and *Open Doors*[43] (ECtHR). The cases appeared simultaneously before the courts and concerned Article

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p.55 argue that this method of analysis is not appropriate: "There are limitations to motive analysis. It is often speculative, not falsifiable and hence incapable of 'scientific' proof."

[38] Toth, G., "The European Union and Human Rights: The Way Forward", (1997) 34 *C.M.L.Rev* 491, at p.499

[39] Clapham, n.22 above, at p.59

[40] Douglas-Scott, n.11 above, at p.454: "One specific problem with the ECJ as a key guarantor of fundamental rights in the EU, is that this Court has seen economic integration as one of its key objectives." This has prompted some commentator to comment that the Court has placed economic considerations over human rights, by instrumentally manipulating the rhetoric of rights to advance economic integration. Coppel, J., and O'Neill, A., "The European Court of Justice: Taking rights seriously" (1995) 29 *C.M.L.Rev* 669, with a critical response by Weiler and Lockhart, n.4 above. In contrast to the arguments of Coppel and O'Neill, the case of C-60/00, *Mary Carpenter* [2002] E.C.R I-6279, demonstrates the instrumental manipulation of economic provisions to protect human rights. Acierro, S "The Carpenter judgement: fundamental rights and the limits of the Community legal order" (2003) 28 *E.L.Rev* 398, at p.406 comments: "The economic freedom thus becomes an instrument to protect the right to respect for family life"

[41] Dauses, M., "The Protection of fundamental rights in the Community legal order" (1985) 10 *E.LRev* 398 at p.402: "In the Testa, Maggio and Vitale cases, the protection of fundamental rights at a Community level acquired a new aspect, namely a social aspect."

[42] C-159/90, *The society for the protection of unborn children (Ireland) Ltd* v *Stephen Grogan and others*, [1991] ECR I-4685

[43] *Open Doors Counselling and Dublin Well Woman* v *Ireland*, Judgment of 29 October 1992, Series A No. 246; (1993) 15 E.H.R.R 244

40.3.3 of the Irish Constitution and the publication and distribution of information about the availability of legal abortions in the United Kingdom. The ECJ addressed the issue by considering whether there was an economic link between Grogan and the abortion clinics for the purposes of Article 59 EC (now Article 49) concerning the freedom to provide services. In finding that the economic link was too tenuous[44], the ECJ could not address the issues of the freedom of expression and the freedom to receive and impart information[45]. In contrast, the ECtHR considered that there had been a violation of Article 10 in terms of the freedom of expression and freedom to give and receive information, as the absolute nature of the Supreme Court injunction was disproportionate[46].

2.3 When do conflicting interpretations occur?

In each case where the ECJ has adopted a conflicting interpretation that fails to meet the Strasbourg 'minimum standards', it has always been the ECJ that has interpreted the Convention before the ECtHR[47]. Although the ECJ is not legally obliged to follow the interpretation of the ECtHR[48], most commentators consider that "there is good reason to believe that the Luxembourg court would not adopt conflicting solutions to the problems at stake if there were relevant case law from Strasbourg."[49] However, the absence of any mechanism enabling the ECJ to request guidance on the

[44] Para. 24
[45] Para.31
[46] Paras. 73-74 and 80.
[47] See n.36 for these cases and the dates of judgment. Krüger, H. and Polakiewicz, J. "Proposals for a coherent human rights protection system in Europe. The European Convention on Human Rights and the EU Charter of fundamental Rights" (2001) 22 *H.R.L.J* 1, at p. 6: "it is true that the ECJ gave judgment before the Court of Human Rights in most of the cases"; Lawson, n.36 above, at p.251: "the Hoechst/Niemetz comparison shows, however, that divergences can easily occur when the ECJ interprets the Convention before the Strasbourg bodies have given their opinion."; Schermers, H., and Waelbroeck , D., *Judicial Protection in the European Union*, p.311: "Although the Court of Justice will obviously be keen to avoid such discrepancies, they may sometimes be inevitable as the Court of Justice is found to rule on issues which may not as yet have been decided by the Court of Human Rights." The only arguable exception to this pattern is the case of *Emesa Sugar*, n.7 above. In this case, the ECJ considered that the role of the Advocate-General did not violate Article 6 ECHR, which (according to Lawson n.33 above) is a slight departure from the ECtHR case of *Vermeulen* v *Belguim*, Judgment of 20 February 1996, (2001) 32 E.H.R.R 15. However, Beaumont has argued that this case was not a conflict *per se*, as the "Court of Justice engaged in some old fashioned distinguishing." Beaumont, P., "Human Rights: Some Recent Developments and their Impact on Convergence and Divergence of Law in Europe" in Beaumont, P., Lyons, C., and Walker, N., (eds.) *Convergence and Divergence in European Public Law*, p.159
[48] See chapter 1 for a discussion of the legal relationship between the Union and the Convention
[49] Spielmann, n.35 above, at p.770. Gaja, G., "Opinion 2/94", (1996) 33 C.M.L.Rev 973, at p.987: "never stated or implied that it does not have to abide by the case law when the Convention is applied." See also Schermers, *infra* at note 70.

interpretation of the Convention[50] has meant that in the absence of any Strasbourg guidance, the ECJ, in furthering the objectives of the Community, has had to interpret the Convention on its own. Although the absence of any case-law has tended to be expressly noted by the ECJ[51], the lack of guidance has meant that the Court either ignores the human rights issue[52], or "is forced to interpret the rights guaranteed by the ECHR in its own way, thereby possibly deviating from the present, or especially, future-case law of the European Court of Human Rights."[53]

2.4 Future conflicts

One might have expected that the risk of conflicting interpretations would decrease over time, as the ECtHR would produce more guiding case-law (particularly following the entry into force of Protocol 11[54]), which could then be followed by the ECJ. However, there is a growing concern that the risk and occurrence of conflicting interpretations will actually increase. Krüger and Polakiewicz consider that the expansion of the Community to "areas of relevance to human rights, such as asylum, immigration policy, and police and judicial co-operation matters"[55] will inevitably lead to an increase in the number of conflicts, as more human rights issues will be brought before the ECJ. This is not only the result of the expanding powers of the Union, but also due to the large transfer of much of the third pillar to the first pillar by

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[50] Such a mechanism was first mentioned by Advocate-General Warner in C-130/75 *Vivian Prais* v *Council* [1976] ECR 1589 at p.1607: "Here I will say at once that I regret the absence from that Convention of any power for this Court, or for national courts, to refer to the European Court of Human Rights for preliminary ruling questions of interpretation of the Convention that arise in cases before them. However, in the absence of such a power, we must do our best." Such a scheme has been suggested by Sieglerschmidt, Document 3852 (1976) of the Parliamentary Assembly of the Council of Europe, p.24: "The court of justice should be able to consult the Human Rights Court on any matter concerning the Human Rights Convention whereas the European Commission and Court of Human Rights should be able to ask the Court of Justice for preliminary rulings (similar to the proceedings of Article 177, EEC Treaty) on any matter for which that Court is competent."

[51] See n.21 above

[52] This has occurred in a number of cases including: C-136/79, *National Panasonic* [1980] ECR 2057; Joined Cases 50-58/82, *Administrateur des affaires maritimes à Byonne & Procureur de la République* v *José Dorca Marina et al* [1982] ECR 3494; C-168/91 *Konstantinidis* v *Stadt Altensteig, Standesamt, & Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191. Spielmann, n.35 above, comments on p.766 that this "careful approach of the ECJ, of avoiding the human rights dimension, can thus be observed in cases where no Strasbourg case law exists and where the Strasbourg Court is about to decide a rather controversial issue."

[53] Lenaerts, K., and de Smijter, E., "A Bill of Rights for the EU" (2001) 38 *C.M.L.Rev*. 273, at p.296

[54] Schermers, H.G., "The New European Court of Human Rights" (1998) 35 *C.M.L.Rev* 3, at p.7 says that the new full time court should be able to give over 3000 cases a year, whereas the old court was only able to deliver 100 or so.

[55] Krüger and Polakiewicz, n.47 above, at p.7

the Treaty of Amsterdam, thus bringing these issues within the jurisdiction of the ECJ.

Perhaps most worrying for the future though, is the anticipated conflicts that are expected to arise from the ECJ's use of the Charter on Fundamental Rights. Although the Charter was aimed at increasing the visibility and protection of human/fundamental rights[56], various commentators have expressed concern that it will lead to conflicts in the Courts' interpretations. Lenaerts and de Smijter consider that the risk of conflicting interpretations will arise as the "wording of some rights in the Charter differs from the original ECHR version."[57] However, even when the wording of the Charter and the Convention is the same, it is possible that the two Courts may interpret the same written right differently, as they have done with the Convention. In addition, the ECJ stated in *Opinion 1/91* that[58]:

"The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically."

Although Article 53 of the Charter prevents it from being read in a manner that is inconsistent with the Convention, this does nothing to guarantee that the absence of any Strasbourg guidance will not result in any conflicts with future case law of the ECtHR. The danger of the ECJ interpreting the Charter in a manner that will conflict with the future case law of the ECtHR not only stems from the ECJ's considerations of advancing the Community goals and the lack of any Strasbourg guidance, but may also be affected by the presence of second and third generation rights in the Charter[59].

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[56] See chapter 3 for a discussion on this

[57] Lenaerts and De Smijter, n.53 above, at p.296; this opinion has also been suggested by Lawson, n.33 above, at p.990: *"the adoption of an EU Charter may well encourage the ECJ to develop its own approaches, especially if it is not identical to the Convention."*

[58] Opinion 1/91 (1991) ECR I-6079, para. 14 Although this was not the Convention that the ECJ was talking about.

[59] See chapter 4 for a discussion on the problems that may stem from this.

2.5 Lack of external review by the Court of Human Rights

The problem of conflicting interpretations is aggravated by the lack of external review by the ECtHR. This means that in cases where the ECJ incorrectly interprets the Convention, there will be no possibility for the individual to lodge a complaint with the ECtHR directly against the Court's decision. The case of *Confédération Française Démocratique du Travail*[60] demonstrates that such applications are inadmissible *ratione personae*, as "the European Communities are not a High Contracting Party to the European Convention on Human Rights."[61]

Although the ECtHR cannot directly review decisions by the ECJ, the case of *Matthews*[62] and the application of *Senator Lines*[63] demonstrate that the Strasbourg Court is becoming increasingly willing to accept complaints against the Member States, as their responsibility as High Contracting Parties "continues even after such a transfer [of]…competences to international organizations."[64] There is a possibility that the ECtHR could indirectly review the ECJ's interpretation, on the basis that the transfer of powers from the High Contracting parties to the Community, including the ECJ, does not provide "equivalent protection"[65] for the Convention rights. The Member States would therefore be responsible for ensuring that the Court interprets and applies the Convention to an appropriate standard, in order to achieve equivalent protection of these rights.

What would be far simpler and more straightforward is if the Union were to acquire legal personality and accede to the Convention. This would mean that in cases where the ECJ has unsatisfactorily interpreted the Convention or avoided the human rights issue, the ECtHR could find a violation and give a correct interpretation of the Convention. Various commentators have argued in favour of accession as a means to

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[60] *Confédération Française Démocratique du Travail* v *The European Community, European Commission of Human Rights,* [1979] 2 CMLR 229
[61] *Ibid*., at para. 3
[62] *Matthews* v *United Kingdom* (App.24833/94), Judgment of 18 February 1999; (1999) 30 EHHR 361
[63] ECtHR, *Senator Lines GmbH* v *the 15 member states of the EU,* App. No. 56672/00.
[64] *Matthews*, at para. 32 However, this does not mean that the Member States will be liable for any violations that the Community causes, as it has a separate legal entity to the Member States. Instead, Member States are liable when the Community cannot offer, what the Commission has termed, *"equivalent protection"*- Eur. Comm. H.R., application no. 13258/87, *M. and Co.* v *Federal Republic of Germany,* dec. 9/02/1990, DR 64, p. 138
[65] *Ibid*

"avoid inconsistent case law"[66] and to prevent "other Matthews or Senator Lines cases"[67]. The benefit of accession in relation to the problems that have been discussed is that it would allow the aggrieved individual to complain against decisions of the ECJ[68], in which the Convention has been incorrectly interpreted and applied. In addition, accession would also "ensure that the CFI and the ECJ follow the authoritative rulings of the Strasbourg Court"[69]; however, this will change little in practice as the ECJ already "takes the interpretation by the European Court of Human Rights into account, and in fact follows its case-law wherever possible."[70]

Although the option of accession has been discussed for decades[71], it appeared to lose realistic prospect following *Opinion 2/94*[72], when the ECJ held that the Community did not have competence to accede to the Convention as this would entail such significant constitutional change that it would require an amendment to the Treaty. However, this debate has been re-ignited by Article 1-9(2) of the Constitution, which expressly enables and obliges the Union, which is to be given legal personality[73], to "accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." In addition, Protocol 14 to the Convention, if universally ratified by the High Contracting Parties, will insert a new paragraph 2 into the existing Article 59 of the Convention to allow for Union accession[74]. However, Union accession should not be expected for a few more years, as not only does it depend on

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[66] Spielmann, n.35 above, at p.777. Other commentators include Lawson, n.33 and 36 above; Canor, I., "Primus Inter Pares. Who is the ultimate guardian of fundamental rights in Europe", (2000) 25(1) *E.L.Rev* 3; Douglas-Scott, n.11 above; Schermers and Waelbroeck, n.47 above, para.77

[67] Dutheil de la Rochere, J., "The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty", (2004) 41 *C.M.L.Rev* 345 at p.352. It should be noted that there are many other advantages of accession, including how it would improve the international appearance of the Community and affect external relations. Although these issues are important, they are not being discussed here, as they do not have a direct bearing on the ECJ applying the Convention.

[68] Cassese, Clapham and Weiler, n.22 above, at p.97: *"The only extra remedy which accession would bring for Community citizens would be the chance to complain in Strasbourg about the acts and legislation of Community organs."*

[69] Lawson, n.33 above, at p.990

[70] Schermers, n.12 above, at p.206

[71] The first real reference was made by the Joint Declaration of 5 April 1977 [1977] OJ C103/1

[72] *Opinion 2/94 on Accession by the Community to the ECHR* [1996] E.C.R I-1759, para. 34; Spielmann, n.35 above, at p.759: "Opinion 2/94…makes it unlikely that an accession will be foreseeable in the near future."

[73] Article I-7 of the Constitution states: "The Union shall have legal personality."

[74] Article 17 inserts a new paragraph 2 into the existing Article 59 of the Convention: "The European Union may accede to this Convention."

the constitution being ratified by all the Member States, but also Protocol 14 is not expected to come into effect "for another two or three years"[75].

2.6 Accession as the final step?

The advantage of acceding to the Convention will be that decisions by the ECJ are subject to external review by the ECtHR. Therefore, the ECtHR will be able to find a violation in cases where the ECJ has erred in its interpretation and application of the Convention. Accession is certainly the next step towards achieving the harmonious application of the Convention in Europe, as the ECJ will be subject to review by the Strasbourg Court, as with the national courts. The option of accession has been termed as "the key"[76] that will "minimise the danger of conflicting rulings"[77]; denoting that some commentators perhaps view this as the final step for developing the harmonious protection of rights and enabling the Convention to be adequately applied in the Community legal order. However, accession will not actually ensure that the Convention is harmoniously interpreted and applied by the two courts, but it will only provide the aggrieved individual with a remedy of going to the Strasbourg Court, when conflicts have arisen and the ECJ's interpretation has fallen below the Convention's 'minimum standards'. The lengthy procedure of lodging an application and the time that it takes for the ECtHR to give its judgement[78] means that the ECJ may apply its incorrect interpretation of the Convention to other cases before the matter has been adequately rectified by the ECtHR. Although this is the same scenario for domestic courts, the ECJ's jurisdiction is much greater than any national court, covering the scope of Community law in 25 States and affecting nearly 460 million people. The enormity of the ECJ's jurisdiction means that there is a greater chance of conflict, which will affect all the Member States on the basis of the supremacy of Community law. The limitations of accession are easily identifiable; accession will provide the individual with a remedy when the ECJ has failed to correctly interpret

[75] Greer, S., "Protocol 14 and the Future of the European Court of Human Rights" [2005] *PL* 83, at p.84
[76] Council of Europe CDL-AD (2003) 92 Or.Eng., Strasbourg, 18 December 2003, Opinion no. 256/2003, para. 82
[77] Douglas-Scott, n.11 above, at p.467
[78] Lord Irvine of Lairg QC, "The Impact of the Human Rights Act: Parliament, the Courts and the Executive" [2003] *PL* 308 at p.309: "a road that often took more than five years to travel"

the Convention or avoids the human rights issue, but it will not prevent conflicts occurring or 'minimise' their occurrence.

2.7 The next step following accession

2.7.1 "Pre-decision interpretation questions"

In order to reduce the risk of conflicts, a mechanism should be introduced in addition to accession that would avoid conflicting interpretations, which are after all the real problem. This could be achieved by enabling the ECJ to refer 'pre-decision interpretation questions'[79] to the ECtHR concerning the interpretation and application of the Convention. The benefit of this mechanism, in addition to accession[80], is that the ECJ could seek clarification on a particular subject where there is no or inadequate case-law from the Strasbourg court, thus avoiding conflicting interpretations caused by the lack of guidance from the ECtHR. These 'pre-decision interpretation questions' could then form the main basis for ensuring consistent application of the Convention, which would be backed up by the benefits of accession to enable external review for situations where the ECJ fails to request an interpretation or avoids the human rights question altogether.

2.7.2 How the system would operate

The pre-decision interpretation questions mechanism would have some similarity to the preliminary ruling system under Article 234 EC[81]. The main similarity would be that when the ECJ is faced with a human rights issue and is unsure as to how to interpret and apply the Convention, then it should stall the proceedings and refer the matter for clarification to the ECtHR. This ability to stall the proceedings would also avoid future *Grogan/Open Doors* scenarios, where the same issue appeared

[79] This term has been created by the author.

[80] Most commentators have talked about establishing a preliminary ruling procedure for the ECJ to ask the ECtHR questions on interpretation as an alternative to accession. One of the more famous articles proposing such a system was Lenaerts, K., "Fundamental Rights to be included in a Community catalogue" (1991) 26 *E.L.Rev* 367. The novelty of this paper is that this system is being put forward as an addition to accession.

[81] There are many problems with the current procedure of Article 234 in ensuring the effective protection of human rights. These are discussed in Chapter 3. Therefore, while the 'pre-decision interpretation' system would derive the benefits of this system, it should also be designed to avoid the main problems of it.

simultaneously before the two Courts. In any such scenario, the power to stall the proceedings would allow the ECtHR to clarify how the Convention is to be interpreted and applied in the case before it, which would then be followed by the ECJ without need for further referral to the Strasbourg Court. Therefore, the benefit of this stalling mechanism is that it would enable the ECtHR to "settle a number of cases pending before the ECJ and of potential applications to both the Luxembourg and Strasbourg Courts"[82].

The ECJ's pre-decision interpretation questions could be sent in one of two forms. The first option is that the ECJ could simply send its questions to the ECtHR and wait for the Court's response. The advantage of this is that the ECtHR could consider its interpretation of the Convention and then inform the ECJ. This would be similar to the procedure under Article 234 EC, where the national courts ask the ECJ (and now the Court of First Instance) how to interpret a provision of Community law[83].

The second option is that the ECJ could send its questions on interpretation, accompanied by its own proposals on how the Convention is to be interpreted and applied. The ECtHR could then approve or disapprove of the proposed interpretation, amending it where necessary. This second format of questions (the 'approval system') is generally preferable to the first option. The first reason why this system is better is that it would encourage the ECJ to consider how the Convention should be interpreted and applied, rather than leaving the matter to the ECtHR. The approval/disapproval of the ECtHR could therefore be a strong indication of how well the Court is independently interpreting the Convention. It also means that the Courts will increase their understanding of each other and hopefully lead to greater harmonious and complementary interpretations. The second reason for this format of questions is that it would allow the possibility of the ECJ to set relatively high 'minimum' levels for the Convention. If the Court's proposals include an interpretation that exceeds the ECtHR's future interpretation then the Court would not only be publicly seen for this,

[82] Council of Europe CDL-AD (2003) 92 Or.Eng., Strasbourg, 18 December 2003, Opinion no. 256/2003, para. 69

[83] Guidance of the Court of Justice of the European Communities in References by National Courts for Preliminary Rulings (1999) 1 W.L.R. 261, para 6: "The order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the court…a clear understanding of the factual and legal context of the proceedings…The aim should be to put the Court of Justice in a position to give the national court an answer which will be of assistance to it."

but would also help to improve the level of protection for human rights in all of Europe.

The 'approval system' would also be less time consuming for the ECtHR, as it will be quicker for the Court to accept an interpretation rather than have to hear the various parties and then provide an interpretation. This system should also be quicker than allowing the ECJ to independently interpret the Convention and then require the individual to lodge an application to the ECtHR, particularly if preliminary rulings are involved.

Although the pre-decision interpretation questions may ensure harmonious interpretation and application of the Convention, such a system should also be compatible with Articles 6 and 13 of the Convention. The purpose of this proposed mechanism is to improve the protection of human rights; it should not undermine them. Provided that the system can satisfy these procedural rights, then it will be beneficial to the ECJ's application of the Convention, as:

"an effective and speedy preliminary rulings procedure is a marvellous tool for the administration of justice, in that it permits resolution of often complex legal issues... hopefully at an early stage of the settlement of a dispute."[84]

2.7.3 Danger of overloading the Court of Human Rights as a result of "an indulgence of the affluent"

There is already a real danger that the ECtHR is being overloaded with applications and that changes must be made in order to allow these cases to be dealt with adequately. Even after the entry into force of Protocol 11, there is still an enormous and ever-growing[85] backlog of applications, which has prompted the need for further reform under Protocol 14. It would not be unimaginable to envisage that Union accession and a 'pre-decision interpretation questions' system could seriously cripple

[84] Eeckhout, P "The European Courts After Nice" in "The European Courts after Nice" in Andenas, M., and Usher, J., (eds.) *"The Treaty of Nice and Beyond"*, at p.325

[85] The 46th Yearbook of the ECHR 2003, p.200 says that in 2003 a total of 35,613 applications were lodged with the Court of Human Rights. This is nearly double the number of applications in 1998 (18164) and over seven times as many as in 1989 (4923).

the ECtHR and the level of protection that the Court can offer.[86] Although it is important that there is external supervision and adequate protection of the Convention rights within the EU, this supervision, where "there is certainly no systematic, persistent and grave violation"[87] of human rights, should not come at the expense of collapsing the Convention system or preventing the ECtHR from protecting the rights of individuals in States where such violations do occur. The external review should be for the protection of human rights, not as "an indulgence of the affluent"[88].

In order to prevent the 'pre-decision interpretation' system from adversely affecting the ECtHR, questions on interpretation should not be sent if the issue is so clear (like the Community doctrine of acte clair[89]) that the ECJ could interpret and apply the Convention for itself to an equivalent or higher standard than the ECtHR would. This would prevent unnecessary questions of a trivial nature clogging up the Strasbourg machinery and encourage the ECJ to interpret the Convention itself. The completeness of this system in conjunction with accession means that if the ECJ errs by failing to send questions, then the individual could lodge an application with the ECtHR.

In contrast to the Community preliminary ruling procedure, pre-decision interpretation questions should only be sent from the highest Community court, the ECJ. Although it is the Court of First Instance (hereafter the 'CFI') that will tend to deal with cases involving individuals[90], the CFI can refer cases to the ECJ if it considers that the case entails a decision on principle that will affect the unity or consistency of Community law. Therefore, the ECJ should be given the opportunity to

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[86] The effect of an increased number of cases is discussed on p.31 *infra* by Jacqué and Weiler.
[87] Weiler, J.H.H., "Methods of Protection: Towards a Second and Third Generation of Protection" in Cassese, Clapham, and Weiler, n.22 above, at p.555
[88] *Ibid*., at p.555.
[89] The essence of this doctrine is explained by the Court in the case of C-283/81, *Srl CILFIT and Lanificio di Gavrdo SpA* v *Ministry of Health* [1982] ECR 3415, para.16: "Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice."
[90] The Court of First Instance's powers were substantially altered by the Treaty of Nice. Under Article 225, the Court can hear *inter alia* proceedings under Articles 230 and 234. Individual applications will usually be heard by the CFI as Hartley, T.C., *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community* explains on p.64: "In general terms, actions against the community by private individuals or companies are heard before the Court of First Instance; all other cases go to the European Court [of Justice]."

consider whether it is able to interpret the Convention without having to ask the ECtHR.

Although there is a danger of overloading the Strasbourg system, it should also be considered that an effective 'pre-decision interpretation question' system could actually ease the number of cases that would have to appear before the ECtHR and the ECJ. One authoritative and correct interpretation of the Convention by the ECtHR could solve a number of potential cases[91] or allow them to be dealt with adequately by the national courts in accordance with the principle of subsidiary.

2.7.4 Why should the procedure be allowed when it is not available for courts in the High Contracting Parties?

It is questionable why the ECJ should be allowed to have a system for consulting the ECtHR, particularly when there is no similar scheme for the domestic courts of the High Contracting Parties[92]. However, the author believes that there are three reasons that justify the exclusive power of the ECJ to send these questions.

Firstly, the problem in the Community is not about the widespread violation of human rights, but concerns the conflicting interpretations of the Convention that result in the ECJ failing to adequately apply this instrument and protect human rights. This proposed system, in conjunction with the benefits of accession, could effectively solve the problems concerning the ECJ's application of the Convention.

The second argument that justifies such a system is that it could facilitate the transition of the ECtHR from being a Court focused on individual cases to one that produces constitutional and jurisprudential decisions. The increased number of applications to the ECtHR, as discussed above, has provoked the current President of the Court, Judge Wildhaber, to argue that the "Court's role should be limited to the 'constitutional' decisions of principle needed to build up a European Public order based on human rights, democracy and the rule of law."[93] The 'pre-decision

[91] See n.82
[92] See Advocate-General Warner's comment in the case of *Vivian Prais*, n.50 above.
[93] Wildhaber, L (2002) "A constitutional future for the European Court of Human Rights" 23 *H.R.L.J* 161, at p.165

interpretation questions' could therefore help with this transition by preparing the ECtHR for this change and demonstrating whether such a system would actually work. This system would therefore operate as a trial basis to indicate whether such questions should be allowed from domestic courts.

The third reason for this system concerns the ECJ's continued reluctance to external review, by both the national Courts (the *Solange* saga[94]) and the ECtHR (*Opinion 2/94*)[95]. Although the relationship between the two courts is not a "zero-sum game"[96], the 'pre-decision interpretation questions' may allow the ECJ to influence the ECtHR in the way that it interprets the Convention and effectively avoid the need for separate external review by the ECtHR. Although Weiler considers that "there is no less prestige for the ECJ to be in the same position as the highest courts in all Member States"[97], this system may encourage a strong relationship of comity to make the formal vertical relationship of accession workable and less aloof.

2.8 Other solutions

Dean Spielmann has suggested that a "possible circulation of judges between Luxembourg and Strasbourg and vice versa"[98] may lead to more harmonious interpretation and application of the Convention. Although Spielmann's suggestion may allow the judges to have a greater understanding of the two systems and the operation of the Courts, the current writer does not consider that this is an appropriate solution. The main reason for this is that if the Union accedes to the Convention then there will already be a judge representing the Union in the Court of Human Rights[99].

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[94] See n. 30 above.

[95] Gaja, n.49 above, at p.989: "The Court's defence of its autonomous role for the protection of human rights has traditionally been aimed at persuading national courts not to interfere. By re-iterating the same position when discussing accession to the European Convention, the Court has discouraged any external review of the way in which human rights are protected within the Community system."

[96] Canor, n. 66 above, at p.4

[97] Weiler, J.H.H., "European Citizenship and Human Rights, in Winter, J., Curtin, D., Kellermann, A., and de Witte, B., (eds.) "Reforming the Treaty on European Union- The Legal Debate" (1996) at p.79, as quoted by De Witte, n.25 above, at p.891

[98] Spielmann, n.35 above, at p.780

[99] Council of Europe, Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002), *Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights*, Strasbourg, 28 June 2002 - DG-II(2002)006 - [CDDH(2002)010 Addendum 2] paras. 66-74. Although it is yet to be confirmed, it is probable that there will be a full-time EU judge participating on an equal footing with other judges of the Court (para. 73); The European Convention, Working Group II, Final Report, p.14: "Basically (and without

This will then provide the ECtHR with an expert on the Union, which could be particularly useful if the 'pre-decision interpretation questions' mechanism is introduced. In order to increase the understanding of the Convention within the ECJ and the CFI, judges could be selected because of their knowledge and experience of human rights and the Strasbourg Court. This could be achieved by inserting a new sentence into Article 223EC/Article III-355 of the Constitution:

"Judges should preferably have professional or academic experience of the European Convention of Human Rights, the workings of the Court of Human Rights and the wider concept of human rights"

2.9 Conclusion to Chapter 2

The current application of the Convention by the ECJ is less than satisfactory, as the Court can adopt interpretations of this instrument and apply them as autonomous Community principles, which conflict with those of the ECtHR. This is aggravated by the fact that complaints directly against the ECJ's interpretation cannot be brought before the ECtHR. Accession to the Convention will rectify this second problem, but it will do little, if anything, to prevent conflicts arising altogether. In order to 'minimise' the risk and occurrence of conflicts, a procedure of 'pre-decision interpretation questions' should be created to allow the ECJ to consult the ECtHR on how to interpret the "vague"[100] text and apply it as more "detailed law"[101] that exceeds the 'minimum standards' of the Convention. The pre-decision interpretation questions would form the main basis for ensuring the consistent and harmonious application of the Convention, which would be backed up by the benefits of accession, enabling external review by the ECtHR if the ECJ fails to request an interpretation or avoids the human rights question altogether. In the same way as diversification reduces the independent variability of two securities in a portfolio[102], diversifying the protection of human rights could reduce the risks (problems) of accession and a 'pre-decision interpretation questions' system as independent means

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anticipating the details to be negotiated upon accession), there would be a judge at the Strasbourg Court elected 'with respect to' ('à titre de') the Union".

[100] Schermers, n. 12 above.

[101] *Ibid.*

[102] See Klein, W.A., and Coffee, J.C., Jr. *Business Organization and Finance*, (8th edition, 2002) pp. 236-7.

of protection. This complete system would use the benefits of both accession and preliminary ruling systems, whilst avoiding the problems of each of the options by themselves.

CHAPTER 3- THE EFFECTIVE APPLICATION OF THE CONVENTION BY THE COURT OF JUSTICE

3.1 Introduction

The last chapter discussed the problems that exist in relation to the ECJ's application of the Convention to cases that actually reach the Court. Although a number of possible changes could be made to improve the standard of the Court's indirect application of the Convention, these changes will be meaningless if individuals are unable to access the European Courts[103] to enforce their rights. The purpose of this chapter is to question if the Court's application of the Convention is "practical and effective"[104], or whether it is "theoretical or illusionary"[105]. The focus of this chapter is therefore to analyse what de Witte terms as the "major, worry…that a number of possible human rights violations may, in fact, never reach the European Court of Justice at all."[106] The discussion in this chapter will address the following issues for their contribution to the problem: the lack of clarity and visibility as to what rights are protected within the Community legal order; the restrictiveness of the locus standi criteria for accessing the Court directly under Article 230; and, the procedure of indirect access to the Courts through the preliminary ruling system of Article 234.

3.2 The lack of clarity

Mancini discussed in 1989 that the ECJ's reading of "an unwritten Bill of Rights into the Community law is indeed the most striking contribution the Court has made to the development of a constitution for Europe."[107] There can be no doubt that the Court deserves the "immense credit"[108] that is has received for this, but it has to be

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[103] The Treaty of Nice 2001 extended the jurisdiction of the CFI so that it is now competent to deal with all direct actions, including those for annulment (Article 230 EC) and preliminary rulings (Article 234 EC). Although the focus of this dissertation is upon the Court of Justice, this section will refer to the CFI as well, due to the increased role that it now has. In addition, although the Constitution will change the name of the 'Court of First Instance' to the 'General Court', to avoid any confusion this paper will simply refer to this court as the Court of First Instance .

[104] *Airey* v *Ireland*, Judgment of 9 October 1979, series A No.32; (1979-80) 2 E.H.R.R, para. 24

[105] *Ibid*

[106] De Witte, n. 25 above, at p.883

[107] Mancini, B., "The making of a constitution for Europe" (1989) 26 *C.M.L.Rev.* 595 at p.611

[108] Weiler, J.H.H. and Alston, P., "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights" in Alston, P., Bustelo, M., and Heenan, J. (eds.), *The EU and Human Rights,* at p.52

questioned to what extent this unwritten Bill of rights helps the individual become aware of his/her rights in order to enforce them.

It was discussed in Chapter 1 that the Court's reliance on the general principles to establish this unwritten Bill has meant that the protection of rights has evolved in an "incremental"[109] manner. Although this has allowed the Court a significant amount of freedom to develop its protection for the Convention 'inspired' rights, it leaves individuals with "little idea what their rights are, even although they possess quite a few of them under European Law."[110] The omission of any Community catalogue or written Bill of rights has been criticised as it entails a lack of clarity as to what rights are protected, as well as the scope of these rights[111]. One commentator who has been very critical of this is Professor Toth, who argued that it is:

"unacceptable that there are no written, binding and enforceable rules on human rights in the Treaty on European Union other than these vague references [in Article 6 TEU] to another international instrument [the Convention] which is not part of Community law."[112]

In this respect, the Charter of Fundamental Rights should be welcomed as it "provides a Bill of Rights for the Community"[113], which enables the individual "to see his fundamental rights set out in black and white"[114]. In addition to this, the Charter, inspired by a number of international agreements including the Council of Europe's Social Charter and the Community Charter of Fundamental Social Rights of Workers, also goes beyond the scope of the Convention and expressly covers second[115] and third[116] generation rights. Although the Charter is not yet legally binding[117], it has

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[109] See n.11 above
[110] Douglas-Scott, n. 11 above, at p.433
[111] Tridimas, T., *The General Principles of EC law*, at p.202: "In the absence of a Community catalogue, which human rights must be protected by the Community judicature?" Lord Goldsmith "A Charter of Rights, Freedoms and Principles" in Andenas, M., and Usher, J(eds.) in *The Treaty of Nice and Beyond* p.389: "It was therefore very difficult for the citizen to see what rights are protected at Union level and enforceable by the ECJ."
[112] Toth, n. 38 above, at p.494
[113] Jacobs F., "Human rights in the EU: the role of the Court of Justice" 2001 *E.L.Rev* 331, at p.339
[114] Toth, n. 38 above, at p.494
[115] Social and economic human rights can be found *inter alia* in Articles 13 (freedom of the arts and sciences), 25 (the rights of the elderly) and 31 (fair and just working conditions)
[116] Article 37 (Environmental protection) and Article 38 (consumer protection)

been referred to by several of the Advocates-General[118] before the Court and also by the ECtHR in the 2002 case of *Christine Goodwin*[119]. The general consensus among commentators is that the Charter should be welcomed as it "appears as a handy catalogue of the fundamental rights"[120] that makes the protection of rights more "visible"[121] than the general principles alone. It should also serve to make individuals "somewhat more aware of their rights"[122].

Although the Charter does have a number of attractive features, it must also be remembered that it is not legally binding. Although the Charter is included in Part II of the Constitution, which if ratified by the Member States would grant "fundamental rights of the Union an disputable value of positive law"[123], the universal ratification of the Constitution is not a foregone conclusion. In light of this, there is presently still a greater reliance on the Convention since it is binding[124], and if the Charter does not acquire binding legal status then it is likely that the Convention would continue to be used. There is also the other problem that the rights contained in the Charter are vaguely worded in "magisterial language"[125], which although useful for judicial interpretation, does not give a clear indication of the scope of the rights that are protected. The only assurance that the individual is given about the standard of protection is contained in Article 53:

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[117] The Charter was signed and solemnly proclaimed by the European Commission, the Council and the Parliament in December 2000.

[118] *Inter alia* Advocate-General Leger in C-353/99P *Council* v *Hautala* [2001] ECR I-9565; Advocate-General Tizzano in C-173/99, *BECTU* v *Secretary of State for Trade and Industry,* [2001] ECR I-4881, paras. 26-28; Advocate-General Jacobs in C-279/99P, *Z* v *European Parliament,* [2001] ECR I-9197, para. 40: "Moreover the Charter of fundamental rights of the European Union, while itself not legally binding, proclaims a generally recognised principle in stating in Article 41(1) that Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union."

[119] *Goodwin* v *United Kingdom* (2002) 35 E.H.R.R. 18, para 100: "The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women."

[120] Lenaerts and De Smijter, n.53 above, at p.281

[121] This term has been used by a number of commentators including: De Witte, n.25 above, at p.891; Betten, L., "Human rights; European Union European Community law". I.C.L.Q. 2001, 50(3), 690 at 691; and, Lenaerts and De Smijter, *ibid*., at p.273

[122] De Witte, n.25 above, at p.891; Douglas-Scott, n.11 above, says on p.478 that *"Citizens ought to be able to know what their rights are."*

[123] De La Rochere, n.67 above, at p.351

[124] Jacobs, n.113 above, at p.339: "it might be unfortunate if the Charter were to be given too much attention and the European Convention too little. Sometimes of course the Charter goes further. But the European Convention is legally binding. It has the force of a European constitutional instrument."

[125] Weiler, J.H.H., "Does the European Union Truly Need a Charter of Rights?" (2000) 6 *E.L.J* 95 at 96

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights… as recognised, in their respective fields of application…including the European Convention for the Protection of Human Rights and Fundamental Freedoms."

However, this Article will only require the ECJ to follow the Convention and the ECtHR's interpretation as it has already done, there is still the same problem as discussed in chapter 2 when the ECJ interprets the Convention before the ECtHR.

The Charter is therefore a useful instrument in seeking to clarify the right that the individual possesses and helping to transform the protection of rights from the general principles into a more visible written Bill of rights. If the Constitution comes into effect and the Charter becomes binding, then it "should play the same role in Community which national constitutional provisions on human rights play in domestic law."[126]Although the Charter may not rectify all the problems of the ECJ's application of the Convention, De Witte comments:

"At least, one would no longer have to suspect that the small number of fundamental rights cases reaching the CFI and the ECJ is simply due to the esoteric nature of the 'general principles' doctrine."[127]

3.3.1 Enforcing human rights through Article 230

Professor Craig has commented that "It will be scant comfort to those who seek to enforce Charter rights against Union acts to be told that even though they possess such substantive rights, they do not have an interest sufficient to allow them to challenge the norm directly"[128] The purpose of this section is to question the effectiveness of the Court's protection of rights, by analysing its narrow interpretation of Article 230(4) for allowing non-privileged applicants access to court. There has been a significant amount of debate on the restrictiveness of Article 230(4) in which

[126] Schermers, n.12 above, at p.207
[127] De Witte, n.25 above, at p.891
[128] Craig, P., "What does Europe need? The House that Giscard Built: Constitutional Rooms with a view" http://www.fedtrust.co.uk/uploads/constitution/26_03.pdf

"much ink has flown"[129]. It is not the purpose of this section to discuss all the problems relating to this Article, but instead to address the problem from a human rights perspective and to suggest proposals that reflect this.

3.3.2 Problems with the current test

For the private party who seeks to enforce his/her rights directly before the Court, he/she must overcome the near "impossible"[130] task of satisfying the restrictiveness of Article 230(4). The requirements of being individually and directly concerned have been "so narrowly interpreted by the European Court of Justice for over fifty years that private parties have rarely been able to surmount this formidable admissibility barrier when challenging Community acts."[131] The compatibility of the restrictiveness of the standing requirements and their interpretation by the Court with Articles 6 and 13 of the Convention was recently challenged by Advocate-General Jacobs in the case of *Union de Pequenos Agricultores*[132]. The Advocate-General argued for a less restrictive approach to be used as he found the Court's current interpretation "hard to reconcile with emerging fundamental rights of access to a court, of effective judicial protection, and to an effective remedy."[133] Jacobs argued that the 'closed circle' approach of the *Plaumann*[134] test requiring that "for a measure to be of individual concern…It must affect their legal position because of a factual situation which differentiates them from all other persons"[135], was too narrow to be compatible with fundamental rights. He proposed that the Court should consider an individual to be individually concerned where "by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests."[136]

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[129] De Witte, n.25 above, at p.875
[130] Eeckhout, n. 84 above, at p.376
[131] Albors-Llorens, A., "The standing of private parties to challenge community measures: has the European Court missed the boat?" (2003) 62(1) *C.L.J* 72 at p.72
[132] C-50/00P, *Union de Pequenos Agricultores* v *Council*, [2002] E.C.R I-6677
[133] Jacobs, F., "Effective judicial protection of individuals in the European Union, Now and in the Future" in Andenas, M., and Usher, J., (eds.) *"The Treaty of Nice and Beyond"*, at p.337
[134] C-25/62, *Plaumann* v *Commission*, [1963] ECR 95
[135] C-26/86 *Deutz und Geldemann* v *Council* [1987] ECR 941, para. 9
[136] Advocate-General Jacobs, para. 60 in *UPA*

However, the ECJ rejected this alternative interpretation and also that of the CFI in *Jego Quere*[137]. The Court considered that such a decision is "for the Member States acting in the European Council…to reform the conditions of admissibility set out in Article 230(4)"[138] as "such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts."[139] The Court has also defended its restrictive interpretation as the procedure of Article 234 means that there is "no real lacuna in protection"[140] as the Court established in the case of *Les Verts*[141]:

"the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 [now Article 230] of the Treaty."

The 'completeness' of the Court's protection has been criticised by de Witte for "forcing individuals to make a detour along the Member State Courts… [which] is a waste a time, energy and money of litigants (and of domestic courts involved in proceedings)…would it not be much simpler to allow litigants to contest the Community measure directly before the Court which is, anyway, the sole competent authority to decide on the validity of the measure?"[142]

The current position is clearly unsatisfactory. Any changes that enable the citizens to become more aware of their rights and allow the ECJ to apply the Convention to an appropriate standard will be ineffective if the individual is denied access to the

[137] T-177/01, *Jego-Quere & Cie SA* v *Commission*, [2002] 2 CMLR 44; Varju, M., "The Debate on the future of the standing under Article 230(4) TEC in the European Convention" *E.P.L.* 2004, 10(1), 43 at p.47: "In Jego Quere the Court of First Instance…concluded that only a new interpretation of individual concern can ensure that adequate judicial protection is provided for private applicants in Community law."
[138] Albors-Llorens, n. 131 above, at p.72
[139] *Union de Pequenos Agricultores* para. 44
[140] De Witte, n.25 above, at p.875
[141] C-294/83 *Les Verts* v *European Parliament* [1986] ECR 1339, para. 23
[142] De Witte, n.25 above, pp.876-877

Court[143] and unable to enforce their rights- *ubi ius ibi remedium*. The problem of access to courts was discussed in Working Group II of the Convention on the Future of Europe. The Group considered a number of options[144], including the amendment of Article 230(4); however, the Group refrained from "making concrete recommendations and commends the question of possible reform in Article 230"[145].

Although the wording of Article III-270(4) is different to that of Article 230 EC, there is doubt as to whether it will make a significant improvement. Menéndez is less than certain and considers that "the literal tenor of Article 270.4 basically reiterates, in more clear terms, the interpretation of Article 230 TEC prevalent in the jurisprudence of the European Court of Justice."[146] He is doubtful that this "solution actually satisfies the right to an effective judicial protection"[147] Similar criticisms have also been voiced by the House of Lords European Committee, which considered that Article III-270(4) "is an improvement but it remains unsatisfactory."[148]

3.3.3 A New Test for locus standi

The test for locus standi to challenge community measures directly before the European Courts should be compatible with Articles 6 and 13 ECHR, particularly if the Union is to accede to the Convention. On this basis, the test for standi should be similar to the 'victim' test of Article 34 of the Convention, which states:

"any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the convention or protocols thereto."

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[143] For a more satirical presentation of the problem see Nik Baker's illustration in the Financial Times on 31 March 1995.
[144] Other options included a referral procedure as an alternative to accession, a special recourse to the Strasbourg Court against the institutions without accession, or a 'joint panel/chamber' composed of judges from both courts, but were rejected by the Group.
[145] The European Convention, The secretariat, Final Report of the discussion circle on the Court of Justice, Brussels, 25 March 2003 (26.03) (OR.fr) CONV 636/03, p.16.
[146] Menéndez, A., "Between Laeken and the Deep Blue Sea" *E.P.L.* 2005, 11(1), 105 at p.141
[147] *Ibid*., at p.142
[148] House of Lords 6th Report of Session 2003-04 HL Paper 47 European Committee, The Future Role of the European Court of Justice, Report with Evidence, p.46 para. 173

The term 'victim' has been interpreted by the former Commission of Human Rights and the ECtHR as meaning "someone 'directly affected.'"[149] The task of satisfying this test is far less restrictive, as the individual does not have to show that he/she was 'individually concerned.'[150] The problem with the requirement of individual concern is that the applicant has to show that he/she was not simply affected by the Community measure, but that the decision was of concern to the applicant in a way that others were not. There is an important distinction between being *affected* by a measure and a measure having *individual concern*. This difference is ostensible from the case of *Deutsche Lebensmittelwerke* v *Commission*[151]:

"Although the contested decision, affects the applicants, that is only because of the effects it produces on their position in the market. In that regard, the decision is of concern to the applicant just as it was to any other person supplying margarine on the West Berlin market while the contested operation was in progress, and it is not therefore of individual concern to them."

Advocate-General Jacobs has already highlighted the substantial adverse effects of this aspect of the test, which arguably should be removed altogether. If such changes are not made by the Member States acting in the Council, then there is a danger that, regardless of whether the Union accedes to the Convention or not, the ECtHR may receive applications on the compatibility of Article 230(4) EC (as amended by the Treaty of Nice)/ Article 365(4) of the Constitution, with Articles 6 and 13 of the Convention, on the basis of Union accession or by holding the Member States liable as High Contracting Parties for failing to secure the protection of rights even after this transfer (*Matthews*/ *Senator Lines*).

However, there is a danger that by relaxing the requirements for standing there will be an increase in the number of direct actions to the CFI[152], since more individuals will

[149] Harlow, C., "Access to Justice as a Human Right: The European Convention and the European Union" in Alston, P., Bustelo, M., and Heenan, J. (eds.), *The EU and Human Rights*, at p.193

[150] Arnull, A., "From Charter to Constitution and beyond: Fundamental Rights in the new European Union" [2003] *PL* 774 at 792: "It is disappointing that the opportunity has not been taken to abandon the notion of individual concern."

[151] C-97/85 *Deutsche Lebensmittelwerke* v *Commission* [1987] ECR 2265, para. 11

[152] Article 225(1) of the Treaty enables the Court of First Instance to hear direct actions for annulments. Individual applications will usually be heard by the CFI as Eeckhout, n.84 above, p.316 says: "There is the beginning of a tendency towards making the CFI the EU's general court, and towards limiting the

be able to satisfy the criteria for standing. Jacqué and Weiler recognise the danger of overloading the Court with cases[153]:

"Nonetheless, judges are human. There can be no question that at a certain point, the number of cases will affect negatively the ability of the Court to address cases with sufficient deliberation. The quality of decisions is bound to suffer."

This is a real danger, but it is questionable whether it should excuse the restrictiveness of 'direct and individual concern' which prevents applicants from accessing the Courts in order for the Court to interpret and apply the substance of the Convention to protect human rights. It is important to encourage individuals to use their national courts in compliance with the principle of subsidiary in order to preserve and utilise the sparse time that the European Courts have, but the cases of *Greenpeace*[154] and *UPA* demonstrate that this is not always possible. The case of *Van Gend en Loos* informed individuals that Community law "intended to confer upon them rights"[155], which the Court has evolved to include the Convention inspired rights. However, the individual is currently unable to enforce these rights in an effective and practical manner.

3.4 The Effective Protection of Human Rights under Article 234

The restrictiveness of Article 230(4) means that for the majority of private parties seeking access to the European Courts, they will have to do so indirectly under the auspices of Article 234. The ECJ has argued that the combination of these two procedures provides for "a complete system of legal remedies and procedures"[156], in which there is "no real lacuna in protection"[157]. However, the procedure of Article 234 has to be questioned for its effectiveness in allowing the Court to deal with

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role of the ECJ to that of a supreme court." The future of the judicial system of the European Union by the ECJ in 1999, p.3: "The Court of Justice and the Court of First Instance have already, very recently, had to alert the Council to a dangerous trend towards a structural imbalance between the volume of incoming cases and the capacity of the institution to dispose of them."

[153] Jacqué, J.P. and Weiler. J.H.H., "On the road to European Union- A new judicial architecture: an agenda for the intergovernmental conference" (1990) 22 *C.M.L.Rev* 185 at p.188

[154] C-321/95P *Stichting Greenpeace Council (Greenpeace International)* v *Commission*, [1998] ECR I-1651

[155] C-26/62, *Van Gend en Loos* v *Nederlanse Administratie der Blastingen,* [1963] ECR 1, p.12

[156] *Les Verts,* n. 141 above.

[157] De Witte, n. 25 above, at p.875.

human rights issues. The main criticism of the preliminary ruling system is that the length of this procedure renders it incompatible with Articles 6 and 13 of the Convention.

The typical length of proceedings for a preliminary ruling is now over 22 months[158]. This direction through the national courts has been criticised by Weiler for being "a serious drain on the litigants, undermining in a problematic sense the principle of remedies." [159] Even though Article 225(3) EC (as amended by the Treaty of Nice) allows the CFI to hear preliminary ruling cases, Arnull considers that this problem will continue as the number of preliminary rulings "can be expected to carry on growing over the coming years." [160] If the Union accedes to the Convention, then the increase in the number of cases is unlikely to prevent the ECtHR from considering that the preliminary ruling mechanism is incompatible with the Convention. In the case of *Salesi* v *Italy*[161], one of the many Italian 'length of proceedings'[162] cases, the ECtHR held:

"As to the argument based on the backlog of cases in the appellate Court, it must not be forgotten that Article 6§1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements."[163]

One option is that the Courts could increase the number of judges that they have, in order to allow for preliminary rulings to be dealt with quicker. This could be done by either making use of the Specialised Courts that can be set up after the Constitution[164], or by simply increasing the number of judges in the European Courts. However, this option may come at the expense of the uniformity of Community law, which is likely

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[158] Arnull, A., "The Past and Future of the Preliminary Rulings Procedure" in Andenas, M., and Usher, J., *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform*, at p.349
[159] Weiler, n.26, at p.214
[160] Arnull, n.158, at p.349
[161] *Salesi* v *Italy,* Judgment of 23 February 1993, Series A No. 257-A; (1998) 26 E.H.R.R 187 The Italian length of proceedings cases have been discussed by Wolf, S "Trial within a reasonable time: The recent reforms of the Italian Justice System in response to the conflict with Article 6(1) of the ECHR" (2003) 9 *E.P.L* 189
[162] This term has been used by a number of commentators, including Greer, n. 75 above, at p.91
[163] Para. 24
[164] Article III-359 of the Constitution

to be under threat if there is a greater number of judges interpreting the Treaties and the Convention.

The current system for getting cases to the ECJ and now the CFI can neither be described as complete nor effective. This is likely to be a major area of discussion following accession; the compatibility of this 'complete' system of protection with the requirements of Articles 6 and 13 of the Convention is bound to be seriously questioned, as the current system clearly does not provide individuals with "a practical, effective right of access"[165] to the European Courts to enforce their human rights. Van Gerven[166] considers that accession will require "changes in the direct nullity procedure under Article 230 and, even more so, in the preliminary ruling procedure under Article 234." One could envisage that this may cause friction and tension between the drafters of the Constitution, who have failed to make any serious improvement to the current position, and the ECtHR, which is unlikely to be satisfied with the current position.

Conclusion

The purpose of this chapter has been to show that in order for the Court to actually apply the Convention to cases before it, individuals have to be actually able to bring cases to the Courts in the first place. The protection of human rights through the application of the Convention by the ECJ should not only ascertain an adequate standard, but it should also be effective in allowing individuals to access the Courts in order to have their rights protected and within a reasonable time. The lack of clarity and visibility of the ECJ's protection of the Convention rights looks likely to be rectified if the Charter is given binding legal effect with the ratification of the Constitution. The problem that looks set to continue is that the individual, who will become increasingly aware of the rights that he/she has and can be enforced to an adequate standard in the ECJ, will not be able to access the European Courts in a manner that complies with Articles 6 and 13 of the Convention. The direct annulment procedure under Article 230(4)/ Article III-365(4) of the Constitution should be amended and based upon the victim status test of Article 34 ECHR. This would

[165] *Geouffre de La Pradelle* v *France*, Judgement of 16th December 1992, [1992] ECHR 76, para. 35
[166] Van Gerven, W., "Remedies for infringements of fundamental rights" *E.P.L* 2004, 10(2), 261 at p.265

remove the almost insurmountable condition of ‘individual concern’, whilst allowing inadmissible and unfounded claims to be filtered out. The preliminary ruling procedure will also have to be substantially altered to shorten the unsatisfactory length. It can be concluded that not only is the current application of the Convention by the ECJ not effective, but it is also falling short of the minimum standards of Articles 6 and 13 of the Convention.

CHAPTER 4- THE APPROPRIATENESS OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS BY THE COURT OF JUSTICE

4.1 Introduction

The discussion so far has provided a critique of the ECJ's application of the Convention, questioning whether the ECJ is adequately interpreting and applying the Convention, and whether this is effective or not. The purpose of this chapter is to question whether it is appropriate for the ECJ to continue applying the Convention in the future.

4.2 The datedness of the Convention

The Convention was drafted over fifty years ago and was designed in light of the atrocities that occurred during the two World Wars. Although the ECtHR has treated the Convention as a "living instrument"[167] which is to be "interpreted in the light of present-day conditions"[168], some commentators have considered that it is "out of date...both in language and content"[169] and that it is unsuitable "for dealing with certain contemporary developments"[170]. Other commentators have rejected these arguments and have dismissed such criticisms for having "misunderstood the nature of the ECHR as a 'living instrument'"[171].

Although the Convention has indeed been interpreted widely to cover a number of important developments, including homosexuality[172] and transexualism[173], it is arguably outdated as it does not exhaust "the spectrum of human rights"[174]. Instead, the Convention primarily covers first generation civil and political rights, but does not cover second and third generation rights. In certain cases, there is an overlap between the different generations of rights, demonstrating that a 'watertight distinction' cannot

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[167] *Tyrer* v *United Kingdom*, Judgment of 25 April 1978, Series A No. 26, (1980) 2 E.H.R.R 1, para. 31
[168] *Ibid*
[169] Douglas-Scott, n.11 above, at p.471
[170] I*bid*
[171] Goldsmith, n. 111 above, at p.392
[172] *Dudgeon* v *United Kingdom,* Judgment of 22 October 1981, Series A No. 45; (1981) 3 E.H.R.R. 40
[173] *Goodwin* v *United Kingdom* (2002) 35 E.H.R.R 18
[174] Weiler, n.27 above, at p.105

always be drawn, as not all rights "can be fitted neatly into the generational taxonomy"[175].

In contrast to the limited scope of the Convention, the Charter of Fundamental Rights covers a wider range of rights including:

"like the ECHR, civil and political rights, but also, unlike the ECHR, economic and social rights as well as the right to good administration, and certain 'third generation' rights such as those to environmental and consumer protection."[176]

The Council of Europe has also expressed concern that "the presence of social rights in the Charter may affect the interpretation of the rights contained therein."[177] Essentially, the narrow focus of the Convention may prevent the substantial development of the Charter's second and third generation rights, as Article 53 of the Charter requires that it is to be interpreted in a way that would not restrict or adversely affect the human rights in the Convention. In this respect, the Convention may actually act as a ceiling to the development and protection of human rights, not the floor as it is so commonly considered[178]. Rather than suppress the protection of second and third generation rights, the Convention should be extended to cover a greater proportion of the spectrum of rights. This would bring the Convention up-to-date as "the historic reasons for treating the two categories of rights strictly separately have, surely, lost their validity."[179] The different generations of rights could be brought together if the European Parliament's suggestion that the EC(EU) could "promote the adoption of additional protocols to the Convention concerning new areas such as socio-economic rights and minority rights"[180] is acted upon.

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[175] Weiler, n.87 above, at p.557
[176] Council of Europe, CDL-AD (2003) 92 Or. Eng. Strasbourg 18 December 2003, Opinion 256/2003, at para. 26
[177] *Ibid* at para. 48. The Environmental Law Centre has petitioned the European Parliament to strongly reconsider the option of accession, as it believes that "an accession to the Convention will remove rights presently available under the Charter within the context of EU legislation." (http://www.elc.org.uk/pages/eu_petition.htm) The author does not agree with the viewpoint of this group, as they consider that there is "judicial abuse and persistent, widespread and systematic violation of human rights by the ECtHR".
[178] Goldsmith, n.111 above, at p.392
[179] Betten, n.121 above, at p.693
[180] O'Leary, S., "Accession by the European Community to the European Convention on Human Rights- The Opinion of the ECJ" *E.H.R.L.R* 1996, 4, 362, at p.370

Although changes to the Convention may be beneficial to the ECJ and for the proper interpretation of all the Charter rights, there may also be a number of problems with this option. Firstly, it would require consensus among all the High Contracting Parties, which may be nearly impossible to achieve in the foreseeable future due to the reluctance of States to increase the number of rights or because such a change would be too costly for the non-member state High Contracting Parties. These High Contracting Parties would inevitably require financial support in order to increase and maintain a heightened level of protection, which may not sound appealing to the Member States as they would probably have to provide such funds. Although this option of increasing the Convention's number of rights may appear to be "a major step forward"[181], it appears to be a step that will not be taken in the near or foreseeable future. It may become a greater possibility if the expansion of the Union brings greater economic and social stability in the Eastern European States.

An alternative option that would allow the ECJ to adequately protect the Convention rights as well as the second and third generation rights of the Charter and the Court's own case law, is to develop the idea that Professor Toth[182] has previously put forward. Following *Opinion 2/94*, Toth argued that the Member States should withdraw from the Convention and that the text of the Convention should be incorporated into Community law. This option would enable the ECJ to have "full jurisdiction…over the interpretation and application of the Convention"[183], which it could interpret in conjunction with the second and third generation rights of the Charter. The protection of human rights in the Union would be able to advance without the burden of non-Member State High Contracting Parties, restricting the Convention to first generation rights. However, this solution is unattractive for two reasons. Firstly, if the Union is to be seen as a global actor in the protection of human rights[184], then it must have a balance between its internal and external human rights policy[185]. The second reason why this option is not appropriate is that the greater protection of all three generations

[181] *Ibid.*, at p.692
[182] See n. 38 above
[183] *Ibid.*, at p.515
[184] Cremona, M., "The Union as a global actor: roles, models and identity" 2004 *C.M.L.Rev* 553, at pp.558-563
[185] Weiler and Alston, n.108 above, discuss the internal and external policies are not completely separate from one another, but are instead two sides of the same coin. Therefore, both policies will affect each other.

of rights in the EU by the ECJ would inevitably come at the expense of protecting human rights in the non-member state High Contracting Parties:

"it would seem to be an abandonment by Western Europe of its important democratic role in the post-communist European legal order. It is important that judges from countries which have just emerged into democracy, and share their experience of the cultural, philosophical and moral phenomenon that is human rights law."[186]

Schermers appears to agree that the Member States should not abandon the rest of Europe in order to develop its own human rights protection:

"For the Union, human rights might be further improved. For Europe as a whole, however, there would also be a considerable loss. Europe would be split with respect to human rights, most certainly to the detriment of the non-members of the Union."[187]

The future protection of human rights in Europe will continue to produce problems, as the division in the financial wealth and willingness to protect human rights between the Member States and the other High Contracting Parties restricts the advancement of human rights in the Union. In light of this, it will probably be the comity of the two Courts and their common concern for human rights that will co-ordinate the incremental development of the Convention to be interpreted in a way that protects second and third generation rights. This expansion will gradually continue to increase if the ECtHR refers to the Charter[188] and if the ECJ is able to put forward 'pre-decision interpretation questions'[189] which may help to expand and raise the level of protection under the Convention.

4.3 Conclusion

Although the Convention has had an enormous impact on the protection of human rights, the limited focus on political and civil rights demonstrates that the Convention must be updated. However, the problem is that the modern day conditions and ability

[186] Douglas-Scott, n. 11 above, at p. 469
[187] Schermers, n.54 above, at p.6
[188] See n.119
[189] See Chapter 2.

to protect human rights in the Western capitalist societies is in strong contrast to the Eastern European countries. While it will be necessary to develop the Convention to include second and third generation rights for the EU and its Member States, if the standard of protection is raised too much too quickly then it may prevent some States from achieving this level and aggravate countries such as Russia[190], which are opposed to the enforcement of westernised capitalist ideas. However, if the Union is to take 'rights seriously' then it should push for the reform of the Convention and use its external relations to help these states. The continued application of the Convention by the ECJ may actually undermine the Union's ability to protect a greater portion of the spectrum of rights.

[190] Barysch, K., *The EU and Russia: Strategic partners or squabbling neighbours* (London: Centre for European Reform, 2004)

CONCLUSION

A number of conclusions can be drawn from this dissertation. The first conclusion that is to be drawn is an important but simple one. The ECJ is not a court of human rights; it is a court that protects human rights. Aspirations for the Court must bear this in contention as Europe does not need a second Court of Human Rights. Instead, the Court has a number of other considerations which it must also seek to address, as although human rights are becoming increasingly important, they are not the "*raison d'être* of the Union."[191]

Although the ECJ is a court that can protect human rights, there are a number of problems with its current application of the Convention. This paper has questioned whether the Court has adequately and effectively applied the Convention, with the conclusion that several alterations should be made to improve the current situation. The inadequate protection of rights could be improved by the Union acceding to the Convention, which would allow for external review by an actual Court *of* Human Rights. This is an important step in furthering the already advanced European integration as the ECJ (a Court that protects human rights) should be subject to review by a Court of Human Rights. However, this important step should not be seen as the final step in the protection of rights, but should be considered as the next step. Human rights will continue to be an issue of debate and discussion for the eternity of the civilised democratic society, and as such, the journey of human rights is never ending. This paper has proposed that one of the steps after accession should be for the establishment of a 'pre-decision interpretation question' system to improve the harmonious protection of human rights in the Union by the ECJ and to help the ECtHR with its inevitable transition from an individual focused court to a jurisprudential and constitutional court. However, any steps that are taken to facilitate and improve the application of the Convention and the wider spectrum of rights by the ECJ, should not come at the cost of undermining the protection of such rights in the rest of Europe. The Union's concern for human rights should not become so introvert that external relations helping non-Member States are forgotten or left to suffer; nor should the Member States withdraw from the Convention to allow the Union

[191] Von Bogdandy, A., "The European Union as a human rights organization? Human Rights and the core of the European Union", (2000) 37 *C.M.L.Rev* 1307 at p.1338

protection to progress without the other High Contracting Parties, who rely on the presence and experience of these states to help the continued growth of democracy.

Another conclusion that can be drawn from this dissertation is that the ECJ has played an enormous role in developing the Community protection of the Convention rights. Although there are problems with the current application of the Convention, much of the developments have been pioneered by the Court with the help of the institutions and the national constitutional courts. Perhaps one could argue that there has almost been too much reliance on the Court, particularly in the absence of any written binding Bill of Rights or a substantial human rights policy for the Community or the Union as a whole. The ECJ has increasingly shown over the years that it does take rights seriously[192]; it is now over to the Member States acting in the Council and for the voters in the referendums on Europe to take the next step. If the Union and the Member States are to take rights seriously then they must develop a strong human rights policy[193] that protects human rights at an earlier stage than the ECJ, which usually becomes involved after the alleged violation has occurred. Establishing a human rights policy would not reduce the role of the Court, but should instead reduce the number of cases that the Court has to deal with. By reducing the number of cases that need to (rather than *can*) actually be heard by the Court, the problems that arise in relation to the Court's application of the Convention would not, in theory, occur altogether. The Court only interprets the Convention incorrectly in cases that actually reach it; a human rights policy would be the optimum means of protecting these rights. The judges in the ECJ are highly intellectual and experienced human beings, but they are sadly not Dworkin's Hercules[194]. Therefore, dealing with human rights at an earlier stage could ensure that the ECJ does not apply the Convention incorrectly or entail the near impossibility of the individual trying to get to the Courts to enforce his/her rights.

Any future developments or changes that will affect the ECJ or its protection of human rights should only be made after the Court has been consulted and given

[192] Contrary to what Coppel and O'Neill have argued, see n.6 above.
[193] This option has been repeatedly called for by Weiler and Alston, n.108 above, who argue for a coherent and highly advance human rights policy, including *inter alia* a Directorate-General and an adequate budget.
[194] Dworkin, R., *Taking Rights Seriously*, chapter 4

serious consideration. The Convention for the Future of Europe was disappointing in this respect, as only "a 'discussion group' was set up late in the day"[195]. The Court has such an important role in applying the Convention and protecting second and third generation rights, that changes should not simply entail political rhetoric and quotations from philosophers[196], but must also be practical for the Court. Although the Court has demonstrated a persistent reluctance to external review, this does not mean that the Union should not accede to the Convention; however, the Court should at least be heard and considered.

This is not the first piece of literature to address the role of the ECJ in applying the Convention and it will certainly not be the last. The protection of human rights in the European Union and the rest of Europe is likely to be a lively and interesting debate for the future, particularly as the two systems of protection strive for greater harmony. It is certain the ECJ will have an incredibly important role to play in exercising its "bold judicial activism"[197] as a court that can protect human rights, including those in the Convention, effectively and to an adequate standard. The application of the Convention by the ECJ will continue to build "an ever closer union amongst the peoples of Europe"[198], uniting not only our common economic interest, but also our common humanity and human rights.

[195] House of Lords 6th Report of Session 2003-04 HL Paper 47 European Committee, The Future Role of the European Court of Justice, Report with Evidence, p.9 para 8
[196] See the Preamble to the Constitution
[197] Weiler, n.13 above, at p.1105
[198] Preamble to the Consolidated Version of the Treaty Establishing the European Community

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