



1. The AIRE Centre and Amnesty International consider that the accession of the European Union ('EU') to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR' or 'Convention') could and should improve protection of fundamental rights for individuals in Europe, by ensuring protection of those rights in the context of the acts and omissions of EU institutions of EU Member States implementing EU law. With a view to ensuring the realisation of this aim, we welcome the opportunity to submit comments and recommendations on the 25 February 2011 *Draft Agreement on the Accession of the EU to the Convention* ('Draft Accession Agreement') and the Draft Explanatory Report.¹ This submission supplements comments that our organisations made during the consultation with the Working Group on Accession of the European Union to the European Convention on Human Rights ('CDDH-UE') on 25 January 2011. This submission provides recommendations to address particular aspects of the 25 February draft of the Accession Agreement and Explanatory Report, which we believe could present barriers to the principal aim of accession, 'improving judicial protection of fundamental rights in Europe for individuals'.²
2. In particular, the AIRE Centre and Amnesty International are concerned that the current wording of the trigger for the co-respondent mechanism, as well as the wording for the proposed mechanism for the Court of Justice of the European Union ('CJEU') to provide its opinion on an issue pending before the European Court of Human Rights ('ECtHR'), may be overbroad. Both of these procedures will place additional demands on individual applicants who are seeking redress before the ECtHR for alleged violations of their rights under the Convention, and the proposed CJEU opinion mechanism will undoubtedly delay the proceedings before the ECtHR. We have set out recommendations aimed at addressing these issues. Furthermore, given the importance of the accession and the modalities agreed to implement it, we urge further consultation with civil society at Council of Europe and European Union levels.
3. This submission is divided into three sections:
 - a. the co-respondent mechanism: examples of cases that raise issues under both EU law and the ECHR;
 - b. recommendations for amendments to provisions of the Draft Accession Agreement and the Explanatory Report; and
 - c. a recommendation for future consultations with civil society.

a. The Co-Respondent Mechanism: cases that raise issues under both EU law and the ECHR

4. As we explained during the consultation held on 25 January, our organisations' principal concern is to ensure that the EU's accession to the ECHR enhances rather than hinders the effective exercise of the right of individual petition to the ECtHR.

¹ The Draft Accession Agreement is set out in CDDH-UE(2011)04 and the Draft Explanatory Report in CDDH-UE(2011)05.

² Paragraph 7 of the 25 February 2011 Draft Explanatory Report, CDDH-UE(2011)05.

5. The following examples, mentioned during the consultation on 25 January, are taken from the experience of our organisations in promoting and defending respect for the rights of victims of human rights violations in Europe. They are intended to provide concrete case-studies that will allow the CDDH-UE to test its proposals – particularly the use of the co-respondent mechanism and the possibility for a preliminary ruling by the CJEU prior to an ECtHR judgment – against real-life situations. The following examples concern what Presidents Costa and Skouris refer to as ‘applications against acts adopted by the authorities of the Member States of the EU for the application or implementation of EU law’.³ It should be noted that this list does not include examples where the EU institutions themselves are alleged to have violated the ECHR. This is because we consider that in such cases, the applicant will be in the same situation, in relation to procedural aspects of the case and in particular in relation to the exhaustion of domestic remedies, as an applicant making a complaint against any of the other Contracting Parties.
- a. The transfer of asylum seekers from one EU Member State to another, when it is alleged that the receiving State is unable to comply with its obligations under EU law and/or the European Convention on Human Rights (see *M.S.S. v Belgium and Greece*, judgment of the Grand Chamber of the European Court of Human Rights, 21 January 2011⁴).
 - b. The transfer of persons under the European Arrest Warrant (Framework Decision 2002/584/JHA⁵) from one EU Member State to another EU Member State where it is alleged that detention conditions do not comply with minimum standards (see, e.g., the judgment of the Supreme Court of Ireland in *Minister for Justice, Equality and Law Reform v Rettinger*, [2010] IESC 45⁶).
 - c. The non-consensual transfer of prisoners from one EU Member State to another based on their nationality or previous residence, provided for under Framework Decision 2008/909/JHA⁷ (which must be implemented by 5 December 2011), where it is alleged that detention conditions in the receiving state do not comply with the minimum standards of the ECHR or that the transfer will disproportionately interfere with the prisoner’s right to respect for private or family life.
 - d. Wrongful removal of a child to or retention of a child in another EU Member State where it is alleged that courts or other authorities in Member States do not respect the

³ CDDH-UE(2011)03, Appendix III.

⁴ Available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=M.S.S&sessionid=67846669&skin=hudoc-en>.

⁵ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML>.

⁶ Available at: <http://www.bailii.org/ie/cases/IESC/2010/S45.html>.

⁷ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2008F0909:20090328:EN:HTML>.

provisions of Regulation 2201/2003/EC⁸ (see, e.g., Case C-497/10 PPU, *Mercredi v Chaffe*, judgment of the CJEU of 22 December 2010⁹; *Monory v Hungary and Romania* (2005)¹⁰).

- e. Cases where a citizen of an EU Member State who is a prisoner in another Member State is deprived of the right to vote in European elections as a result of a blanket prohibition on prisoner voting, violating his or her rights under Article 3 of Protocol 1 ECHR (see, e.g., *Frodl v Austria* (Judgment of the European Court of Human Rights 8 April 2010¹¹)) as well as EU law (see Directive 93/109/EC, Article 6(1)¹²).
- f. Cases where a victim of human trafficking alleges that the authorities of an EU Member State have not provided him or her with adequate protection or adequately investigated his or her case in a manner consistent with EU law (Directive 2004/81¹³ and the proposed Directive on combating trafficking in human beings) and Article 4 ECHR (see *Rantsev v Cyprus and Russia* (judgment of the European Court of Human Rights 7 January 2010)¹⁴).
- g. Cases where the deprivation of liberty in immigration detention arguably violates EU law (Directive 2008/115/EC¹⁵ and Directive 2005/85/EC¹⁶) and (as a direct consequence) Article 5 § 1 of the Convention.

⁸ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>.

⁹ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010J0497:EN:HTML>.

¹⁰ Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Monory%20%7C%20Hungary%20%7C%20Romania&sessionid=67846669&skin=hudoc-en>.

¹¹ Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Frodl%20%7C%20Austria&sessionid=67848190&skin=hudoc-en>.

¹² Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0109&model=guichett.

¹³ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0019:0023:EN:PDF>.

¹⁴ Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Rantsev&sessionid=67944848&skin=hudoc-en>.

¹⁵ Available at: available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>.

- h. Cases where individuals are refused entry or residence rights under provisions of EU law (e.g. under Directive 2004/38¹⁷ or Directive 2003/86¹⁸) in circumstances engaging Article 8 ECHR where the applicable EU law provides for wider human rights protection than under the ECHR.¹⁹
 - i. Cases where the expulsion of Turkish nationals from the European Union raises issues under the EC-Turkey Association Agreement as well as Article 8 ECHR.
 - j. Any other cases in which the ECHR requires that acts or omissions should be in accordance with the law or prescribed by law and the applicable law is EU law. The law in question could be a directly applicable Regulation, or a Directive (or Decision) which has been improperly transposed or which has not been transposed within the prescribed time limits.
6. In all of these examples, it would be inappropriate to include the European Union as a **co-respondent**. This is because EU law does not force an EU Member State to act in a way contrary (or arguably contrary) to the Convention in any of these cases. Indeed, in some of these cases the violation of the Convention is related to or is the direct result of a violation of EU law. However, in all of these cases it might be appropriate for the EU to be invited to join the proceedings as a third party.
7. The 25 February drafts of the Accession Agreement and the Explanatory Report propose that the trigger or threshold for the possible application of the co-respondent mechanism is when the alleged Convention violation appears to have a ‘substantive link with EU legal acts or measures’ and where EU law provides the ‘legal basis’ for an act for whose implementation an EU Member State is responsible. (The ‘substantial link’ concept appears in the two drafting proposals for Article 4(4) – Option A and Option B – in the 25 February draft Accession Agreement and paragraph 66 of the draft Explanatory Report; the ‘legal basis’ concept’ appears in paragraph 44 of the draft Explanatory Report.)
8. **We consider that such formulations risk an overbroad application of the co-respondent procedure.** We note that both concepts apply to cases like *Matthews v United Kingdom*

¹⁶ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>.

¹⁷ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF>.

¹⁸ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF>.

¹⁹ See also Case C-34/09 *Zambrano v Office national de l'emploi*, judgment of the CJEU of 8 March 2011 (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML>).

(Grand Chamber, 1999)²⁰ and *Bosphorous v Ireland* (Grand Chamber, 2005).²¹ However, it is clear that there are many cases where a ‘substantive link’ exists but it cannot be said that EU law provides the ‘legal basis’ (or the sole legal basis) for an act that has been implemented by an EU Member State. For example, in many cases the act the applicant is challenging before the ECtHR will be contrary to EU law; examples of such cases appear in paragraphs 5(d), (e), (f), (g), (h), (i) and (j) above. In other cases, EU Member States may be acting in a domain governed by EU law, but where they are ultimately responsible for the act that is challenged, because the act or omission results from an exercise of discretion by the EU Member State. In *M.S.S. v Belgium and Greece* (paragraph 5(a) above), the Grand Chamber of the ECtHR found Belgium responsible for violations of the ECHR because, inter alia, under Article 3(2) of EU Regulation 343/2003²², Belgium could have examined the asylum-seeker’s application instead of returning him to Greece (*M.S.S.*, § 358). EU Member States retain similar discretion to ensure compliance with their human rights obligations under other EU legislative provisions, such as under Article 1(3) of Framework Decision 2002/584/JHA regarding the European Arrest Warrant (see example in paragraph 5(b) above) and under Article 3(4) of Framework Decision 2008/909/JHA, regarding the non-consensual transfer of prisoners (see example in paragraph 5(c) above).

b. Recommendations for the Draft Agreement and the Draft Explanatory Report

i. The co-respondent mechanism

9. With a view to addressing concerns, occasioned by the wording of the current draft proposals, about the possible over-use of the co-respondent mechanism (in particular in cases where a third-party intervention would be the most appropriate way to involve the EU in a case), **the AIRE Centre and Amnesty International recommend that the CDDH-UE adopts ‘OPTION B’ for Article 4 of the draft agreement on the EU’s accession to the ECHR (CDDH-UE(2011)04)**. We prefer this option as it permits joining the EU or a Member State as a co-respondent ‘where necessary’. This will prevent, in cases where it is not necessary to do so, imposing the procedural and financial burdens attendant to the co-respondent mechanism on applicants, who may struggle and be ill-prepared to take them on, and on EU Member States and the European Union. If the co-respondent mechanism was used inappropriately, applicants and Contracting Parties may, for example, find themselves undertaking research into very complex EU law arguments in cases where the EU law issues are not central to the resolution of the case before the ECtHR.

10. Accordingly, **we also recommend that the CDDH-UE amends paragraph 45 of the Draft Explanatory Report by substituting the word ‘appropriate’ in the fifth line with the word ‘necessary’**. **In the same regard, we also recommend that the CDDH-UE amends the last sentence of paragraph 41 of the Draft Explanatory Report (CDDH-UE(2011)05) as follows (adding the words which are underlined):**

²⁰ Available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Matthews&sessionid=67949541&skin=hudoc-en>.

²¹ Available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Bosphorus&sessionid=67949541&skin=hudoc-en>.

²² Available at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF).

While it will be for the ECtHR to interpret the meaning of ‘substantive link’, it is understood by the use of the term ‘necessary’ that the criterion requires a certain qualifying element, such as a causative interrelation, in order to distinguish cases in which EU law is merely applied by the domestic courts or other authorities from the cases in which an action, a certain measure or a failure to act by the Union is responsible for the alleged violation.

11. In cases such as those described above in paragraph 5(a)-(j), joining the EU as a co-respondent is not necessary. We welcome the fact that the Draft Explanatory Report reflects that there is a ‘certain similarity between third party interventions and the co-respondent mechanism’ (para 40), and that ‘a third party intervention may often be the most appropriate way to involve the EU in a case’ (para 41). In the examples we have highlighted in paragraph 5 above, a third-party intervention by the EU would be likely to contribute much more efficiently to the speedy and correct resolution of the application than joining the EU as a co-respondent. We therefore consider that, in addition to the above-noted recommended amendments it would also be helpful if the CDDH-UE would supplement the Draft Explanatory Report to include discussion of situations where:
 - a. although EU Member States are acting in a domain governed by EU law, they are exercising some degree of discretion that may prevent the commission of a human rights violation (examples in paragraph 5(a), (b) and (c) above); and
 - b. EU Member States are acting contrary to EU law.

We consider that it would be helpful if the Explanatory Report clarified that in both of those scenarios, adding the EU as a co-respondent would be unnecessary and would likely be less helpful than securing the EU’s participation as a third party. **We therefore recommend amending paragraph 44 of the draft Explanatory Report as follows (adding the words which are underlined) to make that paragraph clearer and to reflect these conclusions:**

In a notified case which has been directed against both the EU and one (or more) of its member States in respect of at least one alleged violation, it is understood that the ECtHR would consider the High Contracting Party (ordinarily an EU member State) which bears responsibility for the implementation of that act as respondent, and the High Contracting Party (ordinarily the European Union) which bears responsibility for the legal basis, but not for the implementation of that act, as a co-respondent. Internal EU rules may regulate how the member State(s) and the EU should present their position and their arguments in that situation. However, where an EU member State acts in areas governed by EU law, it will not normally be necessary to add the EU as a co-respondent. Instead, it would usually be more appropriate for the EU to be invited to join the proceedings as a third party.

ii. Preliminary rulings by the CJEU (Article 4(3) of the draft accession agreement and draft Explanatory Report paragraphs 60-69)

12. We note that there appears to be a consensus amongst the members of the CDDH-UE²³ – which Presidents Costa and Skouris share²⁴ – that there should be a mechanism to give the CJEU the opportunity to give its opinion on the compatibility with EU law (notably the Charter of Fundamental Rights) of EU ‘legal acts’ which are challenged before the European Court of Human Rights. The aim of such a mechanism appears to be to compensate for the

²³ See CDDH-UE(2011)04, Article 4(3).

²⁴ CDDH-UE(2011)03 Annex III.

perceived lack of an effective remedy involving the CJEU in cases where there have been alleged violations of fundamental rights related to EU law.

13. The AIRE Centre and Amnesty International are however concerned that the way Article 4(3) is included in the 25 February 2011 draft Accession Agreement (CDDH-UE(2011)04) will slow down proceedings significantly and may hinder applicants' right of application by requiring them to engage in financially, legally and procedurally burdensome proceedings before the CJEU, with which they may not be familiar, may not have anticipated or may not be adequately prepared to address. We therefore consider it important that the co-respondent mechanism is not used unless necessary. **To avoid overuse of this mechanism, we therefore recommend that the wording of Article 4(3) of the draft Accession Agreement (on page 6 of CDDH-UE(2011)04) be amended as follows:**

Prior to a ~~decision by judgment~~ judgment of the European Court of Human Rights on the merits of a case in which the European Union is a co-respondent, the Court of Justice of the European Union shall have the opportunity to rule, if it has not yet done so, on the validity ~~conformity~~ of the act of the European Union if the question of the validity ~~conformity~~ of the act of the European Union is raised by the applicant and is necessary for a decision or judgment.

14. It may be necessary, for example, to determine if an EU legal act is valid to ensure that it is 'in accordance with the law' (Article 8 § 2 ECHR). This would lead, appropriately, to the CJEU ruling on the validity of a legal act of the Union that caused the commission of an alleged violation, for the purpose of determining whether the EU legal act complained of was 'in accordance with the law' if it resulted in an interference with the right to respect for private or family life. This formulation would not lead to the inappropriate result of the CJEU giving a ruling in every case pending before the ECtHR as to whether a provision of EU law implicated in the case was compatible with fundamental rights. Such rulings are not provided for in the Treaty on the Functioning of the European Union and would fundamentally change the role of the CJEU in the EU legal order.
15. Furthermore, we recall that Article 52(3) of the Charter of Fundamental Rights provides that 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.' While '[t]his provision shall not prevent Union law providing more extensive protection', it does indicate that the ECHR provides the (minimum) content for many of the fundamental rights EU law protects. This means, logically, that it will be appropriate for the European Court of Human Rights to rule first in cases which raise issues under both the Convention and the Charter of Fundamental Rights. Such rulings should not however prejudice a ruling from the CJEU or the domestic courts of the EU's Member States that EU law provides greater protection. **We would therefore recommend that the CDDH-UE amend paragraph 60 of the Explanatory Report so that its last sentence reads:**

However, if such a reference for a preliminary ruling were not made, the ECtHR ~~would~~ may be required to adjudicate on an application calling into question provisions of EU law (e.g. where it is alleged that an EU legal act is 'not in accordance with [EU] law' and therefore contrary to Article 8), without the CJEU having the opportunity to review the ~~conformity of that law with fundamental rights as set out in the notification of that case~~ validity of the legal act in question.

16. We are also concerned that potential third-party interveners who could assist the ECtHR in developing its case law in relation to cases where the EU is a co-respondent may not have the opportunity to request permission to intervene before it is known that the case involves the use of the co-respondent procedure. **For this reason, we recommend adding the following sentence to paragraph 48 of the draft explanatory report (CDDH-UE(2011)05):** 'It is

understood that the 12-week period for potential third parties to request permission to intervene, found in Rule 44(3)(b) of the Rules of Court, will only begin to run after the Court has informed that potential co-respondent that it has or has not been invited to join the proceedings as a co-respondent'.

c. Future Consultations with Civil Society

17. We are grateful for having had the opportunity to consult with the CDDH-UE on 25 January.
18. As indicated, the AIRE Centre and Amnesty International attach great importance to the accession of the EU to the ECHR. We believe it is vital that those who promote respect for human rights in Europe – including, among others, those who represent applicants and submit third-party interventions to the ECtHR – have an opportunity to inform this process. We are therefore grateful to have been provided with access to documents of the CDDH-EU and to have been given the opportunity to make written submissions and to consult with the CDDH-UE on 25 January 2011. **We urge the CDDH-UE to hold another consultation with civil society in May 2011.**
19. **We also urge that the CDDH-UE consider recommending to the CDDH that it hold further consultations with civil society as this process continues.**
20. **Lastly, we urge the European Union to ensure that the discussion and drafting of the internal rules required by the accession process be carried out in a transparent manner and include consultations with civil society.** This is particularly important in the light of the fact that it appears there will be a role for the CJEU in giving preliminary rulings. Among other things we consider that civil society organisations would be well placed to make recommendations aimed at ensuring that such EU internal rules and procedure do not hinder the right of individual application to the European Court of Human Rights.

The AIRE Centre
Amnesty International
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