



## NGO submissions on EU accession to ECHR

1. The undersigned Non-governmental organisations (NGOs) welcome the resumed progress of the discussions on the European Union's (EU's) accession to the European Convention on Human Rights (ECHR) and are grateful for the opportunity to contribute to this debate. The delegates will recall that we have already participated in these discussions, most recently on a number of occasions in 2011. On the occasion of the previous consultation with civil society of the 7+7 Group in 2011, our submissions drew attention to situations which we anticipated might give rise to the intervention of the EU in the context of the application of EU law (or the failure to apply it) by a EU member state party to the Convention. In the interests of economy of time and space we do not repeat here the previously made submissions.<sup>1</sup>

### I. General remarks

2. At the outset, we invite the 47+1 group to have at the forefront of their minds throughout these negotiations that the teleological purpose of EU Accession to the ECHR is **to ensure that the people of Europe enjoy more complete recognition and protection of their human rights.**
3. It is worth recalling that – from an EU law perspective - Art 15(1) of the Treaty on the Functioning of the European Union (TFEU) expressly provides that the EU institutions, in the case of the present negotiations the Commission, shall conduct their work so as ***to ensure the participation of civil society.*** Furthermore, the Court of Justice of the European Union (CJEU) has held that the EU principle of transparency stated in Articles 1 and 10 of the Treaty on European Union (TEU) and in Article 15(1) and 15(2) TFEU “**enables citizens to participate more closely in the decision making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic**

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<sup>1</sup> The submissions can be found on the Council of Europe's website at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp). See in particular, In formal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE), Submission by the AIRE Centre and Amnesty International, available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents/AIRE&AI\\_comments\\_Marc\\_h2011.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/AIRE&AI_comments_Marc_h2011.pdf)

system.”<sup>2</sup> This principle is also found in Regulation 1049/2001 regarding public access to all European Parliament, Council and Commission documents.<sup>3</sup>

4. **The undersigned NGOs therefore recommend that the accession of the EU to the ECHR be undertaken with the widest degree of the transparency guaranteed under Articles 1 and 10 of the TEU and look forward to that transparency being upheld in these negotiations. For these reasons, we are particularly pleased to have the opportunity to renew our participation in these negotiations at this stage.**
5. Many of the growing number of human rights sensitive situations in which EU law is engaged concern the conduct of states implementing (or failing to implement) EU law in a manner which may run counter to obligations under the ECHR. Such violations frequently occur as a consequence of omissions or “failure to act” in EU terminology.
6. Moreover, some constitutional and procedural aspects of EU law render compliance with the Convention problematic - not least, despite the proviso of Articles 46 and 47 of the Charter of Fundamental Rights (CFR), with regard to compliance with Article 13 ECHR, the right to an effective remedy. This is largely as a consequence of the restrictive approach taken to date to the possibility for individuals to bring legal actions under Article 265 TFEU against the EU institutions for failure to act under Article 263 TFEU. This EU approach contrasts markedly with the concept of positive obligations on contracting parties developed by the European Court of Human Rights (ECtHR). While the Strasbourg court will require that “the respondent [state] take all the steps it could reasonably have been expected to take to prevent a harm of which it knew or ought to have known”, EU institutions have not always been willing to take all the steps they could reasonably have been expected to take in this context. The possibility of commencing infringement proceedings is recognised in Article 258 TFEU but, as was held in Cases 247/87 *Star fruit* and Case T-47/96 *SDDDA v Commission*, there is no legal means of forcing the Commission to take action. Once the EU has acceded to the ECHR, the Commission may be held accountable before the Strasbourg Court for its failures to act and in particular the failure to commence infringement proceedings in circumstances where this failure to act may prolong breaches of obligations equivalent to those under the ECHR. This is particularly important in the post-Lisbon regime where the Commission can now also request the CJEU to impose a fine on a Member State which persistently violates its human rights obligations under EU law.
7. Detailed compatibility studies carried out by the Council of Europe in relation to states which were seeking to join the Council of Europe and become parties to the ECHR were conducted to ascertain that their laws were in conformity with the

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<sup>2</sup> Joined cases C-9209 and C-9309 *Voker and Marus Schecke v Land Hessen* 9 Nov 2010

<sup>3</sup> Delegates to the 47+1 will doubtless be aware that the CJEU recently (case T-529/09) considered a decision by the Council to refuse to disclose Council documentation regarding the negotiation of an agreement by the EU with a third country. The General Court, in delivering its decision, emphasised the importance and the necessity of maintaining a “**climate of confidence in ongoing negotiations**”. It also emphasised the necessity of giving a “clear and coherent statement” of the reasons for any non-disclosure. The Court accepted in the context of the particular nature of the agreement (the fight against terrorism and the sharing of information about terrorist financing) that some parts of the documentation had to be kept confidential.

Convention. It is to be regretted that no such exercise has been carried out in relation to the EU.

8. Finally, the undersigned NGOs would like to draw the delegates' attention to concerns in the context of EU accession in connection with the application of provisions of EU law, such as the Schengen regime and the Dublin Regulation, by states which are not members of the EU. These concerns extend also to the impact of accession on the institutional relationship between the EU, the European Economic Area (EEA) and the European Free Trade Association (EFTA). **We therefore invite the delegates to consider not only the case law of the CJEU and the EFTA court in this respect<sup>4</sup> but also the dozens of bilateral agreements concluded by the EU – but not by the Member States - with third countries.**

## **II. The revision to the accession agreement discussed at the second meeting between the Comité Directeur pour les Driots de l'Homme (CDDH) ad hoc negotiation group and the European Commission<sup>5</sup>**

### A. Article 1 Scope of the accession and amendments to Article 59 of the Convention

9. The proposed Article 1(2)(c) *aa* and *bb* seem to suggest that the EU (and its court) are the bodies which will be able to decide whether acts and measures are attributable to it for the purposes of considering claims under the ECHR. This is wholly contrary to the general principle of the law of the ECHR that contracting parties are accountable before the ECtHR for all the acts or omissions **which the ECtHR determines are attributable to them** (See e.g. *Loizidou v Turkey*<sup>6</sup>, *Ilascu v Moldova and Russian Federation*<sup>7</sup>). An acceptance of *bb* would mean that the EU, alone of the High Contracting Parties, could avoid accountability and responsibility as a consequence of a decision of its own institutions including of its own court. This is an unacceptable erosion of the jurisdiction of the ECtHR. For example, in a case involving a particular Frontex operation it must be for the ECtHR to decide whether the acts and omissions of Frontex are attributable to the EU or only to the member state(s) participating in the operation. The Court will naturally take into account, and give appropriate weight to the views of the EU on the matter, but those views cannot be dispositive of either attribution or responsibility. This is also an unacceptable position in light of general public international law. The *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations* of 1986 makes it clear in its Article 27.2 that “An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to

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<sup>4</sup> For example, the case of *Clauder* E-4/11 (26 July 2011) recently decided by the EFTA court

<sup>5</sup> Comments in this document are made on the basis of Appendix III to the Meeting report (47+1 (2012) R02).

<sup>6</sup> *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 November 1996

<sup>7</sup> *Ilascu and Others v. Moldova and Russia*, 48787/99, Council of Europe: European Court of Human Rights, 8 July 2004

perform the treaty”.<sup>8</sup> The requirement that the attribution of responsibility will depend in practice on a decision of the EU institutions is wholly at odds with the object and purpose of this fundamental provision of international law, appearing to be more a disguised reservation in the form of a treaty provision, and creates an undue imbalance with the other Contracting Parties to the ECHR. **The undersigned NGOs therefore call on the ad hoc Group to reject the proposed amended article 1(2)(c).**<sup>9</sup>

10. The undersigned NGOs are in addition concerned about the proposed deletion of the terms “persons acting on [the EU institutions, bodies, offices or agencies] behalf” from the article 1(2)(c), as this may exclude national organs or persons acting as organs of the EU for a specific purpose. **We recommend reverting to the original draft proposed by the 7+7 group in this regard.**
11. The proposed amendment to Article 1(4) seems to the interveners to mean that the concept of “jurisdiction” in Article 1 ECHR in relation to persons who are outside the territory of the member states must be applied to the EU as it is applied to other contracting parties. **On the basis of this interpretation, the undersigned NGOs would not object to it but respectfully suggest that its inclusion adds nothing to the way in which the concept of jurisdiction would be applied by the court if the amendment were absent.** Whether or not an applicant is or was within the “jurisdiction” of the EU will depend on an examination of the factual situation and the application of the principles laid down in the Court’s case law in e.g. *Loizidou*<sup>10</sup>, *Cyprus v Turkey*<sup>11</sup>, *Al Skeini*<sup>12</sup>, *Al Jedda*<sup>13</sup>. The Court will apply its well known principles in order to establish whether or not the individual was within the jurisdiction of the respondent party in any case before it - whether that respondent is the EU or another Contracting Party. This does not need to be articulated by treaty amendment.
12. With regard to Article 1(5), the proposed amendment refers to article 5(1) (understood by the undersigned NGOs as a reference to Article 5(1)(f)). We recall that the EU regulates, and in some cases polices access, not only to the territory of the Member States of the EU, but also to the territory of those non-EU states participating in the Schengen and Dublin regimes, and in the context of Frontex and other operations, in some cases, also controls the passage of individuals in the contiguous zones and on the high seas (see e.g. *Medvedyev v France*<sup>14</sup>, *Hirsi v Italy*<sup>15</sup>). The proposed

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<sup>8</sup> A corresponding obligation exists for treaties between States and treaties between States and international organisations.

<sup>9</sup> Article 1 (2)(c)(aa) and (bb) mentioned in the Meeting Report 47+1 (2012) R02, footnote 1, page 18.

<sup>10</sup> *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 November 1996

<sup>11</sup> *Cyprus v. Turkey*, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001

<sup>12</sup> *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011

<sup>13</sup> *Al-Jedda v. United Kingdom*, Application no. 27021/08, Council of Europe: European Court of Human Rights, 7 July 2011

<sup>14</sup> *Medvedyev and Others v. France*, Application no. 3394/03, 29 March 2010

<sup>15</sup> *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012

restriction of the EU's position under the ECHR to the *territories* of the Member States of the EU is thus deficient. **The undersigned NGOs therefore recommend to substitute the reference to *territories* with the term *jurisdiction* or to delete paragraph 5 altogether.** In this context, we would like to recall in particular the contrast which exists between the right to freedom of movement guaranteed in Protocol 4 to the ECHR and the very different right to freedom of movement enshrined in Art 45<sup>16</sup> of the CFR, the EU's free movement *acquis* and the Schengen regime. It is important to stress that the EU's Schengen and Dublin regimes apply to territories of states which are not Member States of the EU.

## B. Article 3: the co-respondent mechanism

### **Third party intervention and the co-respondent mechanism**

13. Our experience of both legal orders suggests to us that it will be rather rare that a complaint directed against a state will require the EU to be joined as a co-respondent. A third party intervention may often be the most appropriate way to involve the EU in a case.<sup>17</sup>
14. Three mechanisms would enable the Court to benefit from the EU's input into the litigation when appropriate:
  - a. the EU itself asking the Court for *permission* to intervene as a third party;
  - b. by analogy with the current Article 36(1) ECHR the EU being *entitled* to submit comments or take part in the hearing of any case where the application of EU law is identified by the Court as a key issue, for example in cases concerning entitlement to social security benefits, the application of the Brussels II bis regulation or the non-consensual transfer of prisoners.
  - c. The Court continuing to *invite* "the EU" - formally – to intervene as a third party under the existing Article 36(2) ECHR.<sup>18</sup>
15. For example, in the key case of *Bosphorus*<sup>19</sup> it was the EU which apparently sought permission to intervene. In *MSS v Belgium and Greece*<sup>20</sup>, the leading cases concerning

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<sup>16</sup> *Explanation on Article 45 — Freedom of movement and of residence*: "The right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 21; and the judgment of the Court of Justice of 17 September 2002, Case C-413/99 *Baumbast* [2002] ECR I-7091). In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties. Paragraph 2 refers to the power granted to the Union by Articles 77, 78 and 79 of the Treaty on the Functioning of the European Union. Consequently, the granting of this right depends on the institutions exercising that power."

<sup>17</sup> See the examples provided in the following submission: In formal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE), Submission by the AIRE Centre and Amnesty International, available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents/AIRE&AI\\_comments\\_Marc\\_h2011.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/AIRE&AI_comments_Marc_h2011.pdf)

<sup>18</sup> Since any such intervention will necessarily present the Commission's view of the position in EU law, it will be for the Court to accept or reject that view.

<sup>19</sup> *Bosphorus Airways v. Ireland*, Application no. 45036/98, Council of Europe: European Court of Human Rights, 30 June 2005

<sup>20</sup> *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011

the operation of the EU's Dublin Regulation, it is our understanding that the EU was asked if it wanted to intervene but chose not to do so. In the *Bosphorus* case it was the European Commission who intervened on behalf of the EU. The CJEU is the only body which has the power to give a definitive ruling on the content of EU law and its view may (and frequently is) very different from that of the Commission. Where third party interventions by the EU are concerned, the Court will wish to bear that in mind.

### **The co-respondent mechanism**

16. Such mechanisms for enhancing the EU's role as a third party intervener are quite different from proposing that the EU should **be joined as a co-respondent** - with its implications for being found in violation of its Convention obligations.
17. In any litigation which has not been directed against it by the applicant the role of co-respondent is one in which the EU should only be placed **if it appears to the Court** that the alleged violation is attributable (or jointly attributable) to the EU. We note that the current proposal seems to refer only to situations where it appears that **a provision of EU law is incompatible with the Convention** and not where the acts or omissions of an EU body have been, are, or would be if carried out incompatible with Convention rights. Nor does the wording appear to cover a situation where the court decides – *ex proprio motu* – that a High Contracting Party should be joined as a co-respondent. **The undersigned NGOs find the current proposed wording of Article 3(5) confusing and would welcome clarification.** In *Behrami and Saramati*,<sup>21</sup> it was the Court which invited the UN - although clearly not a party to the Convention, to intervene. This was to enable the UN's views to be heard before the Court reached the conclusion that the case was inadmissible *ratione personae*. Despite the UN's assertions to the contrary, the Court found that it was UNMIK, not the respondent State, that had been responsible for the omissions which had occurred. However, this finding had no consequences for the UN. In a comparable case involving the EU it would be essential for the EU to be joined as a co-respondent – and not a third party - if there was possibility that the Court would hold the EU liable.

### **Prior involvement of the CJEU: Article 3, paragraph 6**

18. The undersigned NGOs note that judges of both courts (Presidents Skouris and Costa) have expressed a preference for the prior involvement of the CJEU. We have already expressed our concerns about the expertise and associated cost implications that arise as a consequence of both the co-respondent and prior involvement mechanisms. Where the prior involvement of the CJEU is foreseen, and whatever mechanism is adopted by the EU to enable this to occur, it is essential that all necessary steps are taken to ensure that the voice of the individual who is the applicant in the ECtHR proceedings is also heard in the CJEU proceedings and the CJEU's rules on legal aid will need to be adapted in order to ensure that the proceedings before it comply with

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<sup>21</sup> *Behrami v. France; Saramati v. France, Germany and Norway Application* Nos. 71412/01 and 78166/01, ECHR 2007

its own case law in *DEB*.<sup>22</sup> **The undersigned NGOs would therefore ask the EU delegation to clarify how this important question of the participation of the applicant, and of eventual third parties, will be assured by EU law. Furthermore, we would like to invite the European Commission and all other EU institutions, in light of our observations made at the beginning of our submission, to allow for consultation of civil society in the negotiations for this mechanism.**

19. The undersigned NGOs are concerned that both the prior involvement mechanism and the co-respondent mechanism will increase the complexity and cost of litigation in Strasbourg so as to put it beyond the means of most applicants. The adoption of whatever version of these mechanisms is eventually agreed must therefore be accompanied by a **clear commitment to the provision of the enhanced legal aid** that will be necessary if applicants are not going to be denied effective access to justice by the legal complexity and the associated prohibitive costs that will occur as a consequence of recourse to these mechanisms.
20. The undersigned NGOs would like to re-emphasise their view that, when it is proposed that either any co-respondent mechanism should be triggered or the matter is subjected to the prior involvement of the CJEU, there should be an opportunity for third parties to seek the permission of the Strasbourg court to intervene. This is particularly important in the second case as under the present CJEU rules only Member States can intervene in cases sent by national courts under Art 267 TFEU. If third parties have not been accepted as interveners in the national proceedings, no mechanism exists for other interested parties (such as UNHCR or NGOs) to be part of the proceedings in the CJEU. It is therefore essential that the ECtHR is able to consider requests by third parties to intervene, as it does at present after communication of a case, *before* the prior involvement of the CJEU.
21. Finally, we note that the proposed article 3 paragraph 6 is, similarly to article 3 paragraph 2, confined to scenarios where the compatibility of a provision of EU law with the Convention is at issue and not where the acts or omissions of EU institutions or bodies are the subject matter of the litigation.<sup>23</sup>

### **Allocation of Responsibility: article 3, paragraph 7**

22. With regard to proposed Article 3(7), the undersigned NGOs consider that the question of allocation of joint or single responsibility is a matter entirely for the Court to decide – after hearing any representations on this issue from the parties, including the co-respondent party. We consider that it is a wholly inappropriate erosion of the Court’s jurisdiction to include a provision which suggests that this is somehow a

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<sup>22</sup> In *Case C-279/09, DEB v. Germany*, Judgment of the Court of Justice (Second Chamber) of 22 December 2010 - the court held that legal aid must be available to those who wish to assert a claim in national courts that their rights under EU law have not been respected or properly implemented

<sup>23</sup> In this context it should be recalled that although the CJEU has recently annulled the extension of the Frontex regulation to include operations on the high seas, as it lacked the proper legal basis, the Regulation will continue to remain in place until such time as the EU legislature has rectified this situation (see by analogy *Walden v Liechtenstein* dec. 33916/96, 16 March 2000 before the ECHR).

matter for the respondent parties to agree between them. **We recommend that the first option of the proposed amendment be rejected. Should the second option of the proposed amendment be retained, the necessity of a prior joint request should be abandoned.**

C. Article 7: Participation of the EU in the Committee of Ministers in the execution of judgments in which the EU is a respondent

23. At the outset, the undersigned NGOs wish to express concern about the proposition according to which a matter as important as the participation of the EU in the Committee of Ministers should be settled by a so-called gentlemen's agreement. It is a fundamental axiom of the Convention that such matters must be regulated by law (not circulars, ministerial guidelines or gentlemen's agreements),<sup>24</sup> a law which must have the necessary quality of law.<sup>25</sup> The law must be precise and ascertainable so that an individual may regulate his conduct by it if need be with legal advice.
24. Article 7(2) relates to the question of "sincere co-operation", enshrined in Article 4 TEU and which often requires the EU Member States to speak with one voice.
25. The undersigned NGOs welcome the statement by the EU<sup>26</sup> that it does not seek a privileged position nor to distort the present supervisory system. For exactly the same reasons highlighted by Article 7(2)(a) and by the European Commission's intention not to seek a privileged position, we contend that the balance achieved by the 7+7 Group in the draft Rule 18 was a correct one as it reinstated a sense of equality among Contracting Parties in the Committee of Ministers.
26. The undersigned NGOs would also like to draw attention to the fact that any majority proposed without the correction of a "qualified" vote of Contracting Parties non Member of the EU will risk creating an undue imbalance between the Contracting Parties, if not at present at least in the future. Some non-member states might become EU Member States in the next years, and other Contracting Parties are or will be bound by bilateral and multilateral agreements with the EU, such as Accession Agreements or Schengen. These factors may considerably increase the majority on which the EU may rely upon and create imbalance in the Committee of Ministers.
27. Finally, the intervening NGOs reject the idea of a "mediatory" panel. We find it a complex procedure which will only exacerbate the already slow enforcement mechanism of the Committee of Ministers. Furthermore, it appears to create a situation of "special" and privileged status for the EU, something which would run contrary to the Commission's intention expressed during the second negotiation meeting.

**5 November 2012**

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<sup>24</sup> See e.g. *Khan v. the United Kingdom*, Application no. 35394/97, ECHR 2000

<sup>25</sup> *Sunday Times v United Kingdom*, Application no. 6538/74, 26 April 1979

<sup>26</sup> Document 47+1 (2012) R02, paragraph 14.