

ELIMINATING CONFLICTING INTERPRETATIONS
OF THE EUROPEAN CONVENTION ON HUMAN
RIGHTS BY THE EUROPEAN COURT OF JUSTICE
AND THE EUROPEAN COURT OF HUMAN RIGHTS:
THE PDIQ SYSTEM AS A PREVENTATIVE
SOLUTION

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Introduction

The European Union (“EU”) has developed into the world’s first supranational organization¹ and has played a significant role in terms of European integration² since its initial inception following the atrocities of the two World Wars. Having grown from an agreement between France and Germany on coal and steel³ to the organization that it is today, the EU has led to a Europe, previously violently divided, that is now strongly united. The current state of European integration was recently put to the test when the Treaty establishing a Constitution for Europe was laid before the French⁴

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¹ KOENRAAD LENAERTS, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 11 (Sweet & Maxwell 2000); Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27 (2000).

² von Bogdandy, *supra* note 1, at 32: “European integration is a societal evolution that reaches beyond the political and legal processes of the European Union. However, even the legal and the political processes have avoided monopolization by the Union: one has but to recall the prominent role of the European Court of Human Rights (ECHR).”

³ The Treaty of Paris (1951) established the European Coal and Steel Community, which entered into force on 23 July 1952 and expired on 23 July 2002.

⁴ France rejected the Constitution Treaty by referendum on May 29, 2005. *See THE FUTURE OF THE EUROPEAN CONSTITUTION* 7 (2005), <http://www.parliament.uk/commons/lib/research/rp2005/rp05-045.pdf>.

and Dutch⁵ electorates. Despite failing to achieve the ‘*ja*’ and ‘*oui*’ votes, the rejection of the Constitution will serve as an important moment in the history of European integration. Exactly what it will mean for the future of the EU is not yet entirely clear, but one can estimate that its place in history will be significant. It is possible that, like the initial rejection of the Maastricht Treaty, the failure of the Constitution will further serve to bring “Europe into the public eye,”⁶ and to a level of discussion where European citizens do not simply witness discussions in the public forum, but engage in this debate, involving themselves in the future of this supranational entity that affects each and every one of them on their daily lives.⁷

While it is not possible to say what the rejection of the Constitution will mean for European integration in the future, it is possible to comment on what it signifies to date. The Constitution marks a significant step in the development of European integration through the auspices of the EU, and highlights the continued series of developments that have taken place since the European Coal and Steel Community (“ECSC”)⁸ first began. Although the majority of the French and Dutch electorates (and one would suspect several others) indicated that the EU is not ready for a Constitution, it stands as testimony to the efforts and achievements of those who have transformed the dreams of the initial founders⁹ into reality and into a union consisting of the world’s third largest population.

The transforming nature of a unified Europe is a topic that has been discussed by numerous scholars and academics,¹⁰ as has the

⁵ The Dutch rejected the Constitution on June 1, 2005. *See id.*

⁶ Dieter Grimm, *Does Europe need a Constitution?* 1 EUR. L.J., 282, 282-302, 283 (1995): “It was the Maastricht Treaty, which has since been concluded, that brought Europe into the public eye.”

⁷ Grimm, *supra* note 6, at 283: “What has, though, emerged from the public debate over the treaty is how far national policy is now determined by decisions by Community bodies, and how strongly domestic circumstances are marked by Community law and the case law of the European Court of Justice.”

⁸ SIONAIDH DOUGLAS-SCOTT, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 50 (2002).

⁹ Robert Schuman, Foreign Minister of France: The Declaration of 9 May 1950 (May 9, 1950).

¹⁰ DAMIAN CHALMERS et al., *EUROPEAN UNION LAW* (2006); PAUL CRAIG &

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role that the European Court of Justice (“ECJ” or the “Luxembourg Court”) has played in furthering this integration and advancement.¹¹ Yet the integration of Europe, and the role that the ECJ plays in this process, is an ongoing issue. A significant and important part of this continuing discussion concerns the judicial protection of human rights within the EU,¹² with a substantive amount of literature analyzing the role of the ECJ in building the EC protection of the rights enshrined in the European Convention of Human Rights (“Convention” or the “ECHR”), receiving both praise and criticism¹³ for its “bold judicial activism.”¹⁴ Despite this wealth of academic

GRAINNE DE BURCA, *EU LAW* (1999); DESMOND DINAN, *EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION* (2005); PAUL CRAIG & GRAINNE DE BURCA, *THE EVOLUTION OF EU LAW* (1999). *See also infra* note 56.

¹¹ Joseph H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991); ANDREW WILLIAMS, *THE EU HUMAN RIGHTS POLICIES: A STUDY IN IRONY* (2005). Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *THE EU AND HUMAN RIGHTS* 859-898 (Philip Alston, Mara Bustelo, & James Heenan eds., 1999). G. Federico Mancini, *The Making of a Constitution for Europe*, 26 *COMMON MKT. L. REV.* 595 (1989).

¹² Joseph H.H. Weiler, *Methods of Protection: Towards a Second and Third Generation of Protection* in 2 *EUROPEAN UNION: THE HUMAN RIGHTS CHALLENGE* 555, 558 (Antonio Cassese et al. eds., 1991): “The unifying theme of most of the literature and indeed the theme that has dominated the discussion of human rights in the Community has been *Judicial Protection* of fundamental human rights.” Despite the plethora of literature that has been written about the Court of Justice, Joseph H.H. Weiler & Nicolas Lockhart, *Taking Rights Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence*, 32 *COMMON MKT. L. REV.* 51 (Part I), 54 (1995) complained about “the all too small corpus of critical academic writing about the Court.”

¹³ *See* Jason Coppel & Aidan O’Neill., *The European Court of Justice: Taking rights seriously*, 29 *COMMON MKT. L. REV.* 669 (1992). *See also* the response by Joseph H. H. Weiler, & Nicolas Lockhart, *Taking Rights Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence*, 32 *C.M.L.REV.* 51 (Part I), 579 (Part II) (1995). R.R. Churchill & N.G. Foster., *Double Standards in Human Rights? The Treatment of Spanish Fishermen by the European Community*, 12 *EUR. L. REV.* 430-443 (1987). For a more positive assessment of the ECJ, *see* Anthony Arnall, *The European Union and Human Rights: Final Project Report on an Agenda for the Year 2000*, cited by *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 223 (1999).

¹⁴ Joseph H. H. Weiler., *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights*

literature, there is still much to be said and done before the judicial mechanisms and institutions that are so central to European integration are complete. One of the criticisms that has been consistently raised over the years and continues to resonate today, is that in the absence of any formal links between the ECJ and the European Court of Human Rights (“ECtHR” or the “Strasbourg Court”), there have been several instances in which the ECJ has adopted a lower standard of protection than the Strasbourg Court. In turn, questions are then raised about the EC/EU’s effectiveness, ability, and power, to protect human rights, as well as what could and potentially should be done to address the issue. It is frequently suggested that in order to rectify this problem, it would be appropriate to formalize the relationship between the two systems, with the EC/EU acceding to the ECHR as a contracting party, thereby relying upon the ECtHR for external judicial review. This is a solution that is often presented as having the ability to solve most, if not all, of the existing problems.

The main aim of this paper is to critically analyze and question whether EU accession¹⁵ is the most appropriate option in order to provide for the greater protection of human rights in the EU, and for the harmonious interpretation and application of the ECHR by the ECJ and the ECtHR. There are definitely a number of benefits to accession, some of which will be discussed below,¹⁶ but once the various aspects of the problem have been laid out and identified, it becomes ostensible as to why EU accession fails to provide the optimum and most effective means of achieving the desired results; thus, seriously questioning “whether EU accession would strengthen

Within the Legal Order of the European Communities, 61 WASH. L. REV. 1103, 1105 (1986).

¹⁵ Since the Constitution for Europe proposed that the EU should be given legal personality and accede to the ECHR, as well as Protocol 14 to the ECHR referring to the EU, this paper will refer to EU accession., as opposed to EC accession. “EU accession” will therefore refer to EU accession to the European Convention on Human Rights.

¹⁶ See for example, Siofra O’Leary, *Accession by the European Communities to the European Convention on Human Rights: The Opinion of the ECJ*, 4 EUR. HUM. RTS. L. REV. 362-77 (2006).

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the protection of human rights in the EU.”¹⁷ The option of accession has previously been compared to a “tired old” horse that has “over the years been flogged practically to death,”¹⁸ yet we assume that this beast will somehow muster the strength to carry the EU forward in terms of effective and heightened protection of the Convention rights. If we have not relied too heavily on this old horse as the ideal solution for past problems concerning human rights in the EC/EU, then the ever increasing load of human rights issues that the EC and the EU as a whole faces¹⁹ will require it to carry an even greater load in the future.

Therefore, the aim of this article is to highlight the inadequacy of EU accession as a solution, proposing that it is time to give this old horse a rest. Instead, we must be looking for a solution that will improve the current situation within and for the EU. As will be explained later in this paper, a formal relationship between the two Courts is desirable to achieve the harmonious interpretation and application of the ECHR, but our attention, for reasons that will be explained below, should be focused on establishing a referral system

¹⁷ F. G. Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union accession to the European Convention on Human Rights*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 4 (Juliane Kokott et al. eds., 2006).

¹⁸ Joseph H.H. Weiler, *European Citizenship and Human Rights*, in *REFORMING THE TREATY ON EUROPEAN UNION: THE LEGAL DEBATE* 77 (Jan Winter et al. eds., 1996). It is important to note at the outset that this paper does not criticize the ECHR itself not the Strasbourg Court. Instead, this paper is criticizing the option of accession as being appropriate for the harmonious application of the ECHR by the two courts. As will be seen in part two of this paper, the alternative option to EU accession, namely the PDIQ system, relies heavily on the ECHR and the ECtHR. Criticisms of the option of accession should not be considered to be the same as criticisms of the Courts or the ECHR.

¹⁹ SIONAIDH DOUGLAS-SCOTT, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 433 (2002): “EU law today covers many fields capable of having a human rights dimension. Cases have been heard by the ECJ concerning the freedom of expression (*Connolly*), the right to property (*Hauer*) and the right to equal treatment in transsexuals (*Grant*). The ever expanding competence of the EU into areas traditionally within the preserve of state sovereignty has ensured that the issue of the breach of fundamental rights by the Union is not merely a theoretical possibility.”

mechanism, or more specifically, the “pre-decision interpretation question” system,²⁰ as the key to securing the harmonious protection of human rights in all aspects of European integration.

This article is divided into two parts. The discussion in part one focuses on the current application of the Convention by the ECJ, including the Convention’s legal status in the EU legal order when it is applied by the ECJ. Following this, the discussion turns to address the problems associated with the current informal relationship of the two Courts and the current application of the ECHR by the ECJ; namely diverging interpretations of the Convention. In building upon the first part of this paper, the second section provides a critical analysis of the potential solutions to addressing the inadequate protection of human rights in the EU. This part of the paper examines why the option of EU accession is not capable of making the changes that are needed, comparing this with a referral mechanism, namely the pre-decision interpretative question system, and explaining why this is a more suitable and effective solution for ensuring the harmonious application of the ECHR by the two Courts. Within this last section, the paper will provide a series of criteria that represent the needs of the EU protection of human rights, which will determine how the various options can resolve and address the existing problem.

²⁰ This term was first proposed by the author in an article published in the *London Law Review* and also part of the Harvard Law School Student Series. See Adam D J Balfour, *The Application of the European Convention on Human Rights by the European Court of Justice*, 2 *LONDON L. REV.* 855 (2006); Adam D J Balfour, *Application of the European Convention on Human Rights by the European Court of Justice*, Harv. L. Sch., Student Scholarship Ser. Paper 4 (2005) available at <http://lsr.nellco.org/harvard/students/papers/4>. In this paper, I intend to expand upon this idea, highlighting how it is a more attractive solution than EU accession and a viable option by itself.

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Part One: Identifying the Problems with the Current Application of the ECHR by the ECJ

Although the EC is an entirely separate international organization to the ECHR,²¹ the ECJ has applied the ECHR to the Community legal order. The first part of this paper is designed to provide an overview of how the ECJ currently applies the ECHR and the legal status that the Convention has within the EC when applied by the Luxembourg Court. The purpose of this section is not to offer a historical account of the emergence of the protection for the Convention rights within the EC/EU,²² but instead the aim is to provide a succinct overview of the current relationship between the two courts and the legal status that the ECHR has within the Community legal order. In order to find an effective solution to the existing problems associated with the ECJ's application of the ECHR, it is essential that the various components and issues that are affecting the judicial protection of rights are highlighted to indicate what changes or improvements could be made.

²¹ DOUGLAS-SCOTT, *supra* note 8, at 3 (comments on the failure of many people to understand the differences between them: "The EC, EU, and ECHR are often confused by both journalists and the public, for whom they present an incoherent institutional image."). For a brief introduction of the distinction between the EC, the EU, and the ECHR, see LAMMY BETTEN, AND NICOLAS GRIEF, *EU LAW AND HUMAN RIGHTS* (1998).

²² de Witte, *supra* note 11, at 859 has commented that the discussing the history of the emergence of the EC's human rights protection is comparable to "well-trodden paths". This is not to deny that the history is important, but it is merely the process of regurgitating what has already been said by several others before now. For an informative and well-discussed presentation of this topic, see Nanette Neuwahl, *The Treaty on European Union: A Step Forward in the Protection of Human Rights?*, in *THE EUROPEAN UNION AND HUMAN RIGHTS* (Nanette Neuwahl & Allan Rosas eds., 1995); PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS*, ch. 8 (3d ed. 2002).

I. The Legal Status of the ECHR in the Community Legal Order When it is Applied by the ECJ

Despite the fact that neither the EC nor the EU are party to the Convention, the ECJ has indicated that it considers the Convention to have “special significance”²³ within the Community legal order, holding that it “must be taken into consideration in Community law”²⁴ when it is applied. Although the ECJ does not directly apply the ECHR, it instead uses this instrument as “a point of orientation”²⁵ to “inspire”²⁶ and “assist”²⁷ the Community protection of human rights; relying on it as a set of guidelines.²⁸ The ECJ has indirectly applied the Convention by extrapolating the general principles of this instrument and applying them as Community principles, doing so on an “incremental”²⁹ case-by-case basis. What this means is that although the “substance”³⁰ of the principles that the two Courts are applying are generally similar, if

²³ Case C-260/89, ERT, 1991 E.C.R. I-2925, ¶ 41; Op. 2/94, 1996 E.C.R. I-1759, ¶ 33; Case C-299/95, Kremzow v Austria, 1997 E.C.R. I-2629, ¶ 14; Case C-17/98, Emesa Sugar (Free Zone) NV v Aruba, 2000 E.C.R. I-675, ¶ 8.

²⁴ Case C-222/84, Johnston v Chief Constable of the R U C, 1986 E.C.R. 1651, 1682.

²⁵ Manfred Dauses, *The Protection of Fundamental Rights in the Community Legal Order*, 10 EUR. L. REV. 398, 401 (1985).

²⁶ Case C-4/73, J Nold Kohlen- und Baustoffgrosshandlung v. Comm’n, 1974 E.C.R. 491, 507.

²⁷ Rick A. Lawson, *Confusion and conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in 3 THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 227 (Rick Lawson & Matthijs. de Bloijs eds., 1994).

²⁸ *Id.* at 227: “[T]he Court considers itself bound to draw ‘inspiration’ from constitutionally guaranteed rights whereas human rights treaties can supply ‘guidelines’.” LENAERTS, *supra* note 1, at 723 §17-076: “Fundamental rights are an integral part of the Community legal order. As a result of the primacy of Community law, any action on the part of the Member States taken within the scope of Community law has to comply with Community requirements with regard to the protection of fundamental rights.”

²⁹ DOUGLAS-SCOTT, *supra* note 8, at 434.

³⁰ Henry G. Schermers, *European Remedies in the Field of Human Rights in THE FUTURE OF REMEDIES IN EUROPE* 211 (Claire Kilpatrick et al. eds., 2001).

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not the same, jurisdictionally they are entirely separate³¹ principles that are being applied. The text of the Convention, acting as a set of guidelines, is therefore used to “help determine the content of general principles of [Community] law”³² 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 Advocate-Generals 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. This Court may therefore adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systemically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities.³³

Advocate-General Cosmas reiterates a similar point about the indirect application of the ECHR through the substance of Community law in the case of *Van Der Wal*: “[t]he Court of Justice and the Court of First Instance do not apply the ECHR, but rather the

³¹ Weiler, *supra* note 14, at 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.”

³² BETTEN & GRIEF, *supra* note 21, at 62.

³³ Case C-374/87, *Orkem v Comm’n*, 1989 E.C.R. 3283, Advocate General Darmon ¶¶ 139-140. Advocate General Cruz Vilaça in Case C-257/85 *Dufay v Parliament*, 1987 E.C.R. 1561, ¶ 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.”

general principles of Community law.”³⁴

This indirect application of the Convention has been confirmed by the Treaty on the European Union, which states that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention. . . as general principles of Community law.”³⁵

However, it appears that in the vast majority of cases, the current legal status of the ECHR is without problems and does not lack significant impact. In the recent case of *Bosphorus v. Ireland* (2005), Advocate-General Jacobs made the following comment:

Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of Treaty, and although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts where Community law is in issue.³⁶

II. *The Relationship between the ECJ and ECtHR*

As with the Community and the Convention, there is no “formal linking”³⁷ between the ECJ and the ECtHR. However, in the absence of such a link, the two courts have built up a relationship based on informal comity and “co-operation,”³⁸ a relationship, which although took some time to develop, has generally worked well both for the Courts and for the protection of human rights. In recent years

³⁴ Case C-174/98P, *Van Der Wal v. Comm’n*, 2000 E.C.R. I-1, AG ¶ 26; Dean Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementaries*, in *THE EU AND HUMAN RIGHTS* 760 (Philip Alston, Mara Bustelo, & James Heenan eds., 1999): “The European Court of Justice has protected fundamental rights within the Community sphere as being part of the unwritten general principles of Community law.”

³⁵ Treaty on the European Union art. 6(2), Feb. 7, 1992, 1992 O.J. (C191) 1.

³⁶ *Bosphorus v. Ireland*, 2005 Eur. Ct. H. R. 440, ¶ 53 (2005).

³⁷ DOUGLAS-SCOTT, *supra* note 8, at 467.

³⁸ TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 240 (2000).

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the ECJ has increasingly referred to the case law of the ECtHR,³⁹ following this case law where it exists⁴⁰ or explicitly noting “the lack of case law on a particular subject.”⁴¹ This is an important development from the earlier conduct of the ECJ, in which it would look at the text of the ECHR but make little reference to the ECtHR’s case law.⁴² Given that the Convention text lacks detail and substantive meaning until the Strasbourg Court develops the “flesh and blood”⁴³ meaning of the Convention, it is essential that the ECJ

³⁹ Case C-374/87, *Orkem v. Comm’n*, 1989 E.C.R. 3283, ¶ 30; Joined Cases C-46/87 & 227/88, *Hoechst v. Comm’n*, 1989 E.C.R. 2859, ¶ 18; Case C-13/94, *P v. S & Cornwall County Council*, 1996 E.C.R. I-2143, ¶ 16; Joined Cases C-74 and 129/95, *Criminal Proceedings against X*, 1996 E.C.R. I-6609, ¶ 25; Case C-368/95, *Bauer Verlag*, 1997 E.C.R. I-3689, ¶ 26; Case C-249/96, *Grant v. South West Trains*, 1998 E.C.R. I-621, ¶ 34; Case C-185/95, *Baustahlgewebe*, 1998 E.C.R. I-8417, ¶ 29; Case C-199/92, *Huls v. Comm’n*, 1999 E.C.R. I-4287, ¶ 150; Case C-235/92, *Montecatini v. Comm’n*, 1999 E.C.R. I-4539, ¶¶ 175-176; Case C-17/98, *Emesa Sugar (Free Zone) & Aruba*, 2000 E.C.R. I-675, ¶ 14; Case C-60/00, *Carpenter*, 2002 E.C.R. I-6279, ¶ 42; Joined Cases C-238/99 & 244-245/99 & 247/99 & 250-252/99 & 254/99, *Limburgse Vinyl Maatschappij NV v. Comm’n*, 2002 E.C.R. I-8375, ¶¶ 182, 234 & 274-275; ; Case C-94/00, *Roquette Freres SA v. Directeur General de la Concurrence, de la Consommation et de la Repression des Fraudes*, 2002 E.C.R. I-9011, ¶ 29; Case C-274/99, *Connolly v. Comm’n*, 2001 E.C.R. I-1611, ¶¶ 39-49; Case C-7/98, *Krombach v. Bamberksi*, 2000 E.C.R. I-1935, ¶ 39; Joined Cases C-465/00 & 138/01 & 139/01, *Rechnungshof v. Österreichischer Rundfunk*, 2003 E.C.R. I-4948, ¶¶ 77, 83; C-71/02, *Karner v. Troostwijk*, 2004 E.C.R. I-3025, ¶ 52.

⁴⁰ Schermers, *supra* note 30, at 206.

⁴¹ STEVEN WEATHERILL & PAUL BEAUMONT, *EU LAW* 285-286 (2000); Cases C-46/87 & 227/88, *Hoechst A G v. Comm’n*, 1989 E.C.R. 2859, ¶ 18; Case C-85/87, *Dow Benelux v. Comm’n*, 1989 E.C.R. 3137, ¶ 29; Cases 97-99/87, *Dow Chemical Iberica v. Comm’n*, 1989 E.C.R. 3165, ¶ 15: “Furthermore, it should be noted that there is no case law of the European Court of Rights on that subject.” In the case of *Orkem*, *see supra* note 33, Advocate-General Darmon notes in ¶ 132: “no judgment of the European Court of Human Rights has upheld the existence of that right under any provision of the Convention.”

⁴² Jacobs, *supra* note 17, at 292: “This is remarkable particularly since the European Court of Justice does not systematically cite the case-law of any other Court, and indeed cites any other case-law only very rarely”; LENAERTS, *supra* note 1, at 721, §17-075: “There is an increasing tendency for the Court of Justice to review the interpretation and application of Community law in the light of provisions of the ECHR and, in so doing, it refers to an ever greater extent to the case law of the European Court of Human Rights.”

⁴³ de Witte, *see supra* note 11, at 859.

examines and considers the case law of the ECtHR. The ECJ has been criticized⁴⁴ for failing to take the Strasbourg jurisprudence into consideration and, following *Opinion 2/94*, it has demonstrated a greater willingness to follow the ECtHR's interpretation.⁴⁵ 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, in most instances, the same standard as the ECtHR. In general, this system has been very successful and this has been remarked upon by Judge Wildhaber, the President of the ECtHR:

As far as cooperation between the two European Courts is concerned, we have seen in the case-law of the Court of Justice, in parallel to the gradual expanding of the amount of litigation involving fundamental rights, an increasing number of references to the Convention and to Strasbourg case-law, demonstrating a clear commitment to ensure harmony between the Luxemburg and Strasburg jurisprudence. As a result, hardly any conflicts between the two European courts have occurred in the past.⁴⁶

⁴⁴ Andrew Clapham, *Human Rights and the European Community: A Critical Overview*, in 1 EUROPEAN UNION: THE HUMAN RIGHTS CHALLENGE 60 (Antonio Cassese et al. eds., 1991) ("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.").

⁴⁵ Despite the lack of a formal judicial relationship, the two courts have worked together relatively well. Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS. L. REV. 87, 114 ("it is fair to conclude that, generally speaking, the ECJ (and, indeed, CFI) apply ECHR standards diligently and conscientiously.").

⁴⁶ Wildhaber, *supra* note 45, at 114. As far as the current author is concerned, there is no question that the two courts have demonstrated a clear commitment to try to ensure harmony between the two jurisdictions. However, there have been several problems in trying to ensure this level of protection. The suggestions that are being put forward in this paper are designed to strengthen that relationship and to ensure that harmonious and effective interpretation of the Convention can be achieved, rather than strict uniformity. Both Courts are faced with difficult tasks: the ECJ is faced with the issue of trying to shape EC law in a manner that is

III. Diverging Interpretations of the Convention

Although Judge Wildhaber is correct in asserting that “hardly any conflicts” have arisen, such diverging interpretations of the Convention are not without significance and a cause for concern, particularly as the problem is likely to exacerbate over the years with the expansion of the EU’s powers⁴⁷ and the protection provided for second and third generation human rights⁴⁸ in the EU.⁴⁹ These

consistent with the ECHR, but also furthers the goals of the EC; the ECtHR is faced with the challenge of protecting human rights, but also not undermining the EC or the goals of this supranational organization.

⁴⁷ Neil Walker, *Legal Theory and the European Union: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 581, 582: “with the progressive embedding of EU law in domestic systems and its expansion into ever new areas, including in recent years environmental law, public health law and criminal law and procedure, doctrinal analysis has also to some extent been ‘redomiciled’ in its relevant substantive disciplines.”

⁴⁸ Although a watertight distinction between the various taxonomies of rights cannot be drawn. See Weiler, *supra* note 12, at 556, explains the essential differences between the various generations: “First generation rights are by and large a heritage of political philosophy going back to the Enlightenment but revitalized in Europe particularly after the ravages of the 40s. They are symbolized in that major achievement of the early 50s – the European Convention on Human Rights – and the modern constitutions of many of the Post-War European states. Second generation rights (in the European context) correspond to the emergence in the 50s and 60s in practically all Western European states of the Welfare State as a universal patrimony espoused, with different shades and emphases, by all governments regardless of their political complexion whether left, right or centre. Third generation rights have become a general preoccupation in the 70s and 80s with issues such as consumerism, environmental protection, and privacy again transcending, in large measure, classical political divisions.”

⁴⁹ The Charter of Fundamental Rights provides protection for second and third generation rights. For example, second generation 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). Third generation rights are covered by Article 37 (Environmental protection) and Article 38 (consumer protection). Although the Charter was aimed at increasing the visibility and protection of human/fundamental rights, various commentators have expressed concern that it will lead to conflicts in the Courts’ interpretations. Koen Lenaerts & Eddy de Smijter, *A Bill of Rights for the European Union*, 38 COMMON MKT. L. REV. 273, 296 (2001) consider that the risk of conflicting interpretations will arise as the “wording of some rights in the Charter differs from the original ECHR version.” This opinion has also been suggested by Rick Lawson, *Case comment on C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, Order of the Court of Justice 4 Feb 2000*

divergences present a serious challenge and exert pressure on the roles of the two Courts and their relationship:

For the ECtHR, loss of control over EU action, and more particularly Member States acts based thereon, would create an intolerable gap in legal protection. Over time, it could come to denude the ECHR of relevance, as the scope of EU action increases. Moreover, Strasbourg would cease to be the focal point of human rights jurisprudence. For the ECJ, on the other hand, a finding by the ECtHR of a violation of fundamental rights would imperil its assertion of the autonomy of the Community legal order and undermine its own arrogated fundamental rights role.⁵⁰

Furthermore, failing to protect human rights to a standard equivalent to the ECtHR not only raises “at least a *prima facie* delicate question of judicial credibility,”⁵¹ but also leaves the

37 COMMON MKT. L. REV 983, 990 (2000): “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.” 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. Georg Ress, *The Situation between the European Court of Human Rights and the Court of Justice of the European Communities according to the European Convention on Human Rights*, in GOVERNING EUROPE UNDER A CONSTITUTION: THE HARD ROAD FROM THE EUROPEAN TREATIES TO A EUROPEAN CONSTITUTIONAL TREATY 284 (Herm. Josef Blanke & Stelio Mangiameli eds., 2006) (talking about the Charter: “In cases where an established jurisprudence of the Strasbourg Court exists, the horizontal clauses in Art. II-112§3 TEC may lead to rather clear conformity. But for those fields where there is no yet an established jurisprudence, there is still no guarantee and no procedure to overcome possible divergences.”). In addition, the ECJ stated in *Opinion 1/91*, 1991 E.C.R I-6079, ¶ 14 that: “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, in the absence of any Strasbourg guidance, conflicts with future case law of the ECtHR will result. The danger of the ECJ interpreting the Charter in a manner conflicting 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.

⁵⁰ Costello, *supra* note 45, at 88.

⁵¹ Weiler, *supra* note 12, at 569.

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Member States in an unsatisfactory position, as they are torn between fulfilling their obligations under the ECHR and the supremacy of EC law:⁵²

Where there is conflicting case law of the Court of Justice and the European Court of Human Rights concerning the scope of the ECHR, national (and Community) authorities are liable to be squeezed between the primacy of Community law, on the one hand, and their obligations under the ECHR, on the other.⁵³

IV. Factors that Possibly Contribute to Diverging Interpretations of the Convention by the Two Courts

It is no real surprise that diverging interpretations of the Convention can and do occur. The two courts have entirely different backgrounds and goals, and these will ultimately have an impact on how the Convention is interpreted and human rights issues dealt with by the respective Courts.⁵⁴ The EC has traditionally been focused on

⁵² The ECJ clearly defined the supremacy of EC law over national law, following the so-called *Solange* saga, in Case C-11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, ¶ 3: “the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights formulated by the constitution of that state or the principles of a national constitutional structure.”

⁵³ LENAERTS, *supra* note 1, at 728 § 17-08. LAWSON, *supra* note 27, at 233: “Thus the situation may occur, and indeed does occur, that the ECJ is called upon to interpret a provision of the ECHR. The resulting judgment may be at variance with the Strasbourg case law. Yet, the national court will be obliged to follow the ruling of the ECJ.”

⁵⁴ The way in which the different goals of the Courts can alter the way they treat a similar issue can be illustrated by examining the cases of *Grogan* (ECJ), C-159/90, *The society for the protection of unborn children (Ireland) Ltd v. Stephen Grogan and others*, 1991 ECR I-4685, and *Open Doors (ECtHR)*, *Open Doors & Dublin Well Woman v. Ir.*, App. Nos. 14234-35/88, 15 Eur. H. R. Rep. 244 (1993). These cases appeared simultaneously before the Courts and concerned Article 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

economic integration, meaning that the ECJ has also been focused on such issues;⁵⁵ whereas, the ECtHR has been entirely focused upon European integration through the judicial protection of first generation human rights, as enshrined in the Convention. However, even with the changing nature of the EC,⁵⁶ the difference between

the freedom to provide services. In finding that the economic link was too tenuous, the ECJ could not address the issues of the freedom of expression and the freedom to receive and impart information. 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. Carole Lyons has also addressed the different backgrounds of the courts and how this can impact how they deal with similar issues. Carole Lyons, *Human Rights Case Law of the European Court of Justice*, 3(2) HUM. RTS. L. REV. 323, 347 (2003): "Friction and conflict can also arise when both courts are dealing with similar types of fundamental rights breaches. Rather like two presidents of the same republic (of rights) they share the desire for similar outcomes (the protection of fundamental rights) but have different powers for and perspectives on that outcome."

⁵⁵ DOUGLAS-SCOTT, *supra* note 8, at 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. Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking rights seriously*, 29 COMMON MKT. L. REV. 669 (1992); *but see* with a critical response by Weiler and Lockhart, *supra* note 4. 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. Silvia Acierno, *The Carpenter Judgment: Fundamental Rights and the Limits of the Community Legal Order*, 28 EUR. L. REV. 398, 406 (2003): "The economic freedom thus becomes an instrument to protect the right to respect for family life."

⁵⁶ The EC has gone through extensive changes and developments over the course of its history. This includes the transformation from the EC/EU being based upon a model of market integration to a model of social citizenship. *See* MARK BELL, *ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION*, Ch. 1 (2002). Other terms have been used, including the transformation of an "economic constitution" to a "political constitution," *see* Neuwahl, *supra* note 22. The focus of the ECJ on issues such as competition law could possibly explain why there have been several diverging interpretations in this field. According to Samantha Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution?*, 6 HUM. RTS. L. REV. 323, 324 (2006): "economic integration is to a large extent exhausted in the European Union."

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the two courts remains, whereby one Court, the ECtHR, is a Court of Human Rights, and the other, the ECJ, although not a court of human rights, is a Court that *can* protect human rights.

These differences are then exacerbated by the fact that the two Courts are interpreting one text (renowned for its vague language)⁵⁷ in the absence of any official mechanisms for ensuring the uniform or, at least, harmonious interpretation of the Convention.⁵⁸ It is not until the ECtHR transforms this “rather vague”⁵⁹ text into more “detailed law,”⁶⁰ clarifying “the scope, nature and content of each right”⁶¹ as well as setting the “minimum standard”⁶² of protection that the High Contracting Parties must “secure,”⁶³ that the meaning, the “flesh and blood of the Convention,”⁶⁴ is elaborated upon.

It is not simply that the vague wording of the Convention that can lead to divergences, but different interpretations can also arise depending on which version of the Convention the ECtHR adopts.⁶⁵

⁵⁷ See *infra* note 59.

⁵⁸ Ress, *supra* note 49, at 284: “The sometimes different interpretation of the Convention is an expression of the different perspective of both courts. While the ECJ is more focused on the efficiency of the internal market and legality of the acts of the European Communities, the Strasbourg Court is more focused on individual rights and freedoms.” This can perhaps explain why the majority of the problematic diverging interpretations have concerned Articles 6 and 8 of the ECHR. Spielmann, *supra* note 34, at 766: “Flagrant conflict as to the case law of the two European Courts can be ascertained in the context of major cases concerning Articles 8 and 6 of the Convention where the Luxembourg Court took a restrictive view.”

⁵⁹ Schermers, *supra* note 30, at 205.

⁶⁰ *Id.* at 205.

⁶¹ Jeffrey Murdoch, *Human Rights*, in STAIR MEMORIAL ENCYCLOPEDIA OF THE LAWS OF SCOTLAND ¶ 7 (1995).

⁶² JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE: ‘DO THE NEW CLOTHES HAVE AN EMPEROR?’ AND OTHER ESSAYS ON EUROPEAN INTEGRATION 105 (2003).

⁶³ Council of Europe, European Convention on Human Rights art. 1, Nov. 4, 1950, 1953, C.E.T.S. No. 5

⁶⁴ Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights in THE EU AND HUMAN RIGHTS* 859 (Philip Alston, Mara Bustelo, & James Heenan eds., 1999).

⁶⁵ European Court of Human Rights, <http://www.echr.coe.int/ECHR/>.

For example, in the case of *Niemietz v. Germany*⁶⁶ before the ECtHR, the Strasbourg Court relied upon the interpretation of the French text of the Convention to extend the protection of Article 8 ECHR⁶⁷ to include “business premises.” The Court then held that interpreting “the words ‘private life’ and ‘home’ as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities.”⁶⁸ In order to provide such protection, the Strasbourg Court relied upon the word “domicile,” which provided for wider protection than “home”: “the word ‘domicile’ has a broader connotation than the word ‘home’ and may extend, for example, to a professional person’s office.”⁶⁹

The wide definition adopted by the ECtHR in interpreting the French text contrasts to the narrower interpretation that the ECJ gave to Article 8 of the ECHR in the case of *Hoechst AG v. Commission*. In this case, the ECJ held that: “the protective scope of that article [Article 8] is concerned with the development of man’s personal freedom and may not therefore be extended to business premises.”⁷⁰

In addition to the somewhat unpredictability of the ECtHR’s interpretation based upon the French and English versions of the vague Convention text, the ECtHR is known for its teleological or evolutive interpretation of the Convention, meaning that the Convention is treated as a “living instrument.”⁷¹ This method of interpretation provides that “the Convention institutions avowedly follow an evolutive and dynamic method, rather than a static and

⁶⁶ *Niemietz v. Germany*, 16 Eur. Ct. H.R. 80 (1992).

⁶⁷ European Convention on Human Rights, *supra* note 65, art. 8. Article 8 (1) reads: “Everyone has the right to respect for his private and family life, his home and his correspondence.” The French version of the same article reads: “Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.”

⁶⁸ *Niemietz v. Germany*, *supra* note 66, ¶ 31.

⁶⁹ *Id.* ¶ 30.

⁷⁰ *Hoechst AG v. Comm’n*, 4 C.M.L.R. 410, ¶ 18 (1991).

⁷¹ *Tyrer v. U.K.*, App. No. 5856/26, 26 Eur. Ct. H.R. 2, ¶ 31 (1995) (states that “the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.”).

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historical one.”⁷² As such, in the absence of guidance from the ECtHR as to this more detailed meaning of the Convention rights, it is understandable as to why diverging interpretations of the Convention can occur. The teleological method of interpretation compounds this problem, as there may be guidance from the Court on a particular matter or provision of the Convention, which will not be followed by the Strasbourg Court itself.⁷³ The issue of when diverging interpretations occur is another matter and will be discussed below.

V. Distinguishing Positive and Negative Diverging Interpretations of the Convention

Although it is not surprising that diverging interpretations of the ECHR by the two courts arise, one should not view all divergences as being problematic. Instead, it is more appropriate to divide diverging interpretations into two categories: those that are beneficial to the protection of human rights within Europe and, those that are problematic and should be prevented. In respect of the first category of diverging interpretations, such positive divergences on the part of the ECJ that lead to a higher “minimum standard”⁷⁴ or more encompassing level of protection for human rights which the ECtHR then adopts, should not be condemned as problematic, and any measures taken to rectify the second group of diverging interpretations should not overburden or restrict this first category. Such acts on the part of the ECJ demonstrate that while not a court of

⁷² Franz Matscher, *Methods of Interpretation of the Convention, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 68 (1993).

⁷³ The Strasbourg Court’s approach to the issue of whether transsexuals have the right to change their birth certificates demonstrates the evolutionary nature and protection that the Convention offers. *See, e.g.,* Rees v. U.K., 9 Eur. H.R. Rep. 56, ¶ 37 (1987), the Court held by 12 votes to 3, that “the fair balance that has to be struck between the general interests of the community and the interest of the individual” falls in favor of the community. *But see, e.g.,* Cossey v. U.K., 13 Eur. H.R. Rep. 622 (1991), the Court’s voting pattern had changed from 12-3 to 10-8. *Cf.,* Christine Goodwin v. U.K., 35 Eur. H.R. Rep. 18, ¶ 93 (2002), the Court held “that the fair balance... now tilts decisively in favour [sic] of the applicant.”

⁷⁴ WEILER, *supra* note 62, at 105.

human rights, the ECJ is a court that can protect human rights.⁷⁵ An example of a positive divergence by the Luxembourg Court is the case of *X v. Commission*.⁷⁶ In this case, the ECJ interpreted Article 8 of the ECHR to include the refusal to undergo an AIDS test for pre-recruitment procedures by the Commission. One commentator has remarked that this case constitutes “a major contribution to the jurisprudence on Article 8 of the Convention,”⁷⁷ thus demonstrating that not all divergences are negative and detrimental for the protection of human rights, and again reflects the idea that although not a court of human rights, the ECJ is a court that can, and does, play an important role in the protection of human rights.

On the other hand, diverging interpretations of the Convention are problematic when the ECJ adopts an interpretation that provides for a lower standard of protection than the ECtHR. As already discussed above, the ECtHR’s interpretation constitutes the “minimum standard”⁷⁸ that must be achieved, so it is a cause for concern when the ECJ fails to attain this base standard. Unfortunately, there have been several instances in which the ECJ’s interpretation of the Convention has failed to meet the minimum standard set by the ECtHR.⁷⁹ An example⁸⁰ of a negative diverging interpretation is provided by a comparison of the cases of *Hoechst* (ECJ) and *Niemetz* (ECtHR), as discussed above.⁸¹ In *Hoechst*, the ECJ concluded that the protection of Article 8 of the ECHR did not

⁷⁵ Balfour, *supra* note 20: “The ECJ is not a Court of human rights; it is a Court that protects human rights.”

⁷⁶ Case C-404/92P, *X v. Comm’n.*, 1994 E.C.R. I-4737.

⁷⁷ Spielmann, *supra* note 34, at 775.

⁷⁸ WEILER, *supra* note 62, at 105.

⁷⁹ The main conflicts are the cases of *Lentia v. Austria*, 17 Eur. H.R. Rep. 93 (1994).; C-260/89, *ERT*, 1991 E.C.R. I-2925; C-46 & 227/88, *Hoechst AG v. Comm’n.*, 1989 E.C.R. 2859; *Niemietz v. Germany*, 16 Eur. Ct. H.R. 97 (1992); *Société Cola Est v. Fr.*, 39 Eur. H.R. Rep. 17 2004; C-374/87, *Orkem v. Comm’n.*, 1989 E.C.R. 3283; *Funke & Others v. Fr.*, 16 Eur. H.R. Rep. 297 (1993).

⁸⁰ It is only appropriate here to give an example of the divergences in interpretation by the two Courts, as this is a topic that has been discussed and recorded by several academics. Like the history of fundamental rights, these cases are well known and not much else is left to be said about them. See Lawson, *supra* note 27; see also Spielmann, *supra* note 34.

⁸¹ See Part One.

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extend to protect “business premises”;⁸² in contrast, the later decision of the ECtHR held, on the basis of the French text of the Convention, that such areas fell within the rubric of Article 8 protection. Unfortunately, these cases do not demonstrate the sole instance of a negative diverging interpretation by the ECJ, as several other instances have occurred, especially in relation to Articles 6⁸³ and 8⁸⁴ of the Convention.⁸⁵

VI. *When Do Diverging Interpretations Occur?*

An important issue concerns “when do these diverging interpretations occur”? This is an important question, as it will help illustrate whether there is a real and direct “conflict”⁸⁶ between the Courts, or whether the problem is of a different nature. This discussion will also provide a greater opportunity to identify the solutions or measures that need to be implemented to rectify the problem of negative diverging interpretations.

It is important to note, that in each case where the ECJ has interpreted the Convention in a manner that fails to meet the ECtHR’s “minimum standards,” the Luxembourg Court’s interpretation has always come before that of the Strasbourg Court’s.⁸⁷ Although the ECJ is not legally obliged to follow the

⁸² Joined Cases 46/87 & 227/88, *Hoechst AG v. Comm’n*, 4 COMMON MKT. L. REV. 410, ¶ 18 (1991).

⁸³ ECHR, *supra* note 63, art. VI.

⁸⁴ *Id.* art. VIII.

⁸⁵ Spielmann, *supra* note 34, at 766: “Flagrant conflict as to the case law of the two European Courts can be ascertained in the context of major cases concerning Articles 8 and 6 of the Convention where the Luxembourg Court took a restrictive view.”

⁸⁶ *See supra* note 45.

⁸⁷ *See supra* note 78; H.C. Kruger et al., *Proposals for a Coherent Human Rights Protection System in Europe: The European Convention on Human Rights and the EU Charter of Fundamental Rights*, 22 HUM. RTS. L. REV. 1, 6 (2001): “[I]t is true that the ECJ gave judgment before the court of Human Rights in most of the cases”; *see Lawson, supra* note 27, at 251: “[T]he Hoechst/Niemietz comparison shows, however, that divergences can easily occur when the ECJ interprets the Convention before the Strasbourg bodies have given their opinion.”; HENRY SCHERMERS & DENIS WAELBROECK, *JUDICIAL PROTECTION IN THE*

interpretation of the ECtHR,⁸⁸ 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.”⁸⁹ However, in the absence of any mechanism enabling the ECJ to request guidance on the interpretation of the Convention⁹⁰ from the Strasbourg Court when no such guidance already exists, the ECJ has often been left to interpret the Convention on its own, whilst trying to further the objectives and goals of the Community. Although the absence of any case law has tended to be expressly noted by the ECJ,⁹¹ the lack of guidance has meant that the Court either ignores the human rights

EUROPEAN UNION 311 (6th ed. 2001): “Although the Court of Justice will obviously be on issues which may not as yet have been decided by the Court of Human Rights.”; *but see supra* note 23 (considering that the role of the Advocate-General did not violate art. VI ECHR, which (according to Lawson, *see supra* note 49) is a slight departure from the ECHR case of *Vermeulen v. Belgium*, App. No. 21794/93, 32 Eur. H.R. Rep. 15 (2001) (Commission report); *But cf.* Paul Beaumont, *Human Rights: Some Recent Developments and Their Impact on Convergence of Law*, in CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 159 (2001): arguing that this case was not a conflict *per se*, as the “Court of Justice engaged in some old fashioned distinguishing.

⁸⁸ *See Part One.*

⁸⁹ Spielmann, *supra* note 34, at 770; Giorgio Gaja, *Opinion 2/94 Accession of the Community to the European Convention on Human Rights*, 33 COMMON MKT. L. REV. 973, 987 (1996): “never stated or implied that it does not have to abide by the case law when the Convention is applied”; SCHERMERS & WAELBROECK, *supra* note 30, at 206: “takes the interpretation by the European Court of Human Rights into account, and in fact follows its case-law wherever possible.”

⁹⁰ Case C-130/75, *Vivian Prais v. Council*, 1976 E.C.R. 1589, 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.” Sieglerschmidt, Parl. Ass. of the Council of Eur., Doc. No. 3852 (1976): “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.”

⁹¹ *See, supra* note 41.

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issue,⁹² 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.”⁹³ The result with either of these responses is the same: on occasions, the protection of the human rights guaranteed by the ECHR and by the ECJ is at odds with that offered by the ECtHR.

VII. Key Differences between Diverging Interpretations Adopted by the ECJ and National Courts

Although national courts are also at risk from adopting inconsistent or diverging interpretations of the ECtHR, there is an important difference when such interpretations are adopted by the ECJ. When a national court interprets the Convention in a manner that fails to meet the ECtHR’s minimum standards, the Strasbourg Court can hear complaints brought by aggrieved individuals, once domestic remedies have been exhausted as stated in Article 35 of the ECHR. As such, this external review allows for the diverging interpretation to be rectified and provides the individual with a remedy. However, it is this external review and correction system that is absent from the protection of human rights in the EU: “The crucial difference with respect to the ECJ’s human rights case-law is that this correction mechanism is missing.”⁹⁴

⁹² See, Case C-136/79, Nat’l Panasonic, 1980 E.C.R. 2033; Joined Cases 50-58/82, *Administrateur des affaires maritimes á Byonne & Procureur de la République v. José Dorca Marina et al.*, 1982 E.C.R. 3494; C-168/91, *Konstantinidis v. Stadt Altensteig, Standesamt & Landratsamt Calw, Ordnungsamt*, 1993 E.C.R. I-1191; Spielmann, *supra* note 34, at 736: “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.”

⁹³ *Lenaerts & de Smijter*, *supra* note 49, at 296.

⁹⁴ Lawson, *supra* note 27, at 230; Costello, *supra* note 45, at 88: “The EU is an actual and potential violator of human rights through its legislative and executive action. As such, the European Court of Justice (ECJ or ‘Luxembourg’) has developed an internal control mechanism, based on the constitutional traditions common to the Member States and pertinent international instruments, in particular the ECHR. However, there is no apparent external control mechanism, as the EU is not, as yet, a party to the ECHR.”

As such, the ECtHR can correct inadequate protection on the part of national courts, but it is left powerless to directly review the decisions of the ECJ, as such complaints are inadmissible *rationae personae* since “the European Communities are not a High Contracting Party to the European Convention on Human Rights.”⁹⁵ Therefore, the problem of negative diverging interpretations is aggravated by the lack of external review by the Strasbourg Court. This means that in cases where the ECJ has incorrectly interpreted the Convention text, the aggrieved individual is prevented from lodging a complaint against the Luxembourg Court’s interpretation with the ECtHR.

Although the ECtHR cannot directly review decisions by the ECJ, the judgment in *Matthews v. UK*⁹⁶ and the application of *Senator Lines GmbH v. 15 Member States of the EU*⁹⁷ demonstrates that the Strasbourg Court is becoming increasingly willing to accept complaints against the Member States, given that their responsibility as High Contracting Parties “continues even after such a transfer [of] . . . competences to international organizations.”⁹⁸ Therefore, there is the possibility that the ECtHR could indirectly review the ECJ’s interpretation of the Convention, on the basis that the transfer of powers from the High Contracting parties to the Community, including the ECJ, does not provide “equivalent protection”⁹⁹ or “manifestly deficient”¹⁰⁰ protection for the Convention rights. The

⁹⁵ Confédération Française Démocratique du Travail v. The Eur. Cmty, Eur. Comm’n H.R., 2 COMMON MKT. L. REV. 229, ¶ 3 (1979).

⁹⁶ *Matthews v. U.K.*, App. No. 24833/94, 1999 Eur. Ct. H.R. 12.

⁹⁷ *Senator Lines GmbH v. 15 Member States of the EU*, App. No. 56672/00, 2004-IV Eur. Ct. H.R.

⁹⁸ See case *Matthews v. U.K.*, *supra* note 96, ¶ 32; *Melchers & Co. v F.R.G.*, App. No. 13258/87, 64 Eur. Comm’n H.R. Dec. & Rep. 138 (1990) (holding that 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”).

⁹⁹ *Id.*

¹⁰⁰ See *Bosphorus v. Ir.*, *supra* note 36, ¶ 156; Kathrin Kuhnert, *Bosphorus-Double Standards in European Human Rights Protection?* 2 UTRECHT L. REV. 177. 185 (2006) (commenting on this new standard in relation to the “equivalence human rights protection at Community level by reviewing the Community’s

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Member States would therefore be responsible for ensuring that the ECJ interprets and applies the Convention to an appropriate standard, in order to achieve equivalent protection of these rights, despite the fact that the EC is a separate legal entity. This would not only be against the arguments for giving the EC legal personality and a separate identity from the Member States, but if this pattern continues then it may start to damage the Luxembourg-Strasbourg relations. One can only speculate what the effects on the relationship between the two courts and their credibility, if the Strasbourg Court is continuously forced into indirectly reviewing the protection offered by the ECJ and transforming the relationship based on comity into a *de facto* vertical relationship.

VIII. Conclusion to Part One

The problem of diverging interpretations should, therefore, not be viewed as a conflict between the two courts,¹⁰¹ but instead as instances in which the ECJ interprets the Convention in a manner that is inconsistent with later case law of the ECtHR. The two systems are currently left to harmonize the interpretation and application of the Convention without an official conductor or mechanism to coordinate or orchestrate this. At times this is not a problem; for the vast majority of cases, where the ECtHR has provided a relevant interpretation of the Convention, the ECJ generally follows this guidance. In other instances, the ECJ might set an even higher standard that the ECHR can follow. However, without an official control mechanism to ensure the harmonious and consistent interpretation of the Convention, the two courts are left to coordinate with each other on the basis of their relationship of comity; a relationship, which, although generally adequate, is failing to allow both Courts to maximize their ability to protect human

substantive guarantees and procedural mechanisms for potential ‘manifest deficiency’”).

¹⁰¹ Lawson, *supra* note 27, at 250: “Of course, it cannot be maintained that the ECJ has deliberately interpreted the Convention in a diverging sense. The *Hoechst/Niemietz* comparison shows, however, that divergences can easily occur when the ECJ interprets the Convention before the Strasbourg bodies have given their opinion.”

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rights. It is therefore understandable why, in light of the general success and the shortcomings, Weiler has commented that: “[j]udicial protection of fundamental human rights by the Court of Justice of the European Communities (ECJ) may operate as a source of both unity and disunity in the dialectical process of European integration.”¹⁰² The clear desire of both courts to work together is being undermined by this lack of a formal relationship or mechanism to facilitate the harmonious and equivalent interpretation of the Convention.

Given this current predicament that the two courts face, what should be done in order to improve matters? It is clear that the current situation could be improved by some sort of external review mechanism, but is the solution to be found in EU accession? The answer, at least in the author’s opinion, for reasons that will be explained in Part Two, is no. The option of accession is not the most appropriate solution to remedying the current problems. Instead, a solution must be found that can not only successfully address the problems that the Courts have experienced in the past, but also try to ensure that diverging interpretations do not cause a problem in the future. Given that several academics are of the opinion that the number of negative diverging interpretations could actually rise in the future,¹⁰³ it is essential that an adequate solution is found and implemented in the near future.

¹⁰² Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: on Standards and Values in the Protection of Human Rights*, in *THE EUROPEAN UNION AND HUMAN RIGHTS* 51 (Nanette Neuwahl & Allan Rosas eds., 1995).

¹⁰³ Ress, *supra* note 49, at 283: “The actual situation between the ECtHR and the ECJ according to the case law of both courts leads to the conclusion that the divergences between the two courts may increase. The European Union gets more competences in fields that are particularly important for human rights, such as the right of asylum, immigration policy and co-operation in the field of internal affairs and justice. Also the existence of a binding European Charter of Fundamental Rights may ultimately exacerbate this problem. Because the ECJ then disposes of its own legal basis for the judicial review of fundamental rights and freedoms which may – despite the horizontal clauses – induce it to depart from the interpretation of the Convention by the ECtHR.”

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*Part Two: Finding a Suitable and Appropriate Solution**I. Introduction*

Having discussed the problem of negative diverging interpretations and placed it within the context of the existing informal relationship of the two Courts, the remainder of this article questions what can be done to rectify or improve the current situation. In order to determine the appropriateness and effectiveness of any proposed solution for the harmonious interpretation and application of the two Courts, there are three requirements that should be satisfied. These three requirements will be used to test EU accession and the solution that this paper proposes.

The first of these requirements rests on the idea that it is only logical and sensible that any solution should build upon the existing relationship that the two courts have with each other, and reflect the fact that the current problem concerns the lack of a mechanism to ensure the harmonious interpretation of the ECHR, rather than a direct conflict between the two Courts.¹⁰⁴ Therefore, any solution that is premised or built upon the idea of “one court must prevail over the other” is bound to be unsuccessful and would serve as a significant alteration of the current relationship between the two courts. “Ultimately, at the end of the day one side is going to lose. Which court should prevail? The ECJ would base its decision on arguments of the EC Treaty, whereas the ECHR would base its decision on arguments from the European Convention.”¹⁰⁵

If we are to think of the problem in terms of “one court must prevail over the other,” where the “winner takes all,” then we are likely to force the courts into a formal relationship in which this exists; despite the fact that their informal relationship is not based upon this idea. Instead, any solution should build upon, rather than distort or ruin, the existing relationship that the two courts have with each other and reflect the different roles that the Courts have in terms of European integration. Ultimately, we should be driven by a desire

¹⁰⁴ See *supra* Part One.

¹⁰⁵ Clemens Rieder, *Protecting Human Rights within the European Union: Who Is Better Qualified to Do the Job – the European Court of Justice or the European Court of Human Rights?*, 20 TUL. EUR. & CIV. L.F. 73 (2005).

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to find a solution that respects both jurisdictions and their respective roles in furthering European integration and the protection of Convention rights:

the Luxembourg Court and the Strasbourg Court are courts of equal dignity, important institutions responsible for judicial functions in two discrete international legal systems. Both courts are tasked to interpret and apply the European Convention on Human Rights, the Luxembourg Court by its own jurisprudence, the Strasbourg Court by the express terms of the European Convention on Human Rights itself.¹⁰⁶

We have already seen that both courts are likely to treat certain issues differently due to their different roles and backgrounds,¹⁰⁷ but that does not mean that one must be subordinated to the other; an appropriate solution can be found that avoids this winner-loser mentality.

The second requirement concerns the ability of the solution to reflect the realities that the two Courts face and the roles that each of them has in terms of European integration. The various pressures that the Courts, particularly in respect of time and the number of cases being heard, must be given strong consideration; otherwise any improvements will undermine the overall effectiveness and purposes of both Courts. Both Courts face what seems to be an ever-increasing caseload each year, and despite various attempts to alleviate the strain of this increase, the case number for both courts continues to

¹⁰⁶ Mark W. Janis, *Fashioning a Mechanism for Judicial Cooperation on European Human Rights Law Among Europe's Regional Courts*, in 3 *THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE: ESSAYS IN HONOUR OF HENRY G. SCHERMERS* 213 (Rick Lawson & Matthijs de Bloijs eds., 1994). Iris Canor, *Primus Inter Pares: Who is the Ultimate Guardian of Fundamental Rights in Europe*, 25 *EUR. L. REV.* 3, 4 (2000): "One should not treat the relationship between these courts as a war. It is not a zero-sum game in which if the one has won it should necessarily be deducted that the other has lost. Such a binary way of thinking is not suitable to characterise [sic] the social reality prevailing between the two courts."

¹⁰⁷ See discussion comparing the cases of *Grogan* and *Open Doors*, *supra* note 54.

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grow.¹⁰⁸

The last requirement is that whatever improvements are to be made or implemented, they should be appropriately tailored to meet the problem that has been discussed above, and ideally be the most effective means for ensuring this. To re-iterate the problem that has been discussed above: the issue concerns negative diverging interpretations of the Convention that occur when the ECJ interprets the vague ECHR before the ECtHR has provided any guidance on the matter. Therefore, any measures designed to improve the current situation must provide that the ECJ, and the EU as a whole, “endorse standards always at least as high as those for the Council of Europe and, even, to raise its sights on occasion.”¹⁰⁹ In essence, an effective solution would be narrowly tailored to ensure the prevention of negative diverging interpretations, whilst allowing the ECJ to continue to issue positive diverging interpretations and exceed the Strasbourg minimum level of protection.

Specific Solutions to the Problem:

II. The Option of Accession as an Improvement on the Current Situation?

Although various solutions¹¹⁰ have been suggested over the

¹⁰⁸ The increased number of cases for both courts is discussed below, *see infra* notes 32-138.

¹⁰⁹ Janis, *supra* note 106, at 217.

¹¹⁰ A number of other solutions have been proposed in the past to rectify and improve the position of human rights in the EC/EU. One such idea, proposed by Toth, was for the EC Member States to withdraw from the ECHR and for the EC to have its own internal charter of rights. *See* Akos G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491 (1997). The focus of this paper is on addressing the suitability and appropriateness of EU accession and also the author's idea of the PDIQ system. Given that EU accession was proposed by the Constitution for Europe (Title II, Fundamental Rights and Citizenship of the Union, Article I-9 Fundamental Rights (2): “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.”) and Protocol 14 ECHR (Article 17: “Article 59 of the Convention shall be amended as follows: 1. A new paragraph 2 shall be

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years to improve the protection of human rights within and by the EC/EU, one of the most common responses has been that the EC/EU should accede to the ECHR. This option has found support on many levels, including several top scholars,¹¹¹ the EU institutions,¹¹² and even some of the judges in the Strasbourg Court.¹¹³

The option of EU accession would certainly provide for a number of changes that would be beneficial in terms of the protection of human rights in the EU. One of the main differences that would occur is that individuals could bring complaints directly against the EU institutions before the Strasbourg Court, including complaints concerning the ECJ's interpretation and application of the Convention. As a result, the ECJ would be subject to external review in a similar way that the national court decisions and interpretations are subject to such review, thus removing the "crucial difference"¹¹⁴ which currently exists. Therefore, in cases where the ECJ has adopted an interpretation of the Convention that fails to meet the Strasbourg minimum standard, the ECtHR review could provide a

inserted which shall read as follows: '2. The European Union may accede to this Convention.'" As of Jan. 23, 2007, Protocol 14 has not entered into force. The only High Contracting Party that has not ratified the Protocol is Russia.), this option has the greatest chance of being implemented if the Constitution in its current form is resurrected and ratified. Other proposals, such as Professor Toth's idea, appear to have been entirely rejected and unlikely to be implemented in the foreseeable future. Another solution was proposed by Dean Spielmann, *supra* note 34, at 780, who suggested the "possible circulation of judges between Luxembourg and Strasbourg and vice versa."

¹¹¹ Lawson, *supra* note 27; Spielmann, *supra* note 34.

¹¹² The Joint Declaration of 5 April 1977, 1977 O.J. (C 103/1); the Memorandum of the Commission of 1979, Bull. EC. Supp. 2/79; the Communication of the Commission of 10 Nov 1990, (1990) (SEC 90) 2078 final; the Resolutions of the European Parliament of 17 Dec 1993, 1994 O.J. (C20/546) and 18 Jan 1994, 1994 O.J. (C44/32); Op. 2/94 on Accession by the Community to the ECHR, 1996 E.C.R I-1759.

¹¹³ Support for EU accession has also been expressed by certain judges in the Strasbourg Court. See *Bosphorus*, *supra* note 36, concurring opinion of Judge Ress, ¶ 1: "This judgment demonstrates how important it will be for the European Union to accede to the European Convention of Human Rights in order to make the control mechanism of the Convention complete." See also the literature of Dean Spielmann.

¹¹⁴ See *supra* note 94.

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cure for such divergences: the ECtHR could rectify the diverging interpretation and grant relief for the aggrieved individual, whose Convention rights had not been adequately protected within the EU legal order. Furthermore, accession would also “ensure that the CFI and the ECJ follow the authoritative rulings of the Strasbourg Court”;¹¹⁵ however, one would have to question whether this would make little difference in practice given that the ECJ already “takes the interpretation by the European Court of Human Rights into account, and in fact follows its case-law wherever possible.”¹¹⁶

Another major benefit of EU accession is that the Strasbourg Court would no longer have to continue with indirect review of the ECJ decisions, whereby the ECtHR hears complaints against the Member States in their capacity as High Contracting Parties for the EU failing to provide “equivalent protection.” Given that complaints against the EU institutions are currently inadmissible *rationae personae*,¹¹⁷ the equivalent protection doctrine “allows the ECtHR to accommodate the autonomy of the EU legal order, whilst encouraging, if not inducing, compliance with ECHR standards by the ECJ. The ECHR standards are thereby valorized, as the effective fundamental rights *jus commune* of Europe.”¹¹⁸ EU accession would mean that the ECtHR would no longer have to provide only “some

¹¹⁵ Lawson, *supra* note 49, at 990.

¹¹⁶ Schermers, *supra* note 30, at 206.

¹¹⁷ See *supra* note 95.

¹¹⁸ Costello, *supra* note 45, at 91. LENAERTS, *supra* note 1, at 727 §17-081: “The European Court of Human Rights has confirmed that acts of the Community cannot be tested against the ECHR, because the Community is not a party to the Convention, but an indirect review may nevertheless be carried out by testing the act by which a Member State gives effect to Community provisions against the Convention. The European Court of Human Rights has held that the fact that the member States have transferred powers to the Community does not, in principle, release them from their obligations to comply with the ECHR. That Court has declared that it is competent to review acts adopted in the framework of the Community/Union against the ECHR in so far as the Community legal order itself does not afford equivalent protection.” *Matthews v. UK*, *supra* note 96, ¶ 32: “The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured.’ Member States’ responsibility therefore continues even after such a transfer.”

scrutiny of EU actions,”¹¹⁹ but could review the actions of these institutions directly and to the same extent as the national authorities of the High Contracting Parties.

External review by the Strasbourg Court would not only benefit those individuals within the EU who feel that their Convention rights have been violated by one of the institutions, but this option would also have benefits for the EU’s appearance to outsiders. Over the years, the EC/EU has developed a strong external human rights policy¹²⁰ and monitors the human rights records of other countries and organizations. Thus, external review by the ECtHR of the EU institutions could enhance the credibility and authority of the EU’s monitoring of the human rights records of others: “In addition, however, being a party to the ECHR would also enhance the Community’s image on the international plane; since the Community supports the protection of human rights in other societies (notably in the context of the OSCE).”¹²¹

Another benefit of EU accession is that in terms of those rights that are contained in the Convention, this option would allow the ECJ to continue as a court that can make an important contribution to the protection of human rights and the minimum standard to which they should be protected. For example, it was noted earlier that diverging interpretations of the Convention should

¹¹⁹ Costello, *supra* note 45, at 91.

¹²⁰ See Bruno Simma et al., *Human Rights Considerations in the Development Co-operation Activities of the EC*, and Andrew Clapham, *Where is the EU’s Human Rights Common Foreign Policy, and How Is It Manifested in Multilateral Fora?*, in *THE EU AND HUMAN RIGHTS* 553-570, 627-686 (Philip Alston, Mara Bustelo, & James Heenan eds., 1999).

¹²¹ Neuwahl, *supra* note 22, at 20. A similar opinion is voiced by de Witte, *supra* note 10, at 890: “the existence of a check by ‘outsiders’ on the human rights performance of the EU institutions would be a sign of self-confidence and a useful message to those third countries whose human rights performance is monitored by the EU.” Weiler, *supra* note 18, at 78: “The main advantage which would accrue to the Community would be the symbolism inherent in subjecting even the European Court itself to a measure of scrutiny by an outside body. It would also be esthetic. How can one preach to all the new East European States the virtues of the ECHR and not be a Member oneself (a little bit like the democracy story: democracy is a condition for accession to the EU, but the EU suffers from a perennial democratic deficit itself).”

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be divided into those divergences that are positive and those that are negative. The option of accession would provide for aggrieved individuals when such negative diverging interpretations occur, but it would not restrict the ECJ's ability to develop positive diverging interpretations, as in the case of *X v. Commission*.¹²² The protection offered by the ECHR is designed to set the "minimum standard,"¹²³ rather than an upper limit; meaning that this option would hopefully restrict the effects of the negative diverging interpretations, but also enable the ECJ to offer a higher level of protection for human rights than required by the ECHR.

A. Testing the Option of EU Accession with the Three Requirements

There are clearly many benefits that could be provided by EU accession and this paper does not claim to have exhausted them all, but how does this option fare against the three requirements to test whether this is the best available option?

The first of these requirements, as noted above, is whether or not the proposed option can build upon the current relationship between the two courts, taking the positive aspects of their informal relationship and carrying them into the formal relationship, whilst simultaneously avoiding a winner-loser mentality. The option of accession is certainly able to develop the existing relationship, without resulting in the winner-loser mentality that we are trying to avoid. According to Weiler, accession should not be considered as automatically meaning that the ECJ would lose status or respect, as he considers that "there is no less prestige for the ECJ to be in the same position as the highest Courts in all Member States."¹²⁴ In addition, as noted above, like national courts, the ECJ would only be required to ensure that it meets or exceeds the minimum level of protection that the ECtHR sets; there is nothing to prevent the ECJ

¹²² See *supra* note 76.

¹²³ WEILER, *supra* note 62, at 105.

¹²⁴ Weiler, *supra* note 18, at 79; see also Arnulf, *supra* note 13, at 390: "Union accession to the ECHR would ensure that the Union was subject to the same level of external scrutiny as its Member States. The role of the Court of Justice in this constellation would mirror that of supreme national courts."

from continuing to protect the rights contained in the Convention to a higher standard.

The effectiveness of EU accession and the durability of the Luxembourg-Strasbourg judicial relationship would also depend upon the ECJ's opposition to external review. In order for this system to work efficiently and on the basis of a cooperative inter-court relationship, this reluctance must be overcome. While Arnall does not believe that there is any opposition, Gaja commented on *Opinion 2/94* saying:

The Court's defence [sic] 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.¹²⁵

Another important issue in this respect is how EU accession would affect the ECJ's ability to protect second and third generation rights,¹²⁶ as contained in the Charter of Fundamental Rights. The option of accession should, at least in theory, not affect the ECJ's ability to protect second and third generation rights; the reason being that Article 53 of the Charter provides:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised [sic], in their respective fields of

¹²⁵ Gaja, *supra* note 89, at 989. In contrast, Arnall, comments that: "As far as one can judge, accession would be welcomed by the members of both the Court of Justice and the European Court of Human Rights," *supra* note 13, at 385. He cites various articles, cases, and speeches by the judges of these Courts to support his point. See Gaja, *supra* note 89, at 985.

¹²⁶ See, *supra* note 48 providing an explanation of the differences between first, second, and third generation rights. The Charter of Fundamental Rights protects "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." (Council of Europe, CDL-AD (2003) 92 Or. Eng. Strasbourg 18 December 2003, Op. 256/2003, ¶ 26)

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application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.¹²⁷

However, what is interesting to note is that Article 53 makes no reference to the case law of the Strasbourg Court itself and instead simply refers to the Convention itself.¹²⁸ It has already been noted that it is not until the ECtHR interprets the text of Convention that we have a clearer and more precise understanding of what the Convention actually means. However, given that the ECJ tends to follow the guidance of the ECtHR when such guidance exists, there would appear to be little to suggest that accession would dramatically change the manner in which the Luxembourg Court currently protects second and third generation rights.¹²⁹ On the other hand, the

¹²⁷ Charter of Fundamental Rights of the European Union art. 53, Dec. 18, 2000, 2000 O.J. (C 364) 1.

¹²⁸ The European Parliament has explained this omission, by commenting that: "The jurisprudence of the European Court of Human Rights is not included in the references mentioned here, as it is difficult to envisage recognition of laws which are being developed, whose substance may evolve, and which would amount a priori to the recognition of provisions which had not yet been established. The reference in this jurisprudence is, nevertheless, mentioned in the Preamble to the Charter, just as the Treaties, national constitutional traditions and the international obligations of Member States are mentioned." (http://www.europarl.europa.eu/comparl/libe/elsj/charter/art53/default_en.htm, last visited Jan. 25, 2007) The Parliament's explanation of why there is no reference to the ECtHR jurisprudence is not entirely convincing. The ECtHR has a fundamental role in defining the detailed meaning of the Convention text, so it seems inappropriate to refer to the Convention without the Court. It is not clear as to why the Parliament considered it appropriate to recognize the vague Convention text, the meaning of which will depend on the interpretation by the Strasbourg Court, without recognizing the more detailed law that will be provided by the Court of Human Rights itself.

¹²⁹ Furthermore, although the Charter, which is not legally binding, has been referred to by the Advocates-General, the ECJ has not actually referred to this document yet. However, the ECJ has not decided a case on the basis of the Charter yet. For references by the Advocates-General, see Advocate-General Leger in C-353/99P, *Council v. Hautala*, 2001 E.C.R. I-9565; Advocate-General Tizzano in C-173/99, *BECTU v Secretary of St. for Trade & Industry*, 2001 E.C.R. I-4881, ¶¶

narrow focus of the Convention may prevent the substantial and substantive development of the Charter's second and third generation rights, as the ECJ's interpretation of those rights depends on their compatibility with the Convention rights by virtue of Article 53 of the Charter. Therefore, there is the possibility that the Convention could operate as a ceiling in terms of the ECJ's future ability to develop the protection for second and third generation rights, especially as these areas become more important and also since "the historic reasons for treating the two categories of rights strictly separately have, surely, lost their validity."¹³⁰ However, even with Article 53, there are no guarantees that the ECJ will not interpret the Convention differently from the ECtHR when there is no guidance from the Strasbourg Court, which ultimately leaves us with the same problem that has already been discussed in Part One of this paper.

The next question is whether or not accession reflects the realities that these Courts face and the roles that each Court has in furthering European integration? Given that both Courts are charged with the task of interpreting and protecting the Convention rights,¹³¹ there can be little doubt that EU accession would build upon the roles that both Courts have in this respect. The external mechanism of Strasbourg review would provide a cure for diverging interpretations

26-28; Advocate-General Jacobs in C-279/99P, *Z v. Eur. Parliament*, 2001 E.C.R. I-9197, ¶ 40: "Moreover the Charter of Fundamental Rights of the European Union, while itself not legally binding, proclaims a generally recognised [sic] 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." Interestingly, the ECtHR has also referred to the Charter, *Goodwin v. U.K.* (2002) 35 Eur. H.R. Rep. 18, ¶ 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."

¹³⁰ Lammy Betten, *Human Rights: European Union European Community Law*, 50 INT'L & COMP. L.Q. 690, 693 (2001). The current author has previously suggested that there would be benefits in this respect, as well as several difficulties, in extending the Convention's protection to include second and third generation rights. Balfour, *supra* note 20: "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."

¹³¹ See Janis, *supra* note 107.

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of the Convention text by the ECJ. However, we must also question whether EU accession would prove to be a workable solution for both courts. It is no secret that that both Courts are suffering from enormous amounts of pressure in terms of time and caseload.¹³² Would EU accession push the caseload of both courts over their limits? It would make little sense for a solution to address one problem, only for it to then create further problems or exacerbate other existing problems. The Strasbourg Court, in particular, is displaying signs of strain under the ever-increasing amounts of pressure. Although various measures were introduced by the entry into force of Protocol 11,¹³³ the number of cases being brought to this Court is constantly rising and Protocol 14 has proposed further changes.¹³⁴ To illustrate this exponential growth of cases, the 46th

¹³² To illustrate the caseload and pressures on the ECJ, a comparison can be drawn between this Court and the Supreme Court of the United States. For example, Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. CONST. L. 618, 627 (2006): "Overall, the ECJ decides more than five hundred cases per year, while the Supreme Court decides about eighty. Moreover, the Supreme Court has virtually complete discretion with constitutional cases before it for adjudication. In contrast, the ECJ has very little discretion with constitutional cases, such as those referred to it by national judges. Additionally, not only does the Supreme Court pick and choose which cases to adjudicate, it also has the benefits of the many judicial decisions by lower federal courts and/or state courts on the constitutional issues it must decide. In contrast, as a court of first instance in most cases, the ECJ cannot count on the experience of other courts in interpreting the relevant EU law's provisions."

¹³³ Protocol 11 entered into force on November 1, 1998. Volker Schlette & Nicola Rowe, *The Protection of Human Rights in Europe After the Eleventh Protocol to the ECHR*, 23 EUR. L. REV. 1998 (Supp. Hum. Rts.) 3, 12 (describing Protocol 11 as "a revolutionary document"). This Protocol made numerous changes to the Strasbourg machinery, including: a full time Court; abolishing the Commission; reducing the size of each Chamber from 9 to 7 judges; right of individual petition and jurisdiction of the Court made mandatory; and, admissibility determined by Committee of three judges or Chamber. For a more detailed discussion, see Henry G. Schermers, *The New European Court of Human Rights*, 35 COMMON MKT. L. REV. 3 (1998).

¹³⁴ One of the main changes that Protocol 14 would introduce, is that it would reduce the admissibility decision from three judges to one judge. As of Jan. 23, 2007, Protocol 14 has not entered into force. The only High Contracting Party that has not ratified the Protocol is Russia. Despite the fact that Protocol 14 has not even entered into force, critics are already suggesting that it is insufficient and

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Yearbook of the ECHR indicated that in 2003 a total of 35,613 applications were lodged with the Strasbourg Court.¹³⁵ This is nearly double the number of applications in 1998 (18,164) and over seven times as many as in 1989 (4,923). However, by the end of September 2006, this number had grown to a staggering 89,000.¹³⁶ This dramatic increase in the number of applications has meant that there is an ever-growing backlog of cases pending before the Court, which means that cases can take years to be heard.¹³⁷ Writing in July 2006, Caflisch made the following observations:

With its 45 judges and about 250 Registry lawyers, the Court is presently confronted with an accumulated case-load of 82,600 applications, out of which 45,550 were made in 2005, the yearly capacity of absorption of the Court now being at around 28,000 cases. This means that: (i) *the yearly input exceeds the output* by about 17,000 cases and (ii) if applications were stopped altogether from coming in at this very moment—an absurd supposition—it would take the Court a *minimum of three years* to dispose of its accumulated case-load.¹³⁸

inadequate to make the necessary changes. Steven Greer, *Protocol 14 and the Future of the European Court of Human Rights*, PUB. L. 83, 85 (2005) describing Protocol 14 as “a missed opportunity and is likely, at best, to be only a partial success.” Interim Report of the Group of Wise Persons to the Committee of Ministers, May 10, 2006, CM (2006) 88, ¶ 32: “However, it can already be anticipated that the reforms it introduces will not be sufficient to enable the Court to find any lasting solution to the problem of congestion. According to estimates produced within the Court, the increase in productivity resulting from the implementation of this protocol might be between 20 and 25%.”

¹³⁵ 46 Y.B. E.C.H.R. 200 (2003).

¹³⁶ Interim Report of the Group of Wise Persons to the Committee of Ministers, May 10, 2006, C.M. 88, ¶ 27 (2006): “At the end of September 2006, 89,000 cases were pending before the Court. Of this total, 24,650 individual communications are awaiting ‘regularisation’ as applications. Many of these cases have been pending for a very long time. In addition, out of the total mentioned above, 21,900 are chamber cases.”

¹³⁷ Lord Irvine of Lairg QC, *The Impact of the Human Rights Act: Parliament, the Courts and the Executive*, PUB.L. 308, 309 (2005): “a road that often took more than five years to travel.”

¹³⁸ Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 HUM. RTS. L. REV. 403, 404 (2006).

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To add to this problem would possibly cripple the Strasbourg Court, or at least contribute to the already lengthy period of time that it can take for the ECtHR to hear a case.¹³⁹ The extent that EU accession affects the number of cases and the length of the average time to decide a case will depend on several factors, including the future structure and setup of the Strasbourg Court. The ECtHR will have to go through further dramatic changes and alterations in order to deal with the ever-increasing caseload. One such suggestion for reform came from Judge Wildhaber, who suggested that the ECtHR should be transformed from an individual-focused Court to a Court that is more concerned with constitutional matters. This would mean that the ECtHR would be less focused on individual complaints and more concerned with “‘constitutional’ decisions of principle needed to build up a European public order based on human rights, democracy and the rule of law.”¹⁴⁰

It should also be kept in mind that given the ECJ’s protection of human rights to date, which has been on the whole largely successful, there is unlikely to be a significant number of complaints against the EU institutions¹⁴¹ – although this does not mean that the small number of cases that have been problematic are not significant. As such, although the number of cases pending before the ECtHR might increase slightly with EU accession, it is unlikely to increase by such an amount that it would cripple the Strasbourg machinery of protection, particularly if further reforms, such as those proposed by Wildhaber, are implemented.

¹³⁹ See *supra* note 136.

¹⁴⁰ Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 23 HUM. RTS. L. REV. 161, 165 (2002).

¹⁴¹ Weiler, *supra* note 12, at 555: “By any comparative and relativist account both the levels of violation of Human Rights *by the Community and its organs* and the level of protection afforded in case of such violation is not unsatisfactory. There is certainly no systematic, persistent and grave violation, and the mechanisms which are available to redress those violations which do occur tend to be adequate.” See also, Lawson & Schermers, *supra* note 4, at 768: “Only a very small amount of cases relate to the conduct of international organizations. In many respects they simply lack the capacity to violate human rights; they tend not to deprive citizens of their liberty or curtail their freedom of speech. By their very nature, they normally behave in such a manner as not to violate human rights, even if they could.”

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The ECJ is also under extreme pressure. There is the risk that EU accession could result in several violations of Articles 6¹⁴² and 13¹⁴³ of the ECHR, due to the length of the time that it takes for cases to be heard. This, by itself, is certainly not an argument to justify why the EU should not accede to the ECHR, but instead is being mentioned to highlight how the judicial procedures and protection in the EU will need to change in order to ensure that this protection is not merely “theoretical or illusionary,”¹⁴⁴ but “practical and effective.”¹⁴⁵

The third requirement which EU accession should be tested against is whether this option is appropriately tailored and effective in terms of addressing the problem of negative diverging interpretations by the ECJ. Even if the option of EU accession has managed to satisfy the first two requirements, this is where, at least in the current author’s opinion, the weaknesses of this option become apparent. The option of accession has been described as “the key”¹⁴⁶ that will “minimise [sic] the danger of conflicting rulings,”¹⁴⁷ indicating that some commentators view this as the final step in completing the harmonious protection of human rights across Europe and enabling the Convention to be adequately applied in the Community legal order. However, the problem with accession is that it will not actually ensure that the Convention is harmoniously interpreted and applied by the two Courts; instead, 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 level of protection. The lengthy process of bringing and having a case decided by the Strasbourg Court means that the ECJ may apply its incorrect interpretation of the Convention to other cases before the

¹⁴² See *supra* note 83.

¹⁴³ Article 13 provides “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy.” ECHR, *supra* note 15, art. 13.

¹⁴⁴ Airey v Ireland, 2 Eur. H.R. Rep. 305, ¶ 24 (1979).

¹⁴⁵ *Id.*

¹⁴⁶ Council of Eur. CDL-AD (2003) 92 Or. Eng., Strasbourg, Dec. 18, 2003, Op. No. 256/2003, ¶ 82.

¹⁴⁷ DOUGLAS-SCOTT, *supra* note 8, at 467.

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matter has been adequately resolved by the ECtHR. While 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 the now 27 States and affecting over 490 million people (not to mention the significant number of legal persons). The enormity of the ECJ's jurisdiction and the expansion of the EU's powers¹⁴⁸ mean that there is a greater chance of conflict, which will affect all the Member States on the basis of the supremacy of Community law. While accession has a number of benefits, it is limited in what it can offer; it can provide the individual with a remedy when the ECJ has failed to correctly interpret the Convention or avoids the human rights issue, but it will not prevent conflicts occurring or "minimize" their occurrence in the first place. The problem is then aggravated by the fact, as already noted above, that diverging interpretations are expected to increase over time.

B. Conclusion on the Option of EU Accession

Although accession appears to be a *prima facie* ideal solution for rectifying the problem of diverging interpretations of the Convention, supported by the fact that all the Member States of the EU have acceded to the Convention, in reality this option fails to adequately prevent this problem from arising in the first place, indicating that it is not in fact "the key"¹⁴⁹ to achieving the harmonious application of the Convention by the Luxembourg and Strasbourg Courts. This is an option that has been described as a tired old flogged horse¹⁵⁰ and yet we assume that this flogged horse will carry Europe to a future where the application and protection of human rights is harmonious in both multinational jurisdictions. Although EU accession would certainly entail practical and effective benefits,¹⁵¹ it will have a limited impact in terms of strengthening the

¹⁴⁸ See *supra* note 47.

¹⁴⁹ See *supra* note 145.

¹⁵⁰ See *supra* note 18.

¹⁵¹ Lawson, *supra* note 27, at 220: "The ECJ was thus able to protect fundamental rights in individual cases, despite the absence of specific human rights provisions in the constituent Treaties. The 'solution de dépannage' has in turn led some commentators to the rather paradoxical conclusion that, since human rights

protection of human rights in the EU. As stated above, the main concern with this option is that it will not prevent conflicting interpretations of the convention occurring. Instead, and at best, it will provide a cure for diverging interpretations, but it cannot prevent this problem arising in the first place. Although this is better than the current situation, both for the individuals and for the courts as indicated by the unsatisfactory equivalent protection doctrine, it is far from ideal.

III. Pre-Decision Interpretative Question System

Although accession would provide for certain benefits and improvements, it does not efficiently and effectively prevent the problem of diverging interpretations from arising in the first place; instead, as discussed above, it merely provides a remedy for such diverging interpretations. The failure of EU accession to adequately address this problem means that a better solution would be to devise a mechanism or solution that would prevent diverging interpretations occurring in the first place. This could be achieved by enabling the ECJ to refer, what the author has previously termed, “pre-decision interpretation questions”¹⁵² to the ECtHR concerning the interpretation and application of the Convention. The benefits of a referral mechanism, similar to what is being proposed in this paper, have been highlighted by Professor Schermers, who commented: “[w]hen faced with questions of human rights any court [including the ECJ] could ask a preliminary ruling of the European Court of

are protected, Community accession to the ECHR is only of theoretical interest, without much practical relevance.” (referring to HoL Select Committee on the EC, Human Rights Re-examined, June 23, 1992, at 28 §71).

¹⁵² Balfour, *supra* note 20. Several commentators in the past have commented on the option of a preliminary ruling system both for the national courts and the ECJ/CFI to the ECtHR. See Ronald MacDonald, *Supervision of the Execution of the Judgments of the European Court of Human Rights*, in *MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS* 417, 435 (René-Jean Dupuy ed., 1999): “in my opinion it would be useful to establish a mechanism of consultation between the national jurisdiction and the European Court, such as exists in the European Communities”; Koen Lenaerts, *Fundamental Rights to be included in a Community catalogue*, 26 *EUR. L. REV.* 367 (1991); Schermers, *infra* note 161; Janis, *supra* note 107.

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Human Rights on the interpretation of such a right.”¹⁵³

In a similar manner, Macdonald has commented that:

The creation of a procedure enabling the ECHR to rule on questions of the interpretation of the Convention at an early stage . . . would have benefits for the economy of proceedings and might, therefore, contribute towards the more effective protection of human rights in Europe.¹⁵⁴

The main benefit of this mechanism would be that the ECJ could consult the ECtHR on matters relating to the interpretation of the Convention when there is no or insufficient case law from the Strasbourg Court on the matter. This mechanism could avoid conflicting interpretations caused by the lack of guidance from the ECtHR, which, as we have already discussed above, is when such divergences tend to occur. The key difference in respect of accession is that the referral mechanism would address and prevent potentially inconsistent interpretations before the ECJ decides the case, rather than merely providing a remedy to rectify the effects of the interpretation once it has been adopted and applied by the Luxembourg Court. This would essentially build upon the existing human rights protection in the EU, whereby the ECJ tends to follow the interpretation adopted by the Strasbourg Court, or notes the absence of such guidance. By building upon the existing relationship between the two courts, one could expect that a referral system would prove particularly successful in addressing the problem of negative diverging interpretations of the Convention. The “pre-decision interpretation questions” system could then form the main basis for ensuring consistent application of the Convention.

¹⁵³ Schermers, *infra* note 161, at 265. See also LENAERTS, *supra* note 1, at 728, § 17-081: “That problem could be resolved by allowing the Court of Justice and the Court of First Instance to make references for preliminary rulings to the European Court of Human Rights.”

¹⁵⁴ Ronald MacDonald, *The Luxembourg Preliminary Ruling Procedure and its Possible Application in Strasbourg*, in MÉLANGES OFFERTS À LOUIS EDMOND PETTITI 593, 603 (1999).

A. How the System Would Operate

Although this section aims to build upon my earlier description of the PDIQ system in the *London Law Review*, it is worth remembering that this idea is still in the theoretical and early stages of development. Therefore, while the basis of this system can be described, much of the details about how this system would operate and be put into practice are still to be developed.

Essentially, the PDIQ system is based upon a model of judicial cooperation that shares some similarities to the preliminary ruling system under Article 234 of the EC.¹⁵⁵ Although this mechanism would be similar to the EC preliminary rulings, it would have to be tailored to meet the needs and demands of the two Courts. MacDonald commented in this respect that “any preliminary ruling mechanism under the Convention would have to be carefully tailored to suit the particular features of that system.”¹⁵⁶ This mechanism would mean that if the ECJ is faced with a question on the interpretation of the Convention in the absence of guidance from the Strasbourg Court, then the ECJ should stall the proceedings and refer the matter for clarification to the ECtHR. By being able to stall the proceedings and gain clarification on how the Convention should be interpreted, the PDIQ system would help to avoid future *Grogan/Open Doors* scenarios,¹⁵⁷ where the same issue appeared simultaneously before both Courts and was dealt with very differently by each of them. The power to stall the proceedings before the ECJ when there is a real danger of the two Courts producing diverging interpretations of the Convention could prove to be very effective. This would enable the ECJ to simply wait for the

¹⁵⁵ There are many problems with the current procedure of Article 234, especially in terms of the length of proceedings. See Anthony Arnall, *The Past and Future of the Preliminary Rulings Procedure*, in *THE TREATY OF NICE AND BEYOND: ENLARGEMENT AND CONSTITUTIONAL REFORM* 345 (Mads Andenas & John Usher eds., 2003). Therefore, while the “pre-decision interpretation” system would be based on the same concept, the differences are that it would derive the benefits of this system and seek to avoid the main problems of the current preliminary ruling system of the EC.

¹⁵⁶ MacDonald, *supra* note 154, at 603.

¹⁵⁷ See discussion of these cases, *supra* note 54.

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Strasbourg Court's interpretation, thus clarifying how the Convention is to be interpreted and applied, thereby enabling the ECJ to then follow the guidance and apply the harmonious interpretation of the Convention, 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."¹⁵⁸ Put simply, for the Strasbourg Court, it would be a case of two birds, one stone: with one decision, the Strasbourg Court could produce sufficient guidance as to allow for the harmonious application of the Convention rights in all of Europe. However, this would also leave the ECJ with the ability to go beyond the minimum level of protection determined by the ECtHR, as the PDIQ system would not seek to prevent or suppress positive diverging interpretations of the Convention.

The PDIQ system is designed to have sufficient flexibility, in order to allow the ECJ to obtain sufficient guidance without requiring a "standard" procedure that would possibly unnecessarily take up the precious and limited time of both Courts. Therefore, the ECJ's questions under this system could be sent in one of two forms, depending upon the needs and abilities of the two Courts concerning each individual question. The first option is that the ECJ could simply send its questions to the ECtHR and wait for the Strasbourg Court to respond with its answers. The advantage of this first option is that the ECtHR could consider its interpretation of the Convention and then inform the ECJ, much like the procedure under Article 234 of the EC, where the national Courts ask the ECJ (and now the Court of First Instance)¹⁵⁹ how to interpret a provision of Community

¹⁵⁸ Council of Eur. CDL-AD (2003) 92 Or. Eng., Strasbourg, Dec. 18, 2003, Op. No. 256/2003, ¶ 69.

¹⁵⁹ 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). Under Article 225, the Court can hear *inter alia* proceedings under Articles 230 and 234. Individual applications will usually be heard by the CFI. "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]." T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE

law.¹⁶⁰ Given that this first option is built upon the preliminary ruling procedure in the EC, it would also entail the benefits and effectiveness of that procedure. Schermers has discussed the benefits of the EC mechanism, commenting:

This provision permits national courts to obtain authentic interpretations from the regional court on the rules of regional law, which they can subsequently apply in their national court decision. Even though the regional court cannot overrule the domestic court, its ruling obtains force of law in the national legal system through the cooperation of the national court which makes it part of its own decision. This system has worked well and could be expanded to the relationship between other legal systems.¹⁶¹

Therefore, this “questions and answers” version of the PDIQ system would allow the ECtHR to provide clear guidance and an authentic interpretation of the Convention, which would then be applied as the EU’s substantively similar standards by the ECJ.

The second way in which the PDIQ system could operate 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. This would mean that the ECtHR could then approve or disapprove of the proposed interpretation, making amendments and suggestions where necessary. The “approval system” would also be less time consuming for the ECtHR, as one would expect that it would be quicker for the Strasbourg Court to accept an interpretation

CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY 64 (2003).

¹⁶⁰ “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.” ECJ, *Notes for Guidance on References by National Courts for Preliminary Rulings*, 1 W.L.R 261, ¶ 6 (1999).

¹⁶¹ Henry G. Schermers, *The ICJ in Relation to Other Courts*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 264 (Sam Muller et al. eds., 1996).

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of the Convention rather than having to hear the various parties and then provide a series of answers to the ECJ's questions on 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. There is no question that the PDIQ system must be a time-sensitive mechanism and preferably provide for a more efficient level of protection of human rights. Schermers has commented on these time issues, but believes that they are the greatest, and essentially only, challenge that such a system would face: "[a]part, perhaps, of problems of workload and efficiency, there is no fundamental objections against preliminary rulings between all different legal systems."¹⁶²

The second format of questions (the "approval system") is perhaps more preferable than the first option of "questions and answers." The approval system would encourage the ECJ to consider how the Convention should be interpreted and applied, rather than leaving the matter to the exclusive decision of the ECtHR. Therefore, the approval or disapproval of the Luxembourg Court's interpretation by the ECtHR would act as a strong indication of how well the Court is independently interpreting the Convention. This option also means that the Courts will hopefully increase their understanding of each other and be able to take both Union and Convention interests and goals into consideration when they are striving for the harmonious and complementary interpretation of the Convention. The approval system would also enable the ECJ to possibly influence the minimum level of protection for the Convention rights. If the Luxembourg Court's proposal includes an interpretation that exceeds the ECtHR's future interpretation, for example the case of *X v. Commission*, then not only would the ECJ be publicly seen to be setting high standards, which would send a strong message to the countries and organizations that are monitored by the EU for their human rights records, but this could also help to improve the level of protection for human rights across Europe.

Although the PDIQ system would provide for the harmonious

¹⁶² *Id.* at 264.

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interpretation and application of the Convention, it is essential, as highlighted above, that this system does not constitute a major drain on the limited time that the two Courts have. Furthermore, the system must also be compatible with Articles 6 and 13 of the Convention. The purpose of the PDIQ mechanism is to improve the protection of human rights; it should not undermine them. However, 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 marvelous 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."¹⁶³

When one sets out exactly what the problem is with the current application of the ECHR by the ECJ, it soon becomes ostensible as to why this system would work. It has already been discussed that the problem of diverging interpretations of the Convention does not arise from what appears to be a direct conflict between the two courts, but is instead the result of when the ECJ is required to interpret the Convention on a matter for which there is no guiding case law from the ECHR. As Judge Spielmann has commented "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."¹⁶⁴ He continues to say: "[i]t seems that the ECJ would be prepared to take into account relevant case law from the European Court of Human Rights. After all, in *Hoechst*, it took for granted 'that there is no case-law of the European Court of Human Rights on the subject' and in *Orkem* it reached a similar conclusion."¹⁶⁵ Given that this is the existing situation, the PDIQ system, or a similar mechanism, would enhance and "help assure the uniformity and clarity of European Human Rights Law,"¹⁶⁶ because it provides a mechanism of consultation that would avoid the ECJ having to interpret the Convention without

¹⁶³ Piet Eeckhout, *The European Courts After Nice in THE TREATY OF NICE AND BEYOND* 325 (M. Andendas & J. Usher eds., 2003).

¹⁶⁴ Spielmann, *supra* note 34, at 770.

¹⁶⁵ *Id.*

¹⁶⁶ Janis, *supra* note 106, at 213.

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assistance and guidance from the Strasbourg Court.

Furthermore, it is also true that the benefits that could be derived from EC/EU accession would actually be better served by a referral system. For example, Dean Spielmann considered that the “best way to avoid inconsistent case law would of course be for the Community to accede formally to the Convention.”¹⁶⁷ Yet the problem is that diverging interpretations arise when there is no guidance from the Strasbourg Court. Therefore, the option of accession cannot “avoid inconsistent case law”; it merely provides a means for rectifying the ECJ’s negative diverging interpretation that is inconsistent with the later authority from the ECtHR. Instead, the PDIQ system serves the goal of avoiding inconsistent case law and interpretations of the Convention, before such divergences become a problem.

B. Matthews Case Scenario

It could be considered that one of the benefits of accession would be that the ECtHR could address human rights complaints in areas of the EU that the ECJ does not have jurisdiction. There are certain matters on which the Court cannot hear cases, namely primary legislation.¹⁶⁸ The reason for this is that the EU is constructed on the basis of three pillars,¹⁶⁹ with the ECJ having jurisdiction over the first pillar. Although the Treaty of Amsterdam incorporated much¹⁷⁰ of the third pillar into the first, bringing these

¹⁶⁷ Spielmann, *supra* note 34, at 777.

¹⁶⁸ See LENAERTS, *supra* note 1, at 705. “Primary Community law consists of those provisions which were adopted directly by the Member States in their capacity as ‘constituent authority’, meaning in the first place the Community Treaties and the Treaties amending or supplementing them.”

¹⁶⁹ The first pillar is the European Community; the second pillar is the Common Foreign and Security Policy; and, the third pillar is Justice and Home Affairs (now the Policing and Judicial Cooperation in Criminal Matters).

¹⁷⁰ The Treaty of Amsterdam did not incorporate the entire third pillar. Indeed, the ECJ noted in the 2005 case of *Spain v. Eurojust*, C-160/03, E.C.R. I-2077, ¶ 33 (2005): “the jurisdiction of the Court in the context of the third pillar is limited.” The third pillar was renamed Policing and Judicial Cooperation in

issues within the jurisdiction of the ECJ, the *Matthews* case demonstrates that there are occasions when the ECJ cannot deal with a certain complaint.¹⁷¹ Accession is certainly one solution to this problem, but again one should question whether this is the best way of solving this problem. Jacobs has described the option of accession to correct this problem in the following terms:

[It is] little short of perverse to advocate accession to the ECHR as a means of providing a remedy which is not otherwise available. The solution should rather be to extend the jurisdiction of the EU courts to enable them to review such action and where appropriate to grant a remedy. Indeed the absence of such a remedy would itself be a violation of the Convention.¹⁷²

A far more appropriate solution, as Jacobs points out, would surely be for the ECJ to be given greater jurisdiction in EU matters, so that individuals, such as *Matthews*, can actually bring a complaint that would entail internal judicial review. As such, the PDIQ system can still work to reduce the possibility of future *Matthews* cases. All that is required is for the ECJ to have greater jurisdiction, so that the Court can continue to apply its human rights standards by itself where appropriate and ask the ECtHR for guidance on such matters where there is no authority or guidance on the matter.

C. Potential Criticisms of the PDIQ system

Although the current writer strongly believes that the PDIQ system is an ideal model for the future protection of Convention rights in the EU, one can foresee that certain criticisms may be raised in response to this idea. Perhaps one of the main criticisms that could be raised is that there would be the risk that the Strasbourg Court

Criminal Matters (PJCC). See generally DAVID O'KEEFE AND PATRICK TWOMEY, *LEGAL ISSUES OF THE AMSTERDAM TREATY* (1999).

¹⁷¹ "Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a 'normal' act of the Community, but it is a treaty within the Community legal order." *Matthews v. U.K.*, *supra* note 96, ¶ 33.

¹⁷² Jacobs, *supra* note 17, at 295.

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issues a ruling under the system that the ECJ does not agree with, whereby the possibility exists that the ECJ refuses to apply this interpretation. This would certainly undermine one of the main aims of the PDIQ system, which is to provide “a mechanism . . . for the judicial cooperation on the law of the European Convention on Human Rights (‘European Human Rights Law’) among Europe’s regional courts.”¹⁷³ Of course without the option of EU accession to “ensure that the CFI and the ECJ follow the authoritative rulings of the Strasbourg Court,”¹⁷⁴ there is the possibility of this occurring. Therefore, there is little to suggest that the ECJ would depart from clear guidance and much, namely the Court’s record to date, to suggest that the ECJ would follow the standards set by the ECtHR in the future.¹⁷⁵ As we have already seen, both in this paper and in other literature,¹⁷⁶ the problems with conflicting interpretations have arisen when the ECJ has interpreted the ECHR before the ECtHR. There is absolutely nothing to suggest that the ECJ would ignore the interpretation provided by the ECtHR, simply because this system does not compel the ECJ to follow the Strasbourg Court’s case law.

The second concern is that under the PDIQ system, the ECJ may decide not to consult the ECtHR on certain matters, with the result that the same negative diverging interpretations occur as before. This would be particularly problematic, as it would leave the level of protection for Convention rights in the EU unaltered from its present state, and would give the appearance of the PDIQ system as being an empty and ineffective measure. The Court’s apparent confidence in *Hoechst* that Article 8 does not extend to business premises, could indicate that there could be some occasions in which

¹⁷³ Janis, *supra* note 106, at 212.

¹⁷⁴ Lawson, *supra* note 49, at 990.

¹⁷⁵ “It seems that the ECJ would be prepared to take into account relevant case law from the European Court of Human Rights. After all, in *Hoechst*, it took for granted ‘that there is no case-law of the European Court of Human Rights on the subject’ and in *Orkem* it reached a similar conclusion... 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.” Spielmann, *supra* note 34, at 770. “[The ECJ] never stated or implied that it does not have to abide by the case law when the Convention is applied.” *Id.* at 987.

¹⁷⁶ See Part One.

the Court's confidence in its interpretation is not shared by the Strasbourg Court. However, the PDIQ system could, arguably, avoid this problem in practice. In the case of *Hoechst*, the ECJ commented that there was no guidance from the ECtHR on the matter, meaning that the Luxembourg court had to interpret the meaning of "home"/"domicile" for the purposes of Article 8 ECHR¹⁷⁷ on its own. One can only speculate, but in such instances, one would assume that in the absence of guidance from the Strasbourg Court that the ECJ would take advantage of the PDIQ system to ensure that the application of the Convention in both jurisdictions would be harmonious and complementary. One could also assume that given the fact that most of the negative diverging interpretations have occurred in relation to Articles 6 and 8 of the ECHR, the ECJ might be more inclined to consult the Strasbourg Court for guidance before applying its own interpretation of the Convention.

D. Assessment of the Option of the PDIQ System

The PDIQ system must also be tested against the three requirements that were presented to the option of EU accession. In respect of the first requirement, to ensure that both courts play a pivotal role in the advancement of Europe, it is ostensible that the PDIQ system would achieve this goal. It was highlighted earlier, that, in the opinion of Wildhaber, the two courts have established a good, albeit informal, relationship, which has resulted in few conflicts. The last thing that we should do is introduce a solution that would risk jeopardizing this relationship. Instead, the PDIQ system aims to improve upon the cooperative relationship of the two courts, by transforming this informal relationship into a stronger and more formal one. Essentially, this is an option that would work for both courts, as it would mean that the Strasbourg Court could maintain its central role as the guardian of the ECHR and the authoritative court on matters relating to interpretation, whilst the Luxembourg Court can be the highest court for determining matters relating to the EU.

¹⁷⁷ The Court comments: "Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject." *Hoechst*, *supra* note 39, ¶ 18.

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For the ECtHR, negative diverging interpretations can be corrected before they become a problem, and the practice of the ECJ, namely following the Strasbourg authority when it exists, demonstrates that this would be a complete system. For the ECJ, the PDIQ system provides the opportunity to maintain a relative amount of independence in the interpretation and application of both EU law and the ECHR, but also enables the Court to influence the ECtHR in the protection of human rights. Essentially, the PDIQ system takes the benefits of the current situation and combines them with the benefits that would be derived from accession, but without the drawbacks of both systems. The option of accession provides that the ECtHR will review the interpretation adopted by the ECJ with little direct involvement of the ECJ. The PDIQ system, recognizing both the ECJ's willingness to follow the Strasbourg Court's precedent and reluctance to external review,¹⁷⁸ would allow the ECtHR to set parameters for interpretation and human rights protection, within which, the ECJ could then apply and tailor the more detailed levels of protection, to ensure that both human rights and EU goals are advanced; thus allowing for the advancement of EU interests in a manner that adequately protects and respects Convention rights. The PDIQ system is not based on an idea of hostility or mistrust on the parts of the Courts, but is designed to strengthen the existing relationship by ensuring that their working conditions are effective and allow each Court to perform their respective functions. This system therefore, enhances the existing relationship and enables both Courts to have an important role in the proceedings for the protection of human rights and the advancement of European integration.

The PDIQ system would also benefit national courts and the individuals in these courts. As we already saw above, negative diverging interpretations of the ECHR by the ECJ leave the national Courts torn between fulfilling their obligations under the Convention and also the supremacy of EC law.¹⁷⁹ Thus, the PDIQ system will provide clarification for the ECJ, which in turn will benefit the national courts as the interpretation applied by the ECJ will be

¹⁷⁸ See generally, Gaja, *supra* note 89.

¹⁷⁹ See, *supra* note 52.

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consistent with the obligations that the States have to secure in fulfilling their ECHR obligations.

Essentially, by remedying the absence of a mechanism to prevent negative diverging interpretations from arising, the PDIQ system can provide for the harmonious application of the ECHR without resorting to either Court having to “lose” to the other side. Thus, the PDIQ system offers an attractive “win-win” solution for the Luxembourg and Strasbourg Courts, the Member States, and aggrieved individuals.

The second requirement that this system must satisfy is to demonstrate its ability to reflect the realities that both Courts face in pursuit of their respective goals. As we have discussed above, 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-growing¹⁸⁰ backlog of applications, which has prompted the need for further reform under Protocol 14. Given the pressures that the Strasbourg Court is facing, it would not be unimaginable to envisage that a PDIQ system could seriously cripple the Strasbourg machinery and the level of protection that the Court would offer,¹⁸¹ particularly since the Interim Report of the Group of Wise Persons to the Committee of Ministers made the following remarks about a similar mechanism for the national courts:

In this connection, the introduction of a

¹⁸⁰ “The Court has a serious problem of its own. The influx of applications threatens to overwhelm the institution. The backlog is already huge ... and it continues to grow.” See generally *supra* notes 132-138 and Doris Provine, *How Rights Evolve: The Case of Non-Discrimination in the European Court of Human Rights*, in *COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY* 102 (Mary Volcansek & John Stack eds., 2005).

¹⁸¹ The effect of an increased number of cases is discussed by Jacqu , and Weiler: “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.” Jean Paul Jacque & Joseph H.H. Weiler, *On the Road to European Union- A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 22 *COMMON MKT. L. REV.* 188 (1990).

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preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court's workload.¹⁸²

Although the protection of human rights within the EU would be strengthened by establishing a formal link between the two Courts and providing for external supervision, this review, where "there is certainly no systematic, persistent and grave violation"¹⁸³ 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"¹⁸⁴ or simply to give the EU a better appearance. Therefore, in order to prevent the PDIQ system from adversely affecting the ECtHR and the protection that it can offer, questions, in either form as discussed above, on interpretation should not be sent if the issue is so clear (like the Community doctrine of *acte clair*)¹⁸⁵ 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

¹⁸² Interim Report of the Group of Wise Persons to the Committee of Ministers, May 10, 2006, CM (2006) 203, ¶ 80, available at <http://www.statewatch.org/news/2006/dec/wcd.coe.pdf>.

¹⁸³ Weiler, *supra* note 12, at 555.

¹⁸⁴ *Id.*

¹⁸⁵ The essence of this doctrine is explained by the Court in the case of C-283/81, Srl CILFIT and Lanificio di Gavardo Spa v. Ministry of Health, 1982 E.C.R. 3415, ¶ 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."

clogging up the Strasbourg machinery and encourage the ECJ to interpret the Convention itself.

Another means of ensuring that the Strasbourg machinery is not clogged up with PDIQ referrals is to limit the power to send these questions to the ECJ, as the highest Community Court. Although it is the Court of First Instance (“CFI”) that will tend to deal with cases involving individuals,¹⁸⁶ 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 consider whether it is able to interpret the Convention without having to ask the ECtHR. This would mean that the ECJ could become involved in the human rights process to a greater extent and also ensure that matters that could be resolved by the ECJ are not unnecessarily sent to the ECtHR.

Although there is the concern that the PDIQ system could overload the ECtHR and that measures must be taken to prevent this, it is also possible that the PDIQ system could actually ease the number of cases that would have to appear before the ECtHR and the ECJ. One authoritative interpretation of the Convention by the ECtHR could solve a number of potential cases¹⁸⁷ or allow them to be dealt with adequately by the national courts in accordance with the principle of subsidiarity; essentially, several birds, one stone.

E. Why Have a Special System for the ECJ?

Given that the EU is not a persistent and serious violator of Convention rights,¹⁸⁸ it is appropriate to question why this option should be available for the ECJ, when there is no equivalent for the domestic courts of the High Contracting Parties.¹⁸⁹ This is *prima facie* a valid question, but there are several reasons to justify the

¹⁸⁶ See generally *supra* note 158.

¹⁸⁷ See generally *supra* note 157.

¹⁸⁸ See generally *supra* note 140.

¹⁸⁹ Advocate-General Warner’s comment in the case of *Vivian Prais*, *supra* note 90.

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exclusive power of the ECJ to send these questions.

The first reason to support the exclusive power for the ECJ might seem counterintuitive. The limited problem concerning human rights in the EU is actually a reason to justify why this mechanism should only be allowed for the ECJ. The problem of human rights protection in the EC/EU is not about the widespread violation of such rights, but instead concerns negative diverging interpretations of the Convention that result in the ECJ failing to adequately apply this instrument and protect human rights to the minimum level set by the Strasbourg Court. This proposed system could effectively solve the problems concerning the ECJ's application of the Convention, as it would ensure that the ECJ has guidance from the Strasbourg Court which it could then follow. Therefore, this option would resolve the problems that the EU and the ECJ currently have, thus allowing the ECtHR to focus on providing protection for those individuals who are suffering from serious and persistent violations by the High Contracting Parties.

The PDIQ system could also serve to help develop the role that some people would like for the Strasbourg Court to take in the protection of human rights. The PDIQ system could facilitate the transition of the ECtHR from being a court focused on individual cases to one that produces constitutional and jurisprudential decisions.¹⁹⁰ Due to the increased number of applications that the ECtHR is facing, as discussed above, the former President of the Court, Judge Wildhaber, had argued 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."¹⁹¹ The PDIQ system could therefore help with this

¹⁹⁰ In discussing the benefits of a preliminary reference mechanism between the national courts and the ECtHR, the Interim Report of the Group of Wise Persons to the Committee of Ministers, held "the Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court's "constitutional" role." *Interim Report, supra* note 135, ¶ 81.

¹⁹¹ Wildhaber, *supra* note 139, at 165.

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transition by preparing the ECtHR for this change and demonstrating whether such a system would actually work. This system would therefore operate on a trial basis to indicate whether such questions should be allowed from domestic courts once the Strasbourg Court has become more of a constitutional court.

Another benefit of the PDIQ system concerns the ECJ's continued reluctance to external review, by both the national Courts (the *Solange* saga)¹⁹² and the ECtHR (*Opinion 2/94*).¹⁹³ Although the relationship between the two Courts is not a "zero-sum game,"¹⁹⁴ the pre-decision interpretation questions may allow the ECJ to influence the ECtHR in the way that it interprets the Convention and effectively avoids the need for separate external review by the ECtHR, or for an official vertical relationship between the two Courts. Although accession would only result in the ECJ being in a comparable position to the highest national Courts,¹⁹⁵ the PDIQ system may encourage the Courts to foster a stronger relationship, whereby both Courts have a central and important role in harmoniously protecting and advancing the protection of human rights.

The fourth benefit of the PDIQ system is that it would allow the ECJ to apply the ECHR standards in a manner that is tailored to the Community objectives and goals,¹⁹⁶ including the protection of

¹⁹² See generally *supra* note 52.

¹⁹³ Gaja, *supra* note 89.

¹⁹⁴ Canor, *supra* note 106, at 4.

¹⁹⁵ Canor, *supra* note 106 at 4.

¹⁹⁶ "However, in the event of accession to the Convention, it seems virtually inevitable that the ECHR would get involved in the interpretation of Community law, if only to establish whether a Community rule or practice is compatible with the Convention (this would, after all, be its main judicial function). In this situation, the ECHR would interpret Community law so as to achieve the objectives of the Convention which ...are not necessarily identical with those of the Community. This would re-create the present problem in the reverse (as seen, at present the ECJ interprets the Convention according to Community objectives)." Akos G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491 (1997). "In the context of the European Community then, the protection afforded the individuals may be turned *against* the Community, its policies and even its value. Clearly there is no problem when the protection prevents bad faith *abuse* of power. But to be meaningful, protection will

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second and third generation rights. Although the Strasbourg Court should be the main authority on identifying and interpreting the Convention standards, it could be considered more appropriate for the ECJ to apply these standards in a manner that protects the rights of the individual and simultaneously advances EU/EC goals. The surroundings and context within which human rights are protected can alter the impact that such protection will have. It would be more appropriate for the ECJ, the court familiar with the jurisdiction within which these rights are to be protected, to apply the interpretation provided by the ECtHR: “the actual judicial application of human rights shows that far from representing absolute and static notions, human rights are always interrelated to the societies where they are applied.”¹⁹⁷

This will be particularly important, especially if the ECJ tries to develop the status of the Charter and protect second and third generation rights. Furthermore, this point is consistent with the principle of subsidiarity; a principle that is important to both Courts. The PDIQ system would therefore allow the ECJ, and the EU as a whole, a large degree of flexibility in striving to protect a greater number of rights, whilst also guaranteeing the minimum protection for the Convention rights. Although the Charter limits itself to interpretations that are consistent with the ECHR, there is the risk that this could come at the cost of first generation rights taking priority over second and third generation rights.¹⁹⁸ The PDIQ system would therefore allow the ECJ to develop the EC/EU’s protection for

have to extend on occasion even against policies adopted in good faith to further the goals of European Integration. It is true that violations of fundamental human rights occur not only at the instigation of autocratic and dictatorial regimes but also by the paternalistic benevolence of democratically elected governments and legislatures who feel they know better than their subjects.” “The Court, and other bodies dealing with Human Rights in the context of European Integration might well find themselves in difficult policy dilemmas in trying to reconcile these conflicting purposes of a higher law of human rights in the EC. The ECJ might find this particularly painful since, in the process of European integration it has not been an aloof organ adjudicating federal disputes between the Community and its Member States but has been one of the champions of the process of European Integration, taking an active role in its furtherance.” Weiler, *supra* note 12, at 570.

¹⁹⁷ Lawson, *supra* note 27, at 227.

¹⁹⁸ See generally *supra* note 49.

the three generations of rights, and also allow for the ECJ to protect human rights to the equivalent protection standard that the ECtHR provides. What is important to note is that the doctrine of “equivalent protection” does not mean identical protection,¹⁹⁹ but instead relates to “comparable” protection.²⁰⁰ Therefore, this mechanism could allow the ECJ to develop a comparable protection of human rights within the EU, by allowing it to have an important and central role to this process.

The last test for the PDIQ system is to demonstrate its ability and effectiveness in providing a tailored and preventative solution to the problem of negative diverging interpretations of the ECHR by the ECJ. This is where the option of EU accession failed, as it merely provides the possibility of a cure to the problem; it does not prevent negative diverging interpretations in the first place. In this regard, the PDIQ system is a well-tailored solution, as it provides the ECJ with the opportunity to consult the Strasbourg Court before applying its interpretation of the Convention when there is no or insufficient guidance on the matter. The reason why this system would work so well is that the negative diverging interpretations of the Convention occur when there is insufficient guidance from the Strasbourg Court: the PDIQ system is a model of judicial cooperation that can rectify this. Again, the difference between accession and the PDIQ system in this respect, is that one is a cure whereas the other prevents the problem from arising in the first place.

F. Conclusion of the Option of a Pre-Decision Interpretation Question System

The option of a referral mechanism, namely the PDIQ system, is a superior solution to address the problem of negative diverging interpretations of the ECHR by the two European Courts than EU accession. This solution would provide a more effective

¹⁹⁹ “By ‘equivalent’ the Court means ‘comparable:’ any requirement that the organisation's [sic] protection be ‘identical’ could run counter to the interest of international co-operation pursued.” *Bosphorus*, *supra* note 36, ¶ 155.

²⁰⁰ *Id.*

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form of “lubricant of transjudicial relations”²⁰¹ than the current informal relationship of comity and EU accession, as it facilitates both the Luxembourg and Strasbourg Courts in protecting human rights through the interpretation and application of the ECHR. The PDIQ system, unlike the option of accession, is capable of satisfying the three basic needs that one would expect of a solution to address the problem of negative diverging interpretations and improve the protection of human rights within the EU.

IV. Other Benefits that Accession May Be Able to Offer, but that Cannot be Achieved under the PDIQ System by Itself

A. Statehood

Although the option of accession is not the optimum solution to addressing the issue of diverging interpretations of the Convention, there are several benefits that the EU could obtain. One such benefit is that the option of accession may provide a much-needed upswing for the EU, particularly following the rejection of the Constitution. The idea of the EU acquiring a form of “Statehood” could perhaps encourage the willingness of European citizens to accept the concept of Europe. In this regard, EU accession to the ECHR could help achieve this goal. In discussing the Commission’s attempts in 1979 for accession, Weiler commented in 1991:

In my view, behind the Commission initiative in 1979 was the international personality and status implications that would have accrued to the Community as a result of Accession. It would have enhanced the ‘State’-like features of the Community in a period in which European integration seemed to be stagnating. If I am right in this speculation this rationale would no longer apply. The Community, once again on an upswing, does not need that kind of boost. Indeed, more than the Community needs for its internal reasons to accede to the ECHR, the ECHR needs Community accession; for without accession there is the danger that the focal point of Human Rights

²⁰¹ Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT’L L. 708 (1998).

jurisprudence would shift from Strasbourg to Luxembourg.²⁰²

However, the motivation for “Statehood” may be exactly what supporters of the idea of a Constitution for Europe need and are in search of, as it could support the idea that it is appropriate for the EU, like a country, to have a written constitution.

B. Backup for the PDIQ System

It was noted earlier that there is the danger that by simply adopting the PDIQ system by itself, the ECJ may ignore the interpretation provided by the ECtHR or possibly fail to consult the Strasbourg Court on a particular matter. The first of these concerns fails to recognize the existing relationship that the two Courts share, which is what the PDIQ system would be built on and enhance. As we have seen, the ECJ follows the guidance of the ECtHR where such guidance exists; the problem is not that the two Courts are directly competing with each other or in conflict. As such, based upon the existing relationship of the two courts and the actions of the ECJ, it seems pessimistic to assume that the PDIQ system would not work because there is no formal measure to ensure that the ECJ follows the interpretation of the Strasbourg Court. However, if for whatever reason, the relationship between the ECJ and the ECtHR deteriorates and it transpires that the ECJ is ignoring the guidance of the Strasbourg Court, then the option of accession might become appropriate. Given that this is not how the Courts currently interact with one another, it appears unlikely that the option of accession, as nothing more than a backup, is unlikely to make any real difference in reality, provided that the PDIQ system is in place.

The second of these concerns, namely that the ECJ may not consult the ECtHR on certain matters, could prove to be more problematic. However, this paper also argues that in instances such as *Hoechst*, where the ECJ noted the absence of any guidance from the Strasbourg Court, one could expect that the Luxembourg Court would consult the ECtHR using the powers granted to it by the PDIQ

²⁰² Weiler, *supra* note 12, at 619.

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system. In practice, based upon the ECJ's record of noting the absence of any Strasbourg case law, there is unlikely to be any problem with this system. However, theoretically there is still the possibility that, for whatever reason, the Luxembourg Court may decide not to consult the Strasbourg Court and instead decide to interpret the Convention itself in the absence of such guidance, only for the interpretation to fall below the minimum level of protection later set by the ECtHR. Although this is an unlikely prospect, the option of accession could again be useful here as a backup, merely to ensure that, if for some reason, the ECJ failed to rely upon the PDIQ system, then the aggrieved individual would have recourse to the Strasbourg Court for the matter to be resolved there.

V. Conclusion

Writing in honor of Professor Schermers, Professor Rick Lawson ended his much respected contribution with the following questions:

Should we really wait until there is manifest confusion or a direct conflict between Strasbourg and Luxembourg? Would it not be preferable to settle the relationships between the two Courts, to create a system of judicial cooperation on human rights issues, before they adopt overtly opposing views and prestige becomes a barrier to any solution?²⁰³

One of the purposes of the current paper has been to show that it is preferable to settle this issue in the near future, and to do so in a manner that builds upon the cooperative relationship that the Courts have successfully developed. However, it is no longer simply preferable to settle this issue; it has become essential. The credibility of both Courts, the future of both organizations, and the protection of fundamental human rights, are what are at stake here. We have watched the Courts grow over the years; witnessed both of them face challenging cases and doctrines; commented on their informal relationship of comity that has proven incredibly successful in only

²⁰³ Lawson, *supra* note 27, at 252.

but a few occasions; yet, we are currently watching them struggle to maintain their relationship and adequately protect human rights. To protect all that these Courts have achieved, it is essential that changes must be made to enhance, not reduce, this relationship. The option of accession will certainly build upon this relationship and ensure that aggrieved individuals are offered the possibility of bringing a complaint against the Luxembourg authorities before the Strasbourg Court, as well as providing for other benefits that the PDIQ system cannot provide by itself. However, in terms of the protection of human rights and the harmonious interpretation and application of the Convention, EU accession cannot prevent conflicting interpretations from arising in the first place. Despite all the benefits that EU accession could provide, it does not provide the benefits that are required for the future of Europe. The benefits that EU accession can provide are important, but the real question, as summed up by Francis Jacobs, is “whether EU accession would strengthen the protection of human rights in the EU.”²⁰⁴

Although EU accession may strengthen the protection of human rights to a certain extent, it is not the best possible solution to strengthen the protection of human rights in the EU. A far more suitable option, and one that certainly builds upon the existing relationship of the two Courts, would be for a referral system, namely the PDIQ system, which would introduce a more formal relationship with a mechanism that can provide for the harmonious interpretation and application of the Convention. As we noted earlier, the Luxembourg Court is not a Court *of* Human Rights, but it has demonstrated that it is a court that can, and does, protect human rights. The PDIQ system recognizes this and provides an opportunity in which the ECJ’s ability to protect such rights and simultaneously advance the other goals of the EU can be maximized.

The option of accession has been described as a tired old horse that has nearly been flogged to death. There is no doubt that the Strasbourg Court and the Convention have transformed the

²⁰⁴ Jacobs, *supra* note 17, at 294.

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global protection of human rights in post-War Europe,²⁰⁵ and one certainly hopes that they should remain central to the protection of human rights in Europe. It is neither the Convention nor the Court itself that has been referred to as the tired old flogged horse; instead, it is the option of EU accession that is the subject of the above criticism. Both the Strasbourg and Luxembourg Courts have a tremendously important role to play in the protection of human rights and the future of Europe, which is apparent from the fact that the PDIQ system places great significance on the participation of both Courts in this proposed mechanism. The two Courts will take the harmonious protection of human rights in Europe to a greater and more encompassing level, but the option of EU accession will not take this level of protection to where it could go. This old horse might be able to carry the protection of human rights within the EU for some distance, but it will fall far short of the distance that the PDIQ system can take it. The option of accession has been around for a long time and we must let go of the idea if we are to allow the EU and the protection of human rights in Europe to advance. The PDIQ system is the only solution that “would strengthen the protection of human rights in the EU.”²⁰⁶

²⁰⁵ One only has to look to the number of legal systems that have joined the ECHR or refer to it on a frequent basis. For example, *see* the reference by the High Ct. of Austl. in *Dietrich v. The Queen*, (1992) 177 C.L.R. 292. The Canadian Supreme Court has referred to the Convention on many occasions, including *Suresh v. Can. (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3. Even the United States Supreme Court, with much controversy, has cited the Convention in the case of *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Kennedy cited the case of *Dudgeon v. U.K.*, 45 Eur. Ct. H.R. (ser. A) (1981), but Justice Scalia’s dissent presents a strong argument against this.

²⁰⁶ Jacobs, *supra* note 17, at 294.