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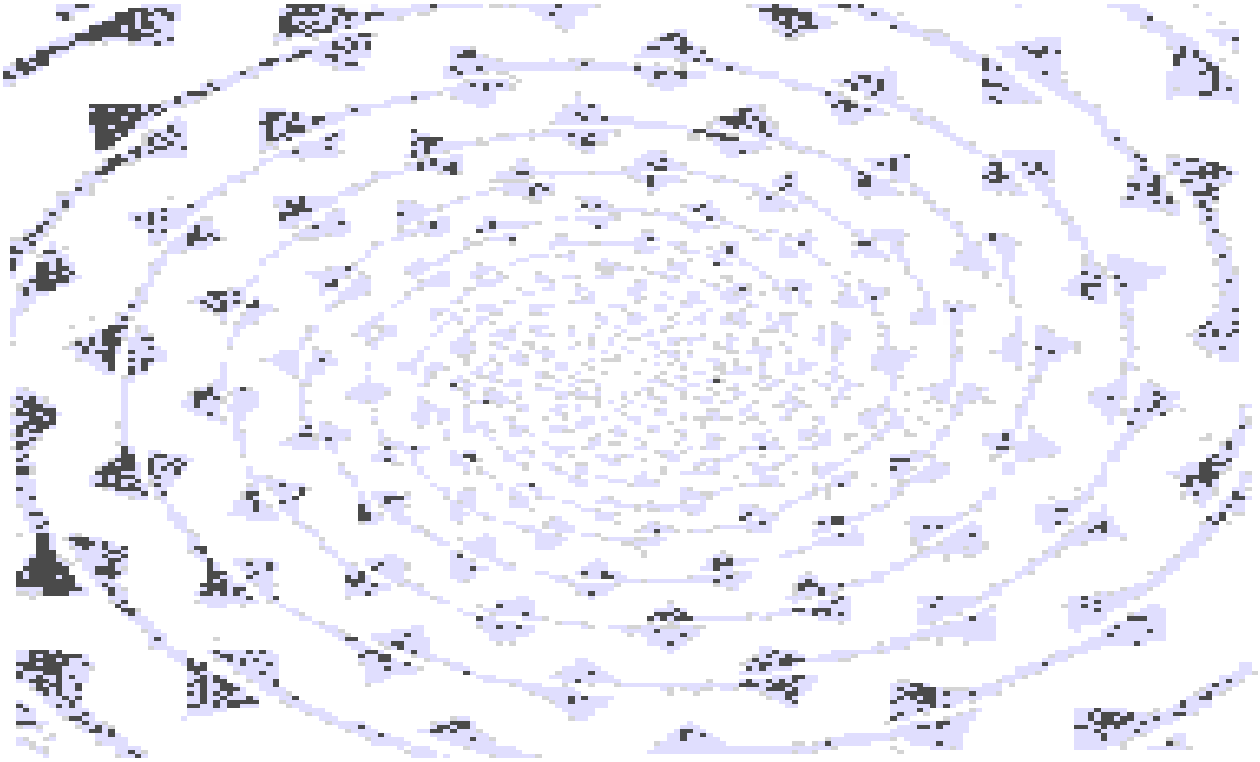

The Two Lives of Bosphorus: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention

Les deux vies de Bosphorus: la redéfinition des rapports entre la Cour européenne des droits de l'Homme et les Parties à la Convention

Olivier De Schutter

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Université catholique de Louvain
Faculté de droit
Centre de philosophie du droit
Cellule de recherche interdisciplinaire en droits de l'homme
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The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), an extra-department Institute of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

The Two Lives of *Bosphorus*: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention

Les deux vies de *Bosphorus*: la redéfinition des rapports entre la Cour européenne des droits de l'Homme et les Parties à la Convention

by Olivier De Schutter

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ABSTRACT. In its 2005 *Bosphorus Airways* judgment, the European Court of Human Rights established a presumption of compatibility with the European Convention on Human Rights of measures adopted by the States Parties to the Convention under the control of the Court of Justice of the European Union, when they act in accordance with the requirements of EU law. This article examines the future of the *Bosphorus* doctrine following the accession of the EU to the ECHR. Maintaining the doctrine in its current form would lead to recognize to one Party to the Convention, the EU, a privileged position, in comparison to the other Parties to the Convention. This, the article notes, would be justified neither legally nor politically. However, if it is not abandoned, a generalization of the *Bosphorus* doctrine accompanied by its transformation could lead to redefine the relationships between the European Court of Human Rights and the Parties to the Convention. It may lead the Court to shift the focus of its control from the current focus on the outcomes reached to a focus on compliance with certain procedural conditions. This would lead to a clearer division of labour between the European Court (clarifying the normative standards) and the domestic courts (applying these standards to specific factual settings). And, if combined with a requirement imposed on national authorities that they provide a justification for the restrictions they impose on human rights based on the best practices that emerge from a comparison across all Parties to the Convention, it may in fact strengthen the architecture of the European system of human rights protection.

RESUME. Dans son arrêt *Bosphorus Airways* de 2005, la Cour européenne des droits de l'Homme a établi une présomption de compatibilité avec la Convention européenne des droits de l'Homme des mesures adoptées par les Etats parties à la Convention sous le contrôle de la Cour de justice de l'Union européenne, lorsque ces mesures sont prises en exécution d'obligations découlant du droit de l'Union européenne. Cette étude examine l'avenir de la doctrine *Bosphorus* à la suite de l'adhésion de l'UE à la CEDH. Le maintien de cette doctrine sous sa forme actuelle conduirait à reconnaître à une des Parties à la Convention, l'Union européenne, une position privilégiée, par rapport à toutes les autres Parties. Ceci ne serait pas justifié du point de vue juridique, et serait politiquement contestable. Cependant, à défaut de son abandon pur et simple, une généralisation de la doctrine de *Bosphorus* accompagnée de sa transformation pourrait contribuer à redéfinir les rapports entre la Cour européenne des droits de l'Homme et les Parties à la Convention. Elle pourrait amener la Cour à faire porter son contrôle sur les conditions procédurales à travers lesquelles les mesures querellées ont été adoptées, plutôt que sur les résultats de ces mesures. Elle pourrait aussi clarifier la répartition des tâches entre la Cour (chargée de développer les standards normatifs) et les juridictions internes (chargées d'appliquer ces standards à des contextes factuels spécifiques). Enfin, une doctrine *Bosphorus* revue, si elle se combine avec une exigence imposée aux autorités nationales qu'elles justifient les restrictions amenées aux droits fondamentaux au regard des meilleures pratiques que ferait apparaître un examen comparatif des solutions adoptées par les autres Parties à la Convention, pourrait renforcer l'architecture du système européen de protection des droits de l'Homme.

I. INTRODUCTION

In the 2005 "*Bosphorus Airways*" case,[1] the European Court of Human Rights innovated. It shaped a doctrine expressing its trust in the fact that the EU guarantees a level of protection of fundamental rights equivalent to what the European Convention on Human Rights provides itself, and that it, the Court, could therefore presume that any measure adopted by an EU member State in fulfilment of its obligations under EU law, under the supervision of the Court of Justice of the European Union, is compatible with the Convention's requirements unless a "manifest deficiency" is apparent. At the time it was developed, the doctrine was well suited to the need to organize the coexistence of two jurisdictions, the European Court of Human Rights and the European Court of Justice, both ensuring respect for Convention rights, but without hierarchical link or coordination between one another.

This paper argues that there shall be no argument to justify the survival of the doctrine in its current form following the accession of the EU to the European Convention on Human Rights, as this would unduly establish the European Union in a privileged position vis-à-vis the other Parties to the Convention. But if it is to die in its current incarnation, the *Bosphorus Airways* presumption-of-compliance doctrine may resuscitate in an expanded and different guise. Reborn and generalized, it may guide the future relationships between the European Court of Human Rights and the domestic courts of the Parties to the European Convention on Human Rights. This would transform such relationships from their current hierarchical and vertical mode, to a more dialogical and horizontal mode. In this new understanding, in order to deserve the trust they claim for themselves, domestic courts shall be expected to provide a solidly argued reasoning for the outcomes that they reach, that takes into account the framework set in the existing case law of the European Court of Human Rights. According to this model, the conclusions domestic courts reach may differ from those that the European Court of Human Rights would have arrived at itself -- that is left open. But the reason why they are to be trusted in reaching such outcomes is because of the tools they use in doing so, meeting a burden of justification that is defined by the jurisprudence of the European Court of Human Rights.

The paper proceeds in three parts. The following Part briefly recalls the circumstances in which the *Bosphorus Airways* doctrine emerged, as well as its content. Part III then explores three scenarios following the accession of the European Union to the European Convention on Human Rights. In scenario 1, the doctrine is simply abandoned: the European Union comes to be treated as any other Party to the Convention is currently treated, without being granted any privileged position. In scenario 2 on the contrary, the current *statu quo* is maintained: the *Bosphorus Airways* doctrine survives, and may even guide the European Court of Human Rights not only in its assessment of measures adopted by the EU member States in fulfilment of their obligations under EU law, but also in its assessment of measures adopted by the EU's institutions, that currently are beyond its jurisdiction.

I argue that scenario 1 is not realistic, and that scenario 2, though perhaps likely, is not desirable. The preferred scenario is scenario 3, in which the *Bosphorus* presumption of compatibility, under certain conditions that it would be for the European Court of Human Rights to define, extends to all Parties to the Convention that apply directly the Convention rights, with the interpretation authoritatively given to those rights by the that Court. The paper discusses the significance of the transformation in the relationship between the European Court of Human Rights and the domestic courts that such an approach would entail. The shift that would occur under that scenario would *not* mean that the level of scrutiny exercised by the European Court of Human Rights on States parties would be lowered.

[1] Eur. Ct. H.R. (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005 (Appl. No. 45036/98) (hereafter referred to as "*Bosphorus Airways* judgment").

Rather, the nature of its scrutiny would be transformed: it would be procedural, more than substantive; focused on the means through which protection of Convention rights is ensured at domestic level, rather than on the outcome in each individual case; and result in a horizontal and dialogical type of relationship between the European Court and national courts, rather than a vertical and hierarchical relationship. Part IV describes what this "second life" of the *Bosphorus* doctrine would look like, and how it could in fact strengthen the architecture of the European system of human rights protection. Part V offers a brief conclusion.

II. THE *BOSPHORUS AIRWAYS* DOCTRINE

The European Court of Human Rights has always sought not to obstruct the establishment of international organisations or other forms of international cooperation by the States parties to the European Convention on Human Rights, while at the same time ensuring that the progress of such cooperation does not result in States evading their obligations under the Convention. The need for a compromise between these two potentially conflicting objectives is at the heart of the *Bosphorus Airways* line of case-law.

The Convention, the Court has consistently held, 'does not exclude the transfer of competences to international organizations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer'.[2] In order to ensure that human rights continue to be secured even as international organizations are attributed larger competences in areas that might affect the enjoyment of human rights, the Court had to develop a doctrine that would accommodate both the need to allow certain transfers of powers, including transfers through which the member States of the organization renounce any possibility to veto decisions adopted by that organization,[3] and the need to ensure that they do not thereby 'circumvent' their pre-existing human rights obligations.[4] In order to do so, the Court proposed to provide a reading of the requirements of the European Convention on Human Rights that could accommodate other obligations States may have incurred by joining an international organization.[5] It announced that it would presume the compatibility with the European Convention on Human Rights of acts adopted by

[2] Eur. Ct. HR (GC), *Matthews v. the United Kingdom*, judgment of 18 February 1999 (Appl. No. 24833/94), § 32.

[3] One author has proposed to distinguish on that basis between "transfers of powers" and mere "delegation of powers": see D. Sarooshi, *International Organizations and their exercise of sovereign powers* (Oxford, Oxford University Press 2005), chapter 5, sect. II, pp. 58-64. For instance, 'the World Health Organization, the Universal Postal Union, and the International Civil Aviation Organization are given powers such that an organ of the organization can adopt binding regulations by majority decision, but in such cases the Member States have an express right to contract out of, or make reservations to, the application of a specific regulation to them, usually before it enters into force' (p. 59; reference is made for these examples to A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass, Harvard University Press 1995) pp. 226-227). In such cases of "delegation of powers", the risk of pre-existing human rights obligations being circumvented by the State joining an international organization is non-existent: that State always retains a right not to have to comply with a decision, adopted within the organization, that would conflict with such pre-existing obligations. Unfortunately that distinction is not very useful: at best, it provides a terminology to identify with precision the nature of the problem.

[4] The notion of 'circumvention' is of course borrowed from the final version of the Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission at its sixty-thrid session in 2011, and presented to the sixty-sixth session of the General Assembly (A/66/10, para. 87). According to Article 61 of the Draft Articles, titled 'Circumvention of international obligations of a State member of an international organization': "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence is relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation'. The General Assembly commended the ILC for having completed its work on this topic (Res. 66/98, 'Report of the International Law Commission on the work of its sixty-third session', para. 4).

[5] The Court has sought to read the Convention, to the fullest extent possible, in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties, in conformity with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969: see Eur. Ct. H.R., *Al-Adsani v. the United* Kingdom, judgment of 21 Nov. 2001 (Appl. No. 35763/97), § 55.

States in fulfilment of the obligations imposed on them as members of an international organization, to the extent that these acts may be adequately reviewed for their compatibility with fundamental rights in the system set up within that organization itself. That, in essence, is the doctrine established in the 2005 *'Bosphorus Airways'* case (see Box 1), where the Court announced that:

> State action taken in compliance with such legal obligations [deriving from commitments of a State party to the Convention under a treaty concluded subsequently to their accession to the Convention] is justified as long as the relevant organization [set up by such subsequent treaty] is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (...). By 'equivalent' the Court means 'comparable': any requirement that the organization's protection be 'identical' could run counter to the interest of international co-operation pursued.[6]

Box 1. The background of the *Bosphorus Airways* doctrine

The *Bosphorus Airways* case concerned the impounding on an aircraft that had landed in Ireland for maintenance works on 17 May 1993. The aircraft was the property of the Yugoslav Airlines (JAT), the national airline of the former Yugoslavia (at the time the Federal Republic of Yugoslavia (FRY)), which had been leased by a company incorporated in Turkey, Bosphorus Hava Yolları Turizm. The measure, which led to the aircraft being immobilized in Ireland, was decided in implementation of United Nations Security Council Resolution 820 (1993) of 17 April 1993, adopted under Chapter VII of the UN Charter. The resolution provided that States should impound, *inter alia*, all aircraft in their territories 'in which a majority or controlling interest is held by a person or undertaking in or operating' from the FRY. That Resolution had been implemented by EC Regulation 990/93 which entered into force on 28 April 1993 (OJ L 102/14 (1993)), and implemented in turn in Ireland by the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (SI 144 of 1993). In a judgment of 30 July 1996 delivered in answer to a referral from the Irish Supreme Court, the European Court of Justice confirmed that Article 8 of EC Regulation 990/93 applied to the aircraft concerned and that the impounding did not violate the fundamental rights of the applicant company. The European Court of Justice took the view, in particular, that the restriction to the right to property of the company was proportionate to the fulfilment of 'an objective of general interest (...) fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina' (Case C-84/95, *Bosphorus v. Minister for Transport, Energy and Communications and others*, [1996] ECR I-3953 (para. 26)).

Ireland therefore could assert before the European Court of Human Rights that "the Government considered that Ireland acted out of obligation and that the EC and the UN provided [a protection of fundamental rights equivalent to that provided by the European Convention on Human Rights]. [Ireland] argued that it had complied with mandatory obligations derived from UNSC Resolution 820 (1993) and EC Regulation No. 990/93. As a matter of EC law, a regulation left no room for the independent exercise of discretion by the State. [...] The ECJ later conclusively confirmed the applicability of Article 8 of EC Regulation 990/93 and, thereby, the lawful basis for the impoundment. Even if the jurisdiction of the ECJ in a reference case could be considered limited, the ECJ authoritatively resolved the present domestic action. Thereafter for the State to look behind the ECJ ruling, even with a view to its Convention compliance, would be contrary to its obligation of "loyal co-operation" (Article 5, now Article 10, of the EC Treaty – paragraph 82 above) and would undermine the special judicial co-operation between the national court and the ECJ envisaged by Article 177 (now Article 234) of the EC Treaty" (*Bosphorus Airways* judgment, § 110).

[6] *Bosphorus Airways* judgment, § 155.

Under the *Bosphorus Airways* doctrine, the measures adopted by a State that implements obligations it is imposed as a member of an international organization it joined after acceding to the European Convention on Human Rights will be presumed compatible with the Convention, if human rights are protected, in the said organization, in a way that can be considered 'equivalent' to their guarantee under the Convention : 'If such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization'[7] – that is, when the State is deprived of any margin of appreciation in the implementation of those obligations.

Such a presumption may not be absolute, however. The Court reiterates its view according to which 'absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards'. It follows not only that the State 'is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention',[8] but also that the presumption of compatibility as defined above 'can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights'.[9]

In essence, the *Bosphorus Airways* doctrine transforms the obligations of the States parties to the European Convention on Human Rights, when they transfer certain powers to an international organization, into a due diligence obligation to ensure that Convention rights shall be protected through mechanisms internal to that organization.[10] The doctrine is enunciated in general terms by the Court, and it is therefore not necessarily limited to the European Union.[11] But it did emerge in a highly specific context : one in which a number of States parties bound by the European Convention on Human Rights decided to establish the European Communities, now absorbed by the European Union, joining a new "legal order" within which a judicial control of compliance with fundamental rights has emerged since the late 1960s.[12] Indeed, the approach of the Court clearly was inspired by the attitude of the German Federal Constitutional Court (*Bundesverfassungsgericht*) towards what was then European Community law. Only after it surmounted its initial hesitations and was convinced that fundamental rights are adequately protected in the legal order of the Community did the German Federal Constitutional Court agree to recognize the supremacy of European Community

[7] *Bosphorus Airways* judgment, § 156.
[8] *Bosphorus Airways* judgment, § 154.
[9] *Bosphorus Airways* judgment, § 156.
[10] See Johan Callewaert, 'The European Convention on Human Rights and European Union Law : a Long Way to Harmony', *European Human Rights Law Review*, n°6 (2009), p. 768, ici pp. 771-774.
[11] See, for instance, Eur. Ct. HR (2nd sect.), *Gasparini v. Italy and Belgium* (Appl. No. 10750/03), decision (inadmissibility) of 12 May 2009 (where the Court describes its role as being to "determine whether, when they joined the NATO and transferred to it certain sovereign powers, the defending States could have, in good faith, consider that the mechanism for the adjudication of employment disputes internal to the NATO was not in flagrant contradiction with the provisions of the Convention" (author's translation; the case exists only in French)).
[12] Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case 4/73, *Nold v. Commission*, [1974] ECR 491. The Court recognizes not only that the EU institutions are bound to comply with fundamental rights, but in addition that the EU Member States may invoke the need to protect fundamental rights as general principles of law even where this may lead them to derogate from their obligations under EU Law (see, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24) ; Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (para. 81)). This is crucial, since it renders unlikely, if not impossible, a situation where a State might have to forego its human rights obligations in order to comply with its obligations under EU law.

law, without a scrutiny of its compatibility with the fundamental rights protected under the German Basic Law (*Grundgesetz*).[13]

Nor is this cooptation of the "*Solange*-in-reverse" doctrine of the German Federal Constitutional Court by the supervisory bodies of the European Convention on Human Rights unprecedented. It is already that attitude of the *Bundesverfassungsgericht* which had led the European Commission of Human Rights, in 1990 -- at the instigation of Henry Schermers and Hans-Christian Krüger, respectively one of its Members and its Secretary --, to develop the doctrine of an 'equivalent protection', according to which the monitoring bodies set up by the European Convention on Human Rights should not control acts adopted by States parties as Member States of the European Community in fulfillment of their Community obligations insofar as the legal order of the Community provides for its own system of protection of fundamental rights which can be considered to be generally satisfactory.[14]

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[13] This case-law has been developing in different phases, to which judgments adopted respectively in 1974 ('Solange I') (BverfGE 37, 271 (280)), 1987 ('Solange II')(BverfGE 73, 339 (379)), 1993 (the 'Maastricht' decision) (BverfGE 89, 155 (174)) and 2000 (concerning the market organization for bananas)(2 BvL 1/97, EuGRZ 2000, p. 328 (333)) correspond. The development of this case-law has been abundantly commented upon; I will therefore be excused for not describing it in detail. The main lesson is that, after initially reserving the right to review secondary EC law against the requirements of the fundamental rights of the German Basic Law, the German Federal Constitutional Court decided in its 'Solange II' decision of 1987 that it would abstain from doing so "[s]o long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights" (('Solange II')(BverfGE 73, 339 (379)), par. 48). The *Bundesverfassungsgericht* appeared to be reassured by the development of a case-law of the European Court of Justice ensuring that fundamental rights will be protected within the legal order of the European Union at a level substantially equivalent to that provided by the German Basic Law – this case-law being itself an answer to the doubts raised by certain national constitutional courts about the compatibility of the doctrine of supremacy of EC Law with the protection of fundamental rights under national constitutions –. Consistent with this presumption of compatibility of EU law with the requirements of fundamental rights, the German Federal Constitutional Court now announced that it would henceforth agree to review the compatibility of EU law with those requirements only in situations where the applicant brings forward elements demonstrating that the *general* level of protection of fundamental rights -- beyond the *specific* case concerned -- has not been maintained at the level at which it was found by the *Bundesverfassungsgericht* to be satisfactory in its 'Solange II' decision of 22 April 1987: constitutional complaints that do not provide evidence of such a gap in fundamental rights protection within the EU legal order shall be inadmissible. See on these developments, *inter alia*, J. Limbach, 'La coopération des juridictions dans la future architecture européenne des droits fondamentaux. Contribution à la redéfinition des rapports entre la Cour constitutionnelle fédérale allemande, la Cour de justice des Communautés européennes et la Cour européenne des droits de l'homme', *Revue universelle des droits de l'homme*, n° 12 (2000) pp. 369-372.

[14] Eur. Comm. HR, *M. & Co v. Germany,* (Appl. N° 13258/87), decision of 9 February 1990, *Decisions and Reports*, vol. 64, p. 138. The European Commission on Human Rights explicitly states that "the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection"; noting that the institutions of the European Communities pledged to uphold fundamental rights, most notably in their Joint Declaration of 5 April 1977, and that "the Court of Justice of the European Communities has developed a case-law according to which it is called upon to control Community acts on the basis of fundamental rights, including those enshrined in the European Convention on Human Rights", it concludes that the application by M & Co., a company fined for violation of antitrust rules and which complained that the procedure followed for the imposition of the fine had not complied with its rights of defence, was incompatible *ratione materiae* with the provisions of the Convention. The Commission added that, in reaching that conclusion, it "has also taken into consideration that it would be contrary to the very idea of transferring powers to an international organisation to hold the member States responsible for examining, in each individual case before issuing a writ of execution for a judgment of the European Court of Justice, whether Article 6 of the Convention was respected in the underlying proceedings". In their joint concurring opinion to the 2005 *Bosphorus Hava* judgment, judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki consider that "the Court clearly acknowledges its jurisdiction to review the compatibility with the Convention of a domestic measure adopted on the basis of a European Community Regulation and, in so doing, departs from the decision given in *M. & Co. v. the Federal Republic of Germany* by the European Commission of Human Rights". But this is playing on words : in substance, *Bosphorus* in fact replicates the very démarche inaugurated in *M. & Co.* by the European Commission on Human Rights. See also, *inter alia*, Eur. Comm. HR, *Heinz v. the Contracting Parties also parties to the European Patent Convention* (Appl. N° 21090/92), decision of 10 January 1994, *Decisions and Reports*, vol. 76-A, p. 125.

This doctrine has also been relied upon in later cases by the European Court of Human Rights, even before its spectacular reaffirmation in *Bosphorus Airways*. Most notably, it appears at least implicitly in two judgments the Court delivered on 18 February 1999 where it considered that the application by the German courts of the rule on immunity of jurisdiction of the European Space Agency does not constitute a violation of Article 6 § 1 of the Convention, which guarantees in principle a right of access to a court. Indeed, the Court considered there that, insofar as it corresponds to a long-standing practice established in the interest of the good working of international organizations and fits within a 'trend towards extending and strengthening international cooperation in all domains of modern society',[15] applying a rule on immunity of jurisdiction of international organizations is permissible under the Convention, insofar as 'the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.[16] It thus recognized that the setting up of remedies within the internal structures of the European Space Agency could ensure compatibility with the requirements of Article 6 § 1 of the Convention, although the immunity of jurisdiction of the ESA implied that it could not by sued before the domestic courts of Germany.

The case-law of the European Court of Human Rights leading to the *Bosphorus Airways* judgment seeks to ensure that the Convention will not constitute an obstacle to further European integration by the creation among the Member States of the Union of a supranational organization – a development which, as the representatives of the European Commission argued in their submissions to the Court in that case, would be seriously impeded if the Member States were obliged to verify the compatibility with the European Convention on Human Rights of the acts of Union law before agreeing to apply them, even in situations where they have no discretion to exercise at the implementation level. But the Court stops short of stating that, as the Member States have transferred certain powers to a supranational organization, the European Union, their international responsibility could not be engaged for situations resulting directly from the application of European Community acts. The Convention remains applicable to such situations, and the States parties remain fully answerable to the supervisory bodies it sets up. But the nature of the inquiry of the European Court of Human Rights will be quite decisively influenced by the circumstance that the alleged violation has its source in the application of an act adopted within the European Union. The Court considers that, insofar as the legal order of the European Union ensures an adequate level of protection of fundamental rights, and unless it is confronted with a 'dysfunction of the mechanisms of control of the observance of Convention rights' or with a 'manifest deficiency',[17] it may be allowed to presume that, by complying with the legal obligations under this legal order, the EU Member States are not violating their obligations under the ECHR.

But this raises two concerns. First, it will be noted that the Court considers that a protection may be 'equivalent' to that provided by the European Convention on Human Rights although it remains *internal* to the international organization concerned. But, however adequate the remedies available to individuals within the European Union legal order may be when they complain about violations of their fundamental rights,[18] this in effect obliterates the added value that a form of judicial control

[15] Eur. Ct. H.R., *Beer and Regan v. Germany*, judgment of 18 February 1999 (Appl. No. 28934/95), § 53; Eur. Ct. H.R., *Waite and Kennedy*, judgment of 18 February 1999 (Appl. No. 26083/94), § 63. Both judgments were decided by a unanimous Court.

[16] *Beer and Regan v. Germany* judgment, cited above, § 58; *Waite and Kennedy* judgment, cited above, § 73.

[17] *Bosphorus Airways* judgment, § 166.

[18] Obviously, the *Bosphorus Airways* doctrine would not apply where there are no remedies available to the aggrieved individual because the the EU's judicature, for instance, where the alleged violation results from the adoption of a legislative act (see, for this restrictive understanding of the conditions of admissibility of direct actions for annulment under Art. 263 al. 4, TFEU, General Court, Case T-18/10, *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, judgment of 6 September 2011, para. 56 ; at the time of writing, an appeal is still pending before the Court of Justice of the EU (Case C-583/11 P), however AG J. Kokott supports the interpretation of the General Court in her opinion delivered on 17 January 2013), or concerns an area over which the Court of Justice lacks jurisdiction: see Olivier De Schutter, "L'adhésion de l'Union

external to the legal order concerned might represent. This assimilation of both forms of monitoring, respectively internal and external to the legal order concerned, may not be justified. Indeed, it is doubtful whether this approach is compatible with the general international law of human rights, where it is traditionally emphasized that the object and purpose of international human rights treaties is not only to impose substantive obligations on the States parties, but also to submit them to monitoring mechanisms ensuring a collective enforcement of these obligations.[19] That was the concern expressed by six judges of the European Court of Human Rights in the *Bosphorus Airways* case. While expressing their agreement with the operative part of the judgment, these judges filed a joint concurring opinion in which they questioned whether the protection of fundamental rights in the EU legal order could truly be said to be "equivalent" to that provided by the European Court of Human Rights under a full review, since 'it remains the case that the Union has not yet acceded to the European Convention on Human Rights and that full protection does not yet exist at European level'.[20]

A second deficiency of the doctrine developed by the European Court of Human Rights in *Bosphorus Airways* is that it allows for the possibility that a member State of an international organization will not be considered responsible for a violation of its international obligations, even where that State has transferred powers to an international organization which the organization then exercises by adopting measures which would constitute a violation of the international obligations if they had been adopted by the member State itself. It will be sufficient for a State, in order to avoid being found internationally liable, to show that it has been taken by surprise: if the said violation could not have been reasonably anticipated, the mere fact that competences have been attributed to the international organization in a domain in which the State had accepted certain international obligations cannot, *by itself*, trigger the international responsibility of that State.[21] In other words, the obligation to ensure, when an international organization is established, that it will not exercise its competences in a way which would result in violations of the international obligations of States if the measures adopted were attributable to them, is not an obligation of result: it is, to borrow from a distinction familiar in tort liability law, a mere obligation of means. What is required from the State is that it has acted with due diligence, making the transfer of powers to the international organization conditional upon human rights being secured within that organization, by the adoption of measures reasonably well suited to achieve that end. In order for a State to escape international responsibility,

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européenne à la Convention européenne des droits de l'homme : feuille de route de la négociation", *Revue trimestrielle des droits de l'homme*, July 2010, pp. 535-571.

[19] For instance, the Human Rights Committee states that the object and purpose of the International Covenant on Civil and Political Rights is not only to 'create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify', but also 'to provide an efficacious supervisory machinery for the obligations undertaken' (Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994 (CCPR/C/21/Rev.1/Add.6)).

[20] Joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebalsky, and Garlicki, to the *Bosphorus Hava* judgment of 30 June 2005.

[21] Article 61 of the International Law Commission's Draft Articles on *the Responsibility of International Organizations* ('Circumvention of international obligations of a State member of an international organization') provides that "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation" (para. 1). The commentary to Draft Article 61 makes it clear that a State will not be considered responsible if it transferred powers to the international organization in good faith, without being able to anticipate that such powers might lead to the commission of acts that, if they were the State's own, would engage its responsibiity ("International responsibility will not arise when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as the unintended result of the member State's conduct") (International Law Commission, *Commentary to the Draft Articles on the Responsibility of International Organizations*, adopted by the ILC at its 3118th meeting on 5 August 2011 and included in the Report of the ILC to the 66th session of the General Assembly (and in the *Yearbook of the ILC*, 2011, vol. II, part 2)). This is relevant, since the ILC cites as authority the judgments of the European Court of Human Rights in the *Waite and Kennedy* and *Bosphorus Airways* cases.

it is therefore enough that it has sought to ensure that the international organization will not exercise its powers in violation with the international obligations of that State, *even if it appears retrospectively that, in fact, the precautions taken were not sufficient*. Of crucial importance, the liability of the State will thus be limited whether or not the State has reserved the right to veto the decision within the internal decision-making procedures of the organization, or to block the implementation of the decision.[22]

Is this satisfactory? The *Bosphorus Airways* doctrine was articulated by the European Court of Human Rights only following a long and searching examination of the level of protection of human rights achieved within the legal order of the European Union, and only after it was reassured that the European Court of Justice was faithfully applying the Convention, taking into account the case law of the European Court of Human Rights in its interpretation of the requirements of fundamental rights.[23] Indeed, the Court distinguishes the *Bosphorus Airways* situation from *Pellegrini v. Italy* – where Italy was found to have violated the right to a fair trial guaranteed in Article 6 § 1 of the Convention for having enforced a judgment delivered by the Vatican courts in violation of the rights of defence of the applicant[24] – on the basis that 'enforcement of a judgment not of a Contracting Party to the Convention [as was the case in *Pellegrini*[25]] (...) is not comparable to compliance with a legal obligation emanating from an international organization to which Contracting Parties have transferred part of their sovereignty'.[26] The implied suggestion is that, when States parties to the European Convention on Human Rights co-operate with one another, or implement decisions of international organizations offering an equivalent level of protection of human rights, they may subject the acts of the other States or emanating from such international organizations to only minimal review; instead, where they cooperate with States not parties to the European Convention on Human Rights, or when they implement secondary legislation adopted within international organizations not offering a protection of human rights at a level similar to that guaranteed by the European Convention on Human Rights, there could be no presumption that the measures adopted in the framework of such co-operation comply with the requirements of the Convention, and a strict scrutiny of such compliance therefore would be required.

Though certainly not immune from critique, the *Bosphorus* doctrine played a useful role in defining the modalities of the cooperation between the Court of Justice of the European Union and the European Court of Human Rights. The Court of Justice is tasked with preserving fundamental rights in the EU legal order: as long as it does so, upholding the Convention rights taking into account the

[22] In the terms suggested by Sarooshi, the presumption established by the *Bosphorus Airways* doctrine applies both where powers are *delegated* to the international organization, while the State retains the possibility to "contract out" any particular decision adopted by the organization or to refuse to take part in the implementation of the decision, and where powers are *transferred*, the State agreeing to be bound by particular decisions of the organization even against its will. The attribution of powers to the EU belongs of course to the second category: although the EU Member States may invoke the need to protect fundamental rights as general principles of law even where this may lead them to derogate from their obligations under EU Law, the invocation of this exception remains placed under the ultimate supervision of the Court of Justice of the European Union, which in that sense retains the final word. See, for a detailed discussion of these issues of State responsibility, Olivier De Schutter, 'Human Rights and the Rise of International Organisations : The Logic of Sliding Scales in the Law of International Responsibility', in Jan Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations*, Intersentia, Antwerp-Oxford-Portland, 2010, pp. 51-129.

[23] Currently, the European Court of Justice, just like any supreme or constitutional court of the States parties to the Convention, applies the Convention taking into account its interpretation by the European Court of Human Rights. For example, see among many others Case C-249/96, *Grant* [1998] ECR I-621; Case C-185/95, *Baustahlgewebe* [1998] ECR I-8417; *Connolly*, Case C-274/99 [2001] ECR I-1611, and *Karner*, Case C-71/02, judgment of 25 March 2004. For a further elaboration, see O. De Schutter, 'L'influence de la Cour européenne des droits de l'homme sur la Cour de justice des Communautés européennes', in G. Cohen-Jonathan & J.-Fr. Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant-Nemesis, 2005, pp. 189-242.

[24] Eur. Ct. HR (4th sect.), *Pellegrini v. Italy* (Appl. N° 30882/96) judgment of 20 July 2001, § 40.

[25] The Holy See is not a Contracting Party to the European Convention on Human Rights.

[26] *Bosphorus Airways* judgment, cited above, § 157.

interpretation given to those rights by the European Court of Human Rights, its findings shall be trusted; only where "manifest deficiencies" appear -- or, of course, where the Court of Justice has not been able to exercise its control -- shall such findings be questioned. At times, the presumption does appear to enlarge the margin of appreciation of the Court of Justice, which seems to be recognized a freedom to adapt the requirements of the European Convention on Human Rights to the specific exigencies of EU law, beyond what would be tolerated from even the highest domestic courts.[27] But it also has a disciplining function: in order to deserve this trust, the European Court of Justice must be irreproachable, and it is likely that it has been a particularly diligent student of the jurisprudence of the European Court of Human Rights, not *despite* of, but rather *because* of, the division of labour established by the *Bosphorus* doctrine.

III. THE FUTURE OF THE *BOSPHORUS AIRWAYS* DOCTRINE: THREE POST-ACCESSION SCENARIOS

Shall the *Bosphorus Airways* doctrine survive the accession of the EU to the European Convention on Human Rights? It shall continue to apply, in principle, to international organizations other than the EU, which some States parties to the Convention have joined. With respect to those organizations, the Court in the future will continue to distinguish, as it currently does, between (i) the acts adopted by the international organization itself, for which the member States incur no responsibility and which, as the organization is not a party to the European Convention on Human Rights, the European Court of Human Rights considers to fall outside its jurisdiction *ratione personae*[28]; and (ii) the acts adopted by the States parties to the Convention, particularly as they establish the international

[27] The *Kokkelvisserij* case illustrates this. The applicant association complained under Article 6 § 1 of the Convention that its right to adversarial proceedings had been breached as a result of the refusal of the ECJ to allow it to respond to the Opinion of the Advocate General, in violation, allegedly, of the interpretation by the European Court of the Human Rights of that provision (see especially Eur. Ct. H.R. (GC), *Kress v. France*, judgment of 7 June 2001 (Appl. no. 39594/98), § 76, where the Court concluded that Article 6 § 1 ECHR had not been violated by the practice of the Conseil d'Etat, the highest administrative court in France, of allowing the Government Commissioner to deliver his submissions after the oral proceedings are closed, only because "the parties may reply to the Government Commissioner's submissions by means of a memorandum for the deliberations, a practice which – and this is vital in the Court's view – helps to ensure compliance with the adversarial principle"). By a majority vote, the European Court of Human Rights dismissed the application as manifestly ill-founded. It recalled that the presumption established under *Bosphorus* "applies not only to actions taken by a Contracting Party but also to the procedures followed within such an international organisation and hence to the procedures of the ECJ", and reiterated in that regard that "such protection need not be identical to that provided by Article 6 of the Convention; the presumption can be rebutted only if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient"; it then noted that "the procedure before the ECJ was accompanied by guarantees which ensured equivalent protection of the applicant's rights", giving particular weight to the possibility of the ECJ "to order the reopening of the oral procedure after the Advocate General has read out his or her Opinion, if it finds it necessary to do so", and that "a request for reopening submitted by one of the parties to the procedure is considered on its merits". The Court concluded that it "cannot find that the applicant association has shown that the protection afforded to it was "manifestly deficient" because it did not have an opportunity to respond to the Opinion of the Advocate General"; the association "has therefore failed to rebut the presumption that the procedure before the ECJ provided equivalent protection of its rights" (Eur. Ct. H.R. (3rd sect.), *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v. The Netherlands*, dec. of 20 Jan. 2009 (Appl. no. 13645/05)).

[28] See, e.g., Eur. Ct. H.R. (5th sect.), *Boivin v. France and Belgium, and 32 other member States of the Council of Europe*, dec. of 9 Sept. 2008 (Appl. no. 73250/01) (inadmissibility of an application filed against the States parties to the 1960 International Convention relating to Co-operation for the Safety of Air Navigation establishing Eurocontrol, for a decision of that organisation validated by the Administrative Tribunal of the International Labour Organisation); or, for an example concerning the EU, Eur. Ct. H.R. (5th sect.), *Connolly v. 15 Member States of the European Union*, dec. of 9 Dec. 2008 (Appl. no. 73274/01) (challenging a decision by the European Commission imposing a disciplinary sanction on the applicant, a public servant with the Commission); Eur. Ct. HR (2nd sect.), *Gasparini v. Italy and Belgium* (Appl. No. 10750/03), decision (inadmissibility) of 12 May 2009, cited above; Eur. Ct. HR, *Galić v. The Netherlands* (Appl. No. 22617/07), dec. (inadmissibility) of 9 June 2009; Eur. Ct. HR, *Blagojević v. The Netherlands* (Appl. No. 49032/07), dec. (inadmissibility) of 9 June 2009; Eur. Ct. HR, *Beygo v. 46 Member States of the Council of Europe* (Appl. No. 36099/06) decision (inadmissibility) of 16 June 2009; and comp. with Eur. Ct. HR (5th sect.), *Chapman v. Belgium* (Appl. No. 39619/06) decision (inadmissible) of 5 March 2013 (where the domestic courts of the defending State had applied the doctrine of immunity of jurisdiction in a case concerning an employee of the NATO), . We return to this situation below, when exploring the second "post-accession" scenario: see text corresponding to notes 44-47.

organization or transfer certain powers to be exercised by the organization: such acts remain subject to the supervision of the European Court of Human Rights, which shall examine, in particular, whether in establishing the organization, the States concerned have been acting "in good faith", or instead have "circumvented" their preexisting international obligations.

The more delicate question however, is whether the *Bosphorus* doctrine shall continue to apply for the benefit of the European Union itself, once the EU shall have acceded to the European Convention on Human Rights. In theory, three scenarios are possible.

Scenario 1: the EU loses its privileged position

A first possibility is that the presumption established by *Bosphorus* shall be abandoned. After all, the presumption aimed to ensure a harmonious coexistence between the requirements imposed under EU law and the requirements imposed under the European Convention on Human Rights, *in a context in which the former was not subordinated to the latter*: the doctrine therefore appeared necessary in order to avoid a situation where the EU member State concerned would be imposed inconsistent international obligations. Following the EU's accession to the European Convention on Human Rights, this justification shall lose much of its weight: since the EU shall have become a party to the ECHR, any inconsistency between the obligations following for the EU member States from their membership in the Union and the requirements of the Convention shall have to be resolved in favor of the latter, and there should be in principle no reason to grant the EU a treatment more favorable than that granted to any other Party to the Convention. The first scenario is therefore one of normalisation: though with some minor institutional adjustments, the EU will simply appear as one more Party to the Convention -- the forty-eighth --, without any difference in the nature of the supervision exercised.[29]

Under this scenario, in a situation such as that presented in *Matthews* or *Bosphorus Hava*, it will be the European Union itself, not the EU Member State implementing EU law by adopting measures that are the immediate cause of the violation, that will in fact have to adopt the measures required to avoid the repetition of such a violation.[30] The European Union will be approached by the European Court of Human Rights as any other party to the Convention: the acts adopted *by the Union* would be subject to the same level of scrutiny than the acts adopted by any other Party to the European Convention on Human Rights.[31] Since the sole purpose of the doctrine of 'equivalent protection' – requiring that a lower level of scrutiny be applied – is to facilitate the compliance *by States* with

[29] Paul Mahoney has sought to defend the current, pre-accession, deference to the assessments made by the Court of Justice of the European Union, as one that should be maintained post-accession, by asserting: "The general rationale underlying the Strasbourg Court's approach in the Bosphorus case will continue even after accession by the EU to the ECHR, since the EU, as an international organisation, will not lose its specificity in relation to the ECHR Contracting States and so will never be in a position where it can be assimilated, purely and simply, to a Contracting State. ... The EU pursues a general aim broadly comparable to that assigned to the ECHR by the Council of Europe, namely to create a European, supranational "space" governed by political democracy and the rule of law. By reason of those parallel supranational tasks, there exists a certain overlapping of competence vis-à-vis the States between the EU and the ECHR, which in itself creates a relationship different from that between the ECHR and the States. This different relationship must have some incidence on the nature of the external control that the Strasbourg Court will be called on to exercise over the legal acts of the EU after the latter's accession to the ECHR" (P. Mahoney, "From Strasbourg to Luxembourg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon", *Human Rights Law Journal*, vol. 31, n° 2-6 (2011), p. 73, at p. 79). The argument remains a circular one: in essence, it states that the EU deserves a specific treatment due to it beng a specific international organization.

[30] Although the determination of which Party to the ECHR shall have to adopt measures to put an end to the violation shall be determined within the legal order of the European Union itself, and not by the European Court of Human Rights.

[31] The only difference between how the European Court of Human Rights will approach the EU and how it will adjudicate claims against other Parties to the Convention would result from the division of competences between the Union and the Member States. But this is of course a division that the European Court of Human Rights may conveniently ignore, as the co-respondent mechanism allows it to arrive at a finding of joint responsibility.

commitments they have made in the context of a supranational organisation such as the EC/EU, without setting aside their responsibilities under the Convention, there would be no reason either to extend that privilege *to the Union itself*, nor even to maintain that privilege for the benefit of the member States following accession.[32]

Though plausible in theory, this scenario is not very likely in practice. It would certainly not seem to be the expectation of the Court of Justice of the European Union. Indeed, soon after the entry into force of the Treaty of Lisbon finally providing an indisputable legal basis for the accession of the EU to the ECHR, the Court of Justice insisted on the need to ensure that it should be provided an opportunity to intervene, prior to the European Court of Human Rights having to decide whether a particular application of EU law is in violation of the Convention, in order to allow it to pronounce itself on any alleged incompatibility with the Convention, where such decision concerns the application or implementation of EU law.[33] The motives animating the Court of Justice can be discerned if we recall the two arguments it puts forward in favor of its position.[34]

The Court first refers to the principle of subsidiarity, according to which "it is for the States which have ratified the Convention to guarantee that the rights enshrined in the Convention are observed at national level and for the European Court of Human Rights to verify that those States have in fact complied with their commitments. It is thus primarily for the national authorities and the national courts to prevent or, in default of prevention, examine and penalise breaches of the Convention".[35] The Court of Justice draws the consequence that "the Union must make sure, as regards acts of the Union which are susceptible to being the subject of applications to the European Court of Human Rights, that external review by the Convention institutions can be preceded by effective internal review by the courts of the Member States and/or of the Union".[36] However, this does not follow. The principle of subsidiarity does not require any particular mode of judicial review, in the legal order concerned, of the measures alleged to violate the ECHR. At most, it expresses a preference for any violations to be remedied at domestic level, so that the intervention of the international supervisory mechanism should be limited to the (in principle exceptional) circumstances when such remedies have failed to effectively protect the victim. But it remains for each Party to decide how the Convention rights shall be guaranteed, by organizing a system of effective remedies. As the Court of Justice itself acknowledges in its May 2010 Discussion document, "the system established by the Convention does not lay down, as a condition of admissibility of an application to the European Court of Human Rights, that in every case a court of supreme jurisdiction must first have been asked to rule on the alleged violation of fundamental rights by the act in question".[37] It may be desirable to ensure that the Court of Justice of the European Union shall have the possibility to review any act adopted

[32] It is clear that this is the sole reason for the development by the European Court of Human Rights of the doctrine of 'equivalent protection'. This is consistent with the approach of the Court, which is to read the requirements of the Convention within the broader framework of public international law, and to seek, to the fullest extent possible, to avoid imposing on States conflicting international obligations (see for instance at para. 148 of the *Bosphorus Hava* judgment : 'The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations (...). Such considerations are critical for a supranational organisation such as the EC. This Court has accordingly accepted that compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1 (...)'). Such a rationale disappears once the European Union itself will have become a Party to the Convention. No risk of the EU Member States being faced with conflicting international obligations will then exist, since Union law itself will have to comply with the Convention, not out of its own volition, but as a matter of international law.

[33] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg, 5 May 2010.

[34] For a more detailed critique, see Olivier De Schutter, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : feuille de route de la négociation', *Revue trimestrielle des droits de l'homme*, July 2010, pp. 535-571.

[35] May 2010 Discussion document, para. 6.

[36] Ibid., para. 7.

[37] Ibid., para. 11.

by the EU member States in the scope of application of EU law before the European Court of Human Rights assesses whether the said act results in a violation of Convention rights. This is not, however, a requirement under the European Convention on Human Rights.

Nor is this a requirement under EU law. Here also, the argument of the Court of Justice of the European Union -- its second argument -- fails. It is well-established -- and it follows from the principle of uniform application of EU law across the EU -- that national courts of the EU member States cannot themselves declare an act of the EU to be invalid : that is an exclusive prerogative of the Court of Justice of the European Union.[38] According to the Court, it would follow that "[t]o maintain uniformity in the application of European Union law and to guarantee the necessary coherence of the Union's system of judicial protection, [and because] it is [...] for the Court of Justice alone, in an appropriate case, to declare an act of the Union invalid", "the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point".[39]

This argument too is unconvincing. It attributes to the European Court of Human Rights powers it does not have. When that Court finds a particular measure to be in violation of the Convention rights, it may declare so in the operational part of its judgment. But the European Court of Human Rights is not a constitutional court or a court of cassation: it remains to the State party which has been found to be in violation of the Convention to decide, in accordance with its own, domestic constitutional procedures, how to comply with the said judgment. It is therefore to the State authorities to adopt the measures the judgment may call for -- for instance, to disapply a particular legislative provision, to amend or to annul it, to interpret in a way that shall reconcile its operation with the requirements of the Convention, or to modify certain policies that have been found to be inconsistent with such requirements. The European Convention on Human Rights does impose on the Contracting Parties that they execute the judgments delivered in the cases that they are parties to; it is up to them however, to decide by which means these judgments shall be complied with, under the supervision of the Council of Europe's Committee of Ministers. To use a distinction now out of fashion in international law: theirs is an obligation of result, not an obligation of conduct.

Consider the example of an EU regulation, applied by the national authorities of an EU member State in circumstances that allegedly result in a violation of Convention rights, leading the victim of the alleged violation to challenge the said measure before the domestic courts, and finally -- after these courts have denied the claim -- to file an application before the European Court of Human Rights. The EU regulation would remain in place even following a final judgment by that Court that it has been applied in violation of the Convention. Of course, in accordance with Article 46 of the Convention, such a judgment will require the member State concerned, or the EU as its co-defendant, to adopt measures that execute the judgment. But that is not to say that the judgment of the European Court of Human Rights is *self-executing*: in particular, it is neither required under the ECHR, nor allowed under EU law, for the domestic courts of the member State concerned (nor indeed for those of any other State) to strike down or disapply the contested regulation at their own motion. Implementation problems may occur, particularly where the EU measure at stake must be amended in order to comply with the judgment of the European Court of Human Rights, which may require the consent of EU member States to which the judgment was not addressed and may be reluctant to reopen a compromise solution negotiated within the Council: this is illustrated by the problems the United Kingdom faced when it had to implement the 1999 judgment delivered in the case of *Matthews*, concerning the organization of elections for the European Parliament in Gibraltar (see Box 2). But such problems may occur precisely because the judgment of the Strasbourg court is *not* self-

[38] Case 314/85, *Foto-Frost* [1987] ECR 4199.
[39] May 2010 Discussion document, paras. 8-9.

executing, and instead leaves entirely in place the contested EU regulation.

Box 2. The execution of the judgments of the European Court of Human Rights finding a violation in the implementation of EU law

When the European Court of Human Rights arrives at the conclusion that the Convention has been violated, the State party against which the application has been filed may find it difficult to comply with that judgment, although it has a legal obligation to do so under Article 46 ECHR. In *Matthews v. the United Kingdom*, the European Court of Human Rights found the United Kingdom in breach of Article 3 of the First Additional Protocol to the Convention, for having denied the applicant the possibility to take part in the election for the European Parliament as she was a resident of Gibraltar.[40] But this situation – while it fell under the territorial jurisdiction of the United Kingdom – flowed from an annex to the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976, which was attached to Council Decision 76/787, signed by the President of the Council of the European Communities and the then member States' foreign ministers, together with the extension to the European Parliament's competences brought about by the entry into force of the Maastricht Treaty on the European Union on November 1st, 1993. Since the violation had its source in EU law – specifically, in primary EU law (the EU Treaties) –, the United Kingdom *alone* could not in principle decide to comply with the judgment of the European Court of Human Rights.

The United Kingdom therefore negotiated a means through which it would be allowed to comply with the *Matthews* judgment of the European Court of Human Rights. When the 2002 Council Decision was adopted, amending the 1976 Act,[41] the following declaration of the United Kingdom, reflecting a bilateral agreement concluded between that Member State and the Kingdom of Spain, was formally recorded in the minutes of the Council meeting of 18 February 2002:

'Recalling Article 6(2) of the Treaty on European Union, which states that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law, the UK will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the EP as part of and on the same terms as the electorate of an existing UK constituency, in order to ensure the fulfilment of the UK's obligation to implement the judgment of the European Court of Human Rights in the case of *Matthews vs UK*, consistent with the law of the European Union.'

Having secured that agreement, the United Kingdom adopted the European Parliament (Representation) Act 2003 (EPRA 2003). This Act finally did provide for the enfranchisement of the Gibraltar electorate for the purposes of European Parliamentary elections as of 2004, ensuring compliance with the *Matthews* judgment four years after it was delivered.[42] This action was taken unilaterally by the United Kingdom, after a failure to secure the unanimous agreement of the Council to an amendment to the EC Act on Direct Elections of 1976 to provide for its application to Gibraltar. However, whereas Spain has agreed that the United Kingdom could take measures to conform itself

[40] Eur. Ct. H.R. (GC), *Matthews v. the United Kingdom* (App. No. 24833/94), judgment of 18 February 1999.

[41] Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 283 of 21/10/2002, p. 1.

[42] Section 9 of the EPRA 2003 provides that Gibraltar is to be combined with an existing electoral region in England and Wales to form a new electoral region. In accordance with that provision, the United Kingdom authorities combined Gibraltar with the South West region of England by the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004.

with the requirements of the European Convention on Human Rights, it had reservations about the fact that the EPRA 2003 extended the right to vote in European Parliament elections to persons who are not United Kingdom nationals for the purposes of EU law.[43] This, Spain considered to constitute a violation by the United Kingdom of its obligations under EU law. In July 2003, Spain therefore filed with the Commission a complaint pursuant to Article 227 EC against the United Kingdom with a view to the Commission bringing infringement proceedings against the United Kingdom before the Court of Justice because of the alleged incompatibility of the EPRA 2003 with Community law. The Commission denied this request, stating that Annex I to the 1976 Act must be interpreted in the light of the European Convention on Human Rights and that it is sufficiently open to enable the UK to include the Gibraltar electorate in the UK's electorate in European parliamentary elections, according to its national electoral system.

Spain then chose to file a direct action against the United Kingdom, alleging that the UK had violated its obligations under EC law by extending the right to vote to European elections to the residents of Gibraltar, who are not citizens of the United Kingdom. The European Court of Justice rejected this claim in a judgment of 12 September 2006.[44] It took the view that 'in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory'. As to the argument that the United Kingdom would be in breach of Annex I to the 1976 Act and of the Declaration of 18 February 2002, the European Court of Justice considered that, in the light of the judgment of the European Court of Human Rights in *Matthews v. the United Kingdom*, 'the United Kingdom cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom' (para. 95).

This episode illustrates the difficulties an EU member State may be facing, when found to have acted in violation of the European Convention on Human Rights in the implementation of EU law, where it would only be possible to avoid such violation by securing an amendment of EU law itself. Ireland would have faced a similar difficulty if, in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, the European Court of Human Rights had concluded that the Convention had been breach by the impounding of the aircraft leased by the applicant company.

I conclude that neither the argument based on the subsidiarity of the international judicial control exercised by the European Court of Human Rights, nor arguments based on the logic of EU law itself -- including the monopoly of the Court of Justice on findings of validity of EU law --, fully explain the insistance of the CJEU that it have a say on the alleged incompatibility of the measure adopted by the EU with the requirements of the European Convention on Human Rights, prior to any involvement of the European Court of Human Rights. The motives of the Court of Justice probably reside elsewhere: in its hope, or its anticipation, that once it shall have made its own determination, the European Court of Human Rights will simply defer to that assessment, consistent with the *Bosphorus* doctrine described above. If this is indeed its expectation, it becomes highly unlikely that the first scenario -- that of "normalisation", in which the doctrine would be simply abandoned -- will materialize: in such circumstances, judicial *realpolitik* generally trumps arguments of principle. Indeed, we may expect the opinion that the Court of Justice shall deliver on the draft Agreement providing for the EU's accession to the ECHR to reflect its understanding that the *Bosphorus* doctrine shall be maintained :

[43] The EPRA 2003 provided (under section 16(5)) that all residents of Gibraltar above 18 years of age who were qualifying Commonwealth citizen or a citizen of the EU, would be allowed to vote at the European parliamentary elections.
[44] Case C-145/04, *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland.*

the doctrine may be seen as part of the implicit package deal that allowed the negotiations to be finalized.

Scenario 2: the preservation of the *statu quo*

If the conclusion above is correct, the reason why the Court of Justice of the European Union has insisted on being given a chance to review the compatibility with Convention rights of an act adopted in the field of application of EU law, before such assessment is made by the European Convention on Human Rights, is because its expects that, as regards the relationship between the EU legal order and the European Convention on Human Rights, nothing of importance will change. The Court of Justice places its hopes in what is our second scenario : the doctrine of 'equivalent protection' will continue to be relied upon by the European Court of Human Rights when examining the compatibility of measures adopted by the EU with the European Convention on Human Rights – whether these have their source in primary or secondary Union law –.

While this second scenario is not implausible, it would be both legally unjustified and politically inopportune. Indeed, once the Union will have acceded to the Convention, the need to reconcile potentially conflicting international obligations of the EU Member States (as having to comply both with Union law and with their obligations under the Convention) will have disappeared ; in addition, while the doctrine may have been useful until now for evaluating the obligations of the *EU Member States* under the Convention, its rationale cannot plausibly be extended to evaluating the obligations of *the Union itself* -- for there are no potentially conflicting obligations that the EU is imposed, that might represent an obstacle to its full implementation of the Convention rights. This scenario would also be politically inopportune. Since it would not align the status of the Union with that of the other Parties to the Convention, it would be sending the wrong signal to the public opinion ; and it would only partly address the problems justifying the accession of the Union to the Convention in the first place.

There are two versions of this second scenario. According to the "weak" version, the presumption of compatibility established under *Bosphorus Airways* would benefit the EU member States, in order to ensure that their national courts shall not be obliged either to depart from the interpretation of EU law imposed by the Court of Justice of the European Union, or to prioritize the obligations imposed under the European Convention on Human Rights. According to the "strong" version, the presumption would extend to acts adopted by the institutions of the Union, in which the EU member States have taken no part -- such as decisions or regulations adopted by the European Commission. This scenario deserves a word of explanation.[45]

Currently, acts that are adopted by an international organization without any implication of the States parties to the Convention are considered by the European Court of Human Rights to lie outside its jurisdiction : where applications are filed against specific decisions of organs of international organizations in the adoption of which the member States have played no role (as opposed to applications alleging a "structural deficiency", that the States having established the organization should have prevented), the Court simply treats them as incompatible *ratione personae* with the Convention -- which is to say, such applications are in reality challenging a conduct adopted not by the States parties to the Convention that have joined the organization but by a distinct international legal subject, the international organization, that is not itself a party to the Convention.

[45] See further Xavier Groussot et Laurent Pech, "La protection des droits fondamentaux dans l'Union européenne après le traité de Lisbonne", *Questions d'Europe* n°173, Fondation Robert Schuman, 14 juin 2010; and Florence Benoît-Rohmer, 'Bienvenue aux enfants de Bosphorus', *Rev. trim. dr. h.*, 2010, pp.19-37.

The case of *Boivin v. France and Belgium and 32 other member States of the Council of Europe* provides an illustration.[46] In this case, the applicant was challenging a decision of its employer, the European Organisation for the Safety of Air Navigation ("Eurocontrol"), to cancel his appointment to a post within the organization and then to deny him an appointment, after his name was not included on the list of qualified candidates drawn up by a Selection Board. Boivin took his case to the International Labour Organisation Administrative Tribunal, the sole body having competence to settle disputes between Eurocontrol and its staff according to Article 5 § 2 of Eurocontrol's Statute, challenging the cancellation of his appointment and seeking compensation for the injury caused to him : though he did obtain some compensation, he failed to obtain the annulment of the impunged decision concerning the appointment. He then applied to the European Court of Human Rights, alleging that the ILO Administrative Tribunal had violated a number of procedural rights guaranteed by the European Convention on Human Rights.

The Court found that the application was incompatible *ratione personae* with the provisions of the Convention. It reasoned that Eurocontrol has a legal personality separate from that of its member States, and is not a party to the Convention : neither Belgium nor France played any role in the adoption of the decision that allegedly caused the violation. The Court analogized the situation of Mr Boivin to that of the applicants in the 2007 cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[47] where, distinguishing *Bosphorus* and *Matthews*, the Court took the view that the respondent States' responsibility could not be engaged on account of the impugned acts and omissions of NATO troops deployed in Kosovo or of the UN mission to Kosovo (KFOR and UNMIK), as such acts were "directly attributable to the United Nations, an organisation of universal jurisdiction fulfilling its imperative collective security objective". The Court considered that Boivin was in a similar situation -- challenging in fact acts that were not those of the member States of Eurocontrol, because addressing a "structural deficiency" these States should have prevented, but discrete acts adopted by the ILO Administrative Tribunal (ILOAT), without the States being implicated in the adoption of such acts. "[In] reality", said the Court, "the applicant's complaints were directed essentially against the relevant judgment of the ILOAT concerning his individual labour dispute with Eurocontrol". It continued :

> The Court would point out that the impugned decision thus emanated from an international tribunal outside the jurisdiction of the respondent States, in the context of a labour dispute that lay entirely within the internal legal order of Eurocontrol, an international organisation that has a legal personality separate from that of its member States. At no time did France or Belgium intervene directly or indirectly in the dispute, and no act or omission of those States or their authorities can be considered to engage their responsibility under the Convention. In this respect the instant case is to be distinguished from previous cases where the international responsibility of the respondent States has been in issue, for example that of the United Kingdom in the *Matthews* case (cited above – decision not to register the applicant as a voter on the basis of an EC treaty), that of France in the *Cantoni* case (15 November 1996, *Reports of Judgments and Decisions* 1996-V – enforcement against the applicant of a French law implementing an EC Directive), that of Germany in the *Beer and Regan* and *Waite and Kennedy* cases ([GC], nos. 28934/95 and 26083/94, 18 February 1999 – denial of access to the German courts) or that of Ireland in the above-mentioned *Bosphorus* case. Unlike in those cases, in all of which the State or States concerned had been involved directly or indirectly**,** in the present case the applicant cannot be said to have been "within the jurisdiction" of the respondent States for the purposes of Article 1 of the Convention.

[46] Eur. Ct. HR (5th sect.), Boivin v. *France and Belgium and 32 other member States of the Council of Europe* (Appl. No. 73250/01), dec. (inad.) of 9 September 2008.

[47] See Eur. Ct. HR (GC), *Behrami and Behrami v. France* (Appl. no. 71412/01), dec. of 31 May 2007; and Eur. Ct. HR (GC), *Saramati v. France, Germany and Norway* (Appl. no. 78166/01), dec. of 31 May 2007.

The Court concluded on these grounds that the violations of the Convention alleged by Boivin therefore could not be attributed to France and Belgium. As to the possibility of finding Eurocontrol itself to be responsible, the suggestion was given short shrift by the Court: "since this international organisation is not a party to the Convention its responsibility cannot be engaged under the Convention".

The Court currently takes the same position where the acts allegedly resulting in a violation of Convention rights are adopted by organs of the EU, through procedures in which the member States play no role. In *Connolly*, the applicant was a public servant of the European Commission, who had been subjected to disciplinary proceedings for having published a book denouncing certain practices within the EU institutions, while on short leave from his institution.[48] He was dismissed as a result. He challenged that decision before what was then the Court of First Instance of the European Communities (CFI), and later, in cassation proceedings after the CFI rejected his action for annulment, the European Court of Justice. His requests to be given an opportunity to respond to the views expressed in the opinion presented to the European Court of Justice by the Advocate General were rejected by the Court. Connolly then turned to the European Court of Human Rights, alleging violations both of freedom of expresssion and of his right to a fair trial, as guaranteed under Article 6, para. 1, of the European Convention on Human Rights, as he considered that he had not been given a fair opportunity to challenge the reasoning of the Advocate General, which is presented after the proceedings are closed. The Court considered that the situation was similar to that of *Boivin*. It concluded that the application was incompatible *ratione personae* with the provisions of the Convention, because the impunged measures were adopted by bodies of the EU, rather than by the EU member States as States parties to the Convention. Neither the decision to dismiss the applicant, nor the alleged violations of his procedural rights in the proceedings before the European Court of Justice, could be imputed to the member States :

> La Cour note que seuls les organes communautaires, à savoir l'AIPN [autorité investie du pouvoir de nomination], le TPICE et la CJCE, ont eu à connaître du contentieux opposant le requérant à la Commission européenne. Elle constate qu'à aucun moment l'un ou l'autre des Etats mis en cause n'est intervenu, directement ou indirectement, dans ce litige, et ne relève en l'espèce aucune action ou omission de ces Etats ou de leurs autorités qui serait de nature à engager leur responsabilité au regard de la Convention. On ne saurait donc dire que le requérant, en l'espèce, relève de la « juridiction » des Etats défendeurs au sens de l'article 1 de la Convention.
>
> La Cour estime qu'en conséquence les violations alléguées de la Convention ne sauraient être imputées aux Etats mis en cause dans la présente affaire.
>
> Quant à une responsabilité éventuelle de l'Union européenne, elle rappelle que cette organisation internationale n'a pas adhéré à la Convention et qu'elle ne peut donc voir sa responsabilité engagée au titre de celle-ci.

In clear contrast to the *Boivin* and *Connolly* line of cases, are cases where the applicant challenges not the decision adopted by the international organization itself, but a structural feature of the procedures through which human rights are protected within the organization, for which the member States -- who have established the organization and are its "fathers" -- may be held responsible. Thus, in the case of *Gasparini*, the applicant had sought to rely on the internal procedures established within the North Atlantic Treaty Organization (NATO) to challenge the consequences of a decision by the North Atlantic Council concerning the prorata of wages that would

[48] Eur. Ct. HR (5th sect.), *Connolly v. 15 member States of the EU*, Appl. No. 73274/01, dec. of 9 December 2008.

go to paying pensions. After he failed in his attempt, he turned to the European Court of Human Rights, challenging the compatibility with the procedural rights guaranteed under the Convention of the procedures themselves. This, the Court noted, concerned an alleged "structural deficiency" of NATO's internal procedures : as such procedures are defined by the North Atlantic Council in which the NATO member States' representatives are sitting, the States themselves may be held responsible for such a deficiency.[49] It matters not that the application failed: what is striking is that the Court examines the substance of the application filed by Gasparini, asking specifically whether the NATO member States had acted in good faith, or whether instead they should have suspected that the system they were establishing within the organization was not sufficiently "rights-proof".

Following the accession by the EU to the European Convention on Human Rights, it would fall upon the European Court of Human Rights to examine, in cases such as *Connolly*, whether the EU has been acting in accordance with the requirements of the Convention. There is no logical reason why the presumption of compatibility with these requirements, as established by *Bosphorus*, should apply to such cases: there is here no risk of the addressee, the European Union, being imposed conflicting international obligations, or being able to comply with the European Convention on Human Rights only at the expense of deepening the process of integration -- especially not since all the EU member States are also parties to the European Convention on Human Rights. And just like there is no reason to apply the presumption to the EU itself, there is no reason to apply it to the EU member States implementing EU law, even in circumstances where they have no margin of appreciation, because the very possibility of EU law having to be implemented despite its incompatibility with Convention rights is excluded in principle, as a result of the EU having become a party to the Convention. This is why the second scenario, the closest to the *statu quo*, should be avoided: its would confirm the current privileged position of the EU member States when they act in accordance with obligations imposed under EU law and under the supervision of the Court of Justice of the European Union, when the current justification for that privilege shall have disappeared. The real problem with this scenario, however, is not that is allows the European Court of Human Rights to rely on a presumption of compatibility with the Convention in certain circumstances : it is that these circumstances are reserved to some parties, and denied to others, when there is no principled justification for that difference in treatment. The next scenario is one in which the doctrine is maintained, but the differential treatment removed.

Scenario 3: *Bosphorus* generalized

Our third and final scenario is that the doctrine of 'equivalent protection' will expand further: the privilege which is currently granted to the EU member States when they act in implementation of requirements of EU and under the supervision of the Court of Justice of the European Union would not be denied to them; rather, it would be extended to all situations which comply with a same set of (strictly defined) conditions. As noted by six juges of the European Court of Human Rights who filed a joint concurring opinion in *Bosphorus Hava*, the "general abstract review of the Community system" to which the Court proceeds in that case, which leads it to conclude that the EU offers a protection of fundamental rights "equivalent" to that of the system of the European Convention on Human Rights, is one "to which all the Contracting Parties to the European Convention on Human Rights could in a way lay claim".[50] The argument is put forward there to question the attitude of the European Court of Human Rights towards situations where States are merely fulfilling obligations incurred under EU law, under the supervision of the European Court of Justice. But it could as well be invoked to justify an extension of the *Bosphorus* doctrine beyond its current scope of application, under certain well-

[49] Eur. Ct. HR (2nd sect.), *Gasparini v. Italy and Belgium* (Appl. No. 10750/03), dec. of 12 May 2009 (inadmissible) (cited above; decision available only in French).

[50] Joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebalsky, and Garlicki, to the *Bosphorus Hava* judgment of 30 June 2005, at para. 3.

specified conditions. The third scenario would establish a *Bosphorus*-like presumption in any situation where, at national level, a protection 'equivalent' to that provided by the European Court of Human Rights is ensured.

The conditions for such 'equivalence' would have to be clarified by the Court, but one could easily think of a set of requirements including, at a minimum, the direct application of the Convention rights by the domestic courts before which a claim was fined by the alleged victim, an interpretation of the Convention systematically based on the case-law of the European Court of Human Rights, or the adoption of appropriate measures to ensure that claims based on Convention rights are processed without unreasonable delays. Beyond those elementary conditions, other requirements, concerning for instance the relationship between substantive rules applied by domestic courts and the procedural requirements that define the scope of their powers or measures ensuring that the European Convention on Human Rights is taken into account preventively, in the formulation of generally applicable regulations (rather than merely on an individual and *ad hoc* basis, at the request of aggrieved litigants), could be included.[51]

This new and strengthened version of the doctrine would clearly manifest the principle of subsidiarity in the system of the European Convention on Human Rights – i.e., the principle according to which the protection of the rights and freedoms of the Convention must primarily take place at national level, the intervention of the European Court of Human Rights being only justified where those internal mechanisms have failed to prevent violations from occuring or, if they do occur, from being remedied.[52] The principle of subsidiarity, it is worth emphasizing, does not assert that the European Court of Human Rights should somehow renounce fully exercising its role in scrutinizing measures adopted at domestic level. Rather, it insists on the domestic authorities having to do their part in strengthening the protection of individual rights : though the principle of subsidiarity does not, as such, require a direct application of the Convention in the domestic legal order, its aim is to ensure that the individual shall not have to wait to file a claim at the international level in order to be able to denounce a violation of the Convention.

Similarly, in line with the principle of subsidiarity thus understood, this third scenario would allow the European Court of Human Rights to develop a case-law providing strong incentives to the States parties to the Convention, to *strengthen* the protection of Convention rights within their domestic legal order. It could do so, *inter alia*, by enhancing the status of the European Convention of Human Rights at national level. Today, all member States of the Council of Europe allow their courts to apply directly the European Convention on Human Rights in the disputes they are asked to adjudicate.[53] But the modalities can vary significantly from State to State.[54] For instance, courts in different States may or may not accept that, in cases of conflict with the national Constitution, the Convention rights shall prevail; they may be authorized to disapply even clear legislative mandates in order to apply

[51] Some of these conditions could be set seeking inspiration from Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th session. In any event, the Bosphorus doctrine in its new incarnation would only apply to situations that have been reviewed by domestic courts on the basis of the requirements of the European Convention on Human Rights, as interpreted by the Strasbourg Court.

[52] For an in-depth discussion of the principle of subsidiarity under the European Convention on Human Rights, see O. De Schutter, "La subsidiarité dans la Convention européenne des droits de l'homme : la dimension procédurale", in : M. Verdussen (dir.), *L'Europe de la subsidiarité*, Bruxelles, Bruylant, 2000, pp. 63-130.

[53] See, for studies comparing the status of the European Convention on Human Rights in different national legal orders, Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe. The ECHR and Its Member States, 1950-2000*, Oxford Univ. Press, 2001; Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems, Oxford Univ. Press, 2008.*

[54] See for a comparative overview G. Martinico and O. Pollicino, *The National Judicial Treatment of the ECHR and EU Laws. A Constitutional Comparative Perspective*, Europa Law Publ., Amsterdam, 2010.

provisions of the Convention, or they may be prohibited from doing so[55]; they may be under a duty to raise *ex officio* the issue of compatibility with Convention rights in legal proceedings, or this question shall only be raised at the initiative of the parties[56]; they may or may not apply the provisions of the Convention, or all of them, to relationships between private parties, where protecting the rights of one of the parties would imply imposing correlative obligations on other parties.[57] Moreover, even where its provisions are directly applied, the Convention can only be invoked before national courts in accordance with the procedural requirements imposed, for instance, under statutes of limitations defining the maximum time that may have elapsed between the moment when the alleged violation took place and the commencement of legal proceedings based on that event, under rules of evidence, or under other rules defining the conditions of access to court -- only a small portion of which shall be included among the minimum requirements imposed as part of the right to an effective remedy under Article 13 of the Convention.[58] Finally, moving beyond the role of courts in enforcing Convention rights and to other actors within the domestic legal system, the attention paid to the requirements of the Convention by parliamentary committees or by the Executive differs widely from State to State: human rights proofing of legislation or policies remains the exception rather than the rule, and the inclusion of human rights in impact assessments, even when such assessments are performed, is variable[59]; not all pieces of legislation or policy frameworks that could impact human rights are preceded by a consultation of stakeholders ; not all Council of Europe member States have an independent national human rights institution, and the practice even of the existing institutions is highly uneven.

The list could be made longer, and each of its items could be discussed at length. But the point made is a simple one: were the *Bosphorus* presumption-of-compatibility doctrine to be expanded into a

[55] In the United Kingdom for instance, the Human Rights Act 1998 allows the domestic courts since 2 October 2000 to apply Articles 2 to 12 and 14 of the Convention, as well as Articles 1 to 3 of the (First) Additional Protocol, and (since the Human Rights Act 1998 (Amendment) Order 2004 (S.I. 2004/1574)) Article 1 of the Thirteenth Protocol, together with Articles 16 and 18 of the Convention. But where an Act of Parliament cannot be interpreted in order to ensure compliance with the Convention, courts can only make a declaration of incompatibility, without being authorized either to strike down the legislative provision found to be incompatible, or to disapply such provision; the principle of parliamentary sovereignty remains unaffected. See, *inter alia*, David Hoffman and John Rowe, *Human Rights in the UK. An Introduction to the Human Rights Act 1998*, Longman, 3rd ed. 2006, pp. 64-65.

[56] In the 1996 case of *Ahmet Sadik v. Greece*, Judge S.K. Martens famously opiniated that "in those cases where domestic courts, under their national law, are in a position to apply the Convention ex officio, those courts must do so under the Convention. That is an obvious demand of the effectiveness both of the Convention as a constitutional instrument of European public order (ordre public) and of the "national human right systems"." (Eur. Ct. HR, *Ahmet Sadik v. Greece*, judgment of 15 November 1996, partly dissenting opinion of judge Martens, joined by judge Foighel, § 11). He was not followed on this point by his fellow judges.

[57] It is notable that, while, as seen above, the Committee of Ministers of the Council of Europe has sought to encourage the member States to improve the effectiveness of the remedies available, at domestic level, to the alleged victims of violations of the Convention (Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session), its recommendations have addressed none of these points. Here, the principle of procedural autonomy of the States seems to prevail.

[58] It is of course telling that Article 13 ECHR is not listed among the provisions of the Convention listed by the Human Rights Act 1998 as provisions that the United Kingdom courts may rely on in their development of the common law or in their interpretation of legislation: thus, they will not be tempted to expand their powers in order to ensure that aggrieved individuals turning to the courts have access to effective remedies.

[59] See Committee of Ministers of the Council of Europe, Recommendation Rec(2004)5 to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights *(adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)* (identifying a range of good practices to ensure that "there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the [European Court of Human Rights]"; that "there are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars"; and ensuring "the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention").

rule applicable across the full range of situations covered by the Convention, the Court could seize upon this opportunity to impose strict conditions on the Parties who claim to be worthy of benefiting from the doctrine -- or, more likely, for an equivalent doctrine, inspired by *Bosphorus* without replicating it exactly.

That is clearly the direction encouraged by the Brighton Declaration adopted at the 19-20 April 2012 High-Level Conference on the Future of the European Court of Human Rights. Reiterating concerns already expressed by similar conferences in the past,[60] the Brighton Declaration addresses a number of recommendations to the member States of the Council of Europe in order to ensure the "full implementation of the Convention at national level", including the establishment of national human rights institutions ; the adoption of "practical measures to ensure that policies and legislation comply fully with the Convention, including by offering to national parliaments information on the compatibility with the Convention of draft primary legislation proposed by the Government"; "the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention"; or providing information and training on Convention rights to judges and lawyers, and to public officials.[61] The Declaration also emphasizes that, according to the principle of subsidiarity, it is first and foremost to the national authorities to ensure that the Convention is complied with: "the Convention system is subsidiary to the safeguarding of human rights at national level and [...] national authorities are in principle better placed than an international court to evaluate local needs and conditions".[62] It considers the possibility of inserting a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law in the Preamble of the Convention, as well as the possibility of providing the Court with a competence to deliver "advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level".[63] Most importantly for our purposes, however, the Declaration favors a stricter application of the existing criteria that determine whether an application shall or shall not be considered admissible and examined on the merits, and even an amendment to Article 35(3) of the Convention in order to strengthen the conditions of admissibility of individual applications. Following the latest amendments to that provision by Protocol No. 14,[64] Article 35(3) now reads :

> The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that :
> a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
> b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

The High-Level Conference on the Future of the European Court of Human Rights "affirms" that "an application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia*, to the extent that the Court considers that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of

[60] Particularly the High-level conferences convened at Interlaken on 19 February 2010 and at Izmir on 27 April 2011.
[61] See High-Level Conference on the Future of the European Court of Human Rights Brighton Declaration, 19-20 April 2012, para. 9.
[62] Ibid., para. 11.
[63] Ibid., para. 12, d).
[64] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194), adopted in Strasbourg on 13 May 2004, and entered into force on 1 June 2010.

the Convention; and encourages the Court to have regard to the need to take a strict and consistent approach in declaring such applications inadmissible, clarifying its case law to this effect as necessary".[65]

This is a plea to the Court to consider that an application shall not be examined on its merits if the alleged violation has already been duly examined at domestic level, by a court applying the provisions of the Convention and taking into account the case law of the Court, unless there is a need for the Court to intervene ("the application raises a serious question affecting the interpretation or application of the Convention"). In practice, following this suggestion would imply a shift in the nature of the control exercised by the European Court of Human Rights: instead of examining each application on its merits, essentially re-examining how the various rights and interests were balanced by the domestic court, the European Court would consider whether the domestic court applied the rights stipulated by the Convention, accompanied by the interpretation authoritatively provided to these rights by the European Court. The control would be less substantive, and more procedural; it would assimilate the role of the European Court of Human Rights more to a court of cassation, limited to ensuring that the law is correctly applied, but leaving it to the domestic court itself to assess the facts and to decide the outcome of the balancing act that human rights courts are commonly required to perform. It is striking however that, in contrast to the third scenario explored here, nothing of significance is said about the conditions that the domestic judicial proceedings should comply with for such proceedings to be trusted: that is, the Brighton Declaration takes the view that, provided the individual has access to effective remedies in the domestic legal order, and provided the domestic courts apply faithfully the case law developed by the European Court of Human Rights, it would be unnecessary to superimpose a review at international level to the judicial review that took place at national level. In contrast, the suggestion here is that, whereas a shift in the nature of the control to be exercised by the European Court of Human Rights may be justified provided a set of conditions are fulfilled, this should not result in a lower level of scrutiny, potentially at the expense of the protection of the rights of the individual. It is the opposite: because remedies at national level are more accessible to the individual and can provide more immediate protection, insisting on such remedies being strengthened as a condition for the European Court of Human Rights to trust the protection of individual rights as it is ensured within the national legal order may in fact improve the level of such protection, rather than undermine it.

Box 3. The nature of the judicial control exercised by the European Court of Human Rights and the workload of the Court

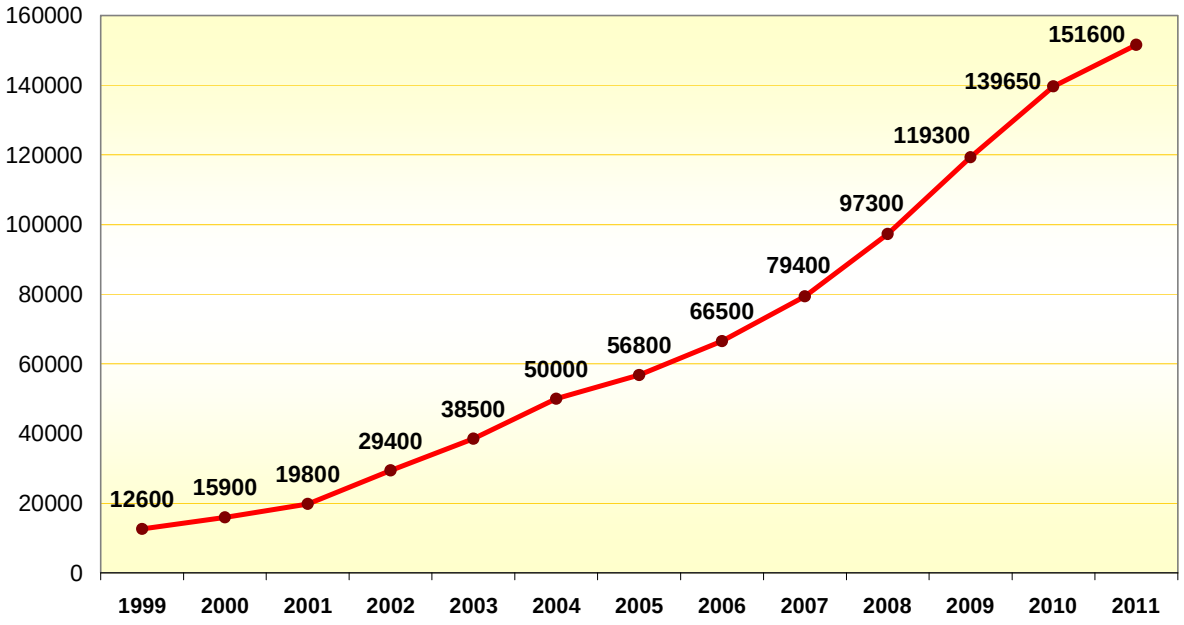
Though it may be thought that the extension of a renewed and strengthened version of the *Bosphorus* doctrine would allow the European Court of Human Rights to find manifestly ill-founded a range of applications the substantive merits of which, currently, it must examine, thus diminishing its workload -- certainly a major motivation explaining the insistence of the Brighton Declaration on a fuller reliance on national remedies against violations of the Convention --, it is unclear whether this will result in fact.

The question of the ability of the Court to manage its case-load is not a minor part of the discussion concerning its working methods. By 31 October 2012, at the time when a first version of this paper was presented, 135,350 applications were pending before the Court -- a decrease of 11 per cent in comparison to the beginning of that year, but still a very high number.[66] The importance of this figure

[65] Brighton Declaration, para. 15, d). The Declaration also "concludes" that "Article 35(3)(b) should be amended to remove the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal”; and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013" (para. 15, c)). This is of course a much more worrying prospect.

[66] See the Tables of statistics available from the website of the Court (the figures cited are from the "General Statistics" for 2012).

can be seen if we compare it to pace at which applications are disposed of judicially: in 2011, 52,188 applications could be decided, which represents a significant increase of 27 per cent in relation to 2010 (41,182), but still means that every month during 2011, approximately one thousand more applications were received than could be disposed of. The backlog is mounting. The following chart, established by the services of the Court, illustrates this :



Applications pending before a judicial formation, 1999-2011. Source: European Court of Human Rights, Analysis of Statistics 2011, January 2012, p. 7.

In large part thanks to the entry into force of the Protocol No. 14 to the Convention, the first impacts of which were being felt in 2012, the situation has improved since: in reviewing its statistics concerning that year, the Court could proudly announce that on average, 1,900 more cases were disposed of each month than were allocated to the Court, so that "for the first time since 1998, the stock of allocated applications pending before the Court decreased over the year, by 16% from 151,600 to 128,100".[67]

But, however serious we rate the problem of the case-load of the European Court of Human Rights and of its ability to manage it, would a "*Bosphorus*-bis" doctrine make a difference? The answer would obviously depend on the version of the doctrine that would ultimately be retained. Though blindly trusting that the outcomes of procedures conducted before certain courts shall be fully in line with the requirements of the European Convention on Human Rights might represent an economy of judicial resources, as the European Court of Human Rights could content itself with examining whether no "manifest deficiency" is apparent in the case which it is presented, such a gain would be erased once we move beyond this most extreme version of the doctrine, to require from the Court that it examines whether the procedures followed in the domestic legal order concerned have complied with a set of conditions that justify deferring to the assessment reached by the relevant national jurisdictions. The approach examined here, under the third of the three scenarios explored, would not represent a significant gain in this regard: it would shift the focus of the review by the Court, without truly facilitating its task. The Court would still have to examine the procedure that was followed to arrive at the particular outcome that is alleged to constitute a violation; it would have to verify whether the domestic courts relied on its established case-law; and it would have to examine

[67] European Court of Human Rights, *Analysis of Statistics 2012*, January 2013, p. 4.

whether the domestic courts have met the burden of justifying that their assessments took into account the best practices developed in other member States of the Council of Europe, as regards how to reconcile the requirements of fundamental rights with competing policy objectives.

IV. THE SECOND LIFE OF *BOSPHORUS*

In fact, though it would be made more explicit if a new version of the *Bosphorus* doctrine were to expand in the future, this evolution would simply deepen what largely corresponds to the current approach of the European Court of Human Rights. The nature of the scrutiny exercised by the Court already depends, to a significant extent, on how the domestic courts have reached their decision in the particular case that it is presented with: the "how" matters as much, it might be argued, than "what" outcome has been reached. It is important to note, however, that once the procedures followed at domestic level are assessed, it is less the *degree* of scrutiny exercised by the European Court that evolves (for example, from a "strict" scrutiny to an "intermediate" level of scrutiny or to a mere "rationality review", to borrow from the categories of Equality Clause jurisprudence in American constitutional law), than the *kind* of scrutiny that is exercised: instead of the Court performing anew the balancing act that will lead it to arrive at its own conclusions as to the existence of a violation, essentially replicating what the domestic jurisdictions have done, the European Court shall examine whether the arguments put forward by the domestic court are consistent with its case law and with the nature of the claims put forward. The focus is on the quality of the arguments offered, rather than on the conclusions reached.

The result is that the relationship between the domestic courts and the European Court of Human Rights is more dialogical and horizontal, than based on judicial fiat and vertical.[68] There follows a strong incentive for domestic courts to provide consistent, and substantive, reasons, for the conclusions they reach, so as to convince the European Court of Human Rights that they have considered all the dimensions of the case, without neglecting any major aspect, and have provided the kind of detailed response to each of the arguments presented by the alleged victim of a violation, commensurate with the quality of these arguments themselves. This new approach, based on mutual trust between the European Court of Human Rights and national jurisdictions of the Parties to the Convention, would present three defining characteristics. First, it would lead to emphasize compliance with certain procedural rules that national authorities, including courts, would have to comply with, as a condition for the trust they would claim to deserve. Second, it would redefine the European Court of Human Rights as a standard-setter, defining the parameters that should be taken into account by the domestic courts applying the Convention, but leaving it to these courts to apply those standards to the specific facts they are presented with. Third, it would encourage collective learning, and the rapid adoption of best practices, provided the justifications required from national courts are understood to include what other national authorities have done when confronted with similar problems, if the solutions they arrived at have ensured a better preservation of the rights at stake. The following sections describe the approach proposed, and highlight the key advantages that can be expected from this shift in perspective.

1. The procedural turn

At present, there is already a strongly dialogical dimension to the relationship between the European Court of Human Rights and the domestic courts of the States parties to the Convention. This dimension enters the case law, most explicitly, through the channel of the margin of appreciation

[68] This approach is expounded and richly illustrated in Charles F. Sabel and Oliver Gerstenberg, "Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order", *European Law Journal*, vol. 16, Issue No. 5 (2010), pp. 511-550.

doctrine.[69] According to the classic formulation of this doctrine, carried over from one case to another, "by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions".[70] Although it is often misunderstood, the doctrine is *not* a blank authorization given to national authorities, including courts, to do as they please, in areas that are particularly sensitive and in which, therefore, great weight should be recognized to domestic public opinion.[71] The doctrine of the margin of appreciation simply recognizes that national authorities may be better placed to make certain *factual assessments*, including those that enter into play in balancing of interests analysis, but *using the framework of analysis that the case law of the European Court of Human Rights provides*. Indeed, whenever the Court invokes the doctrine, it hastily adds that the choices made at national level remain to be monitored, for their compliance with the Convention, at the international level. By relying on this doctrine, the Court does not abdicate its role. Instead, as already suggested above,[72] the doctrine is a mechanism for the allocation of decision-making between the international and the national level. In matters pertaining to the Convention, the assessments made by the national authorities shall be deferred to, to the extent that the procedures followed at national level may be presumed to ensure an adequate compliance with the Convention.

Thus understood, the doctrine of the national margin of appreciation could create an incentive for legislative and executive authorities to better take the Convention into account in their law- and policymaking procedures, and for the domestic courts to pay a greater attention to the requirements of the Convention and the evolving international case-law providing it with an authoritative interpretation. In accordance with the principle of subsidiarity of international judicial supervision, the 'wide margin of appreciation' could benefit national authorities where, for instance, human rights impact assessments have been performed prior to the adoption of legislation or the

[69] The literature, on this point also, is overwhelming. We owe the most extensive studies of the subject to H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, London/The Hague/Boston, Martinus Nijhoff Publ., 1996; J.G.C. Schokkenbroek, *Toetsing aan de vrijheidsrechten van het Europees Verdrag tot bescherming van de Rechten van de Mens*, WEJ Tjeenk Willink, Zwolle, 1996 (pp. 11-241); and E. Kastanas, *Unité et diversité. Notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 1996. Significant early studies of the subject were made by R. Higgins, 'Derogations under Human Rights Treaties', *British Yearbook of International Law*, vol. 48 (1976-1977), pp. 281-320, at pp. 296-30; R. St. J. Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights', in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Milan, Giuffré, t. III, 1987, pp. 187-208; and from the same author, 'The Margin of Appreciation', in F. Matscher, R. St. J. Macdonald and H. Petzold (dir.), *The European System for the Protection of Human Rights*, London/The Hague/Boston, Martinus Nijhoff Publ., 1993, pp. 83-124. Among the more recent contributions see, *inter alia*, in addition to the special issue dedicated to this issue by the *Human Rights Law Journal* in 1998 under the title 'The Doctrine of the Margin of Appreciation Under the European Convention on Human Rights: its Legitimacy in Theory and Application in Practice'; Y. Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights', *Neth. Q. H.R.*, 1998, pp. 41-61; E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 56, 1996, pp. 240-314; T.H. Jones, 'The Devaluation of Human Rights Under the European Convention', *Public Law*, 1995, pp. 430-449; P. Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments', *E.H.R.L.R.*, 1997, pp. 364-379; J. Callewaert, 'Quel avenir pour la marge d'appréciation?', in P. Mahoney, H. Petzold, F. Matscher and L. Wildhaber (dir.), *Protection des droits de l'homme : la perspective européenne. Mélanges en hommage à R. Ryssdal*, Köln, Carl Heymanns, 2000, pp. 147-167.

[70] Eur. Ct. HR, *Buckley v. the United Kingdom* judgment of 25 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 75. The case concerned a land planning policy that adversely impacted the possibility for Roma families living in caravans to find suitable accommodation places where to stay. The full quote is : "It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases ... . By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation".

[71] See, for a more detailed analysis of this point, Olivier De Schutter and Françoise Tulkens, "The European Court of Human Rights as a Pragmatic Institution", in E. Brems (ed.), *Conflicts Between Fundamental Rights*, Intersentia, Antwerp-Oxford-Portland, 2008, pp. 169-216.

[72] See above, text corresponding to notes 50-56.

implementation of certain policies, or where decisions were preceded by consultations of stakeholders; or where the Convention is directly applied by national jurisdictions, taking into account the relevant case-law of the European Court of Human Rights. Far from deferring to the evaluations of the domestic authorities, the Court would thus put more pressure on those authorities to implement fully the requirements of the Convention in the decisions they adopt.

Consider for instance the case of *Hatton and Others v. the United Kingdom*. There, the applicants challenged before the European Court of Human Rights the implementation in 1993 of a new scheme for regulating night flights at Heathrow. The scheme replaced the earlier system of movement limitations with a regime which gave aircraft operators a choice, through a quota count, as to whether to fly fewer noisier aircraft, or more less noisy types. The 1993 Scheme accepted the conclusions of the 1992 sleep study that found that, for the large majority of people living near airports, there was no risk of substantial sleep disturbance due to aircraft noise, and that only a small percentage of individuals (some 2 to 3%) were more sensitive than others. On this basis, disturbances caused by aircraft noise were regarded as negligible in relation to overall normal disturbance rates. It was agreed, nevertheless, that the new scheme was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention. The Court noted that it was faced with two versions of the extent to which the margin of appreciation doctrine should apply : "on the one hand, the Government claim a wide margin on the ground that the case concerns matters of general policy, and, on the other hand, the applicants' claim that where the ability to sleep is affected, the margin is narrow because of the "intimate" nature of the right protected".[73] In effect, the Court chose to define whether the government has overstepped its margin of appreciation by examining the decision-making procedure that was followed, asking in particular which procedural safeguards had been included allowing various stakeholders to have their views heard. It found that the decision concerning the new schemes for night flights at Heathrow was based on various studies and studies allowing ample room for participation for the communities, and grounded on solid evidence. It concluded that it was unable to "find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole", nor that there have been "fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights".[74] This example is not isolated : the case law of the Court offers other examples of situations where the procedural safeguards built into decision-making processes were determinative of the question of whether the authorities had overstepped their margin of appreciation.[75]

A first characteristic of the approach proposed here is therefore that it would lead to impose on domestic authorities that they comply with a number of safeguards, ensuring that the trust in the decisions that they adopt is not blind, but instead grounded on these authorities complying with a number of conditions. This procedural turn leads the European Court of Human Rights to assess whether certain procedural safeguards have been complied in the adoption of the impunged

[73] Eur. Ct. H.R. (GC), *Hatton and Others v. the United Kingdom* (Appl. no. 36022/97), judgment of 8 July 2003, § 103.
[74] Ibid., § 129.
[75] See, e.g., Eur. Ct. H.R. (GC), *Chapman v. the United Kingdom* (Appl. No. 27238/95), judgment of 18 January 2001 (concerning a Gypsy by birth, who had been travelling constantly with her family during her youth, and continued to live in caravans with her husband and children after her marriage, but was subsequently denied the permission to station caravans on the land she had purchased due to land planning requirements, the Court notes in § 114 that "proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interests under Article 8 and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The decisions were reached by those authorities after weighing in the balance the various competing interests. It is not for this Court to sit in appeal on the merits of those decisions, which were based on reasons which were relevant and sufficient, for the purposes of Article 8, to justify the interferences with the exercise of the applicant's rights").

decision (the "how") rather than to focus on the outcomes (the "what").[76] This may in fact strengthen, rather than weaken, the protection of human rights at the level of each State.

2. The division of labour between international and national courts

A second characteristic is that the European Court of Human Rights would remain in charge of shaping the normative framework, establishing the standards that the national authorities should take into account in making their assessments. Here again, the existing doctrine on the margin of appreciation may serve as a departure point. Though the doctrine is often misunderstood, it is relevant to note that its use is limited to the evaluation of facts (of what is required in a particular situation); it does not extend to the interpretation of the requirements of the Convention (which it is the role of the European Court of Human Rights to supervise).[77] Rather, it is when the national courts appear to have faithfully applied the case-law of the European Court of Human Rights that they are "trusted" in assessing particular factual situations, within the margin of appreciation that is left to them.

Importantly however, it is not enough for national courts to restate the well-established case-law of the European Court of Human Rights, in order for their appreciation of the consequences to be drawn in particular factual settings to be deferred to. Consider for instance the case of *Schüth v. Germany*.[78] The applicant in that case was complaining that he had been dismissed from his job as an organist and choir master by his employer, the Catholic parish church, after having left his wife to life with another woman, for breach of his duty of loyalty under the Church regulations. Asked to decide whether this resulted in a violation of the right to respect for private life as guaranteed under Article 8 ECHR, the European Court of Human Rights first recalled that the question of whether church-based organizations could require from their employees that they comply with certain duties of loyalty, as a condition for their employment, had been addressed by the Federal Constitutional Court in 1985. The Federal Constitutional Court had essentially upheld the validity of the "loyalty clauses" in such employment relationships on the basis of the right of religious societies to manage their affairs autonomously within the limit of the general law, the *Selbstbestimmungsrecht* enshrined in Article 137 § 3 of the Weimar Constitution, a provision that the Basic Law (*Grundgesetz*) of 1949 had maintained in force.[79] A few years later, when asked whether this position was compatible with the European Convention on Human Rights, the European Commission on Human Rights answered in the affirmative.[80] Thus, when in 2010, the question again arose in *Schüth v. Germany*, the European Court of Human Rights could "observe[...] that the Federal Employment Tribunal, in its judgment of 12 August 1999, referred extensively to the principles established by the Federal Constitutional Court in its judgment of 4 June 1985".[81] The Court added however "that the Employment Appeal Tribunal merely stated that it did not disregard the consequences of dismissal for the applicant" but that it "failed, however, to explain the factors it had taken into consideration in that connection when

[76] See also Robert Harmsen, "The (Geo-)Politics of European Union Accession to the European Convention on Human Rights: Democracy and Distrust in the Wider Europe", in V. Kosta, N. Skoutaris and V. Tzevelekos (eds), *The Accession of the EU to the European Convention on Human Rights*, Hart Publ., 2013 (in press) (noting the potential "jurisprudential reorientation in which the ECtHR shows more explicit awareness and places greater weight on the 'deliberative quality' of national decision-making", in essence shifting "to a role in which it scrutinised decision-making procedures more closely, while variably calibrating the scope and intensity of its substantive determinations in function of the extent to which questions of the balancing of fundamental rights had appropriately figured in prior national deliberations").

[77] See in particular J. Callewaert, 'Quel avenir pour la marge d'appréciation?', cited above, at p. 163.

[78] Eur. Ct. HR (5th sect.), *Schüth v. Germany* (Appl. No. 1620/03) judgment of 23 September 2010 (final on 23 December 2010).

[79] 2 BvR 1703/83, 1718/83 and 856/84, judgment published in the Reports of Judgments and Decisions of the Federal Constitutional Court, volume 70, pp. 138-173.

[80] Eur. Comm. HR, *Rommelfanger v. Germany*, Appl. no. 12242/86, dec. of 6 September 1989, Decisions and Reports, vol. 62, p. 151 (the case concerned a medical doctor employed in a hospital depending on the Catholic Church, who had made declarations in favor of the freedom of women to choose abortion).

[81] *Schüth v. Germany* judgment, cited above, § 60.

weighing up the interests involved" although in the Court's opinion, "the fact that an employee who has been dismissed by a Church has limited opportunities of finding another job is of particular importance".[82] It concluded that the dismissal of the applicant resulted in a violation of the right to respect for private life, because of its disproportionate consequences, because the domestic courts had not passed the test of deliberative justification required in this architecture:

> The Court is therefore of the view that the employment tribunals did not sufficiently explain the reasons why, according to the findings of the Employment Appeal Tribunal, the interests of the Church far outweighed those of the applicant, and that they failed to weigh the rights of the applicant against those of the employing Church in a manner compatible with the Convention.[83]

The wording used suggests the nature of the control exercised by the European Court of Human Rights. It is not substituting its own judgment to that of the German courts; nor is it repeating the weighing of the interests performed by these courts. Rather, the European Court examines whether the domestic courts have appropriately justified, in the light of the guidelines that can be derived from the existing case-law, the conclusion that they have reached: the finding of violation follows from the finding that, in some important respects, the arguments put forward have been found lacking. The European Court of Human Rights expresses its disagreement, not with the outcome *per se*, about which it may be said to be agnostic, but with the method by which the outcome was reached.

Such an approach may represent a significant gain in legitimacy in the implementation of the standards of the European Convention on Human Rights. This is both because of the active role the actors most immediately concerned shall have played in its adoption (if, among the said conditions, are procedural conditions related to whether the decision was reached by national authorities taking into account all relevant viewpoints), and because it will be a decision better informed by the realities of the circumstances in which the alleged violation occured -- the unique constellation of facts that no predefined grid could have anticipated. Both input legitimacy (the perception that the procedure has been fair to all participants) and output legitimacy (the acceptability of the result) are strengthened. This in turn may improve enforcement of the decision, both because, as co-authors of the solution that is reached, all the participants involved may perceive that they have an interest in the implementation, and because the decision will not be seen as "foreign" or imposed from above.

3. The "deliberative polyarchic" element

There is finally a third characteristic to this new approach, that may make it particularly attractive. This characteristic, however, does not simply keads to make explicit what is already implicit in the case-law of the European Court of Human Rights. It goes beyond the current approach. It does so by seeing the establishment of a more dialogical relationship between courts as an opportunity to encourage the national authorities to develop innovative solutions to questions raised by the application of the Convention for which the member States of the Council of Europe have not defined a common solution. Indeed, one of the main justifications of the doctrine of the "margin of appreciation" today is that it avoids imposing uniform solutions throughout the member States, at least where no single solution is imposed by the requirements of the Convention.[84] The doctrine therefore may both promote diversity, and encourage the search for the best techniques through which to reconcile conflicting claims made on the national authorities: by deferring to the

[82] Id., § 73.
[83] Id., § 74.
[84] See the references cited in that respect by S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux,* Bruxelles, F.U.S.L. / Bruylant, 2001, pp. 497-503.

appreciation of the national authorities about what responses are required by the situations they are confronted with, the reliance by the Court on the "margin of appreciation" may favor the search for solutions which, once they are identified and found to be compatible with the requirements of the Convention, may benefit other States, who may seek inspiration from local experiments. We enter into an architecture that J. Cohen and Ch. Sabel have labelled "deliberative polyarchy", in which "the very different circumstances in which problems arise suggest a need for differences in solution, while the commonality of problems indicates a need to discipline local solutions against those adopted elsewhere: the aim is not to achieve uniformity, but to pool information, identify best practices, and compare solutions across locations".[85] It is the contention of this paper that courts may participate in what is, in essence, a joint and co-ordinated search, that shall not necessarily lead to common or uniform solutions, but shall increase the burden weighing on each jurisdiction to justify the solutions it prefers in the light of other, alternative solutions developed by other jurisdictions facing similar circumstances.

This greater "freedom" left to the national authorities thus comes at a price, and it is not unconditional. For the choices that they are allowed to make depend upon these choices being justified, and it will be for the European Court to assess whether the justifications provided are sufficiently convincing: not taking into account solutions developed by other jurisdictions that achieve a better conciliation between the requirements of fundamental rights and the public policy objectives that lead to certain restrictions being imposed, could be seen as a deficiency that is "manifest" enough to trigger the intervention of the European Court of Human Rights. This would imply, for instance, a doctrine of proportionality according to which domestic courts would assess the restrictions imposed on human rights, not only based on the classical test (asking in essence whether the legitimate aim could be achieved by less restrictive means), but also taking into account solutions developed elsewhere (and therefore asking the author of the challenged measure whether such solutions have been considered, and if they have not been adopted, why).

Thus, one specific justification that could be required from the national courts claiming the benefit of trust, is that when confronted to an allegation of violation of Convention rights resulting from the adoption of a particular measure by national authorities, they examine whether the same objective could have been achieved at a lesser cost to the rights concerned -- i.e., with less severe limitations being imposed on the said rights --, *by examining how other States have been addressing the same issue*. The greater diversity of solutions adopted across the Council of Europe member States then could be transformed into an asset: far from constituting an obstacle to the adoption of uniform solutions, it would become a condition for collective learning to take place. This is what Cohen and Sabel call "deliberative coordination", which they describe as "deliberation among units of decision-making directed both to learning jointly from their several experiences and improving the institutional possibilities of such learning -- a system with continuous discussion across separate units about current best practice and better ways of ascertaining it".[86]

V. CONCLUSION

There is an analogy between the shift proposed here in the nature of the control exercised by the European Court of Human Rights, and a similar shift proposed a generation ago, in the debates concerning judicial review in domestic constitutional law. We now understand better that judicial control exercised on the basis of certain constitutional norms, is not necessarily opposed to democratic self-determination based on the principle of majoritarian decision-making: "representation-reinforcing" theories of judicial review and the New Public Law Movement have

[85] Joshua Cohen and Charles F. Sabel, "Global Democracy?", *New York University Journal of International Law and Politics*, vol. 37, No. 4, 2005, pp. 763-797, at p. 781.
[86] Cohen and Sabel, "Global Democracy?", cited above, at p. 781.

shown since the 1980s that this opposition was in many cases a false one, based both (as public choice theory was emphasizing at the same time in political science) on an idealization of the democratic process and on a misunderstanding of the reasons, based on democratic failure, why the intervention of courts might be required to uphold the social compact.[87] For very similar reasons, we now must acknowledge that there is no necessary tradeoff between a strong monitoring role of the European Court of Human Rights, and a greater space for deliberation at domestic level, based on the comparison of the best practices developed in the full range of Council of Europe member States.

It would be neither legally justified nor politically opportune to maintain the *Bosphorus* doctrine in its current form, as a doctrine that places the European Union in a privileged position, and that, instead of treating the Court of Justice of the European Union as a constitutional court comparable to any other, somehow inexplicably defers to its assessments more generously than to similar assessments made by its national counterparts. But if, for obvious political reasons, *Bosphorus* must have a second life, then it is time perhaps to transform it into something that would be both more promising and more theoretically sound. It can become a doctrine by which the European Court of Human Rights expresses its confidence in the decisions reached by independent courts established within the different legal orders that it supervises, provided certain procedural conditions are met, and provided these courts faithfully base their decisions on the body of jurisprudence gradually developed by the European Court itself, and meet the test of justifying their decisions taking into account the best practices available across all Parties to the Convention. If this is what the second life of *Bosphorus* looks like in a few years time, the accession of the EU to the European Convention on Human Rights will appear, in retrospect, as having accelerated a shift towards a new relationship between the European Court of Human Rights and the domestic courts: one that is more respectful of decision-making at national level, that strengthens the legitimacy of international judicial control of human rights, and that leads to a richer and more deliberative breed of case-law. The wide diversity across the member States of the Council of Europe will appear then not as a liablity, but as an asset; the principle of subsidiarity will be seen as a tool to strengthen rights, rather than used as a pretext to weaken them; and the doctrine of the margin of appreciation will be considered as a first but still under-theorized attempt to build an architecture in which courts do not compete against one another, but instead enter into a dialogue with one another based on a sound division of labour between them. It is such a future that this paper has outlined.

[87] See John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review*, Harvard Univ. Press, 1980; and, for major contributions to drawing the implications from public choice theory on constitutional law, the review by Daniel A. Farber and Philip P. Frickey, "The Jurisprudence of Public Choice", *California Law Review*, vol. 65 (1987), p. 873 and the follow-up volume by the same authors, *Law and Public Choice: A Critical Introduction*, Univ. of Chicago Press, 1991, as well as William N. Eskridge and Gary Peller, "The New Public Law Movement: Moderation as a Postmodern Cultural Form", *Michigan Law Review*, vol. 89 (1991), p. 707.