ESIL Reflections

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The 'Co-Respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR

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1. My analysis will consider questions of attribution of responsibility in the perspective of the Accession Agreement when an alleged breach of the European Convention on Human Rights (ECHR) involves both the European Union and one or more member States.*

Normally, this issue will arise when an application to the European Court of Human Rights is directed against a member State whose conduct implements a provision of EU law and this provision is to some extent at the origin of the alleged breach. As is well known, for this type of situation the draft Accession Agreement has provided for the EU the opportunity of becoming a party to the proceedings alongside the respondent State, as a co-respondent. A similar opportunity has also been envisaged in certain cases for member States, when an application is brought against the EU. These texts are designed to implement Article I (b) of Protocol No. 8 to the EU Treaties, which calls for "the mechanisms necessary to ensure that proceedings by non-member States and individual applications are correctly addressed to the member States and/or the Union as appropriate".

It would be pointless, at the advanced stage of negotiations concerning the Accession Agreement, to propose that a different approach should be taken. My aim is necessarily more limited: to suggest some adjustments to the mechanisms which have been devised and which by and large have already been agreed upon.

2. Before examining these "mechanisms", it is useful to consider briefly the approach taken by the European Court of Human Rights in addressing the issue of attribution of

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conduct and of responsibility when an alleged breach of an obligation under the European Convention finds its origin in a provision of EU law. So far, the issue could only be raised when an application was brought to the European Court against one or more member States and the Court could only assess the member States' responsibility. The clearest dictum of the European Court may be found in paragraph 153 of the *Bosphorus* judgment, given by the Grand Chamber in 2006. It reads as follows:

> "a Convention Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations" [in the case in hand, obligations under EU Law]

Thus a member State is considered to incur responsibility when the conduct of one of its organs is in breach of the European Convention, irrespective of the possibility that the State organ was complying with an obligation under an instrument other than the European Convention. This view is consistent with the general rule on attribution set forth in article 4, paragraph 1, of the ILC articles on State responsibility, according to which:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions…"

Although the ILC commentary does not expressly address the issue, the fact that the State organ implements an obligation under international law or under EU law does not affect the attribution of conduct to that State. Moreover, according to the articles on State responsibility, when a State's conduct is in breach of an obligation under a treaty such as the European Convention, it incurs responsibility unless it can invoke a circumstance precluding wrongfulness.

3. During the discussions which led to the adoption of the ILC articles on the responsibility of international organizations, the European Commission took a different view on the attribution of conduct implementing obligations under EU law. According to this view, State organs act quasi as organs of the EU when they implement an obligation under EU law which leaves them no discretion. Responsibility for their conduct would have to be attributed only to the EU, which, unlike other international organizations, does not shy away from international responsibility.

This approach has not been pursued in the negotiations leading to the draft Accession Agreement. Last September, the EU proposed "to make explicit the attribution rule whereby acts of member States are and remain only attributable to them, even if they are acts of implementation of EU law". Thus, one has to assume that, like the *Bosphorus* judgment, the Accession Agreement will start from the premise that, if an

organ of one of the member States causes a breach of an obligation under the ECHR when implementing a EU rule, the act is attributed to that State which incurs responsibility.

4. The key aspect of the devised “mechanisms” is that the EU may, at its request with the approval of the European Court or by accepting an invitation by the latter, become co-respondent with the member State or States against whom the application is directed.

One important point is that, even if the proceedings may lead to asserting the responsibility of the EU, the fact of adding the EU as a co-respondent does not affect the admissibility of the application. The last sentence of the proposed new Article 36, paragraph 4, of the European Convention reads: “The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings”. This seems to imply that the admissibility has only to be ascertained with reference to the entity against which the application was originally directed.

Thus, when the EU is only a co-respondent, an application could be declared admissible even if the local remedies have not been exhausted within the EU legal system. This looks odd, but may find a justification in the fact that the addition of the EU as co-respondent depends on the EU’s consent, which may be taken as a waiver of any objection to the admissibility of the application concerning the EU which might otherwise have been raised.

5. According to the draft Accession Agreement, the EU may be invited by the European Court to become a co-respondent, or make a request to that effect in relation to an alleged violation of the ECHR, “if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law” (article 3, paragraph 2).

The main purpose of the EU becoming a co-respondent is to allow the EU to enjoy all the rights of a party to the proceedings in order to defend what it considers to be the proper interpretation of the relevant provisions of EU law and of the ECHR.

In the proceedings before the European Court the EU’s line of defence would have to take into account the views of the Court of Justice, should this Court take up a position on the question of compatibility between the provision of EU law and the Convention. The role of the Court of Justice has been enhanced by a paragraph in the draft Accession Agreement (article 3, paragraph 6) which envisages that, in “proceedings to which the European Union is co-respondent”, before the decision of the European Court of Human Rights, the Court in Luxemburg may provide an “assessment” of “the compatibility with the Convention rights at issue of the provision of European Union law” in question. In the same paragraph it is stated that “[a]ssessing the compatibility shall mean to rule on the validity of a legal provision contained in acts of the European Union institutions, bodies, offices or agencies, or on the interpretation of a provision of the

Treaty on European Union, the Treaty on the Functioning of the European Union or of any other provision having the same value pursuant to those instruments". It is clear that, when considering the validity of a provision of EU law, the Court of Justice will have to give an interpretation of that provision. This might lead the same Court to conclude that the provision in question is consistent with the Convention.

The relevant procedure – the so-called procedure of "prior involvement" of the Court of Justice - is still undefined. It is likely that this procedure will not be outlined in the Accession Agreement, but will be left to provisions of EU law. This is an understandable choice that would, however, entail the need for a revision of the TFEU through one of the procedures envisaged in article 48 TEU. It is not clear who will be able to start the relevant proceedings and who will be entitled to be a party, nor is it easy to imagine what effects the Court's assessment will have, both on the provision of EU law and on the legal position of the applicant.

The idea of giving the Court of Justice the opportunity of making an assessment on compatibility with the ECHR when the EU is a co-respondent has been criticized because of the privileged position that the Accession Agreement would give this Court in relation to all the supreme courts of the States parties to the Convention. It may be expected that the European Court of Human Rights will not lightly contradict an assessment specifically made by the Court of Justice. Since the members of the Court of Justice have clearly expressed their strong wish that the procedure of "prior involvement" be introduced, and moreover the same Court is likely to be requested to give an opinion on the Accession Agreement under Article 218 (9) TFEU, I shall refrain from making any suggestion concerning this part of the mechanisms.

6. Traditionally, one matter of major concern from the EU's point of view is that no court or tribunal other than the Court of Justice should take a decision on the respective competences of the EU and its member States. This issue is viewed as a delicate internal matter, which should be cooked in the EU "cuisine", whether it is to be settled by the Court of Justice or by an agreement between the EU and the relevant member States.

This concern has led the negotiators to omit in the draft Agreement any indication of the criteria that the European Court of Human Rights should use in order to allocate responsibility between the EU and its member States in case of an assessed breach. With regard to the EU being a co-respondent, the commentary (paragraph 54) on the draft Agreement states that, "should the Court find this violation, it is expected that it would ordinarily do so jointly against the respondent and the co-respondent(s); there would otherwise be a risk that the Court would assess the distribution of competences between the EU and its member States". More recently, in November 2012, the following text was added as Article 3, paragraph 7: "If the violation in respect of which a High Contracting Party has become a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless they have jointly requested the Court that only one of them be held responsible and the Court decides that only one of them be held responsible".

The solution endorsed in these texts is not convincing. In most cases in which the EU would be co-respondent no issue of competence will arise. The question of competence may be relevant when a breach derives from an omission, supposing that the procedure of co-respondent is applicable also in that case. This will be a rare occurrence. What the European Court would normally have to decide is whether, apart from the responsibility of the member State against whom the application is directed, the EU would also be responsible for its contribution to the wrongful act of the member State. The question is *not about who is competent, but whether the provision of EU law is actually at the origin of the breach*.

For instance, if a breach depended on an implementation of a directive, the question would be whether the breach is due to the use by the Member State of its discretion or whether the breach depends on the mandatory content of the directive. In the latter case, the EU would also be regarded as responsible.

It is true that, in deciding on the responsibility of the EU, the European Court of Human Rights would then have to examine some provisions of EU law and the way they relate to rules of municipal law. This is nothing new in the European Court's jurisprudence: I may quote as an example the 1996 judgment in *Cantoni v. France*. Moreover, how can one expect an external control over compliance by the EU with its obligations under the Convention if the European Court was prevented from interpreting the content of provisions of EU law? The concern that matters relating to EU law should be left to be resolved by the EU and its member States cannot be carried too far.

7. Letting the European Court of Human Rights identify when the EU is responsible is more consistent with what is required by Protocol No. 8 to the Treaties than what is suggested in article 3, paragraph 7, of the draft Accession Agreement. The relevant text of the Protocol, which I quote again, requires the Agreement to provide for "the mechanisms necessary to ensure that … individual applications are correctly addressed to member States and/or the Union, as appropriate". This requirement does not imply, but rather seems to exclude, that a mechanism be established according to which the EU be considered as a rule jointly responsible, when, as in the example of a breach committed through the implementation of a directive, the application has been correctly addressed to a Member State which breached its obligations under the ECHR in the exercise of its discretion in the implementation of the directive. This could also reflect the position that the EU may have taken as co-respondent in the case.

8. As I mentioned at the beginning, the mechanism of co-respondent is also intended to apply when an application is directed against the EU. According to article 3, paragraph 3, of the draft Accession Agreement, member States may, when invited by the Court or at their request subject to the Court's approval, "become co-respondents to the proceedings in respect of an alleged violation […] if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably

where that violation could have been avoided only by disregarding an obligation under those instruments".

This provision is intended to reflect the fact that member States are required to express their consent when one of the Treaties has to be revised. The paragraph in question gives member States the opportunity of expressing their views before the European Court even when the applicant is not one of their nationals. Moreover, they can do so with the rights belonging to a party to the proceedings. Since the Treaties are part of EU law and the interpretation that the Court of Justice may have given is authoritative for the member States, there is little that a member State could contribute by becoming a co-respondent.

9. Article 3, paragraph 4, of the draft Accession Agreement also envisages that "where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent" if the conditions set out in the previous paragraphs are met. It is difficult to understand the practical meaning of this provision. The European Court of Human Rights could at any event find that a co-respondent incurs international responsibility. With regard to a co-respondent, admissibility of the application would not have to be assessed, but this would hardly correspond to an interest of the entity accepting the European Court's invitation or requesting that Court to become co-respondent. Another consequence of there being a co-respondent is that it becomes possible to trigger the procedure for "prior involvement" of the Court of Justice. However, there is little reason why this procedure should not be applicable also when the EU is respondent. It would be even more logical to make it applicable in all the instances in which a question of compatibility of a provision of EU law with the European Convention arises.