Judicial Comity Overstretched:

The Bosphorus Presumption as an Attempt to Channel the Opposing Tides of European Fundamental Rights Protection

Eve Thomson
Word Count: 14,982
Supervisor: Professor Victor Ferreres Comella

Submitted in Partial Fulfilment of the Requirements of the L.L.M. in European and Global Law

Abstract

Far from channelling opposing tides, the Bosphorus presumption of equivalent protection is an example of judicial comity overstretched: with a distorting effect on fundamental rights protection. This thesis will contextualise Bosphorus against a background of concerns about the 'fragmentation' of international law: querying, but ultimately refuting, the idea that judicial comity can be framed as a *legal* concept in international law. By employing a comparative analysis with the Solange doctrine of the German Federal Constitutional Court, this thesis will rebut the assumption underlying Bosphorus. Where a substantive and procedural comparison between German law and EU law is justified as a comparison between two polities with similar political structures, the same *procedural* comparison of equivalence cannot be made between the EU and Council of Europe. The latter lacks constitutional traits. The insufficiently robust scrutiny of potential rights violations and lack of clarity surrounding the dynamic between EU law and the ECHR will lead to the conclusion that Bosphorus should be abandoned upon accession of the EU to the ECHR. This conclusion is reinforced by the importance of the EU, a self-referential legal system like any other Council of Europe state, being subject to an external control mechanism upon accession; without any presumptive benefit. The ECtHR can, however, continue to show comity: by deploying the margin of appreciation, with a particular mind to the nature of EU acts as the product of the negotiations of 27 member States.

Acknowledgments

I would like to thank my supervisor Professor Victor Ferreres Comella for his invaluable support. This thesis owes its existence to his brilliant mind, which first sparked my interest in this area of the law and which pushed me to interrogate my own understanding.

I am indebted to my undergraduate tutors, whose generosity has opened up a world of opportunities. The support of Professor Andrew Dickinson, Professor Justine Pila and Associate Professor Thomas Adams continues to be a source of confidence in my studies. I am equally indebted to all of the staff at UPF, who have coloured my time here with new ways of thinking. Professor Giuseppe Martinico's support in undertaking a comparative legal analysis has been invaluable in writing this thesis. I am especially grateful to Associate Professor Josep Capdeferro, without whom I would not have embarked upon this Masters. Writing this thesis involved delving into a legal system – and a language – I was not familiar with. I am grateful to my German friends for all of their help.

Arriving in Barcelona alone, I could not have imagined I would have been fortunate enough to meet the people I have. This year would not have been the same without the kindness of the people around me. I am grateful to the friends I have made, who will soon be spread all over the world but to whom I will always be thankful to have in my life. To Sydney and Babette, whose laughter has made this year so special. To Shane, for the endless support and willingness to catch a flight. To the city of Barcelona, for inspiring me every day.

Over the last five years, my studies have taken me far from home. None of this would have been possible without the unwavering support of my family. I am thankful to both my grandparents and my brother for their constant encouragement. I am thankful to my parents for their endless love and generosity, to which I owe everything.

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Introduction

The Bosphorus strait signifies the point at which Asia ends and Europe begins. There is no such clear delineation between the spheres of application of European Union (EU) law and the European Convention on Human Rights (ECHR)[1]. The European Court of Human Rights (ECtHR/Strasbourg Court) has sought to channel opposing tides through the Bosphorus presumption of equivalent protection: the presumption that a State has not strayed from ECHR requirements when it does no more than implement EU obligations[2]. Premised on the idea that the EU system of fundamental rights protection is 'equivalent' though not identical to that of the ECHR, Bosphorus strives to balance respect for the autonomy of EU law with the need to prevent an EU-shaped gap in rights protection. This thesis will seek to examine the extent to which the presumption offers an appropriate means of regulating the complex system of European fundamental rights protection.

Chapter One will provide an overview of the dynamic that exists between the ECHR and EU law. Until the mandate for the EU to accede to the ECHR is realised[3], the ECtHR can only indirectly review national acts implementing EU law. Bosphorus must therefore be understood contextually, as a tool which regulates the interaction between two jurisdictions which do not relate to one another in a straightforward, hierarchical manner.

Chapter Two will discuss the particular sources of inspiration for the development of the presumption of equivalent protection: analysing both the Solange method of the German Federal Constitutional Court (BVerfG)[4] and concerns about the 'fragmentation' of international law[5]. Lavranos' identification of 'judicial comity' as the legal basis of the Bosphorus doctrine will be considered and rejected: although the ECtHR were certainly inspired by the idea of 'judicial comity' this cannot be reconstructed as a technical doctrine in international law.[6] Bosphorus has lacked a sound legal basis from its inception.

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[1] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (1950)
[2] *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005)
[3] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) Article 6(2)
[4] BVerfG, 22 October 1986, 2 BvR 197/83, *Solange II*
[5] United Nations General Assembly, 'Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (13 April 2006) U.N. Doc. A/CN.4/L.682
[6] Nikolaos Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions among International Courts and Tribunals' (2008) 30 Loy LA Int'l & Comp L Rev 275

Chapter Three will employ both Platon's methodology[7] and a comparative analysis with the Solange doctrine to break down the distinct components of the presumption of equivalent protection. This will lead to the conclusion that the assumption underlying Bosphorus – the idea that a comparison of equivalence *can* be drawn between the two legal orders – ought to be refuted. Where a procedural comparison between German law and EU law is justified as a comparison between two polities with similar political structures, the same cannot be said of the EU and Council of Europe. The latter lacks the constitutional features which make the drawing of a procedural comparison appropriate. This is not mitigated by the fact that Bosphorus, unlike Solange, admits rebuttal in individual cases: this possibility is undermined by the stringent standard of 'manifest deficiency' and the ECtHR's reluctance to carry out meaningful scrutiny.[8] The result is insufficiently robust scrutiny of potential human rights violations, and an unacceptable lack of certainty as to the scope of protection.

Chapter Four will therefore conclude that accession of the EU to the ECHR ought to be seen as an opportunity to confine the Bosphorus presumption to the past. An analysis of the nature of the EU will lend itself in support of the EU being treated like any other party to the Convention following accession. This is not to say that there will be no place for judicial comity. Rather, it is to say that the ECtHR already has a tool at its disposal to display comity. Namely, the margin of appreciation: applied with a particular mind to the nature of EU acts as the product of the negotiations and compromise of 27 Member States, who may be said to support the balance of fundamental rights struck therein.[9]

[7] Sébastien Platon, 'The Equivalent Protection Test: From European Union to United Nations, from Solange II to Solange I' (2014) 10 Eur. Const. Law Rev. 226
[8] C. Eckes, 'Does the European Court of Human Rights Provide Protection from the European Community – The Case of Bosphorus Airways (2007) 13 Eur Pub L 47
[9] Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham Int'l LJ 1114, 1141

Chapter One: Overview of the Dynamic between the ECHR and EU Law

Two European courts - one in Strasbourg, one in Luxembourg – have long coexisted in the absence of a clearly defined jurisdictional connection. Where the ECHR was established as a specialist human rights jurisdiction from its inception, the early European Economic Community (EEC) was initially premised purely on market integration. Arguably, this divergence in purpose continues to distinguish the two Courts today: whilst one may truly be regarded as a human rights court, the other pursues a "pro-integratione approach"[10] to fundamental rights: its central objective being to ensure the primacy of Union law.[11]

I. The Development of the EU Fundamental Rights Narrative

The dynamic between the two legal systems reached new heights upon the development of an EU fundamental rights narrative. Although declared to be foundational principles of the Union, fundamental rights were not recognised by the early EEC. It was the Court of Justice of the European Union (CJEU) that took the first step in acknowledging fundamental rights as general principles of EU law.[12] Their acknowledgment must be contextualised alongside the Court's own pronunciation of the supremacy of EU law.[13] The trigger for the fundamental rights narrative was the objection to supremacy voiced by the BVerfG, articulating concern in Solange I as to whether EU law respected the human rights embedded in the German Constitution.[14] German courts would continue to query the compatibility of a European Community (EC) measure with the German Constitution, *as long as* the European integration project continued not to provide for a catalogue of fundamental rights.[15] This triggered the development of the 'Solange method' as a means of accommodating a complex jurisdictional relationship between the national and supranational spheres.

[10] FRAME Lecture by Judge Dean Spielmann on The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights (27 March 2017) Brussels, 3
[11] ibid
[12] Case 29/69 *Stauder* [1969] ECR 419
[13] Case C–6/64 *Costa v ENEL* [1964] ECR 585
[14] BVerfG, 29 May 1974, BvL 52/71 *Solange I*
[15] ibid BVerfGE 37, 271, 281

The transformation of the Union into a supranational constitutional order via the recognition of fundamental rights *was* sparked, then, by 'pro-integratione' reasons.[16] The CJEU had to confer normative validity upon the principle of supremacy to guarantee member States' compliance. The CJEU turned to the "constitutional traditions common to the Member States"[17] and "international treaties"[18] which they had ratified, with a particular mind to the ECHR, as the sources from which fundamental rights were derived from. The ECHR, then, has always been a source of inspiration for the interpretation of EU fundamental rights.

II. Defining the Relationship between the EU and ECHR

Beyond simply *drawing inspiration* from the ECHR, the EU has taken particular steps to show compliance with the Convention. Article 6(3) Treaty on European Union (TEU) provides that fundamental rights, as guaranteed by the ECHR, shall 'constitute general principles of EU law.' [19] Article 52(3) of the EU Charter of Fundamental Rights (CFR) provides that where the rights contained therein correspond to those in the ECHR, they will be given the same meaning and scope as laid down in the Convention, albeit this does not 'prevent Union law providing more extensive protection.'[20] Article 53 provides a safeguard for ECHR rights, providing that nothing in the Charter 'shall be interpreted as restricting or adversely affecting human rights' recognised by the ECHR.[21] This is a clear mandate not to use the Charter to give a restrictive interpretation to another ECHR right[22], albeit with the qualification that this must not compromise the effectiveness of EU law.[23]

These provisions may, however, be misleading insofar as they do not make the ECHR a *formal* source of EU law: in the absence of accession (mandated, but not yet realised, by Article 6(2) TEU) there is no institutional relationship between the EU and ECHR. The outcome is two European jurisdictions, which do not relate to one another in a straightforward, hierarchical relationship. Although the EU cannot be directly sued in litigation before the ECtHR, the latter Court does have jurisdiction over the acts of national

[16] Spielmann (n 10) 3
[17] Case C–11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4
[18] Case 4/73 *Nold* [1974] ECR 491, para 13
[19] Consolidated Version of the Treaty on European Union (n) Article 6(3)
[20] Charter of Fundamental Rights of the European Union [2000] OJ C364/01, Article 52
[21] Ibid, Article 53
[22] Bruno de Witte, 'Article 53 - Level of protection' in S. Peers, T. Hervey, J. Kenner, & A. Ward (Eds.), *The EU Charter of Fundamental Rights: a commentary* (Hart 2014) 1523, 1527
[23] Case C–399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107

authorities implementing EU law. Matthews v UK confirms that whilst Council of Europe states may transfer competences to an international institution, they remain individually responsible for any breach of human rights incurred in the exercise of the Treaties.[24] The ECtHR will scrutinise not only the direct act of states at national level, but also the exercise of those competences by international organisations. This gives rise to a risk of conflicting obligations for EU member States, all of which are party to the ECHR. This is evidenced by the case of Bosphorus.

III. Bosphorus v Ireland

In the Bosphorus litigation, Ireland impounded a plane rented by the applicant company from the former Yugoslavia's national airline.[25] Ireland's actions were based on an EU regulation[26], as interpreted by the CJEU in a preliminary ruling[27], which sought to give effect to a UN sanctions regime against Yugoslavia. The applicant argued that this constituted an infringement of its ECHR rights. The ECtHR, recognising that Ireland was acting consistently with a binding rule of EU law, under which it had no discretion, acknowledged that the alleged infringement emanated from the EU Regulation. The Court proceeded to set out the general approach to be adopted in such a situation.

Strasbourg held that it was 'legitimate' for states to grant competences to an international institution such as the EU, even where that institution is not itself party to the Convention.[28] National states would nonetheless remain individually responsible for any breach of human rights, regardless of their actions being the result of adherence to obligations emanating from membership of an international organisation.[29] However, these state actions could be justified, provided the organisation in question protected 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."[30] Where a finding of equivalent protection is made out, there will be a

[24] *Matthews v the United Kingdom* App no 24833/94 (ECtHR, 18 February 1999)
[25] Bosphorus v Ireland (n 2)
[26] Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14
[27] Case C–84/95 *Bosphorus v Minister for Transport* [1996] ECR I–3953
[28] Bosphorus v Ireland (n 2) para 150
[29] ibid para 153
[30] ibid para 155

presumption that the state has not departed from its obligations under the ECHR where it does no more than implement its obligations emanating from its membership.[31] Only where the protection of ECHR rights is 'manifestly deficient' will that presumption be rebutted.[32] In Bosphorus itself, as the EU legal system was deemed by Strasbourg to provide equivalent protection for fundamental rights, the presumption arose and was not rebutted on the facts of the case.[33] The impoundment of the applicant's aircraft by the Irish authorities did not therefore amount to a violation of Article 1 ECHR.[34]

Bosphorus was not the first time that Strasbourg attempted to carve out an approach which balanced Member States' competing interests under EU law and the ECHR. Indeed, the ECtHR appeared to take a *more* deferential approach in M & Co v Germany.[35] The applicant claimed that the enforcement of a European Commission fine imposed upon Germany violated its Convention rights. Although German responsibility under the ECHR could be engaged by virtue of its implementation of EU law, the European Commission of Human Rights rejected the case on the basis that the EU legal system ensured rights protection *equivalent* to that under the ECHR. Insofar as Germany was left with no discretion in implementing Union law, Strasbourg would not interfere: *as long as* an equivalent system of rights protection existed in EU law. Bosphorus is distinguished from M & Co by the fact that Strasbourg in the former case articulated its intention to review the particular circumstances of each case to scrutinise lapses in rights protection, albeit that it would approach *the system as a whole* as opposed to individual EU acts. In contrast to the abstract approach taken by the Court in M & Co, the Bosphorus presumption is contingent on an examination of protection available 'at the relevant time', such that there is no "enduring presumption of compliance."[36]

[31] ibid para 156
[32] ibid
[33] ibid para 166
[34] ibid para 167
[35] *Melcher (M) v Germany* App no 13258/87 (ECtHR, 9 February 1990)
[36] Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Hum. Rights Law Rev 87, 103

Chapter Two: The Bases of Bosphorus

I. The Solange Method

The ECtHR were very clearly influenced by the Solange jurisprudence of the German Federal Constitutional Court; some commentators going as far as to argue that Bosphorus amounts to a straightforward application of the Solange method in a novel context.[37] This thesis will therefore seek to employ a comparative analysis with the Solange doctrine of the BVerfG, to examine the extent to which its extension by Strasbourg was justified.

Following the German Court's challenge to supremacy in Solange I, expressing concern about the extent to which EU law respected fundamental rights, the BVerfG subsequently accepted the effectiveness of EU fundamental rights protection in Solange II.[38] Although the EU was *yet* to formally expounded a catalogue of rights[39], as called for in Solange I, the German Court held that *as long as* the CJEU continued to effectively guarantee a level of fundamental rights protection essentially equivalent to that provided by the German Constitution, it would refrain from reviewing EC secondary law for rights compliance.[40] Whilst conceding part of its jurisdiction, the BVerfG did ultimately preserve for itself the competence to review EU law: where the standard of the entire EU system of rights protection failed to be maintained at the minimum level of the German Constitution.

The starting point of the ECtHR in Bosphorus, looking to the substantive and procedural protection of the EU system in order to determine whether it can be considered 'equivalent' to that of the ECHR, is therefore the same. However, where the Solange tool regulates the hierarchical, jurisdictional relationship between a national and supranational legal order (albeit one characterised by competing conceptions of the supremacy of EU law), Bosphorus regulates a horizontal jurisdictional relationship between two international courts. In order to determine whether this extension is justified, we must examine whether there is a legal basis for the method as a tool to regulate the relationship between legal systems in international law.[41]

[37] See Platon (n 7); Lavranos (n 6)
[38] Solange II (n 4)
[39] The Charter of Fundamental Rights of the European Union (n 20) was not ratified until 2000.
[40] Solange II (n 4) BVerfGE 73, 339 (387)
[41] Lavranos (n 6) 324

II. Judicial Comity as a Response to the Fragmentation of International Law

The horizontal relationship that Bosphorus regulates suggests that the doctrine must be understood contextually: against a background of concerns about the 'fragmentation' of international law. As aspects of societal life multiply and become increasingly specialised, so too does their legal regulation: giving rise to many autonomous bodies of legal rules, institutions and jurisdictions.[42] 'Fragmentation', as identified by the Report of the Study Group of the International Law Commission (ILC), is the naturally occurring process that arises from the expansion of legal activity worldwide.[43] The development of both the ECHR and EU legal spheres evidence the 'fragmentation' of international law into specialist areas: the former a human rights treaty, the latter a project of market integration. The growth of regional and international jurisdictions should be positively appraised: signifying a shift towards the use of legal tools to resolve the disputes which inevitably arise in an increasingly complex globalised world.[44]

Problems arise when autonomous systems develop without regard to the practices of other, overlapping jurisdictions; each of which provides for divergent means of addressing problems. Insofar as "novelty presents itself as 'fragmentation' of the old world"[45], specialist systems often arise specifically to depart from previous practice: with a knock-on effect on the integrity and coherence of the law. Conflict, then, should be seen as the inevitable by-product of overlapping jurisdictions which coexist on an ambiguous plane in the supranational sphere. It is when nation states are faced with *irreconcilable* obligations in international law that concerns about 'fragmentation' are heightened: pertaining to the fear that states may be compelled to violate one law to comply with another, or will be faced with the possibility of continuous re-litigation of the same dispute.[46] Directly inconsistent interpretations risk dismantling the core of legal principles, and thereby subverting the authority of the systems in question.[47] Ultimately, this undermines compliance with, and respect for, international law as a means of resolving disputes. The fragmentation of international law therefore risks degrading the rule of law itself.

[42] UN General Assembly (n 5) 11
[43] ibid 15
[44] Lavranos (n 6) 276
[45] UN General Assembly (n 5) 16
[46] Lavranos (n 6) 333
[47] ibid

It is against this background that lawyers strive towards harmony and systematicity in constructing an account of law. In the absence of an apex rule regulating the interaction of jurisdictions, it is for interpreters to 'seek relationships'[48]. In this way, rules can be envisaged 'as the operation of a whole'[49]: consistent with Dworkin's approach to legal interpretation.[50] Such is the idea of judicial 'comity': where courts in one jurisdiction show "respect and demonstrate a degree of deference to the law of other jurisdictions, including the decisions of judicial bodies operating in the jurisdictions."[51] This mitigates the risk of conflict that arises from overlapping jurisdictions by facilitating mutual judicial dialogue and "cross-fertilisation."[52]

This is how we ought to understand Bosphorus and Solange: as forming part of a jurisprudence characterised by compromise to accommodate different systems in a fragmented international order. This emerges clearly from the Bosphorus judgment itself. The lack of a clearly defined, hierarchical relationship between the ECHR and EU law did not need to result in 'legal paralysis'.[53] Acting consistently with its obligations under EU law was deemed to be not only a general interest worthy of Ireland pursuing, but "a legitimate interest of considerable weight"[54] on the basis that "the Convention has to be interpreted in light of any relevant rules and principles of international law in relations between the Contracting parties."[55] This particular eminence given by the Court to Article 31(3)(c) Vienna Convention is an explicit nod to Strasbourg's pursuit of systematicity in Bosphorus: it is by contextualising a Treaty amongst the existence of others that interpreters pave the way for harmonisation.[56]

The presumption of equivalent protection was therefore adopted to *facilitate* "state cooperation through international organisation"[57], arguing that this was "especially important for the European Community given its distinctive features of supranationality and the nature

[48] UN General Assembly (n 5) 20
[49] ibid 23
[50] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977)
[51] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003) 260
[52] ibid 261
[53] UN General Assembly (n 5) 245
[54] Bosphorus v Ireland (n 2) para 150
[55] ibid
[56] Vienna Convention on the Law of Treaties (Adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S 331
[57] Bosphorus v Ireland (n 2) para 124

of Community law."[58] At first glance, then, it seems that the immediate beneficiary of the doctrine is the EU itself: its integration project less likely to be hindered by more lenient scrutiny. Although it is not refuted that the EU reaps the benefits of the presumption, it is in fact the EU member States that we ought to envisage as the *principal* beneficiaries of the doctrine. This was hinted at by the ECtHR, in holding that it would "pose an incalculable threat to the very foundations of the Community"[59] if *member States* were compelled to scrutinise rights compliance prior to implementing EU acts. Insofar as judicial comity mitigates the risk of conflict that arises from overlapping jurisdictions, it is primarily states that end up better off: equipped with the means to reconcile their obligations in international law. The ECtHR, too, may be said to benefit from the rule of law being upheld generally.

Fragmentation was characterised by the ILC Report as a natural process. International law has, by its very nature, always suffered from a fragmenting effect by virtue of being comprised of different national jurisdictions.[60] Thus, a central conclusion of the report was that we already have at our disposal a "wealth of techniques"[61] to address the risk of conflicting obligations. This is precisely what the ECtHR sought to do in Bosphorus: drawing upon a technique developed by the BVerfG in order to regulate its own horizontal relationship with the EU.

> The move from a world fragmented into sovereign States to a world fragmented into specialized 'regimes' may in fact not at all require a fundamental transformation of public international law – though it may call for imaginative uses of its traditional techniques.[62]

III. Judicial Comity: Legal Obligation or Mere Judicial Discretion?

The extension of the Solange reasoning to the relationship between EU law and the ECHR *does* raise the question as to whether there is a legal basis for the application of the presumption. Lavranos argues that the display of comity is not simply a matter of judicial discretion, rather it should be considered a legal principle grounded in international law.[63]

[58] ibid
[59] ibid
[60] UN General Assembly (n 5) 15
[61] UN General Assembly (n 5) 15
[62] ibid 246
[63] Lavranos (n 6) 326

Lavranos cites the duty of *all* international courts under Article 1 United Nations (UN) Charter to 'bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes'.[64] This legal duty is reinforced by the Preamble to the Vienna Convention, customary international law which mandates that 'disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law.'[65] These provisions lead Lavranos to the conclusion that judicial comity forms a component of the principles of justice: placing a legal obligation on judges to facilitate the effectiveness of international law.[66] Bosphorus is not merely justified, it is legally mandated.

There are several problems with Lavranos' thesis. First, Lavranos argues that *all* international courts are obliged to comply with the standards of the UN Charter, including Article 1.[67] We should, however, query whether the ECtHR *is* an international court obliged to accommodate other subjects of international law to achieve peace: its principal mission is to protect human rights. Strasbourg is not a classic international law court: undermining the extent to which it may be bound to abide by concepts stemming from public international law. This argument may sit at odds with the Court's own invocation of Article 31(3)(c) Vienna Convention in Bosphorus.[68] Indeed, the ECtHR frequently relies upon international law standards to interpret the Convention. It has repeatedly affirmed that the ECHR 'cannot be interpreted in a vacuum.'[69] However, Judge Ress' concurring opinion demonstrates that we should not take the Court's application of public international law over the Convention for granted.[70] Judge Ress was clear that the Court's invocation of Article 31(2)(c) "cannot be interpreted as giving treaties concluded between the Contracting Parties precedence over the Convention."[71] As identified in Matthews v UK[72], "international treaties between the Contracting Parties have to be consistent with the provisions of the Convention."[73]

[64] United Nations, Charter of the United Nations, 1945 1 UNTS XVI, Article 1(1)
[65] Vienna Convention on the Law of Treaties (n 56) Preamble
[66] Lavranos (n 6) 326
[67] Ibid 325
[68] Bosphorus v Ireland (n 2) para 150
[69] See, for example, *McElhinney v. Ireland* App no 31253/96 (ECtHR, 21 November 2001) para 36; *Hassan v the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) para 77
[70] Bosphorus v Ireland (n 2) Concurring Opinion of Judge Ress para 5
[71] ibid
[72] Matthews v UK (n 24)
[73] Bosphorus v Ireland (n 2) Concurring Opinion of Judge Ress para 5

Second, even assuming that the ECtHR *can* be regarded as a traditional international court, it is submitted that the tenor of Lavranos' reasoning is contingent upon Article 103 UN Charter: the 'supremacy clause' which provides for the pre-eminence of Charter obligations over those flowing from any other international agreement.[74] However, it is submitted that Article 103 cannot provide a robust legal basis. The decision of the CJEU in the Kadi jurisprudence demonstrates that the EU will not enforce a decision of the UN Security Council that violates EU fundamental rights.[75] Although the CJEU has no free-standing jurisdiction to conduct fundamental rights scrutiny of a UN Resolution, such a measure *will* have to abide by EU rights standards to be implemented by EU institutions.[76] Insofar as Bosphorus *did* concern Ireland's implementation of an EU Regulation which itself sought to give effect to the UN sanctions regime against Yugoslavia, it might be said that "the ECtHR did end up taking – at least indirectly – a stand on that hierarchy."[77] The Court confirmed its willingness to scrutinise a national act emanating from the UN in the case of Al-Dulimi, whilst circumventing explicit consideration of the status of Article 103.[78] Strasbourg's readiness to review national actions for Convention compliance, regardless of their origins, is itself a suggestion that "in the Strasbourg Court, a binding Security Council resolution is not the end of the discussion."[79] The 'supremacy clause' is in crisis.

Third, even assuming that Article 103 is in good health and the ECtHR is bound to comply with the standards contained in the Charter, the presumption of equivalent protection does not follow from either Article 1 UN Charter or the Preamble of the Vienna Convention. Strasbourg, a third-party adjudicator committed to the 'peaceful' resolution of disputes, may already make the claim to compliance with the general provisions of both Article 1 and the Preamble. Thus, even if we were to accept that judicial comity has a *legal* basis in international law, comity does not necessarily compel a presumption of equivalent protection. Indeed, as will be argued in this thesis, the ECtHR already has the tools at its disposal to accommodate other legal orders. Most importantly, the margin of appreciation: the scope for

[74] United Nations (n 64) Article 103: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
[75] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi* (Judgment of 18/7/2013)
[76] ibid
[77] Eckes (n 8) 60
[78] *Al-Dulimi and Montana Management Inc. v Switzerland* App no 5809/08 (ECtHR, 21 June 2016) paras 145-149
[79] Eckes (n 8) 60

flexible operation granted by the ECtHR to the authorities of Contracting States in performing their obligations under the Convention.[80]

The preliminary conclusion is that although the ECtHR were inspired by the idea of judicial comity in the development of the presumption of equivalent protection, we cannot situate this concept in international law. Even prior to EU accession to the ECHR, Bosphorus has lacked a sound *legal* basis from its inception.

[80] Steven Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights' (2000) Human rights files No. 17, Council of Europe Publishing, 5

Chapter Three: The Components of Bosphorus

This thesis will seek to break down and examine the distinct components of the Bosphorus presumption of equivalent protection to identify its shortcomings as a means of accommodating the EU and ECHR legal orders. With some modifications, this section will broadly adopt Platon's methodology in examining the components of Bosphorus: turning firstly to how the ECtHR establishes the existence of 'equivalent protection', before looking to the scope of immunity conferred by virtue of that presumption.[81] This will be supported by a comparative analysis of the Solange doctrine. Three principal conclusions will be reached. First, where a substantive and procedural comparison between German domestic law and EU law is justified as a comparison between two polities with similar political structures, the same *procedural* comparison of equivalence cannot be made with the Council of Europe; which lacks constitutional traits. Second, although Bosphorus admits rebuttal in individual cases: this possibility is undermined by the standard of 'manifest deficiency' and the ECtHR's reluctance to carry out meaningful scrutiny.[82] Third, the dynamic between EU law and ECHR remains unclear, as a result of Bosphorus' failure to adequately clarify both the *object* of the immunity it confers, and whether it operates as an admissibility criterion or standard of substantive review. The result is insufficiently robust scrutiny of potential human rights violations, and a lack of certainty as to the scope of individual rights protection.

I. Establishing Equivalence

Forms of Equivalence

The ECtHR were clear that for the presumption to arise, it must be established that the organisation in question protects fundamental rights "as regards both the substantive guarantees offered and the mechanisms controlling their observance"[83]. There are therefore two *forms* of equivalence mandated by Bosphorus. Firstly, substantive: asking whether the substantive fundamental rights protected in the system are equivalent to those contained in the ECHR. Secondly, procedural: asking whether the *mechanisms* to protect fundamental rights in the system are equivalent to those of the ECHR. Academic commentary on the comparison made in Bosphorus tends to focus upon the extent to which EU substantive and

[81] Platon (n 7) The order of Platon's methodology has been modified
[82] Eckes (n 8)
[83] Bosphorus v Ireland (n 2) para 155

procedural rights protection can in practice be regarded as equivalent to that of the ECHR.[84] This thesis will instead focus upon the premise: the very making of that comparison.

It is submitted that when the BVerfG looks to the reliability of the EU system in comparison to the German Constitution, it is justified in searching for equivalence because the subjects of the comparison are broadly similar. This analysis is contingent upon ascertaining the precise nature of the EU itself. The EU clearly goes beyond the scope of a traditional international organisation: it is an international organisation of integration.[85] The Union bears little resemblance to the original EEC, largely due to the development of constitutional structures and institutions. Many of its traits resemble that of a federal polity: with a broadly democratic procedure, political institutions and ordinary courts, it may be said to be a "federal state in the making."[86] As stated by Dean Spielmann, Judge at the General Court of the EU and Former President of the ECtHR, the EU is akin to a "domestic…self-referential legal order".[87] Just as Germany has both substantive fundamental rights enshrined in its Basic Law *as well as* political and institutional structures geared towards their protection; so too does the EU.

Indeed, in Solange II, the BVerfG placed emphasis on the political endorsement of fundamental rights within the EU.[88] The German Court drew attention to the Joint Declaration by the European Parliament, the Council and the Commission which "stressed the prime importance they attach to the protection of fundamental rights"[89] as well as the European Council's Declaration on democracy.[90] Discussing the degree of *procedural equivalence* therefore makes sense. The comparison is apples and apples.
By contrast, when the ECtHR looks to the EU system to determine whether there is fundamental rights protection, it makes sense to focus on substantive but not procedural

[84] See, for example, Kathrin Kuhnert, 'Bosphorus - Double Standards in European Human Rights Protection' (2006) 2 Utrecht L Rev 177
[85] For an opposing view see Paul Mahoney, 'From Strasbourg to Luxembourg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon' (2011) 21 Hum. Rights Law Journal 73
[86] Olivier De Schutter, 'The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe' (2008) 14 Colum J Eur L 509, 560
[87] Spielmann (n 10) 18-19
[88] Solange II (n 4)
[89] Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Luxembourg, 5 April 1977) OJEC 103, 27/04/1977, Article 1
[90] Declaration on democracy at the Copenhagen European Council (7 and 8 April 1978) https://www.consilium.europa.eu/media/20773/copenhagen_april_1978__eng_.pdf accessed 08/06/2022

elements. The ECtHR can certainly inquire as to the nature of the EU's political structures and institutional features to determine their reliability. Indeed, the Court frequently scrutinises domestic procedural mechanisms to determine whether the substance of a right has been guaranteed, insofar as procedural flaws may lead to the violation of substantive rights.[91] Thus, it can certainly query whether the EU system contains remedies which abide by ECHR standards. However, it does not make sense to ask whether those mechanisms are *equivalent* to those of the ECHR system, which ultimately does not have any political structures to compare. Thus, whilst the starting point for Bosphorus is the same as Solange, the only type of equivalence that can be examined in the former is the substantive human rights standards. Procedural *equivalence* simply makes no sense in this context. The comparison is apples and oranges. Bosphorus is premised on a comparison of equivalence that does not make sense.

Degree of Equivalence

The Bosphorus doctrine is premised on the recognition of the EU as a system which protects rights in a manner that is equivalent, though not identical, to the ECHR: thereby precluding the need for constant supervision on the part of the ECtHR. The presumption of 'equivalent' protection suggests that the degree of procedural and substantive protection need not correspond precisely to that under the ECHR, rather it should be commensurate to its level of protection. However, falling short even of 'equivalence', the degree of likeness mandated by Bosphorus is merely 'comparable'.[92] The Court "understands equivalent differently from the literal meaning of the word."[93] This may be said to mitigate the fundamental problem underlying Bosphorus: if the systems need only be 'comparable', the extent to which the Council of Europe lacks *equivalent* procedural mechanisms becomes less important. However, the degree of equivalence required does nothing to remedy the root of the issue: the fact that the Council of Europe system has nothing in terms of political structures or institutions *to compare.* The problem persists.

For the Court in Bosphorus, setting the degree of equivalence at too high a level would undermine the very comity the presumption seeks to achieve: "any requirement that the

[91] Most obviously, the violation of the right to a fair trial (Article 6 ECHR)
[92] Bosphorus v Ireland (n 2) para 155
[93] Eckes (n 8) 55

organisation's protection be identical could run counter to the interest of international cooperation pursued."[94] Certainly, if the EU system had to be *identical*, there would be no need for a presumption at all: the EU measure would simply protect fundamental rights in the same way as the Convention and thereby comply with its standards. There would be no possibility of rebuttal. This would fail to respect the diversity of the jurisdictions which comprise the complex European fundamental rights protection system.

It is nonetheless submitted that, firstly, the effect of Strasbourg's requirement of a merely comparable system of rights protection paves the way for insufficiently robust scrutiny of fundamental rights compliance: at odds with the ECHR system itself. Secondly, that a more exacting degree of equivalence could be demanded, without necessarily running counter to the notion of judicial comity. Requiring the level of protection to be truly *equivalent* or even *commensurate* would not undermine the autonomy of the Union's system of rights protection. This is demonstrated by the language employed by the BVerfG in Solange II: provided EU rights protection 'is substantially to be regarded as equal' (im wesentlichen gleichzumachen ist)[95] to that contained in the German Constitution, the BVerfG will not engage in rights scrutiny. This demonstrates that a more exacting standard of equivalence need not necessarily undermine the autonomy of the EU system of rights protection.

It is clear from the analysis thus far that whilst the ECtHR were certainly influenced by the Solange method, the two doctrines may also be characterised as less 'equivalent' and more 'comparable' to one another.

Burden of Proof

Where a finding of equivalent protection is made out, there will be a presumption that the state has not departed from its obligations under the ECHR where it does no more than implement its obligations emanating from its membership.[96] Only where the protection of ECHR rights is 'manifestly deficient' will that presumption be rebutted.[97]
There is divergence in the burden of proof which must be surpassed in the Bosphorus and Solange methods. As noted by Judge Wildhaber of the ECtHR, Solange precludes rebuttal on

[94] Bosphorus v Ireland (n 2) para 155
[95] Solange II (n 4) BVerfGE 73, 339 (387)
[96] Bosphorus v Ireland (n 2) para 156
[97] ibid

the basis that there is insufficient protection of fundamental rights in the individual case: requiring there to be "a general or large-scale drop in the EU-standards to be established."[98] This is a high barrier to overcome. Indeed, it is generally accepted in academic opinion that it is "highly unlikely that the general level of EU fundamental rights protection will fall short of this standard."[99]

In contrast, Bosphorus admits the possibility of rebuttal on a "case by case basis"[100], by adducing evidence that there was insufficient rights protection in the individual circumstances in question. The suggestion is that Bosphorus compels more intensive scrutiny than Solange; perhaps mitigating the extent to which both the problematic assumption underlying Bosphorus and the mere comparable level of equivalence it mandates leaves individual rights vulnerable to deficient protection. There are two reasons the possibility of case-by-case rebuttal in Bosphorus is particularly important. First, the individual approach is consistent with the very essence of human rights: purported to "establish areas of freedom for the individual upon which the state cannot encroach and which, indeed, do not surrender automatically to an abstract public interest."[101] Second, Eckes characterises the difference between the burden of proof in Bosphorus and Solange as one of "individual rights versus institutional setup"[102]. The inherently problematic nature of the ECtHR drawing a comparison of *procedural* equivalence with the EU, in light of the Council of Europe's lack of political structures, suggests that 'institutional setup' as the focus of the Court's rebuttal inquiry would be inappropriate. A focus on individual rights, the ECtHR's area of expertise, is therefore more appropriate.

In spite of this, there are two principal reasons that the burden of proof cannot be said to remedy the shortcomings of Bosphorus. First, the standard required to rebut the presumption in an individual case is that of 'manifest deficiency': the inadequacy must be "blatant."[103] As noted by the concurring judges in Bosphorus itself, this high standard appears to sit at odds with the rest of the ECHR system of rights protection: it stands in "marked contrast to the

[98] Luzius Wildhaber, 'The Coordination of the Protection of Fundamental Rights in Europe.' Address by the President of the European Court of Human Rights, Geneva (8 September 2005) 6-7
[99] Clara Rauchegger, 'The Bundesverfassungsgericht's human dignity review: Solange III and its application in subsequent case law' in Lorenza Violini and Antonia Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edward Elgar Publishing 2018) 94, 101
[100] Wildhaber (n 98) 6-7
[101] Eckes (n 8) 63
[102] ibid 62
[103] Platon (n 7) 13

supervision generally carried out under the ECHR."[104] On the one hand, this exceptional standard may be regarded as appropriate in this unique context, insofar as potential rights infringements are arguably susceptible to a twofold justification.[105] The institutions of the EU have decided that compliance with an EU obligation is necessary to pursue a particular policy interest, whilst acting consistently with EU law constitutes in itself a 'legitimate interest' for states to pursue.[106] However, Costello is correct to reject this explanation, on the basis that "separate policy objectives do not ordinarily operate cumulatively"[107], particularly in order to justify human rights violations. The extensive number of examples of legal failings provided by Judge Ress in his concurring opinion in Bosphorus suggests an alertness to this problem: evidencing concern that the standard had been set so high as to make the circumstances in which it *would* be surpassed unobvious.[108]

Second, although in principle the presumption can be rebutted by proof of insufficient protection in the *individual* case before the Court, in practice the ECtHR has demonstrated a reluctance to carry out any meaningful scrutiny.[109] In this regard, the burden of proof in Bosphorus may resemble Solange more closely than is initially apparent: the suggestion being that Bosphorus could not cast off its origins so easily after all.

This is betrayed by Bosphorus itself. In spite of the clear statement of purported scrutiny of "the circumstances of the present case."[110], in reality the Court's examination failed even to pierce the surface. In just one sentence, the Court – claiming to have had regard to "the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ"[111] – but without expanding on any of these in any detail, concluded that there was "no dysfunction of the mechanisms of control of the observance of Convention rights."[112] This lack of scrutiny is surprising, insofar as the Court's own

[104] Bosphorus v Ireland (n 2) Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki para 4
[105] Costello (n 36) 102
[106] ibid
[107] ibid
[108] Bosphorus v Ireland (n 2) Concurring Opinion of Judge Ress para 3
[109] Eckes (n 8)
[110] Bosphorus v Ireland (n 2) para 158
[111] ibid para 166
[112] ibid

reasoning alludes to the need to establish a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."[113]

By holding that the general interest pursued was that of Irish compliance with obligations flowing from its membership of the EC, the Court declined to conduct scrutiny of the actual aims pursued by the sanctions regime itself. [114] The burden of substantive review was therefore shifted entirely onto the CJEU. There are, however, reasons to doubt whether this trust is warranted. First, an examination of the CJEU's reasoning in Bosphorus reveals that it appeared to engage only in a "cursory proportionality test"[115]: relying on the abstract interest of international peace and security at the expense of considering how the sanctions actually facilitated these objectives.[116] The suggestion is that the proportionality test conducted by the CJEU is not up to the standard of the ECtHR.

Second, excessive reliance on the judgment of the CJEU is problematic, due to the lack of certainty as to whether such a judgment is necessary to apply the Bosphorus doctrine.
On the one hand, the ECtHR's reliance upon the Article 267 TFEU preliminary reference procedure[117] in establishing equivalent procedural protection in Bosphorus itself suggests that the existence of a preliminary ruling is a pre-condition for the operation of the doctrine.[118] This is supported by the subsequent case of Michaud v France, authority for the proposition that Bosphorus will not apply when "the full potential of the relevant international machinery for supervising fundamental rights"[119] has not been deployed. The failure of the French Conseil d'Etat to refer the question to the CJEU was fatal to the application of the presumption.[120] A somewhat analogous position was taken by the German Court in Solange I: emphasising that before it undertakes scrutiny of EU measures, a preliminary reference to the CJEU must be made.[121] This is to prevent the BVerfG making a premature interpretation that

[113] ibid para 149
[114] ibid para 150
[115] Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 Hum. Rights Law Rev. 529, 541
[116] Case C–84/95 *Bosphorus v Minister for Transport* [1996] ECR I–3953, para 24
[117] Consolidated Version of The Treaty on the Functioning of the European Union [2012] OJ C326/47, Article 267
[118] Bosphorus v Ireland (n 2) para 164
[119] *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012) para 115
[120] Bosphorus was also differentiated on the basis that France "had a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection" ibid para 113
[121] Solange I (n 14) analysed by *L. Fischer*, in: *Große Hüttmann / Wehling*, Das Europalexikon (3.Auflage), Bonn 2020, Verlag J. H. W. Dietz Nachf. GmbH.

differs from the position of the CJEU, thereby refusing to apply a norm that is in fact inconsistent with primary EU law. [122] The trust placed in the EU legal system by both Bosphorus and Solange appears to be contingent on letting the CJEU have its say. It is perhaps in this context that we ought to understand the CJEU's insistence upon a prior intervention mechanism in the accession negotiations: perhaps an indication of its hope that the ECtHR will simply submit to its scrutiny.[123] This could amount to a de facto presumption post-accession; to Bosphorus in a new guise.

On the other hand, if "the domestic courts are part of the Community legal system in the wider sense"[124], the existence of effective procedural mechanisms may not be contingent upon use of the preliminary reference procedure. In Cooperative des Agriculteurs de Mayenne v France, the presumption operated in spite of the Conseil d'Etat's refusal to make a reference to the CJEU.[125] In Avotins v Latvia, the lack of a preliminary reference by the Latvian courts was "not a decisive factor"[126], insofar as it was the *applicant* who had failed to request such a reference.[127] Insofar as the case-law presents a confused picture, the shift of the burden of proportionality review onto the CJEU becomes problematic. Proportionality review of an impugned measure risks disappearing altogether. A precedent of artificial scrutiny has left the door ajar to insufficiently robust scrutiny, at the expense of fundamental rights protection.

[122] ibid
[123] Olivier De Schutter, 'Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention' in Vasiliki Kosta, Nikos Soutaris and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2005) 177, 183
[124] Lock (n 115) 540
[125] *Coopérative des Agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v France* App no 16931/04 (ECtHR, 10 October 2006)
[126] *Avotins v Latvia* App no 17502/07 (ECtHR, 23 May 2016) para 111
[127] ibid

II. Scope of Immunity

Where equivalent protection has been established and is not rebutted by proof of 'manifest deficiency', the Contracting State will not have departed from its obligations under the ECHR *provided* it does no more than implement its obligations emanating from its membership of that organisation.[128] Bosphorus, then, does not confer comprehensive immunity: its scope is constrained.

Object of Immunity

The current inability of the ECtHR to review EU acts directly means that Bosphorus confers an *indirect* immunity: protecting Member State *implementing measures* from the full force of ECtHR scrutiny for fundamental rights compliance. Strasbourg will, however, seek to locate Member State involvement where possible, to review EU action indirectly via national measures. In Kokkelvisserij, for example, recourse to the preliminary ruling procedure by the Dutch courts was sufficient to trigger Dutch responsibility under the ECHR. [129] By contrast, insofar as the BVerfG ultimately reserves itself the competence to review EU measures directly, the immunity conferred by the Solange method can be direct or indirect. Solange II itself concerned a direct challenge to EC secondary legislation on the basis of its compatibility with the German Constitution: namely, a Regulation.[130]

Importantly, neither Bosphorus nor Solange are applicable where the member State is left discretion in the implementation of its EU obligations. Just as the BVerfG will continue to scrutinise German implementing measures which are not fully determined by EU law against the Basic Law, so too will the ECtHR conduct more thorough review where a Member State has scope for discretion. This was made clear by the ECtHR's endorsement of the case of Cantoni v France[131] in Bosphorus.[132]

However, the endorsement of Cantoni suggests that Strasbourg has failed to clarify the dynamic that exists between the ECHR and EU law. First, Bosphorus does not make clear

[128] ibid para 156
[129] *PO Kokkelvisserij v the Netherlands* App no 13645/05 (ECtHR, 20 January 2009) para 3
[130] Regulation (EEC) No 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms [1974] OJ L218/54
[131] *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996)
[132] Bosphorus v Ireland (n 2) para 157

when a Member State is deemed to have had discretion. On the one hand, a formalistic distinction could be made on the basis of the type of EU law-making measure at issue. In this regard, Platon argues that there is a rebuttable presumption of discretion where the measure being implemented is a Directive: EU measures which are, by their nature, 'binding, as to the result to be achieved… but shall leave to the national authorities the choice of form and methods.'[133] On the other hand, the substantive examination undertaken by the ECtHR in Cooperative des Agriculteurs de Mayenne v France, considering the particular degree of discretion left to France by a Regulation suggests that the ECtHR must undertake a specific analysis of each individual implementing measure in order to determine whether the presumption is applicable.[134] The case-law again presents a confused picture: a recurring observation in the context of the presumption of equivalent protection.

Second, distinguishing between the situations in which Member States do and do not have discretion in the implementation of EU obligations is not always straightforward. Craig evidences this by querying the object of the review conducted by Strasbourg in Cantoni itself.[135] It was alleged that the classification of the applicant's sale of pharmaceutical products as unlawful constituted a violation of its Convention rights. Although the French classification emulated the interpretation of a Directive provided by the CJEU, this did not take the French authorities outside the scope of the ECHR. Strasbourg empowered itself to conduct full scrutiny of the implementing act, as France was deemed to have discretion in the precise mode of implementation. Indeed, the test for what constitutes a medicinal product was left to national authorities by the Directive, albeit susceptible to CJEU review. France merely *chose* to adopt the definition provided in the Directive: "in the applicant's submission, other solutions were available to the authorities."[136] However, from a different perspective, Craig points out that France was not exercising any *real* degree of discretion.[137] The object of the Court's scrutiny was the definition attributed to a concept by the organs of the EU, which was subsequently implemented without modification by a Member State. As acknowledged by Strasbourg, the Article of the French provision was "based almost word for word on

[133] Consolidated Version of the Treaty on the Functioning of the European Union (n 117) Article 288
[134] Coopérative des Agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v France (n 125)
[135] Craig (n 9) 1139
[136] Cantoni v France (n 131) para 33
[137] Craig (n 9) 1139

Community Directive 65/65"[138] The tenor of the application was that the definition of the Directive was *itself* inconsistent with the ECHR.

Cantoni demonstrates that the situations in which states have discretion to implement EU law are not inconsiderable. Insofar as Directives are an expression of respect for the principle of subsidiarity[139], they are a popular form of Union law-making. Strasbourg's endorsement of Cantoni may therefore mitigate the extent to which Bosphorus gives rise to a double standard of rights protection within the Council of Europe. However, the preceding analysis demonstrates that even in the context of Directives, distinguishing between the situations in which constrained Bosphorus review as opposed to more stringent Cantoni review will apply is far from straightforward. This is problematic for member States, the purported beneficiaries of the presumption of equivalent protection, who are faced with insufficient clarity in managing their obligations under international law.

Extent of Immunity

Even where there is equivalent protection, in some cases immunity may not stretch as far as to preclude judicial review *on every ground*. The application of Bosphorus and Solange finds itself constrained.

Identifying the limits of Bosphorus' application compels examination of how the presumption is accommodated within the structure of Strasbourg's reasoning. Is the presumption part of the substantive review; *or* a preliminary criterion for admissibility? In Bosphorus itself, the presumption of equivalent protection was integrated in the Court's substantive analysis. Having established that there was an interference with ECHR rights, the presumption was applied in considering whether the impoundment was justified: to determine if the impugned measure had struck a fair balance between the general interest and interests of the applicant.[140] As a component of the proportionality inquiry, Platon argues that Bosphorus will have no application in the context of alleged interferences with rights which do not permit an exception on the basis of the general interest.[141] Such rights include the

[138] Cantoni v France (n 131) para 30
[139] Consolidated Version of the Treaty on European Union (n 3) Article 5(3)
[140] Bosphorus v Ireland (n 2) para 149
[141] Platon (n 7) 18

prohibition of torture, and of slavery and forced labour.[142] This is, however, unlikely to pose a significant constraint on the application of Bosphorus. Were EU obligations to compel Member States to infringe Article 3 or 4, it would be hoped that the institutional level of Union fundamental rights protection would not in any case be considered 'equivalent'.

The nature of the presumption of equivalent protection is, however, muddied by cases following on from Bosphorus, the structure of which suggests that the application of the presumption may have developed into a preliminary, 'quasi-admissibility' test.[143] Platon points to M.S.S. v Belgium and Greece, in which the application of the presumption was considered under the heading 'The responsibility of Belgium under the Convention'.[144] This suggests that the Bosphorus doctrine was applied in determining whether there was an interference with ECHR rights. Similarly, albeit in the context of the UN, the Chamber in Al-Dulimi considered the application of Bosphorus under the heading of 'Preliminary question'[145]; albeit the very application of the presumption was subsequently overturned by the Grand Chamber.[146]

If these cases are indicative of the fact that Bosphorus has developed into a pre-condition for Strasbourg review, two important consequences follow. First, the presumption is likely to apply even where the case concerns the infringement of an absolute right.[147] Second, the presumption risks being applied at the expense of any substantive scrutiny of the merits of the case. In Al-Dulimi, the Chamber considered that the presumption was "rebutted in the present case"[148] owing to the fact that the UN system of rights protection was not equivalent to that of the ECHR. It followed that the Court 'must accordingly rule on the merits of the complaint.'[149] It might reasonably be inferred from this statement that the Court would refrain from ruling on the merits when the presumption is not so rebutted. It is submitted that this would leave individual rights protection vulnerable to insufficiently robust protection.

[142] Convention for the Protection of Human Rights and Fundamental Freedoms (n 1), Articles 3 and 4
[143] Platon (n 7) 18
[144] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) page 70
[145] *Al-Dulimi and Montana Management Inc. v Switzerland* App no 5809/08 (ECtHR, 26 November 2013)
[146] Al-Dulimi and Montana Management Inc. v Switzerland (n 78)
[147] Platon (n 7) 18
[148] Al-Dulimi and Montana Management Inc. v Switzerland (n 145) para 121
[149] ibid para 122

The application of the Bosphorus criterion as an admissibility criterion may be influenced by the doctrine's origins in the Solange method. In Solange II, the BVerfG necessarily had to enter into a substantive analysis of fundamental rights protection, but the findings indicate that in the future, the Court would only do so if the applicant claims that the CJEU is fundamentally disrespecting the scope of fundamental rights.[150] The Solange doctrine, then, adds a layer to the admissibility test wherever the interpretation of EU law is concerned.

It is, however, important to note that the Solange method, too, finds its applicability constrained: it cannot prevent judicial review in every case that there is deemed to be equivalent institutional protection of fundamental rights. The BVerfG understands the principle of supremacy to be mediated through the German Constitution: which determines the precise way in which EU law penetrates its national legal order. The BVerfG's understanding of the German Constitution as the bridge through which EU law flows means that it also has the power to impede its access.[151] Solange II itself acts as a precondition upon which the principle of supremacy is contingent: the maintenance of EU fundamental rights protection at the level of the German Constitution. However, the ultra vires and constitutional identity doctrines also act as constraints on the immunity of EU measures before the Court. Although an analysis of these two doctrines falls beyond the immediate scope of this thesis, the ways in which these doctrines have contoured and shaped the Solange method ought to be noted. In particular, the BVerfG confirmed in its 15 December 2015 judgment that the principle of human dignity, ingrained in the German Constitution, must always be respected.[152] This case was coined 'Solange III' insofar as scrutiny for compliance with human dignity applies even to the implementation of obligations determined in full by EU law.[153] Where Solange II pertains to EU fundamental rights protection at a more abstract, institutional level; Solange III mandates compliance with human dignity on a case-by-case basis. This adds an additional qualification to Solange: *as long as* the CJEU continues to effectively guarantee a level of fundamental rights protection essentially equivalent to that provided by the German Constitution, it will refrain from reviewing EU law for rights compliance; *provided* there is no violation of human dignity in the case at hand. The waters are becoming increasingly muddied.

[150] Solange II (n 4)
[151] BVerfG, 6 July 2010, 2 BvR 2661/06 *Honeywell*
[152] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III*
[153] Rauchegger (n 99) 103

Preliminary Conclusions

It follows from the preceding analysis that, as well as lacking a sound *legal* basis, the very assumption underlying Bosphorus – that a presumption of equivalence *can* be drawn between the EU and ECHR legal orders – is misconceived. The standard of 'manifest deficiency' which must be surpassed to rebut the presumption, combined with a lack of meaningful review of the individual circumstances in question, suggests that fundamental rights have been made vulnerable by insufficiently robust scrutiny. Finally, the lack of clarification provided by Strasbourg as to the way in which the presumption is accommodated within the Court's analysis has created an unacceptable lack of certainty as to the level of rights protection individuals may avail themselves of. Judicial comity has been overstretched, with a distorting effect on fundamental rights protection.

Chapter Four: The Fate of Bosphorus upon Accession

Bosphorus, decided prior to the Lisbon Treaty and mandate provided by Article 6(2) TEU, must be re-appraised in light of accession of the EU to the ECHR. The compounding effect of the problems identified with Bosphorus in this thesis suggest that the rights guaranteed by the Convention have been made vulnerable by insufficiently robust scrutiny, whilst the dynamic between the two jurisdictions remains unclear. Accession should therefore be seen as an opportunity to confine the doctrine to the past. The following considerations concerning the fate of Bosphorus upon accession support this conclusion.

I. A Double Standard

The high standard of 'manifest deficiency' required to rebut the Bosphorus presumption gives rise to 'double standards'[154] within the Council of Europe system of rights protection. The ordinary case-by-case examination of compliance with ECHR standards falls away in favour of a more abstract review when infringements emanate from EU law. The result is a differential, and indeed - preferential, treatment over both Council of Europe contracting States who are not members of the EU; and national rights standards, including EU member State actions that do not constitute a straightforward implementation of EU law.

At present, the EU certainly has a unique standing in relation to the ECHR as compared to other Council of Europe states, insofar as it is not yet a party to the Convention. However, following accession, what distinguishing feature of EU acts could warrant special treatment?

The EU certainly boasts an advanced system of rights protection, showing particular respect to the ECHR in its jurisprudence and Treaties. It is not, however, unique in this respect. As identified by the concurring judges in Bosphorus, equivalent protection is something which "all the Contracting Parties to the ECHR could in a way lay claim."[155] The development of the EU fundamental rights narrative was itself premised on progressive national rights standards.[156] The CJEU adopted national standards, before adapting them to the special

[154] Bosphorus v Ireland (n 2) Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki para 4
[155] ibid para 3
[156] Internationale Handelsgesellschaft (n 17)

interests of EU law. A particularly advanced system of rights protection cannot be the distinguishing feature.

For some commentators, the EU will not lose its "specific, sui generi"[157] nature upon accession, such that it will continue to be deserving of special treatment following accession.[158] But what is this 'special character'? This thesis has established that the EU is distinguished from other international organisations by virtue of its constitutional, state-like structures: it more closely resembles a federal state. It follows from this analysis that following accession, it will simply be a party like any other to the ECHR and should be treated as such. In this regard, "the EU falls prey to its own exceptionalism."[159] In the absence of any distinguishing characteristic, the double standard Bosphorus gives rise to becomes manifestly inappropriate following accession.

II. What Form would Bosphorus Take Upon Accession?

If Bosphorus *is* to be retained upon accession, we ought to query what *form* the presumption of equivalent protection would take. It may be argued that the nature of the presumption could be strengthened upon accession, such that it also applies directly: to EU acts presently outside the scope of ECtHR review, over which national authorities have no control.[160] It is, however, argued that this would sit at odds with the purported objective of Bosphorus itself. This thesis has situated the inspiration of the Bosphorus doctrine in the idea of judicial comity, albeit rejecting its persuasiveness as a *legal* basis. The presumption of equivalent protection must be understood as an expression of deference to regulate an ambiguous, non-hierarchical relationship between legal systems. The principal beneficiaries of the doctrine are thus nation states: equipping them with the means to reconcile their obligations in international law. It follows that there is no scope for the presumption to apply directly. There is simply no comparable risk of the EU being confronted with inconsistent obligations in international law. Nor will the Union be forced to forgo its own harmonising project in order to abide by the ECHR: every one of its Member States has acceded to the Convention.[161]

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[157] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Hum. Rights Law Rev. 645, 662

[158] See Mahoney (n 85)

[159] Lucas Lixinski, 'Taming the Fragmentation Monster through Human Rights? International Constitutionalism, 'Pluralism Lite' and the Common Territory of the Two European Legal Orders' in Vasiliki Kosta, Nikos Soutaris and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2005) 219, 231

[160] De Schutter (n 123) 184

[161] ibid 187

Upon accession, Bosphorus could therefore continue to apply only to national implementing measures which are determined in full by EU law: Member States remaining the principal beneficiaries of the doctrine. This, De Schutter argues, would be non-sensical: following accession there should be no circumstances in which national authorities find themselves compelled to implement EU rules which violate the ECHR.[162] This argument ought to be queried: accession does not mean that every rule flowing from EU law will automatically be consistent with the ECHR. Member States may still find themselves confronted with conflict. The point is that member States will no longer be unable to resolve that conflict: "any inconsistency between the obligations following for the EU Member States from their membership in the EU and the requirements of the Convention will have to be resolved in favour of the latter".[163]

Accession will not only clarify the dynamic that exists between the Council of Europe and EU law; it will transform that relationship entirely. The ongoing nature of the accession negotiations makes it impossible at present to pinpoint the intricacies of the relationship which will arise between the two jurisdictions upon accession.[164] What is clear is that the ambiguous, horizontal relationship that exists at present will be fundamentally altered. Accession to an international organisation that possesses its own court will oblige the EU to defer to the decisions of that court. Under international law, the EU will not be able to 'invoke the provisions of its internal law as justification for its failure to perform a treaty'.[165] The EU will not be able to rely on its own harmonising project to violate the ECHR. Whilst many commentators – particularly those within the CJEU – would shy away from employing the word 'vertical' to denote the future relationship between the ECtHR and CJEU, there is no denying that it will become more hierarchical. If there ever was a need for EU member States to benefit from the presumption of equivalent protection, that need will fall away upon accession.

It should be noted that as the Solange method of the German Court was developed to regulate a vertical, jurisdictional relationship between national and supranational systems, following

[162] ibid
[163] ibid 182
[164] See Council of Europe, '12th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") On the Accession of the European Union to the European Convention on Human Rights – Meeting Report' (10 December 2021) *available at* https://rm.coe.int/cddh-47-1-2021-r12-en/1680a4e547 accessed 20/05/2022
[165] Vienna Convention on the Law of Treaties (n 56) Article 27

accession to the ECHR, the Bosphorus presumption would more closely resemble its origins. This would not, however, lend the presumption more credibility. First, the transformation of the jurisdictional *relationship* between the EU and ECHR does nothing to alter the nature of the Council of Europe which makes a presumption of *equivalent* procedural protection inappropriate. Second, the effect of accession will be to fundamentally *clarify* the nature of the relationship that exists between the EU and ECHR legal orders: a clarity that cannot be said to apply to the dynamic that exists between the CJEU and BVerfG. The Solange jurisprudence itself demonstrates that German acceptance of the supremacy of EU law is, at best, subject to qualification. EU supremacy is often conceived of in terms of legal pluralism, by virtue of the fact that there are conflicting understandings of supremacy within the Union legal order.[166] Just as moral pluralism is premised on toleration of inconsistent moral codes, the EU legal order is based on the coexistence of incompatible perspectives. The existence of this constitutional pluralism depends on *ambiguity:* contributing to a dialogue of scrutiny and restraint on both sides. The use of Solange as a means of navigating this inherent uncertainty therefore makes sense. The same ambiguity cannot be said to pertain to the relationship between the ECHR and EU legal systems following accession. The EU will simply be bound to secure the standards contained within the Convention.

III. Judicial Comity Moving Forwards

What the Solange jurisprudence *does* demonstrate is that judicial comity does not simply fall away upon the straightening up from the horizontal plane. The dynamic between Strasbourg and Luxembourg may be complex, but it is also characterised by mutual cross-citation and *comity*. The reliance of the CJEU on the Convention in the development of its own rights narrative has been well-documented in this thesis. Strasbourg, too, has referenced both the case-law of the CJEU and the Charter as tools with which to interpret ECHR rights.[167]

Following accession, it is expected that Strasbourg will continue to display comity and respect to the EU legal order. Strasbourg can, however, do so in a manner that does not give rise to a double standard within the Council of Europe. In this regard, the ECtHR already has

[166] Neil MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999) 117-121
[167] See *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002); *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010)

the tools at its disposal to display comity. Namely, the margin of appreciation: the scope for flexible operation granted by the ECtHR to the authorities of Contracting States in performing their obligations under the Convention.[168] The margin is closely connected to the idea of a 'European consensus': an interpretive concept employed by Strasbourg to refer to "the level of uniformity present in the legal frameworks of the member States of the Council of Europe on a particular topic."[169] The margin of appreciation narrows where there is deemed to be a European consensus on what a particular right requires; widening in the absence of any uniform approach.[170] It is submitted that Strasbourg should apply the margin of appreciation with a particular mind to the nature of EU acts, as the product of the negotiations and compromise of 27 Member States, who may be said to support the balance of fundamental rights struck therein.[171] To prevent the emergence of a double standard, this power of appreciation should only be applicable if and when it would be to any other contracting state.[172]

Revisiting Comity in light of Opinion 2/13

The position taken by the CJEU in Opinion 2/13 sits uneasily with the idea of judicial comity.[173] In rejecting the Draft Accession Agreement for failing to preserve the specific characteristics and autonomy of EU law, the CJEU adopted a defensive position: prioritising the supremacy of EU law and the role it envisages for itself at the apex of the Union legal order, at the expense of strengthening fundamental rights protection. The Opinion thus confirms what was made clear in Melloni: the Union takes a "pro-integratione approach to human rights,"[174] their protection "pursued to the extent and only to the extent it does not undermine the unity and effectiveness of EU law."[175]

The ECtHR may have been minded to re-visit its own presumption benefitting EU implementing measures in light of the CJEU's attitude of distrust. It is perhaps surprising,

[168] Greer (n 80) 5
[169] Council of Europe, 'Interpretative mechanisms of ECHR case-law: the concept of European consensus' HELP – Human Rights Education for Legal Professionals, *available at* https://www.coe.int/en/web/help/article-echr-case-law accessed 06/06/2022
[170] ibid
[171] Craig (n 9) 1141
[172] ibid
[173] Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Opinion 2/13) [2014] EU:C:2014:2454
[174] Spielmann (n 10) 3
[175] ibid 4

then, that in the subsequent case of Avotins v Latvia, the Grand Chamber affirmed the continued operation of Bosphorus.[176] However, a closer examination of Strasbourg's judgment reveals that the case is not just a straightforward affirmation of Bosphorus. Spielmann argues that the Court "offers a more nuanced reading"[177] of the presumption in Avotins; a cautionary approach to the doctrine *in light of* Opinion 2/13. Indeed, Strasbourg were explicit about the importance of reviewing the mutual trust principle in EU law for rights compliance.[178] For Spielmann, the Court "took pains to send implicit but clear signals that the presumption should no longer be taken as granted and it would be eager in the future to scrutinise carefully decisions of domestic courts implementing EU law."[179]

The progress of the accession progress is beyond the immediate scope of this thesis.[180] For present purposes, it suffices to say that negotiations were resumed in June 2020 and, from the provisional agreements concluded in the sessions conducted thus far, a "cautious optimism"[181] is justified. It is hoped that it has been made clear in this thesis that the EU and Council of Europe cannot stumble along according to the status quo; relying upon unsatisfactory tools such as Bosphorus to regulate their complex dynamic. Comity can only go so far in maintaining "the delicate balance within a multi-player judicial mechanism"[182]. Bosphorus illustrates the dangers of comity overstretched: with a distorting effect on the nature of Strasbourg's fundamental rights scrutiny. The resulting uncertainty as to the level of rights protection individuals may avail themselves of can be clarified by accession.

Accession should be realised; and not only because of the clear legal mandate provided by the EU member States in Article 6(2) TEU, the failure of which to observe could place the primacy and effectiveness of EU law in jeopardy. As legal scholars, we have a tendency to think about accession in purely legal terms. However, the significance of accession extends far beyond the legal realm. Recent events point to a weakening of the culture of fundamental rights and the rise of autonomism. The UK Ministry of Justice has proposed to replace the Human Rights Act[183], the mechanism through which the ECHR is incorporated in domestic

[176] Avotins v Latvia (n 126)
[177] Spielmann (n 10) 16
[178] Avotins v Latvia (n 126) para 116
[179] Spielmann (n 10) 15
[180] See Council of Europe (n 164)
[181] Johan Callewaert, 'No more common understanding of fundamental rights?' (2022) 22 Revue des Juristes de Sciences Po 25
[182] Spielmann (n 10) 19
[183] Human Rights Act 1998

law, with a modern Bill of Rights.[184] The Bill is described as a 'democratic shield'[185] against the ECtHR, accused of surpassing its proper role. The Constitutional Court of the Russian Federation has held that ECtHR decisions will not be given effect in Russia where their implementation would run contrary to the foundations of the Russian Constitution.[186] We continue to bear witness to the systematic violation of citizens' Convention rights in the ongoing war in Ukraine. The BVerfG finally pulled the trigger it had long reserved for itself to review EU law, deeming the CJEU's judgment in Weiss to be ultra vires and thus without binding force in Germany.[187] This missed opportunity to bolster community law may have wider ramifications in Hungary and Poland, where the rule of law is in crisis.

The suggestion is that "autonomism, constitutionalism or indeed legal nationalism are on the rise."[188] In the words of Johan Callewaert, Deputy Grand Chamber Registrar at the ECtHR, "giving up on EU-accession to the Convention would entail the risk of undermining the very idea of a collective understanding of fundamental rights, thereby opening the floodgates to more patchwork and more relativism."[189] Accession would mark a renewed commitment to European fundamental rights protection, which finds itself increasingly at risk of being washed away.

[184] UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights, A consultation to reform the Human Rights Act 1998' (December 2021) *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf accessed 06/06/2022
[185] ibid 7
[186] Resolution of the Constitutional Court of the Russian Federation, nº 21-PG (14 July 2015), cited by Callewaert (n 181) 27
[187] BVerfG, 5 May 2020, 2 BvR 859/15 *Weiss*
[188] Callewaert (n 181) 29
[189] ibid 30

Conclusion

This thesis has argued that, far from channelling the opposing tides of European fundamental rights protection, the Bosphorus presumption of equivalent protection has muddied the waters further. Bosphorus has been shown to be an example of judicial comity overstretched: with a distorting effect on fundamental rights protection.

This thesis has contextualised Bosphorus within the wider context of a complex interaction between two jurisdictions which do not relate to one another in a straightforward, hierarchical manner. This, as Bosphorus itself demonstrates, gives rise to a risk of conflict: member States are forced to reconcile their obligations in international law. Strasbourg acted against a background of concerns about the fragmentation of international law: seeking a connection with the EU legal order to mitigate the risk of conflict. In line with the recommendations of the Report of the Study Group of the International Law Commission, the ECtHR looked to "the wealth of techniques"[190] already at its disposal; drawing upon the technique developed by the BVerfG in Solange II to regulate its own horizontal relationship with the EU. Bosphorus and Solange act as bridges between legal orders.

However, whilst judicial comity was certainly the source of inspiration for the Court in Bosphorus, this concept cannot be elevated to a principle of international law. Contrary to Lavranos' thesis, neither Article 1 UN Charter nor the Preamble to the Vienna Convention can provide a suitable legal basis for the presumption of equivalent protection.[191] Comity stems from mere judicial discretion.

By employing a comparative analysis with the Solange doctrine to breakdown the distinct components of the presumption, the principal shortcomings of Bosphorus have been identified. Most importantly, the very idea that a comparison of equivalence can be drawn between the EU and Council of Europe legal orders has been refuted. Where a substantive and procedural comparison between German domestic law and EU law is justified as a comparison between two polities with similar political structures, the same *procedural* comparison of equivalence cannot be made with the Council of Europe. It lacks constitutional traits. Although Bosphorus, in contrast to Solange, admits the possibility of rebuttal in

[190] UN General Assembly (n 5) 15
[191] Lavranos (n 6)

individual cases, this is undermined by the stringent 'manifest deficiency' standard and the ECtHR's reluctance to carry out meaningful scrutiny.[192] The result is insufficiently robust scrutiny of potential human rights violations. Finally, Bosphorus does not make clear *when* a Member State is deemed not to have had discretion in the implementation of its EU obligations so as to benefit from the presumption. Combined with the continued lack of certainty as to the way in which the presumption is accommodated within the structure of the Court's reasoning, the suggestion is that the complex dynamic between the EU and ECHR has not been clarified.

The ripple effects of Bosphorus suggest that accession of the EU to the ECHR should be seen as an opportunity to confine the doctrine to the past. This conclusion is reinforced by the way in which the relationship between the EU and ECHR legal orders will be transformed by accession. Member States will no longer find themselves without the tools to reconcile their obligations in international law. As identified by Dean Spielmann, Judge at the General Court of the European Union and Former President of the European Court of Human Rights, the EU is "a domestic legal order, not state like, but a self-referential legal order."[193] It follows from this that "external review will always be an added value for the EU, as it is in the case of a sovereign state."[194] It also follows that the external control mechanism which will be imposed on the EU following accession should not be subject to any presumptive benefit, in the interest of both equal treatment and a thorough observance of rights in Europe.

This is not to say that there is no scope for judicial comity following accession. Rather it is to say that Strasbourg should show comity in a manner that does not give rise to double standard within the Council of Europe. Thus, the ECtHR already has the tools at its disposal to display comity: the margin of appreciation, applied with a particular mind to the nature of EU acts as the product of the negotiations of 27 member States.[195]

[192] Eckes (n 8)
[193] Spielmann (n 10) 19
[194] ibid
[195] Craig (n 9)

Bibliography

CASES

ECtHR

Al-Dulimi and Montana Management Inc. v Switzerland App no 5809/08 (ECtHR, 26 November 2013)

Al-Dulimi and Montana Management Inc. v Switzerland App no 5809/08 (ECtHR, 21 June 2016)

Avotins v Latvia App no 17502/07 (ECtHR, 23 May 2016)

Bosphorus v Ireland App no 45036/98 (ECtHR, 30 June 2005)

Cantoni v France App no 17862/91 (ECtHR, 11 November 1996)

Christine Goodwin v the United Kingdom App no 28957/95 (ECtHR, 11 July 2002)

Coopérative des Agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v France App no 16931/04 (ECtHR, 10 October 2006)

Hassan v the United Kingdom App no 29750/09 (ECtHR, 16 September 2014)

M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011)

Matthews v the United Kingdom App no 24833/94 (ECtHR, 18 February 1999)

McElhinney v. Ireland App no 31253/96 (ECtHR, 21 November 2001)

Melcher (M) v Germany App no 13258/87 (ECtHR, 9 February 1990)

Michaud v France App no 12323/11 (ECtHR, 6 December 2012)

PO Kokkelvisserij v the Netherlands App no 13645/05 (ECtHR, 20 January 2009)

Schalk and Kopf v Austria App no 30141/04 (ECtHR, 24 June 2010)

CJEU

Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Opinion 2/13) [2014] EU:C:2014:2454

Bosphorus v Minister for Transport (Case C–84/95) [1996] ECR I–3953

Costa v ENEL (Case C–6/64) [1964] ECR 585

Heinrich Weiss and Others (Case C-493/17) [2018] EU:C:2018:1000

Internationale Handelsgesellschaft (Case C–11/70) [1970] ECR 1125

Nold (Case 4/73) [1974] ECR 491

P Commission and Others v Kadi (Joined Cases C-584/10 P, C-593/10 P and C-595/10) (Judgment of 18/7/2013)

Stauder (Case 29/69) [1969] ECR 419

Stefano Melloni v Ministerio Fiscal (Case C–399/11) [2013] EU:C:2013:107

BVerfG

Honeywell, BVerfG, 6 July 2010, 2 BvR 2661/06

Solange I, BVerfG, 29 May 1974, BvL 52/71

Solange II, BVerfG, 22 October 1986, 2 BvR 197/83,

Solange III, BVerfG, 15 December 2015, 2 BvR 2735/14

Weiss, BVerfG, 5 May 2020, 2 BvR 859/15

TREATIES

Consolidated Version of The Treaty on European Union [2008] OJ C115/13

Consolidated Version of The Treaty on the Functioning of the European Union [2012] OJ C326/47

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Council of Europe (ECHR) (1950)

LEGISLATION

Charter of Fundamental Rights of the European Union [2000] OJ C364/01

Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14

Human Rights Act 1998

Regulation (EEC) No 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms [1974] OJ L218/54

BOOKS

De Schutter, O, 'Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention' in Vasiliki Kosta, Nikos Soutaris and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2005) 177

De Witte, B, 'Article 53 - Level of protection' in S. Peers, T. Hervey, J. Kenner, & A. Ward (Eds.), *The EU Charter of Fundamental Rights: a commentary* (Hart 2014) 1523

Dworkin, R, *Taking Rights Seriously* (Harvard University Press, 1977)

Lixinski, L, 'Taming the Fragmentation Monster through Human Rights? International Constitutionalism, 'Pluralism Lite' and the Common Territory of the Two European Legal Orders' in Vasiliki Kosta, Nikos Soutaris and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2005) 219
MacCormick, N, *Questioning Sovereignty* (Oxford University Press, 1999)

Rauchegger, C, 'The Bundesverfassungsgericht's human dignity review: Solange III and its application in subsequent case law' in Lorenza Violini and Antonia Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edward Elgar Publishing 2018) 94

Shany, Y, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003)

JOURNALS

Callewaert, J, 'No more common understanding of fundamental rights?' (2022) 22 Revue des Juristes de Sciences Po 25

Costello, C, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Hum. Rights Law Rev 87

Craig, P, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham Int'l LJ 1114

De Schutter, O, 'The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe' (2008) 14 Colum J Eur L 509

Douglas-Scott, S, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Hum. Rights Law Rev. 645

Eckes, C, 'Does the European Court of Human Rights Provide Protection from the European Community – The Case of Bosphorus Airways (2007) 13 Eur Pub L 47

Fischer, L, in: *Große Hüttmann / Wehling*, Das Europalexikon (3.Auflage), Bonn 2020, Verlag J. H. W. Dietz Nachf. GmbH.

Kuhnert, K, 'Bosphorus - Double Standards in European Human Rights Protection' (2006) 2 Utrecht L Rev 177

Lavranos, N, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions among International Courts and Tribunals' (2008) 30 Loy LA Int'l & Comp L Rev 275

Lock, T, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 Hum. Rights Law Rev. 529

Mahoney, P, 'From Strasbourg to Luxembourg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon' (2011) 21 Hum. Rights Law Journal 73

Platon, S, 'The Equivalent Protection Test: From European Union to United Nations, from Solange II to Solange I' (2014) 10 Eur. Const. Law Rev. 226

REPORTS

Council of Europe, '12th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") On the Accession of the European Union to the European Convention on Human Rights – Meeting Report' (10 December 2021) *available at* https://rm.coe.int/cddh-47-1-2021-r12-en/1680a4e547 accessed 20/05/2022

UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights, A consultation to reform the Human Rights Act 1998' (December 2021) *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf accessed 06/06/2022

United Nations General Assembly, 'Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (13 April 2006) U.N. Doc. A/CN.4/L.682

OTHER

Council of Europe, 'Interpretative mechanisms of ECHR case-law: the concept of European consensus' HELP – Human Rights Education for Legal Professionals, *available at* https://www.coe.int/en/web/help/article-echr-case-law accessed 06/06/2022
Declaration on democracy at the Copenhagen European Council (7 and 8 April 1978) https://www.consilium.europa.eu/media/20773/copenhagen_april_1978__eng_.pdf accessed 08/06/2022

FRAME Lecture by Judge Dean Spielmann on The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights (27 March 2017) Brussels

Greer, S, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights' (2000) Human rights files No. 17, Council of Europe Publishing

Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Luxembourg, 5 April 1977) OJEC 103, 27/04/1977

Wildhaber, L, 'The Coordination of the Protection of Fundamental Rights in Europe.' Address by the President of the European Court of Human Rights, Geneva, 8 September 2005