



1. The Undersigned Organisations take note of the Chairperson’s revised proposal on outstanding issues. In addition to the issues raised in our previous submission,¹ (attached for convenience to this document), we wish to submit the following comments on some of our main remaining concerns.
2. We welcomed the opportunity to participate in the meeting of the Group in Strasbourg in November 2012. We reiterate our request to be able to participate in any further meeting of the Group as these negotiations go forward, particularly in the light of the EU’s treaty obligation (referred to in our previous submission)² to involve civil society in such matters.

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

3. We welcome the inclusion of the wording “persons acting on their behalf” in new Article 1(3) and (4). We are concerned however that unnecessary ambiguity remains by the omission of the term “actions”, since the terms “acts” and “measures” are often restricted to legislative acts and measures. We consider it essential that all EU actions and omissions, including but not limited to legislative acts and measures, are unequivocally brought within the scope of the accession agreement. We are concerned however that the new draft Art 1(4) (as well as the new Art 3) does not make it explicitly clear that it must be left to the Court, after hearing appropriate submissions, to decide to whether an act or omissions is attributable to state and/or the EU.
4. Art 1(6) refers to “territories” rather than situations which fall within the jurisdiction of the Contracting Parties and thus might risk appearing to exclude, for example, the actions and omissions of bodies such as FRONTEX on the high seas.³

B. Article 3 Co-respondent mechanism

5. The undersigned organisations broadly welcome the proposed changes to Art 3(7).
6. With reference to Article 3(2), we welcome the recognition of the point that EU law can bind not only EU Member States but also other states parties to international agreements with the EU, as pointed out in paragraph 3 of the Chairperson’s proposal. We note in this regard that there may be circumstances where extending the co-respondent mechanism to non EU member states may be appropriate. As regards the point raised in footnote 1 to paragraph 5 of the Chairperson’s proposal, we remain concerned that the statute of the CJEU refers only to states which are parties to the EEA and the EFTA Surveillance Authority but does not extend to those Contracting Parties to the ECHR, who are not EEA or EFTA members, but who have concluded agreements with the EU which are binding on them and binding on the EU under EU

¹ *NGO submissions on EU accession to ECHR*, 5 November 2012, available on the Council of Europe’s website at www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working_documents/NGO_submissions_EU_accession_5Nov2012.pdf

² *NGO submissions on EU accession to ECHR*, 5 November 2012, paragraphs 2 to 4.

³ See *NGO submissions on EU accession to ECHR*, 5 November 2012, paragraph 12.

law –e.g. re-admission agreements. Given the general exclusion of third party interventions at the CJEU, it is difficult to see, absent an amendment to the Statute, how such non EEA, non EFTA Contracting Parties could participate in proceedings involving them brought before the CJEU under Article 3(6). We would welcome clarification of this issue.

7. In respect of Article 3(4), we are concerned that it remains unclear how this respondent status mechanism would work: would it be for the Court *ex proprio motu* to decide to change the status of the respondents or is it the procedure under 3(5) which would apply? We consider that it would be helpful if it was explicitly mentioned that, when an application is directed against and notified to both the EU and an EU member state, it is for the Court alone to make a binding decision on who becomes the respondent and who becomes the co-respondent. We would welcome clarification and confirmation of this important point.
8. With regard to Article 3(5), we still consider, as made clear in our previous submissions to the Group, that many issues will be able to be resolved by third party interventions by the EU. However we reiterate the view that it is essential that, once the Court has decided that a matter is attributable to the EU, the co-respondent mechanism must be binding, not optional, meaning that a High Contracting Party would be bound to accept an invitation by the Court. Any other mechanism would allow the party to whom a violation is attributable to decide on an *ad hoc* basis whether or not it wishes to be held accountable. The undersigned organisations find that this outcome is contrary to the rule of law and would constitute an unacceptable erosion of the Court’s supervisory jurisdiction.
9. Furthermore, the undersigned organisations are concerned that the language in paragraph (a) of the proposed *Draft declaration by the European Union, to be made at the time of signature of the Accession Agreement* (no. 4) may leave open the question as to whether it is for the EU or for the Court to decide when and whether the requirements to trigger the co-respondent mechanism have been met. The undersigned organisations stress their preference for a binding co-respondent mechanism which would avoid the need for Declaration no. 4(a). However, if this proposal of Declaration is maintained, it should be amended to make clearer that it is for the Court to decide when the conditions set out in Article 3(2) of the Accession Agreement are met.
10. Finally, with regard to the mechanism of prior involvement of the CJEU, foreseen in Article 3(6), the undersigned organisations would like to reaffirm the concerns presented in their submission of November 2012⁴ (attached to this document)including on legal aid and on the possibility to present third party intervention, and express hope that, in light of the principles of transparency raised in our previous submission, they would be able to feed their views in the EU processes leading to the set-up of such mechanisms.

The AIRE Centre, Amnesty International and the International Commission of Jurists

March 2013

⁴ See, *NGO submissions on EU accession to ECHR*, 5 November 2012, paragraphs 18-21.