

# *Contents*

|                                    |       |
|------------------------------------|-------|
| <i>Acknowledgements</i> .....      | vii   |
| <i>Table of Figures</i> .....      | xiii  |
| <i>List of Abbreviations</i> ..... | xv    |
| <i>Table of Cases</i> .....        | xvii  |
| <i>Table of Legislation</i> .....  | xxvii |

## **PART I: INTRODUCTION—A TALE OF TWO COURTS.....1**

|   |           |
|---|-----------|
| <b>1. Setting the Scene for Accession .....</b>                     | <b>3</b>  |
| I. The EU and the European Convention on Human Rights.....          | 3         |
| II. Accession and Autonomy: The Research Question of this Book..... | 7         |
| III. A Caveat on Legal Definitions.....                             | 11        |
| <b>2. Scope of this Book.....</b>                                   | <b>13</b> |
| I. A Survey of the Status Quo .....                                 | 13        |
| II. The Shape of Things to Come.....                                | 14        |
| III. Conclusions and Outlook.....                                   | 16        |

## **PART II: THE AUTONOMY OF EUROPEAN UNION LAW VERSUS INTERNATIONAL LAW AND COURTS .....17**

|   |           |
|---|-----------|
| <b>3. The Notion of Legal Autonomy.....</b>                                       | <b>19</b> |
| I. The Legal Framework: The CJEU's Exclusive Jurisdiction .....                   | 19        |
| II. Accession and Autonomy: Justified Concerns or Much<br>Ado about Nothing?..... | 22        |
| III. The Union's Legal Autonomy and International Law .....                       | 26        |
| <b>4. The EU and International Courts and Tribunals.....</b>                      | <b>31</b> |
| I. European Union Law at Risk: The CJEU and the EEA Court .....                   | 32        |
| A. CJEU Opinion 1/91 .....  | 32        |
| B. Aftermath: A Question of Legal Hierarchy .....                                 | 34        |
| II. Competing Jurisdictions: The <i>MOX Plant</i> Case.....                       | 36        |
| A. Factual Background and Procedures.....   | 37        |
| B. The UNCLOS Arbitral Decision.....  | 39        |
| C. The Judgment of the Court of Justice of the European Union.....                | 42        |
| III. Legal Analysis .....   | 44        |
| A. Elements of the European Union's Legal Autonomy.....                           | 44        |
| B. Protecting Legal Autonomy and Exclusive Jurisdiction .....                     | 45        |
| C. Limiting the Choice and Utilisation of International Courts.....               | 46        |
| D. Constraining the Jurisdiction of International<br>Courts and Tribunals .....   | 48        |

|   |            |
|---|------------|
| <b>5. A Special Case: The Court of Justice of the European Union<br/>and the European Court of Human Rights .....</b> | <b>50</b>  |
| I. The Convention and the EU: A View from Luxembourg .....  | 51         |
| A. Luxembourg's Case Law: Recourse to the Convention .....  | 51         |
| B. General Principles Derived from the Convention as<br>Part of EU Law .....  | 53         |
| C. Consequences for the EU Member States .....  | 55         |
| D. The Charter of Fundamental Rights: Incorporation<br>of the Convention .....  | 58         |
| II. Violations of the Convention by EU Law:<br>The Strasbourg Perspective .....                                       | 64         |
| A. Inescapable Obligations of the Member States.....  | 64         |
| B. The <i>Bosphorus</i> Case: Strasbourg's Solange Approach .....   | 69         |
| III. Opinion 2/94: Obsolete Concerns or Autonomy at Risk? .....   | 76         |
| A. The Statements of the Governments.....   | 76         |
| B. Luxembourg's Opinion .....   | 79         |
| <b>6. The EU, International Law and International Courts:<br/>An Anticipating Assessment for Accession.....</b>       | <b>82</b>  |
| I. Lessons of the Past .....  | 82         |
| II. Questions for the Future .....  | 85         |
| <b>PART III: THE ROAD FROM LUXEMBOURG TO STRASBOURG:<br/>RECONCILING ACCESSION AND AUTONOMY.....</b>                  | <b>87</b>  |
| <b>7. The Status of the Accession Agreement and<br/>the Convention after Accession .....</b>                          | <b>89</b>  |
| I. The Legal Basis: Article 218 TFEU and the Court of Justice .....   | 89         |
| II. The Need for an Accession Agreement .....   | 91         |
| A. Preserving the Convention System.....  | 91         |
| B. Scope of Accession and Amendments to the Convention.....   | 93         |
| III. The Status of the Convention and the Agreement in EU Law.....  | 97         |
| A. The Status of International Agreements within Union Law .....  | 97         |
| B. The Convention as Part of Primary Law? .....   | 99         |
| C. Legal Consequences of the Convention's Mezzanine Status .....  | 102        |
| IV. Interim Conclusions .....   | 110        |
| <b>8. External Review by Strasbourg: A Hierarchy of Courts?.....</b>  | <b>113</b> |
| I. External Review vs Autonomy: The Legal Issue Situated.....   | 113        |
| II. A Binding Interpretation of Union Law by Strasbourg?.....   | 114        |
| A. Assessing Domestic Law under the Convention.....   | 114        |
| B. European Union Law as 'Domestic Law' .....   | 118        |
| C. Ramifications for the European Union's Legal Autonomy .....  | 121        |
| III. European Union Law in Violation of the Convention .....  | 125        |
| A. The EU's 'Constitutional' Foundation: Primary Law .....  | 125        |
| B. European Union Legislation: Secondary Law.....   | 132        |
| IV. Interim Conclusions .....   | 135        |

|   |            |
|---|------------|
| <b>9. Individual Applications after Accession: Introducing the Co-Respondent Mechanism .....</b>      | <b>138</b> |
| I. Individual Applications: Core of the Convention .....  | 138        |
| II. Identifying the Right Respondent after Accession.....   | 139        |
| A. The Problem Located: Who is the Appropriate Addressee? .....                                       | 139        |
| B. The Applicant: An Average Person without Legal Education .....                                     | 142        |
| C. Designating the Right Respondent: Risks to the Union's Autonomy .....                              | 143        |
| D. Solutions Based on the Present Convention System .....   | 144        |
| E. The Co-Respondent Model .....  | 148        |
| III. Interim Conclusions.....   | 171        |
| <b>10. Inter-Party Cases after Accession .....</b>  | <b>174</b> |
| I. Inter-State Cases: A Reminiscence of Westphalia .....  | 174        |
| II. The Internal Dimension: Luxembourg versus Strasbourg.....   | 175        |
| A. An Encounter of Exclusive Jurisdiction .....   | 176        |
| B. Exclusion of Inter-State Cases? .....  | 182        |
| C. The Legal Framework: Articles 4 and 5 of the Draft Accession Agreement.....                        | 184        |
| D. The Locus Standi of the Parties after Accession .....  | 189        |
| III. The External Dimension: The European Union as a Human Rights Litigator in Europe? .....          | 197        |
| A. The European Union's External Human Rights Policy and Accession .....                              | 197        |
| B. A Question of Competence .....   | 198        |
| C. Conclusion.....  | 205        |
| IV. Interim Conclusions .....   | 206        |
| <b>11. The Exhaustion of Domestic Remedies and the Prior Involvement of the Luxembourg Court.....</b> | <b>209</b> |
| I. The 'Exhaustion Rule' after Accession.....   | 209        |
| II. Direct and Indirect Actions .....   | 211        |
| A. Direct Actions against EU Acts: The European Union as Respondent.....                              | 212        |
| B. Indirect Actions against EU Acts: The Member States as Respondents .....                           | 222        |
| III. The Solution of the Draft Accession Agreement .....  | 234        |
| A. Preliminary Remarks on the Necessity of Internal Union Review .....                                | 234        |
| B. Article 3 (6) of the Draft Accession Agreement and the Autonomy Question .....                     | 235        |
| IV. Interim Conclusions .....   | 251        |
| <b>PART IV: CONCLUSIONS AND OUTLOOK.....</b>  | <b>257</b> |
| <b>12. The Analytical Point of Departure: Revisiting and Answering the Research Question .....</b>    | <b>259</b> |

|  |            |
|--|------------|
| <b>13. The Prerequisites and Consequences of Accession:<br/>A Summary of Findings .....</b>      | <b>261</b> |
| I. The Importance of the Autonomy Principle.....   | 261        |
| A. Luxembourg's Sceptical View on International Law.....   | 261        |
| B. Luxembourg's Distaste for other International Courts .....                                    | 261        |
| C. Luxembourg and Strasbourg: A Cooperative Rivalry.....   | 263        |
| II. Legal Interfaces between Accession and Autonomy.....   | 264        |
| A. The Legal Hierarchy of European Union Law,<br>the Convention and the Accession Agreement..... | 264        |
| B. Strasbourg's External Review of European Union Law .....                                      | 266        |
| C. Individual Applications: The Co-Respondent Mechanism .....                                    | 268        |
| D. The Future of Inter-Party Cases.....  | 270        |
| E. Luxembourg's Prior Involvement: New Procedural Routes .....                                   | 272        |
| <b>14. Outlook and Future Perspectives .....</b>   | <b>278</b> |
| <i>Appendix: Draft Accession Agreement and Explanatory Report.....</i>                           | 281        |
| <i>Bibliography and References .....</i>   | 312        |
| <i>Index .....</i>   | 330        |

## *Table of Figures*

|   |     |
|---|-----|
| Figure 1: <i>The Convention as Part of Union Law Taking Precedence Over National Fundamental Rights</i> ..... | 104 |
| Figure 2: <i>The Duplication of the Convention</i> .....  | 107 |
| Figure 3: <i>Does Luxembourg Have the Last Say in Human Rights?</i> .....                                     | 109 |
| Figure 4: <i>Stages of the Co-Respondent Mechanism</i> .....  | 171 |
| Figure 5: <i>Access to Strasbourg for EU-Related Complaints Pre- and Post-Accession</i> .....                 | 252 |