NGOs' PERSPECTIVE ON THE EU ACCESSION TO THE ECHR:

THE PROPOSED CO-RESPONDENT PROCEDURE AND CONSULTATION WITH CIVIL SOCIETY

The above-named NGOs address this note to the informal group on accession of the European Union to the European Convention on Human Rights on the occasion of its meeting of 6-8 December 2010, at which it will be discussing the proposed co-respondent mechanism and consultation with civil society. Our aim is to assist the group in its discussions by providing our organisations' views on these two issues.

I. Co-Respondent Mechanism

In relation to the co-respondent mechanism, and having considered in particular section C.3 of the Meeting Report of the third working meeting of the informal working group as well as the Draft revised elements prepared by the Secretariat on the Introduction of a co-respondent mechanism CDDH-UE (2010)16 (dated 24 November 2010 and uploaded to the Council of Europe's website on 1 December), we set out below our view on three subjects:

1. the role of applicants when the co-respondent mechanism is triggered;
2. third-party interventions in cases where the co-respondent mechanism has been triggered;
3. findings of violations and awards of just satisfaction.

1. The Responsibilities of Applicants when the Co-Respondent Mechanism Is Triggered

When an application is directed against an EU Member State but not the EU, or vice versa, and it would have been appropriate to direct it against both, the reasons for this may be various. Applicants may not understand that they can bring an application against the EU or against both the EU and a Member State; they may feel that taking on the Union or the Union and a Member State is too great a challenge; or, and we anticipate that this will usually be the case, they will not understand how the violation of which they have been a victim engages the responsibilities of both the EU and a Member State. Understanding this will usually require complex knowledge about the division of competences between the Union and its Member States.

It is necessary to ensure that the applicant is consulted at all points in the process and given an opportunity to make her/his views known. The working group should continue to consider the extent to which obtaining an applicant's consent may be necessary. The working group should also consider these

issues in the light of the **considerable burden adding the EU or a Member State as a respondent** will place on an applicant. The text of the Convention is much more accessible to individuals than the complex provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Few lawyers in Europe are experts in both legal orders. It will be necessary to ensure that applicants have access to a lawyer as quickly as possible. It may also be necessary to extend time deadlines for the applicant to ensure that (s)he can grapple with the issues that the co-respondent mechanism will raise.

The joining of a co-respondent may also affect the applicant in other ways: for example, it may affect the prospect of a friendly settlement; it may delay the process of the case before the Court; and following judgment it may complicate or delay the execution process.

Because of the burden that triggering the co-respondent mechanism may place on an applicant, the working group should make sure that the precise drafting of the criterion for triggering the mechanism is carefully worded so as to exclude cases where the addition of a co-respondent is unnecessary. For example, in *Aristimuño Mendizabal v France* (2006), a link with EU law certainly existed: France's breach of its obligations under EU law made the interference with the applicant's right to respect for private life not "in accordance with the law", resulting in a violation of Article 8. However, there was no question that EU law or the actions of EU institutions had led to the violation. It would not have been necessary, therefore, and might have posed an unnecessary burden on the applicant, to have included the EU as a co-respondent, had the EU been a Contracting Party at the time. Inviting the EU to submit observations in accordance with Article 36 § 1 of the Convention would be more appropriate. The form of words proposed in CDDH-UE (2010)16 (page 5) and intended for the accession agreement – "the alleged violation appears to have a substantive link with European Union law" – may be inappropriate; the *Aristimuño Mendizabal* case might have then fallen within the scope of the mechanism because there was a substantive link, yet the EU's participation as a co-respondent (as opposed to a third party) would have been unnecessary and potentially burdensome on the applicant.

Recommendation 1: ensure that applicants are promptly notified when potential co-respondents are alerted to a case as well as when the mechanism is formally triggered. Prior to the joining of a co-respondent, applicants should have an opportunity to make their views known and have adequate time to do so and the applicant's views and interests should be given due consideration by the Court in deciding whether to join a co-respondent. It is not appropriate to provide short time limits as a default and rely on the Court's generosity with applicants in granting extensions. Many applicants will not know that they can ask for an extension and the Court cannot be expected to stray from its rules on a regular basis. The time limits discussed in CDDH-UE (2010)16, including four weeks for applicants and eight weeks for potential co-respondents, are inadequate. These time limits are much shorter than those normally imposed by either the ECtHR or the Court of Justice of the European Union.

Recommendation 2: give further consideration to requiring that the applicant's consent is necessary before joining the EU or one of its Member States as a party. We recognise that joining the EU or one of its Member States as a co-respondent may be important for the functioning of the Convention system as a whole, not simply in the interests of the applicant, and this must be taken into account. However, the co-respondent procedure is likely to pose special burdens on applicants that may impair or even hinder the effective exercise of the right of individual petition, as enshrined in Article 34.

Recommendation 3: ensure that applicants have access to adequate advice and representation, including considering whether to amend Rule 36 § 2 of the Rules of Court to ensure that an applicant is represented by a lawyer at the time that the co-respondent mechanism is triggered and that all deadlines are adjusted to ensure that applicants have been able to benefit from legal advice before responding to the Court.

Recommendation 4: draft the criterion for triggering the co-respondent mechanism in such a way as to ensure that the EU or one of its Member States is added only when necessary, and when other mechanisms (such as a third-party intervention by the EU or the State) would not suffice.

2. Third-Party Interventions

NGOs and others have played a crucial role as third-party interveners in ensuring the sound development of the Court's jurisprudence. Third-party interventions allow the Court to take into consideration the wider context in which an alleged violation has taken place, complex issues of law and the wider consequences of its judgment, issues that applicants and governments are often not well placed to address. Those organisations like ours which have been considering the developing relationship between EU law and the ECHR can continue to play that role as third parties in assisting the Court as it grapples with the difficult questions that the EU's accession will raise.

The twelve-week window for asking permission to intervene following communication of cases to the respondent government already poses a challenge for potential third parties, especially when communicated cases are not immediately posted on the Court's website. The co-respondent mechanism may exacerbate the problem. NGOs may bring a particular added value to the litigation by intervening in those cases where the co-respondent mechanism has been triggered. If a case is communicated, for example, to an EU Member State and the EU is given eight weeks to decide whether it wishes to join the proceedings as a co-respondent, that may not give potential third parties sufficient time to request permission to intervene.

The current timescales proposed for the co-respondent mechanism will prevent or hinder the intervention of many NGOs who would wish to assist the Court in developing its judicial practice in these cases, particularly in relation to the allocation of responsibility between co-respondents Option "a" on page 3 of CDDH-UE (2010)16 envisions activating the co-respondent mechanism after communication of the case. That is of course logical: the notification of the case must necessarily precede triggering the co-respondent mechanism. However, unless the twelve-week time limit for submitting requests for leave to intervene is extended, it may not be clear to third parties until after that time limit has expired whether those cases involve co-respondents. In particular, applications which have only been lodged against an EU Member State, and which eventually involve the co-respondent mechanism, are not likely to come to the attention of potential third parties until it is too late for them to ask for permission to intervene within the ordinary time limits set out in the Rules of Court.

Recommendation 5: consider changing the mechanism for potential third parties to request permission to intervene in cases where the co-respondent mechanism has been triggered, including

- notifying the public clearly through the Court's website when the mechanism has been triggered and

- changing Rule 44(3)(b) of the Rules of Court to allow for a longer period for requesting permission to intervene when the mechanism has been triggered and/or ensuring that the process for adding a co-respondent takes place before formal communication of the case.

3. Finding Violations and Just Satisfaction

When the working group considers the three possible approaches to the way the Court could deliver judgments against co-respondents (paragraph 21 of the Meeting report of 22 October 2010), it is crucial to ensure that judgments will be clear to applicants, States, the EU and the many others concerned and that effective individual and general implementation measures can be identified. The key point is to ensure that confusion about the responsibility of the Union and the State(s) concerned does not delay the execution of individual and general measures and that the Committee of Ministers is not put in a position of having to mediate between the EU and its Member State(s) when overseeing the execution of decisions and judgments. In this regard it would be important that judgments should specify whether responsibility for each violation found attaches to the EU or to a Member State, and, where responsibility is shared, that it be specified what measures of implementation are required from each co-respondent.

Recommendation 6: ensure that there is clarity about responsibility for taking individual and general measures following decisions and judgments, through the way the Court delivers those decisions and judgments, the arrangements between the EU and its Member States for executing them and the Committee of Ministers' system for overseeing that execution.

II. Consultation with Civil Society

Our organisations remain at the disposal of the informal working group to provide information and views about the practical details of the EU's accession to the ECHR. Our many years of experience as legal advisers, applicants' representatives, and third-party interveners before both the ECtHR and the CJEU and as promoters of respect for human rights and fundamental freedoms through the application of both Council of Europe and EU law makes us particularly well-placed to provide practical input to the deliberations of the informal working group. We would welcome participating in a more formal consultation process, including an invitation to meetings and/or an invitation to respond to specific issues in writing.

3 December 2010