

January 1999

Kremzow v. Republik Osterreich: A Case for Excluding Human Rights Issues from the Jurisdiction of the European Court of Justice

Erin McAlpin Eiselein

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Erin McAlpin Eiselein, *Kremzow v. Republik Osterreich: A Case for Excluding Human Rights Issues from the Jurisdiction of the European Court of Justice*, 27 *Denv. J. Int'l L. & Pol'y* 583 (1999).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

Kremzow v. Republik Osterreich: A Case for Excluding Human Rights Issues from the Jurisdiction of the European Court of Justice

Keywords

Human Rights Law, Jurisdiction, Civil Rights

KREMZOW V. REPUBLIK OSTERREICH: A CASE FOR EXCLUDING HUMAN RIGHTS ISSUES FROM THE JURISDICTION OF THE EUROPEAN COURT OF JUSTICE

ERIN MCALPIN EISELEIN*

I. INTRODUCTION

In 1997, the Austrian Supreme Court asked the European Court of Justice (ECJ)¹ for a preliminary ruling in the case of *Kremzow v. Republik Osterreich (Austrian State)*² to determine what effect a decision by the European Court of Human Rights (ECHR) has upon a Member State.³ After a brief analysis relying entirely on five prior ECJ opinions,⁴ the ECJ held that it lacked the jurisdiction to offer interpretive guidance since the matter was not grounded in community law.⁵

The ECJ opinion in *Kremzow* exemplifies a fundamental problem of Europe as a united body. There is a lack of clear definition regarding the scope of authority between the various European supranational bodies. Specifically, between the European Union (EU or Union)⁶ and

* J.D. Candidate, May 2000, University of Denver College of Law.

1. The European Court of Justice (ECJ) is the primary judicial branch of the European Union. T.C. HARLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 52 (4TH ed. 1998). The Treaty of Rome created the ECJ in Articles 164-88. TREATY OF ROME, Mar. 25, 1957, [1957] 298 U.N.T.S. 11 arts. 164-88 (1957) [hereinafter EEC TREATY]. The ECJ is discussed in detail infra, notes 134-174 and accompanying text.

2. Case C-299/95, *Kremzow v. Republik Osterreich*, 3 C.M.L.R. 1289 (1997).

3. See *Kremzow*, 3 C.M.L.R. at 2642-43, ¶ 12(1).

4. See generally Opinion 2/94, RE the Accession by the Community to the European Human Rights Convention, 1996 E.C.R. I-1759, [1996] 2 C.M.L.R. 265 (1996); Case 260/89, *Elliniki Radiofonia Tileorassi Anonimi Etairia (ERT AE) and Another v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Another*, 1991 E.C.R. I-2925; Case 159/90, *Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Steven Grogan and Others*, 1991 E.C.R. I-4685, [1991] 3 C.M.L.R. 849 (1991); Case 180/83, *Hans Moser v. Land Baden-Wurttemberg*, 1984 E.C.R. 2539, [1984] 3 C.M.L.R. 720 (1984); Case C-144/95, *Criminal Proceedings Against Jean-Louis Maurin*, 1996 E.C.R. I-2909.

5. See *Kremzow*, 3 C.M.L.R. at 2646, ¶ 19.

6. On February 7, 1992, the Treaty on European Union (also called the Maastricht Treaty) was signed in Maastricht. Previously, the bodies that were independently called the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community, collectively became the "European Union." TREATY

the Council of the Europe;⁷ and, between the various bodies and their respective Member States. Over the last fifty years, Europe has created the most sophisticated system of international community institutions, yet many structural questions remain unanswered and produce continual confusion among the Member States.⁸ The ECJ is a critical channel established by the European Union to clarify and develop issues surrounding the relationship between the various European bodies and their respective Member States.⁹ Ideally, the jurisprudence of the ECJ should guide both the Union and the Member States toward an in-

ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] *amending TREATY OF ROME*, Mar. 25, 1957, [1957], 298 U.N.T.S. 11 (1957), as amended by Single European Act, 1987 O.J. (L 169) 1, [1987] 2 C.M.L.R. 741. It is important to note that the European Community and the European Union are two separate bodies. The European Community (formerly the European Economic Community) is only one of the bodies incorporated into the larger European Union. See JAMES D. DINNAGE & JOHN F. MURPHY, *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 3 (1996) (clarifying the distinctions between the various European bodies since the 1993 Treaty of European Union). Although, in the *Kremzow* opinion, the ECJ refers to this group of 15 Member States as the "European Community," this case note will refer to this group as the "European Union," to reflect the Maastricht change. However, the "European Community" will be used when analyzing the ECJ's opinions. See also WALTER CAIRNS *INTRODUCTION TO EUROPEAN UNION LAW* 2 (1997). The 15 Member States of the European Union are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 209 (1995).

7. The Council of Europe was established in 1949 as a post-World War II body, created "for the purposes of achieving co-operation in the cultural, political, legal and social fields." CAIRNS, *supra* note 6, at 12. The Council gained rapid acceptance from many nations, based in large part upon a collective guilt for failing to prevent Nazism and Fascism during World War II. Peter Leuprecht, *Innovations in the European System of Human Rights Protection: is Enlargement Compatible with Reinforcement?*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 313, 313 (1998). As of March 1, 1999, the 40 Member States of the Council of Europe are: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and United Kingdom. *The Council of Europe Homepage* (visited Feb. 28, 1999) <<http://www.coe.fr/eng/legaltxt/esignpays.htm>>. See also Andrew Drzemczewski, *The European Human Rights Convention: A New Court of Human Rights in Strasbourg as of November 1, 1998*, 55 *WASH & LEE L. REV.* 697 (1998) (listing the 40 Member States of the Council of Europe). In six years, the Council of Europe has grown from 23 members to 40 members. There are also five additional states (Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina and Georgia) with special guest status who have applied for full membership. *NATO: The Council of Europe*, M2 Presswire, Jan. 8, 1997, WL 8023394, at *4-5. See also Leuprecht, *supra* note 7, at 326 ("The Council's role is no longer limited to the defense of pluralist democracy, the rule of law and human rights. Its new task is to play an active role in 'democracy-building' in the post-communist countries").

8. See A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 8, 156 (1996).

9. See *EEC TREATY*, *supra* note 1, arts. 164-88.

creased understanding of Union law and its relationship with Member State law. However, the continual pressure on the ECJ to broaden the scope of its authority to include other issues such as human rights, detracts from its ability to perform its essential function of developing Union law.

The ECJ struggled with how to further define the scope of Union law when it decided *Kremzow v. Republik Osterreich*.¹⁰ *Kremzow* pressured the ECJ to extend its jurisdiction to include human rights protection.¹¹ After an initial reading of the opinion, it may appear that the Court placed human rights in a secondary position when it declined to address Austria's preliminary rulings based upon procedural grounds.¹² In actuality, the court declined to extend its jurisdiction to include human rights because, if extended, its jurisdiction would then significantly overlap with the jurisdiction of the European Court of Human Rights (ECHR).¹³ This case note argues that if the ECJ is to remain a successful and legitimate judicial body, it must continue to limit the scope of its authority to issues relating exclusively to the European Union.

The first section of this casenote will offer a detailed examination of the Court's opinion in *Kremzow v. Republik Osterreich*. The factual

10. See *Kremzow*, 3 C.M.L.R. at 2646, ¶ 19 ("when national legislation is concerned with a situation which . . . does not fall within the field of application of community law, the Court cannot . . . give the interpretive guidance [requested]").

11. See *id.* at 2642-43, ¶ 12.

12. See *id.* at 2646, ¶ 19.

13. The European Court of Human Rights ("ECHR") was created by Articles 38-56 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. European Convention, Nov. 4, 1950, [1950] 312 U.N.T.S. 221, (1950) [hereinafter European Convention]. The European Convention emerged in post World War II Europe and was founded upon a strong desire to protect human rights and preserve these rights against the newly emerged Soviet Bloc. ROBERTSON & MERRILLS, *supra* note 8, at 120. The preamble to the European Convention explains that the goal of the European Convention:

is the achievement of greater unity between its Members and . . .
[re]affirming their profound belief in those Fundamental Freedoms
which are the foundation of justice and peace in the world and are best
maintained on the one hand by an effective political democracy and on
the other by a common understanding and observance of the Human
Rights upon which they depend. . . .

European Convention, at preamble. The European Convention has grown into what has been called "the strongest and most effective human rights treaty there is today." Leuprecht, *supra* note 7, at 316. In 1998, the Member States of the Council of Europe ratified Protocol No. 11 to the European Convention, streamlining the part-time institutions that had previously monitored human rights in Europe, into a full-time European Court of Human Rights in Strasbourg, France. Drzemczewski, *supra* note 7, at 697. For further information on Protocol No. 11, see *id.* (offering a detailed description of the Strasbourg reform). For a detailed description of the process of filing a complaint with the ECHR, see generally LUKE CLEMENTS, EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION (1994).

background and procedural posture of the case will be discussed to provide a framework for the ECJ's opinion. The second section will conduct an inquiry of the Court's analysis and a detailed discussion of each of the five cases the Court relied upon in reaching its decision. The third section will argue that European human rights are sufficiently protected through a number of other European and international institutions. Further, the ECJ must confine the scope of its authority to issues exclusively relating to Union law if it is to remain a successful and legitimate judicial body. While the complex issue of the interrelationships between the European courts is continually debated, the coming of the millennium begs clarity of this situation in order for Europe to move forward as a united body.

II. FACTS

The following section will provide the factual background of *Kremzow v. Republik Osterreich* and a discussion of how *Kremzow* reached the European Court of Justice (ECJ). Friedrich Kremzow, an Austrian man, worked in Vienna as a legal consultant after retiring from the Austrian judiciary.¹⁴ On December 16, 1982, Kremzow confessed to murdering one of his clients, Mr. P.,¹⁵ a confession he promptly retracted.¹⁶ Two years later, the Court of Assizes (*Geschworenen-gericht*) at the District Court (*Kreisgericht*) found Kremzow guilty of murder and unlawful possession of a firearm.¹⁷ Kremzow received the maximum sentence under Austrian law:¹⁸ twenty years in an institution for the mentally ill.¹⁹

Kremzow appealed to the Austrian Supreme Court (*Oberster Gerichtshof*) by filing a plea of nullity (*Nichtigkeitsbeschwerde*).²⁰ The plea was partially supported by the fact that he was denied the right to represent himself.²¹ He also filed an appeal against the sentence (*Berufung*), asking for a reduction in his sentence.²² The Supreme Court rejected Kremzow's plea of nullity and affirmed his guilty verdict.²³ Additionally, the Supreme Court modified his sentence and ordered him to serve life in an ordinary prison rather than twenty years

14. See *Kremzow v. Austria*, 17 Eur. H.R. Rep. 322, ¶ 8 (1993).

15. See *id.*

16. See *Kremzow*, 3 C.M.L.R. at 2640, ¶ 3.

17. See *id.* at 2640, ¶ 4.

18. See *Kremzow*, 17 Eur. H.R. Rep., ¶ 11.

19. See *Kremzow*, 3 C.M.L.R. at 2640, ¶ 4.

20. See *Kremzow*, 17 Eur. H.R. Rep. at ¶ 12.

21. *Id.*

22. See *Kremzow*, 17 Eur. H.R. Rep., ¶ 12.

23. See *Kremzow*, 3 C.M.L.R. at 2640, ¶ 5.

in a mental institution.²⁴ The Supreme Court also rejected supplementary pleas of nullity brought by Kremzow's wife and mother.²⁵

Kremzow did not request to attend the appellate proceedings, nor was his presence requested by the Supreme Court.²⁶ This fact resulted in the referral of his case to the ECHR.²⁷ The premise of the referral was that Kremzow's human rights, under the European Convention for Human Rights and Fundamental Freedoms (European Convention),²⁸ were violated when he was not allowed to defend himself in person at the Austrian Supreme Court.²⁹ On September 21, 1993, the ECHR unanimously found that Kremzow's absence at the hearing violated his right to a fair trial under the European Convention, Article 6(1),³⁰ when taken in conjunction with Article 6(3).³¹ Article 6(3) provides the right to defend oneself in person.³² The ECHR awarded Kremzow costs and expenses in the amount of 230,000 Austrian schillings,³³ as "just satisfaction" under Article 50 of the European Convention.³⁴ Articles 53 and

24. *See id.* at 2640, ¶ 5.

25. *See Kremzow*, 17 Eur. H.R. Rep., ¶¶ 12, 22.

26. *See Kremzow*, 3 C.M.L.R. at 2640, ¶ 5.

27. *See id.*

28. *See generally*, European Convention, *supra* note 13.

29. *See Kremzow*, 3 C.M.L.R. at 2640-41, ¶ 6.

30. Article 6(1) of the European Convention states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

European Convention, *supra* note 13, art. 6(1). While Article 6 of the European Convention guarantees the right to a fair and public hearing within a reasonable time, it is violated more often than all other articles combined. Henricus G. Schermers, *International Human Rights in the European Community and in the Nations of Central and Eastern Europe: An Overview*, 8 CONN. J. INT'L L. 313, 315 (1993). For an interesting discussion of Article 6, see Annemarieke Beijer et al., *Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice*, in CRIMINAL JUSTICE IN EUROPE 283 (Phil Fennell et al. eds., 1995) (comparing the different approaches taken by England and the Netherlands concerning vulnerable witnesses and witnesses outside the jurisdiction).

31. Article 6(3) of the European Convention provides in relevant part "[e]veryone charged with a criminal offence has the following minimum rights . . . (c) to defend himself in person . . ." European Convention, *supra* note 13, at art 6(3).

32. *See Kremzow v. Austria*, 17 Eur. H.R. Rep. 322, ¶ 69 (1993).

33. *See id.* ¶ 10. The currency in Austria is the *schilling*, which is roughly equivalent to the German *deutsche mark*. FEDERAL RESEARCH DIVISION, AUSTRIA, A COUNTRY STUDY 120 (Eric Solsten & David E. McClave eds. 2d ed. 1994).

34. Article 50 of the European Convention states:

54 of the European Convention provide the supervision for the enforcement of this judgement.³⁵

Based on his victory at the ECHR, Kremzow brought two claims against the Austrian courts in the Regional Civil Court in Vienna (*Zivilrechtssachen Wein*).³⁶ Kremzow asked for a reduction in his sentence, in accordance with paragraph 410 of the Austrian Code of Criminal Procedure,³⁷ that allows for a reduction of sentence when mitigating circumstances emerge.³⁸ Additionally, he requested damages in the amount of 3,969,058 Austrian schillings for unlawful detention³⁹ during the time period of July 3, 1986 through September 30, 1993, as allowed by Article 5(5) of the European Convention.⁴⁰ The Regional Civil Court

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford *just satisfaction* to the injured party.

European Convention, *supra* note 13, art. 50 (emphasis added).

35. Article 53 of the European Convention states "[t]he High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties." European Convention, *supra* note 13, art. 53. Article 54 of the Convention states "[t]he judgment of the court shall be transmitted to the Committee of Ministers which shall supervise its execution." European Convention, *supra* note 13, art. 54.

36. *See Kremzow*, 3 C.M.L.R. at 2641, ¶ 7.

37. *See id.*

38. Paragraph 410 of the Austrian Code of Criminal Procedure:

If, after a sentence (penalty) may no longer be appealed, mitigating circumstances emerge, which were not available or were not known at the time of deliverance, and if, indeed, the use of another penal clause is not involved, but nevertheless they plainly would have brought about a more lenient assessment of the penalty, so the court of first jurisdiction is to issue, as soon as it is satisfied as to the existence of these mitigating circumstances, a petition for reasonable relaxation of the penalties to the court of second jurisdiction, which is to give a ruling on the petition after hearing the attorney general. (2) No legal remedy is permitted against denial of a petition for reduction in penalty. If the court of second jurisdiction accedes to the petition for leniency on assessment of penalty given by the highest court, then it is to present the petition to the highest court, which is to give the final ruling after hearing the attorney general.

§410 StPO (Phyllis Shorman trans.)

39. *See Kremzow*, 3 C.M.L.R. at 2641, ¶ 7.

40. Article 5(5) of the European Convention allows an injured party to be compensated for violations of their rights under Article 5(1)-(4). It reads as follows:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the

in Vienna (*Zivilrechtssachen Wein*) found for the Austrian government on both claims.⁴¹ On appeal, the Higher Regional Court in Vienna (*Oberlandesgericht Wien*) affirmed the decision,⁴² based on Paragraph 2(3) of the Law on State Liability (*Amtshaftungsgesetz*).⁴³ That paragraph states in part "no claim for compensation could arise out of a judgment of the Supreme Court."⁴⁴ The judgment of the European Court of Human Rights has Constitutional status in Austria,⁴⁵ and is therefore binding.⁴⁶ However, when the original case has achieved the

lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantee to appear for trial. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

European Convention, *supra* note 13, art. 5(5).

41. See *Kremzow*, 3 C.M.L.R. at 2641-42, ¶ 9.

42. See *id.*

43. See *id.*

44. See *id.*

45. Austria gave the European Convention constitutional status in their domestic jurisprudence as a result of the Federal Constitution (Amendment) Act of March 1964. Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 334 (Fall 1995-Winter 1996). However, Austrian courts have been inconsistent in their application, sometimes finding the European Convention subordinate to Austrian domestic laws. *Id.* at 335.

46. See Eva Brems, *Kremzow*, 3 COLUM. J. EUR. L. 474, 475 (1997). See also Jean M. Sera, Note, *The Case for Accession by the European Union to the European Convention for the Protection of Human Rights*, 14 B.U. INT'L L.J. 151, 152 ("The European Convention and the judgments of the ECHR are binding on all members of the Council of Europe which have ratified the European Convention"). Austria was not an original member of the Council of Europe; they joined in April 1956, and ratified the European Convention on September 3, 1958. ANDRE Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 93 (1983). See generally MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS

status of *res judicata* the effect of such judgment remains undecided in Austrian Courts.⁴⁷ Kremzow was therefore unable to enforce the judgment of the ECHR against the Austrian Supreme Court.

Under these circumstances, Kremzow filed an "extraordinary appeal"⁴⁸ to the Austrian Supreme Court,⁴⁹ asking them to request the European Court of Justice for a preliminary ruling on the issue of whether the decision of the European Court of Human Rights is binding on Austrian Courts.⁵⁰ The Austrian Supreme Court stayed their proceedings and addressed two questions to the ECJ for preliminary rulings. The Austrian Court first asked the following question:

Are all or at least the substantive-law provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")—including the provisions of Articles 5,⁵¹ 6,⁵² and 53⁵³ of the Convention which are relevant to the proceedings before the Oberster Gerichtshof—part of Community law (Article 164 EC),⁵⁴ with the result that the Court of Justice of the European Communities may give a preliminary ruling on their interpretation pursuant to the first paragraph of Article 177⁵⁵ EC?⁵⁶

LAW 428-450 (1995) (describing how the European Convention has the status of a treaty and states are required to make the substantive ideas of the Convention applicable to citizens).

47. See Brems, *supra* note 46, at 475.

48. See Kremzow, 3 C.M.L.R. at 2642, ¶ 11.

49. One author suggests that the Austrian Supreme Court "possesses a strong conservative inclination generally, with an attitude of particular reserve towards the [European] Convention." DRZEMCZEWSKI, *supra* note 46, at 103. This is significant as Member States national courts must act in accordance with the ideals of the European Convention although there is no sufficient enforcement mechanism in place. See *infra* note 231 (Article F of the TEU establishes this relationship.)

50. See Kremzow, 3 C.M.L.R. at 2642, ¶ 11.

51. See European Convention, *supra* notes 13, 31, 41, art. 5.

52. See European Convention, *supra* notes 13, 31, 32, art. 6.

53. See European Convention, *supra* notes 13, 31, 36, art. 53.

54. Article 164 of the EEC Treaty states "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." EEC TREATY, *supra* note 1, art. 164. The purpose of the European Community is explained in Article A of the Treaty on European Union that states: "[t]he Union shall be founded on the European Communities, supplemented by the policies and forms of co-operation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the member-States and between their peoples." TEU, *supra* note 6, art. A.

55. Article 177 of the EEC Treaty states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council; where those statutes so provide. Where such a ques-

Essentially, Austria asked the ECJ to determine the relationship between the European Convention and European Union law. Austria's second question was actually a series of five questions to be answered only in the event that the first question was answered in the affirmative.⁵⁷ The ECJ never addressed the second question, since the first question was answered in the negative; therefore, this case note will not directly address it.⁵⁸

III. COURT'S ANALYSIS AND DECISION

The ECJ, through Judge Rapporteur⁵⁹ and President of the Fifth

tion is raised before any court or tribunal of a member-State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a member-State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EEC TREATY, *supra* note 1, art. 177.

56. See *Kremzow*, 3 C.M.L.R. at 2642-43, ¶ 12(1).

57. See *id.* at 2642-43, ¶ 12(2)(a)-(e). The second question asked:

(2) Only in the event that Question 1 is answered in the affirmative, at least as regards Articles 5 and 6 of the Convention: (a) Are national courts bound by judgments of the European Court of Human Rights finding violations of the Convention at least to the extent that they are not entitled to hold that the conduct of State institutions to which the finding of a violation relates was in accordance with the Convention? (b) Are claims for compensation for damage based on Article 5(5) of the Convention precluded where the damage flows from a decision of the Oberster Gerichtshof? (c) Is detention within the meaning of Article 5(1)(a) of the Convention contrary to the Convention *ex tunc* where the European Court of Human Rights has found that, in the criminal proceedings, the national court was in breach of the procedural safeguards enshrined in Article 6 of the Convention? (d) Is the legal entity against which proceedings have been brought for State liability entitled to plead that the punishment would have been on no different a scale if the violation of Article 6 of the Convention found by the European Court of Human Rights had not occurred, although the Austrian law of criminal procedure - to date - does not provide in such cases for proceedings for the revision of a judgment or other amending proceedings by means of which the procedural error could have been remedied? (e) Does the burden of proving the causal connection between the violation of Article 6 of the Convention and the deprivation of the plaintiff's liberty fall on the plaintiff or does the burden of proof in respect of this defect fall on the defendant legal entity?

Id. at 2642-44, ¶ 12.

58. See *id.* at 2646, ¶ 19.

59. In each case, the President of the ECJ appoints one Judge to serve as Judge Rapporteur. RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE 13 (1998). The job of the

Chamber, J.C. Moitinho de Almeida, offered a brief opinion in response to the preliminary rulings requested by the Austrian Supreme Court.⁶⁰ After a summary of the factual background, the ECJ affirmed Kremzow's position that he felt entitled to damages because his right to freedom of movement under Article 8(a) of the Treaty of Rome.⁶¹ The violation occurred when Austria unlawfully detained him in violation of Community law.⁶² To reach its conclusion, the ECJ's analysis relied entirely on a series of five prior ECJ decisions: *RE the Accession by the Community to the European Human Rights Convention*;⁶³ *Elliniki Radiofonia Tileorassi Anonimi Etairia (ERT AE) and Another v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Another*;⁶⁴ *Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Steven Grogan and Others*;⁶⁵ *Hans Moser v. Land Baden-Wurttemberg*;⁶⁶ and *Criminal Proceedings Against Jean-Louis Maurin*.⁶⁷

The ECJ's first point was that "fundamental rights form an integral part of the general principles of Community law."⁶⁸ ECJ jurisprudence has reiterated this ideology, most notably in Opinion 2/94, *Re the Accession of the Community to the European Human Rights Convention*,⁶⁹

Judge Rapporteur is to create a preliminary report summarizing the case, which is distributed to the other judges to help them prepare for the hearing. *Id.* The Judge Rapporteur also prepares draft opinions on behalf of the chamber. *Id.* Because the position of Judge Rapporteur is quite influential, judges are never assigned to cases originating from their own country. *Id.*

60. See generally Kremzow, 3 C.M.L.R. at 2637-47.

61. Article 8(a) of the EEC Treaty states in relevant part "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States . . ." EEC TREATY, *supra* note 1, art. 8(a).

62. See Kremzow, 3 C.M.L.R. at 2644, ¶ 13.

63. Opinion 2/94, RE the Accession by the Community to the European Human Rights Convention, 1996 E.C.R. I-1759, [1996] 2 C.M.L.R. 265 (1996).

64. Case 260/89, *Elliniki Radiofonia Tileorassi Anonimi Etairia (ERT AE) and Another v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Another*, 1991 E.C.R. I-2925 [1991].

65. Case 159/90, *Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Steven Grogan and Others*, 1991 E.C.R. I-4685, [1991] 3 C.M.L.R. 849 (1991).

66. Case 180/83, *Hans Moser v. Land Baden-Wurttemberg*, 1984 E.C.R. 2539, [1984] 3 C.M.L.R. 720 (1984).

67. Case C-144/95, *Criminal Proceedings Against Jean-Louis Maurin*, 1996 E.C.R. I-2909. Although the ECJ does not officially recognize precedent, they often act in conformity with their previous decisions. HARTLEY, *supra* note 1, at 75. However, Kremzow is particularly interesting since instances where the court directly cites their previous decisions are extremely uncommon. *Id.* at 76

68. See Kremzow, 3 C.M.L.R. at 264, ¶ 14.

69. Opinion 2/94, RE the Accession by the Community to the European Human Rights Convention, 1996 E.C.R. I-1759, [1996] 2 C.M.L.R. 265 (1996). The ECJ stated that, "it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures." *Opinion 2/94*, 2. C.M.L.R. at 290, ¶ 33. For an excellent discussion on the arguments for European Community accession to the ECHR, see Tara C. Stever, *Protecting Human Rights in the European Union: An Argument for Treaty Reform*, 20 FORDHAM INT'L L.J. 919 (1997).

which the *Kremzow court* relied upon. *Opinion 2/94* was an advisory opinion⁷⁰ requested by the Council of the European Community.⁷¹ The request arose after contemplating the idea of opening negotiations to discuss accession by the Community to the European Convention.⁷² Under the authority of Article 228(6) of the Treaty of Rome,⁷³ the Council asked the ECJ the following question: "Would the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 be compatible with the Treaty establishing the European Community?"⁷⁴

The ECJ responded by describing a two-fold problem with Community accession to the Convention.⁷⁵ First, the Community may not be competent to make such a conclusion; and, second, there may be problems with the compatibility of the Community to the provisions of the Treaty.⁷⁶ The ECJ noted it has the capability to give an opinion when provided with sufficient information concerning the issue. In that particular instance, adequate information was not provided to the ECJ, therefore, it was not appropriate to offer an opinion on the issue of whether accession by the European Community to the European Convention would be compatible with the Treaty of Rome.⁷⁷ Second, the ECJ asserted that both express and implied provisions of the Treaty of Rome provide the requisite competence.⁷⁸ However, no provision within the Treaty confers the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.⁷⁹

In closing, the ECJ noted that Article 235 of the Treaty of Rome⁸⁰

70. See *infra* notes 165-169 and accompanying text, for a discussion of advisory opinions.

71. The Council of the European Community was created in Articles 145-154 of the EEC Treaty. The function of the council is described in Article 146, which states in relevant part "[T]o ensure the objectives set out in the Treaty are attained." EEC TREATY, *supra* note 1, art. 145. The Council has jurisdiction to bring issues before the ECJ through Article 228(6), see *infra* note 73 (citing the text of Article 228(6)). Advisory opinions are discussed in further detail, *infra* notes 165-169.

72. See *Opinion 2/94*, 2 C.M.L.R. at 267.

73. Article 228(6) states:

The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may come into force only in accordance with Article N of the Treaty on European Union.

EEC TREATY, *supra* note 1, art. 228(6).

74. See *Opinion 2/94*, 2 C.M.L.R. at 269.

75. See *id.* at 288, ¶ 9.

76. See *id.*

77. See *id.* at 289.

78. See *id.* at 289, ¶ 26.

79. *Id.* at 290, ¶ 27.

80. Article 235 of the EEC Treaty states:

can "fill the gap" when the Treaty of Rome does not include provisions specific to issues raised in the ECJ.⁸¹ Article 235, however, cannot be used to widen the scope of the Treaty of Rome in such a way as to informally amend the Treaty of Rome.⁸² In the end, the ECJ held that the European Convention had "special significance",⁸³ but the Community had "no competence to accede to the Convention"⁸⁴ without significant amendments to the Treaty of Rome.⁸⁵ As in *Kremzow*, this opinion is consistently cited by the ECJ as the primary authority against accession by the Community to the Convention.⁸⁶

The second issue that the ECJ addressed in *Kremzow* was that "measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognized and guaranteed."⁸⁷ To emphasize this point, the Court's opinion relied on *Elliniki Radiofonia Tileorassi Anonimi Etairia (ERT AE) and Another v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Another (ERT AE)*.⁸⁸ *ERT AE* involved a state-owned Greek broadcasting monopoly, ERT AE, that brought suit against an independent broadcasting agency for violating ERT AE's exclusive right of monopoly. The Greek Court asked the ECJ to make ten preliminary rulings about monopolies and their consistency with European Community law.⁸⁹ Question nine asked the Convention to consider whether a monopoly controlling a major service of a Member State is consistent with the "social objectives" of the Treaty of Rome as well as the provisions of Article 10 of the ECHR.⁹⁰ Question ten asked if the freedom of expression guaranty of

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

EEC TREATY, *supra* note 1, art. 235.

81. See *Opinion 2/94*, 2 C.M.L.R. at 290, ¶ 29.

82. See *id.* at 290, ¶ 30.

83. *Id.* at 291, ¶ 33.

84. *Id.* at 291, ¶ 36.

85. See *id.* at 291, ¶ 35.

86. See, e.g., Case 260/89, *Elliniki Radiofonia Tileorassi Anonimi Etairia (ERT AE) and Another v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Another*, 1991 E.C.R. I-2925, ¶ 41 [hereinafter *ERT AE*]; Case 159/90, *Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Steven Grogan and Others*, 1991 E.C.R. I-4685, [1991] 3 C.M.L.R. 849, (1991), ¶ 30.

87. *Kremzow*, 3 C.M.L.R. at 2645, ¶ 14.

88. *ERT AE*, 1991 E.C.R. I-2925.

89. See *id.* ¶ 5.

90. *Id.* ¶ 4. A further discussion of the relationships between Article 10 of the European Convention and the ECJ is outside the scope of this paper. See, e.g., Benjamin L. Apt., *On the Right to Freedom of Expression in the European Union*, 4 COLUM. J. EUR. L. 69, 88-92 (1998) (noting the ECJ's inconsistency in applying Article 10 of the European Convention, yet finding that the European Convention is beyond the scope of their juris-

the ECHR and the social objectives of the Treaty of Rome create implied obligations on Member States.⁹¹

In deciding questions nine and ten, the *ERT AE* Court first articulated the idea from *Re the Accession of the Community to the European Human Rights Convention*, that fundamental rights are integral to Community law.⁹² These "fundamental rights" are found through a variety of sources including, common constitutional traditions, international treaties to which Member States are parties, and the European Convention.⁹³ Measures incompatible with fundamental human rights are unacceptable in the European Community.⁹⁴ Next, the ECJ explained that its jurisdiction to make references sought by Member States exists only when the issue is within the scope of Community law,⁹⁵ requiring the national court to apply the provisions in accordance with Community law.⁹⁶ The ECJ concluded by finding that the limitations imposed by the Treaty of Rome must be "appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights."⁹⁷ Through a reference to *ERT AE*, the Court in *Kremzow* acknowledged that Community law must be read in accordance with the principles set forth in the European Convention when the issue directly involves Community law.⁹⁸

The third point that the ECJ made in their analysis of *Kremzow* was that when an issue arises in the application of Community law, the ECJ is obligated to assist the national court to the best of its ability to act in conformity with both Community law and the European Convention.⁹⁹ The caveat is that when the issue falls outside the scope of Community law, there is no jurisdiction for the ECJ to give a preliminary ruling or interpretative guidance.¹⁰⁰ Many see this as one of the most significant problems with the ECJ and the European Community.¹⁰¹

The ECJ relied upon *Society for the Protection of Unborn Children*

diction).

91. See *ERT AE*, 1991 E.C.R., ¶ 4.

92. See *id.* ¶ 41.

93. See *id.*

94. See *id.* ("the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.")

95. See *id.* ¶ 42.

96. See *id.* ¶ 44.

97. *Id.* ¶ 45.

98. See *Kremzow*, 3 C.M.L.R. at 2645, ¶ 14 ("measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognized and guaranteed.")

99. See *id.* at 2645, ¶ 15.

100. See *id.*

101. See *Apt*, *supra* note 90, at 94 ("Grogan represents one of the most difficult instances of incompatibility between cultural values particular to one nation and EU subjective rights.")

Ireland Ltd. (SPUC) v. Steven Grogan and Others (SPUC) to illustrate this point.¹⁰² This case concerned student groups at three Irish universities that published information about obtaining foreign abortions,¹⁰³ because abortion is illegal in Ireland.¹⁰⁴ SPUC, an organization dedicated to prevent "the decriminalisation of abortion, and . . . protect the rights of unborn life from the moment of conception"¹⁰⁵ brought suit against the student groups to prohibit them from publishing further information on foreign abortions.¹⁰⁶ The Irish Supreme Court found the student's activities violated the Irish Constitution. The student groups, however, ignored the decision of the Irish Supreme Court and continued to publish information on foreign abortions.¹⁰⁷ Following this disobedience by the student groups, SPUC attempted to obtain an injunction against the student groups from continuing to publish this controversial information.¹⁰⁸ The High Court declined to make an immediate ruling, and filed preliminary rulings with the ECJ.¹⁰⁹ In the meantime, SPUC appealed to the Supreme Court who granted the injunction, but allowed the ECJ to decide the preliminary rulings.¹¹⁰ The students argued that the actions taken by the Irish courts breached their freedom of expression under Article 10(1) of the European Convention.¹¹¹

The ECJ answered the preliminary rulings by again nodding to the notion that fundamental rights are integral to the Community.¹¹² The ECJ next stated that the function of the ECJ is to "give the national court all the guidance as to interpretation necessary" to make a decision in compliance with the European Convention when the issue was within the scope of Community law.¹¹³ Because this issue fell outside the scope of Community law, the ECJ could not offer interpretive guidance to the Irish Courts.¹¹⁴ The ECJ finally held that it was "not contrary to Community law for a Member State . . . to prohibit students associations from distributing information . . ." ¹¹⁵ In *Kremzow*, the ECJ used this case to illustrate that when an issue falls outside the scope of

102. Case 159/90, *Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Steven Grogan and Others*, 1991 E.C.R. I-4685, [1991] 3 C.M.L.R. 849 (1991) [hereinafter SPUC].

103. See SPUC, 3 C.M.L.R. at 855.

104. See *id.* at 887, ¶ 3.

105. *Id.* at 887, ¶ 2.

106. See *id.* at 855.

107. See *id.* at 888, ¶ 7.

108. See *id.*

109. See *id.* at 888, ¶ 8.

110. See *id.*

111. Article 10(1) states in relevant part, "[e]veryone has the right to freedom of expression." European Convention, *supra* note 13, art. 10(1).

112. See SPUC, 3 C.M.L.R. at 892, ¶ 30.

113. *Kremzow*, 3 C.M.L.R. at 2645, ¶ 15.

114. See SPUC, 3 C.M.L.R. at 892, ¶ 31.

115. *Id.* at 893.

Community law, the ECJ does not have jurisdiction to offer interpretive guidance.¹¹⁶

The fourth issue the *Kremzow* Court addressed was that a hypothetical possibility of restraint upon his right to freedom of movement does not create a "sufficient connection with Community law to justify the application of Community provisions."¹¹⁷ To emphasize this point, the ECJ referred to *Hans Moser v. Land Baden-Wurttemberg (Moser)*, decided in 1984.¹¹⁸ This case centered on Moser, a man prohibited from earning his teaching certificate due to his affiliation with the German Communist party.¹¹⁹ Moser sued the *Land* authorities for their refusal to allow him to take the certification exams and to prohibit him from the possibility of teaching in another Member State.¹²⁰ The ECJ strongly disagreed with Moser's attempt to establish a weak connection with Community law when there was no German remedy available to him.¹²¹

The ECJ first stated that Article 48 of the Treaty of Rome¹²² was not applicable to exclusively internal issues of a Member State.¹²³ The ECJ went on to find that "purely hypothetical"¹²⁴ issues brought by a party are not actionable, and a person cannot rely on Community law "to contest the application to him of the legislation of his own country."¹²⁵ In *Kremzow*, *Moser* supported the analysis that hypothetical situations, created purely to establish a connection to the Community, are insufficient to apply Treaty of Rome provisions to an individual or a Member State.¹²⁶

The final analytical point the ECJ made was that *Kremzow's* punishment was for the violation of a national law, not a community law.¹²⁷ The crimes he committed (murder and illegal possession of a weapon) were within the exclusive realm of national law¹²⁸ and were not created

116. See *Kremzow*, 3 C.M.L.R. at 2645, ¶ 15 ("however, the Court has no such jurisdiction with regard to national legislation lying outside the scope of community law.").

117. *Id.* at 2645 ¶ 16. In contrast, actual deprivation of a citizen's right to freedom of movement is actionable by the ECJ. *Id.*

118. Case 180/83, *Hans Moser v. Land Baden-Wurttemberg*, 1984 E.C.R. 2539, [1984] 3 C.M.L.R. 720 (1984).

119. See *Moser*, 3 C.M.L.R. at 722.

120. See *id.* at 725, ¶ 4.

121. See *id.* at 728, ¶¶ 18-20.

122. Article 48(1) of the EEC Treaty states "[F]reedom of movement for workers shall be secured within the Community . . ." EEC TREATY, *supra* note 1, art. 48.

123. See *Moser*, 3 C.M.L.R. at 727, ¶ 15.

124. *Id.* at 728, ¶ 18.

125. *Id.* at 728, ¶ 20.

126. *Kremzow*, 3 C.M.L.R. at 2645, ¶ 16 ("a purely hypothetical prospect of exercising that right [right to free movement] does not establish a sufficient connection with Community law to justify the application of Community provisions").

127. See *id.* at 2646, ¶ 17

128. See *id.*

or intended to comply with Community law.¹²⁹ The Court referred to a 1996 opinion, *Criminal Proceedings Against Jean-Louis Maurin (Maurin)* to make their final point.¹³⁰

The *Maurin* case involved a man arrested for selling food past the expiration date on the package. In his defense, Maurin relied on a French procedural rule, asserting that because the head of the investigation did not sign the police report, the report was void under both French national law and the European Convention.¹³¹ The case was brought before the ECJ on a preliminary ruling to determine whether the French national law was "compatible with the general principles of law laid down by the ECJ."¹³² The ECJ found it lacked jurisdiction to decide a matter of exclusive national legislation that was not within the purview of Community law.¹³³ The holding in *Moser* is substantially similar to the holding in *Kremzow*, both refused to give a preliminary ruling on issues falling outside the scope of Community law.

After the brief discussion of these five cases, the *Kremzow* Court held that the question, whether the European Convention is substantively part of Community law allowing the ECJ to give preliminary rulings on the interpretation of the European Convention, did not fall inside the scope of Community law.¹³⁴ The questions were concerned with Austrian national legislation not Community law, therefore, the Court could not give the Austrian Supreme Court a preliminary ruling.¹³⁵ The refusal of the ECJ to provide interpretative guidance to the Austrian Supreme Court demonstrates its attempt to further define the scope of Community law by refusing to extend ECJ jurisdiction to include the European Convention.

IV. DISCUSSION

This case note will first look briefly at the history and jurisdiction of the ECJ in order to establish the context for the following discussion.

129. *See id.*

130. Case C-144/95, *Criminal Proceedings Against Jean-Louis Maurin*, 1996 E.C.R. I-2909 [1996]. *Maurin* is similar to *Kremzow* as both cases concern national criminal proceedings and their relationship to Article 177 of the Treaty of Rome. EEC TREATY, *supra* note 1, art. 177. It is possible that *Maurin* heavily influenced the final decision in *Kremzow*, as it is the capstone of the Court's analysis.

131. *See Maurin*, 1996 E.C.R., ¶ 3.

132. *Id.* ¶ 6.

133. *See id.* ¶ 12. *See also Kremzow*, 3 C.M.L.R. at 2646, ¶ 17 ("Mr. Kremzow was sentenced for murder and for illegal possession of a firearm under provisions of national law which were not designed to secure compliance with rules of Community law."). *See also* Case 12/86, *Demirel v. Stadt Schwaebisch Gmuend*, 1987 E.C.R. 3719, ¶ 28 (1987).

134. *Kremzow*, 3 C.M.L.R. at 2646, ¶ 19.

135. *Id.*

Next, it will examine human rights in Europe and argue that they are protected through a number of other European and international institutions. These institutions negate the necessity for the ECJ to offer additional protection. Finally, this paper will conclude that it is in the best interest of Europe to allow the ECJ to limit its authority to matters exclusively within the scope of Union law, rather than extending its jurisdiction to include human rights issues.

A. *History and Jurisdiction of the European Court of Justice*

The European Court of Justice is the primary judicial branch of the European Union, created by Articles 164-188 of the Treaty of Rome.¹³⁶ The main function of the ECJ is to "ensure that in the interpretation and application of this Treaty, the law is observed."¹³⁷ Historically, the ECJ was the final authority on Union law in terms of its application within the European Union; between the European Union and Member States; and, between individuals and the European Union.¹³⁸ Eventually, the extraordinary workload of the ECJ became too burdensome and the ECJ suggested establishing a secondary court to handle a portion of their caseload.¹³⁹ This suggestion led to the creation of the Court of First Instance (CFI) in 1989.¹⁴⁰ The CFI has the authority to hear a variety of cases and their decisions are only reviewable by the ECJ on legal issues.¹⁴¹ Essentially, the CFI takes away the burden of routine cases, allowing the ECJ to concentrate on cases that the court can use to further develop and clarify EU law.¹⁴²

136. EEC TREATY, *supra* note 1, arts. 164-188. For additional information on the European Union, see generally CAIRNS, *supra* note 6.

137. EEC TREATY, *supra* note 1, art. 164. For a provocative analysis of the legal theory and justifications used by the ECJ, see JOXERRAMON BENGOETXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE* (1992).

138. See CAIRNS, *supra* note 6, at 34.

139. See L. NEVILLE BROWN & FRANCIS G. JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 64 (3rd ed. 1989).

140. See CAIRNS, *supra* note 6, at 35. The Court of First Instance ("CFI") was created by Article 168(a) of the EEC Treaty. Article 168(a) reads in relevant part:

A Court of First Instance shall be attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceeding defined in accordance with the conditions laid down in paragraph 2. The Court of First Instance shall not be competent to hear and determine questions referred for a preliminary ruling under Article 177.

EEC TREATY, *supra* note 1, art. 168(a).

141. See CAIRNS, *supra* note 6, at 34

142. See *id.*, at 35. The Court of First Instance has limited jurisdiction and hears all actions that concern EU trademark laws, staff cases, competition cases, plant variety rights cases and cases brought by individual plaintiffs. DINNAGE & MURPHY, *supra* note 6, at 34-35.

The ECJ has no inherent jurisdiction¹⁴³ but derives its broad jurisdiction from the EU Treaty, specifically Articles 177-183.¹⁴⁴ There are three main categories of the ECJ's jurisdiction: judgments, opinions and appellate jurisdiction over the Court of First Instance.¹⁴⁵

The most common source of jurisdiction for the ECJ are judgments, a loose term describing any number of actions brought before the ECJ.¹⁴⁶ Judgments concern the intricate relationship between Union law and Member States' law, and are considered fundamentally important in effectuating Union law within the Member States.¹⁴⁷ There are two types of judgments: direct actions and preliminary rulings.¹⁴⁸

Direct actions arise when the ECJ has jurisdiction by agreement or direct application of the law.¹⁴⁹ Direct actions begin at the ECJ, and the ECJ is the final decision maker; there is no appellate procedure.¹⁵⁰ This type of judgment concerns issues brought by or against Member States, any of the Union's institutions, and in rare cases, by private citizens of the EU.¹⁵¹

Preliminary rulings are often requested when the national court of a Member State is faced with an issue that directly relates to the application of EU law within that State.¹⁵² The national court requests a preliminary ruling from the ECJ, and the ECJ has the jurisdiction to decide these issues under Article 177 of the Treaty of Rome.¹⁵³ The decision reached by the ECJ on a specific point of EU law is then adopted by the national court to its own decision.¹⁵⁴ The ECJ has jurisdiction to make preliminary rulings on three issues: treaty interpretation, questions of validity, and interpretation regarding acts of Union institutions and interpretation of statutes created by EU institutions.¹⁵⁵ This was the basis for the Court's jurisdiction in *Kremzow*, the Austrian Supreme Court asked the ECJ to make preliminary rulings on two questions dealing with the application of Union law to Austrian national law.¹⁵⁶

The rationale behind the Court's involvement with preliminary

143. HARTLEY, *supra* note 1, at 56.

144. See EEC TREATY, *supra* note 5, arts. 177-83.

145. See BROWN & JACOBS, *supra* note 139, at 71-75. See generally HARTLEY, *supra* note 1, at 58-63.

146. See HARTLEY, *supra* note 1, at 58-61. See also BROWN & JACOBS, *supra* note 139, at 71-73.

147. See HARTLEY, *supra* note 1, at 58-61.

148. See *id.* at 59.

149. See *id.* at 61. See also BENGOETXEA, *supra* note 137, at 14-15.

150. See HARTLEY, *supra* note 1, at 61.

151. See *id.* at 61.

152. See HARTLEY, *supra* note 1, at 59. See also BENGOETXEA, *supra* note 137, at 15.

153. See EEC TREATY, *supra* note 6, art. 177. Full text of Article 177 is *supra* note 55.

154. See HARTLEY, *supra* note 1, at 59.

155. See EEC TREATY, *supra* note 1, art. 177. Full text of Article 177 is *supra* note 55.

156. See *Kremzow*, 3 C.M.L.R. at 2642-44, ¶ 12.

rulings is to ensure consistency in terms of application and interpretation of Community law within Member States because consistency is widely recognized as the hallmark for a successful and functional community.¹⁵⁷ Preliminary rulings have been a primary vehicle for the ECJ to define and shape Union law.¹⁵⁸ Recent criticism of the ECJ suggests the ECJ has not offered Member States adequate guidance in their opinions on preliminary rulings, leaving Member States to interpret the judgment as they see fit.¹⁵⁹ This significantly increases the potential for inconsistent judgments by the Member States.¹⁶⁰

In addition to preliminary rulings and direct actions, judgments can be in the form of actions against Member States,¹⁶¹ judicial review of community acts,¹⁶² and plenary jurisdiction,¹⁶³ although a large part of the Court's former authority over plenary jurisdiction has been delegated to the CFI.¹⁶⁴

The second form of jurisdiction of the ECJ is that of advisory opinions.¹⁶⁵ Article 228(6) of the EU Treaty authorizes this jurisdiction by explaining:

The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force

157. See, e.g., P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 66 (1985). It is interesting to compare the system of interpretation of Union law to the system of appellate procedure in the United States. Preliminary rulings are a feature unique to the ECJ. There is no similar system in the United States, whereby a State court can ask a Federal court for any kind of interpretive guidance before they reach a decision. Because interpretation of Union law is such a critical role for national courts throughout the EU throughout the EU, many issues have been raised before the ECJ before they are decided by the national court. See DINNAGE & MURPHY, *supra* note 6, at 360.

158. See BENGOTXEA, *supra* note 137, at 15.

159. See CAIRNS, *supra* note 6, at 301.

160. See *id.* See also Stever, *supra* note 69, at 943-46 (summarizing the ECJ's decision in *Solange I* and commenting that the legal consistency of the European Community is jeopardized when "Member State courts do not agree on an interpretation of EC law and apply varying forms of a directive.")

161. See BROWN & JACOBS, *supra* note 139, at 76. Actions against Member States occur when a Member State is charged with not fulfilling its obligations under the EEC Treaty and the ECJ has the jurisdiction to hear these cases based on Articles 169 and 170 of the EEC Treaty. *Id.*

162. See *id.* at 95-96. The ECJ has jurisdiction to judicially review acts of the EU under Articles 173 and 179 of the EEC Treaty. *Id.*

163. See *id.* at 131-32. Plenary jurisdiction is a French concept that was adopted by the EU. *Id.* at 131. It refers to the Court's ability to have jurisdiction over issues concerning penalties established by the Treaty. The ECJ derives its plenary jurisdiction from Articles 172, 178, and 179 of the EEC Treaty. *Id.*

164. See *id.* at 132.

165. See HARTLEY, *supra* note 1, at 59.

only in accordance with Article N of the Treaty on European Union.¹⁶⁶

Advisory opinions are used preemptively when the Council, the Commission, or a Member State is unsure of the compatibility of a future action with the Treaty.¹⁶⁷ Advisory opinions are rarely used because they ask the Court to define the scope of a particular aspect EU Treaty.¹⁶⁸ If the ECJ concludes that the action in question is outside the purview of the Treaty only an amendment to the Treaty providing for such action, will legitimate the action.¹⁶⁹

The ECJ's final area of jurisdiction is appellate jurisdiction over issues of law arising in the Court of First Instance.¹⁷⁰ This is a new form of jurisdiction for the ECJ, and is exclusively limited to points of law.¹⁷¹ An appeal may arise from any infringement of Union law, including *ultra vires* actions¹⁷² and procedural errors.¹⁷³ When the ECJ accepts an appeal from the CFI, the decision of the CFI is no longer valid and the ECJ must either decline a final judgment or remand the case back to the CFI for further proceedings.¹⁷⁴

Although the CFI relieved some of the burden on the ECJ, the number of cases pending before the ECJ remains staggering.¹⁷⁵ Therefore, the CFI has done little to reduce the backlog of cases for the ECJ even though the CFI remains busy in its own right.¹⁷⁶ Adding human rights issues to the ECJ's already broad jurisdictional base would greatly increase the already dramatic backlog of cases awaiting decision by the ECJ.

B. European Human Rights are Protected through other European and International Institutions.

The *Kremzow* decision naturally introduces the question of whether the European Union offers sufficient human rights protection to its

166. EEC TREATY, *supra* note 1, art. 228(6). Full text of Article 228(6) is *supra*, note 73.

167. See BROWN & JACOBS, *supra* note 139, at 203. See also EEC TREATY, *supra* note 1, art. 228(6).

168. See also HARTLEY, *supra* note 1, at 59.

169. See BROWN & JACOBS, *supra* note 139, at 203. See also EEC TREATY, *supra* note 1, art. 228(6).

170. See BROWN & JACOBS, *supra* note 139, at 75.

171. See HARTLEY, *supra* note 1, at 62.

172. The doctrine of *ultra vires* refers to an action taken by a legislative body that is outside the scope of their authority. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2480 (1993).

173. See HARTLEY, *supra* note 1, at 62.

174. See *id.*

175. See *id.* at 58.

176. See *id.*

Member States. At first, it may appear paradoxical that the *Kremzow* Court proclaimed fundamental rights as integral to the Union, then refused to make a decision on the human rights issue presented by this case.¹⁷⁷ However, the issue of human rights in Europe is significantly more complex. *Kremzow* should be analyzed within the complete spectrum of human rights protection, both on a European scale and worldwide scale, rather than an exclusive province of the ECJ. The following paragraphs will discuss the proposition that human rights are more than adequately protected throughout Europe.¹⁷⁸ Further, there is an urgent need to allow the ECJ to limit its jurisdiction if it is to remain a legitimate and successful judicial body.¹⁷⁹

European human rights are protected on multiple levels through a network of Treaties, State practice, and the European Court of Human Rights.¹⁸⁰ The European Convention was established as a regional effort to secure the fundamental human rights described in the Universal Declaration of Human Rights.¹⁸¹ To enforce and protect the ideals set forth in the European Convention, the Treaty also established the European Court of Human Rights.¹⁸² The Council of Europe, whose Member States are all signatories to the European Convention,¹⁸³ differs in structure, function, and purpose from the EU.¹⁸⁴ The Council of Europe was established as a political body for the promotion of European unity,¹⁸⁵ while the EU (and its predecessor the European Economic Community) was created to develop Europe's economic interests.¹⁸⁶ Interestingly, the fifteen Member States of the European Union are all members of the Council of Europe, and signatories to the European Convention.¹⁸⁷ Because these two bodies are separate, the ECJ governs only the European Union and has no jurisdiction over issues arising from the Council of Europe or the European Convention.¹⁸⁸ To further confuse these two institutions, ECJ opinions frequently recog-

177. See *Kremzow*, 3 C.M.L.R. at 2644, ¶ 13.

178. See, e.g., *Brems*, *supra* note 46, at 478-79.

179. *Id.*

180. See *Kremzow*, 3 C.M.L.R. at 2645, ¶ 14.

181. See European Convention, *supra* note 13, at preamble ("Being resolved, as the Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.")

182. See *supra*, note 13 and accompanying text (describing the ECHR).

183. See *supra*, note 7 and accompanying text (describing the European Convention).

184. See *supra*, note 6. See also *Sera*, *supra* note 46, at 152.

185. For further information on the Council of Europe, see *Leuprecht*, *supra* note 7, at 313-36 (providing a historical analysis of the Council of Europe and its human rights protections).

186. See *CLEMENTS*, *supra* note 13, at 2-3.

187. Compare *supra* note 6 (describing the EU) with *supra* note 7 (describing the Council of Europe).

188. See EEC TREATY, *supra* note 1, arts. 164-88.

nize that the fundamental freedoms represented by the European Convention are integral to the ideals of the European Union.¹⁸⁹

When the European Community, now integrated as the EU, was established through the Treaty of Rome, the Treaty failed to include basic human rights provisions.¹⁹⁰ The 1993 amendments to the Treaty of Rome, the Treaty on European Union, remedied this situation in part through Article F, which states that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950."¹⁹¹ The extent to which Article F should be interpreted as providing human rights protection to the European Union and its Member States is the subject of current debate.¹⁹² Currently, Article F is not enforceable by the ECJ based upon Article L of the Treaty on European Union.¹⁹³ The failure of the EU to provide its members with adequate human rights protection is seen by many people as a fundamental problem of the EU.¹⁹⁴

As noted above, all members of the EU (which does not provide a bill of rights for basic human rights) are also members of the Council of Europe (which does provide a bill of rights for basic human rights).¹⁹⁵ Therefore, all members of the EU receive regional human rights protection through their affiliation with the Council of Europe. Clearly, there

189. See Sera, *supra* note 46, at 161.

190. See generally EEC TREATY, *supra* note 1.

191. TEU, *supra* note 6, art. F. Full text of Article F is *infra*, note 231.

192. See *infra*, notes 231-235 and accompanying text.

193. Article L of the TEU states:

The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers *shall apply only to the following provisions of this Treaty*: (a) provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community; (b) the third subparagraph of Article K.3(2)(c); (c) Articles L-S.

TEU, *supra* note 6, art. L (emphasis added).

194. See Sera, *supra* note 46, at 185. Sera makes the argument that accession to the European Convention would solve many of the problems faced by the EU resulting from their lack of a bill of rights. See also Stever, *supra* note 69, at 991 ("The European Community should amend the EEC TREATY to allow for accession to the ECHR so that the European Community, along with Member States and institutions, will be held accountable consistently for human rights violations.").

195. See *supra* notes 6-7 and accompanying text. See also Sera, *supra* note 46, at 154 ("The Council of Europe, an organization entirely independent from the EU, has as its thirty-nine members all European states, and among them are all the Member-States of the EU."). This was written before Russia, the 40th member, joined the Council of Europe. See *supra*, note 7.

is a significant overlap between the Member States of these two institutions. There are strong arguments that both institutions are better served by performing separate tasks. Specifically, to leave the monitoring of human rights exclusively to the Council of Europe while the European Union focuses on the economic aspect of the Union. The case note will later discuss this issue in detail.¹⁹⁶

While Europe has a comprehensive set of treaties and conventions protecting against human rights abuse, further human rights protection is available to individual Member States by becoming signatories to various international declarations and conventions.¹⁹⁷ Many European countries support the international efforts to combat human rights abuse by signing these declarations and conventions, including the Universal Declaration of Human Rights,¹⁹⁸ the Covenant on Economic, Social and Cultural Rights,¹⁹⁹ the Convention on Elimination of Racial Discrimination,²⁰⁰ the Convention Against Torture,²⁰¹ the Genocide Convention,²⁰² the Convention on the Rights of the Child,²⁰³ and the Convention on Discrimination Against Women.²⁰⁴ Since each Member State possesses the discretion to ratify international conventions, not all members of the EU are signatories to all of the conventions listed above.²⁰⁵ Through these various mechanisms, Europe has successfully established a multi-layered system of human rights protection for its citizens.²⁰⁶

One caveat to any criticism of the European human rights system is that this issue must be analyzed on a global scale rather than in a purely regional context. Europe, as a unified community, represents the most exceptional human rights system currently in place.²⁰⁷ The issues arising before the European Courts are relatively sophisticated

196. See *infra*, notes 237-247 and accompanying text.

197. See Stever, *supra* note 69, at 968-69.

198. Universal Declaration of Human Rights, G.A. Res. 217 (1948).

199. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

200. Convention on the Elimination of Racial Discrimination, Jan. 7, 1966, 5 I.L.M. 352.

201. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, as modified 24 I.L.M. 535.

202. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 227.

203. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

204. Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33.

205. See, e.g., signatories to Conventions listed *supra*, notes 196-204.

206. See ROBERTSON & MERRILLS, *supra* note 8, at 156.

207. "Over the years, the Council of Europe has set up a system of human rights protection which, in spite of certain weaknesses and shortcomings, can be regarded as the most advanced international human rights structure in the world today." Leuprecht, *supra* note 7, at 314. See also JANIS, *supra* note 46, at 3; ROBERTSON & MERRILLS, *supra* note 8, at 156.

compared to human rights violations occurring in other parts of the world.²⁰⁸ When *Kremzow* is examined through this perspective, the case takes on a different demeanor. It is not a globally recognized right or even custom to allow a convicted murderer to appeal their judgment on human rights grounds. Kremzow's application for relief based on his inability to defend himself in person would be difficult to sustain in many parts of the world. Nevertheless, Kremzow was successful at the ECHR when it recognized this as a violation of his rights under the European Convention.²⁰⁹

The European multi-layered system for human rights protection clearly reveals the adequate protection available to both individuals and Member States of various European supranational bodies.²¹⁰ Therefore, the ECJ, created purely as the judicial body for the EU, does not deny the EU basic human rights when it refuses to define the relationship between the EU and the European Convention. Instead, the ECJ has the luxury of limiting its jurisdiction and allowing other institutions created expressly for the protection of human rights, the ECHR, to adjudicate without interference from them. Defining the jurisdictional limits between the ECJ and the ECHR benefits both judicial bodies; it allows the ECJ to focus on EU law while permitting the ECHR to be the lone decisionmaker on European human rights issues.²¹¹

C. Jurisdiction of the European Court of Justice Should be Limited to Matters of Union Law Exclusively.

After *Kremzow*, the following question remains: is the inability of the ECJ to provide guidance regarding the European Convention in the best interest of the European Union and its Member States? The enduring question presented by the *Kremzow* decision surfaces in the jurisprudence of the ECJ and is the subject of endless debate within the international human rights field. One position supports accession by the Union to the European Convention as the most effective way to establish human rights for the Union.²¹² Another position asserts that

208. See ROBERTSON & MERRILLS, *supra* note 8, at 156. Robertson and Merrills comment that "[T]he systematic torture of political prisoners, arrest of persons who then 'disappear', persecution of political opponents, imprisonment of human rights activists, and other practices which are prevalent elsewhere pose problems which are immeasurably more serious than those which constitute the day-to-day business of the European organs." *Id.*

209. See *Kremzow*, 3 C.M.L.R. at 2640-41, ¶ 6.

210. See *supra* notes 197-209.

211. For an interesting comparison of the relationships between the ECHR, the Inter-American Court of Human Rights, and their respective Member States, see Jarmul, *supra* note 45, at 311-65

212. Stever, *supra* note 69, at 919.

the Treaty of Rome should incorporate a bill of rights.²¹³ Others suggest that perhaps human rights are already sufficiently incorporated into the EU through Article F of the Treaty on European Union.²¹⁴ This case note argues a different position, that human rights are already sufficiently protected in Europe through the multi-layered system discussed earlier, and the ECJ must limit its caseload to issues of Union law if it is to remain a successful and legitimate judicial body.

The first position mentioned argues that accession to the Union is the most effective way to establish human rights for the Union.²¹⁵ This position asserts that the EU should ratify the European Convention and amend the Treaty of Rome to allow for individual access to the ECJ on human rights issues.²¹⁶ Procedurally, an individual bringing a human rights claim would first exhaust all national remedies, appeal to the ECJ, and finally appeal to the ECHR — the final decisionmaker for human rights issues in Europe.²¹⁷ This position, heavily promoted a few years ago,²¹⁸ now appears to have lost some of its momentum.²¹⁹

One problem with EU accession to the European Convention is that it would severely alter the current structure of the ECJ. By allowing for individual petitions to the ECJ, there is the potential that the effects of a national court decision would be minimized, which could turn the ECJ into an appellate court for all forty Member States of the Council of Europe. Another reason why this suggestion is problematic is that the ECJ is currently the final judicial authority on EU issues. By subjecting the ECJ to review by the ECHR, the ECJ would be no more than a supranational appellate court, a position entirely foreign to the ECJ, and arguably an undesirable position for any supranational court. This fundamental structural shift would demand a number of ramifications at both the Member State level and the judicial level.²²⁰ Additionally, problems could arise, as the ECJ would be responsible for interpreting another treaty that is already competently interpreted by the ECHR.²²¹

213. See, e.g., Sera, *supra* note 46, at 178.

214. See *infra* notes 231-235 and accompanying text.

215. See, e.g., Stever, *supra* note 69, at 919 (arguing that accession by the Union to the European Convention is the most desirable solution to promote human rights in the EU):

216. See Sera, *supra* note 46, at 178.

217. See *id.* at 178-79.

218. See, e.g., Stever, *supra* note 69, at 919; Sera, *supra* note 46, at 176-85.

219. See Leuprecht, *supra* note 7, at 335 ("the prospects for Community (or Union) accession seem rather more remote than a few years ago").

220. See generally Mary Frances Dominick, *Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights*, 14 *FORDHAM INT'L L.J.* 639, 668 (1990/1991) ("As a federated Europe comes closer to reality, it is essential that its institutional framework contain explicit, invocable, and directly effective fundamental protections for those whom the governments are designed to serve.").

221. The ECHR is guided by the European Convention. See *supra* note 13, arts. 38-56.

Accession would place a large burden upon the ECJ by increasing its caseload, and arguably alter the caseload of the ECHR only minimally, as human rights issues could still be appealed to the ECHR from the ECJ.²²² It is unclear if this position suggests that the ECHR would exclusively function as a supreme court, or if individuals would be able to appeal directly to the ECHR and bypass the ECJ.

A different position suggests the Treaty of Rome should incorporate a bill of rights; establishing human rights protections for the EU and enforceable by the ECJ.²²³ An interesting parallel is to compare the EU's potential to adopt a bill of rights to the United States, as a loose federation adopting the same document two hundred years ago. Just as the American Constitution originally failed to provide American citizens with comprehensive human rights protections, the Treaty of Rome failed to provide citizens of the EU with such protections. The United States remedied this situation three years after the ratification of the Constitution when the States ratified the first ten amendments, collectively known as the "Bill of Rights".²²⁴ Europe approached human rights protections for its citizens in an entirely different manner. The Treaty of Rome, establishing what has now become the European Union, was signed in 1957 and, as discussed earlier, did not provide human rights protections.²²⁵ However, the European Convention for the Protection of Human Rights and Fundamental Freedoms was passed and entered into force, four years before Europe had a unifying treaty.²²⁶ The European Convention established comprehensive human rights protections for all of Europe and created a special supranational judicial body to adjudicate this issue, the European Court of Human Rights.²²⁷ While the United States established a union prior to offering human rights protections, Europe accomplished human rights protection before creation of their unifying body.²²⁸ It is possible to propose

222. See Sera, *supra* note 46, at 179 ("Once an individual has exhausted all of her "national remedies" up through the ECJ, she would then have the opportunity to appeal to [what is now the unified ECHR in Strasbourg].").

223. See, e.g., *id.* at 178 ("there have been occasions in which the European Community has proposed and agreed to an enumerated list of rights that should be protected in the Community.").

224. U.S. CONST. arts. 1-10 (1791).

225. See also text accompanying *supra* notes 185-189 (discussing the failure of the EEC Treaty to include human rights protections). See generally EEC TREATY, *supra* note 1.

226. See European Convention, *supra* note 13. It is important to remember that the European Convention was created by the Council of Europe, an entirely different body than the European Union and the extent to which human rights are protected in Europe today stem from the difference in these two bodies. See *supra*, notes 13 and accompanying text.

227. See European Convention, *supra* note 13, arts. 38-56; ECHR, *supra* note 13 and accompanying text.

228. Compare U.S. CONST. arts. 1-10 (incorporating the Bill of Rights into the United States Constitution) with European Convention, *supra* note 13, arts. 1-66 (providing hu-

that establishing human rights protections was of greater importance to Europe than unionization. This comparison will become even more provocative should Europe make the decision to unionize to the extent that the United States has.

It is unlikely that the EU will adopt a bill of rights for a number of reasons. First, the Member States of the EU are already provided with more than adequate human rights protection through their individual accession to the European Convention.²²⁹ It would be redundant for the ECJ to enforce the same treaty over similar jurisdiction as the ECHR. Second, this suggestion is not a solution to the lack of human rights protection in the EU because there is nothing to suggest that decisions from the ECJ would be any different than without a bill of rights, as they already profess that fundamental rights are integral to Union law.²³⁰

Another position asserts that European human rights are adequately protected through an interpretation of Article F of the Treaty on European Union as binding the Union to the European Convention.²³¹ A debate of current interest is the extent to which Article F actually incorporates the European Convention into the EU. Article F, which requires the EU to "respect fundamental rights, as guaranteed by the European Convention", is the primary manner that the EU currently provides human rights protections to its citizens.²³² As previously mentioned, the major drawback to utilizing Article F as the main human rights enforcement mechanism for the EU is that it is unen-

man rights and fundamental freedoms protection for the Council of Europe).

229. Member States of the EU are listed *supra*, note 6.

230. See Sera, *supra* note 46, at 178. Furthermore, Sera argues that this option is heavily criticized because it does not give citizens of the EU notice of what liberties are protected by a potential bill of rights. *Id.* However, this critique is difficult to understand from an American point of view because notice is traditionally satisfied when it is made public through an accepted medium. From this perspective, it is hard to imagine that such a sweeping change in ECJ jurisprudence would not be made public to EU citizens in an acceptable manner, to put them on notice of these new protections. See also Kremzow, 3 C.M.L.R. at 264, ¶ 14 ("fundamental rights for an integral part of the general principles of Community law.").

231. See Sera, *supra* note 46, at 153. Article F of the Treaty on European Union provides:

1. The Union shall respect the national identities of its member-States, whose systems of government are founded on the principles of democracy. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member-States, as general principles of Community law. 3. The Union shall prove itself with the means necessary to attain its objectives and carry through its policies.

TEU, *supra* note 6, art. F.

232. TEU, *supra* note 6, art. F. Full text of Article F is *supra* note 231.

forceable by the ECJ.²³³ Due to this anomaly, the ECJ specifically found that the human rights and fundamental freedoms guaranteed in the European Convention "form an integral part of the general principles of Community law",²³⁴ a position they frequently reaffirm.²³⁵ Although the ECJ may choose to reaffirm this position in every case, it does not change the fact that it is not bound to enforce the European Convention.

The final position and the position articulated by this case note is that limiting the ECJ case load to issues arising exclusively from the EU Treaty would best serve the EU. A successful judicial body requires that the ECJ limits its caseload to some degree. The ECJ has already done this, in part, by limiting the scope of its jurisdiction to the issues set out in Articles 164-188 of the EU Treaty.²³⁶ Thus, the ECJ limited its jurisdiction by excluding issues that are of purely national interest to Member States and not relevant to Union law.²³⁷ By excluding itself from the internal jurisprudence of Member States, the ECJ clearly asserts that their function is not to serve as an additional national Supreme Court for each of the fifteen Member States who are signatories to the EU Treaty.²³⁸ The decision by the ECJ to limit its case load provides the dual function of: (1) offering security to national courts of knowing that the ECJ will not interfere with their purely internal issues, while (2) providing the ECJ with a more limited function and allowing them to concentrate on the application of EU law.

Within this framework, it becomes easier to understand the ECJ's predicament when faced with a case such as *Kremzow*.²³⁹ Since there is no legal obligation for the ECJ to follow the European Convention,²⁴⁰ they cannot offer interpretive guidance on human rights issues falling within the scope of Convention law.²⁴¹ Therefore, as seen in *Kremzow*, the court may acknowledge that human rights exist in Union law, but may not offer interpretive guidance to the Member State because the

233. See *id.* art. L. Full text of Article L is *supra*, note 193.

234. *Opinion 2/94*, 2 C.M.L.R. at 290.

235. See, e.g., *Kremzow*, 3 C.M.L.R. at 264, ¶ 14; Case 260/89, *ERTAE*, 1991 E.C.R. I-2925, at ¶ 41.

236. Jurisdiction over preliminary rulings is set out in Article 177, *supra* note 56. To examine the ECJ's jurisdiction in general, see Articles 173-183. EEC TREATY, *supra* note 1, arts. 164-188.

237. See *Hans Moser v. Land Baden-Wurttemberg*, 1984 E.C.R. 2539, [1984] 3 C.M.L.R. 720, 728, ¶ 20 (1984) ("the provisions of the [EEC] Treaty . . . cannot be applied to situations which are purely an internal concern of a member-State, *i.e.* which have no connection with any of the situations envisaged by Community law."); *Kremzow*, 3 C.M.L.R. at 2646, ¶ 19.

238. See EEC TREATY, *supra* note 1 and accompanying text.

239. See *generally Kremzow*, 3 C.M.L.R. at 2637-47.

240. See *Opinion 2/94*, 2 C.M.L.R. at 291, ¶ 36.

241. See *generally Kremzow*, 3 C.M.L.R. at 2646, ¶ 19.

issue of human rights remains a wholly internal matter.²⁴² In *Kremzow*, the ECJ performed the necessary limiting function to ensure that the scope of its jurisdiction remains manageable and is not pushed beyond the boundaries established by the EU Treaty, and remains at a level it can currently maintain.²⁴³

If the ECJ were to become involved in the human rights arena, it would not be as effective in interpreting the actual provisions of EU law. Member States are capable of providing for the enforcement of both supranational courts' judgments (the ECJ and the ECHR). A Member State's refusal to enforce the judgment of one court should not necessarily prompt action by the other. The extent that either court should begin to enforce judgments of the other raises issues of integration of the two courts. This subject is beyond the scope of this casenote. What becomes clear is that human rights in the EU are fundamentally important, yet the issue begs clarification in order for the EU to become a truly unified body.

In the wake of the complexities surrounding the *Kremzow* decision, it can actually supply a defining statement of the scope of Union law. Since the ECHR does not provide adequate measures for enforcement of its decisions, there is currently no remedy for a party when the Member State refuses to enforce a decision of the ECHR.²⁴⁴ *Kremzow*, attempting to confront and challenge this issue, appealed to the ECJ for a resolution of this highly debated area of European law.²⁴⁵ *Kremzow* may have intended that his action provoke the ECJ into offering a definitive statement of the relationship between the European Union and the European Convention, but the ECJ refused revisit a previously addressed issue.²⁴⁶ Instead, the court maintained its position that separation of the various European institutions is essential to the proper function of the Union and refused to expand its already broad jurisdiction.

The ECJ decision in *Kremzow* exemplifies only one of the many complexities of European law. Some scholars suggest that perhaps if they simplified their regional groups Europe could better protect human rights.²⁴⁷ Simplification may have led to a favorable outcome for Mr. *Kremzow*, if it was confusion as to each court's role within the Europe that ultimately led to the non-enforcement of his judgment. However,

242. *See id.*

243. *See* EEC TREATY, *supra* note 1, arts. 164-88.

244. *See* Jarmul, *supra* note 45, at 331. *See also* RALPH BEDDARD, HUMAN RIGHTS AND EUROPE 22 (1993). Beddard discussed this contradiction by explaining that "[O]ften applicants have been no better off, except in peace of mind, after applying to the European Commission, although in fact the presence of the Convention and the existence of its machinery has improved the quality of life of many other European citizens." *Id.*

245. *See* *Kremzow*, 3 C.M.L.R. at 2642-44, ¶ 12.

246. *See generally* Opinion 2/94, 2 C.M.L.R. at 265-91.

247. *See generally* ROBERTSON & MERRILLS, *supra* note 8, at 191.

this suggests a larger problem that unless there are competent enforcement mechanisms available to the ECHR, Member States may continue to ignore judgments such as in *Kremzow*.

V. CONCLUSION

It is surprising that in the more than fifty years of the European Union, there remains no formal declaration of human rights.²⁴⁸ While human rights are adequately protected in Europe through the European Convention,²⁴⁹ it is important to remember that the ECJ was not established to protect the human rights of Union members.²⁵⁰ The ECHR was created specifically to perform this task, but it is the exact situation seen in *Kremzow* that suggests the distinction between these two supranational courts is not so clear.

In defense of the action taken by the ECJ, the ECJ must clearly define what issues fall within its jurisdiction, and it is not within its jurisdiction to hear cases concerning human rights. Fortunately for citizens of the EU, that responsibility falls within the jurisdiction of the ECHR. If one analyzes this decision as a failure by the EU to protect human rights, a greater message is lost. That message is that the ECJ continues to empower the ECHR by deferring to its better judgment concerning human rights issues.

The ECJ already has an enormous jurisdictional base, partially demonstrated by its recent need to establish a secondary court.²⁵¹ Adding another area to the ECJ's jurisdiction would only make the ECJ less efficient and less effective in implementing the laws it was created to enforce. This is additionally supported by the fact that Europe has established the ECHR. The exclusive purpose of the ECHR is to adjudicate potential human rights violations, and to serve as a model for human rights protections throughout the rest of the world.

As Europe moves closer to unionization, a reexamination of the powers and jurisdiction of these two courts are imminent. Many possibilities exist for the status of these supranational courts if full unionization is reached, and possibly some degree of integration will result. While the EU concentrates on the economic aspect of unionization for the moment, the Council of Europe remains Europe's primary human rights monitor. The *Kremzow* opinion is therefore a necessary limita-

248. *Sera*, *supra* note 46, at 152. *See also* EEC TREATY, *supra* note 1, arts. 1-240.

249. *See generally* European Convention, *supra* note 13.

250. While the ECJ defers to the European Convention when issues concerning human rights arise, the European Convention does not bind them. *Sera*, *supra* note 46, at 152.

251. *See supra*, note 142 and accompanying text (discussing the Court of First Instance).

tion on the ECJ's jurisdiction, rather than a denial of human rights protection for the citizens of the European Union.

