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## **The accession of the European Union/European Community to the European Convention on Human Rights**

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mrs Marie-Louise BEMELMANS-VIDEC, Netherlands, Group of the European People's Party

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### *Summary*

The report gives clear backing for European Union (EU) accession to the European Convention on Human Rights (ECHR).

The question has been under discussion for several years and the Assembly has regularly called for such accession.

The report reiterates the arguments for accession, which include greater protection of individuals' rights, the guarantee of a coherent Europe-wide system of human-rights protection, and reinforcement of legal certainty. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed on 13 December 2007 by the heads of state and government of the EU member states, provides a legal basis for EU accession to the ECHR.

Noting that the political will for accession clearly exists within the two organisations and that the legal situation permits it, the report concludes that the declarations of intent must now be given practical effect by speedy EU accession to the ECHR.

The Committee of Ministers and the EU should immediately begin negotiations on the accession instrument. The European Parliament and national parliaments are urged to approve and/or ratify without delay the instruments necessary for accession.

### **A. Draft resolution**

1. The Parliamentary Assembly notes with satisfaction that today there is a broad consensus on the question of the accession of the European Union (EU) to the European Convention on Human Rights (ECHR).
2. Calls for this accession have been issued for a long time and on numerous occasions, inter alia by the Assembly, most recently in its [Recommendation 1744](#) (2006) on "Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union".
3. The Council of Europe and the EU reiterated their common resolve to effect this accession when concluding the Memorandum between the Council of Europe and the European Union signed in May 2007; the legal path to accession is already laid out in Protocol No. 14 to the ECHR and was opened once again by the adoption in December 2007 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

4. The Assembly considers that henceforth accession must be the priority in the dialogue between the two Organisations.
5. Whereas accession to the ECHR is one of the conditions of entry into the EU listed among the 1993 Copenhagen criteria, the institutions of the EU/ European Community are presently not bound by the ECHR. The fact that the EU member states – all member states of the Council of Europe and parties to the ECHR – have transferred substantial powers to supranational institutions without transmission of the responsibilities accruing from the ECHR conveys a negative message by giving the impression of disparate legal protection.
6. Non-accession has adverse effects on the proper functioning of European justice as it imperils the coherence of the system of human rights safeguards in Europe. As long as the EU has not acceded to the ECHR:
  - 6.1. there will be divergences in human rights standards both at European level (between European institutions) and between the EU and its member states;
  - 6.2. the EU institutions will not come under external judicial supervision where respect for human rights and fundamental freedoms is concerned;
  - 6.3. the coherence of European legal protection will not be fully assured, since the case-law of the European Court of Human Rights and the Court of Justice of the European Communities might not be appropriately harmonised;
  - 6.4. European citizens will not have direct access to the European Court of Human Rights when they consider that their fundamental rights have been violated by the European Union's institutions;
  - 6.5. execution of the judgments of the European Court of Human Rights will remain a difficult undertaking in cases involving EU law.
7. Accession will convey a strong message of a clear commitment to the protection of human rights not only within the boundaries of the EU but also Europe-wide, in keeping with the community of values shared by the Council of Europe and the EU.
8. Accession will also confirm the EU's essence as a "community based on law" and will strengthen the principle of legal certainty, to the extent that the EU institutions will be subject to the same external review of the conformity of their acts and decisions as are member states.
9. The Assembly considers it high time for the declarations of intent to be carried into effect with the EU's early accession to the ECHR.
10. In this context, the Assembly questions the expediency of the procedural changes added by the Treaty of Lisbon, which provides that the decision on the agreement on Union accession to the ECHR be adopted by the Council unanimously, only after approval by the European Parliament. These additions may well have the effect of slowing down the accession procedure.
11. The Assembly is convinced that there is no longer any need for delay in opening negotiations on practical questions linked with accession, since there is a clear political will on both sides and a legal framework permitting accession.

12. The Assembly therefore calls upon the governments of the EU member states to apply themselves to this task without delay while adopting a positive, creative approach in order to find workable and effective solutions to the technical and legal questions raised by accession, and calls upon the European Union to expedite the conclusion of the necessary instruments for accession.

13. The Assembly also urges the European Parliament to take timely steps for the prompt approval of the decision on the agreement relating to the accession of the EU to the ECHR.

14. Finally, the Assembly urges the parliaments of all member states to act quickly to ratify the necessary instruments for accession.

## **B. Draft recommendation**

The Parliamentary Assembly, recalling its Resolution ... (2008) on the accession of the European Union/European Community to the European Convention on Human Rights, recommends that the Committee of Ministers immediately open negotiations with the European Union on the instrument of accession, on arrangements for accession and on its procedural implications, bearing in mind the specific characteristics of the European Union, so as to ensure the rapid adoption of instruments for accession.

## **C. Explanatory memorandum, by Mrs Marie-Louise Bemelmans-Videc, Rapporteur**

### **Contents**

I. Introduction

II. Why accession?

III. The path to accession

IV. Conclusion and recommendations

Appendix: Other analyses made in the context of this report

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### **I. Introduction**

1. This report stems from a motion for a resolution (Assembly [Doc 11001](#)) tabled by Mr Van Thijn, Mr Kox and others on *The accession of the European Union/European Community to the European Convention on Human Rights*, dated 5 July 2006, appealing to the European Union (EU) to accede, without delay, to the European Convention of Human Rights (ECHR).

2. In April 2007, the rapporteur presented an introductory memorandum which served as a basis for discussions at the hearing held by the Committee on Legal Affairs and Human Rights on 11 September 2007<sup>1</sup>. On that occasion the following experts addressed the Committee: Mr Francis Jacobs, former Advocate General at the Court of Justice of the European Communities; Mrs Florence Benoît-Rohmer, Professor at the Robert Schuman University (Strasbourg) and Mr Olivier De Schutter, Professor at

the Law Faculty of the Catholic University of Leuven and at the College of Europe. In addition, Mr Pieter van Dijk, member of the European Commission for Democracy through Law (Venice Commission) and former judge of the European Court of Human Rights (ECtHR), transmitted a written contribution to the committee members. All these experts' particularly informative contributions have been appended to this report.

3. The need for EU accession to the ECHR has been repeatedly advanced by, *inter alia*, Council of Europe bodies, such as the Secretary General of the Council of Europe<sup>2</sup> and the Parliamentary Assembly<sup>3</sup> as well as the European Commission<sup>4</sup> and the European Parliament<sup>5</sup>. Although the proposal for an EU/EC accession to the ECHR dates back to 1979, it has gained increased political momentum over recent years.

4. The Declaration adopted by 46 Heads of State and Government of the Council of Europe's member states in Warsaw in May 2005, reiterates the resolve "to create a new framework for enhanced co-operation and interaction between the Council of Europe and the European Union in areas of common concern, in particular human rights, democracy and the rule of law."<sup>6</sup> In this context, the Declaration explicitly requests Luxembourg's Prime Minister, Jean-Claude Juncker, to write, in his personal capacity, "a report on the relationship between the Council of Europe and the European Union, on the basis of the decisions taken at the Summit and taking into account the importance of the human dimension of European construction."<sup>7</sup> The *Guidelines on the Relations between the Council of Europe and the European Union*<sup>8</sup>, drawn up and adopted during the Summit, urge early accession of the EU to the ECHR.<sup>9</sup> Recent reports by the Parliamentary Assembly on *the State of Human Rights and Democracy in Europe*, reiterate that EU accession to the ECHR should be regarded as an urgent priority<sup>10</sup>.

5. The draft Constitutional Treaty for the European Union (2003) also foresees the accession of the EU to the ECHR in Article 7(2).<sup>11</sup> This provision was taken over from Article 6 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007)<sup>12</sup>.

## II. Why accession?

6. The key arguments for EU accession to the ECHR are the following<sup>13</sup>:

7. Firstly, accession will convey a strong message about the commitment to human rights protection not only within the EU's borders but on the whole European continent, emphasising the importance of co-operation between the EU and the Council of Europe (CoE) in seeking to achieve a pan-European identity of shared values without dividing lines, in keeping with the community of values shared by the Council of Europe and the EU<sup>14</sup>. As underscored in its final report, the EU Convention's Working Group II on the EU Charter and accession to the ECHR (EU Working Group II), "accession would give a strong political signal of the coherence between the Union and the 'greater Europe', reflected in the [CoE] and its pan-European human rights system."<sup>15</sup>

8. Secondly, EU accession to the ECHR will help rectify discrepancies in human rights standards which currently exist both at the European level (as between European institutions) and as between the EU/EC and individual member states. As a

result, ensuring consistency in human rights protection in Europe is of crucial importance<sup>16</sup>. This concern was amply acknowledged in the Memorandum of Understanding concluded in May 2007 between the Council of Europe and the European Union, which provides that “Early accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms would contribute greatly to coherence in the field of human rights in Europe”<sup>17</sup>.

9. At the European level, and in the context of the establishment of the Fundamental Rights Agency, the Parliamentary Assembly considered that “the political will impelling the proposals for the Agency should be employed to give new impetus towards EU accession to the ECHR, which would be the most important step in ensuring that the EU acts with full respect for human rights”<sup>18</sup>.

10. At present, all EU member states are subject to the ECHR because they are also member states of the Council of Europe. However, the supra-national institutions to which they have transferred significant competence are themselves not, creating a considerable gap in the human rights protection system in Europe. Mr van Dijk says in this connection that “by transferring more and more powers to the EC/EU, the exercise of which may interfere with the member states' obligations under the ECHR, the member states have, in fact, also transferred part of their answerability under the ECHR to the EU/EC. However, the latter's answerability has not yet been materialised by its submission to the jurisdiction of the ECtHR”<sup>19</sup>. As observed by the Assembly, “by far the most serious lacuna surrounds the institutions of the European Union itself, the only public authorities operating in Council of Europe member states that are outside the jurisdiction of the European Court of Human Rights” (ECtHR)<sup>20</sup>, although it acknowledges that “the European Court of Justice [ECJ], in its decisions, does in fact follow the case law of the [ECtHR].<sup>21</sup>” The Assembly stresses that its “concern in this matter is motivated by a desire to ensure that the inhabitants of Europe as a whole benefit from the most effective and efficient overall human rights protection system.<sup>22</sup>” As noted by Mr Pourgourides in his report on the *State of Human Rights in Europe*, “accession of the EU/European Community to the Convention will serve to remedy negative consequences arising out of such a disparate system.<sup>23</sup>” In this regard, the Committee of Ministers referred to the Warsaw Summit Action Plan, which suggested that “early accession of the EU to the ECHR would strongly contribute to ensuring coherence in the field of human rights in Europe.<sup>24</sup>” The Secretary General of the Council of Europe lately recalled, and rightly so, that the “prospect of the European Union acceding to the European Convention on Human Rights [is] a very important development “ adding that “the preparation for accession will not be easy – it will require a great deal of negotiation between the EU and the Council of Europe so that we and our colleagues in Brussels need to start immediately and work expeditiously”<sup>25</sup>.

11. As noted above, discrepancies exist between the EU/EC and individual member states, due to the fact that the EU imposes human rights standards on non-European Union states (for instance, in the context of bilateral agreements and development aid), which it does not impose upon itself. In addition, the fact that the EU is gradually establishing its own standards, notably in the area of justice and home affairs (third pillar), has spurred some debate. For instance, the recent Draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union has evoked doubts about its consistency with the ECHR<sup>26</sup>. This is aggravated by the lack of external scrutiny of its own activities<sup>27</sup>. Furthermore, a pre-

condition for EU membership is accession to the ECHR (Copenhagen criteria 1993), and the post-accession condition for continuous and unimpeded membership requires, *inter alia*, “respect for human rights and fundamental freedoms” set out in Article 6(1) of the Treaty on European Union, which at a minimum includes “all rights and freedoms guaranteed by the [ECHR]”<sup>28</sup>, explicitly referred to in Article 6(2) of the same treaty<sup>29</sup>. Despite the imposition of the foregoing pre- and post-accession conditions, the EU has itself not acceded to the Convention. This apparent contradiction will be eliminated by EU/EC accession to the ECHR.

12. Another pertinent argument in favour of accession is the fact that EU institutions will become subject to the same system of independent external monitoring of compliance with fundamental rights, which public authorities in Council of Europe member states (thus, all EU member states) are already subject to<sup>30</sup>. In addition, accession will enable European citizens to bring complaints against the EU institutions directly before the ECtHR<sup>31</sup>. This will in turn provide the EU itself with the opportunity to participate as a party in cases directly or indirectly concerning the application of Community law before the ECtHR, thereby enabling it procedurally to explain contested provisions<sup>32</sup>. Finally, the binding effects on the EU of any decision by the ECtHR confirming a violation of the ECHR will be enhanced<sup>33</sup>. As a result, accession “would confirm the European Union’s standing as a Community based on the rule of law, and legal certainty would benefit if the actions and decisions of the European Union institutions were subjected to the same external scrutiny as those of its member states.”<sup>34</sup>

13. Furthermore, and this is a weighty argument raised by Mrs Benoît-Rohmer in her contribution, accession would have the practical consequence of simplifying legal remedies. Mrs Benoît-Rohmer recalls that “the procedures that currently have to be followed by a potential victim are complicated in that, after exhausting domestic and EU remedies, he or she must lodge an application with the Strasbourg Court, not against the perpetrator of the contested act (the Union or the Community), but against a member state. If that state is convicted, there is no guarantee that the victim's situation will be remedied, since the remedy depends on a third party, the European Union”<sup>35</sup>. Mr De Schutter also mentions the fact that “the accession of the EU to the ECHR would ensure that any individual aggrieved by an act adopted by the EC or the EU will have access to a court which will be competent to determine whether or not that act infringes fundamental rights”. Although he finds that the judicial protection of the individual would be markedly improved by the provisions of the Treaty of Lisbon, he stresses the undeniable added value of external judicial supervision of respect for human rights and fundamental freedoms which the ECtHR will be able to exercise after accession<sup>36</sup>.

14. Lastly, execution of the ECtHR’s judgments proves to be a most difficult undertaking in cases involving Union law. While the effective enforcement of the Court’s judgments forms the backbone of the Convention system, the current situation is seen to be unsatisfactory. Indeed, it is clearly difficult for a member state against which the Court delivers judgment to comply with the judgment if the violation arises partly from its obligations under Community law<sup>37</sup>.

15. As with any long-standing debate, objections have been raised over the years, the main ones concerning the autonomy of the EU’s legal system and the perceived inappropriateness of the ECJ’s “subordination” to the ECtHR. It is clear that the



autonomy of the EU's legal system and the special status of the ECJ must form part and parcel of any integration scheme<sup>38</sup>. Indeed, Article 220 of the European Community Treaty (ECT) imposes the ultimate authority on the ECJ as regards the interpretation of Community law<sup>39</sup>. In other words, the issue is not one of "subordination" of one court by another, but one of specialisation<sup>40</sup>. As noted by the European Convention's Working Group II, the ECtHR "could not be regarded as superior Court but rather as a specialised court exercising external control over the international law obligations of the Union resulting from accession to the ECHR."<sup>41</sup> As a result, the ECJ will retain exclusive competence (being the court of last instance) in reviewing final decisions in all matters relating to Community law. In the event that the ECtHR finds inconsistencies between Community law, as interpreted by the Court in Luxembourg, and the ECHR, responsibility will lie on the EU, like any other CoE member state, to align regulations or their application in a particular context with the requirements of the ECHR<sup>42</sup>. The ECtHR's jurisdiction will be confined to the determination of violations of the ECHR, which concern only a small percentage of the cases brought before the ECJ<sup>43</sup>. Community law and the ECHR are in any event based on the same values and principles regarding the protection of fundamental human rights<sup>44</sup>. In the same way as the ECtHR has a subsidiary role with regard to national courts, the EU institutions, upon accession, will continue to bear primary responsibility for ensuring respect for the rights enshrined in the ECHR<sup>45</sup>. As noted by the former Deputy Secretary General of the Council of Europe, Hans-Christian Krüger, "the issue here is not subordination or primacy of courts but, rather, the submission of final decisions on alleged violations of fundamental rights to a uniform, specialized, pan-European body, with power merely to verify whether Community law and Community measures are compatible with fundamental rights."<sup>46</sup> He rightly argues that: "the autonomy and authority of the two courts would also be strengthened if each had the final say in its own area of jurisdiction."<sup>47</sup> As stressed by the EU Working Group II, "[a]ccession would be the ideal tool to ensure a harmonious development of the case law of the two European Courts in human rights matters."<sup>48</sup>

16. Some anxieties have been raised regarding the influence which the Court's imposition of positive obligations might have on the existing apportionment of powers between the European Union and its member states. The rapporteur draws attention to the stance of the EU Network of independent experts on fundamental rights, which states that "the Union will only be obliged to discharge such "positive" obligations insofar as it has the necessary competences. It is only in the areas where the member states have conferred competences upon it that, in certain cases, it may be obliged to exercise them in order to ensure an effective protection of the rights and freedoms enshrined in the European Convention on Human Rights. (...), so the undertaking by the Union to observe the European Convention on Human Rights does not create any new competences or tasks for it, nor will it affect the existing division of competences between the Union and the member states."<sup>49</sup>

17. Mrs Benoît-Rohmer concludes in perfectly plain terms that "while the existence of pragmatic solutions probably makes accession less urgent than it used to be, the need for clarity, legal certainty and judicial protection for individuals, along with political factors, militates in its favour."<sup>50</sup>

### **III. The path to accession**

#### *i. Possibilities in the event of a modified institutional system*

18. The referenda in France and the Netherlands have put on hold the entry into force of the Constitutional Treaty, which, as mentioned previously, had explicitly foreseen the EU accession to the ECHR in Article 7(2), (“*the Union shall accede*”)<sup>51</sup>. But the legal possibility of accession does not depend on the Constitutional Treaty, which had merely intended to facilitate it. In other words, “accession is highly desirable while being legally possible with due regard to the autonomy of the Community legal order and without substantially altering the human rights protection mechanism set up under the ECHR.”<sup>52</sup>

19. On 13 December 2007, the Heads of State and Government of the EU member states signed the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community<sup>53</sup>. In a new Article 6, the Treaty provides that “the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”<sup>54</sup>

20. This treaty indubitably lays a legal foundation for the accession of the EU to the ECHR. As Mr Jacobs points out in his contribution, the prescriptive formulation chosen for the new Article 6 has the effect of “not merely enabling, but requiring the European Union to accede to the ECHR”<sup>55</sup>.

21. The question has arisen which entity would have the capacity to accede to the ECHR. Strictly speaking, only the European Community at present has the necessary legal personality for accession. Mr De Schutter notes in his contribution that “there is a consensus among jurists that the European Union has an international legal personality.” Indeed, on the basis of Articles 24 and 38 of the EU Treaty, the Council (representing the European Union) may conclude international agreements. It follows that the Union is “endowed with the international legal personality, without it being necessary to stipulate this explicitly”<sup>56</sup>. The issue no longer arises since the Treaty of Lisbon integrates the EC with the EU, which in effect becomes the sole entity able to accede to the ECHR. For that reason, the rapporteur has opted to contemplate only the accession of the EU in her preliminary draft resolution and recommendation.

22. One may nevertheless question the expediency of the procedural changes projected by the insertion of a new Article 188N (in place of Article 300 of the EC Treaty) providing that the decision on the agreement on Union accession to the ECHR can only be adopted by the Council after obtaining the European Parliament’s consent. Furthermore, the new article provides that the Council is to decide unanimously in this matter.

23. There may be anxieties over these additional stages which will indubitably have the effect of considerably slowing down the accession procedure. Given that the accession no longer raises any dispute, but is the subject of a broad consensus, it would have been preferable for everything to be done to hasten its actual attainment.

24. Although also not yet in force, Protocol No. 14 to the ECHR, which is aimed at securing the medium-term effectiveness of the ECHR system, explicitly provides for the possibility of EU accession to the Convention through an amendment of its Article 59<sup>57</sup>. Further legal and technical amendments to the Convention, which principally relate to the modalities of participation in the control machinery of the ECHR (ECtHR, Committee of Ministers) will be necessary on the Council of Europe’s side in order to allow for accession<sup>58</sup>. In this regard, the Steering Committee for Human



Rights (CDDH) prepared a report in 2002 examining the technical and legal issues of a possible EC/EU accession<sup>59</sup>, advancing two principal modalities by which accession could be achieved: either by way of an amending protocol to the Convention or by means of an accession treaty to be concluded between the EU and the CoE member states. Although the CDDH expresses preference for the latter option, it was deemed that explicit reference to an accession treaty should be avoided so as to keep all options open<sup>60</sup>. Due to the fact that the EU was held to lack competence to accede<sup>61</sup>, no further modifications to the Convention were included in Protocol No. 14. As a result, and depending on the modalities chosen for accession, further modifications must become subject to a separate ratification procedure<sup>62</sup>.

ii. *Possibilities in the event of an unchanged institutional system*

25. In the unlikely event that the Treaty of Lisbon was not ratified by all member states and thus could not take effect, the legal reasoning put forward by the rapporteur in her introductory memorandum would stand<sup>63</sup>.

iii. *Follow-up*

26. It will also be important, once the text relating to EU accession to the ECHR is ready, to ensure that all 47 member states of the Council of Europe ensure its rapid entry into force.

#### IV. Conclusions and recommendations

27. Over the years, the European Union has evolved in such a way as to reflect, in explicit terms, not only the growing awareness of human rights standards generally<sup>64</sup>, but also the vital role played by the ECHR and the Strasbourg Court in this area. For instance, Article 6(2) of the Treaty on European Union stipulates: “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...).<sup>65</sup>” The Charter of Fundamental Rights of the European Union (EU Charter) as well as its ‘explanatory report’<sup>66</sup> further make explicit reference, *inter alia*, to the ECHR and the case law of the ECtHR. In addition, the ECJ explicitly follows ECtHR case law in deliberating cases brought before it<sup>67</sup>. Further, the recent creation of the EU Agency for Fundamental Rights confirms the EU’s growing commitment to human rights. In light of the foregoing, it is clear that “human rights have thoroughly permeated the Community legal system”<sup>68</sup>. EU accession to the ECHR therefore represents a logical and necessary next step in harmonising the *corpus juris* concerning fundamental human rights across Europe.

28. To sum up these non-exhaustive considerations, accession will provide for:

- greater protection of individuals’ rights;
- consistency both at the level of European institutions and as between the EU/EC and individual member or prospective member states;
- external review by an independent court, and enhanced credibility of the EU vis-à-vis third countries in implementing human rights standards.

29. Accession will thus ensure the coherence of the system of human rights protection throughout Europe and promote legal certainty<sup>69</sup>. The adoption of the EU Charter only enhances the relevance of these considerations since accession to the

ECHR and the implementation of the EU Charter should be seen as complementary processes<sup>70</sup>.

30. Whilst EU accession to the ECHR has been debated for nearly 30 years, it has received increased political momentum following the Warsaw Summit of the Council of Europe, the Juncker report, the elaboration of the draft Constitutional Treaty and finally the adoption of the Treaty of Lisbon. This opportunity must now be seized in order to move on to concrete action. Undoubtedly, this will involve legal and technical complexities. In the words of the United Kingdom's Select Committee of the House of Lords: "We do not mislead ourselves in thinking that accession by the Union (and Communities) to the E.C.H.R. would be anything but politically and legally complex. Treaty amendments would be needed, certainly to the E.C.H.R. and probably to the E.U. Treaties. But we do not doubt that, given the political will, the legal and other skills can be found to overcome the difficulties."<sup>71</sup>

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## APPENDIX

### **Other analyses made in the context of this report<sup>\*</sup>**

A. *Contribution by Mr Pieter van Dijk (The Hague), State Councillor of the Netherlands, member of the Venice Commission and former Judge on the European Court of Human Rights*

B. *Contribution by M. Francis G. Jacobs, Professor in law, King's College (London) and former Advocate General at the Court of Justice of the European Communities*

C. *Contribution by Mrs Florence Benoît-Rohmer, Professor at the Robert Schuman University (Strasbourg)*

D. *Contribution by Mr Olivier De Schutter, Professor at the Law Faculty of the Catholic University of Leuven and at the College of Europe (Bruges)*

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### **A. Contribution by Mr Pieter van Dijk, Member of the Venice Commission and former Judge on the European Court of Human Rights**

#### *I. Introductory observations*

1. The Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe invited me to participate in an exchange of views on the matter of the accession of the European Community/European Union to the European Convention on Human Rights on 11 September in Paris. Since I will not be able to attend the meeting, I take the liberty to present some written observations that might be included in the debate.

2. The issue of accession of the European Union (EU)/ European Community (EC) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been discussed for almost thirty years, if we take the Memorandum of the European Commission of 1979 as a starting point<sup>73</sup>. This lapse of time may have enhanced and at the same time diminished its urgency. In my

opinion, from a substantive and practical point of view, its urgency has been diminished, thanks to the way in which the Court of Justice of the European Communities (CJEC) has developed its case-law in the area of the protection of human rights<sup>74</sup>, and thanks to the gradual standard-setting of the EU/EC in the same area. On the other hand, from a dogmatic and formal point of view, the urgency has increased in view of the extension of the powers of the EU/EC in fields which traditionally belong to States, and in the exercise of which all member States of the EU would be submitted to the jurisdiction of the European Court of Human Rights (the ECtHR).

3. Although the proposals for accession from different sources<sup>75</sup> have found broad support in governmental and non-governmental circles, the adoption of the Constitutional Treaty was the first occasion where the idea was supported unanimously by the Heads of State or Government of all member States. The change of attitude of the former opponents may be explained by the fact that their domestic authorities have also become accustomed to international human rights standards and international supervision; the ECHR has internal effect in their domestic legal orders and the jurisdiction of the ECtHR has become compulsory. If therefore alone, the moment seems more appropriate than ever for the (Parliamentary Assembly of the) Council of Europe to, on its part, revisit the issue and take the necessary initiatives.

## *II. Practical point of view: the CJEC's case-law*

4. This aspect does not need any further description on my part, since the surveys of the case-law of the CJEC on the human rights principles as part of Community law and on the guiding role of the Strasbourg case-law in interpreting these standards, are abundant and easily accessible<sup>76</sup>.

## *III. Principal point of view: international supervision*

5. The development of international human-rights standard-setting, and the concomitant international supervision of action and inaction by domestic authorities, has not yet incorporated the phenomenon of international governmental organizations with powers delegated by the member States to take decisions and action that so far were the domain of domestic authorities.

6. This holds, in particular, true for the EC/EU. On the one hand, it is an international organization with powers delegated to it by its member States, but with the sovereignty of the member States remaining the decisive factor (“*une succession fonctionnelle et limitée*”<sup>77</sup>), and with its own supervisory mechanism attuned to that special relationship. On the other hand, the institutions of the EC/EU exercise powers which are delegated to them with exclusion of the national authorities and which are comparable to certain powers traditionally exercised by the legislative, administrative and judicial authorities of the member States. Without such attribution of powers to the EU/EC, the exercise of these powers by the authorities of the member States would have been subject to review by the ECtHR for its conformity with the ECHR<sup>78</sup>. In fact, accession to the ECHR, with compulsory jurisdiction of the ECtHR, was in recent years, and still is a condition for membership of the EC/EU<sup>79</sup>. For its credibility as a defender of human rights the EU/EC has to be prepared to also submit its own legal order and legal action to external supervision<sup>80</sup>. This would mark the recognition that also within the legal order of the EU/EC the interests of European integration are controlled and delimited by the effective protection of the fundamental human rights

of the EU citizens, this “common code of fundamental values, in particular those laid down in the European Convention on Human Rights”<sup>81</sup>.

7. It is a general feature of the law of international organisations that these organizations and their organs are immune, not only from the jurisdiction of the courts of their member states, but also from judicial organs of other international organisations. As the Venice Commission observed in that respect in one of its previous opinions: "The purpose of this rule is to ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems"<sup>82</sup>. However, this rationale would seem less valid in the area of human rights, since human rights standards are not just part of the legal system in the framework of which they have been adopted but are of a general universal or regional nature, as the case may be. Consequently, the international bodies set up to supervise the implementation and interpretation of these standards may be imbedded in a particular organisation but must primarily be seen as the protectors of these universal/regional standards rather than as the supervisory bodies of those organisations

8. In the case of the EC/EU in relation to the ECHR and the ECtHR there is an even more significant specific feature. As said before, the EC/EU has been endowed with powers that were originally exercised by the member States and as such belonged to the area of the ECtHR's jurisdiction. By transferring more and more powers to the EC/EU, the exercise of which may interfere with the member States' obligations under the ECHR, the member States have, in fact, also transferred part of their answerability under the ECHR to the EU/EC. However, the latter's answerability has not yet been materialized by its submission to the jurisdiction of the ECtHR. The result, therefore, is erosion of the jurisdiction of the ECtHR *ratione personae* as well as *ratione materiae*<sup>83</sup>. This lacuna will gradually be filled, to a large extent, by the CJEC's supervision of EU/EC acts for their conformity with fundamental-rights principles, but this will not necessarily lead to a result equal to supervision by the ECtHR.

9. This fact has not escaped the attention of the ECtHR. In a judgment of 1999, it adopted the position previously taken by the European Commission for Human Rights<sup>84</sup> that the member States cannot, by transferring powers to an international institution, evade their own responsibility under the ECHR and their answerability towards the ECtHR<sup>85</sup>. The European Commission for Human Rights had put it in very clear terms as follows: "Under Article 1 of the Convention the member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations"<sup>86</sup>. And in a judgment of 1996 the ECtHR held that the fact that the applicable domestic legislation is based almost word for word on an EC directive, does not remove it from the ambit of the ECHR<sup>87</sup>. For the scope of the ECtHR 's review and the member State's responsibility under the ECHR to pertain, it appears to be decisive whether or not the member States exercised discretion<sup>88</sup> and had freely accepted the international obligation concerned<sup>89</sup>.

#### IV. The Strasbourg attitude so far

10. The principle point of view set out under § 3 could have led the ECtHR, from the perspective of its own responsibilities and powers and in order to avoid a vacuum of international legal protection of the rights and liberties laid down in the ECHR, for the determination of its own jurisdiction to ignore the setting-up of the EU/EC with its supranational features (to “pierce the veil”) and to attribute the act or omission challenged before it to all member States or one or more member States in particular (the so-called “substitution approach”). The party who brings the complaint might invite the ECtHR<sup>90</sup> to do so by bringing the claim, in addition to or instead of the EU/EC, to any or all member States.

11. This construction of holding the member States answerable would, however, have the disadvantage for the member States that they are held responsible for an action they were obliged to take or in the taking of which they had no part at all or only a minor part. It would bring them in the awkward position that, on the one hand, Article 46, paragraph 1, of the ECHR obliges them to implement the ECtHR's judgment, while, on the other hand, EU law may prohibit them to take the required individual and general measures which such implementation requires, except the measure of paying damages. For the EU/EC it would have the disadvantage that its law and actions are examined and judged by the ECtHR in a procedure in which it has no party position enabling it to explain and defend that law or these actions, while the member State(s) concerned may press for changes to meet the standards of the ECHR.

12. So far, "Strasbourg" has chosen not to follow that conflict-provoking and unsatisfactory path. In cases where the substance of the complaint basically also concerns the interpretation or application of Community Law, the ECtHR, without relinquishing jurisdiction, is prepared to refer to the judgment of the CJEC, as long as the procedure followed by that court offers substantive guarantees and a controlling mechanism that are equivalent to the procedure provided by the ECHR<sup>91</sup>. By "equivalent", the ECtHR means "comparable", since "any requirement that the organisation's protection be 'identical' could run counter to the interest of international cooperation pursued"<sup>92</sup>. From the case-law of the CJEC and the references to human rights standards in the respective EU/EC treaties, the ECtHR has so far drawn the assumption – with the possibility of rebuttal in a specific case - "that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, 'equivalent' (...) to that of the Convention system"<sup>93</sup>.

#### *V. Specific identity of the EU*

13. Although the EC/EU has acquired several powers which before were exercised by the competent authorities of the member States, the EC/EU is not a State nor a federation of States. It remains an international organisation with specific goals and specific powers transferred to it to achieve these goals. This makes accession on the one hand more urgent and, on the other hand, more complicated.

14. Through the case-law of the CoJCE and subsequent Declarations adopted by institutions of the EU/EC, the human rights standards laid down in the ECHR have been incorporated within the legal order of the EC/EU ("factual accession"). However, this does not necessarily mean that the institutions of the EC/EU will always apply these standards in the way they are interpreted and applied by the ECtHR. The latter's case-law is oriented towards States and their powers and (democratic) decision-making processes, and does not necessarily take into account



(yet) the specific features of the EC/EU in such a way that the latter may be sufficiently guided by its interpretation and application of the rules laid down in the ECHR. As long as the human-rights standards to be applied by the CJEC are part of the EU/EC Treaty, the CJEC will be inclined to interpret them in the light of the purposes of European integration<sup>94</sup>. After accession, the ECtHR would have direct jurisdiction over the EC/EU institutions, would be informed about the EU/EC perspective on behalf of the EU/EC institution involved in a particular case, and would thus be enabled to take the specific features of the EU/EC as an organisation and of EU/EC law into account (with a judge elected in relation to the EC/EU participating in the deliberations). This would enhance the uniform interpretation and application of the ECHR in relation to all actions of authorities *vis-à-vis* individuals within the European human rights space, taking into due account also the specificities of the EC/EU.

15. The above observation implies that accession would make it also more complicated for the ECtHR to develop its case-law in such a way that it would remain consistent but, at the same time, would enable the institutions of the EC/EU to be guided by it. This asks not only for accession but also for dialogue, and for full consideration of the EU/EC elements and interests in the ECtHR's deliberations. It may also revive the plea for introducing the possibility, especially for the CJEC, to ask the ECtHR for an advisory opinion<sup>95</sup>.

16. A balance may be found by the ECtHR's preparedness, already indicated in its present case-law, to leave the EC/EU institutions, and in particular the CJEC, a very broad margin of discretion, but in a restrictively defined area of EU jurisdiction<sup>96</sup>. To what extent the ECtHR will be prepared to do so appears from its judgment in the *Bosphorus* Case. The Government had contended that the interference complained of was justified for the reasons set out by the CJEC, an assessment that the ECtHR in their opinion should decline to review "unless it is perverse, which they argue it clearly is not"<sup>97</sup>. The ECtHR followed this reasoning by stating that "[i]f such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation"<sup>98</sup>. But, again, such presumption may be rebutted; the "equivalent protection doctrine" functions as a kind of a "Solange doctrine".

17. The path followed by the ECtHR is in the interest of the administration of justice within a reasonable time and at the same time serves legal certainty. It means that, as a rule, the decisions by the CJEC about maintaining the ECHR within the EU/EC context will be endorsed by the ECtHR, provided that the CJEC has jurisdiction on the matter, and provided that the latter does not depart from well-established Strasbourg-case law and that its judgment does not concern an issue under the ECHR that has not yet been decided by the ECtHR<sup>99</sup>.

18. For the same purposes of the reasonable-time requirement and legal certainty, it might be considered to include in the accession instrument a provision comparable to Article 43, paragraph 2, of the ECHR: if an application is brought before the ECtHR against an institution of the EU/EC, a panel will decide on whether the application will be accepted in the interest of legal protection and/or a uniform interpretation and application of the ECHR as a "constitutional instrument of European public order"<sup>100</sup>. The "equivalent protection" criterion would thus function



as an admissibility criterion, not as a jurisdiction condition. If the application is accepted by the panel, it will be dealt with by the Grand Chamber. This will keep the additional burden for the ECtHR as restricted as possible, while this process of co-operation would also avoid a “prestige battle” between the two judicial organs<sup>101</sup>.

19. Should accession by the EC/EU to the ECHR lead to a substantial flux of cases related to the (non-) application of the ECHR within a EU/EC context, the establishment of a separate unit within the ECtHR, consisting of additionally elected judges, could be envisaged.

20. Although the CJEC has amply shown its preparedness to be guided by the case-law of its Strasbourg counterpart, it is obvious that the functioning of the "equivalency balance" set out above requires that the EU/EC system should be formally brought within the ECHR system by accession.

#### *VI. Treaty basis for accession*

21. Mrs Bemelmans may be right in her assessment that the CJEC might, if asked at the present moment for an opinion about the question of whether the treaties establishing the EC and EU provide a basis for accession of the EC or the EU to the ECHR, reach a conclusion that differs from its opinion of 1996, and find the legal basis adequate and sufficient. Nevertheless, it would not seem very appropriate to ask for a second opinion on the matter without any relevant change in these treaties on the matter having been made. Moreover, even if such a second opinion would be asked, it is not very likely that the CJCE, regardless of the opinion of the majority of its members in the present composition and the present circumstances, would be inclined to revise its former very pertinent opinion.

22. For these and other obvious reasons, it would seem advisable, if not necessary, to include in the Treaty amending the existing EC and EU treaties a provision along the lines of the second paragraph of Article 7 of the Treaty establishing a Constitution for Europe. This is indeed anticipated in the mandate to the Inter-Governmental Conference. The ultimate provision should be formulated in the same obligatory form: "The Union shall accede". There is no reason to expect that the time that elapsed since the adoption of the Treaty establishing a Constitution for Europe and the moment the Inter-governmental Conference will negotiate a new version, has brought changes in the political will to make accession to the ECHR possible. It would seem desirable, however, that the legal basis for accession will be formulated in broad enough terms to also make it possible for the EU/EC to accede to other human rights treaties that have direct relevance for its functions and powers.

#### *VII. Concluding observations*

23. The IGC should decide to leave/include in the amending Treaty a provision that the EU has international legal personality and that the EU shall accede to the ECHR.

24. The Council of Europe and the EU should immediately start negotiations about the instrument of accession, and about its conditions and modalities, and its procedural implications.

25. The specificities of the EU, as compared to the Contracting States, has duly to be taken into account, both in respect of the selection of applications to be dealt with

and the margin of appreciation to be left, and in respect of the procedure to be followed.

26. The EU/EC has to also adapt its own rules concerning the jurisdiction of the CJEC and concerning individual *locus standi*, to create the best possible conditions for an effective ensurance of respect for the ECHR within the EU/EC area of competence<sup>102</sup>.

27. The text of the EU Charter of Fundamental Rights should preferably be formulated identically to the ECHR, in so far as the same rights are concerned. If the present formulation of the EU Charter of Fundamental Rights remains unchanged and the Charter becomes binding law, either by incorporation in the amending Treaty or by a provision in the Treaty to that effect, its Article 52, paragraph 3, has to be interpreted and applied by the ECtHR and the CJEC in such a way that it is guaranteed that, to the extent that this formulation deviates from that of the ECHR, the latter prevails, unless the Charter provides for a more extensive protection of the right concerned or provides for additional rights.

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**B. Contribution by Mr Francis G. Jacobs, Professor of Law, King's College (London), and former Advocate General at the Court of Justice of the European Communities**

*I. Introduction*

This is a short written version, as requested, of my analysis. It assumes that the proposed EU "Reform Treaty", due to be agreed in October 2007, enters into force. That Treaty will have the consequence of providing a treaty basis for the European Union to accede to the ECHR, a basis which arguably does not exist under the present Treaties; indeed it will have the effect of not merely enabling, but *requiring* the European Union to accede to the ECHR. Moreover, while previous discussion has considered the issue of accession by the European Union/European Community, and has involved discussion of the EU's capacity to enter into treaties, the European Union will be the sole relevant organisation since, under the Reform Treaty, the European Community will be subsumed into the European Union and will cease to exist, while the EU will have unquestioned treaty-making capacity. In the rest of this note I refer only to the EU.

I am asked to consider in particular the implications of EU accession for the observance of human rights standards across Europe and the relationship between the European Court of Human Rights and the European Court of Justice.

*II. The consequences of EU accession*

In my view EU accession, while widely regarded as valuable for political and symbolic reasons, will have rather limited concrete effects on the observance of human rights standards. The effects will be limited because the ECHR is already accepted as the fundamental standard of human rights protection in Europe: this has long been recognised, for example, in the EU Treaty itself, and in the EU's own policies including its enlargement policy. More recently it has been accepted in the case-law of the ECJ, which not only applies the ECHR as if it were already in force for the EU, but also closely follows the case-law of the European Court of Human

Rights. The significance of the ECJ's case-law was strikingly recognised by the European Court of Human Rights itself in its judgment in the *Bosphorus Airways* case.

### *III. The legal effects of accession – gaps in the present system*

For legal, as opposed to political, purposes the main question must be whether the absence of EU accession leaves gaps in the system of human rights protection. The picture is of course complex: it must take account, for example, both the case where member states implement EU law and the case where the EU institutions themselves are said to infringe the ECHR; a distinction must also be drawn between Treaty measures (and measures of equivalent status) and subordinate measures in the form of EU legislation or decisions. But the answer is briefly that the existing gaps are not great: they are most likely to arise in the limited areas where the ECJ does not have the requisite jurisdiction. It would be desirable, in any event, for the ECJ's jurisdiction to be extended to cover all cases in which the ECHR rights of individuals were affected by EU measures. Indeed the absence of a judicial remedy before the ECJ might itself be a violation of the ECHR. A possible beneficial effect of EU accession to the ECHR could therefore be the enlargement of the jurisdiction of the ECJ in such cases. That enlargement could be effected by Treaty amendment or in some areas by development of the ECJ's case-law – for example, by enlarging the individual's right of access to the EU Courts, in particular the Court of First Instance.

### *IV. The EU Charter of Fundamental Rights*

The system of protection of human rights in the EU will be made more complex by the EU Charter of Fundamental Rights, which will become legally binding (with certain limits) under the Reform Treaty, although not incorporated into the Treaties. The intention of the Charter is that those rights which correspond to ECHR rights should be interpreted consistently with ECHR rights. But the existence of two separate texts, with different formulations, will cause confusion. Further confusion may be caused if it is forgotten that the Charter binds EU member states only where they are implementing EU law. There is also a risk of division between EU member states and non-member States, the latter bound by the ECHR but not by the Charter. Measures should be taken, if possible, to limit the confusion and to ensure harmonious interpretation. The ECHR should remain the bedrock of human rights protection in Europe.

### *V. The modalities of EU accession to the ECHR*

Negotiating the modalities of EU accession to the ECHR, and deciding what amendments are necessary to the Convention system and to the Convention text, may prove a difficult exercise. Substantive questions will arise about the scope of the Convention rights and their limitations, procedural questions about the relationship between the EU and its member states in proceedings before the European Court of Human Rights, institutional questions about the place of the EU on the Court and in the Committee of Ministers. It is essential however that the Convention system should not become unduly complex and that nothing is done which would weaken the Convention system.

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### **C. Contribution by Mrs Florence Benoît-Rohmer, Professor at the Robert Schuman University (Strasbourg)**

After a long period during which several European Union member states had serious misgivings about the EU's accession to the ECHR, there is now unanimous support for this. The time for debating principles appears to be behind us, and it now seems more important to consider the practical implications.

#### *I. Arguments in favour of accession*

The basic arguments in favour of accession have become considerably weaker over time. Today, pursuant to Article 6 § 2 of the Treaty on European Union, the European Union respects the rights safeguarded by the Convention, since they are incorporated in the treaty. In its case law, the European Court of Justice requires the Community and the member states, where they are acting under Community law, to respect these rights as general principles of law. Admittedly, the actions of the EU in the field of justice and home affairs (JHA) have so far been largely beyond the supervision of the Court, and this is a particularly sensitive field in respect of human rights. The "Communitarisation" of JHA, provided for in the Constitution and in the treaties now being negotiated, will make good this loophole.

Further to the Matthews<sup>103</sup> and Bosphorus Airlines<sup>104</sup> judgments, however, EU scrutiny does not rule out supervision by the European Court of Human Rights. According to the latter judgment, Community acts are presumed to be in keeping with the Convention, provided Community law affords protection equivalent to that provided by the Convention. This presumption is not absolute, however, and may be rebutted in individual cases. In practice, the situation is very similar to accession from every point of view.

In the circumstances, is there still a benefit to be gained from accession? Politically, accession would be a clear sign of European solidarity in the area of fundamental rights. In practical terms, it would simplify legal remedies, for the procedures that currently have to be followed by a potential victim are complicated in that, after exhausting domestic and EU remedies, he or she must lodge an application, with the Strasbourg Court, not against the perpetrator of the contested act (the Union or the Community), but against a member state. If that state is convicted, there is no guarantee that the victim's situation will be remedied, since the remedy depends on a third party, the European Union. To be convinced of this, one need only look back at the saga of the right of the inhabitants of Gibraltar to vote in the European elections. It took the indulgent intervention of the Court of Justice of the European Communities to provide an answer, which the European institutions had not succeeded in doing<sup>105</sup>.

Furthermore, the prospective applicant is forced to engage in subtle analyses in order to determine whether the protection afforded by Community law is or is not equivalent to that provided by the Convention. The various unknown factors may prevent him or her from lodging an application, which is hardly conducive to ensuring judicial protection. Moreover, it is somewhat illogical for a state to be accused of an act for which it is not responsible, while the body actually responsible, the EU, cannot be party to the dispute. Accession would simplify the situation in this respect. Lastly, it would ensure that Article 1 of the Convention is fully effective, by rendering it applicable, no doubt, to all acts within its scope.

To sum up, while the existence of pragmatic solutions probably make accession less urgent than it used to be, the need for clarity, legal certainty and judicial protection for individuals, along with political factors, militates in its favour.

## *II. Do the treaties need to be revised?*

Here we need to be realistic. The member states accepted [Opinion 2/94](#), which the Court of Justice of the European Communities delivered in 1996, on the need to revise the treaties to permit accession. Indeed, they went further by inserting a clause concerning accession in the Constitution<sup>106</sup>. This clause is included in the amending treaties currently being negotiated within the EU. Everything therefore depends on the entry into force of these treaties. In the meantime, all the controversy over the legal possibility of acceding without revising the treaties or of obtaining an opinion from the Court to this end are merely a waste of time - time that could be better spent supporting ratification.

## *III. Conditions of accession*

According to the instruments currently being examined, accession must be based on an agreement negotiated by the Commission in accordance with the classic procedure, on the basis of a mandate from the Council. In the light of the Constitution, the agreement will have to be approved unanimously by the EU members and no longer by a qualified majority. Undue importance should not be attached to this change, which stems from a desire to avoid a transfer of power that would require a referendum in some member states before it could be approved, and not from any distrust of the Convention. In any event, as all the member states are parties to the Convention, their consent would be needed in order to have the accession agreement ratified by their national parliaments. The unanimity requirement does not introduce any substantive change.

The amending treaties maintain the accession requirement: the English text reads: "*The Union shall accede*" to the ECHR.

## *IV. The need to preserve the specific characteristics of the EU*

The draft amending treaties incorporate the Protocol appended to the Constitution, on the EU's accession to the ECHR<sup>107</sup>. Article 1 of the Protocol makes accession conditional upon respect for the specific characteristics of the Union and Union law. This requirement has major implications for the way in which the Court's supervision operates and for the institutional aspects of accession.

Given the sharing of competence between the EU and its member states, it is necessary to ensure that applications are lodged against the party that is actually responsible for the violation. The decision is not easy where states are concerned when EU law affords states a margin of appreciation. In such cases it is necessary to determine whether or not the violation took place within the scope of that margin of appreciation. To leave it to the European Court of Human Rights to determine this would be tantamount to allowing it to pass judgment on the apportionment of competence between the EU and its member states, which is not acceptable. It is therefore necessary to devise a system that allows the individual to attack the EU and a member state simultaneously, leaving it to the EU itself to designate the respondent party, if necessary with the help of the Court of Justice of the European Communities.

A solution of this kind is already provided for in Article 6 of Annex IX to the Convention on the Law of the Sea.

The other question concerns the EU's participation in the supervisory machinery. In the case of the Court, the specific features of the Court would seem to require the presence of an "EU judge". The question is whether this judge should vote in all cases or only those in which the EU's responsibility is in issue. As for the Committee of Ministers, appropriate provision will have to be made for EU participation in proceedings concerning the ECHR.

What form should the Court's supervision take? It has sometimes been suggested that the European Court of Justice should refer preliminary questions to the European Court of Human Rights. Such an arrangement does not seem to respect the specific characteristics of the EU, which, in its area of competence, should be considered a party like any other. Moreover, imagine how long a case would last if the Court of Justice, to which a preliminary issue had been referred, referred a preliminary question in turn to the European Court of Human Rights! Four or five years could elapse before the domestic court handed down a decision on the merits. Such a solution could deter applicants, and this would raise serious problems with regard to the uniform application of Community law. The only reasonable approach is that based on individual petition after the exhaustion of domestic remedies, because it gives the individual a free choice.

Accession cannot be fully effective in this regard unless the European Court of Human Rights succeeds in speeding up its decision-making process. The entry into force of Protocol 14 is therefore, in all respects, a prerequisite, and the reform of the system must be diligently pursued.

#### *V. Respect for the powers of the EU institutions*

This requirement of the Protocol on the accession of the EU to the ECHR is designed, in particular, to preserve the role of the Court of Justice, which is to retain exclusive power to review the lawfulness of the EU's acts. The Strasbourg Court's judgments must remain declaratory, and it will be for the EU institutions to decide on the implications of any conviction.

Similarly, the Court of Justice has sole jurisdiction, as it vehemently pointed out recently, to settle disputes between member states concerning the application of the treaty. It is therefore necessary to exclude such disputes once accession takes place and reserve jurisdiction over them for the Court of Justice. This principle is set out in paragraph 3 of the Protocol<sup>108</sup>.

#### *VI. Commitments of the member states and of the EU*

Article 2 of the Protocol on the accession of the Union to the ECHR is designed to govern relations between the commitments of the EU and those of the member states in relation to the Convention<sup>109</sup>. Each party must remain in control of its own undertakings and free to choose their scope. The EU's commitments must not affect the member states in their areas of competence. This implies that EU involvement in a protocol must not entail any obligations in a field of competence specific to a member state that has chosen not to ratify the protocol, and vice versa.

#### *VII. Conclusion*



The principle of accession is no longer contested, and it is now necessary to focus not on accession itself but on the way in which it should be implemented. In other words, for the sake of effectiveness, we must consider that the time for political rhetoric has passed and must now get down to concrete work on the practical aspects of the EU's participation, with due regard for its specific characteristics and the constraints to which it is subject.

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**D. Contribution by Mr Olivier De Schutter, Professor at the Law Faculty of the Catholic University of Leuven and at the College of Europe (Bruges)**

*I. Introduction*

In view of the hearing it is planning to hold in Paris on September 11th, 2007, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe has requested an opinion on the introductory memorandum (AS/Jur (2007) 22 rev, 9 July 2007) prepared by the Rapporteur, Mrs Marie-Louise Bemelmans-Videc, on the question of the accession of the European Union/European Community to the European Convention on Human Rights (this document will hereafter be referred to as 'the memorandum'). These comments first address the new context created, since the memorandum was completed, by the provisional political agreement reached among the EU Heads of States and governments on the Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (Draft Reform Treaty). It then examines a number of issues raised by the introductory memorandum.

*II. The Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (Draft Reform Treaty)*

In view of the preparation of the report of the PACE, the memorandum should be amended to take into account the political agreement reached on the text of a Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (Draft Reform Treaty) (CIG 1/07, 23 July 2007), which in all likelihood will be confirmed on 18-19 October 2007 and signed at the European Council of December 2007. In this regard, three comments should be made.

*i.. The competence of the European Union to accede to the ECHR*

First and most importantly, the Draft Reform Treaty anticipates that the EU will be attributed the competence to accede to the European Convention on Human Rights. The text on which provisional agreement was obtained would include an amendment to Article 6 of the EU Treaty, which would now state in para. 2:

*"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."*

Apart from the abandonment of the word 'Constitution', this phrase is identical to that mentioned in Article I-9(2) of the Treaty establishing a Constitution for Europe, which was signed on 29 October 2004 following the previous Intergovernmental Conference but which could not be ratified by all the EU member states and, thus, will not enter into force. However, the Draft Reform Treaty also provides the

insertion in the amended EC Treaty (renamed Treaty on the Functioning of the European Union) of Article 188n, replacing former Article 300 EC. Article 188n TFEU would provide, first, that the European Parliament should consent to the agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, prior to this agreement being concluded by the Council (Art. 188n (6), al. 2, (a)(ii)). And it would add (Art. 188n (8), al. 2) that:

*“The Council shall [...] act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements.”*

In other terms, the conclusion of an agreement on the accession of the EU to the ECHR is treated as a constitutional question, requiring that each Member State ratifies the agreement prior to it entering into force. This goes beyond not only the requirement that the Council act by qualified majority when authorising the opening of negotiations, adopting negotiating directives, authorising the signing of agreements and concluding them – which is the general rule in the negotiation and conclusion of international agreements by the Union –, but also the requirement of the Council acting unanimously. Since this may put in jeopardy the objective of concluding an agreement on the accession of the EU to the ECHR for which the Heads of State and governments of the Member States of the Council of Europe have stated their support at the Warsaw Summit of May 2005, the Parliamentary Assembly of the Council of Europe might wish to consider sending a strong signal that thus adding a supplementary hurdle is not in conformity with that proclaimed intention, and that it can only result in delaying further the process of accession.

*ii. The legal personality of the European Union*

Second, the Draft Reform Treaty provides to insert Article 32 into the EU Treaty in order to provide that the Union shall have legal personality, following the entry into force of the Reform Treaty. The memorandum states, on this point, that ‘the EU/EC must also have legal personality, which, to date, is only recognised for the EC, although some argue that the EU’s legal personality has been recognized implicitly, at the latest by the Treaty of Nice’ (para. 16, footnote omitted). However, it should be noted that there is a consensus among jurists that the European Union has an international legal personality<sup>110</sup>. This follows from Articles 24 and 38 of the EU Treaty, which provide that ‘the Council’, representing the Union (*i.e.*, not the EU Member States), and acting as one of the institutions of the Union, concludes international agreements<sup>111</sup>. The Treaty of Nice, insofar as it amends Article 24 EU, merely confirms what was already the case prior to its entry into force. Insofar as the EU has been attributed a competence to conclude international agreements – and it has, indeed, exercised this competence<sup>112</sup> –, it follows that it is endowed with the international legal personality, without it being necessary to stipulate this explicitly<sup>113</sup>. This is also the view adopted by the Legal Service of the Council of the European Union, at least since 2000<sup>114</sup>. It may not be advisable to adopt, on this point, a position which is less progressive than that of the Council of the EU itself<sup>115</sup>.

*iii. Judicial protection under Union law*

A third contribution of the Draft Reform Treaty to the debate on the accession of the Union to the ECHR concerns the question of remedies. In the course of the debate on the accession of the EU to the ECHR, one of the most frequently heard arguments in favour of the said accession – but one not mentioned in the memorandum – is that the remedies open to private parties (whether individuals or legal persons) in the EC/EU legal order are in certain respects insufficient, and that, by contrast, Article 34 ECHR is relatively generous in defining the conditions under which a person alleging to be a victim of a violation of a right or a freedom recognized under the ECHR may file an individual application before the European Court of Human Rights. Therefore, according to this argument, the accession of the EU to the ECHR would ensure that any individual aggrieved by an act adopted by the EC or the EU will have access to a court, which will be competent to determine whether or not that act infringes fundamental rights.

This argument, which was still very powerful a few years ago, now should be treated with caution. The question of whether the individual whose legal situation is affected by an act adopted by the EC / the EU has access to the judicial remedies required under Article 13 ECHR (right to an effective remedy), which Article 47 of the EU Charter of Fundamental Rights builds upon while further strengthening its requirements (right to an effective remedy and to a fair trial), presents at least<sup>116</sup> three distinct branches.<sup>117</sup>

First, there is the question whether the general system of remedies organized by the EC Treaty (including both direct actions before the European Court of Justice and the referral by national courts to the ECJ, which may adopt preliminary rulings in the conditions specified in Article 234 EC) complies with those requirements. The rules of the EC Treaty still currently present significant gaps in this regard: although direct actions seeking the annulment of Community acts with a general scope of application can only be filed by individuals which have not only a direct interest in seeking their annulment, but also an individual interest (according to the traditional interpretation of Article 230 al. 4 EC), certain regulatory acts may directly affect individuals without individualizing them sufficiently for this criterion to be satisfied; and the alternative of seeking a referral from national courts may not be satisfactory where this would oblige an individual to run the risk of being subjected to penalties for having violated a rule applicable to him. However, without modifying its interpretation of the conditions in which a private person may file a direct action before the Court for the annulment of a Community act, the European Court of Justice has shown in its recent case-law a willingness to impose an obligation on States to adapt their national legal systems (specifically, the procedures before the national courts) in order to ensure that the full system of remedies will not leave any gap. Thus, in a judgment it delivered on 13 March 2007, the European Court of Justice noted<sup>118</sup>:

*“Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law (...)*

*It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it*

*possible to ensure, even indirectly, respect for an individual's rights under Community law (...)*

*Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (...) It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (...)"*

This judgment confirms that the Court is willing to impose on the EU Member States to contribute to the elaboration of a complete system of remedies which will ensure that the requirements of Article 47 of the EU Charter of Fundamental Rights will be complied with within the EC legal order.

A second problem results from the specific conditions under which the competences of the European Court of Justice under 234 EC (referral for preliminary rulings) will be exercised in the areas covered by Title IV of the EC Treaty (Visas, asylum, immigration and other policies related to the free movement of persons).

A third problem, finally, concerns the limited powers of the European Court of Justice under Title VI of the EU Treaty. It is left to each EU Member State to define, to a large extent, the conditions under which its national jurisdictions will be allowed (or, in certain cases, obliged) to cooperate with the ECJ by using a referral mechanism (see Article 35 EU). And there is no provision for the filing, by a private individual, of a direct action in annulment of acts adopted by the EU under this Title of the EU Treaty.

These problems are analyzed elsewhere and there is no need here to enter into them in detail<sup>119</sup>. Indeed, as in the 2004 Treaty establishing a Constitution for Europe, in the draft Reform Treaty the normal jurisdiction of the Court will apply to all Justice and Home Affairs matters, with the sole exception of a specific restriction to be set out in Article 240b of the EC Treaty (TFEU):

*"In exercising its powers regarding the provisions of Chapters 4 and 5 of Title IV of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."*

This restriction (which was Article III-377 of the Constitutional Treaty) applies only to criminal law and policing, and retains the current Article 35(5) EU. The various other restrictions on the Court's jurisdiction over matters relating to judicial cooperation in criminal matters and police cooperation on the one hand (Art. 35 EU), and to visas, asylum, immigration, and other policies related to the free movement of persons on the other hand (Art. 68 EC), are to be repealed.<sup>120</sup>

Not only will the powers of the European Court of Justice be extended, the jurisdiction it now is recognized under the EC Treaty spreading to all fields under the EC and EU Treaties. But, in addition, the Draft Reform Treaty intends to improve

access to justice by individuals, partly by liberalizing the rules on standing for the filing of direct actions for annulment of regulatory acts, and partly by constitutionalising the case-law of the European Court of Justice, already referred to above, which imposes on the EU Member States to contribute to ensuring that the right to an effective judicial remedy will be guaranteed in the EU legal order. The Draft Reform Treaty amending the EC Treaty (Treaty on the Functioning of the European Union) will amend Article 230 al. 4 EC. This provision would now read:

*“Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.”*

In addition, the Draft Treaty provides that an Article 9f will be inserted into the EU Treaty, on the Court of Justice of the European Union. This includes an obligation imposed on the EU Member States to contribute to ensuring that the right to an effective judicial remedy will be recognized to all persons affected by Union law (Article 9f (1), al. 2)<sup>121</sup>:

*“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”*

In sum: *a.* the memorandum could refer to the fact that, under the EC/EU treaties, the legal protection of the individual may be insufficient, and his right to an effective remedy may not always be fully complied with; *b.* it could add that this situation will be significantly improved by the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, which currently has been provisionally agreed to in its draft form; and *c.* it could conclude by stating that, while the improvement of the remedies available within the legal order of the European Union ensures that, in the vast majority of situations, any alleged violation of the ECHR rights will be addressed within the EU legal order and according to legal procedures established by the EU treaties themselves, there remains a distinct advantage in organizing an external judicial supervision of the compliance with human rights and fundamental freedoms. Thus, while the EU should not fear any far-reaching consequences of accession to the ECHR for the system of judicial remedies organized by the EU Treaties (since the needed reforms are already underway), it should at the same time recognize that however complete and developed, a system of judicial protection of the rights of the individual internal to the legal order from which the measures threatening those rights emanate is inherently less capable of a fully objective and impartial appreciation of the requirements of judicial protection. In addition, while the European Court of Justice may identify instances of violation of fundamental rights which result from secondary Union law (from the adoption, in particular, of regulations, directives, decisions, or judgments of the Court of First Instance), it cannot remedy violations which have their source in primary Union law (i.e., in the EU Treaties themselves), which the ECJ is bound to respect.

### *III. Arguments in favour of accession of the EU to the ECHR*

The memorandum presents a list of arguments in favor of accession. It refers, appropriately, to the fact that the accession of the Union to the European Convention on Human Rights will ensure that the Union will be represented as such in the European Court of Human Rights and on the

Committee of Ministers of the Council of Europe which oversees the enforcement of the Court's judgments. This situation will be more satisfactory than the situation that exists today, where the compatibility of acts of the Union with the European Convention on Human Rights is in fact reviewed by the European Court of Human Rights, albeit in an indirect way – since this review takes place through the international responsibility of the Union Member States, who are all contracting parties to the European Convention on Human Rights –, and without the Union being represented in any way in the monitoring bodies.

Two supplementary arguments could be put forward, however.

*i. Access to remedies*

First, as mentioned above, reference could be made to the question of the legal remedies available to the individual whose human rights have been violated. While, in my view, the current state of EU law is not satisfactory under Article 13 ECHR – and the possibilities for the individual victim to file an application before the European Court of Human Rights under Article 34 of the Convention are wider than under the range of remedies available in the EU legal order –, the Reform Treaty should improve this, and the changes proposed to the jurisdiction of the European Court of Justice, if combined with the obligation of the EU Member States to organize remedies before the national courts in accordance with the requirements of Article 47 of the EU Charter of Fundamental Rights, probably will ensure that the EU will be in conformity with the requirements of the ECHR.

*ii. Problems with the current situation*

Second, the argument would be strengthened if it were explained why the current situation is unsatisfactory. Currently, the European Court of Justice, just like any supreme or constitutional court of the States parties to the Convention, applies the Convention taking into account its interpretation by the European Court of Human Rights<sup>122</sup>. And the European Court of Human Rights considers that it may find any individual EU Member State's international responsibility to be engaged under the Convention, where, in a situation on which that State has jurisdiction, a Convention right has been violated, even where the direct source of the violation is in EU law. This situation is problematic for two reasons.

*a. The execution of the judgments of the European Court of Human Rights in cases involving Union law*

A first problem is that, when the European Court of Human Rights arrives at the conclusion that the Convention has been violated, the State party against which the application has been filed may find it difficult to comply with that judgment, although it has a legal obligation to do so under Article 46 ECHR. In *Matthews v. the United Kingdom*, the European Court of Human Rights found the United Kingdom to have breached Article 3 of the First Additional Protocol to the Convention, because the applicant could not take part in the election for the European Parliament as she was a resident of Gibraltar (judgment of 18 February 1999). But this situation – while it fell under the



territorial jurisdiction of the United Kingdom – flowed from an annex to the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976, which was attached to Council Decision 76/787, signed by the President of the Council of the European Communities and the then member States’ foreign ministers, together with the extension to the European Parliament’s competences brought about by the Maastricht Treaty on the European Union on November 1st, 1993. Since the violation had its source in EU law – specifically, in primary EU law (the EU Treaties) –, the United Kingdom alone could not in principle decide to comply with the judgment of the European Court of Human Rights. While the European Parliament (Representation) Act 2003 (EPRA 2003) finally did provide for the enfranchisement of the Gibraltar electorate for the purposes of European Parliamentary elections as of 2004<sup>123</sup>, this action was taken unilaterally after a failure to secure the unanimous agreement of the Council to an amendment to the EC Act on Direct Elections of 1976 to provide for its application to Gibraltar<sup>124</sup>. Ireland would have faced a similar difficulty if, in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, the European Court of Human Rights had concluded that the Convention had been breached by the impounding of the aircraft leased by the applicant company.

*b. The degree of judicial scrutiny to be applied to measures adopted by the European Union*

A second problem is that measures adopted by the EC/EU are examined by the European Court of Human Rights with a less requiring level of scrutiny. In the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, the Court confirmed its previous positions according to which, although the Convention does not prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity, a Contracting Party nevertheless remains responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. In the view of the Court, ‘absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention’. However, said the Court (in para. 155 of its judgment):

*“State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (...). By “equivalent” the Court means “comparable”: any requirement that the organisation’s protection be “identical” could run counter to the interest of international co-operation pursued (...). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights’ protection.”*

This ‘Solange’ approach is closely inspired by the attitude of the German Federal Constitutional Court (*Bundesverfassungsgericht*) when asked to recognize the supremacy of EU law even where this might result in situations where the catalogue of fundamental rights of the *Grundgesetz* would be set aside<sup>125</sup>. In 1990, it was imported by the European Commission on Human Rights, inspired in that respect by Henry Schermers and H.-C. Krüger<sup>126</sup>. This doctrine benefits Union law; more precisely, it benefits the EU Member States, as States parties to the European Convention on Human Rights, when they implement Union law in the absence of any margin of appreciation. By contrast, it does not benefit States parties to the Convention, even where they have organized a system of protection of fundamental rights in their internal legal orders which may be considered “equivalent”, both substantively and procedurally, to that provided by the European Convention on Human Rights (for instance, where their national courts apply directly the Convention and take into account the interpretation given to the Convention by the European Court of Human Rights, and where there exists a constitutional court which can annul or set aside national legislation conflicting with the requirements of the Convention).

This doctrine of ‘equivalent protection’ has been initially devised in order to facilitate the participation of the States parties to the Convention in the European Communities / Union, a supranational organisation to which they have agreed to cede certain powers in a number of fields which may affect fundamental rights. In the event of the Union acceding to the Convention, there are three possible scenarios. A *first scenario* is that this doctrine of ‘equivalent protection’ will expand further, to any situations where, at national level, such ‘equivalent’ protection is provided. This ‘contamination’ of the doctrine would clearly manifest the principle of subsidiarity in the system of the European Convention on Human Rights – i.e., the principle according to which the protection of the rights and freedoms of the Convention must primarily take place at national level, the intervention of the European Court of Human Rights being only justified where those internal mechanisms have failed to prevent violations from occurring or, if they do occur, from being remedied. Some might see this as a welcome development, in a context where the European Court of Human Rights manifestly cannot manage its increasing case-load, and where even the solutions offered by Protocol n°14 to the Convention will have a limited impact. A *second scenario* is that, instead, the doctrine of ‘equivalent protection’ will be abandoned. In a situation such as that presented in *Matthews* or *Bosphorus Hava*, it will be the Union, not the Member State implementing Union under whose territorial jurisdiction the alleged violation has occurred, that will in fact have to respond, under the Convention, of the measures adopted. The European Union will be approached by the European Court of Human Rights as any other party to the Convention, the only difference residing in the need to take into account the division of competences between the Union and the Member States: there is no reason to apply a lower level of scrutiny to the acts adopted *by the Union* than to the acts adopted by any other Parties to the European Convention on Human Rights, since the sole purpose of the doctrine of ‘equivalent protection’ – requiring that a lower level of scrutiny be applied – is to facilitate the compliance *by States* with commitments they have made in the context of a supranational

organisation such as the EC/EU, without setting aside their responsibilities under the Convention<sup>127</sup>. A *third scenario*, finally, is that nothing will change: the doctrine of ‘equivalent protection’ will continue to be relied upon by the European Court of Human Rights when examining the compatibility of measures adopted by the EU with the European Convention on Human Rights – whether these have their source in primary or secondary Union law –, but this doctrine will not be relied upon in other circumstances.

I believe that, while this third scenario is not implausible, it would be legally unjustified and politically inopportune. It would be legally unjustified, since, once the Union will have acceded to the Convention, the need to reconcile potentially conflicting international obligations of the EU Member States (as having to comply both with Union law and with their obligations under the Convention) will have disappeared; in addition, while the doctrine may have been useful for evaluating the obligations of the *EU Member States* under the Convention, its rationale should not be extended to evaluating the obligations of *the Union itself*. The third scenario would also be politically inopportune. Since it would not align the status of the Union with that of the other parties to the Convention, it would be sending the wrong signal to the public opinion; and it would only partly address the problems justifying the accession of the Union to the Convention in the first place. Therefore, if the reference to the ‘specific features’ of the Union in the Draft Reform Treaty is meant to preserve the doctrine of ‘equivalent protection’<sup>128</sup>, it should be challenged. This expression should only refer to the need to organize the processing of applications filed against the EU Member States and/or the European Union, in order to take into account the characteristics of the division of competences between them which, in accordance with the principle of autonomy of the Union legal order, should be a matter to be solved by Union law alone, under the supervision of the European Court of Justice (see hereunder, section V). It should not serve to otherwise preserve some form of ‘extra-conventionality’ of the Union.

Ultimately, it will be for the European Court of Human Rights to decide between the three scenarios which have been outlined. It would be unwise to seek to influence the choice of the Court in this regard. What the Parliamentary Assembly of the Council of Europe could do, however, it to oppose any attempt, in the negotiation of the accession treaty (or of a protocol to the European Convention on Human Rights providing for the accession of the EU), to restrict the degree of scrutiny which the European Court of Human Rights will be allowed to exercise on the European Union.

*c. The risk of conflicting interpretations of the requirements of the European Convention on Human Rights*

I have noted that there are two risks present in the current situation, which constitute powerful arguments in favor of the accession of the Union to the European Convention on Human Rights. By contrast, I do not think that there exists a real risk of diverging interpretations of the requirements of the European Convention on Human Rights in the current situation. The European Court of Justice applies the Convention with the interpretation given to that instrument by the European Court of Human Rights: its record in this respect

has been generally excellent, and comparable to the best national constitutional or supreme courts of the Contracting Parties to the Convention. Of course, in situations where the European Court of Justice has decided a case raising an issue under the Convention in the absence of a case-law of the European Court of Human Rights, it may be difficult for the European Court of Justice – like for any national constitutional court placed in a similar situation – to anticipate what the attitude of the European Court of Human Rights might be. But, if it is suspected that the European Court of Justice has erred in applying the Convention to the situation it is confronted with, it remains possible for the victim of the alleged violation to seek to engage the responsibility of the EU Member State under whose jurisdiction she is placed, by filing an application against that State (or indeed, against the 27 EU Member States collectively) before the European Court of Human Rights, as Ms Matthews chose to do following the 1994 elections of the European Parliament.

*IV. The complementarity between the incorporation of the EU Charter of Fundamental Rights in the EU Treaties and accession of the Union to the ECHR*

It is also appropriate that the memorandum underlines the complementarity between the incorporation of the EU Charter of Fundamental Rights in the EU Treaties and the accession of the Union to the ECHR. As stated by the report on the situation of fundamental rights in the Union in 2004 prepared for the EU Network of independent experts on fundamental rights<sup>129</sup>, an analogy can be made with the inclusion in the Member States' constitutions of a more or less extensive range of fundamental rights, which does not prevent those States from acceding to the European Convention on Human Rights or other international instruments for the protection of human rights: likewise, the incorporation of the Charter of Fundamental Rights in the European Constitution does not invalidate the accession of the Union to the European Convention on Human Rights or deprive it of its utility. And just as it is all the easier for the States parties to the European Convention on Human Rights to comply with the obligations of that Convention since their internal constitutional law ensures effective protection of fundamental rights, so it will be all the easier for the Union to meet its obligations under the European Convention on Human Rights since it will strengthen internally the protection of those rights through the incorporation of the Charter of Fundamental Rights in the EU Treaties, by direct incorporation or by reference. For the States as well as for the Union, the undertaking to comply with an international instrument for the protection of human rights does not make it unnecessary to improve this protection in the internal order. On the contrary, such an undertaking constitutes an encouragement to pursue along the lines of such an improvement.

*V. The compatibility of accession with the requirements of EU law*

*i. The question of the autonomy of the EU legal order*

Article 1 of Protocol (no. 5) to the Draft Reform Treaty provides:

*“The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms*

*(...) provided for in Article [I-9(2)] of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:*

*(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;*

*(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.”*

By mentioning the need to “preserve the specific characteristics of the Union and Union law”, this provision refers to the respect due to the principle of autonomy of Union law. Consequently, when an individual application is filed in accordance with Article 34 of the European Convention on Human Rights against the Union or a Member State, the Party concerned must be identified in accordance with the arrangements defined in Union law, under the ultimate control of the Court of Justice<sup>130</sup>.

On this point, para. 12 of the memorandum may create more confusion than it brings clarity. The paragraph discusses together, as if they were somehow linked to one another, the question of the autonomy of the EU legal order, and the question of whether accession of the EU to the ECHR will result in one Court being ‘superior’ to the other. But these questions are distinct and should be kept so. The ‘autonomy’ referred to does not mean that there are limits to which form of external supervision the EU may submit to. Rather, this principle is derived from the rule according to which the European Court of Justice ensures observance of the law in the interpretation and application of Union law<sup>131</sup> as well as from the rule according to which the Member States undertake not to submit a disagreement on the interpretation or application of the EU Treaties to any other mode of settlement than those provided for by the EU Treaties<sup>132</sup>. The European Court of Justice saw in those provisions the expression of a general principle, according to which the Court itself must remain the ultimate interpreter of the law of the Union, and more particularly the rules in the EU Treaties establishing the division of competences between the Union and its Member States. The principle of autonomy of the Union’s legal order consequently rules out that the Court of Justice can be bound by the interpretation which another court of law may give of Union law. Situated according to [Opinion 1/91](#) of 14 December 1991 at “the foundations of the Community”, this principle thus requires that questions of interpretation and application of Union law cannot be settled according to procedures outside the European Union, but only according to the rules of settlement which the Union itself has instituted<sup>133</sup>. Nevertheless, this principle does not exclude all forms of international commitment of the European Union that are placed under the control of an international court outside the Community’s legal order<sup>134</sup>.

In para. 13, the memorandum proposes that ‘an option to avert possible contradictions between the case law of the two courts might consist of inserting an explicit provision into the ECJ and Court of First Instance (CFI) rules of procedure, similar to Article 6 of the European Economic Agreement, which could stipulate that EC/EU law should “without prejudice to future developments (...) be interpreted in conformity with the relevant rulings” of the ECtHR’. This proposal should not be retained. Its immediate effect would be to create the suspicion that the autonomy of



the EU legal order would be threatened by accession, thus further confusing the issue of the requirements linked to the principle of autonomy. Article 6 of the Agreement on the European Economic Area, it should be emphasized, did not state that the European Court of Justice would be bound by the interpretation given to EU law by another judicial body<sup>135</sup>. Should this have been the case, it would probably not have been compatible with the principle of autonomy as explicated by the European Court of Justice in the two opinions it delivered on the EEA Agreement. After accession, the European Convention on Human Rights will be part of EU law, and, both as a result of this and because this is prescribed by Article 52(3) of the Charter, the European Court of Justice will apply the Convention taking into account the case-law of the European Court of Human Rights<sup>136</sup>. This is already its current practice. No supplementary provision, in the rules of procedure of the Union jurisdictions or elsewhere, are required for this to continue. It is, of course, up to Union law, to decide how – according to which horizontal division of tasks between the institutions and vertical division of competences between the EU Member States and the Union – the obligations resulting from the accession of the Union to the ECHR should be implemented in the EU legal order. It may not be appropriate for the Parliamentary Assembly of the Council of Europe to prejudge the measures which shall be taken, within the EU legal order, for that purpose. The clause proposed, in addition, would have the unfortunate consequence of suggesting that the ECJ would in some way be subordinated to the European Court of Human Rights, which it is not currently and which it will not be even after accession.

On the other hand, it would perhaps be desirable for the memorandum to address the question of whether the imposition by the European Convention on Human Rights of positive obligations on the Parties may affect the neutrality of the accession of the European Union to the ECHR on the division of competences between the Union and the Member States.<sup>137</sup> The report on the situation of fundamental rights in the Union in 2004 prepared for the EU Network of independent experts on fundamental rights states the following on this point:

*“(...) the Union’s accession to the European Convention on Human Rights will not lead to any changes in the division of competences between the Union and the Member States<sup>138</sup>. This division of competences will continue to be governed by European Union law only. It is not up to the European Court of Human Rights, which is the guardian of the European Convention on Human Rights, to rule on this. When the European Court of Human Rights, having received an application claiming a violation of the Convention, establishes the existence of such a violation, it will be up to the Union and the Member States, under the supervision of the Court of Justice, to determine which measures need to be adopted in order to put an end to the violation that has been established, and who – the Union or the Member States – should take action to this effect. Doubts have been expressed about the neutrality of the accession of the Union to the European Convention on Human Rights with respect to the existing division of competences, bearing in mind in particular that the European Court of Human Rights has not hesitated to impose on the contracting Parties the observance not only of obligations of abstention, but also of so-called “positive” obligations, consisting in the obligation to act by adopting certain measures, notably of a legislative nature. In fact, the Union will only be obliged to discharge such “positive” obligations insofar as it has the necessary competences. It is only in the areas where the Member States*



*have conferred competences upon it that, in certain cases, it may be obliged to exercise them in order to ensure an effective protection of the rights and freedoms enshrined in the European Convention on Human Rights. Precisely as the Charter of Fundamental Rights of the Union "does not establish any new power or task for the Union, or modify powers or tasks defined in the other parts of the Constitution" (Article 51(2) of the Charter), so the undertaking by the Union to observe the European Convention on Human Rights does not create any new competences or tasks for it, nor will it affect the existing division of competences between the Union and the Member States."*

This position is also that of the Working Group II 'Incorporation of the Charter/Accession to the ECHR' of the European Convention on 2002-2003<sup>139</sup>. Of course, in order to alleviate any fears that the doctrine of positive obligations would result in an extension of the competences of the Union beyond the principle of attribution (i.e., beyond the competences already attributed to the Union by the Member States), certain safeguards can be imagined. The most important of these is to provide that in all cases where the application is filed against an EU Member State or/and against the Union, the Union or (when the application is filed against the Union) any EU Member State should appear as co-defendant before the European Court of Human Rights and they would be jointly responsible for the implementation of any judgment finding a violation. This mechanism would also ensure that the principle of autonomy of the EU legal order is preserved, since the determination of which entity is responsible for the implementation of the judgment will be left to be decided according to procedures internal to the EU legal order itself, under the ultimate supervision of the European Court of Justice.

*ii. The status of the ECHR in EU law following accession*

The memorandum, perhaps wisely, is silent about the status which will be recognized to the European Convention on Human Rights in Union law following accession. This may be adequate, since this is a question for Union law to decide upon. However, on the other hand, in order to avoid certain mistaken assumptions about what would follow, for both the European Union and its Member States, from the Union acceding to the ECHR, certain clarifications could be brought<sup>140</sup>. According to the case law of the European Court of Justice, the provisions of international agreements concluded by the Union and the acts adopted by the organs set up under such agreements 'from the time of their entry into force form an integral part of the Community legal order'<sup>141</sup>. The result is that the legislation of the Union, like the national laws of the Member States, must take into account the provisions of such agreements, the European Court of Justice having the jurisdiction to ensure that they are respected<sup>142</sup>. The manner in which the national legal order of each Member State defines its relationships with public international law is in this respect immaterial: uniform application of the agreement throughout the Union rules out the ability of each Member State to view the effects of an international agreement in terms of its own national law. The Court of Justice indicated in the *Kupferberg* judgment of 26 October 1982 that this was the result of the Community nature of the provisions contained in an international agreement concluded by the Community, which, from the time of its entry into force, becomes part of Community law. The uniform application throughout the Community of the provisions of such an international agreement exclude that their effects can be made to vary according to

whether their application is a matter, in practice, for the Community institutions or for the Member States, and, in the latter case, according to the attitude of each State towards the effects recognized to international agreements<sup>143</sup>. In order for an international agreement concluded by the Union to produce direct effects – giving litigants subjective rights which they can invoke before their national authorities or before a Community Court –, ‘the spirit, the economy and the terms’ of the agreement must be examined<sup>144</sup>. The European Convention on Human Rights will be recognized this effect in EU Law.

iii. *The question of the external competences of the Union*

In para. 17, the memorandum states the following:

*“The ECJ’s [Opinion 2/94](#) of 28 March 1996, holding that the EC did at the time not have the necessary competence to accede to the ECHR, may not be an insuperable obstacle. More than ten years have passed since it was given, during which the political climate and legal interpretations concerning this issue have significantly changed, suggesting that if the ECJ were to revisit the question again today, it may come to an altogether different conclusion.”*

It is a matter of political judgment whether or not it is opportune for the Parliamentary Assembly of the Council of Europe to take a position about what constitutes, in the final instance, a question of interpretation of Union law. However, if this argument is indeed put forward, perhaps it could be made more concrete, by referring to the signature of Protocol n°14 amending the European Convention on Human Rights, which provides that the Union can accede to this instrument<sup>145</sup>. Although Protocol no. 14 still is not in force and although its significance with regards to the accession of the Union to the European Convention on Human Rights is political rather than legal, since a subsequent modification of the European Convention on Human Rights defining the practical details of the Union’s accession to this instrument will in any case be required<sup>146</sup>, the agreement on the text of this Protocol demonstrates a strong political consensus, within the Member States of the Council of Europe, including all the EU Member States, to the accession of the Union to the Convention. This background may indeed influence the interpretation of the external competences of the Union by the European Court of Justice, if and when it will be asked to deliver an opinion on this question<sup>147</sup>. Emphasizing the significance, at political level, of the adoption of Protocol n°14 to the ECHR, may be more advisable than to propose an interpretation of Union law.

At a more fundamental level, I have taken the view elsewhere that the adequacy of the classical case law of the European Court of Justice on the extent of the Community’s external powers would deserve to be challenged, where the question of accession to an international instrument protecting human rights is raised<sup>148</sup>. By acceding to such instruments protecting human rights the States parties undertake to respect certain minimum standards for the benefit of the people under their jurisdiction, which implies in the first place that they will not adopt any measures which violate these standards. In so far as the undertaking is purely negative (formulated as an obligation to abstain from), it is irrelevant whether or not the parties have the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures – to fulfil positive obligations (to act) – that the question of competences may play a role. The accession of the

Union to international instruments adopted in the field of human rights therefore does not necessarily have to have an impact on the extent of its competences. Quite to the contrary: such accession must in principle be considered neutral from the point of view of the division of competences between the Union and the Member States<sup>149</sup>. It is anticipated, in fact, that a specific clause will recall this neutrality, both in the protocol to the ECHR providing for the accession of the EU and in the accession treaty, and in the EU Treaty as revised by the Reform Treaty<sup>150</sup>. This, however, results from the very principle of attributed competences, according to which the Union cannot exercise competences which it has not been attributed by the Member States, even for the sake of better complying with obligations the Union has contracted on the international plane.

#### VI. *Other Council of Europe instruments*

The Committee should consider whether reference should be made, alongside the accession of the Union to the ECHR, to its accession to other international or European human rights instruments. Commenting on Article 9(2) of the 2004 Treaty establishing a Constitution for Europe, which attributed the Union the competence to accede to the ECHR, the report on the situation of fundamental rights in the Union in 2004 prepared for the EU Network of independent experts on fundamental rights insisted that this provision should not and could not be interpreted *a contrario*:

*“(... the Union can accede to other international instruments for the protection of human rights<sup>151</sup>. Such accession may be considered where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act, or is likely to affect an internal act of the Union<sup>152</sup>. For example, the Union may accede to international conventions providing for the elimination of racial discrimination (Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>153</sup>), discrimination against women (United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>154</sup>), promoting and protecting the rights of persons with disabilities or guaranteeing the status of refugees<sup>155</sup>, insofar as it has already adopted important measures in those areas within the Union. Similarly, the importance of European secondary law in the areas covered by the European Social Charter concluded in Turin in 1961 and the revised European Social Charter of 1996<sup>156</sup> could justify the accession of the Union to the latter instrument. This is in keeping with a development which not only acknowledges that the Union is a subject in international law, but also infers the international authority of the Union from the range of competences that have been conferred upon it by the Member States and which it has exercised.”*

After referring to the accession of the European Union to the ECHR, the Guidelines on the Relations between the Council of Europe and the European Union (Appendix 1 to the Action plan adopted by the Heads of State and Government of the Member States of the Council of Europe, meeting in Warsaw on 16 and 17 May 2005, CM(2005)80 final 17 May 2005), states that:

‘Taking into account the competences of the European Community, accession to other Council of Europe conventions and involvement of Council of Europe mechanisms should be considered on the basis of a detailed review’. The PACE might wish to reaffirm this as a mid-term goal.

## *VII. Conclusion*

In sum, my proposals are the following:

- a.* the memorandum should be amended to take into account the political agreement reached on the text of a Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (Draft Reform Treaty). In particular:
  - the memorandum could express its concern that, according to Art. 188n (8), al. 2 of the proposed Treaty on the Functioning of the European Union (TFUE), the conclusion of an agreement on the accession of the EU to the ECHR is treated as a constitutional question, requiring that each Member State ratifies the agreement prior to it entering into force;
  - the memorandum could confirm the view, which is that of the overwhelming majority of jurists, that the European Union in the present situation already has an international legal personality and the capacity to conclude international agreements;
  - the memorandum could refer to the fact that, under the current EC/EU treaties, the legal protection of the individual may be insufficient, and his right to an effective remedy may not always be fully complied with, but welcome the fact that this situation will be significantly improved by the Treaty amending the Treaty on European Union and the Treaty establishing the European Community. It could remark in this respect that, while the improvement of the remedies available within the legal order of the European Union ensures that, in the vast majority of situations, any alleged violation of the ECHR rights will be addressed within the EU legal order and according to legal procedures established by the EU treaties themselves, there remains a distinct advantage in organizing an external judicial supervision of the compliance with human rights and fundamental freedoms;
- b.* the memorandum could strengthen its case in favour of accession of the European Union to the European Convention on Human Rights by mentioning the difficulties raised in the execution of the judgments of the European Court of Human Rights in cases involving Union law;
- c.* the memorandum could address more precisely the implications of the principle of autonomy of the European Union legal order. More precisely:
  - the memorandum could express the view that the reference to the ‘specific features’ of the Union in the Draft Reform Treaty should not be interpreted to preserve the doctrine of ‘equivalent protection’, currently relied upon by the European Court of Human Rights when it examines the compatibility with the requirements of the Convention of measures adopted by the EU Member States when they implement Union law. This expression should only refer to the need to organize the processing of applications filed

against the EU Member States and/or the European Union, in order to take into account the characteristics of the division of competences between them which, in accordance with the principle of autonomy of the Union legal order, should be a matter to be solved by Union law alone, under the supervision of the European Court of Justice. It should not serve to otherwise preserve some form of ‘extra-conventionality’ of the Union. Any attempt, in the negotiation of the accession treaty (or of a protocol to the European Convention on Human Rights providing for the accession of the EU), to restrict the degree of scrutiny which the European Court of Human Rights will be allowed to exercise on the European Union, should be firmly opposed;

- no proposal should be made to insert an explicit provision into the European Court of Justice and Court of First Instance (CFI) rules of procedure, similar to Article 6 of the European Economic Area Agreement, stipulating that EC/EU law should “without prejudice to future developments [...] be interpreted in conformity with the relevant rulings” of the European Court of Human Rights. Such a proposal would raise fears about the impact of accession on the principle of autonomy of the legal order of the Union. It is up to Union law to decide how – according to which horizontal division of tasks between the institutions and vertical division of competences between the EU Member States and the Union – the obligations resulting from the accession of the Union to the ECHR should be implemented in the EU legal order. It may not be appropriate for the Parliamentary Assembly of the Council of Europe to prejudge the measures which shall be taken, within the EU legal order, for that purpose;

- the memorandum should clarify why the imposition of positive obligations on Parties to the European Convention on Human Rights shall not result in the accession of the Union to the European Convention on Human Rights threatening the autonomy of the Union legal order, since the identification of whether the Union or its member States should take action in order to fulfill those obligations will remain a matter for Union law alone to decide, under the supervision of the European Court of Justice;

d. the memorandum should reaffirm that, taking into account the competences of the European Union, accession to Council of Europe conventions other than the European Convention on Human Rights and involvement of the Union in Council of Europe mechanisms should be considered.

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*Appendix to the contribution by Mr De Schutter*

### **The contentious implementation of the *Matthews* judgment**

When the 2002 Council Decision was adopted, amending the 1976 Act (Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 283 of 21/10/2002, p. 1), the following declaration of the United Kingdom, reflecting a bilateral agreement concluded

between that Member State and the Kingdom of Spain, was formally recorded in the minutes of the Council meeting of 18 February 2002:

*“Recalling Article 6(2) of the Treaty on European Union, which states that 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, the UK will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the EP as part of and on the same terms as the electorate of an existing UK constituency, in order to ensure the fulfilment of the UK’s obligation to implement the judgment of the European Court of Human Rights in the case of Matthews vs UK, consistent with the law of the European Union.”*

The EPRA 2003 adopted by the UK, however, provided (under section 16(5)) that all residents of Gibraltar above 18 years of age who were qualifying Commonwealth citizen or a citizen of the EU, would be allowed to vote at the European parliamentary elections. Spain considered that, by extending the right to vote in European Parliament elections, as provided for by the EPRA 2003, to persons who are not United Kingdom nationals for the purposes of Community law, the United Kingdom had violated its obligations under Community law. In July 2003, Spain therefore filed with the Commission a complaint pursuant to Article 227 EC against the United Kingdom with a view to the Commission bringing infringement proceedings against the United Kingdom before the Court of Justice because of the alleged incompatibility of the EPRA 2003 with Community law. The Commission denied this request, stating that Annex I to the 1976 Act must be interpreted in the light of the European Convention on Human Rights and that it is sufficiently open to enable the UK to include the Gibraltar electorate in the UK’s electorate in European parliamentary elections, according to its national electoral system.

Spain then chose to file a direct action against the United Kingdom, alleging that the UK had violated its obligations under EC law by extending the right to vote to European elections to the residents of Gibraltar, who are not citizens of the United Kingdom. The European Court of Justice rejected this claim in a judgment of 12 September 2006 (Case C-145/04, *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland*). It took the view that “*in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory*”. As to the argument that the United Kingdom would be in breach of Annex I to the 1976 Act and of the Declaration of 18 February 2002, the European Court of Justice considered that, in the light of the judgment of the European Court of Human Rights in *Matthews v. the United Kingdom*, “*the United Kingdom*



*cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom” (para. 95).*

*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* [Doc. 11001](#), Reference No 3272 of 2 October 2006

*Draft resolution and draft recommendation* adopted by the Committee on 6 March 2008 with one vote against

*Members of the Committee:* Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro **Marcenaro**, Mrs Nino **Nakashidzé** (Vice-Chairpersons), Mr Miguel Arias, Mr José Luis **Arnaut**, Mr Jaume Bartumeu Cassany, Mrs Meritxell Batet, Mrs Marie-Louise **Bemelmans-Videc**, Mrs Anna **Benaki**, Mr Luc Van den Brande, Mr Erol Aslan **Cebeci**, Mrs Ingrida Circene (alternate: Mr Boriss **Cilevičs**), Mrs Alma Čolo, Mr Joe Costello (alternate: Mr Terry **Leyden**), Mrs Lydie Err, Mr Valeriy Fedorov, Mr Aniello Formisano, Mr György **Frunda**, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Valery Grebennikov, Mrs Carina Hägg, Mr Holger Haibach, Mrs Gultakin **Hajiyeva**, Mrs Karin Hakl, Mr Andres **Herkel**, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Želiko **Ivanji**, Mrs Iglica **Ivanova**, Mrs Kateřina Jacques, Mr Karol Karski, Mr András **Kelemen**, Mrs Kateřina Konečná, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Eduard **Kukan**, Mr Oleksandr Lavrynovych, Mrs Darja Lavtižar-Bebler, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Humfrey Malins (alternate: Mr Christopher **Chope**), Mr Andrija Mandić, Mr Alberto Martins, Mr Dick **Marty**, Mr David Marshall, Mrs Assunta Meloni, Mr Morten Messerschmidt, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr Felix **Müri**, Mr Philippe Nachbar, Mr Fritz Neugebauer, Mr Tomislav Nikolić, Mr Anastassios **Papaligouras**, Mr Ángel Pérez Martínez, Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr John Prescott, Mr Jeffrey Pullicino Orlando, Mr Valeriy **Pysarenko**, Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Paul **Rowen**, Mr Armen **Rustamyan**, Mr Kimmo **Sasi**, Mr Ellert Schram, Mr Christoph **Strässer**, Mr Mihai Tudose (alternate: Mrs Florentina **Toma**), Mr Tuğrul **Türkeş**, Mrs Özlem **Türköne**, Mr Vasile Ioan Dănuț **Ungureanu**, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Klaas **de Vries**, Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Łukasz **Zbonikowski**, Mr Vladimir Zhirinovskiy, Mr Miomir Žužul

N.B. The names of the members who took part in the meeting are printed in **bold**

*Secretariat of the Committee:* Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann

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<sup>1</sup> A collection of documents containing the rapporteur’s introductory memorandum, the record of the hearing of 11.09.2007 and the contributions by experts has been published (see AS/Jur (2007) 53, 12.10.2007).

<sup>2</sup> See for instance, former Secretary General Walter Schwimmer's speech on [“The role of the Council of Europe in the One Europe: the relationship with the enlarged European Union”](#), Rome, 12.03.2003.

<sup>3</sup> PACE, Accession of the European Communities to the European Convention on Human Rights, Memorandum prepared for the Sub-Committee of the European Communities of the House of Lords by MM Blenk and Kriebs, Rapporteurs, AS/Jur (31) 22, 23.01.1980; [PACE Res. 745 \(1981\)](#) on the accession of the European Communities to the European Convention on Human Rights; [PACE Rec. 1017 \(1985\)](#) on the future of the European co-operation, First report of the Commission of Eminent European Personalities (Colombo Commission), §15; [PACE Res. 1068 \(1995\)](#) on the Accession of the European Community to the European Convention on Human Rights, and [Doc. 7383](#), Report on the Accession of the European Community to the European Convention on Human Rights, 14.09.1995; [PACE Rec. 1479 \(2000\)](#), Charter of fundamental rights of the European Union, and [Doc. 8819](#) rev., 27.09.2000, [PACE Res. 1068 \(1995\)](#) on the accession of the European Community to the European Convention on Human Rights; [PACE Rec. 1439 \(2000\)](#), Charter of fundamental rights of the European Union, and [Doc. 8611](#).

<sup>4</sup> [Accession of the Communities to the European Convention on Human Rights: Commission Memorandum](#), Bull. E.C. Supp 2/79 (adopted by the Commission on 04.04.1979), COM (79) 210 final. In the memorandum, the EC strongly advocates the accession of the European Communities to the ECHR. See also a more recent initiative through its communication SEC (90) 2087 final - C3 - 0022/93 referred to in the [Intergovernmental Conference, Briefing notes No.22, Fundamental Rights](#), 09.10.1995. See also: [Commission Communication](#) on Community Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its protocols, SEC(90) 2087 final, Brussels, 19.11.1990. See on this subject: Kim Economides and Joseph H.H. Weiler, “Report of Committees, Accession of the Communities to the European Convention on Human Rights: Commission Memorandum” *The Modern Law Review*, Vol. 42, No. 6 (Nov. 1979), pp. 683-95.

<sup>5</sup> See for instance, proposed resolution in European Parliament, E.P. [Doc. 80/79](#). European Parliament, Working Documents (1982-1983), Report drawn up on behalf of the Legal Affairs Committee, on the Memorandum from the Commission of the European Communities on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms ([Doc. 160/79](#) – COM(79) 210 final), [Doc. 1](#)-547/82, 13.09.1982; See also: European Parliament Working Document, Doc. B 2-1692/85, 06.03.1986. Steering Committee for Human Rights (CDDH), Accession of the European Community to the European Convention on Human Rights, Debates of the European Parliament (1985-1986), Information Document prepared by the Directorate of Human Rights, CDDH (87) 12, 24.04.1987; See further: Motion for a Resolution, OJ No. C 42, 15.02.1993, p. 124 and Explanatory Statement in the Report of the Committee on Foreign Affairs and Security relations between the Union and the Council of Europe, DOC\_EN\PR\240\240921, PE 205.981/fin. Or. FR. [European Parliament Resolution](#) on respect for human rights in the European Union in 1994, Bulletin EU 9-1996, Human Rights (1/9).

<sup>6</sup> Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17.05.2005), [Warsaw Declaration](#), § 10.

<sup>7</sup> Warsaw Declaration, *ibid*, § 10. See also: [Council of Europe – European Union: “A sole ambition for the European continent”](#), Report by Jean-Claude Juncker, 11.04.2006. See also Mr [Juncker’s speech](#) given at the Warsaw Summit.

<sup>8</sup> Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17.05.2005), [Action Plan and Appendix I, Guidelines on the Relations between the Council of Europe and the European Union](#), CM (2005)80 final 17.05.2005.

<sup>9</sup> *Ibid*, § 4.

<sup>10</sup> PACE, *State of human rights and democracy in Europe* in two separate reports, which complement each other: *State of Human Rights in Europe* by the Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Pourgourides, [Doc. 11202](#), 28.03.2007; *State of Democracy in Europe* by the Political Affairs Committee, Rapporteur: Mr. Gross, [Doc. 11203](#), 26.03.2007.

<sup>11</sup> [Draft Treaty establishing a Constitution for Europe](#), Conv 820/1/03 Rev 1, Conv 847/03, Conv 848/03, 18.07.2003. Article 7(2) reads, in part: “the Union shall accede”. This provision was the result of the Convention on the Future of the EU (2002/03) and the Intergovernmental Conference following the Convention. See also [Protocol 32](#) relating to Article I-9(2) of the Constitution on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, C 310/378, Official Journal of the European Union, 16.12.2004.

<sup>12</sup> See text at <http://assembly.coe.int/Main.asp?link=http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

<sup>13</sup> The intended scope of this Introductory Memorandum is to outline some of the important issues raised in this debate so as to provide a basis upon which an exchange of views between the Committee on Legal Affairs and Human Rights, its Rapporteur on this issue, and invited experts in this matter, can take place. For some comprehensive contributions in this area, notably legal and technical questions issues, see: [Speech by Pierre-Henri Imbert](#), Director General of Human Rights of the Council of Europe, on the occasion of the Symposium on the Council of Europe’s European Convention on Human Rights and the European Union’s Charter of Fundamental Rights, Luxembourg, 16.09.2002; Report of the Steering Committee for Human Rights (CDDH) on the [Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights](#), DG-II(2002)006, 28.06.2002, adopted by the CDDH at its 53<sup>rd</sup> meeting (25-28.06.2002), [hereafter, CDDH report]. *Accession of the European Union to the European Convention on Human Rights*, DG-II(2001)02, Reflection paper prepared by the Secretariat, 08.02.2001; See also Juncker, *supra* note 7.

<sup>14</sup> Ed van Thijn, “Accession of the EC/EU to the European Convention on Human Rights”, discussed in COSAC (Conférence des organes spécialisés dans les affaires communautaires/Conference of Community and European Affairs Committees) during its XXXVI COSAC meeting held in Helsinki on 21-22.11.2006. At this meeting, the following conclusion was adopted (see [COSAC Contribution](#)): “COSAC supports the accession by the EU to the European Convention for Human Rights. All EU Member States have ratified the European Convention for Human Rights and support the Charter of Fundamental Rights, as proclaimed at Nice in 2000.” § 2.4, [emphasis added]. See also: European Court of Human Rights, “Accession of the

European Community to the European Convention on Human Rights”, Notes by Rolv Ryssdal, then President of the European Court of Human Rights, which formed the basis of a speech delivered in May 1995 in Brussels.

<sup>15</sup> [Final report of Working Group II](#), CONV 352/02, WGII16, Brussels, 22.10.2002 [hereafter EU Working Group II].

<sup>16</sup> Juncker, *supra* note 7. p. 4. In this context, see also: Hans Christian Krüger and Jörg Polakiewicz, “Proposals for a Coherent Human Rights Protection System in Europe: The European Convention on Human Rights and the EU Charter of Fundamental Rights”, (2001) HRLJ, Vol. 22 No. 1-4, p.1 ff. See also: The EU and Human Rights, ed. Philip Alston with Mara Bustelo and James Heenan (Oxford: Oxford University Press, 1999); Olivier Bot, Charte de Union Européenne et Convention de sauvegarde des droits de l’homme: la coexistence de deux catalogues des droits fondamentaux, *Revue trimestrielle des droits de l’homme*, 14e année, n° 55 (01.07.2003), p. 781ff; See also, Florence Benoit-Rohmer and Heinrich Klebes, Council of Europe Law: Towards a pan-European legal area, (Strasbourg: Council of Europe Publishing, 2005), pp. 132-4.

<sup>17</sup> § 20 of the Memorandum of Understanding between the Council of Europe and the European Union, signed in Strasbourg on 11 and 23.05..2007.

<sup>18</sup> [PACE Rec 1744 \(2006\)](#), Follow-up to the 3<sup>rd</sup> Summit: the CoE and the proposed fundamental rights Agency of the EU.

<sup>19</sup> See § 8 of P. van Dijk’s contribution, appended.

<sup>20</sup> PACE Rec 1744, § 4.

<sup>21</sup> PACE Rec 1744, § 4. As noted by Juncker, “When questions relating to the rights and freedoms enshrined in the ECHR are raised before the [ECJ], the latter treats the ECHR as forming a genuine part of the EU’s legal system”, *supra* note 11, p.4. In fact, as noted by the CoE’s Secretariat on the Proposal for a EU Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, “ECJ rulings on questions of fundamental rights have so far followed the ECHR and the Strasbourg Court’s case-law in exemplary fashion”, 13759/06 DROIPEN 62, 10.10.2006, §14. There has, in a sense, already been a de facto accession of the EC/EU to the ECHR. In this context, see also: Pierre Drzemczewski, “The Council of Europe’s Position with Respect to the EU Charter of Fundamental Rights”, (2001) HRLJ. Vol. 22 No. 1-4, p. 29 ff.

<sup>22</sup> PACE Rec.1744, *supra* note 18, § 4.

<sup>23</sup> State of Human Rights in Europe, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Pourgourides, [Doc. 11202](#), *supra* note 10 § 30.

<sup>24</sup> CM reply to PACE Rec. 1744, [Doc. 11127](#), 20.01.2007, quoting from the Guidelines on the Relations between the CoE and the European Union, § 4.

<sup>25</sup> Speech by Mr Terry Davis, Secretary General of the Council of Europe, on the state of the Council of Europe, 22.01.2008, [http://assembly.coe.int/Main.asp?link=http://www.coe.int/t/secretarygeneral/sg/speeches/2008/D\\_22012008\\_State\\_of\\_the\\_CoE\\_EN.asp](http://assembly.coe.int/Main.asp?link=http://www.coe.int/t/secretarygeneral/sg/speeches/2008/D_22012008_State_of_the_CoE_EN.asp).

<sup>26</sup> For detailed observations on some of the problems raised by the Framework Decision with regard to ECHR standards, see: 13759/06 DROIPEN 62, 10.10.2006, *supra* note 21.

<sup>27</sup> Hans Christian Krüger, “Reflections Concerning Accession of the European Communities to the European Convention on Human Rights”, 21 Penn. St. Int’l. L. Rev. 2002-03, 89 at 94.

<sup>28</sup> Manfred Nowak, “Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU” in *The EU and Human Rights*, *supra* note 14, 687ff. For a detailed discussion on the status of additional protocols to the ECHR in relation to common principles of Community law, see: Georg Ress, “The legal relationship between the European Court of Human Rights and the Court of Justice of the European Communities according to the European Convention on Human Rights” in *Governing Europe under a Constitution: The Hard Road from the European Treaties to a European Constitutional Treaty*, Herm.-Josef Blanke, Stelio Mangiameli, eds. (Berlin: Springer, 2005), p. 279 ff.

<sup>29</sup> See § 18, *infra*. Under Article 7 Treaty on European Union (TEU), where a ‘serious and persistent breach’ of Article 6(1) has been found, a member State’s rights, including voting rights, may be suspended.

<sup>30</sup> Juncker, *supra* note 7, p. 4.

<sup>31</sup> Krüger, *supra* note 27, p. 94. As noted by Krüger, “While all national laws, regulations, court judgments, and other measures fall within that court’s jurisdiction, European Union legal acts do not”.

<sup>32</sup> Juncker, *supra* note 7, p. 4.

<sup>33</sup> Juncker, *ibid.*, p. 4.

<sup>34</sup> Krüger, *supra* note 28, p. 97.

<sup>35</sup> See Mrs Benoît-Rohmer’s appended contribution for further details.

<sup>36</sup> See §§ II.3. and III.2 of Mr De Schutter’s appended contribution for further details.

<sup>37</sup> See for further details the references to the case of *Matthews v. United Kingdom* given in § III.2. a) of Mr De Schutter’s appended contribution. Mr De Schutter explains that in the instant case, although the situation complained of fell under the territorial jurisdiction of the United Kingdom, it also flowed from an annex to the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20.09.1976, which was attached to Council Decision 76/787, signed by the President of the Council of the European Communities and the then member States’ foreign ministers, together with the extension to the European Parliament’s competences brought about by the Treaty on the European Union (Treaty of Maastricht, 01.11.1993).

<sup>38</sup> *Ibid*, p. 95.

<sup>39</sup> *Ibid*. [Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community](#), C 321 E/1 Official Journal of the European Union, 29.12.2006, Article 220.

<sup>40</sup> *Ibid*, p. 97.

<sup>41</sup> EU Working Group II report, *supra* note 15, p. 12.

<sup>42</sup> Krüger, *supra* note 27, p. 96.

<sup>43</sup> *Ibid*, pp. 95-6.

<sup>44</sup> *Ibid.*, p. 95. In this context, see also Nowak, *supra* note 28. See also more generally: Jean-Paul Jacqué, *La Constitution pour L'Europe et les droits fondamentaux*, Europe des libertés, 4e année, n° 14 (aout 2004), pp. 9-13.

<sup>45</sup> Krüger, *supra* note 27, p. 96.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*, p. 97.

<sup>48</sup> EU Working Group II report, *supra* note 15, p. 12.

<sup>49</sup> See Report on the situation of fundamental rights in the Union in 2004 presented to the EU Network of independent experts on fundamental rights; see also § V.1. of Mr De Schutter's appended contribution for further details.

<sup>50</sup> See Mrs Benoît-Rohmer's appended contribution.

<sup>51</sup> [Draft Treaty establishing a Constitution for Europe](#), *supra* note 11.

<sup>52</sup> DGII Reflection paper, *supra* note 13, summary.

<sup>53</sup> See text at <http://assembly.coe.int/Main.asp?link=http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

<sup>54</sup> Regarding the question of respect for the Union's specific characteristics, further particulars may be found in § 4 of Mrs Benoît-Rohmer's appended contribution.

<sup>55</sup> See the appended contribution by Mr Francis G. Jacobs.

<sup>56</sup> For further details, see Mr De Schutter's appended contribution, §II. 2.

<sup>57</sup> [Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention](#), 13.05.2004; See also [Explanatory Report \(CETS No. 194\)](#), (hereafter, Explanatory Report to Protocol No. 14) in particular §§ 101-02. See also the [CDDH report](#), *supra* note 11, referred to in the Explanatory Report to Protocol No. 14. This inclusion was 'inspired' by developments within the EU at the time of drafting Protocol No. 14, notably with regard to the drafting of the constitutional treaty, Explanatory Report to Protocol No. 14, § 101.

<sup>58</sup> In particular, examples of necessary amendments include Article 59 (notably the question who should be allowed to accede: EC or EU), provisions referring to 'State' or 'States': articles 10, 11, 17, 27, 38, 56, 57, article 46 (supervision of judgments) and, depending on the selected options and modalities, amendments may be required to deal with questions relating to the status and participation in ECtHR of judge elected in respect of EC/EU, the introduction of a special procedure whereby the ECJ



(and the Court of First Instance?) could request an interpretation of the ECHR from the ECtHR, etc.

<sup>59</sup>CDDH report, *supra* note 13. “The CDDH has identified three broad categories of provisions that may be necessary or desirable in the event of accession by the EC/EU to the European Convention on Human Rights (ECHR) and its Protocols: a) amendments to the text of provisions already contained in the ECHR and its Protocols; b) supplementary provisions c) any technical and administrative issues not pertaining to the text of the Convention but for which a legal basis would be useful.”, CDDH report, § 2.

<sup>60</sup>Explanatory Report to Protocol No. 14, *supra* note 57, § 101.

<sup>61</sup>In this context, see the ECJ [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). In its opinion, the ECJ held that “*as Community law now stands*, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms” [emphasis added].

<sup>62</sup>Explanatory Report to Protocol No. 14, *supra* note 57, § 102, referring to the CDDH report.

<sup>63</sup>See in particular §§ 16 and 17 of the rapporteur’s introductory memorandum contemplating amendment of the treaties as the simplest solution. As the rapporteur noted in her introductory memorandum, it has been suggested that limited amendments were made to Community law (particularly Article 230 of the Treaty establishing the European Community, TEC) would suffice to open the way to accession to the ECHR for the EU (AS/Jur (2007) 22 rev).

<sup>64</sup>For a detailed contribution on the growing (and systematic) incorporation of human rights standards into an array of legal texts concerning the dealings of the EU/EC (i.e. accession agreements, economic co-operation agreements, etc.), see: Charles Leben, “Is there a European Approach to Human Rights?” in *The EU and Human Rights*, *supra* note 14, p. 69 ff. In this context, see also: Barbara Brandtner and Allan Rosas, [“Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice”](#), EJIL 9 (1998), pp. 468-490. Based on an analysis of existing primary sources of Community law, the authors conclude that there is an emergence of human rights as a ‘transversal’ Community objective at the time of writing (1998).

<sup>65</sup>TEU, [Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community](#), Article 6(2).

<sup>66</sup>EU Charter: [2000/C 364/01](#), Official Journal of the European Communities, 18.12.2000, in preamble and at Article 53. Article 53 stipulates:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, *including the European Convention for the Protection of Human Rights and Fundamental Freedoms*, and by the Member States' constitutions.

“Text of the explanations relating to the complete text of the Charter”, [CONVENT 49](#), CHARTE 4473/00, 11.10.2000, in preamble and in articles 19, 28, 47, 52 and 52(1).

<sup>67</sup> PACE Rec. 1744, § 4. See also: Jean-Paul Costa, *La Convention européenne des droits de l’homme, la Charte des droits fondamentaux de l’Union européenne et la problématique de l’accession de l’Union Européenne à la Convention*, European University Institute Working Paper LAW No. 2004/5, 16.01.2004, p. 7. President Costa notes in this context that the ECtHR also relies on case law of the ECJ; Jean-Paul Jacqué, *La Constitution pour l’Europe et les droits fondamentaux*, Europe des libertés, 4e année, n° 14 (août 2004), pp. 9-13. For an elaborate discussion on how the ECJ applies the ECHR (examining adequacy in interpreting and applying the convention as well as its effectiveness in doing so) and how such application could be improved, see: Adam D.J. Balfour, [“Application of the European Convention on Human Rights by the European Court of Justice”](#), Harvard Law School Student Scholarship Series, Berkeley Electronic Press, 2005;

<sup>68</sup> Patrick Wachsmann, “Les droits de l’homme [dans le traité d’Amsterdam]” (1997) 4 RTDE, p. 883ff at p. 897, cited in English by Leben, *supra* note 57 at footnote 80; See also: Olivier Bot, «Charte de l’Union Européenne et Convention de sauvegarde des Droits de l’Homme: la coexistence de deux catalogues des droits fondamentaux», *Revue trimestrielle des droits de l’homme*, 14<sup>e</sup> année, n° 55 (01.07.2003), p. 781 ff.

<sup>69</sup> DGII Reflection paper, *supra* note 113 summary.

<sup>70</sup> *Ibid.*

<sup>71</sup> Select Committee on the European Union, 8<sup>th</sup> Report, “E.U. Charter of Fundamental Rights”, 16.05.2000, §142.

\*-Contributions prepared by experts for the hearing of 11.09.2007 before the Committee on Legal Affairs and Human Rights.

<sup>73</sup> Accession of the Communities to the European Convention on Human Rights: Commission Memorandum, Bulletin of the European Communities, Supplement 2/79, COM (79) final.

<sup>74</sup> Where there is reference to the Court of Justice, the same applies to the Court of First Instance.

<sup>75</sup> See paragraphs 2 and 3 of Mrs Bemelmans-Videc's Introductory Memorandum, and the references given there. See also: Venice Commission, Opinion on the implications of a legally binding EU Charter of Fundamental Rights on Human Rights Protection in Europe, CDL-AD(2003)022, §§ 53-71.

<sup>76</sup> See, e.g., the references in note 14 of Mrs Bemelmans-Videc's Introductory Memorandum. See also ECtHR 30.06.2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, §§ 73-76.

<sup>77</sup> P. Pescatore, “La Cour de Justice des Communautés européennes et la Convention européenne des Droits de l’Homme”, in: F. Matscher & H. Petzold, *Protecting Human Rights: The European Dimension*, 1988, pp. 441-455 (450).

<sup>78</sup> See H.C. Krüger & J. Polakiewicz, "Proposals for a Coherent Human Rights Protection System in Europe", 22 *HRLJ* 2001, pp. 1-13 at p. 4.

<sup>79</sup> M. Novak, "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU", in: Ph. Alston (ed.), *The EU and Human Rights* 1999, pp. 687-698.

<sup>80</sup> Thus already in 1979 the Commission in its Memorandum of 04.04.1979, Bulletin 1979, Supplement 2. See also the Commission's Memorandum of 19 November 1990, SEC(90) 2087 final, Annex II. And see P. Mahoney, "The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the perspective of the European Convention", *HRLJ* 2002, at p. 303.

<sup>81</sup> Advocate General Francis Jacobs, Conclusions in *Konstantinidis*, Case C-168/91, [1993-3] *ECR*, §§ 45-46.

<sup>82</sup> European Commission for Democracy through Law, Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, CDL-AD (2004)033, 11.10.2004, § 63.

<sup>83</sup> This was observed, for the first time, by the European Commission of Human Rights in its decision of 10.07.1978 in *Confédération Française Démocratique du Travail v. the European Communities, alternatively: their member States a) jointly and b) severally*, D&R 13, p. 231 at p. 240.

<sup>84</sup> Decision of 9.02.1990, *M. & Co. v. Federal Republic of Germany*, D&R 64, p. 138 at p. 145, with reference to a decision of 1958.

<sup>85</sup> ECtHR 18.02.1999, *Waite and Kennedy v. Germany* (Grand Chamber), § 67. See also ECtHR 18.02.1999, *Matthews v. United Kingdom* (Grand Chamber), § 32: "Member States' responsibility therefore continues even after such a transfer".

<sup>86</sup> *Supra* (note 12), at p. 144. The same view was adopted in ECtHR 30.01.1998, *United Communist Party of Turkey and Others v. Turkey*, § 29

<sup>87</sup> Judgment of 15.11.1996, *Cantoni v. France*, § 30.

<sup>88</sup> *Bosphorus* judgment, *supra* (note 4), § 157.

<sup>89</sup> ECtHR 18.02.1999, *Matthews v. United Kingdom* (Grand Chamber), §§ 33 and 34; *Bosphorus* judgment, *supra* (note 4), § 157.

<sup>90</sup> *Idem*, § 165. See also the joint concurring opinion of judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki.

<sup>91</sup> *M. & Co* decision, *supra* (note 12), at p. 145. In its decision, however, the Commission incorrectly declared the application inadmissible *ratione materiae*.

<sup>92</sup> *Bosphorus* judgment, *supra* (note 4), § 155.

<sup>93</sup> *Idem*, § 165. See also the admissibility decision of 10.10.2006, *Coopérative des Agriculteurs de Mayenne et la Coopérative Laitière Maine-Anjou v. France*.

<sup>94</sup> See Article 31 of the Vienna Convention on the Law of Treaties.

<sup>95</sup> See Krüger & Polakiewicz, *supra* (note 6) at p. 10. See also F. Tulkens, "Towards a Greater Normative Coherence in Europe/The Implications of the Draft Charter of Fundamental Rights of the European Union", 21 *HRLJ* 2000, pp. 329-332 at pp. 331-332.

<sup>96</sup> See Article 51, paragraph 1, of the EU Charter of Fundamental Rights.

<sup>97</sup> Admissibility decision of 13.09.2001, Merits.

<sup>98</sup> *Bosphorus* judgment, *supra* (note 4), § 156. See, however, the joint concurring opinion.

<sup>99</sup> See the concurring opinion of Judge Ress in the same case, § 3.

<sup>100</sup> *Bosphorus* judgment, *supra* (note 4), § 156.

<sup>101</sup> See F. Tulkens, "Towards a greater normative coherence in Europe/The implications of the draft Charter of fundamental rights of the European Union", 21 *HRLJ* 2000, pp. 329-332 at p. 331; see also Mahoney, *supra* (note 8), at p. 303.

<sup>102</sup> On the many present restrictions, see Krüger & Polakiewicz, *supra* (note 6), *ibidem*.

<sup>103</sup> European Court of Human Rights, GC, 18 .02.1999, *Matthews v. the United Kingdom*.

<sup>104</sup> European Court of Human Rights, GC, 30.06.2005, *Bosphorus Airlines v. Ireland*.

<sup>105</sup> CJEC, Case C-145/04, *Kingdom of Spain v. the United Kingdom*.

<sup>106</sup> Article I-9(2) of the Treaty establishing a Constitution for Europe contained an actual obligation to achieve a result: "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.*"

<sup>107</sup> Protocol No. 5 relating to Article I-9(2) of the Treaty on European Union on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>108</sup> "Nothing in the agreement referred to in Article 1 shall affect Article [III-375(2)] of the Treaty on the Functioning of the Union." Article III-375 reads: "Member States undertake not to submit a dispute concerning the interpretation or application of the Constitution to any method of settlement other than those provided for therein."

<sup>109</sup> Article 2 of the Protocol reads: "The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof."

<sup>110</sup> See, among many others, N. Neuwahl, "Legal Personality of the European Union – International and Institutional Aspects", in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press,

The Hague, 2001, at 3, esp. at 7-8. Earlier studies did express doubts about the existence of an international legal personality of the European Union, however (see, eg, D. McGoldrick, *International Relations Law of the European Union*, Longman Publ., London, 1997, pp. 37-39; N. Neuwahl, “A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam”, *European Foreign Affairs Rev.*, vol. 3, 1998, p. 177). But this is now clearly the minority view.

<sup>111</sup> St. Marquardt, “The Conclusion of International Agreements under Article 24 of the Treaty on European Union”, in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2001, p. 333, at 342-343.

<sup>112</sup> See, for an early example, the decision of the Council of the EU on the conclusion of an agreement between the EU and the Republic of Yugoslavia, *OJ L* 328 of 31.12.2000, p. 53 (adopted on the basis of Article 24 EU).

<sup>113</sup> That international legal personality follows from the capacity for an entity to exercise it as a participant in the international legal process, and does not require to be explicitly attributed, for instance in the treaty establishing an international organisation, is uncontested. This has been confirmed by the International Court of Justice in its Advisory Opinion of 11.04.1949 concerning *Reparations to the United Nations* (*ICJ Rep.* 1949, at 174). See, e.g., J. Charpentier, “Quelques réflexions sur la personnalité juridique des organisations internationales: réalité ou fiction?”, in: *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob*, Bruxelles, 1997, p. 13; K. Yasseen, “Création et personnalité juridique des organisations internationales”, in R.-J. Dupuy, *Manuel sur les organisations internationales*, Dordrecht, Nijhoff, Academy of International Law, 1988, at 43, esp. at 47.

<sup>114</sup> See the document on the ‘capacity to act’ of the European Union, prepared by the Legal Service of the Council of the EU: SN 1628/00, 16.02.2000.

<sup>115</sup> Para. 16 also refers to the opinion according to which ‘limited amendments to existing EC law (notably Article 230 of the Treaty establishing the European Community, ECT) would enable the Union to accede to the ECHR’. I fail to see why Article 230 EC should be amended in order to allow for accession of the EU to the ECHR. First, since that provision is located in the EC Treaty and not the EU Treaty, it could only affect the conditions for the accession of the European Community, and not those for the accession of the Union – although the distinction between the two organisations will be abolished by the Reform Treaty. Second, the provision cited relates to the conditions under which direct actions may be filed before the European Court of Justice (including the Court of First Instance), which is an issue entirely unrelated to that of the external competences of the EU.

<sup>116</sup> A complete discussion should include the acts adopted by the EU under Title V of the EU Treaty (Common Foreign and Security Policy), see e.g. Cases T-228/02, T-47/03, and T-327/03, which all illustrate the potential impact on fundamental rights of acts adopted in that framework.

<sup>117</sup> This is examined in detail in O. De Schutter, ‘Protection juridictionnelle provisoire et droit à un recours effectif en droit communautaire’, *Journal des tribunaux – Droit européen*, n°128, April 2006, pp. 105-115.

<sup>118</sup> Case C-432/05, *Unibet*, paras. 40-42 (judgment of 13.03.2007).

<sup>119</sup> See, for a further elaboration, O. De Schutter, 'Le rôle de la Cour de justice des Communautés européennes dans l'espace judiciaire pénal européen', in: G. de Kerchove et A. Weyembergh (eds.), *Vers un espace judiciaire pénal européen – Towards a European Judicial Criminal Area*, Institut d'études européennes, éd. de l'U.L.B., Bruxelles, 2000, pp. 55-75; and id., 'La contribution du contrôle juridictionnel à la confiance mutuelle', in G. de Kerchove et A. Weyembergh (éd.), *La confiance mutuelle dans l'espace pénal européen – Mutual trust in the European Criminal Area*, Inst. d'études européennes de l'ULB, Bruxelles, 2005, ici pp. 79-121

<sup>120</sup> However, the UK, Ireland and Denmark can of course avoid the Court's jurisdiction over a particular act by opting out of the act itself.

<sup>121</sup> The insertion of such a provision was originally proposed by the European Convention, in Article 28(1), al. 2, of the Draft Treaty establishing a Constitution for Europe.

<sup>122</sup> For example, see Case C-249/96, *Grant* [1998] ECR I-621; Case C-185/95, *Baustahlgewebe* [1998] ECR I-8417; *Connolly*, Case C-274/99 [2001] ECR I-1611, and *Karner*, Case C-71/02, judgment of 25.03.2004. For a further elaboration, see O. De Schutter, 'L'influence de la Cour européenne des droits de l'homme sur la Cour de justice des Communautés européennes', in G. Cohen-Jonathan & J.-Fr. Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant-Nemesis, 2005, pp. 189-242.

<sup>123</sup> Section 9 of the EPRA 2003 provides that Gibraltar is to be combined with an existing electoral region in England and Wales to form a new electoral region. In accordance with that provision, the United Kingdom authorities combined Gibraltar with the South West region of England by the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004.

<sup>124</sup> See the Appendix on the implementation of the *Matthews* judgment.

<sup>125</sup> See BverfG, judgment of 22.10.1986, 2 BvR 197/83, 73 BVerfGE 339 [1987] 3 CMLR 225 ('Solange II' judgment); confirmed in the 'Maastricht' judgment delivered on 12.10.1993, 2 BvR 2134/92 and 2159/92, 89 BVerfGE [1993] 1 CMLR 57; and, now, BVerfG, 2 BvL 1/97 (judgment of 06.06.2000 ('Bananas')), available on

[http://assembly.coe.int/Main.asp?link=http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607\\_2bvl000197en.html](http://assembly.coe.int/Main.asp?link=http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607_2bvl000197en.html)

<sup>126</sup> European Commission of Human Rights, *M. & Co v. Germany*, Appl. no. 13258/87, Commission decision of 09.02.1990, Decisions and Reports (DR) 64, p. 138; and *Heinz v. the Contracting Parties also parties to the European Patent Convention* (Appl. no. 21090/92, Commission decision of 10.01.1994, DR 76-A, p. 125).

<sup>127</sup> It is clear that this is the sole reason for the development by the European Court of Human Rights of the doctrine of 'equivalent protection'. This is consistent with the approach of the Court, which is to read the requirements of the Convention within the



broader framework of public international law, and to seek, to the fullest extent possible, to avoid placing States before conflicting international obligations (see for instance at para. 150 of the *Bosphorus Hava* judgment: ‘The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations (...). Such considerations are critical for a supranational organisation such as the EC. This Court has accordingly accepted that compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No 1 (...)’). Such a rationale disappears once the European Union itself will have become a Party to the Convention. No risk of the EU Member States being faced with conflicting international obligations will then exist, since Union law itself will have to comply with the Convention, as a matter of international law.

<sup>128</sup> There is no reason to presume that this is the intention of the drafters of the Draft Reform Treaty. A reference to the ‘specific features’ of the Union in the context of accession to the ECHR was already present in 2004, when the 2003-2004 Intergovernmental Conference agreed to attribute to the Union a competence to accede to the ECHR. This was thus before the European Court of Human Rights adopted its ‘equivalent protection’ doctrine in the *Bosphorus Hava* judgment of 30.06.2005.

<sup>129</sup> All the opinions and reports of the EU Network of Independent Experts on Fundamental Rights are available on:

[http://www.europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm](http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm)

<sup>130</sup> See already Article 1 of the Protocol (no. 32) relating to Article I-9(2) of the Constitution on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>131</sup> Article 220 EC (former article 164 of the EC Treaty); also intended to be reproduced in the Treaty establishing a Constitution for Europe (Article I-29(1), par. 1).

<sup>132</sup> Article 292 EC (former article 219 of the EC Treaty); also intended to be reproduced in the Treaty establishing a Constitution for Europe (Article III-375(2)).

<sup>133</sup> See [Opinion 1/91](#) of 14.12.1991, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079 (“First EEA opinion”); [Opinion 1/92](#) of 10.04.1992, [1992] ECR I-2821 (“Second EEA opinion”).

<sup>134</sup> [Opinion 1/91](#), par. 40 (“The Community’s competence in the area of international relations and its authority to enter into international agreements necessarily entails the possibility of submitting to the decisions of a court of law that has been set up or designated by virtue of such agreements for the interpretation and application of their provisions”).

<sup>135</sup> See Final Act containing the Agreement on the European Economic Area, OJ L 1 of 3.1.1994, p. 3. Article 6 of the said Agreement provides: ‘Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the

European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement’.

<sup>136</sup> According to this provision, “Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. The reference to the ECHR for the interpretation of the corresponding clauses of the EU Charter of Fundamental Rights also should be read as referring to the case-law of the European Court of Human Rights.

<sup>137</sup> Although the notion of positive obligations, used in a broader meaning, pre-dated this judgment, the leading cases in which the Court affirmed that the ECHR may require positive measures to be taken, even in the sphere of relations between individuals, are the judgments delivered in the cases of *Young, James and Webster v. the United Kingdom* (judgment of 13 August 1981, § 49), and of *X and Y v. the Netherlands* (judgment of 26.03.1985, § 23).

<sup>138</sup> See Article 2 of the Protocol (no. 32) concerning Article I-9(2) of the Constitution on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>139</sup> See the Final Report of Working group II, CONV 354/02, 22.10.2002, pp. 13-14.

<sup>140</sup> See, for a further elaboration on this argument, O. De Schutter, ‘Anchoring the European Union to the European Social Charter: The Case for Accession’, in G. de Búrca and B. de Witte (eds), *Social Rights in Europe*, Oxford Univ. Press, 2005, pp. 111-152

<sup>141</sup> *Opinion I/91*, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079, at para. 37.

<sup>142</sup> On this point see in particular K. Lenaerts and E. De Smijter, ‘Some Reflections on the Status of International Agreements in the Community Legal Order’, in G.C. Rodríguez Iglesias *et al.*, *Mélanges en hommage à Fernand Schockweiler* (1999), at 347.

<sup>143</sup> Case 104/81 [1982] ECR 3641, at para. 14.

<sup>144</sup> See Case C-280/93, *Germany v Council* [1994] ECR I-3641, at point 14.

<sup>145</sup> Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Article 17 (amending the existing Article 59 ECHR).

<sup>146</sup> Explanatory Memorandum to Protocol No. 14, at para. 101-102.

<sup>147</sup> The European Court of Justice shall not necessarily be requested to deliver an opinion on this issue. This is a mere possibility, not an obligation, prior to the conclusion of an international agreement by the European Community (or, following the adopting of the Reform Treaty, the Union). The political consensus in favour of accession, within the 27 EU Member States, also leads one to expect that, in fact, no request shall be made to the Court for an opinion on this question.

<sup>148</sup> See, for a further elaboration on this argument, O. De Schutter, ‘Anchoring the European Union to the European Social Charter: The Case for Accession’, in G. de Búrca and B. de Witte (eds), *Social Rights in Europe*, Oxford Univ. Press, 2005, pp. 111-152.

<sup>149</sup> *Mutatis mutandis*, Art. 28 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, adopted by the UN Gen. Ass. On 16 Dec. 1966 (Res. 2200 A (XXI)) states that ‘ [t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions’. This provision, however, cannot be construed as having the effect of investing the federative entities within each state with competences which those entities are denied under the constitutional organization of their state.

<sup>150</sup> See Article 2 of Protocol (n°5) to the Reform Treaty, first sentence: ‘The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions’.

<sup>151</sup> See in this respect the Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), allowing the European Communities to accede, adopted by the Committee of Ministers of the Council of Europe at its 675<sup>th</sup> meeting of 15.06.1999.

<sup>152</sup> The general rule is that provided by Article III-323 § 1 of the Constitution: «The Union may conclude an agreement with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.». See also Art. I-13 of the Constitution, which defines areas of exclusive competence of the Union, and provides in § 2 that «The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope». On this last hypothesis, see the Opinion of the Council Legal Service of 12.02.2004, reacting to the recommendation of the Commission to the Council asking to be authorized to participate in the negotiations for the Convention on Promotion and Protection of the Rights and Dignity of Persons with Disabilities (Communication of the Commission to the Council and the European Parliament, “Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities”, COM(2003) 16 final, of 24.1.2003). The Legal Service of the Council concludes in that contribution that, to the extent that certain rules being negotiated within the United Nations Convention may affect, or even alter the scope of, the Community rules laid down in Council Directive 2000/78/EC or in Directive 95/46/EC on the protection of individuals with regard to the processing of personal

data and on the free movement of such data (OJ L 281 of 23.11.1995, p. 31), only the Community can conclude on these issues, while the Member States remain competent to conclude on all those provisions in the Convention that are not covered by Community legislation.

<sup>153</sup>UN Gen. Ass. Res. 2106 A(XX) of 21.12.1965. All the 25 Member States of the EU have ratified this instrument.

<sup>154</sup>UN Gen. Ass. Res. 34/180 of 18.12.1979. All the 25 Member States of the EU have ratified this instrument.

<sup>155</sup>Geneva Convention on the status of refugees of 28.07.1951 and New York Protocol of 31.01.1967.

<sup>156</sup>ETS, n° 163.