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The European Union Accession To The European Convention On Human Rights From The Perspective Of Composite Public Law

Carl Grossmann
Berlin

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The German National Library (*Deutsche Nationalbibliothek*) lists this work in the *Deutsche Nationalbibliografie*; detailed bibliographic data is available in the internet via http://dnb.d-nb.de.

DOI:10.24921/2024.94115972

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Printed in Germany and the Netherlands on acid-free paper with FSC certificate.
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Print and digital edition produced and published by:
Carl Grossmann Publishers, Berlin
www.carlgrossmann.com

ISBN: 978-3-941159-71-6 (printed edition, paperback)
ISBN: 978-3-941159-72-3 (e-Book, Open Access)

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Introduction

A possible accession of European Union (hereinafter: EU/the Union) to the European Convention on Human Rights (ECHR/the Convention) has been discussed in the EU institutions for more than forty years. The topic had widely opened after the 1979 Commission Memorandum where the main pros and cons were underlined and practical problems were addressed. This discussion led to an official request to the European Court of Justice (ECJ before the Lisbon Treaty, CJEU after the Lisbon Treaty/the Court) in relation to the legality of such accession.

In Opinion 2/94, the Court ruled that such accession was incompatible with the European Community (EC/the Community) Treaty at that time. In addition, the Court had already highlighted the impact of the ECHR in the Communities legal order and thus developed the doctrine of Community protection of fundamental rights that was largely based on the ECHR. Technical problems arose from the other part as well. The ECHR was constructed for States to participate in, so the accession of an organization such as the EU would demand significant amendments. A relevant proposal from the Council of

Europe's point of view was manifested in the Steering Committee for Human Rights (CDDH) Document DG-II 2002.[1]

With the enforcement of the Lisbon Treaty and the signature and ratification of Protocol 14, technical problems seemed to have been put in some order. According to article 6, para. 2 of the consolidated version of the Treaty of the European Union (TEU): "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms" and according to the new article 59, para. 2 of the ECHR: "the European Union may accede to this Convention".

But this is the easy part of the story. As included in article 6, para. 2 TEU "such accession shall not affect the Union's competences as defined in the Treaties". This provision is further specified in Protocol 8 of the Lisbon Treaty and raises interpretational issues regarding the EU accession to the Convention. In addition, the persistence of the pro-Lisbon status

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* A shortened version of certain parts of the book can be found at K. Margaritis, "The Framework for Fundamental Rights Protection in Europe under the Prospect of EU Accession to ECHR", Journal of Politics and Law, 6 (1), 2013, pp. 64-79.

[1] The text is available at https://www.europarl.europa.eu/cmsdata/193697/20100324ATT71247EN-original.pdf (last accessed 16 December 2023).

of the ECHR in article 6, para. 3 of the consolidated version of the TEU which states that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms … shall constitute general principles of the Union's law" demonstrates the high position that the ECHR enjoys within the EU legal system, but also raises questions as to its necessity.

The negotiations for accession were introduced in 2012 between the Steering Committee for Human Rights (CDDH) ad hoc negotiations group on behalf of the Council of Europe and the European Commission on behalf of the EU. The negotiations resulted in agreement at negotiators' level on a comprehensive package of legal instruments setting out the modalities of accession of the EU to the ECHR, the draft revised agreement on the EU accession to ECHR, which was included as Appendix I in the final report to the CDDH, on June 10, 2013.

The initial success did not last long. In Opinion 2/13, the CJEU found the draft agreement incompatible with the EU Treaties. The Court based its decision in five axes: 1. the specific characteristics and autonomy of EU law, 2. article 344 TFEU, 3. the co-respondent mechanism, 4. the procedure for the prior

involvement of the Court of Justice and 5. the specific characteristics of EU law as regards judicial review in common foreign and security policy (CFSP) matters.

After the initial impasse, on October 31, 2019, the decision to continue negotiations on accession was taken. On the ground of the Court's verdict, the negotiation process had begun, trying to tackle the problems that the Court acknowledged and finalize the institutional obligation of the Union to accede to the ECHR. This ended to the Draft revised agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms included as Appendix I to the report to the CDDH, on March 30, 2023.

The aim of this book is to understand and analyse the changes that a possible accession to ECHR may bring to the system of fundamental rights protection in EU. This will be achieved in an institutional perspective by firstly trying to identify the final position of the ECHR in the EU legal order and later to define the formation of the relations between the ECHR Member States and EU in view of the accession of the latter in the Convention from a judicial standpoint.

Part one: The path to accession

1. The contribution of Luxembourg and Strasbourg: an overview

1.1 The ECJ principle of Community protection of fundamental rights

The protection of fundamental rights at Community level was not introduced by any Community institution having legislative or executive power but rather had its origins in the case-law as developed by the ECJ.[2] The case of *Stauder vs. City of Ulm*[3] gave the initiative, in 1969,[4] where the Court clearly described "…fundamental human rights enshrined in the general principles

[2] A. Jacobs, *The European Constitution. How it was created. What will change.*, Wolf Legal Publishers, 2005, p. 119.
[3] Case C-29/69 Stauder vs. City of Ulm [1969] ECR 419.
[4] However, in judgements of the 50's and 60's, the Court refused to take into account fundamental rights, see case C-1/58 Stork vs. High Authority [1958-9] ECR 41 and joint cases C-16/59, C-17/59, C-18/59 Ruhr vs. High Authority [1960] ECR 47.

of community law and protected by the court"[5] whilst not much later, in 1970, the Court characterised fundamental rights' guarantee "inherent" in Community Law and added that although the primary source of their protection was the constitutional traditions of the Member States, this protection must be ensured within the framework of the Community[6] which has developed its own legal system. Both cases expanded the concept of the European legal order to include fundamental, human rights protection; in fact the Court underlined its importance. However the only source of protection of fundamental rights was the common constitutional traditions of the Member States because of the absence of a concrete catalogue.

The Court found the chance to fill that gap in the *Nold vs. Commission* case[7] where it not only again underlined that fundamental rights did indeed form an integral part of community law as derived from the constitutional traditions of member states, but mainly added that international treaties for the protection of human rights on which member states have collaborated or of

[5] Stauder, *supra* note 3, Grounds of judgment, para. 7.
[6] Case C-11/70 Internationale Handelsgesellschaft [1970] ECR 1125, Grounds, para. 4.
[7] Case C-4/73 Nold vs. Commission [1974] ECR 491.

which they are signatories can supply an additional source for human rights protection to the Community.[8] Despite the absence of any written law or Bill of Rights, at that time, within the EC Law, the ECJ was, case by case, upholding the protection of fundamental rights in the sense of general principles of Community Law, referring to common constitutional traditions and international instruments in which the Member States were signatories in particular the ECHR.[9]

A further step was taken in *Rutili* case[10] where the Court ruled that the Member States kept the power to determine the concept of public policy according to their national needs; however when this concept is used "as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the

[8] *Idem*, Grounds, para. 13.
[9] The particular significance of the ECHR may be found in later ECJ cases, for example case C-222/84 Johnson vs. Chief Constable of the RUC [1986] ECR 1651 and joint cases C-46/87 and C-227/88 Hoechst vs. Commission [1989] ECR 2859.
[10] Case C-36/75 Rutili vs. French Minister of the Interior [1975] ECR 1219.

institutions of the Community"[11] and implicitly dictated that this power to limitations, granted to Member States, is in a relation of *lex specialis* to the principle enshrined in articles 8, 9, 10, 11 and 2 of Protocol 4 of the ECHR.[12] In some sense, the Court demonstrated to Member States that their power within this specific issue shall be exercised under the legal umbrella of the ECHR. For the first time the ECJ accepted the law of the ECHR not simply as a guiding principle but in its substance, by referring to specific articles and accepting their concept on an issue that was, at the very end, in control of Community institutions.

Following the same line, the Court, in *Hauer* case,[13] once again heightened the status of constitutional traditions common to Member States and that of international treaties for human rights that Member States participate in as guidelines but should be followed within the framework of the Community law. Nevertheless, the ECJ stated that a possible infringement of human rights by a Community act could be judged in the light of Community law itself, otherwise, if special criteria derived from

[11] *Idem*, para. 27.
[12] *Idem*, para. 32.
[13] Case C-44/79 Liselotte Hauer vs. Land Rheinland-Pfalz [1979] ECR 3745, 3746, paras. 14-15.

the legislation or constitutional law of a particular Member State were accepted, the unity of the Community law and therefore the cohesion of the Community would be put in danger. The Community's autonomous legal order that was already established needed a ground for further development of fundamental rights protection; this ground was found in the common constitutional traditions and the international human rights treaties. However, the interpretation of this ground and its elaboration should be made only by taking into consideration the Community's special characteristics and needs.

The approach that the ECJ started to embrace from *Nold* and after might be seen in context with case-law of constitutional courts of specific Member States, the most important of which came from Germany. In *Solange I*[14] the German Constitutional Court ruled that, given the absence of a Community catalogue of fundamental rights, it would be entitled to decide upon the validity of Community acts in the light of the fundamental rights included in the German Constitution. The German Court pointed out its competence to review Community secondary law regarding the compatibility with fundamental rights as long as

[14] BVerfGE 31, 271.

there was lack of a codified catalogue the substance of which was reliably and unambiguously fixed for the future in the same way as the substance of the Constitution,[15] in other words that was equivalent to the German Constitution. The difference was obvious a few years later (1986) in *Solange II.*[16] After the development of the doctrine of Community protection of fundamental rights by the ECJ, the German Constitutional Court expressed its security on that issue as long as the ECJ generally ensure an effective protection on Community level against the sovereign powers of the Community.[17] Still, this security derived mainly from case-law and declarations of political nature; a fact that made the inclusion of a concrete fundamental rights catalogue crucial.

The Court did not simply recognise the rights included in the ECHR as general principles of EC law. Given the fact of non-existence of a fundamental rights catalogue in EC, the Court, case by case, acknowledged the necessity to rule on specific rights;

[15] P. Craig, G. De Burca, *EU Law. Texts, Cases and Materials*, Oxford University Press, 7th edition, 2020, p. 358.
[16] BVerfGE 73, 339.
[17] D. H. Scheuing, "The Approach to European Law in German Jurisprudence", *German Law Journal*, 5, 2004, pp. 707-708.

besides economic rights that fell under the core objectives of the Community, traditional civil rights (contained in the ECHR) were also recognized.[18]

Cases with reference to protection of economic and property rights include the right to property,[19] the freedom to pursue a trade and the freedom to practice a profession.[20] Traditional civil rights that have gained Community protection include respect for human dignity,[21] right to fair trial and

[18] Tridimas classifies three categories of rights protected by the ECJ, economic and property rights, civil and political liberties and rights of defence. T. Tridimas, *The General Principles of EU Law*, Oxford University Press, 2nd edition, 2007, p. 307.
[19] Hauer, *supra* note 13; case C-281/84 Zuckerfabrik Bedrung vs. the Council and the Commission [1987] ECR 84; joint cases C-248/95 and C-249/95 SAM. Schiffahrt and Stapf vs. Germany [1997] ECR I-4475.
[20] Case C-240/83 Procureur de la Republique vs. ADBHU [1985] ECR 531; case C-306/93 SMW Winzersekt GmbH vs. Land Rheinland-Pfalz [1994] ECR I-5555; case C-183/95 Affish BV vs. Rijksdienst voor de keuring van Vee en Vlees [1997] ECR I-4315, 280; case C-491/01 BAT and Imperial Tobacco [2002] ECR I-11453.
[21] Case C-377/98 Kingdom of the Netherlands vs. European Parliament and Council of the European Union [2001] ECR I-7079; case C-36/02 Omega [2004] ECR I-09609, 14.

hearing,[22] respect of privacy[23] and family life,[24] freedom of expression,[25] freedom of association,[26] confidentiality.[27] General principles that coact the protection of fundamental rights have also been accepted by the ECJ case-law, such as the principle of non-discrimination,[28] the principle of equality[29] and the principle of equal treatment.[30]

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[22] Case C-115/80 Demont vs. Commission [1981] ECR 3147; case C-66/90 Netherlands and Others vs. Commission [1990] ECR I-307; case C-135/92 Fiscano vs. Commission [1994] ECR I-2885; case C-17/98 Emesa Sugar (Free Zone) NV vs. Aruba [2000] ECR I-665; case C-3/00 Denmark vs. Commission [2003] ECR 2643.

[23] Case C-136/79 National Panasonic vs. Commission [1980] ECR 2033; joint cases C-97/87to C-99/87 Dow Chemical Iberica and Others vs. Commission [1989] ECR 3165, 929.

[24] Case C-249/86 Commission vs. Germany [1989] ECR 1263; case C-249/96 Lisa Jacqueline Grant vs. South-West Trains Ltd [1998] ECR I-621.

[25] Case C-100/88 Oyone and Traore vs. Commission [1989] ECR 4285. Especially for the freedom of radio/TV case C-260/89 ERT [1991] ECR I-2925 and for the freedom of information case C-159/90 SPUC vs. Grogan [1991] ECR I-4685.

[26] Case C-175/73 Union Syndicale Massa and Kortner vs. Council [1974] ECR 917; case C-415/93 Union Royale Belge des Societes de Football Association and Others vs. Bosman and Others [1995] ECR I-4921.

[27] Case C-155/79 AM & S Europe Limited vs. Commission of the European Communities [1982] ECR 1575; case C-404/92P X vs. Commission [1994] ECR I-4737.

[28] Case C-293/83 Gravier vs. City of Liege [1985] ECR 593, 615.

[29] Case C-810/79 Peter Überschär vs. Bundesversicherungsanstalt für Angestellte [1980] ECR I-2747.

[30] Case C-217/91 Kingdom of Spain vs. Commission of the European Communities [1993] ECR I-3923.

Therewithal, in recent cases the ECJ seemed to emphasise in traditional fundamental rights over the economic norms that the EU conventionally promotes. Distinctive examples are *Schmidberger*[31] and *Omega*.[32] Especially in the latter the Court stated that "the protection of rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services".[33] However, the Court repeated its position that fundamental rights are not absolute,[34] hence in each case the restrictions (possibly) imposed to market freedoms in favour of fundamental rights shall be necessary and proportionate, in order to achive the necessary balance within the EU legal order.[35]

As a result to the above it could be observed that the ECJ had already led the path to a possible accession of the EC/EU to

[31] Case C-112/00 Schmidberger vs. Austria [2003] ECR I-5659.
[32] Case C-36/02 Omega [2004] ECR I-9609.
[33] *Idem*, para. 35.
[34] N. Turkuler Isiksel, "Fundamental Rights in the EU after *Kadi and Al Bavakaat*", *European Law Journal*, 16, 2010, p. 574.
[35] Schmidberger, *supra* note 31, para. 81; C. F. Sabel, O. Gerstenberg, "Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order", *European Law Journal*, 16, 2010, p. 515.

the ECHR. In fact, the Court had created a peculiar "catalogue" of certain fundamental rights in the sense of their recognition at Community level; a catalogue that tended to include more and more rights in a case by case style under the inspiration of the ECHR. More specifically, in many of the cases, specific ECHR articles or ECtHR case-law[36] were used in way of guidance for the ECJ.

1.2 Opinion 2/94: a burden for accession

Since a possible accession was not removed from the agenda,[37] on 26 April 1994, the Council requested an opinion from the ECJ regarding the legality of the Community accession to ECHR in accordance with the EC Treaty. The Court delivered *Opinion 2/94*[38] where it concluded that in its form at that time, the Community had no competence to accede the ECHR.

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[36] Cases that implicitly follow the interpretation of the ECtHR regarding specific ECHR rights are case C-94/00 Roquette Freres [2002] ECR I-9011; case C-276/01 Steffensen [2003] ECR I-3735; case C-105/03 Pupino [2005] ECR I-5285.

[37] Commission Communication SEC (90) 2087, final, 19 November 1990; Commission's working document SEC(93) 1679, final, 26 October 1993.

[38] Opinion 2/94 [1996] ECR I-1759. For an analysis on the opinion, see G. Gaja, "Opinion 2/94", *Common Market Law Review*, 33, 1996, pp. 973-989.

The Community acts within the limits of the powers conferred upon it by the Treaty; such powers are not necessarily the legal aftermath of a specific provision, but may also be implied from them.[39] Hence, the Court's starting point was the absence of a Treaty provision that conferred on the Community institutions any general power to enact rules on human rights or to conclude relevant international conventions; therefore article 235 TEC would be searched as a possible legal basis for accession. Although pointing out that respect for human rights was a condition of the lawfulness of Community acts, the Court stated that a possible accession to ECHR would entail modification of constitutional nature for the system of protection of human rights in the Community as the Community would have to fully integrate to the ECHR system. That goes beyond the scope of article 235 TEC so a Treaty amendment was required, according to the Court.

The opinion as formulated came across a major institutional problem within the EC/EU that could not be easily overlooked. The lack of legal basis within the Treaties would

[39] For the doctrine of implied powers see P. Eechkhout, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford University Press, 2004, pp. 58-100.

prevent the materialization of any accession prospects because of lack of Community competence. Under the application of the principle of conferred powers, a possible accession would be interpreted as an overcome for the Community's power standards. On the other hand, it has been argued[40] that even under opinion 2/94, the EC/EU could develop a human rights policy. The protection of fundamental rights still fell under the objectives of the Community that did not lack competence to legislate therein.[41] Article 235 TEC could be used as legal basis under the prerequisites set by the Court in opinion 2/94. In other words, any policy in human rights issues would be compatible with opinion 2/94 if it does not entail changes of constitutional significance and lies within the fields of Community law. However the strict position of the Court would demand a Treaty amendment for the accession idea to be continued.

[40] J. H. H. Weiler, S. C. Fries, "A Human Rights Policy for the European Community and Union: The Question of Competences", *Harvard Jean Monnet Working Paper* 4/99, pp. 16-25; P. Alston, J. H. H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", *NYU Jean Monnet Working Paper* 1/99, pp. 20-22.

[41] For example, article 19 TFEU.

1.3 Principles of the ECtHR

It is not far from real to argue that the ECtHR is the most "successful" supranational court. With 46 countries being currently parties of the Convention,[42] which represent more than 600 million people, the horizontal jurisdiction that the Strasbourg Court embraces is extremely vast and therefore impossible to be functional in a purely individualistic aspect. The ECtHR was not established to become a specialized "court of appeals", nor a "court of fourth instance", but to give directions on the better application of the principles and rights that the ECHR is meant to protect by the member states, as a court specifically focused on human rights protection. In that sense, the ECtHR delivers judgements that embody principal guidelines. Given the fact that the Strasbourg Court is called to decide upon constitutional issues in so far they concern human rights, it produces constitutional justice[43] where the individual applications serve as "alerts"

[42] Since September 2022, Russia has ceased to be party to the ECHR due to its invasion to Ukraine.

[43] The former President of the ECtHR Luzius Wildhaber described the ECtHR as a quasi-Constitutional Court *sui generis*. See L. Wildhaber, "The place of the European Court of Human Rights in the European constitutional landscape", in *XVIth Congress of the International Academy of Comparative Law*, 14-20 July, 2002, p. 2.

regarding non-compliance matters on behalf of member states. A natural consequence is that the ECtHR has developed, through cases, principles to establish the Convention in the European public order.

This approach was confirmed when the ECtHR referred to the Convention as "a constitutional instrument of European public order"[44] that guarantees "not rights that are theoretical or illusory but practical and effective".[45] This emphasizes the dynamic position of the Strasbourg Court which has repeatedly characterized the Convention as "a living instrument which should be interpreted according to present-day conditions".[46] Taking into consideration that the ECtHR is the ultimate authority in explicating the Convention, it instituted a way of affecting the form of protection guaranteed therein[47] on the basis of the

[44] App. No. 15318/89, Loizidou vs. Turkey [1995] para. 75.
[45] App. No. 6289/73, Airey vs. Ireland [1979] para. 24; App. No. 14038/88, Soering vs. UK [1989] para. 87.
[46] App. No. 5856/72, Tyrer vs. UK [1978] para. 31; App. No. 53924/00, Vo vs. France [2004] para. 82; App. Nos. 46827/99 and 46951/99, Mamatkulov and Askarov vs. Turkey [2005] para. 121.
[47] R. A. Lawson, H. G. Schermers, *Leading Cases of the European Court of Human Rights*, Ars Aequi Libri, 2nd edition, 1999, p. xxvii.

interpretation of the rather vague term of "present-day conditions".

Furthermore, the ECtHR has contributed to the elucidation of constitutional notions of more "general" character like the rule of law. In the case of *Klass and others vs. Germany*[48] the Strasbourg Court underlined the rule of law as a fundamental principle in a democratic society and further judged that "the rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure".[49] The *Klass* case inspired the Strasbourg Court to particularly judge upon the judicial control regarding its effectiveness.[50]

Traditionally, the Strasbourg Court was introduced to observe the engagements undertaken by the parties of the

[48] App. No. 5029/71, Klass and Others vs. Germany [1979].
[49] *Idem*, para. 55.
[50] App. Nos. 1209/84, 11234/84, 11266/84 and 11386/85, Brogan and Others vs. UK [1988] para. 58; App. No. 21987/93, Aksoy vs. Turkey [1996] para. 76.

Convention.[51] As the engagements deriving from the Convention abut on human rights protection and are referred in regard to the parties thereto. Despite the membership of all EC/EU member states to the ECHR, the EC/EU was still not a party of the Convention and therefore in any way not bound by it.[52] Thus the EC/EU legal norms were not subject to the review jurisdiction of the ECtHR.

Nonetheless, in recent years, the ECtHR has started entertained indirect complains against EC/EU rules in cases brought against EC/EU member states. The initiative was given by the (former) Commission on Human Rights with the cases *M. & Co. vs. Federal Republic of Germany*[53] and *Heinz vs. the Contracting States party to the European Patent Convention insofar as they are High Contracting Parties to the European*

[51] Article 19 ECHR.
[52] P. R. Waagstein, "Human Rights Protection in Europe", *SPICE Digests*, Freeman Spogli Institute for International Studies, Spring 2010; L. F. M. Besselink, "The European Union and the European Convention on Human Rights after the Lisbon Treaty: From Bosphorus Sovereign Immunity to Full Scrutiny?" in A. Sabitha (ed.), *State Immunity: A Politico-Legal Study*, The Icfai University Press, 2009, pp. 179-196; App. No. 8030/77, CFDT vs. European Communities, DR 13 1978; App. No. 24833/94, Matthews vs. UK [1999] para. 32.
[53] App. No. 13258/87, M. & Co. vs. Federal Republic of Germany, 64 D & R 138.

Convention on Human Rights;[54] where in the latter the Commission on Human Rights stated that "the Convention does not prohibit a High Contracting Party from transferring powers to international organisations" and concluded that "within that organisation fundamental rights will receive an equivalent protection".

Following the above decisions, the ECtHR confirmed in the case *Matthews vs. UK*[55] that the Convention does not forbid any of its members from transferring competences to other international organizations under the prerequisite of security of Convention rights. In addition, the Strasbourg Court stated that the State remain responsible after such a transfer. Under this aspect the ECtHR would continue to hold the States liable for the exercise of competences having already been transferred to international organizations in order to prevent possible loopholes in human rights protection.[56]

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[54] App. No. 21090/92 Heinz v. the Contracting States party to the European Patent Convention insofar as they are High Contracting Parties to the European Convention on Human Rights, 76 AD & R 125.

[56] Matthews vs. UK, *supra* note 52.

[56] R. Harmsen, "National Responsibility for EC Acts under the ECHR: Recasting the Accession Debate" *European Public Law*, 7, 2001, p. 625; T. Ahmed, I. de Jesus Butler, "The European Union and Human Rights: An

The importance of *Matthews* case is not merely its legal interpretation of competence transfer or liability; it is the first case where the liability of EU member states (the UK in particular) to the Convention when implementing EC/EU law was challenged.[57] The infringement found arose from a European Community's treaty (1976 Act). Since the UK was a member of this treaty and the treaty cannot be challenged before the ECtHR as it is not a Community's normal act, the UK was responsible *ratione materiae* for the consequences of the treaty.[58]

The position of the Strasbourg Court's determination to embrace indirect challenges against EC/EU (secondary) acts in its rulings was strengthened by the formulation of its decision in a

International Law Perspective" *European Journal of International Law*, 17 (4), 2006, p. 782.

[57] S. Peers, "Bosphorus, European Court of Human Rights. Limited Responsibility of European Union member states for actions within the scope of Community law. Judgement of 30 June 2005, *Bosphorus Airways* vs. *Ireland*, Application No. 45036/98" *European Constitutional Law Review*, 2, 2006, p. 444.

[58] Matthews vs. UK, *supra* note 52, para. 54.

variety of cases.[59] Although in cases of *Guerin*,[60] *Senator Lines*[61] and *Emesa Sugar*[62] EC/EU institutions' acts were at stake (EC Commission acts in the first two, an ECJ ruling in the third respectively), the ECtHR declared the relevant applications inadmissible for substantive reasons overlooking the issue of its jurisdiction upon EC/EU measures.

The most important case regarding the jurisdiction of the ECtHR over EC/EU acts was that of *Bosphorus*. Bosphorus was a Turkish airline that had leased two aircrafts from the Yugoslav national airline, one of which was seized by the Irish authorities. Due to the Yugoslavian war, sanctions were imposed by the United Nations (UN) on the warring ex-Yugoslavian states; sanctions that were implemented in EU level through the Council Regulation 990/93. Article 8 of the Regulation stated that EU member states (Ireland in particular) could impound aircraft in

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[59] P. Craig, G. de Burca, *EU Law. Texts, Cases and Materials*, Oxford University Press, 7th edition, 2020, pp. 420-422; S. Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*" *Common Market Law Review*, 43, 2006, n. 41.

[60] App. No. 51717/99, Guerin Automobiles vs. les 15 Etats de l' Union Europeenne [2000].

[61] App. No. 56672/00, DSR-Senator Lines GmbH vs. The 15 Member States of the European Union [2004].

[62] App. No. 62023/00, Emesa Sugar vs. the Netherlands [2005].

which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia.[63]

Bosphorus opened a case before the Irish courts up to the Supreme Court that referred questions to the ECJ under the preliminary ruling process. In its judgement,[64] the ECJ concluded that the general interest of the Community to put an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina prevails over the impounding of the aircraft in question that encompasses the company's right. The Irish

[63] For further analysis: S. Douglas-Scott, "*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi* vs. *Ireland*, application No. 45036/98, judgement of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R. 1" *Common Market Law Review*, 43, 2006, pp. 243-254; A. Hinarejos Parga, "Bosphorus vs. Ireland and the protection of fundamental rights in Europe" *European Law Review*, 31, 2006, pp. 251-259, C. Costello, "The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" *Human Rights Law Review*, 6, 2006, pp. 87-130; K. Kuhnert, "Bosphorus-Double standards in European human rights protection?" *Utrecht Law Review*, 2, 2006, pp. 177-189; Peers, *supra* note 57.

[64] Case C-84/95 Bosphorus vs. Minister for Transport, Communications et al. [1996] ECR I-3953.

Supreme Court adopted the ECJ ruling; as a result Bosphorus complained before the ECtHR.[65]

The Court in Strasbourg asserted that the case fell into the jurisdiction of Ireland within the scope of article 1 ECHR since the aircraft was seized by Irish authorities following a decision by the Minister of Transport. Hence, the complaint of the addressee about that act was compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention.[66]

After amounting the interference to the applicant's property to "control of use", the ECtHR investigated on whether that interference was the result of an exercise of discretion and affirmed that the Irish State simply complied with its legal obligations flowing from EC law, article 8 of EC Regulation 990/93 in particular. Taken into account that the Convention had to be interpreted in the light of the principles of international law, especially that of *pacta sunt servanda*,[67] the general interest of

[65] App. No. 45036/98, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi vs. Ireland [2006].
[66] *Idem*, para. 137.
[67] *Idem*, para. 150.

compliance pursued by the impugned action[68] was not only legitimate but of considerable weight.

The ECtHR re-confirmed its principle that the Contracting Parties are not prohibited from transferring power to international organizations; however they stay responsible under article 1 ECHR for acts and omissions of their organs regardless of whether those acts or omissions were a consequence of domestic law or of a necessity of compliance with international legal obligations.

In order to examine the justification of the interference of the Irish authorities with the applicant's property on the basis of compliance with EC obligations, the ECtHR reiterated the concept of "equivalent protection" of human rights in EC/EU level, as provided by the Convention.[69] If such protection existed, it was presumed that the State has not departed from the requirements of the Convention, when it simply implemented legal obligations flowing from its EC/EU membership. The Strasbourg Court continued that such a finding of equivalence could not be final and would be susceptible to review in the light

[68] *Ibid*.
[69] See Heinz, *supra* note 54.

of any relevant changes in fundamental rights protection.[70] Furthermore, any presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[71]

The approach of the ECtHR in the above mentioned cases clearly demonstrates an intention to indirectly examine EU law, both primary and secondary for compliance with the Convention; in one sense this has led to a *de facto* EU accession to ECHR.[72] By focusing on possible human rights violations derived from EU legislation, the Strasbourg Court raised the issue of Union's responsibility examined on a case by case basis. Therefore, even under the protective *Bosphorus* presumption, the EU could be still found guilty for no compliance with the Convention without a

[70] Douglas-Scott, *supra* note 63, p. 247.
[71] Bosphorus, *supra* note 65, para. 156.
[72] Harmsen, *supra* note 56, p. 640; A. Verstichel, "European Union accession to the European Convention on Human Rights" in P. Lemmens, W. Vandenhole, *Protocol No. 14 and the Reform of the European Court of Human Rights*, Intersentia, 2005, p. 129.

precise prospect to effectively defend itself. Furthermore, in cases that the member states have no discretion when implementing an EU legal act (EU primary law, Regulations), it seems inequitable for them to hold responsibility for human rights violations.[73] Under the circumstances, the Court in Strasbourg raised the gates of accession for EU to ECHR.

2. The institutional approach

2.1 The 1979 European Commission Memorandum

The first positive approach for the accession of the Community to the ECHR was chronologically put in 1979 when the European Commission made a proposal for further discussion on accession analysed in the 1979 Commission Memorandum.[74] As mentioned in its introduction, the Commission underlined the necessity for fundamental rights protection within the Community because of

[73] Douglas-Scott, *supra* note 70, p. 252; J. Dutheil de la Rochere, "The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty" *Common Market Law Review*, 41, 2004, p. 352.
[74] Commission Memorandum, Bulletin of the European Communities, Supplement 2/79.

the latter's upgrading activities that concern individual citizens; the Commission clarified the opinion that the Community should endeavour to complete the Treaties with a catalogue of fundamental rights. But as this achievement demanded long term discussions among Member States, the accession to ECHR at that time consisted the best way to reinforce fundamental rights protection in Community level.[75] Beyond dispute, a possible accession of the Community to the ECHR would not be an easy step, many arguments had developed in favour of as well as against this accession; those arguments were also summarized in the Memorandum.

The Commission based its arguments on the improvement of the Community image as a guardian for human rights and democracy, the enhancement of its own international personality[76] and the strengthening of its institutions. Having been highly influenced by the relevant ECJ judgments of the

[75] Unlike the Report of 1976 where the Commission found the accession of the Community to ECHR unnecessary as the Community was already bound to the rights included to the ECHR on the basis of ECJ case-law, Bulletin of the European Communities, Supplement 5/76, point 28.

[76] K. Economides, J.H.H. Weiler, "Report of Committees, Accession of the Communities to the European Convention on Human Rights: Commission Memorandum.", *The Modern Law Review*, 42(6), 1979, pp. 683–695.

70's[77] and several declarations on human rights by the Member States[78] and other political Community institutions,[79] the Commission seemed to understand that those declarations of political nature should be given the proper weight through the materialization to specific actions; the best way for the Community to achieve this was a possible adoption of a fully accepted, concrete and practically formulated fundamental rights catalogue.

Furthermore, the Community would be in position to participate in proceedings before the organs of the ECHR regarding Community legal acts. Cases of complaints against a Member State's piece of legislation which implemented Community rules, under the law of the ECHR, entitled the Strasbourg authorities to substantially control the Community rule behind the national legal act without the Community being able to defend itself.[80] This participation of the Community to the

[77] Please refer to sub-chapter 1.1 of Part One of this book.
[78] Declaration on European Identity, Bulletin of the European Communities, December 1973, No 12, pp. 118-122.
[79] Joint Declaration by the European Parliament, the Council and the Commission, OJEC 27.04.1977, No. C 103, p. 1.
[80] This was also the reason that the ECtHR established the principles of State liability and equivalent protection.

ECHR organs would also contribute to the better compliance of EC acts with human rights and avoidance of conflicting and inconsistent law-making.[81]

Although, a positive approach was expressed in general, substantial difficulties and technical problems arose. Disagreements in principal focused on the development of an own bill of rights within the Community legal order as the Community should primarily deal with the protection of economical and social rights rather than defending traditional, pan-human doctrines, the purpose that the ECHR was established to fulfill.[82] The point that should be addressed here concerns the purpose and scope of the Community at that time. The Treaties of Paris and Rome were designed as instruments of economic integration and included principles for the achievement of that integration.[83] The

[81] L. Saltinyte, "European Union accession to the European Convention on Human Rights: Stronger Protection of Fundamental Rights in Europe?", *Jurisprudence*, 2(120), 2010, pp. 177-196.

[82] R. Blackburn, "The Institutions and Processes of the Convention" in R. Blackburn, J. Polakiewicz (eds.), *Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000*, Oxford University Press, 2001, pp. 8-9.

[83] B. Balassa, *The Theory of Economic Integration*, Richard D. Irwin, 1961, pp. 3-4; T. Christodoulidis, "The Historical Route of the European Integration" in K. Stefanou, A. Fatouros, T. Christodoulidis (eds.) *Introduction to European Studies Volume 1 History-Institutions-Law*, I. Sideris, 2001, pp. 42-45 (in Greek); D. Chalmers, G. Davies, G. Monti, *"European Union Law: Text and Materials"*, Cambridge University Press, 4th edition, 2019, pp. 12-13.

four traditional freedoms (movement of goods, services, people and capital) that were granted to the citizens of the Member States strengthened the economic identity of the Community; article 3 of the European Economic Community (EEC) Treaty implicitly set merely economic targets. Therefore, a catalogue of Community rights would have been more adapted to the existed at that time political reality.

Nevertheless, the ECJ had already dealt with problems with reference to traditional fundamental rights so that doctrines of their protection were included in its case-law. After the early development of the doctrine of fundamental rights protection at Community level and the insertion of the international treaties of human rights as an additional source for that protection, the avocation with specific traditional rights was simply a matter of time. Hence, directions for human rights protection, besides (and included) those of economic nature, had already dispensed in the Community legal order and in that sense, the accession of to the ECHR would just confirm and upgrade the ECJ position towards fundamental rights to primary Community law.

Major problems that the Commission would challenge within a possible accession are those of participation of

Community in the institutions of the ECHR and the fulfillment of obligations arising from the Convention.

First, the State-oriented approach of the ECHR dictates that sovereign States should participate. Therefore, under the constitutional structure of the time, the Community would face difficulties in fully complying with ECHR institutional law. For example the term "State" or "national security" or "country" in many provisions of the Convention, could not directly apply to international organizations. The Commission suggested a more dilative interpretation and an interpretative clause for those provisions to be applied *mutatis mutandis* to the Community. Another issue arisen regarding the obligation of States to hold free elections to ensure the opinion of the people. The Council of the Communities was not directly elected; hence the Community could not fulfill that Convention obligation. However, according to the Commission a reservation could be entered, as an ultimate solution, that such an accession would not affect the Community's institutional structure.[84]

[84] 1979 Commission Memorandum, *supra* note 74, point 22.

A second issue arose with reference to judicial protection for individuals. This essential fundamental right could not be excluded from a complete Community human rights protection policy. Nonetheless, the Treaties disallowed the Member States to settle disputes regarding Community law in a different manner than as laid down therein. The Commission argued that the Community could accede with a tendency that the accession to ECHR would eventually turn to be an opportunity for the Community to recognize the individual right of petition.[85]

A final matter of institutional nature was that of participation of Community representatives to the institutes of the Convention. It is extremely significant that the Community should be represented in the organs of the ECHR especially when Community rules are at stake. This presumed derogations from articles 20 and 38, regarding nationality of the members of the ECHR organs and articles 39 and 66 regarding the membership in the Council of Europe, as a prerequisite, which in any case the Commission did not find necessary for the Community to access.[86]

[85] *Idem*, para. 27.
[86] *Idem*, paras. 30-37.

The Commission Memorandum of 1979 is of highest importance for the future of the Community. Not only overviewed positions, advantages and disadvantages of the time and formulated possible solutions for the Community to surpass pertinent problems, but it inaugurated practical aspects of human rights policy in the legal order of the Community. It was the first time that an official Community instrument proposed a solution, as far as human rights are concerned, which demonstrates a certain political will, the absolute necessity for accession of the Community to the ECHR. However, the Commission's point of view excluded technical details of accession in relation to legal personality and competence of the Community. More than a decade later, this would be the central issue in formal discussions regarding the future of the EC/EU and the ECHR.[87]

Following the 1979 Memorandum, no important further step was taken.[88] Various European Parliament requests to the Commission on accession (1982 and 1985) had not proceeded

[87] See above sub-chapter 1.2.

[88] R. Lawson, "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in R. Lawson and M. de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe / Essays in Honour of Henry G. Schermers*, Martinus Nijhoff Publishers, 1994, p. 220.

because of objection of certain Member States.[89] On their side, the Member States were seen to simply adopt the position as expressed in the case-law of the ECJ through reference to fundamental rights, for the first time in Treaty text, on the Preamble of the Single European Act (SEA) in 1986. This was crystallised in the Maastricht Treaty establishing the European Union where article F (2) includes fundamental rights as guaranteed by the ECHR and result from common constitutional traditions as general principles of Community law.[90]

2.2 The Council of Europe's point of view

Discussions of EC/EU possible accession to the ECHR could not passed unmarked by the ECHR institutional authorities. In a declaration of 2000, the European Ministerial Conference on Human Rights emphasized on the unity of human rights

[89] L. Betten, "The Protection of Fundamental Social Rights in the European Union - Discussion Paper" in L. Betten, D. Mac Devitt, *The Protection of Fundamental Social Rights in the European Union*, Kluwer Law International, 1996, p. 8.

[90] The terminology and concept in both the Single European Act and the Maastricht Treaty is similar to that of the ECJ in various cases, see sub-chapter 1.1. A difference that may be observed is related to the absence of the reference of the Social Charter in the Maastricht Treaty.

protection in Europe by pointing out the role of the Council of Europe as the appropriate institution for the achievement of that unity and reaffirmed that the ECHR must continue to play a central role as the constitutional instrument of European Public order on which the democratic stability of Europe depends.[91] Not much later, the CDDH was enacted to study the technical aspects on the possible accession. From the beginning, the position of the Council of Europe towards EC/EU was quite clear; it welcomed the developments in the Union level regarding human rights protection. Nevertheless, the Council of Europe addressed the major role that the ECHR is called to play in that matter; adequate protection of human rights in Europe could be accomplished through the effective implementation of the ECHR at both national and European level. This reveals the steady position of the Council of Europe on precedence of the ECHR when issues of human rights arise.

In 2002, the CDDH adopted a report which contained technical and legal aspects of EC/EU accession to ECHR,[92] an extensive report that identified and clarified all technical issues,

[91] Declaration of 3 November 2000, What Future for the Protection of Human Rights in Europe?.
[92] Document DG-II (2002) 006.

in the context of the Council of Europe, which demanded lucid solutions for a possible accession to move on. The Report was organized in three chapters each of which was dealing with issues of different nature.[93] For the better understanding of probable amendments, the CDDH added an appendix were it exemplified its proposals.

The first chapter dealt with the modalities from the point of view of Treaty law. A fundamental question related to the exceptional status of the EC/EU occurred regarding the process that would have to be followed in a possible accession; EC/EU is not a sovereign state and of course not a member of the Council of Europe as article 59 ECHR demanded. This and many other amendments should be forwarded and agreed. The CDDH acknowledged two possible solutions for adoption in terms of Treaty Law: an amending protocol to the ECHR or an accession treaty and argued in favour of the second. The arguments were based on the efficiency of the procedure where the ECHR members and the EC/EU would just need to conclude the

[93] For a diagrammatic depiction see E. Myjer, "Can the EU Join the ECHR – General Conditions and Practical Arrangements", in Ingolf Pernice, Juliane Kokott, Cheryl Saunders, *The Future of the European Judicial System in a Comparative Perspective*, Nomos Verlag, 2006, pp. 305-307.

accession treaty and therefore avoid a time-consuming adoption and ratification process of an amending protocol on one hand and the accession of the EC/EU to the amended Convention on the other hand.

The EC/EU authorities are totally familiar with all technical affairs of an accession treaty in the sense that this particular instrument has become its regular policy when welcoming new members. And given the fact that since 1957 many new members have been accepted in the European family, all of which are also members of the ECHR, the method of formulating an accession treaty has been tested many times in practice.

Nevertheless the ECHR legal system's practice pleaded for the other solution, an amending protocol.[94] From the very beginning, the instrument of signature-ratification for members of the Council of Europe was adopted, for the Convention itself.[95] Hence, the members were bound by the Convention after the finalization of this procedure. As far as amendments of the

[94] This was also the case in the EU accession to ECHR with Protocol 14.
[95] P. van Dijk, G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, 3rd edition, 1998, p. 7.

Convention were concerned, the same *modus operandi* was applied under similar standards and was included in the relevant protocols.[96]

To the very end, the use of either an amending protocol or an accession treaty leads to the same result at the stage of ratification. Eventually, both instruments need to be used in different levels. An amending protocol should be firstly forwarded where all necessary amendments in the Convention and the existing protocols would be drawn at and which all the ECHR members would have to sign and ratify by following their constitutional requirements, thereinafter the EC/EU could start negotiating its accession on the basis of that protocol. The accession treaty would be the outcome of those negotiations which will be adopted under the rules set up in article 218 Treaty on the functioning of the European Union (TFEU).[97]

In the second chapter, the CDDH focused on clear technical issues and proposed amendments in specific ECHR

[96] For example article 6 of Protocol 13.

[97] T. Lock, "EU accession to ECHR: Implications for Judicial Review in Strasbourg", *European Law Review*, 6, 2010, p. 778. Although it may take time, the process of ratification of the accession treaty on behalf of member states is not a major issue as all EU member states would have already ratified the amending protocol (legal basis for negotiations) as members of the ECHR.

articles. In some cases amendments were portrayed as necessary, while in others just as advisable.

A major provision that should be necessarily amended was the one of article 59 of the ECHR. As signature of the ECHR was open to the members of the Council of Europe and the EC/EU was not contemplating a relational membership,[98] the insertion of a specific paragraph in article 59 for EC/EU accession was deemed to be essential.

Provisions referring to the terms "State", "national security" or "territorial integrity" could create interpretational problems and therefore were highly suggested to be revised. In order to avoid complex transformation in many articles and paragraphs of the ECHR,[99] an interpretative clause could clarify that whenever terms relating to States are used, they also applied *mutatis mutandis* to the EC/EU. With reference to participation of an EC/EU representative to the Committee of Ministers, a

[98] In line with the position expressed by the Commission in the 1979 Memorandum, *supra* note 87, point 35.
[99] For example article 8, para. 1; article 10, para. 1; article 11, para. 2; article 15, para. 2; article 17; article 27, paras. 2, 3; article 38, para. 1a; article 56, paras. 1, 4 and article 57, para. 1.

statutory resolution of article 14 of the Statute of the Council of Europe[100] could solve all construal problems.

Nonetheless it should be pointed out that the Committee of Ministers is an organ of highly political nature with a general mission to materialize the aims of the Council of Europe.[101] Although the EC/EU had already developed its own legal order, the political integration would need many steps to be fulfilled. An issue that could be raised is that of the representative of the EC/EU at the Committee (most probably the High Representative for Common Foreign and Security Policy) and more importantly to what extent this representative would act divergently from his own member state's interests which may had served from a similar post.

Another important reason that the participation of an EC/EU representative in the Committee of Ministers could have

[100] Article 14 states among others that "each member shall be entitled to one representative on the Committee of Ministers, and each representative shall be entitled to one vote. Representatives on the Committee shall be the Ministers for Foreign Affairs".

[101] G. de Vel, *The Committee of Ministers of the Council of Europe*, Council of Europe Press, 1995, pp. 26-31; F. Benoit-Rohmer, H. Klebes, *Council of Europe Law Towards a pan-European Legal Era*, Council of Europe Publishing, 2005, pp. 48-56.

been problematic was the absence of a common foreign policy related to human rights within the EC/EU.[102] Forasmuch as a task of the Committee of Ministers is to consult together international problems of common interest and try to take a common stand regarding events that violate the general ideas, on which the ECHR is based,[103] the EC/EU could not have contributed much because of this lack of common policy. The issue of participation of the EC/EU in the Committee of Ministers was also debased by the Commission which had proposed that the Committee should be excluded from proceedings relating to Community matters.[104]

In case of a possible accession, it might be crucial that the procedure before the ECJ would not be characterized as one of "international investigation or settlement" in the sense of article 35 of the ECHR. A negative approach to the above would lead to

[102] B. Schmitt, "Common policy failure: Disunity holds the EU back from a major global role", The New York Times, at: http://www.nytimes.com/2003/02/13/opinion/13iht-edschmitt_ed3_.html (last accessed 16 December 2023). This opinion was unfortunately confirmed by MEP Toomas Hendrik Ilves, vice chairman of the European Parliament's foreign affairs committee who stated: "we should have a coordinated foreign policy; now we don't have a common foreign policy on any matter", The Baltic Times, 22-2-2006.
[103] de Vel, *supra* note 101, p. 27.
[104] 1979 Commission Memorandum, *supra* note 98, point 34.

a limitation on behalf of the ECtHR to control a case that the ECJ has already dealt with. Therefore, under the legal system of the ECHR, the ECJ should rather be considered as a "national" court.[105]

A matter of great importance raised on the position of the EC/EU in the proceedings before the ECtHR. The capability of the EC/EU to participate in the proceedings with the consequent right to defend itself, especially when Community law is at stake, was probably the main reason why this whole accession debate had started.[106] Unarguably, the EC/EU should participate equally, like all other ECHR members, when an application is brought against it. The matter became more complicated when related to the third party intervention of article 36, para. 1 ECHR. Under this process, any High Contracting Party may submit comments and take part in the hearings when one of its nationals is an applicant. The establishment of the citizenship of the Union is strongly tightened to the nationality of the EU member states;

[105] *Idem*, point 24. The CDDH approach may also be seen in Lock, *supra* note 95, p. 788.
[106] *Idem*, point 15. See also "Accession of the European Union to the European Convention on Human Rights", comments made by O. de Schutter, pp. 5-6, available at http://www.statewatch.org/news/2007/sep/decchutte-contributin-eu-echr.pdf (last accessed 16 December 2023).

every national of a member state holds the citizenship of the Union.[107] In that sense, being granted that particular right to EC/EU might lead to a large number of interventions based on nationality.

Being more specific, the CDDH recommended the innervation of a new, special mechanism within the accession process so that the EC/EU would be given the opportunity (or even be obliged) to participate in the proceedings as co-Defendant alongside the EC/EU member state against which the application was initially brought concerning issues involving Community law. From a European point of view, autonomy of EC/EU law and subsequently of the legal order could better be defended before the ECtHR as EC/EU would be in the position of directly defending itself. Plus, the notion of coherence among the two legal orders could be boosted in terms of the existence of a straight, official process in which both the ECtHR and the EC/EU participate and express thoughts and opinions.

A very sensitive issue arose with regard to the participation of a judge elected in respect of EC/EU in the

[107] See article 9 TEU and article 20, para. 1 TFEU.

ECtHR. From the ECHR law point of view the ECtHR consists of a number of judges equal to that of the High Contracting Parties (article 20 ECHR), but since a potential EC/EU accession demanded different approaches in many issues because of its institutional structure as an organization that enjoys partial sovereignty,[108] four possible options were presented with reference to this issue. The first developed a negativism on the basis that the ECtHR had -at that time- 15 "European" judges, hence another one would be superfluous. The second and third options described the EU judge as a "part-time" judge, either *ad hoc*, or full time, with limited participation, only in cases involving EC/EU law. The CDDH mostly argued in favour of the fourth option which would be the presence of an EC/EU judge equally participating as all other judges, still with some exceptions. The exceptions were based on the proposition that a chamber possibly composed of judges coming from EC/EU and its member states would contradict in principle the philosophy of the ECHR which reflects the legal multiculturalism. This idea

[108] N. Nugent, *Government and Politics of the European Union*, Duke University Press, 6th edition, 2010, pp. 546-548; Chalmers et al. *supra* note 80, pp. 185-188.

was also in line with the spirit of the ECHR and the principle of judicial independence.

For purposes of avoidance discrepancies in the approach adopted by the ECJ and the ECtHR in fundamental rights issues, a special type of "preliminary ruling" was proposed. Under that process, the ECJ would be eligible to request an interpretation of the ECHR from the ECtHR. In that sense, not only divergences would be derogated, but also the overload of cases in Strasbourg[109] could be partially countered (regarding EU member states) since the ECtHR opinion would be already known.

Closing this extensive report, the CDDH focused on possible means, other than the accession, to avoid contradictions between the legal systems of the EC/EU and the ECHR (chapter 3). The first proposal on that was the maintenance of the ECHR as the main legally binding instrument for fundamental rights protection in Europe. That reflects the "special role" that the ECHR has in comparison to other international treaties[110] thus the

[109] S. Greer, "What's Wrong with the European Convention on Human Rights?", *Human Rights Quarterly*, 30, 2008, p. 684.
[110] A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of European Court of Human Rights", *European Journal of International Law*, 14, 2003, pp. 540-544.

state parties cannot choose to derogate from them on the basis of other international obligations.[111] Subsequently, the idea of creation of a preliminary ruling mechanism as described above was reinforced and was put forward as to the whether this ruling should be binding or not upon the ECJ. Finally the introduction of a panel among the two Courts was advised on the model of the highest federal courts in Germany.

The report contributed a lot in possible amendments of the ECHR in view of the EC/EU accession from a technical perspective. In fact a consensus with the Commission's positions in the 1979 Memorandum could be observed to some degree; a fact that illustrated the will of both institutions to overcome possible difficulties so that the EC/EU might be finally able to accede to ECHR. Although it would be slightly impossible for a simple technocratic Committee to impugn issues that are either related to European law (e.g. legal personality, binding effect of

[111] C. Lebeck, "The European Court of Human Rights on the relation between ECHR and EC-law: the limits of constitutionalisation of public international law", *Zeitschrift für öffentliches Recht*, 62, 2007, p. 202; J. Frowein, "General Course: The European Convention on Human Rights as the Public Order of Europe", in *The Protection of Human Rights in Europe*, Collected Courses of the Academy of European Law, I (2), Kluwer Law International, 1990, pp. 267-358.

the EU Charter of fundamental rights) or carry a specific political gravity (e.g. participation of EC/EU representatives on ECHR organs), the CDDH tried to address all possible conflicts within the two legal systems and suggested mind provoking solutions of course from the perspective of the Council of Europe.

The Council of Europe's interest towards the accession of the Union in the ECHR was expressed more clearly than ever in the Action Plan (Appendix 1) adopted by the Council in the Warsaw Summit on 17 May 2005.[112] The common values that the Council of Europe and the European Union share were underlined and an early accession was seen as obligatory for the assurance of human rights protection in Europe. The arguments were enforced by the perspective of the enactment of the Treaty establishing a Constitution for Europe where accession was explicitly included for the first time.[113] Ironically, just a few days later the French (29 May 2005) and Dutch (1 June 2005) people

[112] CM (2005) 80 final 17 May 2005. At the same line the speech of J.-C. Juncker in the summit, available at http://www.coe.int/t/dcr/summit/20050516_speech_juncker_fr.asp (last accessed 16 December 2023).
[113] Title III, Article I-9, para. 2.

democratically decided, via referenda,[114] not to accept the European Constitution; a fact that went the accession discussions a few steps back.

Part two: The Lisbon Treaty and beyond

1. Legal basis

1.1 The new article 6, para. 2, section 1 TEU and further process

Under the precise rule of the Court in *opinion 2/94* it needed a Treaty amendment for the Community (of the time) to accede to the ECHR as an outcome of the absence of an explicit

[114] The result of the French referendum is available at http://www.interieur.gouv.fr/sections/a_votre_service/resultats-elections/rf2005/000/000.html (last accessed 16 December 2023) and that of the Dutch one at http://www.kiesraad.nl/nl/Actueel/Persberichten/2005/Vaststelling_uitslag_raadplegend_referendum_Europese_Grondwet.html (last accessed 16 December 2023).

competence.[115] This amendment was forwarded and a specific provision was entered in the Treaty establishing the Constitution for Europe, a Treaty that was never enacted.[116] However, the matter of accession was abided within the EU agenda and subsequently was included in the Treaty of Lisbon which finally came into force on 1st of December 2009. According to the new article 6, para. 2, section 1 TEU:

"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The way that this provision is formulated describes the Union's accession not simply as a wish or a general idea, but more as a duty.[117] The term "shall" exactly reflects that perception in the sense of containing an obligation within a future time instead of the term "may" that gives more freedom in acting.[118] Generally,

[115] Please refer to sub-chapter 1.2 of Part One of this book.
[116] For the results of the referenda in France and the Netherlands respectively, *supra* note 114.
[117] Contribution of Jacobs, *supra* note 2.
[118] For a more detailed view N. P. Tillman, S. B. Tillman, "A Fragment on *Shall* and *May*", *American Journal of Legal History*, 50, 2010, pp. 453-458.

provisions are technically enounced in either an obligatory or a more permissive mode within the EU legal system; this is usually expressed with the terms "shall" and "may" respectively. Article 8 TEU could be an example for both categories; para. 1 dictates that the Union shall develop good relations with neighbouring countries, whilst para. 2 states that the Union may conclude specific agreements with those countries. Hence, the terminology used in article 6, para. 2, section 2 underlines the importance on this issue.

The above mentioned provision should not be examined independently of article 2 TEU.[119] This provision, outcome of the Lisbon policy as well, illustrates the democratic qualities and values of the Union that form part of the common EU identity and inserts a general background for the protection of fundamental rights within the Union to be based on and therefore materialised. This basis has an explicit presence within the autonomous EU legal order and all the more in the forefront of the Treaty and takes

[119] "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

a sympolic approach in providing the Union with the obligation to accede to ECHR.[120]

A major matter that the Lisbon Treaty establishes is the legal personality of the Union.[121] This article comes to put an end to many relevant discussions especially with reference to who shall accede to the ECHR, the EC or the EU. From the enactment of the Treaty of Rome, the Member States intended to attribute legal personality to the Community to act in international scene by concluding international agreements[122] under the principle of conferred powers. The situation became far more complex after the creation of the European Union, a new entity that was based in the three pillar system.[123] The two new pillars (Common Foreign and Security Policy, Justice and Home Affairs) that were introduced in the Maastricht Treaty, along with the existing

[120] J.-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, 2010, p. 71.
[121] According to article 47 TEU: "The EU shall have legal personality".
[122] R. Frid, *The Relations Between the EC and International Organisations. Legal Theory and Practice*, Kluwer Law International, 1995, p. 19; R. Leal-Arcas, "EU Legal Personality in Foreign Policy?", *Boston University International Law Journal*, 24 (2) 2006, pp. 197-199.
[123] P. Craig, G. de Burca, *EU Law. Texts, Cases and Materials*, Oxford University Press, 7th edition, 2020, pp. 24-29; B. Egelund Olsen, "The EU Legal System" in H. Tegner Anker, B. Egelund Olsen, A. Ronne (eds.), *Legal Systems and Wind Energy. A Comparative Perspective*, Kluwer Law International, 2009, p. 45.

European Community, substantially changed the institutional framework around the Community.[124] Therefore an issue arose regarding the legal personality of the Union itself,[125] an open issue until the Lisbon Treaty era. Under the Lisbon framework the three pillar system is abolished[126] and is replaced with a merged legal personality for the Union which leads to the ability of the latter to participate in international agreements.

For the completion of the accession, an international agreement in the form of an accession treaty need to be concluded according to the parameters set in article 218 TFEU. Under the new architecture of the Union's external relations action, this provision entails all procedural matters for negotiating and concluding an international agreement.[127] As seen throughout article 218 TFEU, mainly the Council determines the organization of the Union's negotiation process, while receiving

[124] D. McGoldrick, *International Relations Law of the European Union*, Longman, 1997, p. 4.
[125] Arguments against and for the existence of EU legal personality even before the Lisbon Treaty may be found in R. Leal-Arcas, *supra* note 122, pp. 200-211.
[126] P. Craig, "The Treaty of Lisbon, process, architecture and substance", *European Law Review*, 33(2), 2008, pp. 137- 166.
[127] C. Kaddous, "External Action under the Lisbon Treaty" in I. Pernice, E. Tanchev, *Ceci n'est pas une Constitution - Constitutionalisation without a Constitution?*, Nomos, 2009, p. 174.

recommendations from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy regarding topics of the ex-second pillar[128] and is finally responsible for concluding the agreement.[129] In the case of the EU accession, the consent of the European Parliament is required for the conclusion of the agreement,[130] while the Council's final decision on concluding the EU accession agreement shall be taken unanimously and ratified by the member states in conformance with their constitutional requirements.[131]

An issue that may raise problems regarding the conclusion of an agreement for EU accession to ECHR is that deriving from article 218, para. 11 TFEU. According to that provision, any of the formal EU institutions involved in the process (Council, Commission, European Parliament) as well as every member state may seek an opinion from the CJEU as to whether the agreement is compatible with the Treaties. The term "compatibility" refers to both the procedural provisions of the Treaties (i.e. article 218 TFEU) and provisions of substantial

[128] Article 218, para. 3 TFEU.
[129] Article 218, para. 6 TFEU.
[130] Article 218, para. 6, section a, issue ii TFEU.
[131] Article 218, para. 8 TFEU.

nature.[132] Both situations do not really affect a possible accession since the reasons that made the accession incompatible with the Treaties have been already expressed[133] and surpassed through the Lisbon amendment. What may affect the conclusion of an accession agreement regarding "compatibility" is whether it may also include review of specific clauses of the agreement between the EU and the ECHR as the agreement will still be "envisaged" under the concept of article 218 TFEU.[134] In a positive response, re-negotiations will become necessary if the Court finds asymmetries between clauses of the drafted agreement and the Treaties; this process may end to be highly time consuming especially if the initial negotiations have reached final stages.

From a more practical standpoint, the European Commission and the Council of Europe started official negotiations on the 7th of July 2010 with Viviane Reding, Vice-

[132] G. M. Zagel, "Article 300 TEC on Agreements between the Community and One or More Member States or International Organizations" in P. Herzog, C. Campbell, G. Zagel, *Smit and Herzog on The Law of the European Union*, Vol. 4, Matthew Bender, 2005, pp. 1-51; G. De Baere, *Constitutional principles of EU external relations*, Oxford University Press, 2008, pp. 93-95. See also Opinion 2/00 [2001] ECR I-9713, para 5.
[133] Opinion 2/94, see sub-chapter 1.2 of Part One of the present book.
[134] A. Arnull, *The European Union and its Court of Justice* Oxford University Press, 1999, p. 642. Also on this issue Opinion 1/75 [1975] ECR 1355.

President of the Commission at the time and Thorbjørn Jagland, Secretary General of the Council of Europe at the time, representing the two bodies.[135] The elaboration of a legal instrument, or instruments, setting out the modalities of accession of the European Union to the European Convention on Human Rights, including its participation in the Convention system and the examination of any related issue shall be achieved at the latest by 30 June 2011 according to the CDDH report of the 70th meeting.[136]

1.2 Protocol 14 ECHR and further amendments

From the Council of Europe's point of view, Protocol 14 had been already formulated since 2004. The main scope of Protocol 14 is the introduction of major changes in the control system of the Convention in order to improve the efficiency of the ECtHR and to reduce its workload as well as that of the Committee of Ministers of the Council of Europe, which supervises the execution of the judgments. The ultimate aim is to enable the

[135] Council of Europe, Press release 545 (2010), 7-7-2010.
[136] Report adopted in the 70th Meeting 15-18 June 2010, CDDH 2010 (010), para. 25.

Court to concentrate on those cases that raise important human rights issues.[137] The most important amendment regarding the EU accession to the Convention is that of article 59 ECHR. According to article 17 of the Protocol 14, a new paragraph shall be inserted that provides the Union with the opportunity to accede. This new paragraph of article 59 states that:

"The European Union may accede to this Convention."

The intention regularly expressed by the Council of Europe in welcoming the EU to the ECHR is regulated there. The Council of Europe seemed ready from the very beginning to put the basis for such an accession. Having in mind the finally ineffective effort with reference to the Treaty establishing a Constitution for Europe which also provided the EU with the legal basis needed for accession, the Council of Europe started proceedings to adapt the Convention to such an action by amending the most important

[137] "Protocol 14. The reform of the European Court of Human Rights", Factsheet, p. 1. For a more extensive view on the process of adoption of Protocol 14, J. Lathouwers, "Protocol No. 14: Object, Purpose and Preparatory Work" in Lemmens, Vandenhole *supra* note 70, pp. 1-22.

provision therein, the one related to the signature and ratification of the Convention. Of course the adoption of Protocol 14 was just the beginning since as proven in practice the entry into force took much longer than expected.[138]

Protocol 14 technically initiated, from the ECHR law perspective, the changes within the Convention for a possible EU accession, but still further modifications shall be agreed for the continuation of the accession process.[139]

A clarification shall be made with reference to the terms that demonstrate the State-oriented direction of the Convention. The solution proposed by the Commission in the 1979 Memorandum that was later confirmed by the CDDH in its 2002 Report, of inserting an interpretative clause regarding the application of those terms to the Union in the accession treaty seems adequate to avoid any inconsistencies. Another more precise solution would be to insert a more general term; a

[138] The Protocol 14 finally entered into force on 1st June 2010 after its ratification by Russia that was the last state to ratify it. All information regarding ratification of Protocol 14 are available at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=2&DF=19/02/2010&CL=ENG (last accessed 16 December 2023).
[139] Factsheet, *supra* note 137, p. 3.

probable one could be the "the High Contracting Parties" or simply "the signatories".

Far more important and complicated is the participation of the EU representatives in the Council of Europe's instruments that are in anyway related to the ECHR. The instrument directly set up within the ECHR is the ECtHR which ensures the observance of the engagements of the undertaken by the High Contracting Parties (article 19 ECHR). The appointment of a judge elected in respect of the EU complies perfectly with the ECHR provisions, thus no amendment is required therein. On the contrary, article 20 ECHR directs the number of judges as equal to the one of the High Contracting Parties and since the time of its accession, EU will be one.

Moreover, an EU judge may contribute to the development of better administration of justice in the ECtHR. The scope of EU activities becomes broader that it turns out to be difficult to distinguish any areas not affected by them.[140] In that sense even more and more cases containing EU law may be brought before the ECtHR where the presence of a judge with

[140] G. Davies, "Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time", *Common Market Law Review*, 43, 2006, p. 63.

expertise in EU law will be decisive. In fact, the Union had since many decades[141] constituted an autonomous legal order and developed its own legal system that included fundamental rights protection, especially with the inclusion of the EU Charter of Fundamental Rights in the new TEU. Hence, the EU judge will represent a legal system, different from that of the EU member states, for contributing to the legal multiculturalism of the ECtHR.

The process of selection of the EU judge will be one described in article 22 ECHR. For reasons of validity and democratic legitimacy, members of the EU Parliament shall participate in the electoral process in the Parliamentary Assembly,[142] as the Union institutions will be responsible for nominating the three candidates as article 22 ECHR demands. The advisory opinion process of article 255 TFEU regarding the candidates for the CJEU may apply *mutatis mutandis*. Therefore,

[141] Case C-26/62 Van Gend en Loos [1963] ECR 1.

[142] In line with point 7 of the European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, INI/2009/2241.

the EU judge in the ECtHR will enjoy more credibility being appreciated by legal specialists.

General, full participation of EU Parliamentarians in the Parliamentary Assembly of the Council of Europe would not be recommended for two main reasons. The first is related to the number of the members in the Assembly. Under the current standards, the Assembly consists of 324 parliamentarians that represent the 46 member states of the Council of Europe. As those seats are granted according to the population of each country, the disproportionately large EU population and the analogous seats would make the Assembly dysfunctional.

The other reason is related to political representation in the Assembly. The members of the Parliamentary Assembly are elected (appointed) among members of the National Parliaments.[143] Delegations must show no worse a gender balance than the relevant national parliament, while the fair representation of political parties or groups within the Assembly shall be ensured.[144] Therefore it could be observed that the Parliamentary

[143] Article 25, para. a of the Statute of the Council of Europe.
[144] P. Evans, P. Silk, *The Parliamentary Assembly. Practice and Procedure*, Council of Europe Publishing, 10th edition, 2010, pp. 95-96.

Assembly signifies the political status quo of the member states of the Council of Europe. Although representatives are democratically elected every five years, the situation does not differ much in the European Parliament. Pan-European political parties have not developed a true "European" political identity but remain weak coalitions of the national parties and therefore dependent on them;[145] a fact that leads to a deficit of democratic legitimacy in EU. European Parliamentarians simply follow policies as developed within their national political parties respectively. As a result, the only change that a possible participation of EU Parliamentarians could bring to the Parliamentary Assembly is simply to increase the number of representatives of EU member states in the Assembly. Nevertheless, co-operation between the two bodies could be enhanced by granting to EU the status of observer in the Assembly.

Regarding the Committee of Ministers, as already discussed the lack of a common foreign policy in EU level, makes

[145] J. Thomassen, "Parties and Voters: The Feasibility of a European System of Political Representation" in B. Steunenberg, J. Thomassen (eds.), *The European Parliament. Moving towards Democracy in the EU*, Rowman and Littlefield Pubishers, Inc., 2002, pp. 15-16.

the Union's full participation ineffective in an organ of political importance. Nevertheless, with the establishment of the High Representative of the Union for foreign affairs and security policy (HR), a different basis for developing a common foreign policy has been set.[146] This does not automatically imply the acquisition of a political consensus in foreign affairs issues in the EU. However, the idea of a possible future participation of EU in the Committee of Ministers should not be abandoned.

With reference to the ECHR, the Committee of Ministers acts as a supervisor in the execution of the judgments of the ECtHR (article 46, paras. 2, 3, 4 ECHR).[147] The necessity of the Union to be able to participate in proceedings regarding the execution of the judgements is quite reasonable. High criticism has been voiced for the inconsistent approach of the Union in matters with reference to fundamental rights in particular within the Union itself.[148] And given the fact that twenty seven of the

[146] N. Verola, "The new EU Foreign Policy under the Treaty of Lisbon" in F. Bindi (ed.), *"The Foreign Policy of the European Union. Assessing Europe's Role in the World"*, Bookings Institution Press, 2010, pp. 44-49.
[147] For the position of the European Parliament on the issue see *supra* note 142.
[148] C. Turner, "Human Rights Protection in the European Community: Resolving Conflict and Overlap Between the European Court of Justice and the European Court of Human Rights", *European Public Law*, 5(3), 1999, pp. 453-463; G. de Búrca, "Convergence and Divergence in European Public Law:

forty seven members of the Council of Europe are EU member states, a large amount of cases and hence violations, is subsequently brought against them. So the Union would be highly interested in participating in the process of supervision for the coherence of fundamental rights protection to be ensured, especially in its territory.

Plus, a potential supervision would increase the prestige of the Union as an organization that focuses in fundamental rights protection in practice. The gap between the EU actions and the way that the citizens assume those actions becomes a commonplace. As the Commission has pointed out, "they (the people) expect the Union to act as visibly as a national government".[149] A step to achieve this visibility in fundamental rights policy is to be actively involved in an organ that substantially guards compliance with fundamental rights, as the Committee of Ministers in the form of article 46 ECHR.

Fundamental changes that need to be forwarded for a complete EU accession to ECHR were described above. What

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the case of human rights", in P. Beaumont, C. Lyons, N. Walker, *Convergence and Divergence in European Public Law*, Hart Publishing, 2002, p. 135.

[149] Commission's White Paper on Governance, Brussels, 25-7-2001, COM (2001) 428 final, p. 3.

may be more important is the application of certain provision of the Convention to the special characteristics of the Union. Provisions like article 33 ECHR (inter-state cases), article 35, para. 2 (procedure of international investigation or settlement), the status of the Union when intervening or simply when being in a defending position and the possible judicial interaction with ECHR member states could create interpretational conflicts. An analysis of those matters will be attempted later in this paper.

2. Re-structure of the "pillars" of fundamental rights protection in Europe

In the territorial region of Europe, protection of fundamental rights may be found in many legal documents of national and supra-national level that represent autonomous legal orders but are in an interactive relationship to each other. In national level, a concrete catalogue of fundamental rights that are protected can be observed in every Constitution. This defines the first "line" of protection where the citizen may rely on within the geographical

area of the State.[150] In supra-national level, after the enactment of the Lisbon Treaty, two catalogues of fundamental rights co-exist in Europe. On one hand the EU Charter of Fundamental Rights that embodies the EU legal order and is effective within the Union and on the other hand, the ECHR that reflects the principles of the Council of Europe in a more pan-European dimension which includes more than the 27 EU member states.

The application of the Convention in national legal order and therefore its hierarchical position therein varies among member states.[151] However, the impact and influence of the Convention in interpreting the constitutional rights and freedoms has become inextricable. For example the Federal Constitutional Law in Germany held that "in interpreting the Basic Law, the content and development of the European Convention on Human Rights are also to be taken into account" and further continued

[150] A. Voskuhle, "Protection of Human Rights in the European Union. Multilevel Cooperation on Human Rights between the European Constitutional Courts", Lecture on session 6, *Human Rights-Global Culture-International Institutions*, Hannover, 4-11-2010, p. 2.

[151] For more on this issue see P. Van Dijk, G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, 3rd edition, 1998, pp. 16-22; J. Polakiewicz, "The Status of the Convention in National Law" in Blackburn, Polakiewicz, *supra* note 80, pp. 31-53.

that "the case-law of the European Court of Human Rights also serves in this regard as an interpretational aid in defining the content and reach of the Basic Law's basic and principles of rule by law".[152] The situation is quite similar in Greece[153] and Spain[154] where the interpretation of national fundamental rights and freedoms is in conformity with the ECHR.

This approach adopted especially by EU member states should be interpreted under the light of the general relations between national law and EU law. The EC/EU had already entrenched the protection of fundamental rights through the case-law of the ECJ[155] by being inspired by the ECHR, a fact that was later converted to Treaty law in SEA and Maastricht. As European law takes precedence over national law,[156] the member states are obliged to respect the Convention when acting in European Union competence's domain.

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[152] BverfGE 74, 358; Polakiewicz, *idem*, pp. 47-48.
[153] G. S.-P. Katrougalos, "The influence of ECHR in internal legal order", *To Syntagma*, 5, 2002 (in Greek).
[154] Article 10, para. 2 of the Spanish Constitution.
[155] See sub-chapter 1.1 of Part One of the present book.
[156] Case C-6/64 F. Costa vs. ENEL [1964] ECR 585, 593; case C-106/77, Amministrazione delle Finanze dello Stato vs. Simmenthal SpA [1978] ECR 629. Especially, regarding precedence over national Constitutional law see Internationale Handelsgesellschaft, *supra* note 4.

An issue that remains quite vague and could be examined concerns the relations among the Council of Europe and the Union under the light of the accession of the latter to the ECHR.

2.1 Integration of the two "Europes"

Since the decade of the 50's two international organizations of extreme significance arose within the continent of Europe.[157] First the Council of Europe clearly focused on matters regarding the principles of rule of law and democracy with particular emphasis on human rights.[158] The most important expression of those principles is the ECHR which 47 European countries have already accepted. Through the decades, more and more cases found their way to the ECtHR,[159] a fact that demonstrates the magnitude of the achievement in the field of human rights. Alternatively, the EU, that started merely as an economic

[157] R. de Lange, "The European Public Order, Constitutional Principles and Fundamental Rights", *Erasmus Law Review*, 1 (1) 2007, pp. 12-15.
[158] D. Gomien, "The Strasbourg Court-the arbiter of human rights standards in Europe" in *"The Challenges of a Greater Europe. The Council of Europe and democratic security"*, Council of Europe Publishing, 1996, p. 71.
[159] Greer, *supra* note 108, pp. 687-691. Also T. Koopmans, *Courts and Political Institutions: A Comparative View*, Cambridge University Press, 2003, pp. 84-91.

organization but consequently expanded its actions in many fields of policy, therefore, inevitably, the Court ruled upon cases including human rights.

This is probably the point where those two organizations of different structure finally meet. Protection of fundamental rights is essential, an issue of constitutional nature[160] that is impossible to be excluded from the so-called European public order. Widely-accepted fundamental rights encompass mandatory rules that parties have no freedom to derogate from.[161] The sources of mandatory rules may (also) be sought in norms created at supra-national level, in the field of human rights the ECHR. In EU level, even before and besides the embracement in the Treaties, the Court has provided with many rulings that incessively and eventually accepted such rules of supra-national level within the EU legal order.

Furthermore, another form of interaction could be observed in the formulation of the criteria for accession to EU. According to article 49 TEU any potential EU member state is

[160] L. F. M. Besselink, *A Composite European Constitution. Een Samengestelde Europese Constitutie*, Europa Law Publishing, 2007, p. 3.
[161] C. Kessedjian, "Public Order in European Law", *Erasmus Law Review*, 1 (1), 2007, p. 26.

obliged to respect the values that the EU is founded on and promote them. The relevant values of article 2 TEU[162] represent the core of the Council of Europe whose aim is the greater unity of Europe through the common heritage of the countries that embodies their common thoughts and principles. It comes naturally that those common principles are connected with the rule of law, democracy and respect for human rights. Hence, the EU developed some standards for accepting new member states similar to the ideological background of the Council of Europe.

Therefore it would not be exaggerative to say that the interaction among the two supra-national legal orders (EU, Council of Europe) had already commenced as far as human rights are concerned. The interaction described will be upgraded in the future accession of EU to ECHR in the sense that the EU does not just accept the rules of the ECHR as guiding principles, but want to actively participate therein. So what remains is to examine to what extent this participation may occur.

The legal basis provided within the new TEU for accession to ECHR does not simply set an obligation for the

[162] Article 2 TEU, *supra* note 118.

Union; it also establishes the vertical effects of such an accession. Article 6, para. 2, section 2 TEU states:

"Such accession shall not affect the Union's competences as defined in the Treaties."

In further explaining the statement above, article 2 of Protocol 8 attached in Lisbon Treaty clarifies the retaining stability in the competences of all actors by dictating:

"The agreement (for the accession to the ECHR) 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."

This provision demands a multiple interpretation, both from the EU and from the member states point of view. Unlike the formulation of the relevant provision of article 6, para. 1 TEU regarding the recognition of the EU Charter of Fundamental Rights which states that the Charter shall not extend the competences of the Union, the word "affect" is used in both para. 2 and its explanatory article 2 of Protocol 8. The reason seems to be quite simple; while in the formulation of the EU Charter, the actors involved in the field of human rights protection are the Union with its member states. As EU primary law, the Charter is binding to all EU member states under the principle of supremacy. Nevertheless as it is explicitly mentioned therein,[163] the Charter shall not restrict human rights as are recognized by the Constitutions of the member states. The member states did not seem to intend to transfer powers to the Union in this particular field and as a result extend its competences.

[163] Article 53 of the EU Charter of Fundamental Rights.

The situation is different when it comes to the accession of EU to the Convention. A possible accession may affect both the relations of the Union with its member states under the ECHR law and those of the Union with the Convention itself. Therefore a more general term was used in the formulation of para. 2. The word "affect" is interpreted in a more balanced way; neither restrict, nor extend EU competences.

An issue that should be addressed first is what accession may change from a legal point of view. In terms of legal consequences, EU will become a party to the ECHR and submit its *sui generis* therein, despite the participation of all its member states to the Convention. The jurisdiction of the Strasbourg Court extends to all matters concerning the interpretation and application of the Convention and its Protocols;[164] in other words it indicates revision of domestic legislation in cases of human rights violations. Translated in terms of EU's accession, it involves revision of the EU legislation and acts of its institutions. However, on the CJEU side, there is risk that this eventuality would not be appreciated because of the Court's exclusive

[164] Article 32 ECHR.

jurisdiction on the interpretation and the application of Union law.

It is commonsense that the accession of EU to the Convention will bring an institutional novelty from the viewpoint that an international organization will for the first time accede. In order to be able to control possible aberrations, the EU lawmakers punctuated the concept of the special characteristics of the Union.[165]

A notable observation is the absence of an explanation of what the special characteristics of the Union or what they consist of. One may think that are related with the organization of the Union as described in the treaties, thus the powers of its institutions as vested therein. The EU has been developed to an autonomous legal order however based on the principle of transferred powers by the member states. This contains the source of the Union competences, fields where the Union is entitled to legislate. Furthermore, on the ground of legal autonomy, the widely accepted principles of direct effect and supremacy contribute to the special nature of EU legal order. The way those

[165] Also expressed in article 1 of Protocol 8 of the Lisbon Treaty.

principles have been formulated confirm the nature of Union as a branch of international law with some unusual, quasi-federal, blossoms.[166]

Another concept of EU special characteristics could be tied up with its system of judicial protection. In particular, EU accession to the ECHR must not jeopardize the interpretative authority of the CJEU regarding Union law. To maintain uniformity in the application of European Union law and to guarantee the necessary coherence of the Union's system of judicial protection, it is therefore for the Court of Justice alone, in an appropriate case, to declare an act of the Union invalid.[167]

A core element that describes EU in internal and external actions is that of competences. Article 3 TFEU provides the Union with exclusive competences in some domains wherein only the Union has jurisdiction, thus exclusive competences comprise the peak of EU legal autonomy. The catalogue of article 3 is restrained in the fields of the custom union, the establishing of the competition rules necessary for the functioning of the

[166] B. de Witte, "Direct Effect, Supremacy and the Nature of the Legal Order" in P. Craig, G. de Burca, *The Evolution of EU Legal Order*, Oxford University Press, 1999, p. 210.
[167] Case C-314/85 Foto Frost [1987] ECR 4199.

internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy.

Beyond dispute, even in those strict EU fields of policy the protection of human rights shall be ensured. However, the authority to judge upon EU law matters is the CJEU; the CJEU will remain the sole Supreme Court adjudicating on issues relating to EU law and the validity of the Union's acts.[168] Although in the past the Court had modified its position after the development of ECtHR case law in issues related to certain aspects of the right of privacy,[169] the ECtHR will not acquire the status of a hierarchically superior court; no decision or judgement of the Strasbourg Court adopting a different interpretation in human rights will certainly oblige the Union to change its legislation especially in core issues like, for example, the common commercial policy or the competition rules.

[168] In this line the European Parliament, *supra* note 147, point 1, issue 6.
[169] Case C-88/99 Roquette [2000] ECR I-10465, para. 29 regarding the case law developed by ECtHR after the ECJ judgment of Hoechst.

The purpose of this approach is the protection of the EU autonomous legal order that includes its own principles. Since its establishment the Union has been trying to fulfill aims of economic nature by following a market oriented path and subsequently legislating accordingly. Although the ECJ in recent cases[170] ruled in favour of traditional rights over economic norms, the tendency has always been that fundamental rights are not absolute and may be restricted under certain circumstances.[171] The Union does not give the impression of willing to defeature its special characteristics, nor to reform its economic integration purposes and hence to forfeit its exclusive fields of action to a mere human rights external reviewer.

Nevertheless EU shall respect fundamental rights of the Convention. As has been dictated by many ECJ decisions, ECHR is of special significance.[172] The protection of fundamental rights in Union is inspired by the concept that is given in specific rights included to the Convention which sets the minimum standards to

[170] Schmidberger, *supra* note 31; Omega, *supra* note 31.
[171] Case C-62/90 Commission vs. Germany [1992] ECR I-2575, para. 23; Bosphorus, *supra* note, 65, para. 21; Schmidberger, *idem*, para. 80.
[172] Nold, *supra* note 10; case C-299/95 Kremzow vs. Austria [1997] ECR I-2629.

provide European framework for protection of human rights.[173] From this point of view, the Strasbourg Court acquires a subsidiary role in externally reviewing compliance with the Convention; the guarantee that the rights and freedoms set forth therein lies upon the authorities of the members as major actors in human rights protection.[174]

In addition, competences of the Union are related to human rights protection policy[175] in a more direct way both in internal and external level. In the first category one may include article 19 TFEU that provides the Council with power to take actions in combating discrimination. The Union may also legislate in issues regarding equality among men and women at work (article 153, para. 1, issue i TFEU in conjunction with article 157 TFEU) and maybe the most significantly the shared competence that the Union enjoys in the ex-third pillar (article 4, para. 2, issue j TFEU). Another direct internal fundamental rights competence is the one of article 7 TEU. According to this

[173] Wildhaber, *supra* note 43, p. 4; Lawson et al., *supra* note 47, p. xxviii.
[174] The subsidiary role of the Convention supervisory mechanism has been confirmed in the Interlaken Declaration, PP 6, 19 February 2010.
[175] A. J. Menendez, "Exporting rights: The Charter of Fundamental Rights, membership and foreign policy of the European Union" *ARENA Working Papers*, WP 02/18.

provision, the Union is bestowed the power to monitor compliance of the member states with fundamental rights and apply sanctions in cases of serious and persistent breaches. In external level, the fundamental rights policy of the Union is guided by article 21 TEU which states among others that the Union shall define and pursue common policies and actions in all fields of international relations, in order to consolidate democracy, the rule of law and human rights. In practice the EU had already included human rights references in its international agreements under the name of "human rights clauses".[176]

There is no reason why the Union should not follow the interpretation of the Convention when exercising its human rights policy. By obtaining a catalogue of fundamental rights of its own, the Union codified and specified the general values of article 2 TEU (and subsequently of article 21 TEU) into human rights that express democracy and the rule of law. The EU Charter that embodies those values dictates in article 53 that the meaning and scope of the rights of the Charter that correspond to ECHR shall be the same as those laid down by the said Convention. Therefore

[176] B. Brandtner, A. Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" *European Journal of International Law*, 9, 1998, p. 468.

the values of the Union are substantially incorporated to the Convention that in any case enjoys the reputation of being the most important instrument of fundamental rights in Europe.

Conversely, the Union might obtain more powers in human rights issues after the accession to ECHR. From the early period the accession debate included the strengthening of the Union and its institutions regarding human rights protection, a prospect that could empower the Union's position in that particular field in Europe. Under those circumstances, the role of the ECHR would be enervated.[177]

This may be in line with article 6, para. 3 TEU. This provision states that:

"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[177] Chalmers et al., *supra* note 106, p. 259.

The general approach that demonstrates the importance of human rights within the EU legal system was kept in the post-Lisbon era. It clearly illustrates the commitment of the Union in protecting fundamental rights. On the other hand, one may say that it keeps providing the Court with the power to adjudicate based on ECHR rights despite the existence of an EU bill of rights. This may lead to a constructive role of the CJEU that could create rights out of their formal EU basis, the Charter, based on principles of the Convention.[178] Consequently, the power that the CJEU kept may increase its importance and grant a central role in human rights issues to the Court.

This indirect empowerment of EU would not find its member states consistent. As directly stated in article 3, para. 6 the Union is based on the principle of conferred competences. Should the member states determine to transfer powers regarding fundamental rights protection to the Union, they could follow a different technical path via a treaty amendment and subsequent inclusion of a relevant provision. This is also the reason of the

[178] Rutheil de la Rochere, *supra* note 69, p. 354; Besselink, *supra* note 160, p. 16.

clarification clause of article 6, para. 1 regarding the EU Charter and the Union competences.

Moreover, all EU member states are already signatories of the Convention under special characteristics related to reservations made according to article 57 ECHR. Reservations apply where a state is unhappy about particular provisions, it may, in certain circumstances, wish to refuse to accept or be bound by such provisions, while consenting to the rest of the agreement.[179] From this perspective, the member states of the Convention intend to adapt, up to a certain extent, the legal instrument to their specific political distinctiveness so that the application of the Convention within their respective national legal orders would be effortless.

The reservations generally indicate the exercise of powers in human rights by the member states. The theoretical possibility that the reservations of the EU member states within the ECHR would have been abrogated with the EU accession would have implied an indirect transfer of powers to the Union. The possibility of raising the reservations on behalf of the member

[179] M. N. Shaw, *International Law*, Cambridge University Press, 6th edition, 2008, p. 914.

states as an expression of sovereignty still exists; thus the revocation via a Union act (accession to ECHR) would displace the member states from determining their respective policies.

The reasons described led to the formulation of article 6, para. 2 and article 2 Protocol 8 in such a way that clarifies the position of all actors involved in the accession. Under the hierarchical distinction made by Polakiewicz,[180] the ECHR does not appear to have a clear status within the EU legal order. A basic concern of the Union is evidently to guarantee a special status in the ECHR based on its institutional characteristics. Theoretically, even under those circumstances, this would not be problematic: the Union institutions shall respect the EU Charter of Fundamental Rights which provides with protection of at least at the same level with the Convention. Therefore, the ECHR shall be seen as a complementary, not an alternative instrument that provides of an additional safeguard for human rights

[180] Polakiewicz understands that the member states have implemented the Convention in five different ways: 1) the Convention as superior over all national law, the Constitution included, 2) the Convention as part of the Constitution, 3) the Convention as superior over domestic legislation, 4) the Convention with a rank of statutory law and 5) the Convention without internal formal validity. Polakiewicz, *supra* note 152, pp. 36-46.

protection.[181] In practice, an institutional balance of the two legal orders shall be kept for the proper function of accession. The specific Union features must be respected; nevertheless this should in no occasion lead to institutional excesses on behalf of the Union.

For the achievement of institutional balance, the development of the relations of the two highest courts in their respective legal orders is essential. Recently, in an attempt to contribute to the accession process, the CJEU favoured of the enactment of a specific mechanism for ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the ECtHR rules on the compatibility of that act with the Convention.[182] In that sense the Union's

[181] I. Pernice, R. Kanitz, "Fundamental Rights and Multilevel Constitutionalism in Europe", *WHI-Paper*, 7/04, pp. 9-14; X. Groussot, L. Pech, "Fundamental Rights Protection in the European Union post Lisbon Treaty", *Fondation Robert Schuman/European Issue*, No. 173, p. 12; Rutheil de la Rochere, *supra* note, 178, p. 353.

[182] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5-5-2010, point 12.

judicial protection system, which consists of its special characteristics, would be sufficiently preserved.[183]

An example of highest importance could be a claim of violation of the Convention rooted in the European Union's primary law, i.e. the treaties. Article 3, Protocol 8 of the Lisbon Treaty gives an initiative by stating that:

"Nothing in the agreement referred to in Article 1 (accession agreement) shall affect Article 344 of the Treaty on the Functioning of the European Union."

Article 344 TFEU practically forbids member states to submit a dispute concerning the interpretation or application of the EU primary law to any method of settlement other than those provided for in the treaties; it confirms that the sole and indisputable interpreter of the EU treaties is the CJEU as derived from many provisions therein (e.g. article 19 TEU, article 267 TFEU, etc.).

[183] *Idem*, point 9.

The logical outcome based on the above would be that the EU primary law should be excluded from the ECtHR scrutiny mechanism. In the relevant example the introduction of a mechanism that allows the Strasbourg Court to refer the case to the CJEU[184] would prevent possible disputes. This idea is in line with the concept of Union's special characteristics; decisions of the CJEU regarding EU law affect 27 countries while a possible application of another method of settlement may impinge on policies that have been settled for years and under difficult circumstances. This could be used as a "backdoor" to weaken the process of European integration.

On the other hand, the same special mechanism could be used for an interpretation request of the Convention to the ECtHR on behalf of the CJEU. The main advantage of the process is that the CJEU would be in position to have an authoritative interpretation of the Convention to ground on for further development. Such a mechanism is tightly connected to the nature of the Strasbourg Court as delivering constitutional justice in the

[184] Statement of A. Benaki in European Parliament, Committee of Constitutional Affairs, Hearing, *"The institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms"*, Brussels, 18-3-2010, p. 4 (in Greek).

sense that the ECtHR will provide the CJEU and subsequently all EU member states (even non-EU member states) with an original interpretation of the conventional human rights.

Moreover, the establishment of an interpretative process would assist in avoiding divergences and hence promote cohesion among the case-law of the two courts. Total coincidence of views among the two courts would be an idealistic but rather impossible result. As a minimum, the interpretative mechanism provides the CJEU with a concrete starting point that assist a traditionally non-human rights court to ground its decisions. This approach is also in line with article 53 of the EU Charter that dictates a common interpretation with the Convention where possible.

A major disagreement regards the further postponement in delivering justice. The workload of the Strasbourg Court is commonplace; a workload that increases year by year. At first sight, the insertion of an interpretation reference mechanism seems like delaying cases even more. Giving a second thought, the ECtHR will be in a position to rule upon its actual field of specialization, human rights, in a way of delivering guiding principles rather than solving a particular problem. This process has dual benefits; the position of ECtHR as a constitutional court

is re-defined (and confirmed) while its guiding principles lead to the avoidance of future time consuming relevant cases. Under those terms, the time issue will turn to be a positive aspect for the ECtHR applicant.

It is of the highest significance to understand that the CJEU is not a supreme national court and shall not be confronted as one. Under the principle of supremacy the case law of CJEU (as part of EU law) overcomes national law; plus from a horizontal perspective it influences over 400 million people from different legal systems. Therefore the establishment of an interpretation request mechanism should not be regarded as a privilege granted to EU but rather than a further step towards the completion of European public order.

3. Relations of the Union with the High Contracting Parties under the Convention

As the Strasbourg Court has ruled in its case law,[185] in fields of state actions for compliance with EU law obligations, the

[185] Particularly in Bosphorus, refer to sub-chapter 1.3 of Part One of the present book.

responsibility of the EU member states exists only if the Union does not protect fundamental rights at least at a level equal to the Convention, subsequently the EU member states are presumed not to have departed from the requirements of the Convention if the EU passes the test of "equivalent protection". By applying this principle, the ECtHR received much of criticism in the outcome of the *Bosphorus* case. One point was raised with regard to the level of scrutiny of the ECtHR towards EU member states in relation to that applied to non-EU member states. By transferring powers to the Union, the member states are substantially exempted, to some extent, from scrutiny to which non-EU members of the Convention are exposed, concerning the same state action.[186]

Inevitably, the situation will change after the EU accession to ECHR. The rationale of the Strasbourg Court in all cases involving EU law, which led to the establishment of special principles in its judgements, was simply the fact that as EU was not a part of the Convention; the ECtHR had no direct competence in adjudicating upon EU legal acts regarding their

[186] Besselink, *supra* note 48. See also the concurring opinion expressed by six judges, para. 4, also the one expressed by judge Ress, para. 4.

compliance with human rights. The very reason why all cases were not declined inadmissible for jurisdictional reasons dissembled, on one hand, the will of the Strasbourg Court to take them into account, on the other hand, an action of a member state, which results admissibility under article 1 ECHR, was involved.

Under the accession to ECHR there will be no justified reason for the continuation of the same attitude towards EU on behalf of the Strasbourg Court. By acceding to the Convention, the European Union will have agreed to have its legal system measured by the human rights standards of the ECHR. More importantly, the Union will have the rights to participate in proceedings before the EctHR when EU law is at stake; it will no longer be the case that the member states have to act as sole respondents in lieu of the European Union.[187] Therefore, there will no longer be a need for them to be privileged in cases currently covered by the presumption.

3.1 The Union and its member states

[187] Lock, *supra* note 94, p. 797, but see Besselink, *ibid.*

The first question regarding the judicial relations among the Union itself and the EU member states is with reference to responsibility. Statistically, most cases are brought to the ECtHR by individual applicants under article 34 ECHR. Protocol 8 of the Lisbon Treaty has already approached the issue. In article 1 it is stated that the mechanisms necessary to ensure that proceedings are correctly addressed to member states and/or the Union shall be elucidated in the accession agreement. Therefore the possibilities of misinterpretation will be reduced.

The issue of correct respondent is vital when EU law is at stake. Apparently, the Union would not be pleased about being in a position to defend itself for human rights violations that the member states have committed. One could propose that the criterion for distinguishing the correct respondent already exists in the treaties; the separation of competences. Part one, title I TFEU is dedicated to classification of competences. Hence, a possible solution would be to have the Union as responsible for its exclusive competences (also in cases of action under the subsidiary competences status) and both the Union and the respective member states in cases involved shared competences.

This solution should not be acceptable for two main reasons. Firstly, from a technical point of view, this distinction will directly transfer the power to the Strasbourg Court to interpret the treaties when defining responsibility. When a case finds its way, the ECtHR will inevitably have to judge upon arguments regarding the correct respondent. However, the allocation of responsibility between the EU and the member states falls under the exclusive jurisdiction of the ECJ; an issue that has already been specifically addressed in *Opinion 1/91*.[188] Hence, the method of distinguishing responsibility before the ECtHR on the ground of EU internal division of competences will not be extremely effective.

The second reason is more substantial. Under the internal division of competences, it is highly probable that the Union will be solely responsible for human rights violations when legislating in issues of exclusive competence, for example in the field of common commercial policy. Nevertheless, a violation deriving from an EU piece of legislation is not existent in all cases. For cases where the member states enjoy discretion up to a certain

[188] Opinion 1/91 [1991] ECR I-6079, Summary, para. 2. Also for this issue see B. Brandtner, "The "Drama" of EEA. Comments on Opinions 1/91 and 1/92", *European Journal of International Law*, 3, 1992, p. 309.

extent when implementing EU law (e.g. directives), it is highly probable that the violation can be caused by the national measures. The member state may have exercised its discretion in a way, which violated the Convention and in such cases, it would be appropriate to hold the Member State responsible.[189] Therefore the EU internal division of competences will turn to be a "shield" for the member states of the Union.

Deriving from the aforementioned, the solution regarding the distinction of responsibility between the EU and the EU member states can be found in the notion of discretion. The member states have no discretion when implementing EU primary law or EU regulations. Hence, it would be unfair for them to stand solely responsible for just fulfilling their obligations under EU law (for example *Matthews*). Although, it is clear that the human rights violations substantially originate from EU law in such cases, the violation creates effects in the real world via an act of a member state. This became quite clear in *Bosphorus* where the ECtHR asserted that the case fell into the jurisdiction of Ireland within the scope of article 1 ECHR since the act that

[189] T. Lock, "Accession of the EU to the ECHR: Who Would Be Responsible in Strasbourg?" in D. Ashiagbor, N. Countouris, I. Lianos (eds.), *The EU after the Lisbon Treaty*, Cambridge University Press, forthcoming, 2011.

cause the violation was committed by Irish authorities. Under this perspective, the member states will always be in a defending position before the ECtHR, a fact that may lead to unfair results especially when a particular member state had initially disagreed during the legislative process for the adoption of the regulation.

On the contrary, the level of discretion that the member states enjoy when implementing EU directives is very high. A directive shall only be binding as to the result to be achieved, but leaves the member states free to legislate upon the form and methods. In that sense the acknowledgement of violation's root is more complicated; does it derive from the form and methods that a particular member state chose or does it exist in the very essence of the EU act so the member states could not avoid it?

In order for confusions to be avoided, where there might be any doubt about the way in which responsibility is shared; an application may be brought simultaneously against the Union and the member state.[190] Furthermore, for finding the correct responsible actor, a new mechanism may be initiated. In cases of an application directed against a member state, the EU may join

[190] European Parliament, *supra* note 168, point 9.

as a co-respondent and vice versa. This mechanism, which is based on a proposal of CDDH,[191] will also enhance the idea of the EU legal autonomy as a special characteristic since the Union will be in position to defend its legal acts more efficiently. The decision of the enactment of this mechanism should lie upon either the EU or the member states, not attributed by the Strasbourg Court. Under the latter, the ECtHR might enter the very substance of the case and in some sense pre-judging it, by granting some sort of acquittal to the respondent, when inviting another actor to participate as co-respondent.

The establishment of the co-respondent mechanism will be much more effective than the existing third party intervention of article 36 ECHR. Taking into consideration that the judgement has no legal effects to the intervener, no obligation would arise for the third-party to comply with it. In contrast, the co-respondent participates as an equal litigant accepting all effects of the trial. Moreover, the co-respondent mechanism shall be binding upon both the EU and the member states when asked to enter a case, unlike the non obligatory third party intervention

[191] See pp. 22, 23 of the present.

instrument, in order for responsibilities to be assessed more precisely.

According to the Convention, the ECtHR may only deal with the matter after all domestic remedies have been exhausted (article 35, para. 1). This provision contains a proof of the subsidiary role of the Strasbourg Court. A crucial matter is the exhaustion of domestic remedies regarding EU law. In the cases involving an act of a member state, the respective domestic judicial review mechanism shall be used up to the last possible level of appeal. However, as long as EU law is somehow involved, this will not be enough under the purpose of article 35, para. 1 ECHR. As the EU as an autonomous legal order has its own system of jurisprudence; the EU courts shall also be incorporated in the concept of "domestic remedies". An opposite argument would contradict the very idea of accession under the view that the ECtHR should not examine EU law cases if the ECJ has already decided as another international investigation or settlement in the sense of article 35, para. 2, point b ECHR. The ECJ has also declared that where an act of the Union is challenged, it is a court of the Union before which proceedings can be brought in order to carry out an internal review before the

external review (of the Strasbourg Court) takes place.[192] Thus, the major concern of the ECJ is not its classification as an international court, but rather not to be dispensed when EU law is at issue.

The process that most effectively connects the national and European legal orders in terms of judicial review where individual are involved is the preliminary ruling. As stated in article 267 TFEU, for the ECJ interpretation of EU acts, the preliminary ruling is optional for regular national courts but obligatory for supreme national courts where no other national remedies are provided. The question is now whether the preliminary ruling process satisfies the domestic remedies concept of the Convention. The reason that the Convention process was established in such a way counts on the role of the Strasbourg Court as a subsidiary Court. After all domestic judiciary has ruled upon a case the ECtHR comes to express a more specialized opinion regarding human rights. Thus, all courts need to have spoken about the acts of the legal order they represent before a case reaches the ECtHR.[193]

[192] Discussion document, *supra* note 182, point 11.
[193] *Idem*, point 9.

Under the preliminary ruling rise, the ECJ has the opportunity to give a definite ruling. An example could definitely be the case of *Bosphorus* where the Irish court used the preliminary ruling so that the ECJ had the opportunity to review the regulation as to its conformity with the European Union's fundamental rights before the case was brought to the ECtHR. The problem that may rise pertain to the situation where the national courts do not make a preliminary ruling reference to the ECJ when assuming that no duty to make such a reference exists. Furthermore, in strengthening the argument, the ECJ itself has stated that a national court even of last resort need not make a reference where it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.[194] Under those circumstances, the ECJ would not be in position to adjudicate before the Strasbourg Court.

[194] Case C-283/81 CILFIT [1982] ECR 3415, para. 21.

For that reason a special reference mechanism[195] can be used for avoiding institutional imbalances. Under the accession agreement, the EU legal order will further integrate with that of the Convention for receiving external review for its legal acts regarding compliance with human rights from a specialized court, as the Strasbourg Court is. In the judicial protection system of the Union that consists of one of its characteristics, the CJEU has the competence to rule upon issues with reference to EU legal acts. In cases that the preliminary ruling process of article 267 TFEU will not be followed, the Court will be substantially detoured. This parameter could be problematic since it leads to effects on the powers of the Union's institutions unlike the statement of Protocol 8 of the Lisbon Treaty.[196] On the contrary, this special reference mechanism will give to the CJEU the opportunity to adjudicate before the Strasbourg Court so that the latter will take into account the ruling of the former as the Court representing the European legal order.

[195] See also p. 41 of the present.

[196] In favour of this mechanism is R. Badinter in the speech of 25 May 2010 in the French Senate, available at http://www.senat.fr/europe/r25052010.html#toc1 (last accessed 16 December 2023).

Regarding applications addressed against an EU legal act directly, the respective remedies should be exhausted. The concept of the Convention lies upon the idea of substantial domestic remedies in terms of effectiveness, not remedies that would in principle lead to inadmissibility. The individual complains procedure within the Union's legal system can be found in article 263, para. 4 TFEU. Under the Lisbon Treaty the concept of acts that can be challenged by individual became broader than before.[197] This newly established provision, grants individuals with the opportunity to challenge EU acts that are addressed to them or which are of direct and individual concern to them and against regulatory acts which are of direct concern to them and do not entail implementing measures. Nevertheless, the term "regulatory act" is not very clear; in brief, this contains Regulations and Decisions of general application.[198] Plus, article

[197] For the changes after Lisbon see S. Balthasar, "Locus standi rules for challenges to regulatory acts by private applicants: the new art.263(4) TFEU", *European Law Review*, 35, 2010, pp. 542-550; Chalmers et al., *supra* note 177, pp. 414-415.

[198] The debate regarding the concept of the term "regulatory act" is very extensive. See also M. Dougan, "The Treaty of Lisbon 2007: winning minds, not hearts", *Common Market Law Review*, 45, 2008, pp. 617-703; J. Bast, "Legal Instruments and Judicial Protection" in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Beck, 2nd edition, 2010 pp. 396-397; A. Turk, *Judicial Review in EU Law*, Edward Elgan, 2009, pp. 168-169; A. Dashwood, A. Johnston, "The institutions of the enlarged EU under

265 TFEU covers individual in situations where the EU legal bodies have failed to act.

Both legal remedies shall be processed under the notation of article 256 TFEU. In line with that provision, the General Court is competent at first instance to deal with issues with reference to (among others) articles 263 and 265 TFEU. An appeal is possible to the CJEU which adjudicates only on points of law. Consequently, the remedies provided by the Lisbon Treaty could be regarded effective under the scope of ECHR.

As far as the individual applications are concerned, a matter of highest importance rises with reference to article 27 ECHR. Under this provision the single judge process is introduced in the system of the Convention. A single judge may either declare an individual's application inadmissible or to forward it for further examination. The decision of the judge is final. The purpose of the provision is to reduce the workload of the Strasbourg Court by rejecting plainly inadmissible applications. As long as it has been already agreed that a judge

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the regime of the constitutional treaty", *Common Market Law Review*, 41, 2004, pp. 1481-1518.

elected in respect of the Union will be a member of the ECtHR;[199] details as to when the EU judge serves as single judge shall be clarified. The basic idea is that the judge shall not examine any applications against the state in respect of which he or she was elected.[200] Hence, a first observation is that the EU judge should not sit as a single judge in applications against EU.

Taking into account that the European citizenship is substantially related to that of the EU member states, inevitably the EU judge will possess a citizenship of one of them. The issue is whether that judge will be able to adjudicate applications against the member state of his origin or even against another EU member state within that process. For example, if the judge elected on behalf of the Union is German, apparently he will not examine any applications against EU as a single judge on the basis of non examination of applications against the member in respect of which the judge was elected. But when applications against Germany are at stake, two possibilities could be seen; either examining it on the ground of EU autonomy and the impartiality and independency as principles discerning judges or

[199] Council of Europe, Press Release, *supra* note 133.
[200] Factsheet, *supra* note 137, p. 2.

not examining under the inevitable connection with his country of origin which may prevent him from being objective.

The examination by the EU judge of applications against his own country of origin should not be an acceptable solution. Under different circumstances, the principle dictating that the judge shall not examine any applications against the state in respect of which he or she was elected will be totally violated in its substance. The purpose of this principle was not simply to exclude examination of certain applications by certain judges on the basis of a typical citizenship relation between the citizen and the state but more to establish a strong substantial rule that enriches objectivity of a brand new procedure of the Strasbourg Court.

In that sense, objectivity is mostly achieved by excluding the EU judge from examining applications against his own state of origin. This is implied from the rather unique perception of EU citizenship. Citizenship of the Union could definitely be incorporated to the notion of special characteristics that shall not be affected from accession. This idea of special characteristics must not be solely interpreted from the perspective of Union's principles, but also from those of the ECHR in order for the

institutional balance and thus integration of the two legal orders to be achieved. Therefore, an exception of the EU judge shall be forwarded regarding the applications that he has no competence to rule upon under the single judge procedure; applications against his country of origin.

Regarding the possibility of examining applications against another EU member state, the situation is rather explicit. Continuing the example described above, an EU elected judge to the ECtHR of German origin could examine a case directed against another member state, for example Greece. The reason of lack of objectivity cannot be extended in such cases where the strong connection of citizenship between the state and the citizen does not exist. The idea that the EU is a Union of states should not be subject to such a broad interpretation that identifies the Union with its states. Therefore, the principle of legal autonomy of the Union must prevail so that the EU judge shall not been exempted from examining cases against other member states.

A more complex issue arises with reference to inter-state cases. Aside from individual complaints the Convention also provides for complaints brought by state parties under article 33 ECHR. The question is whether after accession of the Union

inter-state complaints should be excluded as far as the member states and the Union are concerned. This issue creeps a deeper conflict of exclusive jurisdiction between the CJEU and the ECtHR.

On one hand, it is recalled that EU member states are prohibited from submitting disputes to any other method of settlement other than those provided for in the treaties (article 344 TFEU); a process that should be strictly protected from any misinterpretation resulting from accession.[201] Article 7 TEU includes a specific procedure in cases regarding serious breaches of EU values by a member state which eventually embrace human rights. In addition, the position of the European Parliament contributes to the argumentation by stating that the member states should undertake, at the time of accession to the ECHR, with respect to one another and in their mutual relations with the Union, not to bring interstate applications concerning an alleged failure of compliance pursuant to article 33 of the ECHR when the act or omission in dispute falls within the scope of Union law.[202] For the purpose of those cases, article 259, para. 1 TFEU

[201] Article 3 of Protocol 8 of the Lisbon Treaty, see p. 42.
[202] European Parliament, *supra* note 190, point 8.

provides the member state with the opportunity to bring a case before the ECJ regarding non compliance of another member state with the treaties; under article 263, para. 2 TFEU the CJEU may deal with challenges against legal acts of EU institutions while article 265, para. 1 TFEU give the right to open cases for failure to act.

In political terms, the possibility of including inter-state cases among EU member states and EU before the ECtHR could be abused. Since the early 90's, euroscepticism has been increased to a quite important ideology within the European political debate.[203] Recent example of expression of euroscepticism regarding European integration in human rights may be seen in the opt-out protocol (Protocol 30 of the Lisbon Treaty) of the EU Charter of Fundamental Rights signed by the UK and Poland. From this standpoint, eurosceptics in governance of certain member states can persistently challenge EU before a specialized human rights court like the Strasbourg Court for

[203] R. Harmsen, M. Spiering, "Euroscepticism and the Evolution of European Political Debate" in R. Harmsen, M. Spiering (eds.), *Euroscepticism: Party Politics, National Identity and European Integration*, Rodopi B.V., 2004, p. 13.

possibly getting a positive ruling which may be used for further opposition to European integration.

On the other hand, the exclusive jurisdiction of the Strasbourg Court derives from article 55 ECHR. The provision prohibits the High Contracting Parties from availing themselves of treaties, conventions or declarations in force between them for the purpose of submitting a dispute arising out of the interpretation or application of the Convention to a means of settlement other than those provided for in the Convention. Therefore, it mostly seems that the ECHR parties have contracted out of the right to bring cases before another type of jurisdiction regarding issues that fall under the Convention.[204]

As by accession the Union will become a High Contracting Party to the Convention, hence the legal position

[204] C. J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, 2005, p. 286. A different view is expressed by Y. Shany who concludes that "article 55 was drafted mainly with a view of preventing invocation of the Convention before other judicial bodies" and continues that "there is no evidence that the drafters contemplated blocking adjudication before external judicial or quasi-judicial bodies". Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals*, Oxford University Press, 2003, p. 190. For a comparative function of article 55 ECHR before and after the enforcement of Protocol 11 ECHR see T. Lock, "The ECJ and the ECtHR: The Future Relationship between the Two European Courts", *The Law and Practice of International Courts and Tribunals*, 8, 2009, p. 393.

under ECHR law would be that the ECHR member states (including EU member states) are entitled to bring a case against EU. Any opposite opinion in the sense of excluding the possibility of an inter-state case between the EU and its member states leads to substantial elimination of the principle of collective enforcement which is fundamental in ECHR law. Nevertheless, article 55 ECHR itself provides the Convention members with the right to make exceptions under a special agreement. In practice, the parties may waive the ECtHR jurisdiction and seek for the opportunity to have the dispute decided by another forum; but this willingness shall be proven in an agreement. Thus this matter turns to be internal between the EU and its member states. They would have to conclude a special agreement explicitly referring to the ECHR stating that the Convention will be interpreted by the CJEU in cases between the member states or between a member state and the EU. Therefore, the exclusive jurisdiction of the CJEU will be preserved and at the same time, will be in compliance with the requirements of the Convention.[205]

[205] Lock, *idem*, p. 395.

3.2 The Union and non-EU member states of the Convention

Accession to ECHR will not only vitally affect the relations among the EU and its member states, but raises potential judicial conflicts between the Union and the other mambers of the Convention under its legal system. As a High Contracting Party, the Union may have applications addressed against, before the ECtHR. The question here is how those judicial issues will be dealt from an ECHR standpoint.

For entering the Union, the candidate countries need to make progress on the ground of meeting the requirements for membership, most importantly the Copenhagen criteria one of which is the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union and the administrative capacity to effectively apply and implement the *acquis*.[206] The concept of the EU *acquis* includes the Union treaties as well as legislation and decisions adopted pursuant to the treaties and the case law of the CJEU.[207]

[206] For its scope see C. Delcourt, "The *Acquis Communautaire*: Has the Concept Had Its Day?", *Common Market Law Review*, 38, 2001, p. 829.
[207] European Commission, Enlargement, Conditions for Membership available at https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/conditions-membership_en (last accessed 16 December 2023). See also D. Kochenov, "Why the Promotion of the *Acquis* Is Not the Same as the

Therefore, countries negotiating their membership to the Union should implement to a large extent EU law.[208]

The "European family" welcomes every European state that respects and promotes its values according to article 49 TEU; hence, all High Contracting Parties to the ECHR could potentially apply for EU membership. Currently Albania, Bosnia and Herzegovina, Georgia, Moldova, Serbia, Turkey, Iceland, North Macedonia, Montenegro and Ukraine, all ECHR members, are candidates for acquiring EU membership. Hence, the aforementioned countries need to follow the Union *acquis* a fact that may bring conflicts with the Union in terms of human rights violations.

The main problem addressed is that the candidate member states have no access to the CJEU. It is apparent that the relevant articles of TEU are directed to EU member states with no further reference to candidates; for example the preliminary ruling

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Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy Instead of Just Promoting the *Acquis*", *Hanse Law Review*, 2, 2006, p. 173.

[208] A limit is put by article 20, para. 4 TEU stating that "acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union".

process of article 267 TEU is particularly focused on the national courts of full member states. In that sense there is no possibility for the candidate EU member states to reach the Court and as a result, the judicial institutions representing the legal order of EU will be skipped.

Under those circumstances, cases where EU law is at stake may reach the Strasbourg Court without the CJEU having the opportunity to rule upon. A possible solution could be the application of the two new mechanisms mentioned above; the reference to CJEU and the co-respondent mechanism. The idea of the Strasbourg Court referring to CJEU cases where non-EU member states or EU are involved (at least not as both parties) may appear awkward at first glance. From one side, the CJEU will be empowered since it will be competent on adjudicating upon issues under a geographical expansion of its scope. On the other hand, the purpose to preserve the EU legal autonomy through adjudication of its courts in cases regarding EU law should prevail. Under those circumstances, the CJEU will be in position to express its position as the Supreme Court at EU level before the Strasbourg Court will deal with the issue.

Furthermore, the reference process may be used as a tool for familiarizing the official candidate states with the EU judicial procedures. It is commonsense that the technical prerequisites for EU membership aim to formulate institutions of the candidate states in such a way that could be in a better position in applying and implementing EU law, the case law of the CJEU included. By acquiring the opportunity of participating in formal process before the CJEU, the candidate states will be identified with the main judicial body of the Union, in the most important issue, the protection of fundamental rights.

The model of co-respondent before the Strasbourg Court in cases targeting EU law shall be applied as well so that the Union will have the chance to participate more actively in proceedings. The background of the mechanism's idea lies upon perplexity regarding the correct actor responsible when EU member states actions are involved so that judicial grievances will be avoided. At the status of the candidacy for EU membership, states do implement EU legal acts so that the possibility of violating human rights through implementation does exist. Therefore, the situation of candidate states does not differ much in comparison with that of EU member states regarding

responsibility. From this perspective, the co-respondent mechanism will upgrade the prospects in finding who is truly responsible.

4. The Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of June 2013.

The outcome of the negotiations between the CDDH ad hoc negotiation group and the European Commission, the draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms was included in the final report submitted to the CDDH, on June 10, 2013.[209] The main changes and matters of controversy will be addressed.

In article 1 of the agreement, the relevant amendments to article 59 ECHR for the accession of the Union were forwarded. Moreover, certain clarification were provided. First, nothing in

[209] The final report is available at https://www.echr.coe.int/documents/d/echr/UE_Report_CDDH_ENG (last accessed 17 December 2023).

the Convention or the shall require the EU to perform an act or adopt a measure for which it has no competence under EU law,[210] therefore accession does not affect the division of competences in EU level. Secondly, a Member State of the Union remains responsible under the Convention when implementing EU law, but this shall not preclude the responsibility of the Union as co-respondent.[211] Third, in terms of jurisdiction, article 1 ECHR shall be understood, with regard to the Union, as referring to persons within the territories of the Member States of the European Union to which the Treaties apply.[212] The right to make reservations in accordance with article 57 ECHR is provided to the Union, in article 2 of the agreement.

Article 3 introduced a highly controversial process as will be examined, the co-respondent mechanism. A new paragraph 4 was proposed to be added in article 36 ECHR which states: "The European Union or a Member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of

[210] Article 1, para. 3 of the Draft agreement.
[211] Article 1, para. 4 of the Draft agreement.
[212] Article 1, para. 6 of the Draft agreement.

Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings".

What are the circumstances of the Draft agreement that may lead to the Union becoming a co-respondent? First, where an application is directed against one or more Member States of the EU, the Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the ECtHR if it appears that such allegation calls into question the compatibility with the rights at issue defined in ECHR to which the Union has acceded of a provision of EU law, notably where that violation could have been avoided only by disregarding an obligation under EU law.[213] Hence, if the application is directed against a Member State when implementing EU law, the EU may become a co-respondent, mainly in cases where the alleged violation of the Convention could have been avoided if the Member State had not followed its EU law obligations. In such cases, although the Member State seems to have violated the provisions of the

[213] Article 3, para. 2 of the Draft Agreement.

Convention, it had little competence, since it simply complied with its obligations under EU law.

Another case could be that the application is directed against the EU in respect of an alleged violation notified by the ECtHR if it appears that such allegation calls into question the compatibility with the Convention rights of an EU law provision, notably where that violation could have been avoided only by disregarding an obligation under EU law. In those cases, the Member States could act as co-respondents.[214] In cases where an application is directed against both the Union and one or more of its Member States, the status of any respondent may be changed to that of a co-respondent in accordance with the aforementioned scenarios.

Regarding the High Contracting Parties, a High Contracting Party shall become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the ECtHR shall seek

[214] Article 3, para. 3 of the Draft Agreement.

the views of all parties to the proceedings. When deciding upon such a request, the ECtHR shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 article 3 of the Draft Agreement are met.[215]

In cases where the EU is a co-respondent, if the CJEU has not yet assessed the compatibility with the rights at issue, sufficient time shall be afforded for the CJEU to make such an assessment, and thereafter for the parties to make observations to the ECtHR.[216] Under those circumstances, the CJEU will have the opportunity to first review the matters concerned in the legal order of the EU, before the ECtHR takes the final decision on violation of the Convention rights. Finally, if the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent, including the EU, shall be jointly responsible for that violation. An exception to that rule is provided if the ECtHR, on the basis of the reasons given by the respondent and the co-

[215] Article 3, para. 5 of the Draft Agreement.
[216] Article 3, para. 6 of the Draft Agreement.

respondent, and having sought the views of the applicant, decides that only one of them be held responsible.[217]

As the Union will accede to the ECHR, the proceedings before the Court of Justice of the European Union shall not be perceived as procedures of international investigation or settlement within the meaning of article 35, para. 2, issue b of the Convention or means of dispute settlement within the meaning of article 55 of the Convention.[218] In the first scenario, if otherwise agreed, the ECtHR would declare cases involving the EU inadmissible. In the second scenario, the High Contracting Parties have agreed that they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

On the election of judges, a delegation of the European Parliament will participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the

[217] Article 3, para. 7 of the Draft Agreement.
[218] Article 5 of the Draft Agreement.

election of judges in accordance with article 22 ECHR. The delegation of the European Parliament shall have the same number of representatives as the delegation of the State, which is entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.[219] Therefore, a formal Union institution will participate to the election of judges of the ECtHR in equal terms, along with the rest of the High Contracting Parties.

5. Opinion 2/13: a setback in the process of accession

On the ground of article 218, para. 11 TFEU, the Commission requested an opinion from the CJEU as to the compatibility of the Draft agreement, which included several controversial issues, with EU law. On December 18, 2014, the Court delivered Opinion 2/13 where it found the draft agreement incompatible with article 6, para. 2 TEU and Protocol 8 to the Lisbon Treaty on the following reasons.

[219] Article 6, para. 1 of the Draft Agreement.

5.1 The specific characteristics and the autonomy of EU law

One area where the Court found that the draft agreement is not in line with the Treaties refers to the specific characteristics of EU law. The Court itself defines the concept of specific characteristics, which are related to the constitutional structure of the Union, with particular emphasis on the protection of fundamental rights as recognised in the EU Charter and its institutional structure as reflected in the relevant provisions of the Treaties. A further specific characteristic is the very nature of EU law, which is governed by the principles of autonomy, supremacy over the law of the Member States and the direct effect of its provisions on both citizens and Member States.

The first reason for not safeguarding the specific characteristics of the EU under the Draft Agreement relates to article 53 ECHR. This provision states that the ECHR does not limit a higher level of human rights protection in the Member States. Similarly, article 53 of the EU Charter expressly states that the rights recognised in the Constitutions of the Member States or the ECHR are not limited. The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not

compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law. A coordination of the two provisions should therefore have been explicitly included in the Draft Agreement in order to avoid any possible confusion that could jeopardise the specific characteristics of the Union.[220]

In addition, the Court expressed considerations on the principle of mutual trust among EU member states. On the basis of the specific characteristics of the Union, the principle of mutual trust between Member States has been developed which requires each Member State to presume that the other Member States respect EU law and the fundamental rights recognised by EU law in the areas of Union competence. The ECHR system requires a member state to check that another member state has observed fundamental rights, even though EU law imposes an obligation of mutual trust and therefore this principle is undermined.[221]

The third reason refers to the ratification on behalf of Member States of the Union of Protocol No. 16 to the ECHR.

[220] Opinion 2/13, EU:C:2014:2454, paras. 188-189.
[221] Opinion 2/13, *idem*, paras. 191-194. D. Halberstam, ""It's the Autonomy, Stupid!": A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", *German Law Journal*, 15 (1), 2015, pp. 105-146.

Protocol No. 16 permits the highest courts and tribunals of the Member States to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR, a procedure similar to the preliminary ruling of article 267 TFEU. In that sense, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No. 16 could trigger the procedure for the prior involvement of the CJEU, thus creating a risk that the preliminary ruling procedure of article 267 TFEU might be circumvented, a procedure which is the keystone of the judicial system established by the Treaties.[222]

Although from an EU perspective, the observations of the CJEU on the special characteristics of the Union were rather expected, an inconsistency in the approach to those principles could be observed. The first reason essentially concerns the possibility that Member States may apply a higher level of human rights protection on the basis of article 53 ECHR, committing the EU to accept such a situation by virtue of its accession to the Convention. However, the answer to this concern could derive

[222] Opinion 2/13, *idem*, paras. 196-198.

precisely from the principle of mutual trust. The Member States have already embraced the principles of the EU legal order as the basis for the transfer of competences and thus regulatory power to the Union; the latter's accession to the ECHR does not appear to alter this fundamental situation. In seeking institutional safeguards for cases involving the relations between the EU and Member States or between Member States themselves, the Court of Justice seemed to be at least not entirely satisfied with the principle of mutual trust. Under those circumstances, the deeper meaning of this principle, which presupposes the existence of a positive intention rather than institutional support in the context of the Union's relations with a different legal order, is somewhat undermined.

In addition, with regard to the application of Protocol No. 16, apart from the principle of mutual trust, it should be noted that it only concerns the interpretation of the Convention rights, as reflected in article 1, para. 1 thereto. The purpose of the opinion under Protocol No. 16 is provide guidance to the highest courts in the interpretation of the ECHR, towards a faster resolution of cases within domestic legal orders and to promote dialogue at the highest judicial level, for that reason the ECtHR's opinion is not

legally binding, according to article 5 of Protocol No. 16. In cases where the application contains European legislation and the procedure of article 267 TFEU has been bypassed, the mechanism of referral of the case from the ECtHR to the CJEU, as explained above, could be introduced in order to avoid possible conflicts of jurisdiction between the two Courts.

5.2 Article 344 TFEU

Article 344 TFEU states that "member states undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".[223] On the other hand, article 33 of the ECHR states that "any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party". From that perspective, the CJEU ruled that the fact that Member States or the EU are able to submit an application to the ECtHR against each other, is liable in itself to undermine the objective of article

[223] S. O. Johansen, "The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences", *German Law Journal*, 15 (1), 2015, pp. 169-178.

344 TFEU. Moreover, it goes against the very nature of EU law, which, according to the Court, requires that relations between the Member States shall be governed by EU law to the exclusion, if EU law so requires, of any other law.[224]

However, the Draft agreement itself states in article 5 that proceedings before the CJEU shall not be considered a separate means of settlement under article 55 ECHR. In any event, according to article 55 ECHR, the High Contracting Parties are obliged to refrain from invoking treaties, except where there is a specific agreement. Therefore, the issue raised by the CJEU, apart from its strictly Union character, could be resolved with the conclusion of an agreement between the Member States and the EU not be engaged in inter-state cases against another Member State or the Union itself, a procedure fully in line with the letter of the ECHR.

5.3 The co-respondent mechanism

The co-respondent mechanism included in the Draft agreement provides that if the EU or any Member State request leave to

[224] Opinion 2/13, *supra note* 220, para. 205.

intervene as co-respondents in a case before the ECtHR, they must provide reasons from which it can be established that the conditions for their participation in the procedure are met. The ECtHR decides on the request in the light of the plausibility of those reasons. In carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States, as well as the criteria for the attribution of their acts or omissions, in order to clarify which actor can be co-respondent. That interference with the division of powers between the EU and its Member States is, according to the CJEU, not compatible with the specific characteristics of EU law.[225]

An additional element refers to the responsibility that derives from the co-respondent mechanism. According to the Draft agreement, if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is found, the respondent and the co-respondent are to be jointly responsible for that violation. Nonetheless, under article 57 of the ECHR any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any

[225] Opinion 2/13, *idem*, para. 221.

particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. The outcome is that there might be a possibility that a Member State may be held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with article 57 of the ECHR. Such a consequence violates article 2 of Protocol 8 attached to the Lisbon Treaty which, among others, as mentioned above, states that nothing in the accession agreement affects the situation of Member States in relation to the European Convention.

In relation to the aforementioned, the Draft agreement provides for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent and having sought the views of the applicant, that only one of them is to be held responsible for that violation. Again, the exercise of this power on behalf of the ECtHR, presupposes an assessment of the rules of EU law governing the division of powers between the EU and its Member

States and the attributability of that act or omission, which is incompatible with the specific characteristics of the EU.

The fundamental problem in the approach of the CJEU lies in the perception that responsibility between EU and its Member States in a case before the ECtHR, constitutes in principle a violation of the specific characteristics of the Union. Regardless of the Draft agreement at stake, the EU's accession to the ECHR demonstrates, on the one hand, the willingness of the former to be subject to external scrutiny in the context of the protection defined by the latter and on the other hand, to be subject to its legal order. In that regard, the position of the CJEU substantially undermines the role of the ECtHR within the legal order of the Convention. The co-respondent mechanism was precisely agreed to in line with the special characteristics of the Union, where in certain cases requires national implementing legislation, without allowing the Union to explain its position in potential cases against Member States when implementing EU law. This process however takes place within the legal order of the Convention where the Union wishes to accede and where, as explicitly stated in article 19 ECHR, the competent court to ensure compliance with the Convention is the ECtHR. Therefore,

the final arbiter for the allocation of responsibility in a case involving a violation of a Convention right cannot be other than the ECtHR or else, the Strasbourg Court is bypassed within the very legal order it is entitled to protect.

5.4 The procedure for the prior involvement of the Court of Justice

The necessity of the prior involvement of the CJEU in a case brought before the ECtHR in which EU law is at stake, satisfies the requirement that EU competences and the powers of its institutions will be preserved. In that sense, the question whether the CJEU has already delivered a ruling is a matter to be resolved only by the competent EU institution, whose decision should bind the ECtHR, otherwise the latter would be conferred competence to interpret the CJEU case law, an unacceptable situation under EU law. Consequently, according to the CJEU, the prior involvement procedure should be set up in such a way as to ensure that in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether CJEU has already given a ruling on the

question at issue in that case and if not, to arrange for the prior involvement procedure to be initiated.

Another issue with reference to the prior involvement of the CJEU relates to the level of involvement of the Court. Indeed, the procedure described in the Draft agreement is intended to enable the Court of Justice to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded. However, in the draft explanatory report, it is stated that the words "assessing the compatibility of the provision" mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law, excluding the possibility of bringing a matter before the Court in order for it to rule on a question of interpretation of secondary law. Consequently, limiting the scope of the prior involvement procedure, in cases of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the CJEU.

5.5 The specific characteristics of EU law as regards judicial review in Common Foreign and Security Policy (CFSP) matters

The Court of Justice does not enjoy full jurisdiction in the former second pillar, the CFSP.[226] According to article 275 TFEU "the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with article 40 TEU and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V TEU.[227]

This being the case, on the basis of accession, the ECtHR would be empowered to rule on the compatibility with the

[226] R. A. Wessel, J. Larik, *EU External Relations Law: Text, Cases and Materials*, Hart Publishing, 2nd edition, 2020; P. Eechkhout, *EU External Relations Law*, Oxford University Press, 2nd edition, 2011.
[227] G. Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, Hart Publishing, 2019.

Convention of certain acts, actions or omissions performed in the context of the CFSP and notably of those whose legality the Court of Justice cannot review in the light of fundamental rights. In that sense, the ECtHR will be granted, according to the CJEU, certain powers in reviewing compliance of acts in the CFSP with fundamental rights, which the CJEU itself does not have.[228]

This is where the essence of the CJEU's approach to the EU's accession to the ECHR is mostly reflected. The Court's deeper concern the maintenance of a status quo that has itself essentially created. Thus, according to the interpretation of the CJEU, the fact that the Treaties do not provide jurisdiction to the CJEU the jurisdiction of any external judicial body is automatically excluded. The conclusion that can be drawn could be schematically expressed as follows: either the act in the context of the CFSP never violate fundamental rights or if they do, no international judicial body can deliver justice as this is not explicitly mentioned in the Treaties.[229] Such a condition could

[228] Opinion 2/13, supra note 220, paras. 249-257.
[229] S. Peers, "The CJEU and the EU's Accession to ECHR: A Clear and Present Danger to Human Rights Protection", EU Law Analysis, 18 December 2014, available at http://eulawanalysis.blogspot.nl/2014/12/the-cjeu-and-eus-accession-to-echr.html (last accessed 21 December 2023).

lead to a series of violations of fundamental rights without effective judicial protection at the international level.

In conclusion, Opinion 2/13 suspends the EU's accession process to the ECHR, an accession that cannot be completed on the basis of the Draft agreement at stake. The negotiation process involving not only the institutions of the Union but also the 46 High Contracting Parties to the ECHR should be reopened on the ground of the issues raised by the Court. Given the fact that the conclusion of the Draft agreement was a difficult task, these changes are likely to constitute an extremely lengthy process. In any event, the EU's accession to the ECHR remains an obligation under article 6 TEU, which cannot be disputed.

Part three: The accession saga continues

1. Reopening negotiations[230]

[230] All reports of the negotiation meetings are available at https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights (last accessed 24 December 2023).

By a letter of October 31, 2019, the Secretary General of the Council of Europe was informed that the EU stood ready to resume the negotiations on its accession to the ECHR. The negotiations reopened with a virtual informal meeting of the CDDH ad hoc negotiation group, on June 22, 2020. There, the European Commission had the opportunity to present its position towards accession by underlying that the EU would demand only such amendments to the draft accession agreement, which are strictly necessary to address the objections raised by the CJEU in Opinion 2/13. In addition, the Commission made clear that the EU does not seek to jeopardise the balance of the draft accession agreement or to formulate exceptions from the ECHR or its control system.

During the first formal meeting, since negotiations reopened and the 6th in total, all topic were put on table. In an introductory meeting, the framework for discussion was initially presented. The delegations focused on issues regarding the two special mechanisms (the co-respondent and the prior involvement of the CJEU), the operation of the inter-party applications of article 33 of the ECHR in relation to article 344 TFEU and of the Protocol 16 ECHR in relation to the preliminary reference

procedure of article 267 TFEU, the principle of mutual trust, the acts excluded from review in the area of CFSP and the relationship between article 53 of the Charter and article 53 of the ECHR. In the 7th meeting, delegations proposed certain solutions to the matters regarding the two mechanisms and the coordination of article 53 ECHR and article 53 of the Charter, as well as the inter-party applications (article 33 ECHR) and the advisory opinion mechanism of the ECHR (Protocol 16). Delegations also held an exchange of views with representatives of civil society and national human rights institutions, namely the Advice on Individual Rights in Europe (AIRE) Centre, Amnesty International, the International Commission of Jurists, the Council of Bars and Law Societies of Europe (CCBE) and the European Network of National Human Rights Institutions (ENNHRI); all of them strongly supported the EU accession to the ECHR.

The 8th meeting of the CDDH ad hoc negotiation group was devoted to the development of proposals on certain matters. First, an agreement was reached that reservations made under article 57 ECHR shall retain their effect if the High Contracting Party, which made such reservations, is a co-respondent to the

proceedings and the relevant amendment to the accession agreement was forwarded. With reference to the communication between the ECtHR and the CJEU, the systematic information by the former to the EU regarding cases notified to its member states and vice versa was proposed. The EU considered it important that such information would allow making a proper assessment of whether the co-respondent mechanism could apply. As to who should decide on the co-respondent mechanism, a proposal that left the assessment of the conditions to the EU (mainly regarding the separation of powers between EU and its member states), while the ECtHR would retain the decision to apply the mechanism was discussed. Finally, with regard to Protocol 16 ECHR, the group considered a proposal according to this which, the EU would be given the opportunity, in the case a court or tribunal of an EU member state makes a request to the ECtHR for an advisory opinion, to clarify in an EU-internal procedure whether the procedure under article 267 TFEU had been circumvented by such request. If this was to be confirmed, the ECtHR should exercise its discretion under Protocol 16 not to accept the request as far as it was violating EU law.

Proposals on different matters were introduced in the 9th meeting. In respect of article 53 ECHR, it was clarified that the provision should not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights (the EU Charter), provided that the level of protection granted by the Convention is met. On the issue of mutual trust, the EU made a proposal consisting of two sentences. First, the High Contracting Parties recognise that the Convention must be interpreted and applied taking into account the special importance of mutual recognition mechanisms established by EU law, which are founded on the principle of mutual trust, in the relationship between the Member States of the EU. Secondly, the principle of mutual trust requires those Member States, when implementing EU law (notably in the area of freedom, justice and security), to consider that fundamental rights have been observed by the other EU member states, except in extreme cases. Finally, in the area of CFSP, where certain acts are excluded from the jurisdiction of the CJEU, the EU proposed a new clause to the draft accession agreement under which the EU allocates, for responsibility for a CFSP act of the EU to one or more EU member states, if such act is excluded from the judicial review of the CJEU. Plus, the autonomy of EU law requires that

the determination of whether such act falls within the CJEU's jurisdiction is provided by the EU itself.

The 10th meeting provided the opportunity for further elaboration on the proposals submitted in the previous meetings. With reference to inter-party cases (article 33 ECHR), the Norwegian delegation made a new proposal. The proposal consisted of four steps: a) a mechanism to inform the EU of inter-party cases between EU member states, b) the possibility for the EU to assess whether the case (or part of the case) falls within the scope of article 344 TFEU, c) an obligation for the applicant state to withdraw the application (wholly or partly) if the application in the view of the EU does fall within the scope of article 344 TFEU and d) an assessment of how the existing procedural tools would presumably be applied if the applicant High Contracting Party does not withdraw the application. Again, based on the progress made, delegations held another exchange of views with representatives of civil society and national human rights institutions.

During the 11th meeting, the Group discussed proposals related to the EU's specific mechanism of the procedure before the European Court of Human Rights, the operation of inter-party

applications (article 33 of the Convention), the principle of mutual trust between EU member states and other provisions of the Draft agreement, articles 6-8 in particular. Regarding inter-party applications, the proposal consisted of a new paragraph 3 of article 4 of the Draft agreement, which would provide the EU with the possibility to establish whether an inter-party dispute between EU member states or the EU falls within the scope of article 344 TFEU and which would contain an obligation for the applicant High Contracting Party to withdraw such dispute insofar as this was the case.

The discussion was mostly focused on the EU's specific mechanism of the procedure before the ECtHR, the principle of mutual trust between the EU member states, as well as the situation of EU acts in the area of the CFSP that are excluded from the jurisdiction of the CJEU, in the 12th meeting. On the latter, the EU proposed a new operative provision which would allow the EU to designate, in an application before the ECtHR concerning an act, measure or omission which falls in the scope of the CFSP, one or more EU member states to which such act, measure or omission would be attributable for the purposes of the Convention. The CJEU should be given sufficient time to assess,

if it had not yet done so, whether it has jurisdiction with regard to such act, measure or omission. On the basis of this decision, the designated EU member states could become respondents and the application should in such case be deemed to be directed against them. The proposal also contained an element regarding the possible necessity to exhaust domestic remedies within the legal system of the designated EU member states, as generally required by the Convention.

On the 13th meeting, the ad hoc negotiation group held an exchange of views with representatives of civil society on the issues and proposals under discussion. The main results of the 14th meeting were a tentative agreement on the issue concerning inter-party applications under article 33 of the ECHR, on the ground of exception for Member States and the EU from the article 33 ECHR procedure, in their relations with each other and in cases of interpretation or application of EU law. Progress towards a possible solution to the issue concerning the relations of Protocol No. 16 and article 267 TFEU has been made towards recognising the role of the CJEU as the highest court in cases involving EU law and not the respective national courts.

A step further was taken during the 15th meeting, where the group tentatively agreed on the aforementioned proposal concerning requests for advisory opinions under Protocol No. 16 to the Convention. Moreover, on the election of judges, a delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe, when exercising this power. The group's discussions focused mainly on the issue of voting in the Committee of Ministers when supervising the implementation of judgments of the European Court of Human Rights in cases to which the EU is a party in the 16th meeting.

The 17th meeting tried to formulate a proposal on Rule 18 on the decisions of the Committee of Ministers on Judgments and friendly settlements in cases to which the European Union is a party. Moreover, a proposal to reposition the provisions on interpretation of articles 35 and 55 and article 53 of the Convention. The, final, 18th meeting, the ad hoc negotiation group draw certain conclusions on a Draft revised agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, which

was submitted to the CDDH and will be explained in the chapter below.

2. The Draft revised agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of March 2023

Taking into account the Opinion 2/13 of the CJEU, the ad hoc negotiation group tried to revise the Draft agreement in order to keep the institutional balance between the two European legal orders; the EU and the Council of Europe. One main concern was a possible second rejection by the CJEU that could lead to additional years of negotiations and therefore certain amendments were focused on the Court's comments. This new draft agreement was included as Appendix 1 to the report submitted to the CDDH on March 30, 2023.[231]

A first addition to the Draft agreement is found in article 1, para. 9 of the agreement. The provision allows High Contracting Parties to jointly applying a legally binding common

[231] The final report is available at https://rm.coe.int/report-to-the-cddh/1680aa9816 (last accessed 24 December 2023).

level of protection of human rights and fundamental freedoms, provided that it does not fall short of the level of protection guaranteed by the Convention. Regarding the EU and its Member States, this solves the problem of the application of the EU Charter of Fundamental Rights and its relations with the Convention, especially in terms of interpretation of article 53 of the Charter in the light of article 53 ECHR, as was pointed out by the CJEU in Opinion 2/13. Moreover its was further clarified that reservations of the High Contracting Parties in accordance with article 57 ECHR will remain in effect when this Party is a co-respondent.

One of the main problems for the accession of the EU to the ECHR, as dictated by the CJEU, has been the application of the co-respondent mechanism. Several amendments have been forwarded in this context. First, the ECtHR shall make available to the EU information concerning all applications that are communicated to its Member States and vice versa, as explicitly included in paragraphs 2 and 3 respectively of article 3 of the Draft revised agreement, in order to decide whether they decide to participate as co-respondents. Furthermore, the EU and the Member may become co-respondents at their own initiative,

where still the ECtHR will take the final decision on admission. What is clearly stated is that the admission of the co-respondent does not prejudge the Strasbourg Court's decision on the case.[232]

A novelty related to the co-responded mechanism was introduced in article 3, para. 6 of the Draft revised agreement. According to that provision, the ECtHR shall terminate the co-respondent mechanism by decision at any stage of the proceedings only if a reasoned assessment by the EU sets out that the conditions for the application of the mechanism are no longer fulfilled. Of course, the relevant decision is communicated to all parties and the applicant is granted the opportunity to state its views on the matter.

Regarding the inter-party cases, the ad hoc negotiation group has reached a further conclusion in the Draft revised agreement. Article 4, para. 3 of the agreement provides that the EU and its Member States in their relations with each other shall not avail themselves of article 33 of the Convention. Nor shall the EU member states avail themselves of article 33 of the Convention insofar as a dispute between them concerns the

[232] Article 3, para. 5 of the Draft revised agreement.

interpretation or application of EU law. In addition, the agreement goes a step further in article 4, para. 4. Upon request, the ECtHR will provide the EU with sufficient time to assess, as a matter of priority, whether and to what extent an inter-party dispute under article 33 of the Convention between Member States of the Union concerns the interpretation or application of EU law. Therefore, the objections of the CJEU, expressed in Opinion 2/13, as to the application of article 344 TFEU and the interpretation of EU law should be dispelled.

Another important matter addressed by the CJEU in Opinion 2/13 has been inserted in the Draft revised agreement, that of the advisory opinion of Protocol No. 16 to the ECHR. In that respect, where a court or tribunal of an EU member state encounters a question relating to the interpretation or application of the rights and freedoms of the Convention, that court or tribunal shall not be considered as a highest court or tribunal of a High Contracting Party, if the question falls within the field of application of EU law.[233] That approach is in line with the position of the CJEU that the highest court interpreting EU law is the Court itself. Moreover, the Draft revised agreement highlights

[233] Article 5 of the Draft revised agreement.

that the EU accession to the ECHR will not affect the principle of mutual trust,[234] which is one of the characteristics of the Union as indicated by the CJEU in Opinion 2/13.

Regarding the participation of the EU in the Committee of Ministers, article 8, para. 6 of the Draft revised agreement introduces an additional paragraph 6 to article 46 ECHR. Due to the nature of the EU and its relations with the Member States, that provision alters the majority requirements in cases to which the EU is a party. The applicable majorities in such cases shall be laid down in the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.[235]

Concluding chapter: the emergence of a composite public law model in fundamental rights

Accession of the EU to the ECHR is a historic achievement for the protection of fundamental rights in Europe. Finally, a big step

[234] Article 6 of the Draft revised agreement.
[235] For more details, see Appendix3 to the report to the CDDH, on March 30, 2023.

in further integration of Europe has been taken towards the completion of the European public order, inextricable part of which, the protection of fundamental rights is.

Article 52 of the EU Charter of Fundamental Rights introduces the concept of composite public law in the field of fundamental rights. The provision encompasses relevant Treaty provisions, the Convention, constitutional traditions common to the Member States and national law and practices where applicable. All those components interact with each other and provide fermentation in fundamental rights. In particular, the interrelation between the EU Charter and the Convention is further clarified in paragraph 3, which highlights a common interpretational line, as to the respective fundamental rights and the special position of the Convention in the EU legal order, a position clearly expressed by the Court in its case law. In that respect, the conclusion of the EU accession to the ECHR will elucidate this relationship from an institutional perspective.

This book has attempted to give an overview of some of the most problematic and contentious issues of the accession of the EU to the ECHR. For the completion of accession, a harmonious and efficient interaction between the EU and the

ECHR legal orders is essential. The draft agreement of June 2013 tried to tackle certain problems deriving from the special characteristics of the EU and opened discussion on two quite groundbreaking mechanisms, the co-respondent and the prior involvement.

Nevertheless, the aforementioned agreement was not particularly welcome by the CJEU, in Opinion 2/13. In this composite public law environment, the CJEU tried to secure the constitutional identity of the Union which lies upon its special characteristics as a *sui generis* legal order. In that respect, the Court protected its position in this new era that accession of the Union to the ECHR will bring in the field of fundamental rights. On the other hand, the Court did try to shift the balance of competence towards itself. During any procedure before the ECtHR, no other court could ultimately decide on any matter arising, than the Strasbourg Court. This is also a matter of constitutional value for the legal order established under the Convention.

The new Draft revised agreement of March 2023, a product of the second negotioation round, responded to certain challenges imposed in Opinion 2/13. The new agreement clarified

aspects of the co-responded mechanisms, underlined the interpretational scheme between article 53 of the EU Charter and article 53 of the Convention, referred to the principle of mutual trust as fundamental for the EU legal order, put an explicit exception in the inter-party cases between the EU and its Member States or Member States against each other where EU law is at stake and highlighted the role of the CJEU as the competent court in interpreting EU law, in the contect of the advisory opinion mechanism of Protocol No. 16 to the ECHR.

After the completion of accession, the EU legal acts may be externally reviewed for compliance with the Convention and its Protocols by the Strasbourg Court. This perspective sets the basis for the new relations between the two major Courts in Europe, the CJEU and the ECtHR. The special mechanisms introduced under the Draft revised agreement, reflect the different status of the Union and distinguish the roles between the two Courts in a spirit of balance of powers among them. Consequently, the Union will be adequately represented in institutions of the Convention, especially in the ECtHR, taking into account its special characteristics as of the Union as the first High Contracting party that lacks the status of a state.

As the Convention remains the minimum fundamental rights protection instrument in Europe, the EU Charter of Fundamental Rights continues in further elaborating fundamental rights based on that ground. Given the fact that the EU member states' common constitutional traditions and national legislation are also taken into account in the interpretation of certain rights in the EU Charter, all parts that compose fundamental rights protection in Europe will be enclosed. Therefore, the idea of a composite public law model in the field of fundamental rights in Europe is practically coming to life.

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