

## THE ACCESSION OF THE EUROPEAN UNION TO THE ECHR: A GIFT FOR THE ECHR'S 60TH ANNIVERSARY OR AN UNWELCOME INTRUDER AT THE PARTY?

Martin Kuijer\*

### Abstract

This article outlines the European Union's gradual progression towards a legal obligation to observe human rights: a series of stops and starts from Brussels to Strasbourg with a starring role for Luxembourg and significant supporting roles for Berlin and Karlsruhe. This commitment towards human rights will acquire a new dimension. The Lisbon Treaty requires the European Union to accede to the European Convention on Human Rights (ECHR). With the entry into force of the 14th Protocol to the ECHR, Strasbourg too is now ready to accept the EU as a party to the Convention. But the real work is ongoing: the negotiations about the modalities of the accession are underway. This article looks at the main subjects for discussion. Is the EU, as a new party to the ECHR, the ultimate anniversary gift for Strasbourg, or is it a potentially troublesome guest at the party?

### I. Background: the EU's Gradual Progression towards a Legal Obligation to Observe Human Rights

The debate about the desirability of the European Union (or its precursors) being legally bound to respect human rights has been ongoing for decades.<sup>1</sup> It is not very strange that in 1957, when the European Economic Community was founded, human rights were not at the forefront of people's minds. Previous initiatives to establish a more general European Political Community had died a quiet death in 1954, when France's National Assembly decided not to pursue this avenue. Once these initiatives had collapsed, the negotiations focused purely on economic cooperation. This is clearly reflected in Article 2 of the EC Treaty, which states that the Community's objective is to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, a high degree of convergence of economic performance, a high level of employment, sustainable and non-inflationary growth, a high degree of competitiveness, and so forth. None of these objectives leads directly to think of the need to

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\* Professor Martin Kuijer is senior adviser on human rights to the Minister of Security and Justice and professor of human rights at the VU University Amsterdam. This article reflects his personal views; the views set forth in § 4, in particular, do not necessarily reflect the official position of the Dutch government. A Dutch version of this article was published previously in *Nederlands Tijdschrift voor Mensenrechten* 2010, pp. 932-947.

<sup>1</sup> See e.g. R.A. Lawson, *Het EVRM en de Europese Gemeenschappen: Bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties*, Deventer: Kluwer, 1999.

safeguard human rights standards. This was also reflected in the early case law of the European Court of Justice (ECJ)– the *Stork*, *Geitling* and *Sgarlata* cases for instance, in which the Court refused to consider the application of human rights standards, since they were not explicitly based on any article of the Treaty.<sup>2</sup>

With the passage of time, however, came a growing awareness that even in the case of ever closer economic cooperation, human rights standards might come under pressure. Especially Member States with a constitutional tradition, such as Germany, found it intolerable that such a powerful organisation was not formally obliged to operate within certain policy limits. Therefore some national courts reserved the right to declare Community law inapplicable if they deemed it incompatible with domestic constitutional provisions.<sup>3</sup> Partly out of fear that such rulings might undermine the supremacy of Community law,<sup>4</sup> the Court of Justice of the European Community started to emphasise the obligation to observe human rights in its own rulings.<sup>5</sup> Finally, in the *Nold II* judgment, the Court held: “As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.”<sup>6</sup> Since the European Communities did not have their own catalogue of human rights, the Court of Justice was compelled to seek inspiration elsewhere. In determining the scope of these fundamental rights, it looked to “the constitutional traditions common to the Member States” and to “international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories”.<sup>7</sup> The latter referred most notably to the ECHR. This case law was later enshrined in EU law, in the Maastricht Treaty concluded in 1992.<sup>8</sup> Article F (later article 6 of the Treaty on European Union) states that the Union “shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...]”. However that was not the end of the matter; in the following phase, it was once again Germany that took the initiative.

By this time the European Union had been founded in Maastricht based on the European Communities, but with the addition of a Common Foreign and Security Policy and close cooperation in the field of justice and home affairs (JHA). European cooperation extending into JHA territory would be far likelier to raise human rights dilemmas (in cases involving criminal or aliens law, for

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<sup>2</sup> C-1/58, *Stork - High Authority*, [1959] ECR 17; C-36, 37, 38 and 40/59, *Geitling - High Authority*, [1960] ECR 423 and C-40/64, *Sgarlata - Commission*, [1965] ECR 215.

<sup>3</sup> Examples include the *Solange* judgment of the Bundesverfassungsgericht: [1974] 2 CMLR 540.

<sup>4</sup> See e.g. J. Coppe & A. O'Neill, ‘The European Court of Justice: Taking rights seriously?’, in *CMLRev* 1992, p. 669.

<sup>5</sup> See e.g. C-29/69, *Stauder - City of Ulm*, [1969] ECR 419 and C-11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.

<sup>6</sup> See C-4/73, *Nold II*, [1974] ECR 508, consideration 13.

<sup>7</sup> See also C-36/75, *Rutili*, [1975] ECR 1219; C-149/77, *Defrenne - Sabena*, [1978] ECR 1365; C-44/79, *Hauer - Land Rheinland-Pfalz*, [1979] ECR 3727 and C-155/79, *A.M. & S.*, [1982] ECR 1575.

<sup>8</sup> A reference to the ECHR had already been incorporated into the Single European Act of 1986.

instance). In Germany, in particular, there was a persistent sense of unease that an organisation as powerful as the European Union did not have its own binding catalogue of human rights. As a result in 1999, the German EU Presidency put an item on the agenda for the Cologne European Council that had not attracted much attention beforehand: that the EU should have its own written catalogue of human rights.

For outsiders, the decision to work on a separate catalogue of human rights came as a surprise. There was also a certain level of scepticism concerning the time it would take for an actual text to materialise (recalling the interminable years of negotiations it had taken to draft the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). However all this underestimated Germany's determination. A convention chaired by former German President Roman Herzog drew up the text in twelve months and on the 7<sup>th</sup> of December 2000, at the European Council in Nice, the European Charter of Fundamental Rights was proclaimed.<sup>9</sup>

Such speed came at a price: not everyone was convinced that the Charter should be legally binding. It was objected that the definition of certain rights was too general; that there was only one general limitation clause; that certain rights were worded differently, for some inexplicable reason, from similar rights in the ECHR and other human rights instruments. For the time being, the Charter was not legally binding, but many knew it was only a matter of time before its status changed. The Charter existed, and the Court of Justice started unobtrusively citing it.<sup>10</sup> And in due course, the Lisbon Treaty invested the Charter with this legally binding status. On 1 December 2009, the Charter acquired the same legal status as the Treaties.

Thus we have gone from a position of steering clear of human rights in the 1950s, to a home-grown catalogue of human rights, in 2000. In the meantime, this progression towards being legally bound to observe human rights was further reinforced by the activities of the EU Agency for Fundamental Rights from March 2007 and onwards (FRA).<sup>11</sup> This Agency's objective is to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights (article 2, Regulation (EC) no. 168/2007).

Now the EU had its own written catalogue of fundamental rights and its own internal watchdog. Moreover the Lisbon Treaty did not overlook the need for

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<sup>9</sup> OJ 2000, C 364/1; see e.g. the contributions by R.A. Lawson, E. Derijcke and A.W. Heringa in *NJCM-Bulletin* 2000, pp. 924-967.

<sup>10</sup> See e.g. C-540/03, 27 June 2006, Parliament / Council.

<sup>11</sup> See e.g. P.B.C.D.F. van Sasse van Ysselt, 'Het EU-Grondrechtenagentschap: te luxe waakhond zonder tanden?', in *NJCM-Bulletin* 2009, pp. 572-592.

external scrutiny; as it stated that the EU should accede to the ECHR, so that the European Court of Human Rights could serve as an external touchstone.

## II. The EU's Accession to the ECHR

The idea that the EU should accede to the ECHR is certainly not new.<sup>12</sup> It was first proposed by the Commission in 1979.<sup>13</sup> In 1990 the Commission repeated its proposal, in a Communication to the Council.<sup>14</sup> On 30 November 1994, the Council – consisting in this case of the justice ministers – decided to seek the advice of the Court of Justice. The result was Opinion 2/94,<sup>15</sup> in which the ECJ advised against accession. Or rather, the Court observed that accession was impossible in the light of Community law as it existed at the time, since there was no firm legal basis for it. Malicious tongues said that the Opinion was the result of covert rivalry between the Luxembourg and Strasbourg Courts. This cannot be inferred from the wording of the Opinion, which merely states that accession to the ECHR would mean “a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order”. The political will to deal with the legal problems that accession would entail was evidently still lacking.

This did not mean that the issue disappeared from the agenda altogether. Those in favour of accession continued to point out the ways in which accession would enhance the coherence of the system of legal protection in the European region. However, two concerns in particular had to be addressed: (a) that the EU's accession would subject EU Member States to supplementary obligations under the ECHR; and (b) the notion that accession to the ECHR had become unnecessary after the proclamation of the Charter as the EU's own catalogue of fundamental rights. Some of these points are briefly discussed below.

Firstly, accession would significantly improve the legal protection of EU citizens. As things stood, it was impossible to complain about alleged human rights violations by the EU institutions themselves. In relation to human rights violations resulting from a government's actions in its implementation of

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<sup>12</sup> A great deal has been published about the relationship between ‘Strasbourg’ and ‘Luxembourg’. See e.g. I. Canor, ‘*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?’, in *ELRev* 2000, pp. 3-21; J.-P. Puissochet, ‘La Cour européenne des Droits de l’Homme, la Cour de justice des Communautés européennes et la protection des Droits de l’homme’, in P. Mahoney, F. Matscher, H. Petzold & L. Wildhaber (eds.), *Protecting Human Rights: The European Perspective - Studies in memory of Rolv Ryssdal*, Cologne: Carl Heymanns Verlag, 2000, pp. 1139-1152; and D. Spielmann, ‘Human rights case law in the Strasbourg and Luxembourg courts: conflicts, inconsistencies, and complementarities’, in P. Alston (ed.), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, pp. 757-780.

<sup>13</sup> See the Commission's Memorandum on the Accession of the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Bull. EC Supp. 2/79, part I, § 7.

<sup>14</sup> Communication of the Council of 19 November 1990, Bull. EC 10-1990, p. 76.

<sup>15</sup> [1996] Jur. I-1759.

Community law, the Strasbourg Court had adopted a fine-tuned position in the *Bosphorus* case: ruling that a Member State could in principle presume that it is not breaching the ECHR by fulfilling its international obligations, provided the international organisation itself ensured adequate protection of human rights (as was accepted in relation to the EU). In exceptional cases, where the protection was manifestly insufficient, this presumption could be rebutted.<sup>16</sup> The EU's accession to the ECHR would thus expand the legal protection afforded by Strasbourg in two ways: (a) by making it possible to complain about alleged human rights violations by EU institutions themselves; and (b) by making it possible to complain about alleged human rights violations committed by Member States in their implementation of Community law (without having to take account of the *Bosphorus* ruling).

Secondly, accession would minimise the risk of the two courts arriving at diverging interpretations of human rights standards. Such divergences were already occurring,<sup>17</sup> but their frequency might well increase if the ECJ were to take less account of the European Court of Human Rights (ECHR) case law (since the EU had its own human rights instrument and no longer had to consult the ECHR as a source of inspiration). After accession, the Strasbourg Court would have the final word on the interpretation of rights enshrined in the ECHR.

Lastly, the existence of an external touchstone may be deemed desirable in itself. As was shown in the previous section, human rights today greatly enjoy improved institutional safeguards within the legal order of the EU. Nonetheless, the possibility of external scrutiny may be a good thing. Take the following example; for many years in the Netherlands we thought it was perfectly reasonable that the power to order someone's committal to a psychiatric institution was vested in the local mayor. That was the system we were used to, and to us it seemed perfectly normal. Until the ECHR looked at Dutch practice from a greater distance, and pointed out that it was actually very odd that the hospitalisation of psychiatric patients was not ordered by the courts after medical advice had been sought.<sup>18</sup> Today, this change is embedded in our legal culture, and it strikes us as strange that we ever had a system that did not assign a key role to the courts in the case of such a far-reaching intervention in someone's private life. It is useful to have a critical mirror in which to view

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<sup>16</sup> European Court of Human Rights (ECtHR), 30 June 2005, *Bosphorus Airlines v. Ireland* (Appl. no. 45036/98), §§ 155 and 156. See also ECtHR, 20 January 2009, *Coop. Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (Appl. no. 13645/05) and J. Callewaert, 'Het EVRM en de Europese Unie: van Bosphorus naar Lissabon', in *NTER* 2010, pp. 101-107.

<sup>17</sup> For examples, see C-17/98, *Emesa Sugar (Free Zone) v. Aruba* and T-305/94, *LVM v. Commission*. See also R.A. Lawson, 'Confusion and Conflict? Diverging interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in R.A. Lawson & M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe*, Martinus Nijhoff Publishers 1994, pp. 219-252 and R.A. Lawson, 'The impact of the EU Constitution on the relationship between Strasbourg and Luxembourg', in D. Curtin, A. Kellerman & S. Blockmans (eds), *The EU Constitution: The Best Way Forward?*, T.M.C. Asser Press, 2005, pp. 377-395.

<sup>18</sup> ECtHR, 24 October 1979, *Winterwerp v. the Netherlands* (Appl. no. 6301/73).

one's own legal order from a greater distance. The same applies to the EU once it becomes a party to the Convention. The EU's accession to the ECHR should not be seen as a form of interference in EU law, but as supplemental to that legal system. What is more, the EU's accession to the ECHR will send a strong signal to third countries (such as China and Iran) that are frequently called to account by the EU in relation to human rights issues. By acceding to the ECHR, the EU will demonstrate that it too is willing to submit to external scrutiny.

In the debate about the EU's accession to the ECHR, two other matters are raised which supposedly militate against it. The first is the fact that the EU now has its own Charter of Fundamental Rights. If the implication is that the Charter's adoption has rendered accession to the ECHR redundant, this can be refuted by the points outlined above. In my view, the presence of a sound internal infrastructure to safeguard human rights does not detract from the desirability of external scrutiny. In the case of national States that are party to the ECHR, no one would question the need for the country to have its own Constitution, its own system to protect human rights, and national judicial oversight of compliance with human rights standards. Indeed, the protection of the rights enshrined in the ECHR should be effected primarily within the internal legal order. This applies to national legal orders, and it applies equally to that of the Community. The protection of human rights should primarily be a matter for the EU's own institutions (including the ECJ) on the basis of the Charter. But that does not mean that subsidiary external oversight by the ECHR could be considered redundant. The second objection is a fear expressed by some policymakers that the EU's accession to the ECHR will create additional obligations for Member States under the Convention. In my view, this fear is largely unjustified. The EU's institutions will be bound by the ECHR, but this does not influence the degree to which the Netherlands, say, is bound by the Convention. It may perhaps become less easy for EU Member States to invoke the *Bosphorus* case law in the implementation of EU law. On the other hand, applications could in future be directed against the European Union itself, largely superseding the somewhat artificial responsibility of Member States under the ECHR.

At this point, some readers may be wondering why I am dwelling at such length on the arguments for and against the EU's accession to the ECHR. Isn't accession already a done deal? Certainly. Even so, the matter still provokes fierce debate.<sup>19</sup> So it seems a good idea to continue emphasising why the EU's accession to the ECHR is a good thing. At the same time, it would appear sensible to point out that the EU's accession to the ECHR is now a political and legal reality. The ECJ shelved the idea in its Opinion 2/94, only to see it resurface in 2002. In fact it was the President of the ECJ himself who raised the

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<sup>19</sup> For instance, at the conference 'Fundamental Rights in the EU in view of the accession of the Union to the European Convention on Human Rights and Fundamental Freedoms' held in Madrid on 2 and 3 February 2010, organised by the EU Agency for Fundamental Rights, the Spanish EU Presidency, and the Spanish Ministry of Justice.

matter. At the opening of the judicial year of the ECHR on 31 January 2002, President M. Gil Carlos Rodriguez Iglesias observed:

Although the Court of Justice has always avoided adopting a position on the desirability of acceding to the Convention – rightly, in my view –, some of its members, including myself, have expressed themselves personally to be in favour of such accession, which would reinforce the uniformity of the system for the protection of fundamental rights in Europe.<sup>20</sup>

The European leaders subsequently decided to place the issue on the agenda of the Convention that had been established to make preparations for further institutional reforms of the EU after the Nice Treaty. The Draft Treaty establishing a Constitution for Europe, which the Praesidium of this Convention proposed in June 2003, included the possibility of accession to the ECHR in Article I-7 §2: “The Union shall seek accession to the European Convention on Human Rights”.<sup>21</sup> As everyone knows, the Constitutional Treaty came to a sticky end, but the provision on accession was retained in the subsequent talks. Accession was incorporated into the Lisbon Treaty without any proviso: “The Union shall accede . . .” (Article 6, para 2, Treaty on European Union).<sup>22</sup>

The wording that was eventually adopted seems to imply that accession is a matter decided wholly by the EU itself. That is obviously not the case. The Council of Europe, with its 47 Member States, also had to approve. The Council of Europe has therefore done some preliminary work of its own. Protocol 14, which was recently ratified by all Member States, includes an article that provides for the possibility of accession: “The European Union may accede to the Convention”. The Explanatory Report on this article indicates clearly that the matter is far from settled, and that the negotiations on the modalities of accession have yet to take place:

It should be emphasised that further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view. . . . At the time of drafting of this protocol, it was not yet possible to enter into negotiations – and even less to conclude an agreement – with the European Union on the terms of the latter’s possible accession to the Convention, simply because the European Union still lacked the

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<sup>20</sup> ‘Si la Cour a toujours évité de prendre position sur l’opportunité d’une adhésion à la Convention, et ce à juste titre, me semble-t-il, certains de ses membres - dont moi-même - se sont exprimés à titre personnel sur cette question, dans le sens d’une position favorable à une telle adhésion, qui renforcerait l’uniformité du système de protection des droits fondamentaux en Europe.’ See the website:

[http://www.ena.lu/address\\_given\\_gil\\_carlos\\_rodriguez\\_iglesias\\_strasbourg\\_31\\_january\\_2002-020004720.html](http://www.ena.lu/address_given_gil_carlos_rodriguez_iglesias_strasbourg_31_january_2002-020004720.html).

<sup>21</sup> CONV 820/03, Draft Treaty establishing a Constitution for Europe submitted by the President of the Convention to the European Council meeting in Thessaloniki on 20 June 2003. In an earlier version the text was formulated more cautiously: ‘the Union may accede’ (Doc. CONV 528/03, 6 February 2003).

<sup>22</sup> As can also be seen in Doc. CIG 87/2/04 of 29 October 2004.

competence to do so. . . . As a consequence, a second ratification procedure will be necessary in respect of those further modifications, whether they will be included in a new amending protocol or in an accession treaty.<sup>23</sup>

All those who still have vivid memories of the gruelling ratification process of Protocol 14 are already looking forward to this second round. It is a fact that the Lisbon Treaty and the entry into force of the 14th Protocol to the ECHR cleared the way for the actual negotiations between the European Union and the Council of Europe on the modalities of accession to begin. This however raised the question of who should conduct the negotiations on behalf of each of the two parties.

### III. Organisation of the Negotiations

In the EU, negotiations are conducted on behalf of the European Commission. There was initially some talk of assigning a role to the High Representative, because of the possible implications of accession for CFSP issues or for the Presidency, but fairly soon it became clear that the Commission alone negotiates on behalf of the EU.

It was more difficult for the Council of Europe to designate a partner in the negotiations. The Secretariat of a purely inter-governmental organisation such as the Council of Europe is not comparable to the Commission. The Committee of Ministers is the highest organ in the Council of Europe (Article 13 of the Statute of the Council of Europe), but the Committee of Ministers leaves the preparatory work to a range of steering committees. In the sphere of human rights, this is the Steering Committee for Human Rights (*Comité Directeur Droits de l'Homme*, CDDH). Back in 2002, a CDDH working group drafted a report on the technical issues that should be dealt with in relation to the accession of the EU – not being a State – to the Convention.<sup>24</sup> So it seemed reasonable to involve this Steering Committee in the actual negotiations. Eventually it was decided to assign the negotiations to a working group formed from within the CDDH. Assembling this working group (CDDH-EU) proved tricky. On the one hand, it was felt that the working group should not be too large, but on the other hand, it had to proportionally represent EU States and non-EU Member States (EU Member States being particularly eager to take part). The working group that eventually materialised has 14 members, each of whom participates in a personal capacity. Half are from EU Member States: the Netherlands, France, the United Kingdom, Germany, Finland, Latvia and Romania. The other half are from Albania, Armenia, Croatia, Norway, Russia, Switzerland and Turkey. In its early meetings the working group drew up a list of subjects for

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<sup>23</sup> Protocol 14 (CETS No. 194) was adopted on 13 May 2004, but it was not ratified by the last Member State (the Russian Federation) until 2010, after which it entered into effect on 1 June 2010. The Explanatory Report can be found at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>. See esp. §§ 101 and 102.

<sup>24</sup> CDDH (2002) 010 Addendum 2.



discussion<sup>25</sup> and exchanged views on elements of an accession instrument.<sup>26</sup> Some of these subjects are looked at in section 4 below.

As a result, the negotiations have become largely bipolar in nature; nonetheless, the results of the negotiations must obviously be presented to both organisations for approval at a later stage. This means that within the Council of Europe, the final decision must be taken by the Committee of Ministers.

#### **IV. Subjects for Discussion**

A number of relevant topics are examined below. In my personal opinion, it is perfectly clear that certain parameters are to be observed in these negotiations:

- accession should not create any new powers for the EU, and accession should not alter the existing obligations of Member States under the ECHR;
- accession should leave the existing ECHR monitoring mechanism intact as far as possible, and the EU should be treated as far as possible in the same way as any other party to the Convention;
- accession should not affect the competences of the Union or the powers of its institutions (see Article 2 of Protocol 8 to the Lisbon Treaty);
- accession should be finalised as soon as possible, which implies a minimalist accession instrument that regulates only the most essential matters. Matters relating only to the EU Member States or to the EU's internal procedures should in principle be arranged by means of the EU's internal legal instruments (such as a Council Regulation or Decision). In this connection, the EU will want to – and should – ensure that accession does not lead to Treaty amendments (e.g. in relation to the Court of Justice's involvement in Strasbourg proceedings).

The following sections examine a number of specific issues that will certainly need to be settled in the negotiations.

##### **IV.1 Role of the Court of Justice and the Devising of a Co-respondent Mechanism (CRM)**

The first of these issues, namely the importance of the – prior – involvement of the ECJ, before a case against the EU can be brought before the Strasbourg Court, serves a range of interests. The rights enshrined in the ECHR must be safeguarded in the first instance at the level of the specific High Contracting

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<sup>25</sup> CDDH-UE (2010) 006rev.

<sup>26</sup> CDDH-UE (2010)07.

Party.<sup>27</sup> The Strasbourg mechanism is a subsidiary mechanism that can serve as a safety net after all effective domestic remedies have been exhausted. Indeed, it could not be otherwise. Strasbourg has no mandate to act as Europe's primary constitutional court. Nor does it possess either the human resources or the budget to perform such a task. For this reason alone, it would be preferable for the ECJ to be assigned a primary role in safeguarding the rights and freedoms enshrined in the ECHR. At the same time, the EU will surely want the ECJ to be able to consider a specific problem before it is brought before the Strasbourg Court. After all, the EU will wish to maintain, as much as possible, the principle that only the ECJ can declare EU legislation to be incompatible with human rights standards. At the same time, it must be said that at this level, the EU cannot be compared to a national State as a High Contracting Party. After all, not all applicants will necessarily have had access to the ECJ,<sup>28</sup> either because the natural or legal person concerned could have no direct recourse to the ECJ or because the national court wrongly omitted to seek a preliminary ruling from the Luxembourg courts. At the same time, one must take account of the interest that potential applicants have in avoiding unreasonably long throughput times because of an accumulation of proceedings in Luxembourg and Strasbourg, which would undermine the effective legal protection that one is seeking to provide.

The second issue is that of devising a co-respondent mechanism (CRM). This mechanism would seek to ensure that the EU is identified as a respondent if an applicant erroneously addresses his application under the ECHR only to the Member State and not simultaneously to the EU. It may be noted that the reverse situation, too, may occur. Then the co-respondent mechanism will prevent the EU or EU Member State, respectively, from being dependent on the Strasbourg Court for admission as an intervening party. What is more, a respondent party and an intervening party do not have identical rights.

In the light of the above-mentioned issues, Chris Timmermans, at the time a Dutch judge at the ECJ,<sup>29</sup> voiced his concerns about the guarantees of the ECJ's involvement. He argued that if a case were to be brought against the EU in Strasbourg without the ECJ having first had an opportunity to rule, the proceedings should be stayed, to allow the case to be referred first to the ECJ. In my view, however, Timmermans's concerns can be allayed by introducing a CRM. There would then be nothing to prevent the Commission, as the EU's representative in the ECtHR proceedings, from being instructed to act with the

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<sup>27</sup> The subsidiary status of the ECHR's supervisory mechanism is firmly enshrined in the ECHR and was stressed in the recent Interlaken Declaration by virtually all participants.

<sup>28</sup> A point that I think may generate some interesting Article 13 ECHR case law in Strasbourg!

<sup>29</sup> E.g. in a lecture entitled 'The Court of Justice of the EU, a Human Rights Court?', given on 6 May 2010 at King's College, London. See also the Court of Justice's discussion document on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms ([http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf).)

(full) involvement of the ECJ – for instance by giving the ECJ an opportunity to present an interpretation of EU law that could then be submitted in its entirety by the Commission on the EU's behalf in the ECtHR proceedings. After all, every party to the Convention is free to decide how to draft its observations or other documents in the proceedings. In principle, this does mean that the ECJ's involvement must be arranged within the time limits applicable to the ECtHR proceedings (including the possibility of extension). This would make it unnecessary to stay the proceedings in Strasbourg, which would require a substantial amendment of the ECHR and EU legislation and call for a significantly different approach to the EU, in comparison to other parties to the Convention. If the ECJ holds that the actions that have prompted an application to Strasbourg are unlawful under EU law, it would be possible to explore the scope for resolving the dispute before the ECHR by means of a friendly settlement. If this can be done, the case could be removed from the case list on the basis of Article 39 (or 37) of the ECHR. If the Court of Justice rules that the actions concerned are lawful under EU law, it would then be up to the Strasbourg Court to rule on whether these actions were compatible with the Convention.

There is one practical complication I wish to raise in this connection. To make effective use of the CRM, the Commission (and if the above model is followed, the Court of Justice) must be able to take cognizance of cases that are pending in Strasbourg. Still, it would seem to me to be wise to allow the registry of the Strasbourg Court a certain responsibility for selecting relevant cases. Are we going to present all the cases that are pending in Strasbourg against an EU Member State to the Commission, so that it can decide whether to invoke the CRM? This would seem to me a completely unworkable *modus operandi*, unless it were decided to install a 'shadow registry' in Brussels. The disadvantages of such a step – the added pressure on human resources and the duplication of work – would appear obvious. I would trust the registry in Strasbourg to make an initial prudent selection. In any case, it could be agreed that only applications that are not brought before a single judge as being manifestly ill-founded or inadmissible on other grounds would be submitted to the Commission.

#### **IV.2 Representation of the European Union in the ECHR's Supervisory Mechanism**

The EU is acceding to the ECHR; it is not becoming a member of the Council of Europe. Even so, the EU's decision to be bound by the ECHR's supervisory mechanism (which embraces more than merely the Court) makes it necessary to think about the EU's participation in various organs of the Council of Europe. Three types of participation should be considered: a judge in the Court, representation in the Committee of Ministers (in relation to the execution of judgments) and representation in the Parliamentary Assembly of the Council of Europe (in relation to the election of judges). If we treat the EU, as far as possible, as an 'ordinary' party to the Convention, it seems obvious to me that the EU should participate in these three organs on the same basis as other

parties to the Convention, at least inasmuch as their activities bear on the Court's judicial tasks.

First and foremost, I believe that this means that the EU should have a permanent judge on the Strasbourg Court. To me, the appointment of an *ad hoc* judge who only sits in cases against the EU seems wrong in principle and unworkable in practice. Wrong in principle, because no such restriction applies to other parties to the Convention: the Dutch judge, Egbert Myjer, is not confined to ruling in cases against the Netherlands. Unworkable in practice, because precisely in cases against the EU, the question will frequently arise, as to whether the EU or a State should be the respondent (see above). This question will have to be answered as early as possible in the proceedings. It would therefore seem prudent to be able to call on a judge who has been chosen in part for his expertise in the sphere of EU law (just as national judges are selected partly for their ability to explain the finer points of their national law to their fellow judges in chambers). Finally, an extra permanent judge would seem to me a welcome source of relief for the overstretched Court.

In the second place, it seems to me that the EU should also be involved in the Committee of Ministers, where the latter supervises the implementation and execution of the Court's judgments. I believe that participation in this supervisory role should be welcomed. The EU's economic power could help to improve compliance with judgments.<sup>30</sup> The Council of Europe does not have an equivalent to the threat of economic and other sanctions available to the European Union, both against EU Member States (infringement proceedings instituted by the EU) and against members of the Council of Europe that do not belong to the EU (accession negotiations of candidate countries or sanctions in trade relations). In view of the crucial role of the CDDH, described above, one might say that it also makes sense for the EU to participate in the negotiations of this Steering Committee.

In the third place, the EU could be involved in the work of the Parliamentary Assembly (PACE), where it is carrying out the specific task under the ECHR of appointing judges. An obvious solution would be to achieve the EU's representation in this body by offering seats in PACE to a set number of members of the European Parliament (MEP). This would raise the question of whether these MEPs should be allowed to vote on all judges or only on the 'EU judge'. Here too, in my view, it is best to adhere to the usual practice: parties to the Convention have an interest in ensuring the quality of all the judges elected to serve on the Court, not only that of their 'own' judges.

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<sup>30</sup> Viviane Reding, speaking at the Interlaken Conference held on 18 and 19 February 2010, in *Proceedings High Level Conference on the Future of the European Court of Human Rights*, Council of Europe 2010, pp. 24-25: 'I will use all the tools available under the Treaty to ensure compliance with the Charter of national legislation that transposes EU law. I will apply a "Zero Tolerance Policy" on violations of the Charter. I will certainly not shy away from starting infringement proceedings whenever necessary'. It is a pity, however, that Ms Reding confined herself here to violations of the Charter, especially since she was speaking at a conference about the European Court of Human Rights.

### IV.3 Accession to ECHR Protocols

Public debate always refers to the EU's accession to 'the ECHR', but what about the Protocols to the ECHR, which include a wealth of additional substantive provisions? In view of the EU's competences, and given the human rights problems caused in the past by the EU's actions, it would make sense to include the Protocols in the EU's accession. This would mean, for instance, that the EU would agree to be bound by the right to protection of property and the right to free elections by secret ballot, as enshrined in the First Protocol. In view of the far-reaching protection of equal treatment guaranteed by the Twelfth Protocol, it seems to me equally obvious that the EU would wish to be bound by its general prohibition of discrimination. If one were to opt for such a content-based approach to deciding whether being bound by a specific Protocol would have any added value in relation to the EU's actions, one could go further. Certainly in the light of the ongoing initiatives being developed in criminal law and aliens law, one could make a case for accession to Protocols such as the Fourth (including freedom of movement, but also the prohibition of the collective expulsion of aliens), the Seventh (including the right not to be tried or punished twice) and the Thirteenth (abolition of the death penalty). However, it is very doubtful whether EU Member States that are not bound by a particular Protocol would want the EU to be so bound. In that connection, one should note the significance of Article 216, paragraph 2 of the Treaty on the Functioning of the European Union ("Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."). As things stand, only the First and Sixth Protocols have been ratified by all EU Member States. So it cannot be ruled out, however unsatisfactory this may be, that the EU will sign up only to these two Protocols in the short term.

### IV.4 Excluding Certain Parts of EU law?

Another question that may arise is whether the EU's accession to the ECHR should cover areas of EU policy that do not come under the jurisdiction of the ECJ. This includes the Common Foreign and Security Policy (CFSP), in relation to which the Court of Justice possesses no jurisdiction, with the exception of certain specific elements.<sup>31</sup> Every party to the Convention is obviously free to make reservations when acceding to the Convention (see also Article 57 ECHR). But reservations 'of a general character' are not permitted under this Article. So the categorical exclusion of an entire area of policy would seem incompatible with the ECHR in its current form, and here too I would favour the European Union being treated, as much as possible, as an 'ordinary' party to the Convention. Where the CFSP is concerned, it should be borne in mind that the Strasbourg Court already considers itself competent, on the basis of its existing case law, to rule on the external actions taken by Member States on the basis of the CFSP. More importantly still in my view, the EU would be setting an extremely ill-advised precedent if it were to declare some of its own actions to

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<sup>31</sup> Since the adoption of the Lisbon Treaty, the Court of Justice has had jurisdiction over sanctions taken under the CFSP against natural and legal persons.

be beyond the jurisdiction of the European Court of Human Rights. This would open the door for other parties that would also like at times to deny the jurisdiction of the Strasbourg Court in relation to actions that they describe as politically sensitive. Suppose Russia were to propose excluding the Court from involvement in the Chechnya cases?<sup>32</sup>

#### **IV.5 Can an EU Member State Submit an Application Against the EU?**

Article 33 ECHR regulates the right of complaint in inter-state cases: “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.” The provision is seldom invoked in the Court’s everyday practice, but it is not impossible that an EU Member State could submit an application to the Court on the basis of this Article against another EU Member State, or against the EU as soon as the latter has become a full party to the Convention. Is there a need for the workings of this provision to be modified somewhat, partly in the light of Article 344 of the TFEU (“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.”)? Personally, I am not convinced of this. Article 344 does not assign exclusive competence with regard to the settlement of disputes to the Court of Justice. Would the treaties not provide for the settlement of disputes by the European Court of Human Rights once the EU has actually acceded to the ECHR? In my view, the European Union should be treated as much as possible as any other party to the Convention. Should the European Union wish to demand ‘party discipline’ from the Member States, an accession instrument would not be the appropriate place to regulate this. It could nonetheless be regulated in an internal EU document, if there is a desire to do so.

#### **The result**

Should Strasbourg be pleased with the prospect of the EU’s accession as a new High Contracting Party?

On the one hand, accession is the ultimate ‘recognition’ of the authority of the ECHR in the sphere of human rights. And that does seem to be an important matter in Strasbourg, which sometimes falls prey – undoubtedly, in part as a result of the difference in the available budget<sup>33</sup> – to an underdog complex. Instead of focusing on its own reputation and the expertise it has built up, which would be difficult, if not impossible, to equal in the medium term, Strasbourg sometimes feels that it is embroiled in an arduous competitive struggle. This feeling persists even though numerous indications have been given that the Council of Europe remains the yardstick for human rights. The

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<sup>32</sup> See the more detailed discussion in N. Jagers, ‘Is er nog plaats voor Rusland in de Raad van Europa?’, in *NJCM-Bulletin* 2007, pp. 1107-1129.

<sup>33</sup> See my earlier observations on the Council of Europe’s budget in ‘Het Europees Hof voor de Rechten van de Mens: luctor et emergo?’, in *Ars Aequi* 2008, pp. 424-434.

Juncker Report,<sup>34</sup> published in March 2006, for instance, saw the Council of Europe as having a distinct pioneering role. The Memorandum of Understanding (MoU) between the Council of Europe and the EU that was concluded in 2007 also stresses the Council of Europe's primacy in the realm of human rights: "The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe".<sup>35</sup> And this was confirmed once again by Commissioner Reding at the 2010 Interlaken Conference on the future of the European Court of Human Rights: "[the European Union's accession to the ECHR] will make Strasbourg even more so than it is today the European capital of fundamental rights protection".<sup>36</sup> The European Union's accession to the Strasbourg system makes these words a reality. From this point of view, accession is the best gift for the ECHR's 60th anniversary.

On the other hand, accession will undoubtedly have consequences for the Court's already heavy workload. It is difficult to estimate what the exact quantitative consequences will be, partly because the issues mentioned above have yet to be resolved. But it seems logical to assume, in any event, that in the case of the EU, the Strasbourg Court will serve only as a subsidiary safety net. What is more, at the moment, the majority of questions of law in the Community's legal order are not concerned with human rights issues. Some therefore express the hope that the EU's accession will not lead to a substantial increase in the workload.<sup>37</sup> Personally, I believe that it is possible that in ten years' time we shall be forced to conclude that this initial expectation was naïve. The ECHR is also a 'subsidiary' safety net in relation to the highest domestic courts, but it has been substantial nonetheless. Furthermore the EU is becoming more and more active in policy areas which do traditionally involve numerous human rights issues. Take criminal law cooperation in the (former) third pillar, for instance, or the EU's involvement in the organisation of asylum procedures in the Member States. Accession may be the ECHR's best 60th anniversary gift, but it is still one that will create a lot of work.

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<sup>34</sup> In May 2005 Luxembourg's prime minister Juncker was asked to prepare a report (acting in a personal capacity) on the relationship between the EU and the Council of Europe (partly in view of the EU's desire to set up its own Fundamental Rights Agency). In March 2006 Juncker presented his report *Council of Europe - European Union: A sole ambition for the European continent* (11 March 2006), which can be consulted via the website [www.coe.int](http://www.coe.int).

<sup>35</sup> See *NJCM-Bulletin* 2007, pp. 558-564.

<sup>36</sup> Viviane Reding, speaking at the Interlaken Conference held on 18 and 19 February 2010, in *Proceedings High Level Conference on the Future of the European Court of Human Rights*, Council of Europe 2010, p. 26.

<sup>37</sup> *Ibid.*: 'In view of the strength of the EU Charter – which is in many instances more ambitious than the Convention – the European Union will not find it difficult to meet the standards required by the Convention'. This puts me in mind of the Dutch government's initial attitude to the ECHR. Then too, it seemed scarcely conceivable that the Netherlands would ever have difficulty meeting the minimum standards required by the ECHR. See M. Kuijer, 'De betekenis van het Europees verdrag voor de rechten van de mens voor de nationale wetgever', in *Wetgever en constitutie* (Preliminary report issued by the Vereniging voor wetgeving en wetgevingsbeleid (Association for Legislation and Legislative Policy)), Nijmegen: Wolf Legal Publishers, 2009, pp. 52-53.

Even so, I believe that the final verdict on the gift can only be positive. And in that connection, I should like to mention two welcome side-effects of accession. The first is financial. If the EU is one of the parties using the Court's services, and if it shares responsibility for the Court's workload, it is only reasonable that the EU should also contribute to the Court's budget. Strictly speaking, I should refer here not just to the Court itself, but to all Council of Europe activities that are linked to the supervisory mechanism under the ECHR – including the tasks of the Execution Department that supervises compliance with the Court's judgments. This means that the European Union's contribution to the Council of Europe would have to be earmarked. For the time being, the Council of Europe does not favour earmarked contributions of this kind, only in circumstances where no other alternative would be possible. It also seems obvious to me that the EU's contribution would be over and above the existing contributions by Member States. One sometimes hears disgruntled government officials complaining at the prospect of having to pay Strasbourg twice: directly as a party to the Convention, and indirectly as an EU Member State. Nonetheless, this seems to me entirely justified: a State would be creating work both as a party to the convention and as an EU Member State. It seems only fair that the accession of the new High Contracting Party would lead to an increase in the total budget, rather than a different allocation formula among the parties who contribute to the existing budget.

The second side-effect is non-financial. The accession of the European Union will send the only possible right signal to Moscow. The Russian Federation has finally agreed to ratify Protocol 14, after a protracted delay and after considerable pressure was brought to bear by the EU and EU Member States. The Kremlin will be pleased to see that the EU too is finally submitting to this mechanism.

All in all, my conclusion is that the European Union's accession to the ECHR can only be described as the ultimate anniversary present for the ECHR. I would go so far as to say that its accession will actually safeguard the long-term future of the European Court of Human Rights (and the Council of Europe). And I would also venture to observe that it is unusual for a 60-year-old to be at the threshold of a second childhood, with new challenges and new lessons to be learnt. The only thing I would not venture to do is to predict when the second round of ratifications will conclude...