THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

JEAN PAUL JACQUÉ

1. Introduction

Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms (the Convention, or ECHR) will unfortunately deprive academics and lawyers involved in the European legal discourse of one of their favourite topics of discussion. In fact, the problem of relations between the ECHR and European integration is almost as old as integration itself.¹ In 1953, in its draft treaty establishing a European Community, the ad hoc assembly of the European Coal and Steel Community provided for the integration of the substantive provisions of the ECHR in the Treaty.² As it turns out, it is after more than fifty years of debate that Article 6(2) TEU (Lisbon version) now requires the Union to accede to the Convention, and Protocol No. 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms clarifies certain related aspects. Article 6 does not limit itself to providing a legal basis for accession, but states (in French) “l’Union adhère”, and (in English) “The Union shall accede ...”. By using the imperative, the article requires, without any doubt, the Union to accede to the Convention. A failure to do so could be ground for an action for failure to act before the Court of Justice.

¹ Emeritus professor Strasbourg, Former Legal Adviser Council of the EU.
² This shows that the omission of a reference to fundamental rights in the ECSC and EEC treaties was because, in the opinion of their authors, these were economic treaties, with no implications for the protection of fundamental rights. By contrast, when it came to founding a political community, the issue of protection of fundamental rights returned to the forefront. The same was true for the draft Treaty on European Union adopted in 1984, inspired by Spinelli. The draft provides that the Union recognizes the rights under the ECHR and will deliberate accession to the Convention within five years.
In procedural terms, the accession agreement will require unanimity in the Council and the consent of the European Parliament. It will then be subject in all Member States to approval in accordance with national constitutional procedures (Art. 218 TFEU). The Treaty establishing a Constitution for Europe had allowed for a decision of the Council by qualified majority, but unanimity was substituted at the request of Denmark. This change, however, did not really alter the situation in practice, because the accession agreement must also be ratified by all parties to the ECHR, which includes all the Member States of the Union.

The entry into force of the Treaty of Lisbon did not mean, however, that this process could be completed quickly. First, all Member States of the Union had to agree on the negotiating mandate in spring 2010, and then they must approve the results obtained after negotiations. Even though Protocol No. 8 on Accession to the ECHR provides some guidance, it leaves many issues open, and agreement is not easy to find, especially with regard to the difficulties related to the specificity of the Union and participation of the latter in the Strasbourg organs.

Certainly, on the side of the Council of Europe, Protocol No. 14 to the ECHR, which entered into force on 1 June 2010, regulates at least one crucial matter, since it contains a provision, Article 17, which amends the Convention by providing for the possibility of accession of the Union. There are nevertheless still significant issues to be settled from the viewpoint of the Union.

So now the debate focuses on the conditions of accession, and this is a complex matter. The ball is not just in the court of the political organs of the Union and the other parties to the ECHR; the Court of Justice made a resounding entry in the field of negotiations by issuing on 5 May 2010 a “discussion document” on some aspects of accession. It appears thereafter to have undertaken parallel negotiations with the European Court of Human Rights, if one is to judge by the communication of the Presidents of the two courts issued on 24 January 2011. In the latter text it is also stated that: “The two courts take the view that the results of their discussion can usefully be made known in the context of the negotiations on accession ongoing between the Council of Europe and the EU. They are determined to continue their dialogue on these

3. Denmark was anxious to avoid a referendum to ratify the Lisbon Treaty, and thus did not want to give the impression to its people that it was possible to extend the powers of the Union by a qualified majority. This precaution was not necessary, since Art. 6 specifically states that accession does not extend the powers of the Union.


5. <curia.europa.eu/jcms/jcms/74268/>. 
questions which are of considerable importance for the quality and coherence of the case law on the protection of fundamental rights in Europe.6 There can be no question of the other institutions of the EU ignoring the position of the Court of Justice, since the Court will probably be called upon to render an opinion on the conformity of the agreement with the EU treaties under the procedure of Article 218(11) TFEU, as it seems that some Member States intend to seek such an opinion. If any kind of incompatibility were found, the Union would be forced to revise the the Treaties before concluding the agreement; it is unlikely that the EU institutions would take such a risk, given the political importance of an issue that concerns not only the EU but also all members of the Council of Europe who do not belong to the Union.7

Be that as it may, after the adoption of a negotiating mandate by the Council on 4 June 2010,8 discussions were opened in July 2010 with the hope, perhaps optimistically, that they could be concluded within a year.9 For the Council of Europe, negotiations are in the hands of the Steering Committee for Human Rights. A negotiating group was established, consisting of 14 experts from Member States of the Council of Europe (seven members of the Union and seven non-EU) and the Commission (of the EU). The work of this group has been widely publicized,10 whereas the negotiation mandate granted to the Commission by the Council is confidential.

The negotiations are based on the principle of giving the Union as far as possible the same status as other contracting parties, strictly limiting any new

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7. For example, see Opinion 1/09, 8 March 2011, nyr, on the proposed agreement on a European patent court and a Community patent, which is not unrelated to our topic, as the Court says in para 76 that "an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order." One can see in this a warning to the negotiators on accession of the Union to the ECHR. See also Lock, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order", in this Review.


9. This paper is based on the actual results of the negotiations at the end of June 2011. The end of the negotiations had been set at July 2011. A provisional version of the final agreement has been agreed by the negotiating group on 24 June 2011, CDDH-UE(2011)16 prov. The final text will be transmitted to the Steering Committee for Human Rights for discussion in October.

10. See the website of the Council of Europe, under Law and Policy of Human Rights <www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_meetings_EN.asp>.
arrangements necessitated by accession to those elements which are essential in order to take into account the Union’s specific character. These two elements deserve attention. But before examining the issues related to the principle of according the same status (see section 4 below) and specificities related to the nature of the Union (section 5), it seems important to briefly review the progress towards accession (section 2) and consider the scope of obligations to be incurred by the Union (section 3)

2. A long story in a nutshell

The discussion on the issue of accession was mainly developed after the Solange I decision of the German Constitutional Court. In response to the German Court’s decision, various possible responses were discussed: unilateralism, incorporation, hierarchization through accession.

2.1. Unilateralism

The Solange I decision\footnote{May 29, 1974, BVerfGE 37, 271.} did not necessarily imply that the EC had to accede to the ECHR. The Community could develop its own bill of rights which would provide the protection required by Karlsruhe. This was the path followed by the Community institutions when they adopted the Joint Declaration on Fundamental Rights, 5 April 1977, in which they recalled the “prime” importance they attached to fundamental rights and in particular to the ECHR.\footnote{O.J. 1977, C 103.} This was also the path followed by the European Parliament, whose draft Treaty Establishing the European Union provided, in Article 4(3), for the development within five years of a declaration of fundamental rights. The text of the declaration was adopted by the Parliament on 12 April 1989.\footnote{O.J. 1989, C 120/51.} Unilateralism continued to be the path followed years later with the adoption of the Charter of Fundamental Rights, which has now, after the entry into force of the Lisbon Treaty, “the same legal value as the Treaties” according to Article 6 TEU.

This search for a specific solution for the Union on its own has raised many doubts. Schermers, for instance, stressed the difficulty of reaching agreement on any text, but said it would mark a break between the Union and other European States, and would deal a fatal blow to the ECHR.\footnote{“Western Europe would be split further... The creation for a more modern codification for the Community alone would further isolate the others members of The Council of Europe... A separate, more modern codification of human rights by its most important partners would be}
were also strongly manifested during the development of the Charter of Fundamental Rights, would certainly have been justified if the adoption of a Union bill of rights had been considered to exclude any future accession to the Convention, but that was never the case. The Commission itself, in its memorandum on the accession to the ECHR, stressed the compatibility of the two channels. Proponents of this route reasoned by analogy with Member States whose constitutions contain guarantees of rights, while this does not prevent them from become parties to the Convention. It follows that the prospect of accession was not abandoned even after the adoption of the Charter.

2.2. Progressive incorporation

The incorporation route is the result of the jurisprudence of the Court of Justice ensuring that Community acts respect fundamental rights as general principles of law. The first judgments of the Court requiring the Community to respect fundamental rights made no direct reference to the ECHR. It is true that, at the time, not all Member States had ratified the Convention. The first direct reference appeared shortly after the ratification of the Convention by France in May 1974, in *Rutili*. The Joint Declaration of the European Parliament, Council and Commission on Human Rights in 1977 would accelerate the process of incorporation, since *Hauer* cited this Declaration in support of a reference to the Convention. Similarly, thereafter, the Court would refer to Article F, later Article 6 – TEU, and through those provisions, the Convention itself.
However, the Convention did not yet appear to be incorporated as such; the Court only mentioned that it is of “special significance.” It took a long time for this attitude to change, and Pupino provides an excellent example of direct incorporation. Here the Court stated: “Moreover, in accordance with Article 6(2) EU, the Union must respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (‘the Convention’), and as they result from the constitutional traditions common to the Member States, as general principles of law”.20

Indications also started to come that the case law of the European Court of Human Rights must be taken into consideration.21 The change was slow and was accompanied by subsequent amendments of the treaties, so the Court and the constituent power of the Union were mutually influencing each other. This trend of incorporation was crowned by the Charter of Fundamental Rights, whose Article 53 made the Convention the minimum standard of protection of fundamental rights in the Union. At the same time, Article 52 of the Charter requires that the rights contained in the Charter should be given the same interpretation as those guaranteed by the Convention when the rights correspond, but without prejudice to the possibility for the EU to grant more extensive protection. In these circumstances, it is certainly possible to consider that the material content of the Convention has been incorporated into EU law.

2.3. Accession

The possibility of a Community accession to the Convention has never been absent from discussions, both in academic circles and within the institutions during this period.22 In fact, the de facto substantive incorporation had the effect of giving the Court the last word on the Convention within the scope of Community law. This had political consequences and legal effects. On a political level, how was one to explain that people who once had the right to that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. That conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case-law of the Court, refers on the one hand to the rights guaranteed by the constitutions of the Member States and on the other hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

19. See e.g. the Order in Case C-17/98, Emesa Sugar, [2000] ECR 615.
22. For the discussions in the 20th century, see works cited in note 1 supra, and Schermers, “The European Communities bound by Fundamental Human Rights”, 27 CML Rev. (1990), 249.
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go to Strasbourg saw themselves deprived of this possibility once powers transferred to the Union were at stake? In other words, any progress in integration was accompanied by a regression in terms of remedies available to individuals. In legal terms, conflicts between the Luxembourg Court and the Strasbourg Court concerning the interpretation of the Convention could not be ruled out. However, as the implementation of EU law is largely in the hands of the States, they would be the ones who could be faced with a difficult choice between respecting the Convention as interpreted by the ECtHR and the observance of Community law as interpreted by the ECJ. The conflicts have not been many, and the wisdom of the judges has been able to deal with them, but Matthews23 and Bosphorus24 drew attention to this risk. Implementation of Matthews was made possible thanks to the ability of the United Kingdom, supported by a very indulgent Court of Justice.25 Yes, conflicts have been rare, but the threat was ever present.26

In 1988, Judge Pescatore argued that the Community had succeeded the Member States as parties to the Convention as regards the scope of Community law.27 In his view, the States could not transfer to the Community more powers than they had. To the extent the exercise of these powers by the Member States was limited by the obligation to respect the Convention, the Community, as transferee, was bound by the same obligations. His reasoning was based, mutatis mutandis, on the case law of the Court relating to the GATT.28 In fact, he failed to state that, unlike the GATT, not all Member States were party to the Convention at the time of the creation of the Community. In any case, the Court has never accepted this solution. Had it done so, it would still have been difficult to go beyond a substantive incorporation. The Convention was only open to States to becomes parties, and it is unclear how the Community could have participate in proceedings before the (former) ECHR Commission and the European Court of Human Rights.

The option of concluding an accession agreement remained open, and has been proposed by the Commission since 1979.29 Nevertheless, for a long time

this proposal was unheeded and it was not until the Belgian Presidency in the second half of 1993 that an ad hoc working group was formed to examine the issue. Three key issues soon emerged: the competence of the Union to accede, maintaining the autonomy of Community law and the exclusive jurisdiction of the Court of Justice, and the Community (later, Union) participation in the Strasbourg organs.³⁰ Faced with resistance from several Member States, including Spain, France and the United Kingdom, the only way forward seemed to be to seek an opinion from the Court of Justice. Opinion 2/94 responded, as we know, negatively to the question of competence of the Union to accede, leaving the other issues open.³¹ Now it was clear that a revision of the Treaty was needed for any further progress. For that reason, at each intergovernmental conference initiatives have arisen in favour of accession. But they were always peripheral to the main part of the debate and, although greeted with a certain sympathy, were often rejected on the grounds that the matter was too technical to be comprehensively studied in the time available to the Conference. This sympathetic response concealed the profound hostility of some States which had no great affinity with the Strasbourg system, and did not want it to constrain the Union as it did them. The Convention on the Future of Europe was decisive for two reasons. Firstly, the composition was no longer exclusively intergovernmental, and the debates were public. Therefore, it was difficult for hostile States to oppose the project in the face of public opinion. Secondly, the Convention had created a working group on the issue, chaired by former Commissioner Vitorino who, having represented the Commission in the preparation of the Charter of Fundamental Rights, knew the subject inside out. Accession was subject to a thorough examination and was included in the draft Constitution. The die had been cast and there was no going back, even at the time of drafting the Treaty of Lisbon. A long road had been travelled, another began: that of the accession negotiations.

3. The scope of accession

The scope of accession may be viewed from different angles. First of all, the extent of control exercised within the framework of the ECHR needs to be defined. This needs to be examined both by the Strasbourg Court and by the European Union. From the perspective of Strasbourg, it is essential to identify the norms binding the Union. From the EU side, the analysis must

³⁰ These issues are addressed in a memorandum from the Commission to the Working Group, SEC(93)1679.
³¹ Opinion 2/94, [1996] ECR 1759. The Opinion was given during the negotiation of the Treaty of Amsterdam, but it hardly encouraged participants to support the Belgian proposal for accession.
determine – on the basis of Article 6 TEU – what action by the Union may be contested before the ECtHR. Finally, will accession include the possibility to use all available remedies in Strasbourg or will it introduce a specific system for disputes involving the Union?

3.1. The determination of the norms to which the Union will be subject

Although the Treaty on European Union now provides for the Union’s accession to the Convention, it says nothing as regards participation in the protocols to the Convention. Various solutions are possible. It would be possible to have the Union only accede to those protocols that have already been ratified by all Member States, so as to have a unitary corpus of protected rights within the Union and its Member States. This would have the advantage of reassuring those Member States who fear that protocols they have not ratified would become applicable in their national legal order by means of EU law. This was the famous formula of obligations entering “through the backdoor” feared so much by the United Kingdom before the enactment of the Human Rights Act, and was the reason for its hostility to Community accession to the Convention.

However, on a conceptual level, there is no need for such parallelism. Indeed, any protocols ratified will be binding upon the Union, and the Member States will be affected only to the extent that they are implementing Union law. In addition, in some cases, failure to accede to a protocol could imply that the EU refuses an external control of the respect of rights which it protects under its own Charter of Fundamental Rights. For instance, would there be any reason not to accede to Protocol No. 12 on non-discrimination while under Article 21 of the Charter Union law must already fulfil such an obligation? There is thus no reason to exclude this Protocol even if it is not ratified by all Member States. The same applies with regard to the protocols on the death penalty, already prohibited by Article 2 of the Charter.

A suggestion might also be to accede only to protocols that correspond to matters within the competence of the Union. But this would resurrect the debate based on the old confusion between competence to act and the obligation to respect fundamental rights. This debate is definitively settled by Article 6(2) TEU, which confirms the lack of a relationship between accession and the competences of the Union. A fundamental right is neither bound to a specific competence nor does it give rise to a specific competence. It applies horizontally to the whole range of existing powers of the Union. The fact that the Union does not have competence to legislate with regard to the death penalty

32. This concept is clear in theory, although in practice less so. See on the question of scope e.g. Editorial comment, The scope of application of the general principles of Union law: An ever expanding Union? in 47 CML Rev., 1589.
does not mean it is incapable of infringing the right to life. Take, for example, the conclusion of an extradition agreement with a third State which maintains the death penalty in law and practice. If no provision was introduced prohibiting extradition if the death penalty were to be imposed, the EU could undermine the right to life. Therefore wisdom would dictate that a broad view should be taken with regard to the protocols and, at least, that the Union should accede to all protocols that refer to rights guaranteed by the Charter.

This is not the solution that was chosen. The Commission had suggested that accession to protocols should be resolved on a case-by-case basis, and should not constitute a comprehensive package, for fear that the discussions on this point would block the process. In fact, the Council chose to retain the principle of neutrality of accession with respect to the Member States, which entails avoiding any risk of calling into question the action of a Member State in the field of EU law in relation to a protocol that it has not ratified. It was therefore decided only to negotiate the accession to protocols to which all Member States are already parties, which includes the additional Protocol to the Convention (right to property, education, free elections) and Protocol No. 6 on the abolition of the death penalty. It excludes Protocol 4 (freedom of movement, prohibition of collective expulsion of aliens, prohibition of imprisonment for debt) not ratified by Greece and the United Kingdom, Protocol No. 7 (procedural safeguards for expulsion of aliens, right of appeal to a higher court, compensation for wrongful conviction, double jeopardy, equality between spouses), not ratified by Germany, Belgium and Poland, Protocol No. 12 (general prohibition of discrimination) only ratified by Spain, Finland, Romania and Estonia, Protocol 13 (abolition of death penalties in all circumstances) which has not been ratified by Latvia and Poland. Yet, all these protocols involve rights that are guaranteed by the Charter of Fundamental Rights of the European Union.

It is interesting to wonder what the Court of Justice of the Union will do, when people rely on such rights under the Charter, which after all in its Article 52 refers back to the Convention when the rights guaranteed by the Charter correspond to rights protected by the Convention. Will the Court only refer to the provisions of protocols to which the EU has acceded, or will it consider that the other protocols are also covered by these articles? Will it follow the same path when a protocol is invoked before it by means of the general principles of law? As for the Strasbourg view, what will be the attitude of the

33. This solution would make sense since the purpose of these provisions is to avoid differences of interpretation between the Charter and the Convention. The aim is not to impose on the EU respect of rights which are not guaranteed, but to interpret the rights enshrined in the Charter in harmony with the Convention and its protocols. If similar rights are contained in both instruments (Charter on the one hand, the Convention and protocols on the other), the rules of Arts. 52 and 53 should be applicable regardless of the scope of accession.
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Court of Human Rights if it is seized of a complaint against an EU Member State for having violated – in the context of the implementation of EU law – a right contained in a protocol to which the Union has not acceded, but which is binding on that Member State. Here, should it not at least revive the Bosphorus case law\textsuperscript{34} and examine whether the protection offered by the Union is manifestly inadequate?

3.2. \textit{The extent of control over the action of the Union}

The consequence of accession is to submit the action of the Union to control of compliance with the Convention. This is frequently seen as compliance of acts of the Union with the ECHR, but such a view is too narrow since it is not merely the legal acts but also the conduct of the Union which is covered. What is more, the acts or omissions of individuals and entities \textit{under the authority} of a contracting party must also respect the Convention. This consideration raises the question of the possibility of reviewing the activities of the Union within the CFSP, but also of challenging the compatibility of the Union’s primary law with the Convention.

Since, according to Article 6 TEU, it is the Union which accedes to the ECHR, the Convention should, within whatever terms are set, cover the whole of the Union’s activities, regardless of the specific features of certain sectors with regard to the internal legality control. This could result in an asymmetry between the control exercised by the Court of Justice and that of the ECtHR. Indeed, Article 275 TFEU expressly excludes from the control exercised by the Court of Justice the Union’s activities under the Common Foreign and Security Policy, with the exception of restrictive measures against individuals. However, the Convention applies to all matters within the jurisdiction of the contracting parties. The Strasbourg Court could therefore review acts or conduct in relation to external action of the European Union. It is likely that such a possibility was never envisaged by the framers of the EU Treaties. They reasoned from the perspective of classic control of compliance with the Convention only with regard to legal acts of the Union. Insofar as the Common Foreign and Security Policy is rarely translated into action producing legal effects on third parties, except for restrictions that are subject to review by the Court of Justice, they believed that control of compliance with the Convention would not arise in this area. It would only concern States when they implement the decisions taken within the framework of CFSP. It was forgotten that the Union manages a number of external operations, either within the framework of the UN or independently. In this context, it is possible that substantive action

\textsuperscript{34}. \textit{Bosphorus} cited \textit{supra} note 24.
committed by the Union’s missions might constitute a breach of the Convention. According to the *Behrami* case law, the Union would be responsible for these violations when their authors are acting on behalf of the Union and are under its control. In these circumstances it is difficult to prevent activities of the Union in the framework of the CFSP escaping the control of the ECtHR. It might be desirable to make a reservation; however, the Convention does not allow reservations covering future activity in general. Moreover, even if a reservation were possible, would it not be feasible to bring the *Bosphorus* case law into play when Member States intervene in the implementation of the CFSP?

It has also been proposed to exclude primary EU law from control by the ECtHR. There may be good reasons which militate in favour of such an exclusion. The Union is not the author of its primary law, and the EU Court of Justice can not exercise any review of its legality. Member States are the masters of the Treaties and in accordance with the *Matthews* case law, they are the ones responsible. In addition, the EU institutions would be unable to follow up a conviction, as the revision of the Treaties is in the hands of the Member States. On the other hand, it is for the Court of Justice to interpret the treaties

35. Grand Chamber, 2 May 2007, Decision on Appl. No. 71412/01, *Agim Behrami and Bekir Behrami v. France* and Appl. No. 78166/01, *Ruzhdi Saramati v. France, Germany and Norway*. In this case, the ECtHR adopts a position on the UN that could be transposed to the European Union, denying responsibility of Member States: “The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the *Bosphorus* case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant’s leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§ 137 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court’s competence *ratione personae*. There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective*. However, if the Union becomes a contracting party, the jurisdiction of the Strasbourg Court will be extended to CFSP operations.

36. Certainly, in *Behrami*, the ECtHR declared the application inadmissible *ratione personae*, but the UN was in control of the activities complained of and the Court justified its position by including the role of the Security Council in maintaining peace and security, under Art. 103 of the UN Charter; these are arguments that cannot play a role for the benefit of the European Union.
and this interpretation is critical when fundamental rights are concerned, since the Charter is now part of primary law. Also, in case of a conflict between a rule of primary law and the Charter, the Court will have the opportunity to reconcile the provisions challenged by the use of consistent interpretation. Under these conditions, even if the Member States are the authors of primary law, the exclusion of the European Union from review by Strasbourg in such a case is not justified to the extent that the dispute could concern the balance of interests established by the Court of Justice between two provisions of primary law. The co-respondent mechanism (which will be discussed more fully below), which allows the Union to join a Member State as co-respondent in the proceedings, will allow it to assert its interpretation of the treaties. In the current state of negotiations, if one looks at Article 4(3) of the draft agreement, the exclusion of primary law does not seem intended. This provision permits a Member State to stand as co-respondent alongside the Union “if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on The Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments”. Such situations must include those involving primary law. The review of primary law should thus not be completely excluded, and the co-defendant mechanism should overcome the difficulties related to the specific nature of such law.

4. Remedies

The Convention provides for the possibility of individual applications and State applications. With regard to individual applications, in particular, doubts had been cast. G. Sperduti, for instance, proposed to exclude individual applications and to limit individual remedies to the possibility of a preliminary reference from Luxembourg to Strasbourg if a serious issue of interpretation of the Convention were to arise. It is now accepted that the normal route of referral to the Court of Human Rights will be by individual appeal. That may be deduced from Protocol 8 to the Lisbon Treaty, since this refers to claims filed by non-Member States and individual actions.

37. See infra section 5.
40. “The agreement relating to the accession of the Union to the European Convention on the
As for State applications, the only scenario that should be excluded is that of disputes between EU Member States, because of the monopoly of the Court of Justice to examine disputes between Member States which concern the interpretation or application of the Treaties (Art. 344 TFEU). There is no need to consider this exclusion in the accession agreement, as State applications are merely an option in any case. The internal prohibition on the basis of Article 344 TFEU is sufficient. That is not so for applications from States Parties who are not members of the Union, or those from the Union against such States. In this regard, the Union must be regarded as an ordinary party. As has been stated by Judge Tulkens

“Le principe qui doit nous guider ici doit être qu’en adhérant à la Convention, l’UE est appelée à devenir une Partie contractante à part entière, au même titre que les autres États contractants. Elle rejoindra ainsi un groupe d’États liés par les mêmes droits et obligations dans l’application de la Convention et tous, nous le savons, sont ‘égaux devant la Convention’. Or, le but de l’adhésion de l’UE à la Convention a toujours été, précisément, de soumettre l’UE au même contrôle extérieur que les États : il faut donc assurer, autant que possible, qu’elle soit soumise aux mêmes droits et obligations vis-à-vis de la Convention que les États de façon à ce que ‘l’égalité devant la Convention’ s’étende aussi à l’UE”.41

Such identical status, which is also what the Union desires, has consequences for EU participation in the mechanisms of the Convention.

5. The consequences of identical status of the Union and the other States Parties

The institutional aspects of accession are undoubtedly the easiest to resolve because they are based on a simple principle of equal treatment between all contracting parties. The Union should therefore be treated in the same way as the other contracting parties, whether this is with respect to judicial appointments, participation in the bodies of the Convention or its financial contribution to the Court of Human Rights.

Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ‘European Convention’) provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

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

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

5.1. The EU participation in the appointment of judges

Even when negotiations opened, the presence in the Court of Human Rights of a judge proposed by the Union seemed to be accepted. There had been talk in the past of the possibility that the EU judge might not participate in all deliberations of the ECtHR, but only in those cases concerning the Union as a party, having an observer status for other cases. This cautious proposal is no longer under consideration. It was based ultimately on the idea that each judge “represented” a party, and that was actually in contradiction with the principle of judicial independence. The judge proposed by the Union will thus participate in the Human Rights Court with the same status as her colleagues.

For the designation of the judge proposed by the EU, the process will be the normal one. She will be elected by the Parliamentary Assembly of Council of Europe, out of a list of three persons nominated by the Union. The establishment of the list of candidates will be conducted on terms to be defined within the Union, and the choice should take into account the directives of the Assembly.  

In accordance with the principle of equality of parties, the Union will participate in the deliberations of the Parliamentary Assembly and its organs for the election of judges. Since the Assembly is composed of delegations of the parliaments of the Member States, the EU will be represented by a delegation of the European Parliament. It is proposed that the European Parliament delegation includes a number of members equal to the delegations of the largest states, i.e. 18 parliamentarians. As to the modalities of participation, these will be fixed by the Parliamentary Assembly in consultation with the European Parliament.

5.2. The EU participation in the Committee of Ministers of the Council of Europe

Until now, the identity between the members of the Council of Europe and the Contracting Parties to the Convention did not make it necessary to make a distinction between the functions that the Committee of Ministers exercises under the Convention and its other functions as an organ of the Council of Europe. The Convention gives the Committee responsibility for monitoring

42. See in particular resolution 1646 (2009) Assembly.
43. Screening of the candidates by the Committee on Legal Affairs and Human Rights.
44. An agreement has been concluded between the Chairperson of the Council of Europe’s Committee on Legal Affairs and Human Rights and the Chairperson of the European Parliament’s Committee on Constitutional Affairs on 15 June 2011. This agreement will be submitted for approval to the Parliamentary Assembly of the Council of Europe and to the European Parliament <assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=991>.
the execution of judgments (Art. 54) and settlements (Art. 39). It may request advisory opinions from the ECtHR on interpretation of the Convention and its Protocols (Art. 47). It also has the power, if so requested by the Court, to reduce the number of judges in the chambers. The Committee, however, also carries out many other functions related to the operation of the Convention, such as the adoption of protocols or other documents relating to the Convention. To the extent that the Union will be involved with voting rights only in the Committee’s deliberations on the Convention, it will be necessary to define more precisely the functions of the Committee related to the Convention, and to open participation to all contracting parties. The representation of the Union in the Committee and the procedural rules for this will fall under the EU’s internal rules. The right to vote which would be accorded to the Union within the Committee has raised objections from contracting parties who fear that the EU and its Member States will dominate the proceedings if they adopt the same position. To address this concern, it was envisaged that the Union should make a statement in an annex to the accession agreement. This statement would indicate that in cases involving non-EU Member States, there is no legal obligation according to Union law to adopt a coordinated position. Similarly, in cases involving a Member State, the Union cannot exercise its right to vote when it is not a party to the proceedings since the matter is normally outside the scope of its powers. Finally, in cases where the Union is a party (either alone or with a Member State), coordination of positions is required, but a solution has to be find in order to prevent any distortion of the system; this declaration has been inserted in Article 7(2) of the final version. The voting rules of the Committee of Ministers will be modified to prevent the Union from blocking a solution in favour of which a majority of non-Member States of the Union has taken position.45

5.3. Participation in financing expenses related to the Convention

Expenses related to the Convention are part of the regular budget of the Council of Europe and there is no link between the number of cases from a Contracting Party and its contribution. There is no intention to create such a link, but to apply a flat-rate system. On this point, a tentative agreement has been reached as a percentage of the budget of the Council of Europe equal to the highest rate paid by a Member State. The determination of that percentage will probably require that the costs for operating the system of the Convention can be assessed. But this may be the subject of a specific agreement between the

45. For decisions adopted by simple majority, a simple majority of non-Member States in favour will be sufficient. For decisions adopted by a two-thirds majority, a majority of two-thirds of non-Member States in favour will be sufficient.
Council of Europe and the Union. It will concern the participation of the EU and may not cover other expenses related to activities of the Council of Europe.

6. The specific nature of the Union

The first article of Protocol No 8 (on ECHR Accession) states that the accession agreement “should reflect the need to preserve the specific characteristics of the Union and Union law ....” The main problem that arises in this connection is of course the preservation of the autonomy of Union law.\(^\text{46}\) In its Opinion 1/91 on the European Economic Area,\(^\text{47}\) the Court had shed light on this point as regards the participation of the Community in an international agreement. The Court accepts that an international agreement may establish a judicial system to which the Community will be submitted.\(^\text{48}\) But in the case of the European Economic Area, it held that the first agreement was not compatible with the Treaty, in particular because it allowed the court of the European Economic Area to decide on the distribution of competences between the Community and its Member States\(^\text{49}\) and because it led, despite the precautions taken, that court to interpret Community law.\(^\text{50}\)

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\(^{46}\) See in more depth on this issue, in this Review, Lock op. cit. supra note 7.


\(^{48}\) Ibid., para 40: “An international agreement providing for such a system of courts is in principle compatible with Community law. The Community’s competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.” The Court confirmed this in its Opinion 1/09: “74. As regards an international agreement providing for the creation of a court responsible for the interpretation of its provisions, the Court has, it is true, held that such an agreement is not, in principle, incompatible with European Union law. The competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinion 1/91, paragraphs 40 and 70)”, Opinion 1/09 of the Court (Full Court), 8 March 2011, ny.

\(^{49}\) “… This means that, when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression ‘Contracting Party’… in order to determine whether, for the purposes of the provision at issue, the expression ‘Contracting Party’ means the Community, the Community and the Member States, or simply the Member States. Consequently, the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. 35 It follows that the jurisdiction conferred on the EEA Court … is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice …” Opinion 1/91.

\(^{50}\) “Although, under Article 6 of the agreement, the EEA Court is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given
In the light of this Opinion, the Court should not see any obstacle against the ECtHR being responsible for deciding on the compatibility of action of the Union with the Convention. However, the accession agreement will have to preserve the autonomy of Union law and consequently the exclusive competence of the Court of Justice of the Union “to ensure compliance with the law in the interpretation and application of Treaties “ (Art. 19(1) TEU). In this context, two elements are particularly important: the distribution of responsibilities between the Union and its Member States may only be assessed by the Court of Justice, and the Court of Justice has exclusive jurisdiction regarding the application and interpretation of Union law.

6.1. The division of responsibilities between the Union and its Member States

Opinion 1/91 illustrates the concern of the Court of Justice to prevent a court from outside the Union being called upon to decide on the division of competences, which is a constitutional issue of extreme sensitivity. The Agreement on the European Economic Area was a mixed agreement and the contracting parties (both the Community and Member States) could bring cases before the court of the European Economic Area. That court would thus have had the power, in a particular case, of defining the “Contracting Party”, that is to say whether the matter was within the competence of the Community or the Member States.

– The risks to the autonomy of the Union

Even though the situation with regard to the ECHR is not identical, the problem is comparable.51 If the accession agreement contains no provision to deal with such a case, the Strasbourg Court, seized of an individual action, could, at the admissibility stage, be asked to decide on the distribution of powers between the Union and its Member States, through an assessment of the applicant’s choice of defendant. In considering whether a complaint against the State or against the Union is admissible or inadmissible, on the ground that the alleged prior to the date of signature of the agreement, the EEA Court will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date. Consequently, the agreement’s objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law. It follows that in so far as it conditions the future interpretation of the Community rules on free movement and competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community” Opinion 1/91, paras. 44–46.

51. On former approaches to this issue, see Schermers, op. cit. supra note 1, 8 or Jacqué, op. cit. supra note 1, p. 903, who envisage a system of shared responsibility inspired by the Convention on the Law of the Sea.
conduct is not attributable to the defendant, the ECtHR interferes in the distribution of competences between the Union and its Member States. However, this is a choice made by the drafters of the Treaties, and any external monitoring would be a serious infringement of the autonomy of the Union. This hypothesis is not purely academic, as it is not always easy for an individual applicant to determine whether the Union or the Member State is responsible for a violation of his rights, particularly when the law of the Union leaves some discretion to the states. In such a case, it must be decided whether or not the violation occurred within this margin of discretion. Leaving such a determination to the ECtHR would inevitably lead that Court to decide on the distribution of competences between the Union and its Member States.

To illustrate this point, it is interesting to refer to the case MSS v. Belgium and Greece.52 In this case, an Afghan national brought proceedings against Belgium for having, under the Dublin II Regulation, returned him to Greece, which was the country where he first entered the Union, for the purposes of deciding on his request for asylum. He claimed that he should not have been returned to Greece, because of the inhuman and degrading treatment applied in Greece to asylum seekers. The Court ruled against Belgium after correctly analysing the relevant rules, which allow a State in all cases not to return the applicant but to examine his request itself. It therefore refused to apply the Bosphorus solution, and condemned Belgium.53 This solution raises two

52. Grand Chamber judgment of 21 Jan. 2011, Appl. No. 30696/09
53. "The Court reiterated in that case that the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity (see Bosphorus, cited above, § 152). The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (ibid., § 153). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion … The Court found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system (ibid., § 165). In reaching that conclusion it attached great importance to the role and powers of the ECJ – now the CJEU – in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance (ibid., § 160). The Court also took care to limit the scope of the Bosphorus judgment to Community law in the strict sense – at the time the 'first pillar' of European Union law (ibid., § 72) … The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called ‘sovereignty’ clause. In such a case the State concerned becomes the Member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility … The Court concludes that, under the Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece,
questions. What would have happened if, following accession, the applicant had directed his application against the Union? Would it have been declared inadmissible? Is the ECtHR providing an interpretation of EU law? Of course, it is evident in this case that the Regulation is clear and allows a State to deal with the asylum application itself. But does the Regulation obligate a State which is not the State of entry to do so if it considers that the State to which the asylum-seeker should in principle be returned does not respect human rights? Is this not a matter that deserved to be treated by the EU Court of Justice before being resolved in Strasbourg? Although in this case the solution of the ECtHR hardly attracts any criticism, as the Union law is clear, in other cases the situation may be more complex, which would require the ECtHR to intervene in the division of powers and in the interpretation of Union law.

– The proposed solution: the “co-respondent mechanism”

The authors of the TEU were fully aware of this problem when they stated in Protocol No. 8 that the specificity of the Union should entail the provision of “the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.” (Art. 1, under (b)). The establishment of such a mechanism is all the more important in that cases in which the responsibility of Member States and that of the EU is closely intertwined are frequent. The Union institutions apply the Treaties, whose authors are the Member States. Member States implement the provisions of legislation adopted by the Union institutions. This specificity of the Union must necessarily be taken into account in order to avoid gaps in the protection system, insofar as the application could be declared inadmissible if the applicant did not make the correct choice of defendant, which would mean the applicant having to start proceedings all over again – if that is even still possible. Finding a solution to this problem is not merely in order to address a preoccupation of the Union, but also to strengthen the effectiveness of the protection offered to individuals.

The proposed solution is to implement a system of “shared responsibility”, called the co-respondent mechanism, which would allow the Union or a Member State to join the proceedings as “co-respondent” alongside the addressee of the application. In case a violation is found, the co-respondent will be equally bound by that finding, and it is then for the Union to decide who is the real perpetrator of the violation and therefore have to fully repair the victim’s...
legal and factual situation (individual measures) and draw all necessary conclusions with regard to parallel cases (general measures). Although the idea is clear, its implementation is more difficult. Conceivably, the fact of standing as co-respondent would result purely from the voluntary decision of the Member State in question, or the Union. This would cover broadly all cases in which a question of division of powers might arise. This solution was rejected because it would give too much power to the defendants and meant the ECtHR would no longer be in control of the proceedings, to the extent that it would not have the power to refuse a co-respondent which it considered abusive.54

In addition, permission to use the co-respondent mechanism would be granted by the Court of Human Rights after consultation with the parties concerned. This begs the question of the criterion by which this Court will make its decision. Initially, it was proposed that the co-respondent mechanism would be granted when an application “appear[ed] to have a substantive link with European Union legal acts or measures”. That test seemed wide enough to avoid any problems, since an apparent link would be sufficient. The text provisionally approved in March was much less satisfactory in our view. For the Union to be co-respondent, it had to appear that the respondent State could not prevent the violation of the Convention without disregarding an obligation of Union law. For these reasons, the final text seems more favourable to the Union. The status of co-respondent may be granted to the Union in a complaint against a Member State “if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law”.55

For a State to be co-respondent, it must appear that the “allegation calls into question the compatibility with the Convention rights at issue of a provision of the treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments”. The use of the verb “appear” indicates that the ECtHR should not engage in a thorough study of the situation and must accept the co-respondent when there is a prima facie case. The fact remains that it has a discretion that would allow it to interpret EU law and the division of powers. Will it go so far, or will it be satisfied with “mere” appearance? In favour of the prima

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54. In its observations, the Italian delegation proposes a more comprehensive formula for triggering the mechanism: “if the alleged violation refers directly or indirectly to the implementation (of an act or measure) (of a provision of the judicial system) of the Union” CDDH-UE (2011)09.

55. According to the March text, the ECtHR was to assess “whether the reasons stated by the High Contracting Parties concerned are not manifestly incomplete or inconsistent”, cf. Report of 6th working meeting of the CDDH informal working group, 15–18 March 2011, CDDH-EU (2011) 06 p. 12. The text agreed in May is in CDDH-UE (2011)10.
The status of co-respondent will be granted if “it is plausible that the conditions ... are met” (emphasis added).

Finally, the procedure must be determined. The ECtHR could assess the situation itself and seek a co-respondent at the moment it receives an application, but in any case a request from the Member State or from the Union is a precondition for triggering the mechanism: “A High Contracting Party should become a co-respondent only at its own request and by decision of the Court”. The rule is that the Union, or one or more Member States, could apply for the use of the mechanism. Lastly, the applicant could simultaneously address the complaint to the Union and one or more Member States. In that case, a Party can ask for a change in its status from respondent to co-respondent.

The system must in any case necessarily include rules internal to the European Union for determining the procedure for implementing the mechanism: activating the mechanism, participating in the proceedings, enforcement of judgments, settlement of any disputes on the division of powers. The adoption of such rules will be excluded from the negotiation process, because these are matters purely internal to the Union.

The Court of Human Rights may, at the end of proceedings, assign responsibility for the violation to the defendants jointly. Again, this is merely an option, which leaves open the possibility of distinguishing between the responsibility of each, or attributing responsibility for the violation to only one of them. This solution does not totally exclude the possibility that after hearing the defendants, the ECtHR decides on the division of powers, particularly in cases where Member States enjoy a margin of appreciation. Would it not have been wiser to retain joint responsibility in all cases where co-respondents are involved? This discretion left to the ECtHR makes the question of the monopoly of interpretation of the Court of Justice of the Union even more important.

6.2. Preserving the monopoly of interpretation of Union law by the Court of Justice

The preservation of the exclusive power of interpretation of Union law by the Court of Justice pursuant to Article 19(1) TEU is crucial. Some commentators fear that the Strasbourg Court will be led to interpret a provision of EU law in order to determine its compliance with the Convention, thereby undermining the monopoly of interpretation of the Court of Justice. In fact, the question does not arise for acts of the Union, as they may be the object of a direct appeal to the Court of Justice by individuals. The rule of exhaustion of domestic proceedings would apply.

56. It seems that the explanatory report will indicate that joint responsibility will be the rule.
remedies requires them to exercise their right of appeal in Luxembourg before turning to Strasbourg. In such cases, the European Court of Human Rights will have the interpretation of Union law given by the Court of Justice, and according to its traditional jurisprudence will not substitute itself for the national authorities when it comes to interpreting acts of national law (in this case Union law) or a treaty.\(^{57}\) The ECtHR would therefore defer to the interpretation given by the Court of Justice, which will be recalled and explained, where necessary through the co-respondent mechanism.

– Problems related to lack of “prior involvement” of the Court of Justice

The problem only arises when the invalidity of the act for non-observance of rights guaranteed by the Convention is invoked before a national court. If the individual requests a preliminary ruling and the national court acts upon this, the Court of Justice will have the opportunity to pronounce on the matter. If the individual has not requested a preliminary reference, the European Court of Human Rights could possibly reject a subsequent complaint for non-exhaustion of domestic remedies, although there is no clear answer as to whether the exhaustion of local remedies rules applies to preliminary references. In their joint communication, the presidents of the two courts state “that means that the reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before referring the matter to the ECHR.” The use of the word “normally” leaves some uncertainty. Be that as it may, if

\(^{57}\) As it said recently in a decision on admissibility (\textit{W. v. The Netherlands}, Appl. No. 20689/08, 20 Jan. 2009): “The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. More specifically, it is not for the Court to rule on the validity of national laws in the hierarchy of domestic legislation (see also \textit{Kruslin v. France}, 24 April 1990, § 29, Series A no. 176-A). This also applies where international treaties are concerned; it is for the implementing party to interpret the treaty, and in this respect it is not the Court’s task to substitute its own judgment for that of the domestic authorities, even less to settle a dispute between the parties to the treaty as to its correct interpretation (see \textit{Slivenko v. Latvia}\[GC\], no. 48321/99, § 105, ECHR 2003-X).” This obligation is recalled in the Conclusions of the High Level Conference on the future of the ECtHR (19 Feb. 2010) in Interlaken: “The Conference, acknowledging the responsibility shared between the States Parties and the Court, invites the Court to: a) avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court ....” Available through <wcd.coe.int> See also the Izmir declaration (adopted on 27 April 2011 at the High level Conference on the future of the European Court of Human Rights) where the contracting parties recall “that the Court is not an immigration Appeals Tribunal or a Court of fourth instance”, available through <wcd.coe.int>. But it not evident that the Court will always respect this principle. In a recent case, the Court has questioned the interpretation of national law given by the Greek Court of Cassation, based on its own analysis and on dissenting opinions of Greek judges; 3 May 2011, \textit{Negropontis-Giannisis}, Appl. No. 56739/08.
such a reference was requested, but the national court did not follow the request, it would seem unfair to use the non-exhaustion rule to the detriment of the applicant, as his responsibility was not involved. In this case, the Strasbourg Court could be asked to decide on the merits while the Court of Justice has not previously had the opportunity to examine the issue. However, as the Court of Justice has written:

“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. That prerogative is an integral part of the competence of the Court of Justice, and hence of the ‘powers’ of the institutions of the Union, which, in accordance with Protocol No 8, must not be affected by accession … In order to preserve this characteristic of the Union’s system of judicial protection, the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point.”

This requirement is also related to the subsidiary nature of the intervention of the Court of Human Rights, which should allow the Contracting Parties the right to decide first on possible violations. It is interesting to note that, during debates in the working group on fundamental rights during the European Convention, President Skouris did not make reference to this issue when he stated:

“There will not in general be a conflict involving the autonomy of the Community legal order if the EU accedes to the ECHR. All the rules of Community law, with the exception of those of the ECHR, will continue to be adopted by the Community institutions and applied by the EU administration or the authorities of the Member States. Moreover, the application and interpretation of those rules will remain within the jurisdiction of the national courts and the Court of Justice, as is laid down in the Treaty as it stands. However, with respect to the matters covered by the ECHR, accession will represent a limitation to the autonomy of Community law. Regarding the Court of Justice in particular, it will effectively lose its sole right to deliver a final ruling on the legality of Community acts where a violation of a right guaranteed by the ECHR is at issue. In my view, there is nothing shocking in this: the position is the same when the constitutional

courts or supreme courts of Member States test the constitutionality or legality of acts within their domestic legal systems.”

No specific mechanism was proposed by the President of the Court. By contrast, in 1979, the Commission had suggested the establishment of a specific mechanism, but internal to the Community, in the form of a notice given by the Court of Justice to the institution representing the Community before the ECtHR.

– Possible solutions

There are two ways to remedy this situation. The first, which might seem the most logical, would be to strengthen the discipline of the preliminary reference procedure and supplement the *Foto-Frost* case law by requiring national courts to conduct a preliminary ruling in all cases in which the conflict between an act of the Union and the ECHR is invoked, and not just in cases where they consider the complaint to be well-founded. After all, the Treaty clearly requires the courts of last resort to seize the Court, and it is only by way of exception that the Court relaxed this requirement in *CILFIT*. Nothing prevents a return to a more rigorous application of the Treaty in such cases, and this implementation depends only on the Court itself. It is understandable that the Court fears that it would be flooded with such references, especially as lawyers will quickly learn that a mere claim that the act is contrary to the Convention would make

59. European Convention, Working Group II Working Document 19 of 27 Sept. 2002 (Hearing of Judge Mr. Vassilios Skouris – 17 Sept. 2002). He added: “For those reasons I think that if the EU becomes a party to the ECHR it will be unnecessary to determine the respective roles of the Court of Justice and of the European Court of Human Rights or to regulate relations between the two courts, even if the Charter becomes binding law. The suggestion that the Court of Justice should refer such cases to the European Court of Human Rights would involve an unreasonable complication and slow down the procedure for the former court, the more so if the reference to the European Court of Human Rights were made in the context of a reference for a preliminary ruling to the Court of Justice.”

60. “Since it can hardly be envisaged that the Strasbourg organs would themselves refer questions to the Court of Justice, it would appear appropriate to introduce a procedure whereby the Community is obliged, in cases where the compatibility of a Community act with the ECHR is in question, to ask the Court of Justice for an opinion before it submits its own conclusions and to transmit this opinion together with its observations to the Strasbourg organs. This procedure should be employed both in the case of clear failure by national courts of last instance to comply with the third paragraph of Article 177 of the EEC Treaty and in the case of applications by non-member countries which, for their part, when they are in doubt as to the conformity of a Community act with fundamental rights do not have the opportunity to make a reference to the Court of Justice.” Commission memorandum cited supra note 15.


the reference automatic. But would this danger not be limited by the rule of exhaustion of domestic remedies, which would require that in all such cases the highest national courts have been seized? Would it not be sufficient simply to remind these courts of their obligations under Article 267 TFEU? Is it really necessary to seek a solution to a problem that can be resolved through the internal Union framework by introducing specific provisions in the agreement on accession to the ECHR, whose only purpose would be to cover a situation – the non-referral by a court of last resort – that does not comply with the wording of the Treaty?

The feeling is unavoidable that the Court does not trust its powers of persuasion over the national courts, since it pursues a different path. It states that “in order to observe the principle of subsidiarity which is inherent in the Convention and at the same time to ensure the proper functioning of the judicial system of the Union, a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention.”63 Judge Timmermans advocated for this purpose that the Commission be empowered to ask the Court of Justice for a preliminary ruling where it appears, in cases declared admissible by the European Court of Human Rights, that the Court of Justice has not had the opportunity to give a ruling. The procedure would be suspended in the Strasbourg Court, and terminated if the Court of Justice finds a violation.64 Otherwise, it would continue before the ECtHR after the decision by the Court of Justice in Luxembourg. Questions have been raised whether such a solution can be envisaged without revision of the Treaty. Is it possible to implement such a system of reference on the sole basis of the accession agreement? It is for the Court to say so if it is seized, as is likely, with a request for an opinion under Article 218 TFEU on the future agreement, but one need not be a genius to guess that it will be difficult for the Court to decide that a solution which it has itself proposed is contrary to the treaties.

Besides, the two courts have agreed on the need for such a mechanism in their joint statement of 24 January 2011, further to the meeting between the two courts in January 2011.65 In these circumstances, it remains only to

63. Discussion document of the Court of Justice, 5 May 2010.
65. “In order that the principle of subsidiarity may be respected also in that situation, a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECtHR carries out external review. The implementation of such a procedure, which does not require an amendment to the Convention, should take account of the characteristics of the judicial review which are specific to the two courts. In that regard, it is important that the types of
imagine how the mechanism will work in practice. It seems impossible that such a mechanism could be informal, given the view taken by the Court of Justice in Opinion 1/91 on the binding nature of its decisions. A simple consultation procedure is therefore certainly not sufficient.66

The simplest way seems to be a preliminary reference. If the ECtHR is seized by an individual in a case in which the Union is co-respondent, the Court of Justice could be asked to rule on the compliance of the act in question with fundamental rights if it has not already had the occasion to do so. It was suggested that this procedure should only be followed after the application is declared admissible by the ECtHR; but this would seem to be too late, as the decision on admissibility may already contain some assessment of EU law. The EU intervention should occur when it becomes party to the dispute, either because it is addressed by the original complaint, or because it has become co-respondent. As for methods of referral to the ECJ, this is an internal matter for the Union. Judge Timmermans suggested that this should be entrusted to the Commission, but another possibility would be for the first Advocate General to be involved if he is the recipient of communications sent by the ECtHR to the parties. The Court should rule promptly, but given the length of the proceedings in Strasbourg, this should pose few problems. Insofar as the absence of a prior Court of Justice decision is an objective fact, the ECtHR would not need to be asked to decide on the advisability of using this procedure. Once the Union is recognized as a co-respondent, the reference to Luxembourg would be de jure if the Court of Justice has not intervened earlier in the case.67
With regard to the ECtHR, its only obligation is to enable the Court of Justice to rule within a reasonable time. If the Court of Justice finds no violation, the proceedings would continue in Strasbourg. If the Union act is annulled in Luxembourg, the continuation of the proceedings would be in the hands of Strasbourg. The ECtHR should still decide, according to its normal case law, whether the applicant is still a victim, whether to take note of the decision of Luxembourg, and whether to order just satisfaction.

In accordance with the Opinions 1/91 and 1/00, the decision of the Court of Justice must be binding, but this does raise several problems. The question of respect for time-limits for declaring the act unlawful should not arise. If the individual had the opportunity to directly challenge the act in question and did not do so, the complaint should be declared inadmissible for failure to exhaust domestic remedies. In other cases, the situation is identical to that in which the Court of Justice rules on invalidity of an act under Article 276 TFEU, and it will be for the institutions to draw the consequences. However, may the decision call into question national judgments that have acquired final authority of res judicata? Can one imagine, without revision of treaties, a system that would impose on Member States the need for a revision procedure? Should one not limit the effect of the decision to the perpetrators of the act, who must draw the consequences of the declaration of invalidity made by the Court? All these issues will have to be discussed and addressed within the EU before the accession agreement is concluded.

Finally, it should be noted that unlike the Court of Justice, the Strasbourg Court has no power to annul an act of the Union. It merely states the incompatibility of the act with the Convention in a declaration, leaving it to the Union to draw the consequences. The assessment of the consequences of the decision is therefore within the jurisdiction of the Union, which thus allows the Union to retain full control of Union law, provided it complies with the Convention.

7. Conclusion

It took a very long time for the decision to accede to the ECHR to ripen, and it has been a long journey since the first work on the issue. However, even though significant progress was made in the negotiating group, accession does not only depend on an agreement between the Union and the Contracting Parties to the Convention. There are important tasks to be accomplished within the Union itself, in relation to the adoption of internal rules designed to address paragraph does not affect the powers of the Court.” CDDH-UE (2011)10 and CDDH-UE (2011)16 prov.
issues related to accession. Take, for instance, the rules for the co-respondent mechanism or the establishment of a specific preliminary ruling system. The decision concluding the agreement depends on the adoption of these rules, and their outcome can only be envisaged once the content of the agreement is accepted by all parties. Thereafter, the internal decision-making process of the Union with the consent of the European Parliament will be followed by the round of ratification by all contracting parties – and one must just hope that at this stage no political difficulties will disturb the process. The fact remains that accession will not take place tomorrow! However, the progress already made proves that those who argued in the 1990s that the issue was technically so complicated that it was better to avoid it altogether were wrong. Instead, the discussions relating to the specificity of the Union show that it is possible to find solutions. The specific nature of the Union does not prohibit accession under essentially the same conditions as any other contracting party, while preserving its domestic legal autonomy. This does come at the price of some adaptations – but even these are limited.