

# **ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**Comments by Olivier DE SCHUTTER\***

## **I. Introduction**

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

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

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

### **II.1. The competence of the European Union to accede to the ECHR**

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

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

Apart from the abandonment of the word ‘Constitution’, this phrase is identical to that mentioned in Article I-9(2) of the Treaty establishing a Constitution for Europe, which was signed on 29 October 2004 following the previous Intergovernmental Conference but which could not be ratified by all the EU Member States and, thus, will not enter into force. However, the Draft Reform Treaty also provides the insertion in the amended EC Treaty (renamed Treaty on the Functioning of the European Union) of Article 188n, replacing former Article 300 EC. Article 188n TFEU would provide, first, that the European Parliament should consent to the agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, prior to this agreement being concluded by the Council (Art. 188n (6), al. 2, (a)(ii)). And it would add (Art. 188n (8), al. 2) that :

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

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

## II.2. The legal personality of the European Union

Second, the Draft Reform Treaty provides to insert Article 32 into the EU Treaty in order to provide that the Union shall have legal personality, following the entry into force of the Reform Treaty. The memorandum states, on this point, that ‘the EU/EC must also have legal personality, which, to date, is only recognised for the EC, although some argue that the EU’s legal personality has been recognized implicitly, at the latest by the Treaty of Nice’ (para. 16, footnote omitted). However, it should be noted that there is a consensus among jurists that the European Union has an international legal personality.<sup>1</sup> This follows from Articles 24 and 38 of the EU Treaty, which provide that ‘the Council’, representing the Union (i.e., not the EU Member States), and acting as one of the institutions of the Union, concludes international agreements.<sup>2</sup> The Treaty of Nice, insofar as it amends Article 24 EU, merely confirms what was already the case prior to its entry into force. Insofar as the EU has been attributed a competence to conclude international agreements – and it has, indeed, exercised this competence<sup>3</sup> –, it follows that it is endowed with the international legal personality, without it being necessary to stipulate this explicitly.<sup>4</sup> This is also the view adopted by the Legal Service of the Council of the European Union, at least since 2000.<sup>5</sup> It may not be advisable to adopt, on this point, a position which

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<sup>1</sup> See, among many others, N. Neuwahl, “Legal Personality of the European Union – International and Institutional Aspects”, in V. Kronenberger (ed.), *The European Union and the International Legal Order : Discord or Harmony ?*, T.M.C. Asser Press, The Hague, 2001, at 3, esp. at 7-8. Earlier studies did express doubts about the existence of an international legal personality of the European Union, however (see, eg, D. McGoldrick, *International Relations Law of the European Union*, Longman Publ., London, 1997, pp. 37-39; N. Neuwahl, “A Partner with a Troubled Personality : EU Treaty-Making in Matters of CFSP and JHA after Amsterdam”, *European Foreign Affairs Rev.*, vol. 3, 1998, p. 177). But this is now clearly the minority view.

<sup>2</sup> St. Marquardt, “The Conclusion of International Agreements under Article 24 of the Treaty on European Union”, in V. Kronenberger (ed.), *The European Union and the International Legal Order : Discord or Harmony ?*, T.M.C. Asser Press, The Hague, 2001, p. 333, at 342-343.

<sup>3</sup> See, for an early example, the decision of the Council of the EU on the conclusion of an agreement between the EU and the Republic of Yugoslavia, *OJL* 328 of 31.12.2000, p. 53 (adopted on the basis of Article 24 EU).

<sup>4</sup> That international legal personality follows from the capacity for an entity to exercise it as a participant in the international legal process, and does not require to be explicitly attributed, for instance in the treaty establishing an international organisation, is uncontested. This has been confirmed by the International Court of Justice in its Advisory Opinion of 11 April 1949 concerning *Reparations to the United Nations* (*ICJ Rep.* 1949, at 174). See, e.g., J. Charpentier, “Quelques réflexions sur la personnalité juridique des organisations internationales : réalité ou fiction ?”, in : *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob*, Bruxelles, 1997, p. 13 ; K. Yasseen, “Création et personnalité juridique des organisations internationales”, in R.-J. Dupuy, *Manuel sur les organisations internationales*, Dordrecht, Nijhoff, Academy of International Law, 1988, at 43, esp. at 47.

<sup>5</sup> See the document on the ‘capacity to act’ of the European Union, prepared by the Legal Service of the Council of the EU: SN 1628/00, 16 February 2000.

is less progressive than that of the Council of the EU itself.<sup>6</sup>

### II.3. Judicial protection under Union law

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

This argument, which was still very powerful a few years ago, now should be treated with caution. The question of whether the individual whose legal situation is affected by an act adopted by the EC / the EU has access to the judicial remedies required under Article 13 ECHR (right to an effective remedy), which Article 47 of the EU Charter of Fundamental Rights builds upon while further strengthening its requirements (right to an effective remedy and to a fair trial), presents at least<sup>7</sup> three distinct branches.<sup>8</sup>

First, there is the question whether the general system of remedies organized by the EC Treaty (including both direct actions before the European Court of Justice and the referral by national courts to the ECJ, which may adopt preliminary rulings in the conditions specified in Article 234 EC) complies with those requirements. The rules of the EC Treaty still currently present significant gaps in this regard: although direct actions seeking the annulment of Community acts with a general scope of application can only be filed by individuals which have not only a direct interest in seeking their annulment, but also an individual interest (according to the traditional interpretation of Article 230 al. 4 EC), certain regulatory acts may directly affect individuals without individualizing them sufficiently for this criterion to be satisfied ; and the alternative of seeking a referral from national courts may not be satisfactory where this would oblige an individual to run the risk of being subjected to penalties for having violated a rule applicable to him. However, without modifying its interpretation of the conditions in which a private person may file a direct action before the Court for the annulment of a Community act, the European Court of Justice has shown in its recent case-law a willingness to impose an obligation on States to adapt their national legal systems (specifically, the procedures before the national courts) in order to ensure that the full system of remedies will not leave any gap. Thus, in a judgment it delivered on 13 March 2007, the European Court of Justice noted<sup>9</sup>:

Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to

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<sup>6</sup> Para. 16 also refers to the opinion according to which ‘limited amendments to existing EC law (notably Article 230 of the Treaty establishing the European Community, ECT) would enable the Union to accede to the ECHR’. I fail to see why Article 230 EC should be amended in order to allow for accession of the EU to the ECHR. First, since that provision is located in the EC Treaty and not the EU Treaty, it could only affect the conditions for the accession of the European Community, and not those for the accession of the Union – although the distinction between the two organisations will be abolished by the Reform Treaty. Second, the provision cited relates to the conditions under which direct actions may be filed before the European Court of Justice (including the Court of First Instance), which is an issue entirely unrelated to that of the external competences of the EU.

<sup>7</sup> A complete discussion should include the acts adopted by the EU under Title V of the EU Treaty (Common Foreign and Security Policy), see e.g. Cases T-228/02, T-47/03, and T-327/03, which all illustrate the potential impact on fundamental rights of acts adopted in that framework.

<sup>8</sup> This is examined in detail in O. De Schutter, ‘Protection juridictionnelle provisoire et droit à un recours effectif en droit communautaire’, *Journal des tribunaux – Droit européen*, n°128, April 2006, pp. 105-115.

<sup>9</sup> Case C-432/05, *Unibet*, paras. 40-42 (judgment of 13 March 2007).

create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law [...].

It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law [...].

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

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

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

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

These problems are analyzed elsewhere and there is no need here to enter into them in detail.<sup>10</sup> Indeed, as in the 2004 Treaty establishing a Constitution for Europe, in the draft Reform Treaty the normal jurisdiction of the Court will apply to all Justice and Home Affairs matters, with the sole exception of a specific restriction to be set out in Article 240b of the EC Treaty (TFEU):

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

This restriction (which was Article III-377 of the Constitutional Treaty) applies only to criminal law and policing, and retains the current Article 35(5) EU. The various other restrictions on the Court's jurisdiction over matters relating to judicial cooperation in criminal matters and police cooperation on the one hand (Art. 35 EU), and to visas, asylum, immigration, and other policies related to the free movement of persons on the other hand (Art. 68 EC), are to be repealed.<sup>11</sup>

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<sup>10</sup> See, for a further elaboration, O. De Schutter, 'Le rôle de la Cour de justice des Communautés européennes dans l'espace judiciaire pénal européen', in : G. de Kerchove et A. Weyembergh (eds.), *Vers un espace judiciaire pénal européen – Towards a European Judicial Criminal Area*, Institut d'études européennes, éd. de l'U.L.B., Bruxelles, 2000, pp. 55-75 ; and id., 'La contribution du contrôle juridictionnel à la confiance mutuelle', in G. de Kerchove et A. Weyembergh (éd.), *La confiance mutuelle dans l'espace pénal européen – Mutual trust in the European Criminal Area*, Inst. d'études européennes de l'ULB, Bruxelles, 2005, ici pp. 79-121

<sup>11</sup> However, the UK, Ireland and Denmark can of course avoid the Court's jurisdiction over a particular act by opting out of the act itself.

Not only will the powers of the European Court of Justice be extended, the jurisdiction it now is recognized under the EC Treaty spreading to all fields under the EC and EU Treaties. But, in addition, the Draft Reform Treaty intends to improve access to justice by individuals, partly by liberalizing the rules on standing for the filing of direct actions for annulment of regulatory acts, and partly by constitutionalizing the case-law of the European Court of Justice, already referred to above, which imposes on the EU Member States to contribute to ensuring that the right to an effective judicial remedy will be guaranteed in the EU legal order. The Draft Reform Treaty amending the EC Treaty (Treaty on the Functioning of the European Union) will amend Article 230 al. 4 EC. This provision would now read :

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

In addition, the Draft Treaty provides that an Article 9f will be inserted into the EU Treaty, on the Court of Justice of the European Union. This includes an obligation imposed on the EU Member States to contribute to ensuring that the right to an effective judicial remedy will be recognized to all persons affected by Union law (Article 9f (1), al. 2)<sup>12</sup> :

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

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

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

The memorandum presents a list of arguments in favor of accession. It refers, appropriately, to the fact that the accession of the Union to the European Convention on Human Rights will ensure that the Union will be represented as such in the European Court of Human Rights and on the Committee of Ministers of the Council of Europe which oversees the enforcement of the Court's judgments. This situation will be more satisfactory than the situation that exists today, where the compatibility of acts of the Union with the European Convention on Human Rights is in fact reviewed by the European Court of Human Rights, albeit in an indirect way – since this review takes place through the

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<sup>12</sup> The insertion of such a provision was originally proposed by the European Convention, in Article 28(1), al. 2, of the Draft Treaty establishing a Constitution for Europe.

international responsibility of the Union Member States, who are all contracting parties to the European Convention on Human Rights –, and without the Union being represented in any way in the monitoring bodies.

Two supplementary arguments could be put forward, however.

### **III.1. Access to remedies**

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

### **III.2. Problems with the current situation**

Second, the argument would be strengthened if it were explained why the current situation is unsatisfactory. Currently, the European Court of Justice, just like any supreme or constitutional court of the States parties to the Convention, applies the Convention taking into account its interpretation by the European Court of Human Rights.<sup>13</sup> And the European Court of Human Rights considers that it may find any individual EU Member State's international responsibility to be engaged under the Convention, where, in a situation on which that State has jurisdiction, a Convention right has been violated, even where the direct source of the violation is in EU law. This situation is problematic for two reasons.

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

A first problem is that, when the European Court of Human Rights arrives at the conclusion that the Convention has been violated, the State party against which the application has been filed may find it difficult to comply with that judgment, although it has a legal obligation to do so under Article 46 ECHR. In *Matthews v. the United Kingdom*, the European Court of Human Rights found the United Kingdom to have breached Article 3 of the First Additional Protocol to the Convention, because the applicant could not take part in the election for the European Parliament as she was a resident of Gibraltar (judgment of 18 February 1999). But this situation – while it fell under the territorial jurisdiction of the United Kingdom – flowed from an annex to the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976, which was attached to Council Decision 76/787, signed by the President of the Council of the European Communities and the then member States' foreign ministers, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty on the European Union on November 1st, 1993. Since the violation had its source in EU law – specifically, in primary EU law (the EU Treaties) –, the United Kingdom alone could not in principle decide to comply with the judgment of the European Court of Human Rights. While the European Parliament (Representation) Act 2003 (EPRA 2003) finally did provide for the enfranchisement of the Gibraltar

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<sup>13</sup> For example, see Case C-249/96, *Grant* [1998] ECR I-621; Case C-185/95, *Baustahlgewebe* [1998] ECR I-8417; *Connolly*, Case C-274/99 [2001] ECR I-1611, and *Karner*, Case C-71/02, judgment of 25 March 2004. For a further elaboration, see O. De Schutter, 'L'influence de la Cour européenne des droits de l'homme sur la Cour de justice des Communautés européennes', in G. Cohen-Jonathan & J.-Fr. Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant-Nemesis, 2005, pp. 189-242.

electorate for the purposes of European Parliamentary elections as of 2004,<sup>14</sup> this action was taken unilaterally after a failure to secure the unanimous agreement of the Council to an amendment to the EC Act on Direct Elections of 1976 to provide for its application to Gibraltar.<sup>15</sup> Ireland would have faced a similar difficulty if, in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İrketi*, the European Court of Human Rights had concluded that the Convention had been breached by the impounding of the aircraft leased by the applicant company.

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

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

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

This ‘Solange’ approach is closely inspired by the attitude of the German Federal Constitutional Court (*Bundesverfassungsgericht*) when asked to recognize the supremacy of EU law even where this might result in situations where the catalogue of fundamental rights of the *Grundgesetz* would be set aside.<sup>16</sup> In 1990, it was imported by the European Commission on Human Rights, inspired in that respect by Henry Schermers and H.-C. Krüger.<sup>17</sup> This doctrine benefits Union law ; more precisely, it benefits the EU Member States, as States parties to the European Convention on Human Rights, when they implement Union law in the absence of any margin of appreciation. By contrast, it does not benefit States parties to the Convention, even where they have organized a system of protection of fundamental rights in their internal legal orders which may be considered “equivalent”, both substantively and procedurally, to that provided by the European Convention on Human Rights (for instance, where their national courts apply directly the Convention and take into account the interpretation given to the Convention by the European Court of Human Rights, and where there exists a constitutional court which can annul or set aside national legislation conflicting with the requirements of the Convention).

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<sup>14</sup> Section 9 of the EPRA 2003 provides that Gibraltar is to be combined with an existing electoral region in England and Wales to form a new electoral region. In accordance with that provision, the United Kingdom authorities combined Gibraltar with the South West region of England by the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004.

<sup>15</sup> See the Appendix on the implementation of the *Matthews* judgment.

<sup>16</sup> See BVerfG, judgment of 22 October 1986, 2 BvR 197/83, 73 BVerfGE 339 [1987] 3 CMLR 225 (‘Solange II’ judgment); confirmed in the ‘Maastricht’ judgment delivered on 12 October 1993, 2 BvR 2134/92 and 2159/92, 89 BVerfGE [1993] 1 CMLR 57; and, now, BVerfG, 2 BvL 1/97 (judgment of 6 June 2000 (‘Bananas’)), available on [http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607\\_2bv1000197en.html](http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607_2bv1000197en.html)

<sup>17</sup> European Commission of Human Rights, *M. & Co v. Germany*, Appl. no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138; and *Heinz v. the Contracting Parties also parties to the European Patent Convention* (Appl. no. 21090/92, Commission decision of 10 January 1994, DR 76-A, p. 125).

This doctrine of ‘equivalent protection’ has been initially devised in order to facilitate the participation of the States parties to the Convention in the European Communities / Union, a supranational organisation to which they have agreed to cede certain powers in a number of fields which may affect fundamental rights. In the event of the Union acceding to the Convention, there are three possible scenarios. A *first scenario* is that this doctrine of ‘equivalent protection’ will expand further, to any situations where, at national level, such ‘equivalent’ protection is provided. This ‘contamination’ of the doctrine would clearly manifest the principle of subsidiarity in the system of the European Convention on Human Rights – i.e., the principle according to which the protection of the rights and freedoms of the Convention must primarily take place at national level, the intervention of the European Court of Human Rights being only justified where those internal mechanisms have failed to prevent violations from occurring or, if they do occur, from being remedied. Some might see this as a welcome development, in a context where the European Court of Human Rights manifestly cannot manage its increasing case-load, and where even the solutions offered by Protocol n°14 to the Convention will have a limited impact. A *second scenario* is that, instead, the doctrine of ‘equivalent protection’ will be abandoned. In a situation such as that presented in *Matthews* or *Bosphorus Hava*, it will be the Union, not the Member State implementing Union under whose territorial jurisdiction the alleged violation has occurred, that will in fact have to respond, under the Convention, of the measures adopted. The European Union will be approached by the European Court of Human Rights as any other party to the Convention, the only difference residing in the need to take into account the division of competences between the Union and the Member States : there is no reason to apply a lower level of scrutiny to the acts adopted *by the Union* than to the acts adopted by any other Parties to the European Convention on Human Rights, since the sole purpose of the doctrine of ‘equivalent protection’ – requiring that a lower level of scrutiny be applied – is to facilitate the compliance *by States* with commitments they have made in the context of a supranational organisation such as the EC/EU, without setting aside their responsibilities under the Convention.<sup>18</sup> A *third scenario*, finally, is that nothing will change : the doctrine of ‘equivalent protection’ will continue to be relied upon by the European Court of Human Rights when examining the compatibility of measures adopted by the EU with the European Convention on Human Rights – whether these have their source in primary or secondary Union law –, but this doctrine will not be relied upon in other circumstances.

I believe that, while this third scenario is not implausible, it would be legally unjustified and politically inopportune. It would be legally unjustified, since, once the Union will have acceded to the Convention, the need to reconcile potentially conflicting international obligations of the EU Member States (as having to comply both with Union law and with their obligations under the Convention) will have disappeared ; in addition, while the doctrine may have been useful for evaluating the obligations of the *EU Member States* under the Convention, its rationale should not be extended to evaluating the obligations of *the Union itself*. The third scenario would also be politically inopportune. Since it would not align the status of the Union with that of the other parties to the Convention, it would be sending the wrong signal to the public opinion ; and it would only partly address the problems justifying the accession of the Union to the Convention in the first place. Therefore, if the reference to the ‘specific features’ of the Union in the Draft Reform Treaty is meant to preserve the doctrine of ‘equivalent protection’,<sup>19</sup> it should be challenged. This expression should only refer to the need to organize the

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<sup>18</sup> It is clear that this is the sole reason for the development by the European Court of Human Rights of the doctrine of ‘equivalent protection’. This is consistent with the approach of the Court, which is to read the requirements of the Convention within the broader framework of public international law, and to seek, to the fullest extent possible, to avoid placing States before conflicting international obligations (see for instance at para. 148 of the *Bosphorus Hava* judgment : ‘The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations (...). Such considerations are critical for a supranational organisation such as the EC. This Court has accordingly accepted that compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1 (...)’). Such a rationale disappears once the European Union itself will have become a Party to the Convention. No risk of the EU Member States being faced with conflicting international obligations will then exist, since Union law itself will have to comply with the Convention, as a matter of international law.

<sup>19</sup> There is no reason to presume that this is the intention of the drafters of the Draft Reform Treaty. A reference to the ‘specific features’ of the Union in the context of accession to the ECHR was already present in 2004, when the 2003-2004



processing of applications filed against the EU Member States and/or the European Union, in order to take into account the characteristics of the division of competences between them which, in accordance with the principle of autonomy of the Union legal order, should be a matter to be solved by Union law alone, under the supervision of the European Court of Justice (see hereunder, section V). It should not serve to otherwise preserve some form of ‘extra-conventionality’ of the Union.

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

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

I have noted that there are two risks present in the current situation, which constitute powerful arguments in favor of the accession of the Union to the European Convention on Human Rights. By contrast, I do not think that there exists a real risk of diverging interpretations of the requirements of the European Convention on Human Rights in the current situation. The European Court of Justice applies the Convention with the interpretation given to that instrument by the European Court of Human Rights : its record in this respect has been generally excellent, and comparable to the best national constitutional or supreme courts of the Contracting Parties to the Convention. Of course, in situations whig the European Court of Justice has decided a case raising an issue under the Convention in the absence of a case-law of the European Court of Human Rights, it may be difficult for the European Court of Justice – like for any national constitutional court placed in a similar situation – to anticipate what the attitude of the European Court of Human Rights might be. But, if it is suspected that the European Court of Justice has erred in applying the Convention to the situation it is confronted with, it remains possible for the victim of the alleged violation to seek to engage the responsibility of the EU Member State under whose jurisdiction she is placed, by filing an application against that State (or indeed, against the 27 EU Member States collectively) before the European Court of Human Rights, as Ms Matthews chose to do following the 1994 elections of the European Parliament.

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

It is also appropriate that the memorandum underlines the complementarity between the incorporation of the EU Charter of Fundamental Rights in the EU Treaties and the accession of the Union to the ECHR. As stated by the report on the situation of fundamental rights in the Union in 2004 prepared for the EU Network of independent experts on fundamental rights,<sup>20</sup> an analogy can be made with the inclusion in the Member States’ constitutions of a more or less extensive range of fundamental rights, which does not prevent those States from acceding to the European Convention on Human Rights or other international instruments for the protection of human rights: likewise, the incorporation of the Charter of Fundamental Rights in the European Constitution does not invalidate the accession of the Union to the European Convention on Human Rights or deprive it of its utility. And just as it is all the easier for the States parties to the European Convention on Human Rights to comply with the obligations of that Convention since their internal constitutional law ensures effective protection of fundamental rights, so it will be all the easier for the Union to meet its obligations under the European Convention on Human Rights since it will strengthened internally the protection of those rights through the incorporation of the Charter of Fundamental Rights in the EU Treaties, by direct

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Intergovernmental Conference agreed to attribute to the Union a competence to accede to the ECHR. This was thus before the European Court of Human Rights adopted its ‘equivalent protection’ doctrine in the *Bosphorus Hava* judgment of 30 June 2005.

<sup>20</sup> All the opinions and reports of the EU Network of Independent Experts on Fundamental Rights are available on: [http://www.europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm](http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm)

incorporation or by reference. For the States as well as for the Union, the undertaking to comply with an international instrument for the protection of human rights does not make it unnecessary to improve this protection in the internal order. On the contrary, such an undertaking constitutes an encouragement to pursue along the lines of such an improvement.

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

### **V.1. The question of the autonomy of the EU legal order**

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

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (...) provided for in Article [I-9(2)] of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

By mentioning the need to “preserve the specific characteristics of the Union and Union law”, this provision refers to the respect due to the principle of autonomy of Union law. Consequently, when an individual application is filed in accordance with Article 34 of the European Convention on Human Rights against the Union or a Member State, the Party concerned must be identified in accordance with the arrangements defined in Union law, under the ultimate control of the Court of Justice.<sup>21</sup>

On this point, para. 12 of the memorandum may create more confusion than it brings clarity. The paragraph discusses together, as if they were somehow linked to one another, the question of the autonomy of the EU legal order, and the question of whether accession of the EU to the ECHR will result in one Court being ‘superior’ to the other. But these questions are distinct and should be kept so. The ‘autonomy’ referred to does not mean that there are limits to which form of external supervision the EU may submit to. Rather, this principle is derived from the rule according to which the European Court of Justice ensures observance of the law in the interpretation and application of Union law<sup>22</sup> as well as from the rule according to which the Member States undertake not to submit a disagreement on the interpretation or application of the EU Treaties to any other mode of settlement than those provided for by the EU Treaties<sup>23</sup>. The European Court of Justice saw in those provisions the expression of a general principle, according to which the Court itself must remain the ultimate interpreter of the law of the Union, and more particularly the rules in the EU Treaties establishing the division of competences between the Union and its Member States. The principle of autonomy of the Union’s legal order consequently rules out that the Court of Justice can be bound by the interpretation which another court of law may give of Union law. Situated according to Opinion 1/91 of 14 December 1991 “at the foundations of the Community”, this principle thus requires that questions of interpretation and application of Union law cannot be settled according to procedures outside the European Union, but only according to the rules of settlement which the Union itself has instituted<sup>24</sup>. Nevertheless, this principle does not exclude all forms of international commitment of the European

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<sup>21</sup> See already Article 1 of the Protocol (no. 32) relating to Article I-9(2) of the Constitution on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>22</sup> Article 220 EC (former article 164 of the EC Treaty); also intended to be reproduced in the Treaty establishing a Constitution for Europe (Article I-29(1), par. 1).

<sup>23</sup> Article 292 EC (former article 219 of the EC Treaty); also intended to be reproduced in the Treaty establishing a Constitution for Europe (Article III-375(2)).

<sup>24</sup> See Opinion 1/91 of 14 December 1991, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079 (“First EEA opinion”); Opinion 1/92 of 10 April 1992, [1992] ECR I-2821 (“Second EEA opinion”).

Union that are placed under the control of an international court outside the Community's legal order.<sup>25</sup>

In para. 13, the memorandum proposes that 'an option to avert possible contradictions between the case law of the two courts might consist of inserting an explicit provision into the ECJ and Court of First Instance (CFI) rules of procedure, similar to Article 6 of the European Economic Agreement, which could stipulate that EC/EU law should "without prejudice to future developments [...] be interpreted in conformity with the relevant rulings" of the EctHR'. This proposal should not be retained. Its immediate effect would be to create the suspicion that the autonomy of the EU legal order would be threatened by accession, thus further confusing the issue of the requirements linked to the principle of autonomy. Article 6 of the Agreement on the Economic Economic Area, it should be emphasized, did not state that the European Court of Justice would be bound by the interpretation given to EU law by another judicial body.<sup>26</sup> Should this have been the case, it would probably not have been compatible with the principle of autonomy as explicited by the European Court of Justice in the two opinions it delivered on the EEA Agreement. After accession, the European Convention on Human Rights will be part of EU law, and, both as a result of this and because this is prescribed by Article 52(3) of the Charter, the European Court of Justice will apply the Convention taking into account the case-law of the European Court of Human Rights.<sup>27</sup> This is already its current practice. No supplementary provision, in the rules of procedure of the Union jurisdictions or elsewhere, are required for this to continue. It is, of course, up to Union law, to decide how – according to which horizontal division of tasks between the institutions and vertical division of competences between the EU Member States and the Union – the obligations resulting from the accession of the Union to the ECHR should be implemented in the EU legal order. It may not be appropriate for the Parliamentary Assembly of the Council of Europe to prejudge the measures which shall be taken, within the EU legal order, for that purpose. The clause proposed, in addition, would have the unfortunate consequence of suggesting that the ECJ would in some way be subordinated to the European Court of Human Rights, which it is not currently and which it will not be even after accession.

On the other hand, it would perhaps be desirable for the memorandum to address the question of whether the imposition by the European Convention on Human Rights of positive obligations on the Parties may affect the neutrality of the accession of the European Union to the ECHR on the division of competences between the Union and the Member States.<sup>28</sup> The report on the situation of fundamental rights in the Union in 2004 prepared for the EU Network of independent experts on fundamental rights states the following on this point :

... the Union's accession to the European Convention on Human Rights will not lead to any changes in the division of competences between the Union and the Member States<sup>29</sup>. This

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<sup>25</sup> Opinion 1/91, par. 40 ("The Community's competence in the area of international relations and its authority to enter into international agreements necessarily entails the possibility of submitting to the decisions of a court of law that has been set up or designated by virtue of such agreements for the interpretation and application of their provisions").

<sup>26</sup> See Final Act containing the Agreement on the European Economic Area, OJ L 1 of 3.1.1994, p. 3. Article 6 of the said Agreement provides : 'Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement'.

<sup>27</sup> According to this provision, "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". The reference to the ECHR for the interpretation of the corresponding clauses of the EU Charter of Fundamental Rights also should be read as referring to the case-law of the European Court of Human Rights.

<sup>28</sup> Although the notion of positive obligations, used in a broader meaning, pre-dated this judgment, the leading cases in which the Court affirmed that the ECHR may require positive measures to be taken, even in the sphere of relations between individuals, are the judgments delivered in the cases of *Young, James and Webster v. the United Kingdom* (judgment of 13 August 1981, § 49), and of *X and Y v. the Netherlands* (judgment of 26 March 1985, § 23).

<sup>29</sup> See Article 2 of the Protocol (no. 32) concerning Article I-9(2) of the Constitution on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

division of competences will continue to be governed by European Union law only. It is not up to the European Court of Human Rights, which is the guardian of the European Convention on Human Rights, to rule on this. When the European Court of Human Rights, having received an application claiming a violation of the Convention, establishes the existence of such a violation, it will be up to the Union and the Member States, under the supervision of the Court of Justice, to determine which measures need to be adopted in order to put an end to the violation that has been established, and who – the Union or the Member States – should take action to this effect. Doubts have been expressed about the neutrality of the accession of the Union to the European Convention on Human Rights with respect to the existing division of competences, bearing in mind in particular that the European Court of Human Rights has not hesitated to impose on the contracting Parties the observance not only of obligations of abstention, but also of so-called “positive” obligations, consisting in the obligation to act by adopting certain measures, notably of a legislative nature. In fact, the Union will only be obliged to discharge such “positive” obligations insofar as it has the necessary competences. It is only in the areas where the Member States have conferred competences upon it that, in certain cases, it may be obliged to exercise them in order to ensure an effective protection of the rights and freedoms enshrined in the European Convention on Human Rights. Precisely as the Charter of Fundamental Rights of the Union “does not establish any new power or task for the Union, or modify powers or tasks defined in the other parts of the Constitution” (Article 51(2) of the Charter), so the undertaking by the Union to observe the European Convention on Human Rights does not create any new competences or tasks for it, nor will it affect the existing division of competences between the Union and the Member States.

This position is also that of the Working Group II ‘Incorporation of the Charter/Accession to the ECHR’ of the European Convention on 2002-2003.<sup>30</sup> Of course, in order to alleviate any fears that the doctrine of positive obligations would result in an extension of the competences of the Union beyond the principle of attribution (i.e., beyond the competences already attributed to the Union by the Member States), certain safeguards can be imagined. The most important of these is to provide that in all cases where the application is filed against an EU Member State or/and against the Union, the Union or (when the application is filed against the Union) any EU Member State should appear as co-defendant before the European Court of Human Rights and they would be jointly responsible for the implementation of any judgment finding a violation. This mechanism would also ensure that the principle of autonomy of the EU legal order is preserved, since the determination of which entity is responsible for the implementation of the judgment will be left to be decided according to procedures internal to the EU legal order itself, under the ultimate supervision of the European Court of Justice.

## **V.2. The status of the ECHR in EU law following accession**

The memorandum, perhaps wisely, is silent about the status which will be recognized to the European Convention on Human Rights in Union law following accession. This may be adequate, since this is a question for Union law to decide upon. However, on the other hand, in order to avoid certain mistaken assumptions about what would follow, for both the European Union and its Member States, from the Union acceding to the ECHR, certain clarifications could be brought.<sup>31</sup> According to the case law of the European Court of Justice, the provisions of international agreements concluded by the Union and the acts adopted by the organs set up under such agreements ‘from the time of their entry into force form an integral part of the Community legal order’.<sup>32</sup> The result is that the legislation of the Union, like the national laws of the Member States, must take into account the provisions of such agreements,

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<sup>30</sup> See the Final Report of Working group II, CONV 354/02, 22 October 2002, pp. 13-14.

<sup>31</sup> See, for a further elaboration on this argument, O. De Schutter, ‘Anchoring the European Union to the European Social Charter : The Case for Accession’, in G. de Búrca and B. de Witte (eds), *Social Rights in Europe*, Oxford Univ. Press, 2005, pp. 111-152

<sup>32</sup> *Opinion 1/91*, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079, at para. 37.

the European Court of Justice having the jurisdiction to ensure that they are respected.<sup>33</sup> The manner in which the national legal order of each Member State defines its relationships with public international law is in this respect immaterial: uniform application of the agreement throughout the Union rules out the ability of each Member State to view the effects of an international agreement in terms of its own national law. The Court of Justice indicated in the *Kupferberg* judgment of 26 October 1982 that this was the result of the Community nature of the provisions contained in an international agreement concluded by the Community, which, from the time of its entry into force, becomes part of Community law. The uniform application throughout the Community of the provisions of such an international agreement exclude that their effects can be made to vary according to whether their application is a matter, in practice, for the Community institutions or for the Member States, and, in the latter case, according to the attitude of each State towards the effects recognized to international agreements.<sup>34</sup> In order for an international agreement concluded by the Union to produce direct effects – giving litigants subjective rights which they can invoke before their national authorities or before a Community Court –, ‘the spirit, the economy and the terms’ of the agreement must be examined.<sup>35</sup> The European Convention on Human Rights will be recognized this effect in EU Law.

### V.3. The question of the external competences of the Union

In para. 17, the memorandum states the following :

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

It is a matter of political judgment whether or not it is opportune for the Parliamentary Assembly of the Council of Europe to take a position about what constitutes, in the final instance, a question of interpretation of Union law. However, if this argument is indeed put forward, perhaps it could be made more concrete, by referring to the signature of Protocol n°14 amending the European Convention on Human Rights, which provides that the Union can accede to this instrument<sup>36</sup>. Although Protocol no. 14 still is not in force and although its significance with regards to the accession of the Union to the European Convention on Human Rights is political rather than legal, since a subsequent modification of the European Convention on Human Rights defining the practical details of the Union’s accession to this instrument will in any case be required,<sup>37</sup> the agreement on the text of this Protocol demonstrates a strong political consensus, within the Member States of the Council of Europe, including all the EU Member States, to the accession of the Union to the Convention. This background may indeed influence the interpretation of the external competences of the Union by the European Court of Justice, if and when it will be asked to deliver an opinion on this question.<sup>38</sup> Emphasizing the significance, at political level, of the adoption of Protocol n°14 to the ECHR, may be more advisable than to propose an interpretation of Union law.

At a more fundamental level, I have taken the view elsewhere that the adequacy of the classical case law of the European Court of Justice on the extent of the Community’s external powers would deserve

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<sup>33</sup> On this point see in particular K. Lenaerts and E. De Smijter, ‘Some Reflections on the Status of International Agreements in the Community Legal Order’, in G.C. Rodriguez Iglesias et al., *Mélanges en hommage à Fernand Schockweiler* (1999), at 347.

<sup>34</sup> Case 104/81 [1982] ECR 3641, at para. 14.

<sup>35</sup> See Case C-280/93, *Germany v Council* [1994] ECR I-3641, at point 14.

<sup>36</sup> Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Article 17 (amending the existing Article 59 ECHR).

<sup>37</sup> Explanatory Memorandum to Protocol no. 14, at para. 101-102.

<sup>38</sup> The European Court of Justice shall not necessarily be requested to deliver an opinion on this issue. This is a mere possibility, not an obligation, prior to the conclusion of an international agreement by the European Community (or, following the adopting of the Reform Treaty, the Union). The political consensus in favor of accession, within the 27 EU Member States, also leads one to expect that, in fact, no request shall be made to the Court for an opinion on this question.

to be challenged, where the question of accession to an international instrument protecting human rights is raised.<sup>39</sup> By acceding to such instruments protecting human rights the States parties undertake to respect certain minimum standards for the benefit of the people under their jurisdiction, which implies in the first place that they will not adopt any measures which violate these standards. In so far as the undertaking is purely negative (formulated as an obligation to abstain from), it is irrelevant whether or not the parties have the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures – to fulfil positive obligations (to act) – that the question of competences may play a role. The accession of the Union to international instruments adopted in the field of human rights therefore does not necessarily have to have an impact on the extent of its competences. Quite to the contrary : such accession must in principle be considered neutral from the point of view of the division of competences between the Union and the Member States.<sup>40</sup> It is anticipated, in fact, that a specific clause will recall this neutrality, both in the protocol to the ECHR providing for the accession of the EU or in the accession treaty, and in the EU Treaty as revised by the Reform Treaty.<sup>41</sup> This, however, results from the very principle of attributed competences, according to which the Union cannot exercise competences which it has not been attributed by the Member States, even for the sake of better complying with obligations the Union has contracted on the international plane.

## VI. Other Council of Europe instruments

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

...the Union can accede to other international instruments for the protection of human rights<sup>42</sup>. Such accession may be considered where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act, or is likely to affect an internal act of the Union<sup>43</sup>. For example, the Union may accede to international conventions providing

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<sup>39</sup> See, for a further elaboration on this argument, O. De Schutter, 'Anchoring the European Union to the European Social Charter : The Case for Accession', in G. de Búrca and B. de Witte (eds), *Social Rights in Europe*, Oxford Univ. Press, 2005, pp. 111-152.

<sup>40</sup> *Mutatis mutandis*, Art. 28 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, adopted by the UN Gen. Ass. On 16 Dec. 1966 (Res. 2200 A (XXI)) states that ' [t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions'. This provision, however, cannot be construed as having the effect of investing the federative entities within each state with competences which those entities are denied under the constitutional organization of their state.

<sup>41</sup> See Article 2 of Protocol (n°5) to the Reform Treaty, first sentence : 'The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions'.

<sup>42</sup> See in this respect the Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), allowing the European Communities to accede, adopted by the Committee of Ministers of the Council of Europe at its 675<sup>th</sup> meeting of 15 June 1999.

<sup>43</sup> The general rule is that provided by Article III-323 § 1 of the Constitution : « The Union may conclude an agreement with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. ». See also Art. I-13 of the Constitution, which defines areas of exclusive competence of the Union, and provides in § 2 that « The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope ». On this last hypothesis, see the Opinion of the Council Legal Service of 12 February 2004, reacting to the recommendation of the Commission to the Council asking to be authorized to participate in the negotiations for the Convention on Promotion and Protection of the Rights and Dignity of Persons with Disabilities (Communication of the Commission to the Council and the European Parliament, "Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities", COM(2003) 16 final, of 24.1.2003). The Legal Service of the Council concludes in that contribution that, to the extent that certain rules being negotiated within the United Nations Convention may affect, or even alter the scope of, the Community

for the elimination of racial discrimination (Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>44</sup>), discrimination against women (United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>45</sup>), promoting and protecting the rights of persons with disabilities or guaranteeing the status of refugees<sup>46</sup>, insofar as it has already adopted important measures in those areas within the Union. Similarly, the importance of European secondary law in the areas covered by the European Social Charter concluded in Turin in 1961 and the revised European Social Charter of 1996<sup>47</sup> could justify the accession of the Union to the latter instrument. This is in keeping with a development which not only acknowledges that the Union is a subject in international law, but also infers the international authority of the Union from the range of competences that have been conferred upon it by the Member States and which it has exercised.

After referring to the accession of the European Union to the ECHR, the Guidelines on the Relations between the Council of Europe and the European Union (Appendix 1 to the Action plan adopted by the Heads of State and Government of the Member States of the Council of Europe, meeting in Warsaw on 16 and 17 May 2005, CM(2005)80 final 17 May 2005), states that : ‘Taking into account the competences of the European Community, accession to other Council of Europe conventions and involvement of Council of Europe mechanisms should be considered on the basis of a detailed review’. The PACE might wish to reaffirm this as a mid-term goal.

## VII. Conclusion

In sum, my proposals are the following :

a) The memorandum should be amended to take into account the political agreement reached on the text of a Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community (Draft Reform Treaty). In particular :

- The memorandum could express its concern that, according to Art. 188n (8), al. 2 of the proposed Treaty on the Functioning of the European Union (TFUE), the conclusion of an agreement on the accession of the EU to the ECHR is treated as a constitutional question, requiring that each Member State ratifies the agreement prior to it entering into force

- The memorandum could confirm the view, which is that of the overwhelming majority of jurists, that the European Union in the present situation already has an international legal personality and the capacity to conclude international agreements.

- The memorandum could refer to the fact that, under the current EC/EU treaties, the legal protection of the individual may be insufficient, and his right to an effective remedy may not always be fully complied with, but welcome the fact that this situation will be significantly improved by the Treaty amending the Treaty on European Union and the Treaty establishing the European Community. It could remark in this respect that, while the improvement of the remedies available within the legal order of the European Union ensures that, in the vast majority of situations, any alleged violation of the ECHR rights will be addressed within the EU legal order and according to legal procedures established by the EU treaties themselves, there remains a distinct advantage in organizing an external judicial supervision of the compliance with human rights and fundamental freedoms.

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rules laid down in Council Directive 2000/78/EC or in Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23.11.1995, p. 31), only the Community can conclude on these issues, while the Member States remain competent to conclude on all those provisions in the Convention that are not covered by Community legislation.

<sup>44</sup> UN Gen. Ass. Res. 2106 A(XX) of 21 December 1965. All the 25 Member States of the EU have ratified this instrument.

<sup>45</sup> UN Gen. Ass. Res. 34/180 of 18 December 1979. All the 25 Member States of the EU have ratified this instrument.

<sup>46</sup> Geneva Convention on the status of refugees of 28 July 1951 and New York Protocol of 31 January 1967.

<sup>47</sup> ETS, n° 163.

b) The memorandum could strengthen its case in favor of accession of the European Union to the European Convention on Human Rights by mentioning the difficulties raised in the execution of the judgments of the European Court of Human Rights in cases involving Union law.

c) The memorandum could address more precisely the implications of the principle of autonomy of the European Union legal order. More precisely :

- The memorandum could express the view that the reference to the ‘specific features’ of the Union in the Draft Reform Treaty should not be interpreted to preserve the doctrine of ‘equivalent protection’, currently relied upon by the European Court of Human Rights when it examines the compatibility with the requirements of the Convention of measures adopted by the EU Member States when they implement Union law. This expression should only refer to the need to organize the processing of applications filed against the EU Member States and/or the European Union, in order to take into account the characteristics of the division of competences between them which, in accordance with the principle of autonomy of the Union legal order, should be a matter to be solved by Union law alone, under the supervision of the European Court of Justice. It should not serve to otherwise preserve some form of ‘extra-conventionality’ of the Union. Any attempt, in the negotiation of the accession treaty (or of a protocol to the European Convention on Human Rights providing for the accession of the EU), to restrict the degree of scrutiny which the European Court of Human Rights will be allowed to exercise on the European Union, should be firmly opposed.

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

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

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



## APPENDIX

### THE CONTENTIOUS IMPLEMENTATION OF THE *MATTHEWS* JUDGMENT

When the 2002 Council Decision was adopted, amending the 1976 Act (Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 283 of 21/10/2002, p. 1), the following declaration of the United Kingdom, reflecting a bilateral agreement concluded between that Member State and the Kingdom of Spain, was formally recorded in the minutes of the Council meeting of 18 February 2002:

‘Recalling Article 6(2) of the Treaty on European Union, which states that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law, the UK will ensure that the necessary changes are made to enable the Gibraltar electorate to vote in elections to the EP as part of and on the same terms as the electorate of an existing UK constituency, in order to ensure the fulfilment of the UK’s obligation to implement the judgment of the European Court of Human Rights in the case of *Matthews vs UK*, consistent with the law of the European Union.’

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

Spain then chose to file a direct action against the United Kingdom, alleging that the UK had violated its obligations under EC law by extending the right to vote to European elections to the residents of Gibraltar, who are not citizens of the United Kingdom. The European Court of Justice rejected this claim in a judgment of 12 September 2006 (Case C-145/04, *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland*). It took the view that ‘in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory’. As to the argument that the United Kingdom would be in breach of Annex I to the 1976 Act and of the Declaration of 18 February 2002, the European Court of Justice considered that, in the light of the judgment of the European Court of Human Rights in *Matthews v. the United Kingdom*, ‘the United Kingdom cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom’ (para. 95).