

THE ACCESSION OF THE EUROPEAN UNION/EUROPEAN COMMUNITY TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

**Comments by
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I. Introductory observations

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

2. The issue of accession of the European Union (EU)/ European Community (EC) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been discussed for almost thirty years, if we take the Memorandum of the European Commission of 1979 as a starting point.¹ This lapse of time may have enhanced and at the same time diminished its urgency. In my opinion, from a substantive and practical point of view, its urgency has been diminished, thanks to the way in which the Court of Justice of the European Communities (CJEC) has developed its case-law in the area of the protection of human rights,² and thanks to the gradual standard-setting of the EU/EC in the same area. On the other hand, from a dogmatic and formal point of view, the urgency has increased in view of the extension of the powers of the EU/EC in fields which traditionally belong to States, and in the exercise of which all member States of the EU would be submitted to the jurisdiction of the European Court of Human Rights (the ECtHR).

3. Although the proposals for accession from different sources³ have found broad support in governmental and non-governmental circles, the adoption of the Constitutional Treaty was the first occasion where the idea was supported unanimously by the Heads of State or Government of all member States. The change of attitude of the former opponents may be explained by the fact that their domestic authorities have also become accustomed to international human rights standards and international supervision; the ECHR has internal effect in their domestic legal orders and the jurisdiction of the ECtHR has become compulsory. If therefore alone, the moment seems more appropriate than ever for the (Parliamentary Assembly of the) Council of Europe to, on its part, revisit the issue and take the necessary initiatives.

¹ Accession of the Communities to the European Convention on Human Rights: Commission Memorandum, Bulletin of the European Communities, Supplement 2/79, COM (79) final.

² Where there is reference to the Court of Justice, the same applies to the Court of First Instance.

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

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

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

III. Principal point of view: international supervision

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

6. This holds, in particular, true for the EC/EU. On the one hand, it is an international organization with powers delegated to it by its member States, but with the sovereignty of the member States remaining the decisive factor ("*une succession fonctionnelle et limitée*"⁵), and with its own supervisory mechanism attuned to that special relationship. On the other hand, the institutions of the EC/EU exercise powers which are delegated to them with exclusion of the national authorities and which are comparable to certain powers traditionally exercised by the legislative, administrative and judicial authorities of the member States. Without such attribution of powers to the EU/EC, the exercise of these powers by the authorities of the member States would have been subject to review by the ECtHR for its conformity with the ECHR.⁶ In fact, accession to the ECHR, with compulsory jurisdiction of the ECtHR, was in recent years, and still is a condition for membership of the EC/EU.⁷ For its credibility as a defender of human rights the EU/EC has to be prepared to also submit its own legal order and legal action to external supervision.⁸ This would mark the recognition that also within the legal order of the EU/EC the interests of European integration are controlled and delimited by the effective protection of the fundamental human rights of the EU citizens, this "common code of fundamental values, in particular those laid down in the European Convention on Human Rights"⁹.

7. It is a general feature of the law of international organisations that these organizations and their organs are immune, not only from the jurisdiction of the courts of their member states, but also from judicial organs of other international organisations. As the Venice Commission observed in that respect in one of its previous opinions: "The purpose of this rule is to ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems".¹⁰ However, this rationale would seem less valid in the area of human rights, since human rights standards are not just part of the legal system in the framework of which they have been adopted but are of a general universal or regional nature, as the case may be. Consequently, the international bodies set up to supervise the implementation and interpretation of these standards may be imbedded in a particular organisation but must primarily be seen as the protectors of these universal/regional standards rather than as the supervisory bodies of those organisations

8. In the case of the EC/EU in relation to the ECHR and the ECtHR there is an even more significant specific feature. As said before, the EC/EU has been endowed with powers that were originally exercised by the member States and as such belonged to the area of the ECtHR's jurisdiction. By transferring more and more powers to the EC/EU, the exercise of which may interfere with the

⁴ See, e.g., the references in note 14 of Mrs Bemelmans' Introductory Memorandum. See also ECtHR 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, §§ 73-76.

⁵ P. Pescatore, "La Cour de Justice des Communautés européennes et la Convention européenne des Droits de l'Homme", in: F. Matscher & H. Petzold, *Protecting Human Rights: The European Dimension*, 1988, pp. 441-455 (450).

⁶ See H.C. Krüger & J. Polakiewicz, "Proposals for a Coherent Human Rights Protection System in Europe", 22 *HRLJ* 2001, pp. 1-13 at p. 4.

⁷ M. Novak, "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU", in: Ph. Alston (ed.), *The EU and Human Rights* 1999, pp. 687-698.

⁸ Thus already in 1979 the Commission in its Memorandum of 4 April 1979, Bulletin 1979, Supplement 2. See also the Commission's Memorandum of 19 November 1990, SEC(90) 2087 final, Annex II. And see P. Mahoney, "The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the perspective of the European Convention", *HRLJ* 2002, at p. 303.

⁹ Advocate General Francis Jacobs, Conclusions in *Konstantinidis*, Case C-168/91, [1993-3] *ECR*, §§ 45-46.

¹⁰ European Commission for Democracy through Law, Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, CDL-AD (2004)033, 11 October 2004, § 63.

member States' obligations under the ECHR, the member States have, in fact, also transferred part of their answerability under the ECHR to the EU/EC. However, the latter's answerability has not yet been materialized by its submission to the jurisdiction of the ECtHR. The result, therefore, is erosion of the jurisdiction of the ECtHR *ratione personae* as well as *ratione materiae*.¹¹ This lacuna will gradually be filled, to a large extent, by the CJEC's supervision of EU/EC acts for their conformity with fundamental-rights principles, but this will not necessarily lead to a result equal to supervision by the ECtHR.

9. This fact has not escaped the attention of the ECtHR. In a judgment of 1999, it adopted the position previously taken by the European Commission for Human Rights¹² that the member States cannot, by transferring powers to an international institution, evade their own responsibility under the ECHR and their answerability towards the ECtHR.¹³ The European Commission for Human Rights had put it in very clear terms as follows: "Under Article 1 of the Convention the member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations".¹⁴ And in a judgment of 1996 the ECtHR held that the fact that the applicable domestic legislation is based almost word for word on an EC directive, does not remove it from the ambit of the ECHR.¹⁵ For the scope of the ECtHR's review and the member State's responsibility under the ECHR to pertain, it appears to be decisive whether or not the member States exercised discretion¹⁶ and had freely accepted the international obligation concerned.¹⁷

IV. The Strasbourg attitude so far

10. The principle point of view set out under § 3 could have led the ECtHR, from the perspective of its own responsibilities and powers and in order to avoid a vacuum of international legal protection of the rights and liberties laid down in the ECHR, for the determination of its own jurisdiction to ignore the setting-up of the EU/EC with its supranational features (to "pierce the veil") and to attribute the act or omission challenged before it to all member States or one or more member States in particular (the so-called "substitution approach"). The party who brings the complaint might invite the ECtHR¹⁸ to do so by bringing the claim, in addition to or instead of the EU/EC, to any or all member States.

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

12. So far, "Strasbourg" has chosen not to follow that conflict-provoking and unsatisfactory path. In cases where the substance of the complaint basically also concerns the interpretation or application of Community Law, the ECtHR, without relinquishing jurisdiction, is prepared to refer to the judgment of the CJEC, as long as the procedure followed by that court offers substantive guarantees and a

¹¹ This was observed, for the first time, by the European Commission of Human Rights in its decision of 10 July 1978 in *Confédération Française Démocratique du Travail v. the European Communities, alternatively: their member States a) jointly and b) severally*, D&R 13, p. 231 at p. 240.

¹² Decision of 9 February 1990, *M. & Co. v. Federal Republic of Germany*, D&R 64, p. 138 at p. 145, with reference to a decision of 1958.

¹³ ECtHR 18 February 1999, *Waite and Kennedy v. Germany* (Grand Chamber), § 67. See also ECtHR 18 February 1999, *Matthews v. United Kingdom* (Grand Chamber), § 32: "Member States' responsibility therefore continues even after such a transfer".

¹⁴ *Supra* (note 12), at p. 144. The same view was adopted in ECtHR 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, § 29

¹⁵ Judgment of 15 November 1996, *Cantoni v. France*, § 30.

¹⁶ *Bosphorus* judgment, *supra* (note 4), § 157.

¹⁷ ECtHR 18 February 1999, *Matthews v. United Kingdom* (Grand Chamber), §§ 33 and 34; *Bosphorus* judgment, *supra* (note 4), § 157.

¹⁸ *Idem*, § 165. See also the joint concurring opinion of judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki.

controlling mechanism that are equivalent to the procedure provided by the ECHR.¹⁹ By "equivalent", the ECtHR means "comparable", since "any requirement that the organisation's protection be 'identical' could run counter to the interest of international cooperation pursued".²⁰ From the case-law of the CJEC and the references to human rights standards in the respective EU/EC treaties, the ECtHR has so far drawn the assumption – with the possibility of rebuttal in a specific case – "that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, 'equivalent' (...) to that of the Convention system".²¹

V. Specific identity of the EU

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

14. Through the case-law of the CoJCE and subsequent Declarations adopted by institutions of the EU/EC, the human rights standards laid down in the ECHR have been incorporated within the legal order of the EC/EU ("factual accession"). However, this does not necessarily mean that the institutions of the EC/EU will always apply these standards in the way they are interpreted and applied by the ECtHR. The latter's case-law is oriented towards States and their powers and (democratic) decision-making processes, and does not necessarily take into account (yet) the specific features of the EC/EU in such a way that the latter may be sufficiently guided by its interpretation and application of the rules laid down in the ECHR. As long as the human-rights standards to be applied by the CJEC are part of the EU/EC Treaty, the CJEC will be inclined to interpret them in the light of the purposes of European integration.²² After accession, the ECtHR would have direct jurisdiction over the EC/EU institutions, would be informed about the EU/EC perspective on behalf of the EU/EC institution involved in a particular case, and would thus be enabled to take the specific features of the EU/EC as an organisation and of EU/EC law into account (with a judge elected in relation to the EC/EU participating in the deliberations). This would enhance the uniform interpretation and application of the ECHR in relation to all actions of authorities *vis-à-vis* individuals within the European human rights space, taking into due account also the specificities of the EC/EU.

15. The above observation implies that accession would make it also more complicated for the ECtHR to develop its case-law in such a way that it would remain consistent but, at the same time, would enable the institutions of the EC/EU to be guided by it. This asks not only for accession but also for dialogue, and for full consideration of the EU/EC elements and interests in the ECtHR's deliberations. It may also revive the plea for introducing the possibility, especially for the CJEC, to ask the ECtHR for an advisory opinion.²³

16. A balance may be found by the ECtHR's preparedness, already indicated in its present case-law, to leave the EC/EU institutions, and in particular the CJEC, a very broad margin of discretion, but in a restrictively defined area of EU jurisdiction.²⁴ To what extent the ECtHR will be prepared to do so appears from its judgment in the *Bosphorus* Case. The Government had contended that the interference complained of was justified for the reasons set out by the CJEC, an assessment that the ECtHR in their opinion should decline to review "unless it is perverse, which they argue it clearly is not".²⁵ The ECtHR followed this reasoning by stating that "[i]f such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation".²⁶ But, again, such presumption may be rebutted; the "equivalent protection doctrine" functions as a kind of a "Solange doctrine".

¹⁹ *M. & Co* decision, *supra* (note 12), at p. 145. In its decision, however, the Commission incorrectly declared the application inadmissible *ratione materiae*.

²⁰ *Bosphorus* judgment, *supra* (note 4), § 155.

²¹ *Idem*, § 165. See also the admissibility decision of 10 October 2006, *Coopérative des Agriculteurs de Mayenne et la Coopérative Laitière Maine-Anjou v. France*.

²² See Article 31 of the Vienna Convention on the Law of Treaties.

²³ See Krüger & Polakiewicz, *supra* (note 6) at p. 10. See also F. Tulkens, "Towards a Greater Normative Coherence in Europe/The Implications of the Draft Charter of Fundamental Rights of the European Union", 21 *HRLJ* 2000, pp. 329-332 at pp. 331-332.

²⁴ See Article 51, paragraph 1, of the EU Charter of Fundamental Rights.

²⁵ Admissibility decision of 13 September 2001, *Merits*.

²⁶ *Bosphorus* judgment, *supra* (note 4), § 156. See, however, the joint concurring opinion.

17. The path followed by the ECtHR is in the interest of the administration of justice within a reasonable time and at the same time serves legal certainty. It means that, as a rule, the decisions by the CJEC about maintaining the ECHR within the EU/EC context will be endorsed by the ECtHR, provided that the CJEC has jurisdiction on the matter, and provided that the latter does not depart from well-established Strasbourg-case law and that its judgment does not concern an issue under the ECHR that has not yet been decided by the ECtHR.²⁷

18. For the same purposes of the reasonable-time requirement and legal certainty, it might be considered to include in the accession instrument a provision comparable to Article 43, paragraph 2, of the ECHR: if an application is brought before the ECtHR against an institution of the EU/EC, a panel will decide on whether the application will be accepted in the interest of legal protection and/or a uniform interpretation and application of the ECHR as a "constitutional instrument of European public order".²⁸ The "equivalent protection" criterion would thus function as an admissibility criterion, not as a jurisdiction condition. If the application is accepted by the panel, it will be dealt with by the Grand Chamber. This will keep the additional burden for the ECtHR as restricted as possible, while this process of co-operation would also avoid a "prestige battle" between the two judicial organs.²⁹

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

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

VI. Treaty basis for accession

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

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

VII. Concluding observations

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

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

²⁷ See the concurring opinion of Judge Ress in the same case, § 3.

²⁸ *Bosphorus* judgment, *supra* (note 4), § 156.

²⁹ See F. Tulkens, "Towards a greater normative coherence in Europe/The implications of the draft Charter of fundamental rights of the European Union", 21 *HRLJ* 2000, pp. 329-332 at p. 331; see also Mahoney, *supra* (note 8), at p. 303.

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

26. The EU/EC has to also adapt its own rules concerning the jurisdiction of the CJEC and concerning individual *locus standi*, to create the best possible conditions for an effective ensurance of respect for the ECHR within the EU/EC area of competence.³⁰

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

³⁰ On the many present restrictions, see Krüger & Polakiewicz, *supra* (note 6), *ibidem*.