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**The accession of the European Union to the ECHR:  
More than just a legal issue**

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# ***The accession of the European Union to the ECHR: more than just a legal issue\****

**José Martín y Pérez de Nanclares\*\***

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## I. General aspects: revisiting a slippery legal issue

Nowadays it is completely impossible to understand adequately the material scope of the protection of fundamental rights in a specific national legal system without placing it in the context of the international courts entrusted with protecting these rights. This phenomenon is not exclusive to Europe: the Inter-American Court of Human Rights is in fact a classic example which allows us to understand adequately the intense interaction existing in the field of human rights between national jurisdictions and international courts with jurisdiction in this area.<sup>1</sup> In any event, with respect to Europe, the European Court of Human Rights (ECtHR) has, without any doubt whatsoever, become what could well be defined as an international court of a *constitutional* nature;<sup>2</sup> as a specialist international court of a regional nature which, through external judicial scrutiny of human rights issues, sets the rules for other national courts (whether constitutional or ordinary) with jurisdiction in the area (appeals on constitutional grounds or ordinary jurisdiction).

However, at the same time the European continent has experienced an interesting phenomenon of legal convergence in human rights in another international process, in principle one which has no competence in this area. Thus, together with the process of the Council of Europe itself – based on the *cooperation* which commenced with the Statute of London of 1949 and which is exemplified by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (the ECHR), the parallel process of the construction of the European Union (the EU) has taken place, based on the model of *integration*. However, although in principle EU law does not concern human rights at all, as the Member States notably increased the degree of jurisdiction which they attributed to the Union through the successive reforms of the founding treaties (the Single European Act, Maastricht, Amsterdam, Nice etc) it became increasingly clear that it would be difficult for them to accept the consequences (both legal and political) of belonging to a supranational organization with such a degree of jurisdiction in matters connected to the traditional concept of sovereignty without the adequate protection of fundamental rights.

In fact, both processes, although very different in the way they are conceived and their methods of working, have found, through human rights, an interesting point of connection between their respective legal systems and even a progressive process of convergence. Until now this has been based not so much on specific legal texts but rather a sort of *legal dialogue*. In other words, there has been a productive judicial interaction between the ECtHR and the CJEU<sup>3</sup> which has paved the way to the Treaty of

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<sup>1</sup> A particularly useful general work to enable the reader to understand better the valuable work of this court is von BOGDANDI, A./FIX-FIERRO, H./MORALES ANTONIZZI, M./FERRER McGREGOR, E. (Eds.), *Construcción y papel de los derechos fundamentales – Hacia un Ius constitutionale commune en América Latina*, Mexico, 2011.

<sup>2</sup> See, for example, COHEN-JONATHAN, G.: ‘La fonction quasi constitutionnelle de la Cour européenne des droits de l’homme’, in *Renouveau droit constitutionnel-Mélanges en l’honneur de L. Favoreu*, 2007, pp. 1127-1153; WALTER, Ch.: ‘Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1999, p. 961.

<sup>3</sup> The study of this interaction goes beyond the remit of this paper, having been specifically dealt with in our previous work ‘Viejos y nuevos problemas en el espacio europeo de los derechos humanos: Reflexiones a propósito de la necesaria cooperación judicial efectiva entre el TJUE y el TEDH’, in *Estudios de Derecho Internacional y Derecho Europeo en homenaje al profesor Manuel Pérez González*, Tirant lo Blanch, Valencia, 2012, vol I, pp. 791-820, particularly pp. 810-818.

Lisbon finally laying down a new *ad hoc* legal framework which would give legal form to this convergence through an international treaty. Specifically, this international treaty will allow the EU to accede to the ECHR, thus bringing to an end a journey which has lasted almost four decades.

However, accession will not be as straightforward as one may expect on the basis of the wording of Article 6 of the European Union Treaty (the 'EU Treaty'). In fact, we should not even raise our hopes unduly with this new approach: it is simply another step in the progressive process of jurisdictional convergence which, moreover, will probably not end as quickly as might have been thought likely at an earlier stage. The following sections will therefore examine the extent to which the new legal framework arising from the Treaty of Lisbon is genuinely novel (II), while sketching out some of the main legal obstacles being encountered in the ongoing accession negotiations (III), and pointing out some of the main material issues which will have to be resolved one way or another in the legal accession instrument (IV) and in the EU itself internally (V). Having done this, we will be in a position to reach some brief final conclusions on this subject (VI).

## II. The Treaty of Lisbon: a new legal framework whose 'newness' is relative

The Treaty of Lisbon was, without doubt, a significant change. It introduced a new feature which received a great deal of attention from academics: a new provision on fundamental rights (Article 6 of the EU Treaty)<sup>4</sup> which, while making the Charter of Fundamental Rights of the European Union legally binding (Article 6(1)), for the first time also attributed to the Union competence to adhere to the ECHR (Article 6(2)). This *ad hoc* attribution of competences is of undoubted political and legal value. Thus, *inter alia*, it brings to an end a debate concerning accession<sup>5</sup> which started in 1979 with the Memorandum which the Commission addressed to the Council in relation to this question<sup>6</sup> and which, since the declaration of the Court of Justice in this regard, required a reform of the treaties in order to take shape.<sup>7</sup> It also amounts to an important step forward in the progressive process of jurisdictional development and the construction of a separate legal order with specific features which increasingly distance it from a purely international law paradigm. In this regard, the introduction of external judicial supervision in relation to fundamental rights over the action taken by the EU and by

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<sup>4</sup> See, for example, DOUGLAS-SCOTT, S.: 'The European Union and Human Rights after the Treaty of Lisbon', *Human Rights Law Review* 2011, pp. 645-682; LIÑÁN NOGUERAS, D.J. and MARTÍN RODRÍGUEZ, P.J.: 'Reflexiones sobre los derechos fundamentales de la Unión Europea a la luz del Tratado de Lisboa', in *Derecho Internacional y Comunitario ante los retos de nuestro tiempo. Homenaje a la profesora Victoria Abellán Honrubia*, Marcial Pons, Madrid, 2009, vol. 2, p. 1053; WEISS, W.: 'Human Rights in the EU: Rethinking the Role of the European Convention of Human Rights after Lisbon'. *European Constitutional Law Review* 2011, p. 6495.

<sup>5</sup> See COHEN-JONATHAN, G.: 'Le problème de l'adhésion des Communautés européennes à la Convention européenne des droits de l'homme', in *Mélanges en l'honneur de P. H. Teitgen*, Pedonne, Paris, 1984, p. 84; GOLSONG, H.: 'Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften', *Grundrechte-Zeitschrift* 1978, p. 346; JACQUÉ, P.: 'The Convention and the European Communities', in MACDONALD, MATSCHER, PETZOLD (Eds.), *The European System for the Protection of Human Rights*, Nijhoff, 1993, p. 889; SCHERMERS, H. G.: 'The European Communities bound by Fundamental Human Rights', *Common Market Law Review* 1990, p. 248.

<sup>6</sup> COM (79) 210 final.

<sup>7</sup> CJEU judgment of 28 March 1996 (2/94, ECR., p. 1759).

Member States when they apply EU law is an achievement which should not be dismissed lightly.

In short, accession to the Convention did not, in the first place, modify at all either the autonomy of EU law or the CJEU's monopoly on scrutinising the validity of the acts of the Union; all that it did was introduce additional external monitoring in relation to fundamental rights, as occurs with national Supreme Courts. Secondly, neither does it result in any modification of the interesting case law of the CJEU, built up in the 1970s as a consequence of the *judicial dialogue* which took place with the national constitutional courts in the light of the *Solange* case law. Thus, fully in keeping with the abovementioned case law of the CJEU,<sup>8</sup> Article 6(3) of the EU Treaty expressly provides that both the fundamental rights guaranteed by the ECHR and those which are the result of Member States' common constitutional traditions 'shall constitute general principles of the Union's law'. Thirdly, the EU Charter of Fundamental Rights declares, in line with the well-known CJEU judgment in *Internationale Handelsgesellschaft*,<sup>9</sup> that '[i]nsofar 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' (Article 52.3). The fourth and final point is that the case law of the CJEU in this subject area has been highly consistent since the Treaty of Lisbon came into force.<sup>10</sup>

In short, there is a new legal framework whose new features include the legally binding nature of the Charter and external judicial scrutiny by the ECtHR, but which largely contains the previous case law. However, the introduction of this external judicial scrutiny makes it necessary to make more than a few legal adjustments, both within the scope of the ECHR and within the EU itself. Accordingly, to make possible the adhesion of the EU to the ECHR, the first thing that is required is to enter into the relevant Accession Agreement between the 47 states who are signatories of the ECHR and the EU, whose negotiation is proving to be far from easy with respect to either of its two facets.

### **III. The accession negotiations: a process with two facets**

#### ***1. The negotiation of the Accession Agreement***

The negotiations to reach the relevant Accession Agreement were initially seen as a short process which would begin in May 2010 and conclude, at the latest, in June 2011. Thus, on 21 May 2010 the Committee of Ministers of the Council of Europe adopted a mandate in favour of the Steering Committee for Human Rights (CDDH) so that, in cooperation with the representative to be appointed by the EU, 'no later than 30 June 2011' the relevant legal instrument would be drafted 'setting out the modalities of accession of the European Union to the European Convention on Human Rights,

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<sup>8</sup> CJEU judgment of 14 May 1974, *Nold* (4/73, ECR., p. 491); Judgment of 28 October 1975, *Rutili* (36/75, ECR., p. 1219).

<sup>9</sup> CJEU judgment of 17 December 1970 *Internationale Handelsgesellschaft* (11/70, ECR., p. 1125).

<sup>10</sup> See, for example, judgment of 19 January 2010, *Seda Küçükdeveci* (C-55/07, pending publication in ECR); judgment of 9 March 2010, *Commission v. Germany* (C-518/07, pending publication in the ECR); judgment of 14 September 2010, *Akzo Nobel Chemicals v. Commission* (C-550/07P, pending publication in the ECR).

including its participation in the Convention system; and, in this context, to examine any related issue'.<sup>11</sup> In turn, the CDDH entrusted an informal group of experts with the task of preparing this legal instrument.<sup>12</sup> This group was composed of fourteen members, seven of whom belonged to EU Member States and the other seven to non-EU Member States (also known as the 7+7 group).<sup>13</sup> In addition, on 4 June 2010 the Council adopted a decision entrusting to the Commission the negotiation of an accession agreement.<sup>14</sup>

Thus, between July 2010 and June 2011 eight meetings of the informal working group and the Commission were held, after which the draft legal instruments which had been requested were presented. Specifically, on 11 July 2011 the following were presented: a draft Agreement on the accession of the EU to the ECHR, draft rules to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments of the ECtHR and of the terms of friendly settlements, as well as the Explanatory Report of the draft agreement.<sup>15</sup> With the presentation of these projects of the informal working group, the task entrusted to them was considered closed, and from the declarations of the national delegations of the non-EU Member States, it appeared that they considered 'the draft instruments, in their current drafting, as an acceptable and balanced compromise.'<sup>16</sup> In fact, the scope of the technical-legal problems was quite well defined. In this regard, the entry into force of Protocol 14 in June 2010 had notably aided the negotiations, having added to article 59 of the ECHR a new paragraph which made possible the accession of the EU to the Convention. And despite the fact that accession would clearly require additional amendments to the ECHR, back in June 2002 the CDDH had prepared an interesting study which defined fairly precisely the legal and technical issues which the Council of Europe would have to deal with in the event that the EU acceded to the ECHR.<sup>17</sup>

## ***2. The negotiation of the internal Rules of the EU***

However, the text which should have been approved in October 2011 encountered significant obstacles within the EU itself, some after the above-mentioned proposal which was the result of the negotiations between the informal group and the Commission and others which had been developing in parallel to these negotiations. With respect to the former, France and the UK objected to the version which the Commission had sent to them in June 2011, declaring that the wording of the text presented to them could not be accepted. And with respect to the latter, it should also

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<sup>11</sup> CM/Del/Dec(2010)1085F/28 May 2010.

<sup>12</sup> Approved in the CDDH meeting which took place from 15-18 June 2010.

<sup>13</sup> A representative of the CAHDI (Committee of legal advisers on public law of the member States of the Council of Europe, plus the USA, Canada and Japan) and the Secretary of the ECtHR also attended meetings of this informal group of experts as observers.

<sup>14</sup> See Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the CEDH, Doc 10817/10EXT2 of 27 September 2010.

<sup>15</sup> These documents may be consulted, for example, at CDDH-EU (2011) 16 - 19 July 2011 or CDDH (2011) 009 of 14 October 2011.

<sup>16</sup> At least this is what can be deduced from the document published following the CDDH session held between 12 - 14 October; CDDH (2011) 009, *cit.*, para. 9.

<sup>17</sup> CDDH (2002) 010 Addendum 2.

be noted that from September 2010 on, meaningful discussions had taken place in the meetings of the working group of the Council entrusted with the issue (the FREMP) regarding the need to prepare internal rules of action in order to look within the Union for the solution to certain (apparently) technical issues which would be caused by the accession of the Union to the ECHR. In this regard, the UK (initially also supported by Latvia) was the most active EU Member State. As a result of the meetings of the COREPER of 16 April 2012 and the following JAI Council, it is fair to say that a situation close to deadlock was reached. The UK intended (and was able) to make support for the accession instrument subject to a prior agreement being reached on these internal rules.

Given the above, from this moment on the negotiations took on a dual nature which inevitably joined together the external and internal dimensions of the negotiation, i.e. the negotiation of legal instruments to obtain the accession of the EU to the ECHR and the internal negotiation within the EU of the internal rules to regulate the internal action of the Union after accession. Clearly, this setback has introduced an additional element of distortion into the negotiations and has in turn given rise to critical reactions from ECHR signatory states which are not members of the EU in relation to specific matters which suggest that negotiations are likely to be complex.

In view of the deadlock situation existing in April 2012, on 25 May 2012 the EU Presidency published a document in which it invited Member States to a new debate which would make it possible to agree internal rules to resolve all of the questions arising in relation to accession to the ECHR. However, this document was not only an invitation to take part in a debate; it already included – presumably without counting on the Commission – a draft of possible internal rules, which in successive meetings of 11 June and 16 July 2012 have become more clearly defined.

In this complicated context, the first meeting concerning the negotiations per se took place on 21 June 2012,<sup>18</sup> the next ones are scheduled for September and November 2012 and everything suggests that further meetings will prove necessary. And, obviously, this situation makes it necessary to differentiate clearly between the legal accession instrument per se, which we will examine in the next section (IV), and the internal rules which require separate examination (V).

#### **IV. The draft Accession Agreement: certain issues**

The very different issues that may arise in relation to the draft Accession Agreement may be structured, without claiming to cover everything, into the following four large groups: (1) general issues; (2) institutional issues; (3) jurisdictional issues and, finally, (4) the financial dimension.

##### ***1. General issues***

Starting with the general issues which are typical of any international treaty of this nature, the first thing to be considered is the substantive scope. In fact, at the time of the entry into force of the Treaty of Lisbon, academics had discussed whether the Union would only accede to the ECHR or to both the ECHR and its Protocols (all or part of

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<sup>18</sup> 47+1 (2012) R01 of 21 June 2012.



them<sup>19</sup>). In this regard, on the basis of the amendment made by the above-mentioned Protocol 14 to Article 59 of the ECHR, the Draft Agreement provided that the EU would accede to the Convention, the Additional Protocol and Protocol 6; with respect to the rest of the Protocols, the possibility of the EU doing so in the future was expressly included (Article 1 of the Draft Agreement, future Article 59(2) of the ECHR).

In addition, the status which the EU will have within the ECHR, as a High Contracting Party which is not a State, is fully regulated in the Draft Accession Agreement so that, despite the fact that a large part of the provisions will also be included in the text of the ECHR, the future Agreement will retain its specific relevance as such within the system of the Convention. Nevertheless, significant amendments have been made to the ECHR, one of which is the inclusion in article 59 of a clause for the interpretation of expressions whose meaning, until now, has not been in dispute, such as 'State', 'High Contracting Party', 'national law', 'country', 'administration of the State' etc. From now on, however, these terms must be deemed to refer to the EU despite the fact that it is an international organisation and not a state entity.<sup>20</sup>

In addition, the EU is treated in a similar manner to States. The same rules are applied to it with respect to reservations, declarations and repeals. Accordingly, once it has acceded to the ECHR, the EU may also formulate the reservations which it considers appropriate to existing or future Protocols. A different question is that, logically, the Accession Agreement per se does not allow any type of reservation, whether for the EU or for States which are parties to the Convention (Article 12 of the Draft Agreement).

Finally, with respect to the process required to reach the definitive entry into force, the road will undoubtedly be long. As we would expect, the Agreement will come into force when all of the High Contracting Parties of the ECHR and the European Union have given their consent (Article 10 of the Draft Agreement) and, as is easy to imagine, this will take some time. From this moment on, however, all States who join the Council of Europe and accede to the ECHR will therefore be linked both by the Convention and, in accordance with Article 59.2 b) of the ECHR, by this Accession Agreement as well.

## ***2. Institutional issues***

The Report which the European Parliament prepared regarding the access of the EU to the ECHR (the Jáuregui Report) defined very clearly the institutional issues which should regulate the future Accession Agreement. This report argued that the EU should have three basic rights. First, the 'right to submit a list of three candidates for the post of judge, one of whom is elected by the Parliamentary Assembly of the Council of Europe on behalf of the Union and participates in the work of the Court on a footing of equality with the other judges'. Secondly, the Report advocated 'the right to attend via the European Commission with voting rights on behalf of the EU, meetings of the

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<sup>19</sup> See, for example, PASTOR RIDRUEJO, J. A.: 'Sobre la adhesión de la Unión Europea a la Convención de Roma', *Cuadernos Europeos de Deusto* 2010, no. 43, pp. 43-51.

<sup>20</sup> In the ECHR and the two Protocols to which the EU will accede there are about thirty provisions which, in one way or another, currently refer to the terms 'State' (Arts 10.1, 17, 56, 57 ECHR, Arts. 1 and 2 of the Protocol no. 1), 'national law' or 'national laws' (Arts 7.1, 12, 41, 52 ECHR), 'national authority' (Article 13 ECHR), 'territory' (Articles 5.1, 56, 58.4, 57 ECHR), 'administration of the State' (Articles 11.2 ECHR), 'national security' (Articles 6.1, 8.2, 10.2 ECHR) or 'territorial integrity' (Article 10.2 ECHR).

Committee of Ministers when it performs its task of monitoring the execution of judgments of the European Court of Human Rights.’ And thirdly, the Report reiterated the ‘right of the European Parliament to appoint/send a certain number of representatives to the Parliamentary Assembly of the Council of Europe when the latter elects judges to the European Court of Human Rights.’<sup>21</sup> And these have indeed been the main issues in the negotiations<sup>22</sup>. However, in order to structure better this presentation, in this section we will look at the two main subjects of a strictly institutional nature, namely the participation of the Union (*a*) in the Council of Ministers and (*b*) in the Parliamentary Assembly, while leaving the question of the selection of the three possible candidates for the post of judge to be dealt with at the same time as the other jurisdictional issues to be resolved by the Union.<sup>23</sup>

#### *a) The participations of the EU in the Council of Ministers*

Any change to the balance between institutions is always a delicate question in any negotiation. In this case, the presence of the EU in the Council of Ministers is one of the thorniest issues. Probably *the* thorniest. Unsurprisingly, the presence of a block of 28 possible votes (27 Member States and the EU), who must coordinate their position on those disputes which affect the EU, is seen by some non- EU Member States as causing a risk of internal imbalance within the Council of Ministers in favour of the Union. As we might expect, this situation mainly refers to the tasks of monitoring compliance with judgments and friendly settlements (Articles 39 and 46 ECHR) and the issuing of reports and recommendations (Article 47 ECHR)<sup>24</sup> in which the majority required to reach an agreement is two thirds; in these cases, the 27+1 group would have a possible minority blocking vote which is in fact very close to the majority required (28 of the required 32 votes). It may also affect other aspects such as agreements to reduce temporarily the number of judges of the Court (Article 26 ECHR), although the requirement of unanimity in this decision completely removes the obstacle which we are concerned with here.

In this regard, the Draft Accession Agreement provides that when the Committee of Ministers supervises the compliance of obligations by the EU (whether on its own or jointly with one or more Member States) the EU and its Member States must state their positions and define the vote in a coordinated manner because it is a requirement which arises from the founding treaties (Article 7.2. a). And it adds that in order to be able to ensure that the Committee of Ministers can effectively carry out its functions in these circumstances, it will have to amend its internal rules (Article 7.2. a *in fine*). In our opinion, the wording is correct and well-balanced and, in addition to reflecting a requirement arising from EU law, it leaves sufficient margin to enable the necessary amendment of the Rules of the Committee of Ministers to find imaginative mechanisms

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<sup>21</sup> Report on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, A7-0144/2010, 6 May 2010, para 7.

<sup>22</sup> See, for example, JACQUÉ, J. P.: ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’, *Common Market Law Review* 2011, pp. 995-1023; TULKENS, F.: ‘L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme. Pour et vers une organisation harmonieuse’, *Revue Trimestrielle de Droit Européen* 2011, p. 27.

<sup>23</sup> See below, IV, 4.

<sup>24</sup> In this context, the functions entrusted to the Council of Ministers pursuant to the Statute of London with respect to the Council of Europe are not affected (statutory functions).

which make it possible to placate non-EU Member States. Moreover, there is also the possibility of reaching ‘gentlemen’s agreements’ which, with respect to certain specific matters, could ‘qualify’ certain obligations that are regulated in a general manner by the binding rules.

*b) The participation of the Council of Europe in the Parliamentary Assembly*

It appears completely logical that, once the EU has acceded to the ECHR, it should have the power to appoint to the ECtHR a judge in the same way as the rest of the High Contracting Parties; regardless of whether, of course, he or she is also subject to the same rules regarding independence and action on an individual basis to those which the rest of the judges are subject. This therefore means that, in accordance with article 6 of the Draft Accession Agreement, a delegation of the European Parliament must be able to participate, with the right to vote, in the meetings of the Parliamentary Assembly of the Council of Europe in which the judges of the ECtHR are also elected (Article 22). And, if this is the case, it appears clear that, in line with the regulations laid down in this regard in the Statute of the Council of Europe (Article 26), the number of members of that delegation must be identical to that corresponding to the High Contracting Parties with the greatest number of representatives. Naturally, the internal rules of the Assembly will subsequently flesh out the details of this participation. It does not appear, then, that this issue will be controversial in future negotiations.

A different question is defining how the EU will designate its candidates for the post of judge. However, this is an internal matter which is unconnected to the content of the Agreement and which, as we have already mentioned, will have to be resolved by the internal rules of the Union.

### **3. Jurisdictional issues**

Turning to the field of jurisdictional issues, it is crystal clear that the most delicate question of the Accession Agreement is the new procedures which will have to be introduced into the ECHR to allow the EU to be party to proceedings when there is a claim against it for a possible breach of a right contained in the ECHR for one of its own acts; or where there is a claim against one or more EU Member States in which the alleged breach of a right contained in the Convention is the result of an act of that or those Member States in application of the EU law. This is so because of the peculiar nature of the EU, which is an international organization with a specific legal order composed of 27 Member States which are, at the same time, parties to the ECHR as individual States<sup>25</sup>. Accordingly, it is perfectly possible for the Party which adopts a specific act (the EU) and the Party which applies it (one or more Member States) to be different. This requires the design of a procedural mechanism which may address this unique situation and this is done through the *co-respondent* procedural mechanism, which is already described in the ECHR (Article 36.4).

Another consequence of the peculiar nature of the EU’s judicial system is that situations may arise in which a claim against the Union and/or against one or more of its Member States reaches the ECtHR before the CJEU has made any declaration in relation thereto. This, from the perspective of the ECHR, may give rise to difficulties in relation to the

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<sup>25</sup> See LOCK, T.: ‘Walking on a Tightrope: The European ECHR Accession Agreement and the Autonomy of the EU Legal Order’, *Common Market Law Review* 2011, pp. 1025-1054.

requirement that the internal appeals procedure has been previously exhausted and, from the Union's perspective, it may cause problems in relation to the CJEU's status as the supreme body with responsibility for interpreting EU law. And, finally, there are other procedural situations which give rise to the need to make adjustments as a result of the presence of an international organisation within the ECHR system, for example the possibility of intervening as a third party or, even more clearly, the possibility of inter-State claims brought by or against the Union. Each of these three issues will now be examined in turn.

*a) The 'co-respondent' mechanism*

From the very start of the work of the negotiating group, it was clear that the peculiar nature of the EU as an international organisation composed of 27 Member States which are in turn High Contracting Parties of the ECHR required the design of some completely fresh type of procedural mechanism. Above all else, this had to address the fact that, once the EU has acceded to the ECHR, claims could be made against an EU Member State as the result of an act which, in fact, was obligatory under EU law. In such cases, it would appear logical to design some sort of formula to enable the EU to also be a party to such proceedings. This would occur when, in certain circumstances, there was a claim against the EU as the result of certain legal acts in which the presence of Member States was also recommendable, for example because a rule of primary law gave rise to the dispute regarding the compatibility with the fundamental rights protected by the ECHR. But the search for this new magic formula had to be done through some procedural instrument which was balanced since otherwise it could be seen by the non-EU Member States as a procedural privilege.

Thus, on this basis, the concept of the co-respondent came into being. This concept will be included in article 36 of the ECHR as paragraph 4, while the Accession Agreement will regulate in detail its use (Article 3 of the Draft Agreement). Thus, according to the provisions of the Draft Agreement, three possible situations could exist. First, a claim may be solely addressed to one or more EU Member States and not against the EU, in which case the latter could intervene as a co-respondent. This situation would basically arise when the affected Member States are obliged by a rule of EU law to adopt an act or not to act without having any discretion in relation thereto.

Secondly, the claim may be solely against the EU, in which case the Member States may intervene as co-respondents. This situation would clearly exist when a rule of EU primary law is affected by the possible violation of a fundamental right contained in the ECHR. Given the nature of the rule of EU law affected and the mechanisms for the reform thereof laid down in the founding treaties, it would appear perfectly reasonable for Member States to also be co-respondents.

The third possibility is where a claim is brought against both the EU and one or more Member States in a case in which the Union or those Member States are not the ones who have actually engaged in the act or omission in dispute but they are the ones who have established the legal basis for said act or omission. In such a case, it would also be possible to have recourse to the mechanism in question.

In any event, it is worth bearing in mind that a co-respondent would have the status of a party to the proceedings and would not merely intervene therein as a third party (Article

36.2 ECHR). This would make it necessary to set up within the Union internal mechanisms to ensure that co-respondents act in a consistent manner.<sup>26</sup>

*b) Requirement of a prior declaration of the CJEU*

With respect to the requirement of the prior exhaustion of domestic remedies (Article 35 ECHR), another fairly significant difficulty arises, since it is perfectly possible to imagine situations arising where, within the EU, doubt is cast on the compliance of an act of the EU with the fundamental rights without there previously having been a reference for a preliminary ruling to the CJEU. Moreover, this preliminary issue could have been requested by the parties and the national court may have refused to refer the matter to the CJEU. Accordingly, it is not surprising that in these cases the ECtHR cannot exercise external scrutiny until the corresponding internal scrutiny by the CJEU has taken place.

Nevertheless, this logical requirement that the CJEU has made a declaration prior to the ECtHR having done so in questions which clearly affect EU law should be kept in perspective. Thus, there will be very few cases in which this situation may arise, since in the case in point (a claim against one or more States for the application of an act of the Union in which the latter appears as a co-respondent) the way that the preliminary ruling mechanism works suggests that it in most cases the CJEU will have had an opportunity to rule on the issue (Article 267 EU Treaty). This is particularly so if it is considered that it is obligatory (and not merely voluntary) to make a reference for a preliminary ruling in relation to national proceedings where no subsequent appeal exists or in proceedings where the subject matter of the dispute affects the validity of an act of the Union (and not the interpretation thereof). Nevertheless, one can imagine that due to the inappropriate application of the *acte claire* doctrine or simply as a result of the disdain of the courts in some cases, the Court of Justice has not had the opportunity to reach a decision. In such cases, leaving on one side the fact that the preliminary issue is not, strictly speaking, considered as an appeal and the greater or lesser probability of predictable cases in practice, it is highly recommendable to be able to design a mechanism which, in such a scenario, allows the CJEU to reach a decision before the ECtHR does. The problem, which is not a minor one, is how to design such a cooperation mechanism between the two courts, since it would be very difficult to achieve without first amending EU primary law.

Prior to the commencement of the negotiations, academics discussed different possible solutions. These could be classified according to whether or not they required a reform of the EU founding treaties. Thus, among those who put forward proposals within the current framework laid down by the primary law of the Union, Julianne Kokott and Chirstoph Sobotta proposed that this defect could be resolved by the Commission bringing an infringement action against the Member State whose courts had not made the reference for a preliminary ruling which, under Article 267 of the TFEU, they are obliged to make (at least in their final appeal court) if a doubt had been raised regarding the compatibility of an act of the Union with any of the rights contained in the ECHR.<sup>27</sup> And among those who went a step further and accepted proposals which went beyond

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<sup>26</sup> See below, V.1.

<sup>27</sup> 'The Charter of Fundamental Rights of the European Union after Lisbon', EUI Working Paper AEL 2010/6, in particular p. 5.

the current framework of the primary law of the Union, Christian Timmermans proposed the creation of a new procedure through which the Commission would be authorised to lodge an *ad hoc* appeal with the CJEU in those cases in which matters would be raised before the ECtHR which concerned the EU law and the former had not been able to rule on them.<sup>28</sup>

Finally, the draft Accession Agreement resolves the issue through a procedural step whereby the matter will be sent to the CJEU in order for it give a declaration rapidly (Article 3.6).<sup>29</sup> But of course, this says nothing about how this issue must be resolved within the EU. In this regard, as can also be deduced from the above-mentioned provision, an additional challenge will be to obtain a declaration of the CJEU (clearly prior to the ECtHR) rapidly so as not to extend excessively a procedure which is already not exactly short. However, the experience of references for preliminary rulings which the CJEU currently has to deal with swiftly under the Area of Freedom, Security and Justice (AFSJ) suggests that it is perfectly possible to resolve such interlocutory procedures within the period of three to six months which is being considered.

On a separate note, there is also the doubt as to whether the EU should be allowed to act as a claimant not only when a claim is filed which is addressed to a Member State, but also against a non-Member State where said claim is based on an agreement which the EU has signed with the non-Member State in question. This point was not dealt with in the draft agreement produced by the 7+7 group but everything suggests that it will be addressed in the pending negotiations. This is particularly so if we consider the increasingly intense nature of the EU's external action which is reflected in an international agreement, of particular relevance being the position of States which participate in a good part of the Schengen *acquis* and other provisions of the AFSJ (Norway, Island, Liechtenstein) or States with whom bilateral agreements exist which extend to their territory the application of a large part of the internal market rules (Switzerland). And, in our opinion, such a possibility is not unthinkable. A different matter is to calculate the possibility of making a success of proposals of this nature at this stage of the negotiations.

*c) Claims by and against the EU and intervention of the Union as a third party*

It is fair to say that the situation which always comes to mind when we consider the jurisdictional issues arising from the EU's accession to the ECHR is that arising from a claim brought by an individual against an act of the EU or against an act of a EU Member State in application of EU law. And clearly this is the core of the ECtHR's actions. However, it is perfectly possible to imagine that the EU, once it has acceded to the ECHR, could also become involved in a procedure concerning inter-State claims for breach of the Convention (Article 33 ECHR) which affect EU law. However, this type

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<sup>28</sup> This he did in his presentation of 18 March 2010 to the Constitutional Affairs Committee of the European Parliament entitled '*L'adhésion de l'Union européenne à la Convention européenne des Droits de l'homme*'.

<sup>29</sup> On 17 January 2011, a curious meeting took place between delegations of the CJEU and the ECtHR in which, inter alia, the question of the possible involvement of the CJEU in those matters in which the EU acted as co-respondent was tackled. The meeting ended with a joint declaration of the presidents of both courts. Previously, the CJEU had published its position on this issue. See *Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* Luxembourg, 5 May 2010.

of claims should be limited as far as possible since otherwise it would be tantamount to limiting the jurisdiction of the CJEU and undermining the independence of EU law. Ultimately, it would equate to transferring to the ECtHR a power of scrutiny which must correspond in the first instance to the CJEU. There is no doubt at all that the natural judge or the judge predetermined by law to hear appeals brought concerning States for breach of the rights contained in the ECHR (or in the Charter of Fundamental Rights of the EU) due to acts of EU institutions or by States in application of EU law is the CJEU. Only when the latter has ruled and it is considered that the judgment passed does not reflect the possible violation of fundamental rights should it be possible to have recourse to the ECtHR.

Moreover, nothing exists to prevent a situation arising in which, under Article 36.2 ECHR, the EU may be invited to participate in proceedings by the President of the ECtHR. In such a case, the Union should present the submissions which it considers to be relevant. This situation would very clearly exist if a claim is made to the ECtHR alleging the breach of a provision of the ECHR by an international treaty to which the EU is a party, such as that relating to the European Economic Area, and the Statute of the CJEU itself the signatory States of the latter to make submissions to it (Article 23.4). One can also imagine this possibility existing, for example, with respect to the Agreement to extend the Schengen *acquis* to non-EU Member States.

#### **4. Financial issues**

Finally, an issue to which little attention is usually paid is that of financial aspects. Logically, this is not a central part of the negotiations. In fact, the Draft Accession Agreement resolves it in a fairly clear manner. There will be an annual contribution which will be added to that already made by its 27 Member States, whose amount equates to 34% of the highest contribution paid by a High Contracting Party to the ordinary budget of the Council of Europe (Article 8.1 of the Draft Agreement). This contribution is made for '*frais de fonctionnement de la Convención*', where said costs to sustain the ECtHR refer to supervising the enforcement of its decisions and the functioning of the Council of Ministers, the Parliamentary Assembly and the General Secretariat of the Council of Europe to the extent that they exercise the functions attributed to them by the Convention, increased by 15% for general administrative expenses such as buildings, computer systems and so on (Article 8.3 of the Draft Agreement). The Draft Agreement also contains a mechanism for revising this contribution if, in the two years after the entry into force of the Agreement, there were amendments which affected the percentage stake in the costs of functioning of the Convention with respect to the total budget of the Council of Europe (Article 8.2).

Nevertheless, the potential importance of the financial implications of the EU's accession to the ECHR should not be overlooked. The contribution of approximately 9.34m euros to the Council of Europe's shaky finances could go a long way to overcoming the reluctance which is still shown in the negotiations by some States which are parties to the ECHR but not members of the EU.

#### **V. The need for internal EU rules: the other obstacle pending**

As noted above, the negotiation of the Accession Agreement became entwined with the parallel drafting of Internal Rules within the EU. These Rules will have to regulate a good number of legal (and political) issues of importance, some of which will now be

examined. Thus, bearing in mind the political difficulties encountered, it could be said that the greatest problems relate to (1) the concept of ‘co-respondent’, (2) the representation of the EU before the ECtHR and (3) the existence of a prior declaration of the CJEU, (4) whether or not this exhausts the list of possible issues to be regulated.

### ***1. The concept of co-respondent***

An initial problem of some importance is defining the concept of co-respondent. The starting point with this issue does not give rise to any problems. In cases before the ECtHR where the compatibility of a rule of EU law with the ECHR is questioned, a co-respondent situation may arise.<sup>30</sup> However, from the outset an initial doubt arises with respect to whether this co-respondent situation must arise automatically (i.e. the party against whom the claim was not brought would have to be joined into the action) or voluntarily (i.e. the party against whom the claim was not brought weighs up whether it should be joined in each case). We will also examine below whether the solution which is chosen should differ depending on whether the claim is against the EU, one or more Member States or the EU and one or more Member States; it could even be asked whether the treatment would vary according to whether the rule of EU law which caused the possible breach of the ECHR was of primary law or, as would appear more likely in practice, it formed part of secondary law.

In this regard, if there were a claim which concerned primary law it would be difficult to conceive of a situation in which there was not an automatic situation, i.e. the EU and/or the Member State(s) not claimed against would automatically be joined to the action as a co-respondent. However if, as appears more likely, the claim affected secondary law and was only against the EU it may be thought that the possible co-respondent situation of the Member States (not claimed against) would be voluntary in nature. A different situation would be where the claim which affects an act of secondary law was addressed only against one or more Member States, in which case the alleged voluntary nature of the co-respondent of the EU would probably be more theoretical than real.

In fact, while on the subject, we could not exclude either the possibility of a *co-claimant* situation arising; i.e. cases in which the EU and one or more Member States bring an action in the ECtHR.

### ***2. The representation of the EU in the ECtHR***

A second major problem relates to how to regulate the *representation of the EU in the ECtHR* in those cases in which there is a claim as a result of an act of the EU, whether in a claim brought against the EU or against the Member States and in which the EU is a co-respondent. If, as the Council argues, it is considered that representation should be in a manner similar to that occurring in the CJEU, each EU institution should be entrusted with defending the legality of the act alleged to be a violation of a right recognised in the ECHR. By contrast, if, as the Commission considers, the action before the ECtHR was upheld as an act of external representation of the EU, this task would be for the Commission as, therefore, would be the handling of the defence before the ECtHR; except with respect to the possible acts arising from the CESP, which would be

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<sup>30</sup> *Vid. supra*, IV.



for the High Representative of that activity. This approach finds support in Article 17 of the EU Treaty and Article 218(9) TFEU, while Article 13(2) of the EU Treaty and Protocol no. 8 with respect to Article 6(2) EU Treaty could also be used, based on the principle of institutional balance and non-attribution of new competences not referred to in the founding treaties, to sustain the position sustained by the Council. Obviously, intermediate positions could also be included in the final solution, for example attributing to the Commission the general power to represent the EU – High Representative in the case of acts by the CESP – and foresee in a flexible manner very specific cases in which this representative capacity may be for the specific institution which carried out the challenged act.<sup>31</sup>

### ***3. Prior declaration of the CJEU***

A third problem would concern the above-mentioned requirement of a prior declaration of the CJEU. In fact, one would have to interpret the law very imaginatively to resolve this issue without having to reform the founding treaties. But in any event, whichever approach is taken, its regulation through the internal rules could clearly be insufficient. These rules could, however, establish the internal structure of the mechanism or interlocutory procedure which regulates either the accession agreement or the relevant reform of the founding treaties. But the final solution may require, in one sense or another, the reform of the founding treaties or at least of the Statute of the CJEU; it does not appear that a mere reform of the procedural regulations would be sufficient. Unless, of course, an attempt is made to make the most of the potential offered by the ruling of the CJEU in which the latter raised the possibility of attributing new competences to the Court of Justice through an international agreement entered into by the EU.<sup>32</sup> In this case, the Accession Agreement could be considered to be a sufficient basis for introducing the new procedural mechanism requiring a ruling of the CJEU.

### ***4. Other issues***

In any event, apart from these three major problems, other issues exist which will also have to be regulated by these internal rules. For example, it must be decided how to design the process for selecting the three candidates to the post of judge which the EU will have to present pursuant to the requirements of Article 22 of the ECHR. For example, it will have to be determined whether the committee of seven experts referred to in Article 255 TFEU for the assessment of the appropriateness of the candidates to the post of judge or advocate general of the CJEU would be entrusted with doing so in this case too or whether some sort of *ad hoc* mechanism would be required. It will also be necessary to specify whether, in some way or another, weighting criteria among the different EU Member States will be followed.

The coordination and consistency in the presentation of submissions must also somehow be regulated, since it is difficult to consider it acceptable for 27 different parties to raise allegations in their defence with a different or even contradictory content. The same can be said of questions such as the enforcement of judgments and

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<sup>31</sup> In this regard, the last sentence of Art 335 TFEU provides that ‘the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters related to their respective operation.’

<sup>32</sup> Opinion 1/2000, of 18 April 2002, *ECR.*, p. I-3493.

the allocation of pecuniary sanctions (on a *pro rata* basis or payment by each party of the infringements attributed to it) or the possibility of Member States opposing a possible request to refer a case to the Grand Chamber which the Commission has decided not to oppose.<sup>33</sup> All of the above are issues which would need to be adequately dealt with in these internal Rules.

## **VI. Final considerations: an opportunity for the EU and also for the ECHR**

The negotiations regarding the accession of the EU to the ECHR have revealed both technical and political difficulties which will make the task ahead much more arduous. That said, we cannot imagine that the obstacles referred to in the previous pages are of a sufficient scale to frustrate the crystal clear mandate contained in Article 6(2) of the EU Treaty. They do however, suggest that the significant time required by the unavoidable requirements for the entry into force (ratification by the 47 High Contracting Parties to the ECHR and the EU) and the list of objections presented by certain Member States during the negotiations (including the UK) may excessively delay an operation which it seemed would be shorter and simpler. Nevertheless, it should not be forgotten that we are dealing with nothing less than the negotiation of a legal instrument which will lead to an international organisation of a supranational nature (with its own specific legal system and jurisdiction) joining another international organization with human rights jurisdiction in which its 27 Member States (together with another 20 non-Member States) are already members and whose jurisdiction was designed to hear claims filed against said States. The fact that this operation should give rise to legal and political difficulties cannot, therefore, come as a great surprise.

Moreover, once accession has taken place there will also be a degree of risk that the CJEU may find its status as ‘final arbiter’ of the supranational legal order of the EU eroded. As pointed out in a previous article mentioned above, there will always be a certain risk of a ‘sandwich effect’ whereby the CJEU may find itself doubly scrutinised: on the one hand, by the national constitutional courts, which are always ready, on the basis of the well-known judgment in *Solange*, to verify that the case law of the CJEU in this area continues to equate to the minimum standards required by their respective constitutions (with the Fundamental Law of Bonn as the most visible benchmark); and now also by the ECtHR, whose function of external judicial scrutiny of the EU in the area of human rights will be increased and strengthened.<sup>34</sup> Ultimately, leaving on one side the obvious differences between them, the CJEU would be placed in a position which was fairly similar to that in which national constitutional courts found themselves as a result of the role of the CJEU as the final arbiter of the EU legal system.

In any event, the EU’s accession to the ECHR is more an opportunity than a risk. With respect to the EU, this opportunity exists both for its legal system and the CJEU; in the former case, because its (legal) legitimacy will be strengthened and, with respect to human rights issues, it will acquire a very similar position to that of national legal systems themselves; and in the latter case because it will be reinforced with respect to the constitutional courts in one of the areas in which it has always appeared vulnerable.

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<sup>33</sup> This might be viewed as a minor issue and certainly, compared to subjects already dealt with, it is not vitally important. However, it is sufficient to recall the experience in the *Batasuna* case brought before the ECtHR to realise that in certain cases it may have a degree of importance, including of a political nature.

<sup>34</sup> *Loc. cit.* (‘Viejos y nuevos problemas...’), pp. 819-820.

But for the Convention and the ECtHR itself the presence of the EU as another High Contracting Party is also an opportunity. The system of the Convention could be consolidated as the supreme order in the European continent entrusted with the external scrutiny of compliance with fundamental rights both with respect to its 47 Member States and the most developed supranational international organisation in existence. In any event, it is a most interesting legal experiment and, as such, it will surely be examined by academics for some time.