The legal relationship between the European Court of Human Rights and the Court of Justice of the European Communities according to the European Convention on Human Rights

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I. The present relationship between the ECtHR and the ECJ according to the case law of both Courts

1. The European Court of Human Rights (ECtHR) is called upon to supervise the obligations of the Contracting States as to whether they «secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention» (Art. 1 of the European Convention on Human Rights – the Convention). It exercises its jurisdiction not only in relation to Member States of the European Union, but to 45 European States at the present time. As an international regional court, the ECtHR has compulsory jurisdiction with respect to all Contracting States, according to the 11th Protocol to the Convention of 1 November 1998. In the context of the development of international jurisdiction, this Court is a unique example not only in so far as it has been entrusted, for the first time in history of international law, with a compulsory jurisdiction but furthermore with procedures giving the individual a subjective right to introduce individual complaints about alleged violations of their rights and freedoms set out in the Convention. The ECtHR can declare that a State has violated the Convention after the individual applicant has exhausted domestic remedies. Such a declaratory judgment can contain an order to the State to pay just satisfaction to the applicant and the States have a duty not only to immediately refrain from any further violations in that case but also to see that similar violations are prevented generally, for instance, by making any necessary changes to the domestic legal order. Judgments do not have

immediate effect within the legal order of the Contracting States, unless the internal legal order so provides. It is the task of the Committee of Ministers, which has to supervise the execution of the final judgments (Art. 46 § 2 of the Convention), to ensure that the States abide by the final judgment of the Court in any case to which they are parties (Art. 46 § 1 of the Convention). I am of the view that where acts of the State, for instance administrative acts or judgments, are concerned, there should be a procedure for reopening administrative or court procedures, if the outcome, that is the final decision or judgment, was dependent on or influenced by the violation of the Convention. There is no *erga omnes*-effect of the judgments for other States; the judgment only has an *inter partes*-effect. It is nevertheless a ruling on the obligations of the States in relation to Art. 1 of the Convention and one may therefore say that every judgment of the Court has a value of precedent or an effect of orientation for all States, not just those parties to the procedure.

2. The role of the Court of Justice of the European Communities (ECJ) is quite different. This Court is entrusted with the task of reviewing the legality of EC law in relation to the primary law provisions (Treaties) and even to decide conflicts between some provisions of primary law (Art. 220 EC-Treaty²). It is also entrusted with supervising the duties of Member States in executing EC law and fulfilling the duties arising from EC law. The power to interpret and to review the application of EC law is divided between the courts of the Member States and the Court of Justice, even if the latter has the last word in this domain. Simplifying the matter one can say that the ECJ is exercising the judicial power of a constitutional court or supreme court in relation to matters that the Member States have transferred to the European Communities. Or, to put it otherwise, on matters in relation to which the Member States have waived their right to exercise in the future any authority.³

Since, according to the interpretation given by the ECJ in the case *Costa v. Enel⁴*, EC law has superiority in relation to the internal law of the Member States. Every interpretation of a provision of Community law by the ECJ may have a direct impact on the validity or scope of application of internal law rules. This direct effect gives the ECJ a greater degree the status of a constitutional court in relation to the Member States of the European Union and indicates a clear difference with the European Court of Human Rights.⁵

² See Art. I-29 TEC.
³ The Constitution of the EU approves this character of a constitutional court. Article I-29 § 1 TEC says: «The Court of Justice....shall ensure respect for the law in the interpretation and application of the Constitution...».
⁴ Judgment of 15/07/1964, case 6/64, ECR 1964, p 585.
3. The relations between the two courts have up to now not been settled in a definite manner. The question whether acts of the European Community or of the European Union can be attacked directly before the ECtHR awaits an answer and was also not decided in the case of Senator Lines v. 15 Member States of the European Union. But there are other cases pending. Up to now, the Court has only in a decision of inadmissibility in the case of SEGI v. 15 Member States of the European Union decided that a common standpoint of the European Union is in principle not excluded from the scrutiny of the Court because it can be held as a common action of the Member States and not (only) as an act of the European Union or of the European Council itself. In the case of Matthews v. The UK, which concerns the question whether the European Parliament can be considered a legislature in the sense of Art. 3 of the 1st Protocol to the Convention, the ECtHR found a violation of this provision because of the exclusion of the inhabitants of Gibraltar from the elections to the European Parliament. The Court stated that the Contracting States while transferring competences to international bodies or organisations cannot avoid their responsibility under the Convention and that they remain responsible even after such a transfer. The ECtHR has not so far seen fit to apply the theory of functional succession to the relations between Contracting States and the European Union, probably because of the difficulties which would arise when considering the European Union indirectly as a member of the Council of Europe.

The same position as in the Matthews judgment was held in the cases Beer and Regan and Waite and Kennedy v. Germany, concerning the question whether States can exclude the access to their national courts by granting immunity to international organisations that operate on their territory. The transfer of competences or more precisely: the exclusion of the competence of national courts and the conferral of exclusive authority over monopolising the decision on certain legal questions to international organisations may only be agreed upon if the responsibility of the Contracting States under the Convention is fulfilled. States have to ensure that proper judicial procedures and safeguards are available within

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6 Application n. 56672/00; by a decision of 10/03/2004 the Grand Chamber has declared the application inadmissible because the Court of first instance of the EC has annulled the decisions (sanctions) of the European Commission.

7 In particular Bosphorus Hava Yollari Turizm v. Ireland, n° 45036/98, decision from 13/09/2001. The hearing before the Grand Chamber took place on 29 September 2004.

8 Decision of 16/05 and 23/05/2002, case 6422/02 and 9916/02, ECtHR 2002-V.

9 Judgment of 18/02/99, (GC) n° 24833/94, ECHR 1999-I.

10 Para 32 of the judgment.

11 The ECJ has applied this concept in the case International Fruit Company et al., judgment of 12/12/72, joined cases 21 to 24/72, 1972 II, ECR 1219.

12 Judgments of 18/02/99, cases [GC] 28934/95 and 26083/94, ECHR 1999-I.

13 The cases were preceded by labour law proceedings against the European Space Agency before German courts.
the international organisation. As the ECtHR has stated, alternative means of adequate (or equivalent) protection must exist.\textsuperscript{14}

If one transfers this line of reasoning to the European Communities, then the responsibility of the Contracting States for ensuring the correct interpretation and application of the Convention within the EC/EU, to which powers have been transferred, seems to be the necessary conclusion. This is of course a rather remote responsibility of Member States for all acts and omissions of the European Communities via this responsibility of Contracting Convention States by the act of transfer of powers. It may well be the question whether there do not exist a presumption in favour of judgments of the ECJ that its interpretation given to the rights and freedoms are in conformity with the Convention.

It is more obvious and more direct to address the responsibilities of Contracting States when they execute acts like regulations or directives or individual penalties of the European Communities in their domestic order. In all these cases, the direct link between State action or omission and the law of the European Community can be established. That was the case in the procedure M. & Co. v. Germany\textsuperscript{15} before the Commission and the case of Cantoni v. France\textsuperscript{16}, where the Court held that the question whether the French law was verbatim replica of provisions of the European directive does not exclude the responsibility of France for its own laws and regulations.\textsuperscript{17}

4. This situation may be understood as a call for accession of the EC/EU to the European Convention on Human Rights.\textsuperscript{18} Later on we shall have a deeper look at the ongoing development in this regard. But apart from this question how to arrange an accession there are still many other problems to overcome. According to Art. 6 § 1 TEU, the Union has been established on the basis of the principles of freedom, democracy and respect for human rights and fundamental freedoms as well as the rule of law. Article 6 § 2 TEU states that the Union has to respect not only fundamental rights as they are guaranteed in the European Convention on Human Rights but also as they emerge from the common constitutional principles of the Member States and the general principles of Community law. The consequence of this reference in dogmatic legal way is that the Convention is only applied indirectly within the common principles of Community law as it has been established by the ECJ in its decision of Internationale Handelsgesellschaft / Ein-

\textsuperscript{14} See para 68 of the judgment Waite and Kennedy v. Germany (supra note 12).
\textsuperscript{17} See para 30 of the case Cantoni v. France (note 16).
fuhr und Vorratsstelle Getreide. The standard established by the common constitutional principles may well go beyond the level of protection of the Convention (Art. 53 ECHR) and may, in particular, have its own value in fields where the Convention does not contain any specific right. The Convention is, not only in relation to the Contracting States but also in relation to the European Union, a minimum standard of protection of fundamental rights and freedoms, an instrument of European public order, as the ECtHR characterised the standard in the Loizidou judgment. Since not all additional protocols of the Convention have been ratified by the Member States of the European Union, the question may arise whether the additional protocols can and may be part of the common principles of Community law (or whether they are part of the reference in Art. 6 § 2 TEU). This may, in particular, be true for the rights and freedoms of the 1st and 6th additional protocols. But these and also those in the other additional protocols may indicate whether a common value in the sense of Art. 6 § 1 TEU exists (Indizwirkung).

5. The actual situation between the ECtHR and the ECJ according to the case law of both courts leads to the conclusion that the divergences between the two courts may increase. The European Union gets more competences in fields which are particularly important for human rights, such as the right of asylum, immigration policy and co-operation in the field of internal affairs and justice. Also the existence of a binding European Charter of fundamental rights may ultimately exacerbate this problem. Because the ECJ then disposes of its own legal basis for the judicial review of fundamental rights and freedoms which may - despite the horizontal clauses - induce it to depart from the interpretation of the Convention by the ECtHR. It has nevertheless to be noted that the ECJ has always tried to follow the jurisprudence of the Strasbourg Court (decisions on business premises according to Art. 8 of the Convention), even if some discrepancies can be noted in the

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20 See also Art. II-112 § 3 TEC which establishes that the Union Law may provide more extensive protection of human rights and fundamental freedoms than the Convention.
21 Case of Loizidou v. Turkey, judgment (Preliminary Objections) of 23/03/1995, application no. 15318/89, para 75 and 93. See the explanations to the Charter of Fundamental Rights given by The European Convention, Document: CONV 828/1/03 REV 1 (to find under: http://european-convention.eu.int), where it is said in relation to Art. 52 § 3 of the Charter (Art. II-112 § 3 TEC): "In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECtHR."
22 According to the explanations to the Charter (see note 20) the reference in Art. II-112 § 3 covers both, the Convention and the Protocols to it.
23 See Part III, Chapter IV TEC, especially Art. III-265 et seqq.
24 The Charter of Fundamental Rights has been included as Part II in the TEC and will thus acquire legal force.
25 See Art. II-112 § 3 TEC.
26 First the ECJ held that business premises aren't included in the Art. 8 of the Convention (judgment, 21/09/1989, Hoechst v. Commission, Cases 46/87 and 227/88, ECR. 2859), then the ECtHR decided to the contrary (judgment of 16/12/1992, Niemietz v.
application of Art. 10 of the Convention (TV monopoly\(^{27}\)) or in relation to the equality of arms in Art. 6 § 1 (right to response to the final conclusions of the advocate general before the ECJ\(^{28}\)), or the right not to be forced to incriminate oneself. In this field the European Court of First Instance has confirmed its position in a judgment of 20/02/2001 that this does not relate to the area of custom law,\(^{29}\) disregarding a contrary decision of the ECtHR of 25/02/1993.\(^{30}\)

The sometimes different interpretation of the Convention is an expression of the different perspective of both courts. While the ECJ is more focused on the efficiency of the internal market and legality of the acts of the European Communities, the Strasbourg Court is more focused on individual rights and freedoms.\(^{31}\)

6. These diverse perspectives give reason to assume that there will be no complete conformity in the jurisdiction of both courts after the Charter of fundamental rights of the European Union has gained binding force. In cases where an established jurisprudence of the Strasbourg Court exists, the horizontal clauses in Art. II-112 § 3 TEC may lead to rather clear conformity. But for those fields where there is not yet an established jurisprudence, there is still no guarantee and no procedure to overcome possible divergences.

In relation to the national constitutional or supreme courts which apply catalogues of fundamental rights similar to those written in the Convention, an external control by an impartial court that stands outside the national constitutional

\(^{27}\) The ECJ reached the conclusion, that the television monopoly conferred by the Greek state does not violate Community law (judgment of 18/06/1991, C-260/89, *Elliniki Radiofonia Tileorasi Anonymi Etairia v. Dimotiki Etairia Pliroforisis and Kouvelas*) while the ECtHR held later that the Austrian television monopoly was not in conformity with Art. 10 of the Convention (judgment of 24/11/1993, *Informationsverein Lentia and Others v. Austria*), REC 276.

\(^{28}\) The ECtHR states that Art. 6 § 1 of the Convention guarantees the right to reply in civil cases as well as in criminal cases to every statement given to the court in writing or orally, also when those come from an impartial and objective organ of the jurisdiction (judgment of 20/02/1996, *Vermeulen v. Belgium*). Still the ECJ abnegates this in a subsequent decision for the opinion given by the Advocate General on the grounds that latter one isn’t to be seen as pleading with partial interest but as assisting the Court in his exercise of the jurisdiction (Order of 04/02/2000, C-17/98, *Emesa Sugar*). For a more detailed comparison of both cases see: Benedetto Conforti in: *L. C. Vohrah et al. (eds.), Man’s Inhumanity to Man*, 2003, p 221 et seqq.

\(^{29}\) Case *Mannesmannröhrrenwerke*, European Court of 1st Instance, I-112/89, ECR 2001, II-729 (753). The 1st Instance decision based on the former judgment of the ECJ of 18/10/1989, C-374/87 in the case *Orkem*.

\(^{30}\) Case *Funke v. France*, judgment 25/02/1993, Recueil 276-A, § 44.

\(^{31}\) Like said by Rudolf Schuster in his speech of 24 June 2003 before the Parliament Assembly of the CoE: "The European Union will always protect its strict but reasonable economic rules, it is for the Council of Europe to watch over the noble ideals of democracy."
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system has been proven to be crucial for an effective protection of human rights. Such a supervision by the ECtHR has never been questioned. Therefore it is only logical to argue that the same external control is also necessary in relation to acts which have their source in the Union Law.

7. Before entering into the possibilities to overcome the problem of divergences, it is necessary also to address the problem of the lack of competences of the ECJ in relation to specific areas of action of the European Union, as for instance the foreign and security policy. The Court of Justice in its observation on the competences of the EC Court has been very reluctant, if not negative, in relation to an extension of its jurisdiction to cases in this field. On the other hand, as the case of SEG I v. 15 Member States of the European Union demonstrates, it cannot be excluded that a common standpoint of the European Union not only relates to the Member States but also to individuals and may infringe into their rights and freedoms. In the case of SEG I, which concerned a common standpoint of the European Council on fighting terrorism, it included measures against individual organisations or individuals that where treated under this heading and in relation to which the co-ordinated police control of Europol was confirmed, if not enhanced. The ECtHR held that these measures referred only to police competences already established and were therefore merely declaratory. This lack of competences of the ECJ may lead not only to a direct application to the Strasbourg Court if no direct action on the national level is taken and the chilling effect of these common standpoints are obvious, but also to the question whether there is a violation of Art. 13 of the Convention, there being no effective remedy on the national level (here: Community level). If no remedy on the national (Community) level exists, then the ECtHR will act as court of first instance - not a desirable solution in the light of the duty to exhaust domestic remedies - , a situation which was very much

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34 See Art. III-365 § 1 TEC.

35 See note 7.

36 § 2 of Art. 365 TEC, included in the last minute, gives the ECJ a limited competence in the field of common foreign and security policy. It opens the possibility to call on the court for a review of the legality of restrictive measures against natural or legal persons.
II. Proposed answers to the call for a reform

1. One drastic solution to these problems has been proposed by the British professor Toth,\(^{39}\) that the Member States of the European Union should denounce the European Convention of Human Rights, thereby making it possible to establish the ECJ as the only court for human rights questions within the European Union. This is of course an unrealistic and very "euro-concentrated" approach. It does not take into account that the Convention is aimed at supervising all State acts and omissions (mainly on the territory of the Contracting states, as confirmed in the Bankovic case\(^{40}\)) and therefore no such lack of competences should exist in principle for the supreme and national courts. This applies as well to the Court of Justice of the European Communities.

A contrary but similarly drastic solution was proposed by the members of the European Constitution Group. According to Art. 7 (vi) § 1 and 2 of their Draft Constitution, the ECJ shall have no jurisdiction at all in cases where the interpretation of human rights is involved.\(^{41}\) Those cases should be decided directly by the ECtHR. But this would make the ECtHR a first instance court, which is contrary to its philosophy.

2. Apart from these radical solutions, in order to avoid divergences in future between the two courts, at least two proposals have been intensively discussed: the reference procedure and accession by the EU to the Convention. The third position could be that accession is not necessary because of the already or nearly established responsibility of the Contracting States under the Convention for all acts and omissions of international organisations even after a transfer of competences. A fourth position could be that the two institutions could live without any formal regulation by just smoothly adjusting their jurisprudence to each other. This pragmatic way may become more difficult in the future when the ECJ with the European Charter of Fundamental Rights and Freedoms as part of the Constitution has his own legal instrument.

Some questions in relation to Art. II-112 § 3 TEC have not yet received a completely satisfactory answer. When does a right of the Charter really correspond to a right of the Convention? And what does "the same... meaning and scope" really

\(^{37}\) Judgment of 26/08/1997, Recueil 1997-IV.
\(^{38}\) Judgment of 06/04/2000, application no. 27644/95, ECtHR 2000-IV.
\(^{40}\) Decision of 12/12/2001, application no. 52207/99, ECtHR 2001-XII, para 59 et seqq., 67.
mean? Does the reference also embrace the jurisprudence of the Strasbourg Court? According to the explanations to the Charter updated by the Praesidium of the European Convention the Strasbourg case law is a guideline for the ECJ in interpreting the Charter but does not have legal force. Since there is no reference to the jurisprudence of the ECtHR as “binding” on the ECJ (see the restricted reference in the preamble of the Charter) there is no direct legal relationship between the judgments of the Strasbourg Court and the practice within the European Union, and in particular with the judgments of the ECJ. But, as said before, for an effective protection of human rights the possibility of an external review is crucial. Furthermore remains the probability of divergence in fields where not yet a jurisprudence of the ECtHR exists.

3. A procedure of reference from the ECJ to the ECtHR to solve questions of interpretation of the Convention and to avoid divergences of jurisprudence would in principle be possible since already today the Strasbourg Court has the competence to deliver advisory opinions (Art. 47 ECHR). This procedure would need a modification of the Convention, though, and it would not cover cases which do not fall under the competence of the ECJ, like the Matthews case. Furthermore it would not be for the individual to bring this reference procedure to the Court of Strasbourg, but for the ECJ. Apart from this, neither of the two courts has really had good experience with so-called advisory opinions.

III. The proposal of a reform in the new Constitution

1. The text of the proposed new Constitution opened the path for accession of the EU to the Convention. The final report of the Working Group II of the European Convention dealt already with the question of implementing the Charter in the Constitution and of accession to the Convention and outlined that both “should not be regarded as alternative, but rather as complementary steps ensuring full respect of fundamental rights by the Union”.

Since Art. 1-9 § 2 of the draft European Constitution says, “The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, there exists now a legal basis for accession. This text is an improvement in relation to earlier drafts according to which “the Union

42 CONV 828/1/03 REV 1, see note 21.
43 See Callewaert (see note 1) who states that, “according to contemporary legal views protection of fundamental rights on a domestic level only gains credibility if it is also, subjected to review from outside the state.” Taking this view with the Charter accession (to the ECHR) becomes practically a necessity, particularly if the Charter is to acquire binding force.
44 This is true in particular with the advisory opinion of the ECJ about the lack of competence of the European Communities to accede to the Convention (advisory opinion of 28/03/1996, opinion 2/94, Rec. 1996, p I-1759).
may seek accession”. According to Art. III-325 § 6 TEC, the Union - which will now have legal personality according to Art. I-7 TEC and is therefore able to conclude international treaties and to accede to international organisations - normally needs for a conclusion of international treaties only a qualified majority in the Council. For accession of the European Union to the Convention unanimity is nevertheless necessary. This authorisation would be given with the ratification of the Constitution by all Member States. The Parliamentary Assembly of the Council of Europe decided on 25 June 2003 to ask the Committee of Ministers of the Council of Europe to engage as early as possible in negotiations with the European Union on accession. In the 14th Protocol to the Convention, now open for ratification, the Contracting States have inserted Art. 17 § 2: “The European Union may accede to this Convention” which makes it possible that not only states may become Contracting Parties.

It is to be hoped that the clear signal in favour of accession given by the European Constitution will be followed by a quick preparation of the required legal instruments.

2. One impediment to this accession could be that the status of the ECtHR which - in contrast to the status of the ECJ - has never been defined in clear legal terms.

While the ECJ is an organ of the European Communities and will become an organ of the European Union after the Union has acquired legal personality, the same is not true for the relationship between the ECtHR and the Council of Europe. The Council of Europe, in particular the Committee of Ministers, has until now not established clear, definite and satisfactory rules (statutory regulations) on the status of the Court and the judges. The provisional regulation of 1997, which was expressly deemed provisional and to be replaced within one year by a definite one (that is shortly after the coming into force of the 11th Protocol) has until now never been modified or finalised. This provisional regulation speaks of the special status of the Court without clarifying whether the Court is part of the institutional structure of the Council of Europe itself, whether it has legal personality (like other international courts, for instance the recently-created International Court of Justice) or not.


47 Peter Schieder, President of the Parliamentary Assembly of the CoE, called the draft of the European Convention a “crucial first step” not only into direction to accession of the EU to the Convention but also to the EU becoming an associated member of the CoE. Walter Schwimmer, Secretary General of the CoE, spoke in favour of an accession in occasion of the 3rd Council of Europe Summit of Heads of State and Government which took place in spring 2005. But first the European Constitution has to be ratified which according to Romano Prodi could last approximately two years.

Criminal Law) or whether is has to be considered as a “common organ of the Contracting States”, which would mean that it has nevertheless its place outside the Council of Europe but under a certain control of the Committee of Ministers of the Council of Europe as an assembly of the representatives of the Contracting States (not as the Committee of Ministers as such).

Before the European Union seriously envisages the accession to the Convention this question of the status of the ECtHR should be resolved, together with the question of the status of its judges. While judges of other international courts are treated as international staff of a particular judicial nature (independence to the organisation in relation to their judicial function) the judges of the ECtHR are “self employed”. They have no contractual or statutory relationship to the Council of Europe and, until now, do not have the status of any of the other staff members of the Council of Europe. They have no access to the administrative tribunal in relation to their working conditions and other conditions of the Council of Europe and they do not enjoy any social protection. Their salary is not guaranteed for times of illness and they do not have pension rights. The judges in a recent resolution unanimously adopted by all of them have voiced concern about their independence and have stated “on the question of principle, the lack of pension provisions in particular, can be perceived as exposing judges to pressure during their term of office as complete loss of income might result from their departure from office or total disability. Alternatively judges may be forced to rely on their governments for pension provisions, which seems incompatible with their status as members of an international court. This goes directly to the independence of the Court, the essence of the status of international judges being that they should be free of all financial dependence on their governments.

Moreover it may be considered inappropriate that the Council of Europe, as a parent institution of the Social Charter, enshrining as it does the right to social security, should be seen to espouse a system that fails to provide any social security for its judges. This lack of basic social protection also sits ill with the Social Security Convention of the ILO which is binding on all Member States and requires them to provide social protection covering at least some of the relevant risks, and with Art. 9 of the International Covenant on economic, social and cultural rights (1966) which provides inter alia that “the States Parties .... recognise the right to everyone to social security, including social insurance.”

IV. The modalities of accession and the necessary modifications of the statute of the Council of Europe and the European Convention of Human Rights

1. Regarding the modalities of accession by the European Union to the Convention, two options have been proposed; one is for an amending protocol which would contain all the necessary provisions to enable the EU to accede; the other is
for an accession treaty. The first option would entail two steps: the amending protocol would try to overcome the difficulty that the Convention is only open to States that are Member States to the Council of Europe (Art. 59 § 1 ECHR, Art. 4 of the statute of the Council of Europe). This amending protocol would have to be signed and ratified by all State parties to the Convention which would probably take at least a few years. Only then the EU could accede to the modified Convention. In order to accelerate the ratification process a "tacit acceptance clause" which provides the automatic entry into force following the expiration of a certain time period, could be used. Since such a clause is designed for protocols of less importance it does not seem to be the adequate instrument to be applied on the occasion of the accession of the EU to the Convention. The other option of an accession treaty would combine both steps into one. The States Parties to the Convention and the EU would sign one treaty. This treaty could contain a rather short text with the agreement that the EU accedes to the Convention and in the annex the necessary amendments to the Convention and the protocols could be regulated.

2. Both the statute of the Council of Europe and the Convention are based on the concept that only states may be contracting parties. Since the EU is not (yet) a federal state, its accession would mean that both instruments have to be adapted to the idea of an international organisation being a member of the Council of Europe and a party to the Convention. Here, too, different options exist. To make an isolated accession of the EU to the Convention possible, independently from a membership in the Council of Europe, Art. 59 § 1 of the Convention ("This Convention shall be open to the signature of the members of the Council of Europe.") has to be amended. The first option proposed by the working group II of the European Convention is to expressly authorise the EU to accede to the Convention (now Art. I-9 § 2 TEC). The second alternative is to open the possibility of accession to all international organisations with the only restriction that the organisation has to be invited by the Committee of Ministers of the Council of Europe.

3. More complex is the situation in regard to the notion of State or States to which the Convention refers in Art. 10 § 1, 11 § 2, 17, 27 § 2 and § 3, 38 § 1 a, 56 § 1 and § 4 and Art. 57 § 1. There is either the possibility of adding simply the "EU" to the term of "States", or to use generally the expression "High Contracting Party". Another option would be to make it clear in the amending protocol that whenever the text refers to State or States, this could be read as High Contracting

49 See Working document (WD) 08 of the Working Group II of The European Convention which contains a study on technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights elaborated by the Steering Committee for Human Rights, p 7 et seqq.
50 See WD 08, p 7.
51 See WD 08, p 11. In this context also the Art. 59 § 4 of the Convention has to be amended to make clear that it refers on ratification or accession and that all the Contracting Parties of the Convention and not only the members of the CoE are to be informed of a new Contracting Party.
Party(ies).\textsuperscript{52} Or to state that all state-tailored terms are to be applied accordingly.\textsuperscript{53} That would allow the text to remain as it stands and only make one additional rule. This would also avoid the problems how to interpret and apply Articles whose wording obviously is only applicable to states. Those terms are, for instance, "national security", "economic well being of the country", "territorial integrity" and "national laws" used in Art. 8 § 2, 10 § 2, 11 § 2 and 12 § 2 of the Convention. All these terms have to be interpreted \textit{mutatis mutandis} in view of this specific situation in international organisations or in particular the EU. Another example is Art. 15 § 1 of the Convention that refers to "the life of the nation".

4. The situation in the Council of Europe could be solved by admitting the EU not as a state, and thus not as a full member, but as an associate member. This kind of membership does not give the EU an independent status within the Committee of Ministers, except that special regulations are to be provided for in a regulatory or statutory resolution of this body. This kind of "subsequent practice" would avoid a formal modification of the statute of the Council of Europe and a formal ratification by all Member States. It is clear that this kind of procedure is not possible for the Convention, and therefore the accession treaty between the EU and the Contracting States of the Convention needs to be ratified as well by the EU itself and by unanimous decision of the Committee of Ministers of the Council of Europe and on the other hand by all 45 Contracting States. In this respect it is for the first time that quite a large number of Eastern European states, but also Switzerland and Norway would have a formal say on a very substantive question of the further development of the legal order of the EU. It should be made clear that the accession treaty should not be dependent on the fact that one of the Contracting States denounces the Convention according to Art. 58 ECHR or denounces the accession treaty. The legal relation between the EU and the Convention (and the Council of Europe) should not be dependent on the will of states, which may develop in the course of the future a rather intensive opposition to the EU (take the possible example of Russia).

5. A further problem may arise in relation to the execution of judgments of the ECtHR in relation to the European Union. The judgments of the ECtHR are only declaratory and, according to Art. 46 § 2 ECHR, the Committee of Ministers supervises the execution of the judgments. The relations between the representatives of the States in the Committee of Ministers and the duties of the respondent States to execute are practically and also from a legal point of view of utmost importance. Therefore it would be appropriate, if not necessary, that the EU has its own representative as such in the Committee of Ministers. Actually representatives of the European Commission have a right to attend the meetings of the

\textsuperscript{52} See WD 08, p 12 et seq.
\textsuperscript{53} This proposal goes back to the Memorandum of the European Commission of 4 April 1979, Bulletin of the European Communities Supplement 2/79.
Committee of Ministers but this does not include any right to vote. This situation will not be satisfactory after the accession of the EU to the Convention. It could be argued that because the EU has only limited competences compared with those of a sovereign state, it should also have only limited rights of participation in the supervision of the judgments of the ECtHR. But this "limitation" would also apply to all Member States of the EU that have already transferred quite a number of competences to the EU and are, as a result of this transfer, far beyond to be "a full sovereign state". Limitations of the EU of the right to vote in the Committee of Ministers could consist of an exclusive right to vote only in cases with reference to Union law. But this would be an unjustified discrimination compared to the other Contracting Parties of the Convention. Therefore Art. 46 § 2 of the Convention should be amended in the way that the EU gets a right to vote in the Committee of Ministers as far as the execution of judgments of the ECtHR are concerned and not only judgments against the EU but judgments against all other Contracting Parties. In this respect it would not be necessary to amend formally the statute of the Council of Europe because the reformed Art. 46 § 2 of the Convention would constitute a lex specialis to the rules of the statute.

6. It has been argued that the formal accession of the EU to the Convention would be contrary to the so-called autonomy of Union law. But like in the relations to the higher courts of the Member States, the ECtHR would not be an additional instance. The ECJ would not be in a relation of formal subordination to the ECtHR as all national supreme courts are not in a relation of subordination to the Strasbourg Court. The competence of supervision of the Strasbourg Court would exist only in cases with relation to human rights and fundamental freedoms guaranteed in the Convention, which is still a small percentage of all Luxembourg cases. But it is true that more and more questions of fundamental rights and freedoms will arise for decision once the Charter acquires binding status.

7. One of the objections against accession has also been the fear that the standards (the general principles of fundamental rights and freedoms) within the EU may be influenced by positions taken by judges from other legal systems outside the Union and in particular from those of Eastern European countries. Whether there should be, according to Art. 20 and 22 of the Convention, also an EU judge on the ECtHR is a disputed question. Arguments against such a judge are on the one hand the limited competences of the EU compared to a sovereign state. On the other hand it should be taken into account that the EU is already sufficiently represented by the judges of the Member States of the EU. But one has to consider also that there are specific competencies of the EU so that it would seem also possible to have a specific judge on behalf of the Union. If one agrees that the EU should have its own representative with voting right within the Committee of Ministers, then one should also foresee the possibility of such a judge within the ECtHR.

54 This accord was met in an exchange of letters between the President of the European Commission and the Secretary General of the CoE in 1997.
This judge would be a full judge as any other judge, elected on behalf of the EU but not called to “represent” the EU. One of the main tasks of the judges in the Court is to provide the Court with their special knowledge of national law. This could also be the case for a judge elected on behalf of the EU who has special knowledge of the Union law. The different nature of the EU as a special international organisation compared to the other Contracting Parties gives no reason to diverge from the principle of one judge in respect of each Contracting Party.  

Neither would it be justified to give the judge a different status to that of other judges. To a point an ad hoc judge for each case where Union law is involved would not reflect the spirit of this institution. Ad hoc judges are designed in exceptional situations but with an increasing number of cases with connection to EU law that would become a constant situation and would therefore call for a full time judge “à titre de l’Union” as the most adequate solution.

8. Another question is whether it is necessary to create a separate chamber in the E CtHR on Union matters. This proposal reflects again the doubts raised if judges from states that are not members of the EU were to sit in EU cases. Personally I do not see any justification for such a special treatment of the EU. It is just part of the E CtHR system that a mixed college of judges decides. The necessary special knowledge is vested in the “national” judge in so far as there will be an EU case. This regulation seems to be sufficient to take into account the particularities of Union law after an accession of the EU to the Convention; there should be no further reform of the chamber system apart from the integration of the EU judge.

V. Further consequences of such an accession

1. An area of concern is the competence of the ECJ in respect of the standing of individual claimants (Art. 230 § 4 of the EC-Treaty). This Article makes reference only to situations where the individual claimant is directly and personally concerned by an action or omission of the European Union. The Court of Justice has always interpreted these requirements in a very restrictive way and has excluded general acts as for instance regulations or directives from this Article. Only in very specific situations, as for instance the effect of dumping regulations on individual exporters or importers, has the ECJ interpreted their involvement as an individual act. This restriction of the interpretation of the standing of individual claimants may raise problems in the light of Art. 6 § 1 of the Convention.

56 Conclusion also drawn by the Steering Committee, see WD 08, p 21 et seqq.  
57 Art. III-365 § 4 TEC. On these issues see Wolfram Cremer, loc. cit. supra note 33.  
Despite the effort of the European Court of first instance to enlarge this scope (also in view of harmonising the jurisprudence with the interpretation of Art. 6 § 1 of the Convention by the ECtHR), the Court of Justice has nevertheless upheld its restrictive interpretation. After accession of the EU to the Convention, claimants may argue that they did not have access to a court according to the requirements of Art. 6 § 1 ECHR.

2. In relation to the control of the so-called reference procedure (Art. 234 EC-Treaty\(^6^0\)), it has long been discussed whether it is appropriate, if not necessary, to introduce a special action before the ECJ if a national supreme court, whose judgments are not subject to further review, does not suspend its procedure and refer the question of interpretation or application of Community law to the European Court of Justice? Since these complaints may - and very often do - concern interpretation and application of fundamental rights and duties in the light of the European Convention of Human Rights, and in particular, the right to the legal judge (gesetzlicher Richter) as enshrined in the notion of a fair procedure in Art. 6 § 1 of the Convention, the ECtHR is called upon more and more to supervise this application (or non-application) of Art. 234 EC-Treaty. The Strasbourg Court exercises this control in the same way as a Federal Constitutional Court as to an arbitrary denial of reference to the ECJ.\(^6^1\) Although this kind of review of the Union law - legality of decisions of national courts of the Member States - should be in the hands of the ECJ and not be at first instance in the hand of the Strasbourg Court.

3. The view to the competence of both courts is mainly concentrated on individual complaints, but it should be also taken into account that there exist other procedures: firstly, a procedure of supervision of legality (procedure of violation of treaty law) by the Commission. This procedure is seen as the relevant counterpart to the very restrictive extension of Art. 230 § 4 EC-Treaty (restricted standing for individual parties). There is no comparable procedure within the system of protection of human rights in Strasbourg, except the interstate complaints. The possibility for interstate complaints exists also within the European Court of Justice, but history shows that these complaints are rather rare and carry the risk of sharp dissonance between Member States or Contracting States. It is for the moment under discussion within the Parliamentary Assembly of the Council of Europe whether it is useful to establish within the Council of Europe an institution (like the Commission of the European Union) which is enabled to bring ex officio and sua sponte a complaint against any Contracting State for any violation of the Convention (on a more general level). The Parliamentary Assembly has already pronounced several times in favour of an actio popularis and advocated the creation of a post of public

\(^6^0\) Article III-369 TEC.

prosecutor at the European Court of Human Rights or a review of the terms of reference of the Commissioner by amending the European Convention on Human Rights.\textsuperscript{62} Such a procedure could induce structural reforms and be a response to so-called repetitive cases. It could be an answer also to the problem that individuals for one reason or another may not be willing or be able to bring their grievances before ECtHR. Whether, following accession of the European Union to the Convention, an “interstate” complaint could and should be possible by a state against the European Union is an open question. At least Member States of the Union have already such a possibility of action before the ECJ.

There are procedures within the European Union, except those within the Third Pillar (Art. 46 TEU), where the competence of the ECJ is excluded: This is the case for the so-called suspension procedure if one Member State violates basic elements of democracy and freedom or fundamental and human rights (Art. 7 TEU\textsuperscript{63}). Should a state which is subordinated to such a procedure not have access to the ECJ?\textsuperscript{64} And should a state which is warned that it might be expelled from the Council of Europe (Art. 3 of the statute) not have a judicial remedy to clarify and to prove such accusations? Since neither the ECJ nor the ECtHR have for the time being competences in this field there can be no divergence of opinions and decisions. Nevertheless, in view of the rule of law, one has to urge that in this field there must be judicial control as well.

VI. Concluding remarks

The solution to the problem of the relations between the Strasbourg and the Luxembourg Court would and could be well handled by the accession of the EU to the Convention. This accession would also reflect the enlargement of the EU, which, with 27 Member States in the near future, would then include more than half of the Contracting Parties of the Convention system. Community law is already now as a preliminary question often applied in the case law of the ECtHR so that it would not be a drastic change for the ECtHR to be given jurisdiction in relation to the EU. Of course, many new questions may arise, that of the “territorial” responsibility of the EU, which would be quite different from that of the States, and whether for the EU accountability and responsibility would be equivalent and synonymous. There may be some problems with reservations on the part of the EU and also in relation of areas which are not covered by the judicial competence of the ECJ. It may be foreseeable that a test period of about ten years is


\textsuperscript{64} Article I-59 § 3 TEC.

\textsuperscript{64} In the Constitution a limited supervision of suspension measures is provided. According to Art. III-371 TEC the ECJ shall have jurisdiction solely on the procedural stipulations contained in Art. I-59 TEC.
necessary to answer the question what further reforms are necessary. The reform which was under intensive discussion within the Committee of Ministers and the Parliamentary Assembly in relation to the immense number of applications to the ECtHR and which led to the adoption of the 14th Protocol will be only one element in this review.