A square peg in a round hole? The accession of the European Union to the European Convention on Human Rights

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1. Article 6(2) of the Treaty on European Union (TEU), as amended by the Treaty of Lisbon, provides that

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

These two simple statements, along with the three short articles of the accompanying protocol[3], make the task sound almost straightforward. We are now some months into the process of preparing the instrument to effect the accession of the European Union to the European Convention on Human Rights. Even now, it is already becoming clear that this task is far from straightforward: we are engaged in complex surgery on some delicate and vital structures of international law.

2. The European Convention on Human Rights was drafted 60 years ago as an instrument to bind its sovereign state parties. At that time, seven years before even the Treaty of Rome, a supranational regional organisation of the scale and power of the European Union was unimaginable[4]. In laying the foundations for the European Union to accede to the Convention, the functioning of the Convention system will need to be adapted so that it effectively binds the Union but also respects the Union's particular nature and structure. At the same time, the strength, effectiveness and coherence of the Convention system must be preserved as a guarantee of human rights.

3. Much has already been said about whether the accession of the European Union to the Convention is indeed a necessary or worthwhile step[5]. I shall not consider this question, not least because the aforementioned provision of the TEU rather settles the point from a practical point of view. I would note, however, that it remains an open question the extent to which the Union's accession to the Convention can be expected to make a conspicuous difference in practice: not only are the rights under the Convention already firmly established as general

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[2] The author has taken the opportunity to annotate this paper further since its delivery to clarify points raised in discussions, and to reflect some later developments.

[3] Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

[4] The author acknowledges the susceptibility of his rhetorical device to historical counter-examples.

[5] An excellent exposition on this point, subsequent to this lecture, was given by Prof. Françoise Tulkens, a judge of the European Court of Human Rights, in a lecture on 25 October 2010 at the Institut d'Etudes Européennes of the Université Libre de Bruxelles.

principles of Union law[6], but the European Court of Human Rights has also so far shown considerable flexibility to ensure that meritorious proceedings could still be brought against a suitable respondent[7]. Therefore, while the accession of the Union to the Convention will fill a conspicuous theoretical lacuna in the legal framework of human rights protection in Europe, I have yet to encounter anyone who expects this to result in many new admissible applications being brought before the Strasbourg Court.

4. I propose to consider three aspects of this subject. First, I shall set out the process by which the accession instrument is being prepared, and the bodies involved. Second, I shall look at the principles that underpin this process. Third, and finally, I shall examine the key challenges that we face and some particularly difficult issues that will need to be resolved.

The accession process

5. There are 48 principal actors in the accession process: the 47 member states of the Council of Europe, all of them also parties to the Convention, and the European Union as an organisation. Of those 47 states, 27 of them are of course also members of the European Union, giving them the unusual position of having interests on both sides of the accession negotiations.

6. Unlike the European Union, the Council of Europe as an institution is principally intergovernmental: it functions largely as a comity of its member states, and the Secretariat of the Council of Europe is analogous in neither powers nor duties to the Commission of the European Union. Therefore, convenient though it might have been, it would never have been possible for the accession process to be conducted purely as a bilateral negotiation between the permanent institutional structures of the European Union and the Council of Europe.

7. There are also significant differences in the way in which business is done between the European Union and the Council of Europe. There is an aphorism that I am especially fond of citing that neatly encapsulates this fundamental difference in style, drawing on the terminology of the two organisations: in Brussels, one negotiates to reach a deal; but in Strasbourg, one discusses to reach an agreement.

8. In the first half of this year, negotiations took place at the European Union on how to approach the accession process, mainly in the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons, a body that bears the inexplicable acronym FREMP. The resultant deal took the form of a Council Decision[8] authorising the opening of negotiations for accession with the contracting parties to the Convention. The Decision appointed the Commission as the negotiator on behalf of the European Union, bound by a number of

[6] Currently reflected in Article 6(3) TEU, though this provision can be traced back to the Maastricht Treaty, and the underlying point was made by the ECJ in the 1970s.

[7] See, for example, the cases on removals to Greece under the Dublin Regulation brought against a number of European Union states.

[8] Council Decision 10817/10 of 4 June 2010

negotiating directives. The Council Decision, as may be expected in such a situation, is a confidential document[9].

9. From the Council of Europe side, the key body is the Steering Committee on Human Rights, or CDDH[10]. This intergovernmental group reports to the Committee of Ministers, the executive body of the Council of Europe. Instead of the preparation of the accession instrument taking place in CDDH itself – which with 47 states, the Commission and a wide range of bodies with observer status would be an unbearably tedious exercise – CDDH established an informal drafting group from among its membership. This group – CDDH-UE – consists of 14 national experts elected by CDDH itself, of whom seven come from EU states and seven from non-EU states. In June of this year, I had the honour of being elected to CDDH-UE[11]. Only the Registry of the European Court of Human Rights and CAHDI, the group of international legal experts of the Council of Europe, have observer status in CDDH-UE.

10. CDDH-UE meets with the European Commission as the EU negotiator to prepare the accession instrument. One unusual aspect of CDDH-UE is that the 14 national experts serve in a personal capacity. This recognises the unusual situation that, for seven of those experts including me, our national governments are bound by the duty of sincere co-operation under Article 4(3) TEU[12] to "assist each other in carrying out tasks which flow from the Treaties"[13]. The deeper problem here, of course, is that a bloc of 27 EU member states would constitute a substantial majority of the contracting parties to the Convention, a situation that would not be conducive to reaching a sustainable agreement that meets the interests of all 47 states.

11. Another noble tradition of the Council of Europe is that the outcome is more important than the process. In both the structure itself and in certain elements of

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[9] Since the author spoke, this document has been partially declassified: http://register.consilium.europa.eu/pdf/en/10/st10/st10817-ex02.en10.pdf

[10] The usual practice at the Council of Europe is for the abbreviations for its intergovernmental bodies to be based on the body's name in French: in this case, «le Comité Directeur pour les Droits de l'Homme».

[11] Elected to CDDH-UE were Mr Gentian Jahjolli (Albania), Mr Levon Amirjanyan (Armenia), Ms Vesna Batistic Kos (Croatia), Mr Arto Kosonen (Finland), Ms Anne-Françoise Tissier (France), Mr Hans-Jörg Behrens (Germany), Ms Inga Reine (Latvia), Mr Roeland Böcker (The Netherlands), Ms Tonje Meinich (Norway), Mr Razvan Rotundu (Romania), Mr Oleg Malginov (Russian Federation), Mr Frank Schürmann (Switzerland), Ms Deniz Akçay (Turkey), and the present author. Ms Meinich was elected Chairperson of CDDH-UE. Mr Jahjolli has since resigned, leaving a space that will be filled by a further election from among candidates put forward by non-EU states at the November meeting of CDDH.

[12] "Pursuant to the principle of sincere co-operation, the Union and Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[13] The key point here, therefore, is that Member States are bound not to undermine the EU's negotiating mandate – but officials from seven of those Member States are in principle on the other side of the negotiating table reflecting their States' membership also of the Council of Europe. To ensure that the experts can freely participate, all therefore participate in their personal capacity – although, of course, those from the EU Member States would never in practice deliberately seek to undermine the position of the EU.

procedural pragmatism such as personal capacity, the approach that has been adopted to prepare the accession instrument may seem rather ungainly. I acknowledge that not everyone finds it entirely satisfactory. But the key is that there is a will to make it work and to prepare an agreement that delivers EU accession on terms that are acceptable to all 48 of the actors involved.

12. CDDH-UE has now met twice. Our first meeting in July was substantially procedural, devoted to preparing a structure for our future work. At our second meeting last week, we embarked on that work, preparing draft elements for an accession agreement on the scope of EU accession, on reservations, on ancillary instruments of the Convention system[14], and on technical adaptations to the functioning of the Convention itself. Future meetings in October[15] and December will consider issues such as the procedure before the European Court of Human Rights and the participation of the European Union in other bodies relating to the Convention system.

13. After each meeting, the Commission reports back to FREMP in Brussels, while in turn the output from CDDH-UE will be scrutinised by CDDH itself as the decision-making body. While CDDH-UE itself operates somewhat *in camera*, its output is publicly available on the website of the Council of Europe[16]; the most recent documents – the report of the second meeting[17] and the draft elements so far prepared[18] – will shortly be available.

14. I should note in passing that it was a matter of some regret to me personally that CDDH-UE meets without the presence of the usual observers from non-governmental organisations and national human rights institutions who are usually present at CDDH. There is a clear pragmatic reason for this – that states are similarly disentitled from sending representatives as observers – but nonetheless it changes the dynamic of Council of Europe proceedings for the worse on a subject on which transparency is paramount. I can only be heartened that this unusual measure has been clearly agreed not to constitute any form of precedent, and that civil society will retain its usual involvement through CDDH itself.

15. I have so far been carefully using the phrase “the accession instrument”, instead of specifying whether this will take the form of an accession treaty or an amending protocol to the Convention. This is deliberate: while there seems to be a clear preference among the members of CDDH-UE for an accession treaty, not least because this would be an instrument to which the EU itself would also be party, this point is being held open until the contents of the instrument have been settled. What is clear is that this instrument, whatever its form, will need to be ratified by the 47 member states of the Council of Europe.

[14] The European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights; and the General Agreement on Privileges and Immunities of the Council of Europe and the First and Sixth Protocols thereto.

[15] This meeting has now taken place, and the papers from it will also shortly be available on the website of the Council of Europe website as in the footnote below.

[16] http://www.coe.int/T/E/Human_rights/cddh/

[17] CDDH-UE(2010)10

[18] CDDH-UE(2010)11

16. The idea had been mooted that the accession instrument could be subject to some form of provisional application to speed its coming into force. There are many in Strasbourg who recall the protracted ratification process of the Fourteenth Protocol to the Convention, which itself was ultimately subject to provisional application by a number of member states before it came fully into force on 1 June this year. Although the point has not finally been settled, it seems to be a widely-shared view that provisional application would not be suitable for the accession instrument, not least given that it will need to make amendments to the substantive functioning of the Convention system.

Principles underpinning the accession

17. I should now like to consider briefly seven principles that, implicitly or explicitly, underpin the accession process. In most cases, these are not controversial as principles, and are shared by all 48 of the actors in the process. Equally, however, the way in which one might give effect to these principles, especially where they overlap, is not always clear or uncontroversial.

18. The first and foremost principle of accession is that it is for the benefit of the people of Europe. The lacuna in the legal protection of human rights in Europe may be more theoretical than practical, but accession will nonetheless close a gap that has opened as a result of the transfer of competences from states to the European Union. Applicants will for the first time be able to name the Union as a respondent in proceedings before the European Court of Human Rights, and the Union will be directly bound by adverse judgments. The corollary of this principle, of course, is that accession is not intended to be for the benefit of the European Union or of the existing contracting states, nor principally indeed for the benefit of the Convention system.

19. Second, and even more obviously, the European Union is not a state – nor does it possess the character and powers of a state. Above all else, the powers of the Union derive from the conferral of competences, unlike the inherent powers possessed by a sovereign state.

20. Third, and further to this, the European Union is not becoming a member of the Council of Europe. The immediate practical effect of this is that the accession instrument will need to identify and disentangle the elements of institutional structures in Strasbourg that relate specifically to the Convention. This is not as straightforward a task as it may appear: in many case, most notably the Committee of Ministers itself, one body may perform many different functions in a number of different configurations. A further practical effect of this principle is financial: for although the European Union will not become a member of the Council of Europe, a mechanism and a formula will need to be devised by which it will pay its share of the costs of the Convention system.

21. But taking these points into account, the fourth principle is that the EU should accede to the Convention on a basis that is, so far as possible, equal to the others parties to the Convention – in terms both of its obligations and the concomitant privileges afforded to contracting parties. Or put in different terms: there should be no unwarranted special treatment, positive or negative, for the European Union as a contracting party.

22. However, fifth, there are certain particular features of the European Union, particularly as a body created by the conferral of competences, that need to be reflected and respected in the accession arrangements. The most notable of

these is already the subject of a draft provision which defines the scope of the European Union's accession to the Convention. This provision – the elegance of the drafting of which I commend to you – would augment paragraph 2 of Article 59 of the Convention thus:

> Accession to the Convention and its protocols shall impose on the European Union obligations with regard only to acts and measures of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or its protocols shall require the European Union to perform an act or adopt a measure for which it has no competence.

23. Similarly, sixth, the position of the member states of the European Union should not fundamentally change as a result of the Union's accession. There are two aspects to this: on the one hand, the ability of these 27 states to participate as full parties to the Convention, including in particular their right to respond to proceedings; and on the other, the protection of the extent of these states' obligations under the Convention, particularly when one considers limitations of those obligations such as reservations and derogations.

24. Seventh, and finally, in all of this the Convention system should continue to operate effectively. Imperfect though it may presently be, the functioning of the European Court of Human Rights must not be disrupted, nor should the adaptations for the European Union constitute the creation of a special regime within the Convention system. As my Russian colleague recently remarked, the Convention must remain a document of universal application.

Challenges ahead

25. It is not going to be easy to put these principles into practice. Over the next two meetings in particular, we face certain issues that will highlight tensions between them, and that will require vision and creativity to address. In particular, I personally feel that the practical conduct of proceedings involving the European Union before the European Court of Human Rights could prove more complex to establish than any of us expect. Two particular proposals have been made to account for the special circumstances of the European Union.

26. The first is the proposal for a so-called "co-respondent mechanism". At present, proceedings may be brought against multiple respondents before the European Court of Human Rights – but the status of these respondents is several, rather than joint. There will however be occasions upon which the responsibility for a given act is shared between the European Union and one or more of its member states: a prime example is the national implementation of a piece of Union secondary legislation. In such proceedings, it may not always be clear the extent to which an alleged breach of the Convention results from the secondary legislation or the national measures[19]. It should not be for the applicant to have to determine this, nor is this a matter with which the Strasbourg Court should really be burdened. The idea, therefore, is for a mechanism that permits the Union and one or more of its member states to respond to proceedings jointly, and to share responsibility for the execution of an adverse judgment, should one result.

[19] For example, where the member state possesses a margin of discretion in transposing secondary legislation, and the national legislation is successfully challenged, the question may arise whether it was through the State's exercise of discretion that the incompatibility with the Convention arose, or whether it was a necessary implication of the original secondary legislation.

27. It has also been proposed that there should be a mechanism to ensure the role of the European Court of Justice in considering applications before they go before the Strasbourg Court. As a result of the interdependence between the existing rules on the exhaustion of remedies under Article 35 of the Convention[20] and the procedure by which references may be sought to the Luxembourg Court, it is possible that proceedings against the European Union could reach the Strasbourg Court without having been considered by the principal court of the Union. Mr Timmermans, formerly a judge of the Luxembourg Court, has notably made a proposal for this "prior involvement" mechanism. Speaking entirely for myself, the challenge for the Union will be to explain how the case for this mechanism differs from the situation in which a case against a state has not been considered by the higher courts of that state; for a mechanism such as this could perhaps be constructed without significantly delaying the functioning of the Court in respect of one contracting party, but not 48.

28. Finally, the extent of the Union's involvement in the bodies of the Council of Europe relating to the Convention will need to be settled. It is generally agreed, I think, that a judge of the Strasbourg Court will be elected in respect of the Union. I think there is also general agreement that the Union must obviously be permitted to participate in the Committee of Ministers when it scrutinises the Union's own execution of judgments. But beyond this, there are difficult questions, both about the extent to which the Union as an organisation should participate and how its collective position should be established, but also about the extent to which the Union and its members should operate as a bloc on matters falling within Union competence.

Conclusion

29. It may appear from everything I have said that there remain more questions than answers, and more principles than practical provisions. This would not be an unreasonable conclusion. It should not however be cause for despair: even after just one substantive meeting of the drafting group, it seems clear to me that there is a real will to answer the questions and pin the practicalities to the page. By the turn of the year, CDDH-UE should have examined every issue for the first time. I hope then that we will be able to see our way to concluding the preparation of the agreement by the middle of next year, as the group's mandate requires. To put it bluntly, wish us luck.

[20] "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."