CAN THE EU JOIN THE ECHR – GENERAL CONDITIONS AND PRACTICAL ARRANGEMENTS

by

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A. Introductory remark

When asked to speak on this subject, I did not realise how much work had already been done. All my initial ideas have been dealt with in a much more excellent manner by expert groups. All I had to do was to give a summary of already existing texts.

B. Some historical background

When the EEC was established in 1957 the relevant documents did not mention the necessity to also include a separate Bill of Rights. After all, the European Convention on Human Rights (ECHR, 1950) – to which all countries concerned were a Contracting Party - had just entered into force. It was only after a while that the EC Court of Justice (ECJ) was confronted with cases in which human rights were also at stake. This caused the institutions of the EC/EU to address the question of how to deal with these human rights issues. [1] Article 6 paragraph 2 of the Treaty on European Union (1992) then specified:

> „The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles for Community Law.

Later on, the Treaty of Amsterdam (1997) required the ECJ, in so far as it had jurisdiction, to apply human rights standards to acts of Community Institutions.

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1 Antoine Jacobs, *The European Constitution. How it was created. What will change*., Nijmegen 2005, p. 119

In 2000 the EU considered drafting a European Union Charter of Human Rights itself. [2] This Charter was adopted by the European Council of Nice on 7 December 2000.

At the level of the Council of Europe some concern existed that the case-law of the ECJ and the European Court of Human Rights (ECourtHR) might diverge as far as human rights are concerned. So the European Ministerial Conference on Human Rights stated in its: Declaration of November 3 2000: What future for the Protection of Human Rights in Europe?:

> "(..) STRESSES also the need, in regard to the European Union Charter of Fundamental Rights, to find means to avoid a situation in which there are competing and potentially conflicting systems of human rights protection, with the risk of weakening the overall protection of human rights in Europe; EXPRESSES THE WISH that the Council of Europe brings together all European States and CALLS ON the latter to make necessary progress in the fields of democracy, the rule of law and human rights, in order to achieve a greater unity in those key fields for the stability of the Continent; REAFFIRMS that the Convention must continue to play a central role as the constitutional instrument of European public order on which the democratic stability of the Continent depends."

In March 2001 the Committee of Ministers of the Council of Europe instructed the Steering Committee for Human Rights (CDDH) to examine the legal and technical questions that would have to be addressed by the Council of Europe in the event of possible accession of the EU to the ECHR. The CDDH adopted a report identifying those issues in 2002 (document DG-II (2002) 006):

> "In May 2004 the Committee of Ministers of the Council of Europe adopted a series of measures intended to ensure the effective implementation of the European Convention on Human Rights at national and European levels. [3] In Protocol No. 14 to the European Convention on Human Rights, which was opened for signature on 13 May 2004, the possibility is opened that (art. 59): 'The European Union may accede to this Convention' The Explanatory Report on this article reads: Article 59 has been amended in view of possible accession by the European Union to the Convention. A new second paragraph makes provision for this possibility, so as to take into account the developments that have taken place within the European Union, notably in the context of the drafting of a constitutional treaty, with regard to accession to the Convention. It should be emphasised that further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view. The CDDH adopted a report identifying those issues in 2002 (document DG-II (2002) 006). This report was transmitted to the Committee of Ministers which took note of it. The CDDH accepted that those modifications could be brought about either through an amending protocol to the Convention or by means of an accession treaty to be concluded between the European Union, on the one hand, and the State Parties to the Convention, on the other. While the CDDH had expressed a preference for the latter, it was considered advisable not to refer to a possible accession treaty in the current protocol so as to keep all options open.

2 G. de Burca, *The drafting of the European Union Charter of Fundamental Rights,* in: ELR 2000, p. 126-138.

3 Directorate general of Human Rights of the Council of Europe, *Guaranteeing the effectiveness of the European Convention on Human Rights, Collected Texts,* Strasbourg 2004.

> At the time of the drafting of this protocol, it was not yet possible to enter into negotiations – and even less to conclude an agreement – with the European Union on the terms of the latter's possible accession to the Convention, simply because the European Union still lacked the competence to do so. This made it impossible to include in this protocol the other modifications to the Convention necessary to permit such accession. As a consequence, a second ratification procedure will be necessary in respect of those further modifications, whether they be included in a new amending protocol or in an accession treaty."

The date of the entry into force of Protocol No. 14 is unclear. The Declaration of the Committee of Ministers of the Council of Europe "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels" (12 may 2004): *"(…) urges member States to take all necessary steps to sign and ratify Protocol No. 14 as speedily as possible, so as to ensure its entry into force within two years of its opening for signature. (…)"*. However, on January 5 2006 only 21 of the necessary 46 ratifications have been deposited.

29 October 2004 in Rome the treaty establishing a Constitution for Europe was officially signed by the representatives of the 25 Member States of the European Union. Art. I-9 on Fundamental Rights reads:

> "1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competence as defined in the Constitution.
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> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

At the Warsaw Summit of the Council of Europe (May 16-17 2005) everybody expected that since the first necessary drafting had been done, the EU could indeed soon accede to the ECHR.

The European Commissioner for External relations and European neighbourhood policy Benita Ferrero-Waldner was optimistic:

> "Now, finally, the EU Constitution includes a commitment that 'the European Union shall accede to the European Convention'. This will be a historic achievement for the protection of human rights in Europe, and a strong symbol for the protection of human rights in Europe, and a strong symbol of the EU's and Council of Europe's commitment to pan-European values. I am therefore very pleased to announce today that the European Commission, as the institution responsible for negotiating the accession treaty on behalf of the EU, will take two steps towards putting that into practice. First, the Commission will immediately begin preparatory technical discussions with our Member States on the various legal and technical questions surrounding a future accession treaty. These discussions should allow us to clarify the issues at stake. Second, the Commission is ready to begin informal exploratory talks with the Council of Europe as early as this autumn. These will take place in parallel with talks with our own Member States, and will of course depend on the outcome of those discussions; but I believe

> that is important that we lose no time in setting this process in motion. Accession negotiations can only begin once the EU Constitution has entered into force, and we do not want to anticipate the process of ratification. However, by starting the preparatory work on these rather complex technical questions the Commission will fulfil its duty to the other EU institutions and above all to our citizens. They rightfully expect that the EU's accession to the Convention a long-awaited step for the protection of their fundamental rights will become reality without undue delay."

An Action Plan which was adopted during the Summit expressly states in appendix 1 (Guidelines on the Relations between the Council of Europe and the European Union):

> "(...) 4. Early accession of the European Union to the ECHR would strongly contribute to ensuring coherence in the field of Human Rights in Europe. The preparatory work should be accelerated so that this accession could take place as soon as possible after the entry into force of the Constitutional treaty. (..)'

Within two weeks after the Warsaw Summit however the vox populi in French and Dutch referenda rejected the proposed Constitution of Europe. [4] This set at least a temporary stop on the entry into force of the proposed Constitution. Till June 2006 the fate of the Constitution will be uncertain.

C. The relationship between the European Court of Human Rights and the European Court of Justice

From the above it is clear that as far as the Governments of the countries of the Council of Europe and the European Union are concerned, there exists a strong intention for the EU to accede to the ECHR as soon as possible. Only the referenda in France and The Netherlands interfered with this intention. There are however also other players in the field, like the members of the ECJ and the ECourtHR themselves, whose opinions might be of some value to the question of the EU's accession to the ECHR. I can be brief on that. There exists a atmosphere of close collaboration between the two courts in the field of human rights protection. The ECJ acknowledges that the ECourtHR has the final word in matters concerning (the interpretation of) human rights which are contained in the ECHR.[5] Recent case-law of the ECourtHR has cleared some of the possible difficulties. I refer to the non admissi-

4 In that respect as a Dutchman living in France I regret the outcome of the referenda.

5 See as recent authorities: Luzius Wildhaber and Gil Carlos Rodriguez, *Speeches Given on the Occasion of the Opening of the Judicial Year,* Strasbourg, 31 January 2002*;* Dean Spielmann, *Un autre regard: la Cour de Strasbourg et le droit de la communauté européenne,* in*:* Libertés, Justice, Tolérance (Liber Amicorum Cohen-Jonathan)*,* 2004, p. 1447-1466*;* Francis Jacobs, *Interaction of the Case-law of the European Court of Human Rights and the European Court of Justice: Recent Developments* and Luzius Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe,* in: European Court of Human Rights, *Dialogue between judges,* Strasbourg 2005.

bility decision of January 13 2005 in the case Emesa Sugar N.V. v. the Netherlands [6] and to the judgment of the Grand Chamber of June 30 2005 in the case Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland. Since not everybody seems to be acquainted with the latter case, I quote:

> "(..) 3. Whether the impoundment was justified
>
> (a) The general approach to be adopted
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> 149. Since the second paragraph is to be construed in the light of the general principle enunciated in the opening sentence of Article 1, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised: the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual company concerned. In so determining, the State enjoys a wide margin of appreciation with regard to the means chosen to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued (the *AGOSI* case, § 52).
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> 150. The Court considers it evident from its finding at paragraphs 145-148 immediately above, that the general interest pursued by the impugned action was compliance with legal obligations flowing from the Irish State's membership of the EC.
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> It is, moreover, a legitimate interest of considerable weight. The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations (the above-cited cases of *Waite and Kennedy*, at §§ 63 and 72 and *Al-Adsani*, § 54. See also Article 234 (now Article 307) of the EC Treaty). Such considerations are critical for a supranational organisation such as the EC[7]. This Court has accordingly accepted that compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1 (*mutatis mutandis, S.A. Dangeville v. France*, cited above, at §§ 47 and 55).
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> 151. The question is therefore whether, and if so to what extent, that important general interest of compliance with EC obligations can justify the impugned interference by the State with the applicant's property rights.
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> 152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity (the *M. & Co.* decision, at p. 144 and *Matthews* at § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or de-

6 Juliana Kokott, *Die Inistitution des Generalanwalts im Wandel – Auswirkungen der Rechtsprechung des EGMR zu ähnlichen Organen der Rechtspflege in den Mitgliedstaaten,* in: Internationale Gemeinschaft und Menschenrechte (Liber Amicorum Georg Ress), 2005, p. 577-598.

7 *Costa v. Ente Nazionale per l'Energia Electtrica* (ENEL), Case 6/64, [1964] ECR 585

cisions of, its organs as long as it is not a Contracting Party (see *CFDT v. European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay v. European Communities*, no. 13539/88, Commission decision of 19 January 1989; the above-cited *M. & Co.* case, at p. 144 and the above-cited *Matthews* judgment, at § 32).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (*United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, Reports, 1998-I, § 29).

154. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (*M. & Co*. at p. 145 and *Waite and Kennedy*, at § 67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (*mutatis mutandis*, the above-cited *Matthews v. the United Kingdom* judgment, at §§ 29 and 32-34, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII).

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited *M. & Co.* decision, at p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Loizidou v. Turkey (preliminary objections)*, judgment of 23 March 1995, Series A no. 310, § 75).

157. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant at paragraph 117 above confirm this. Each case (in particular, the *Cantoni* judgment, at § 26) concerned a review by this Court of the exercise of State discretion for which EC law provided. The *Pellegrini* case is distinguishable: the State responsibility issue raised by the enforcement of a judgment not of a Contracting Party to the Convention (the above-cited *Drozd and Janousek* case, § 110) is not comparable to compliance with a legal obligation emanating from an international organisation to which Contracting Parties have transferred part of their sovereignty. The *Matthews* case can also be distinguished: the acts for which the United Kingdom was found responsible were "international instruments which were freely entered into" by it (§ 33 of that judgment). The *Kondova* judgment (paragraph 76 above), also relied on by the applicant, is consistent with a State's Convention responsibility for acts not required by international legal obligations.

1. Since the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC (paragraph 148 above), the Court will now examine whether a presumption arises that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

(b) Was there a presumption of Convention compliance at the relevant time?

159. The Court has described (at paragraphs 73-81 above) the fundamental rights guarantees of the EC which govern Member States, Community institutions together with natural and legal persons ("individuals").

While the constituent EC treaty did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law protected by it and that the Convention had a "special significance" as a source of such rights. Respect for fundamental rights has become "a condition of the legality of Community acts" (paragraphs 73-75 above, together with the opinion of the AG in the present case at paragraphs 45-50 above) and in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments (notably those aspects of the Single European Act 1986 and of the TEU referred to at paragraphs 77-78 above).

This evolution has continued thereafter. The Treaty of Amsterdam 1997 is referred to at paragraph 79 above. Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention and the Charter recognises the Convention as establishing the minimum human rights standards. Article I-9 of the later Treaty establishing a Constitution for Europe (not in force) provides for the Charter to become primary law of the European Union and for the Union to accede to the Convention (see paragraphs 80-81 above).

160. However, the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure observance of such rights.

> 161. The Court has referred (at paragraphs 86-90 above) to the jurisdiction of the ECJ in, *inter alia*, annulment actions (Article 173, now Article 230), in actions against Community institutions for failure to perform Treaty obligations (Article 175, now Article 232), to hear related pleas of illegality under Article 184 (now Article 241) and in cases against Member States for failure to fulfil Treaty obligations (Articles 169, 170 and 171, now Articles 226, 227 and 228).
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> 162. It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their right under Article 184; and they have no right to take an action against another individual.
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> 2. It nevertheless remains the case that actions initiated before the ECJ by the Community institutions or a Member State constitute important control of compliance with Community norms to the indirect benefit of individuals. Individuals can also bring an action for damages before the ECJ in respect of the non-contractual liability of the institutions (paragraph 88 above).
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> 34. Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a Member State or another individual for a breach of EC law (see paragraphs 85 and 91 above). Certain EC Treaty provisions envisaged a complementary role for the national courts in the Community control mechanisms from the outset, notably Article 189 (the notion of direct applicability, now Article 249) and Article 177 (the preliminary reference procedure, now Article 234). It was the development by the ECJ of important notions such as the supremacy of EC law, direct effect, indirect effect and State liability (paragraphs 92-95 above) which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights' guarantees.
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> The ECJ maintains its control on the application by national courts of EC law, including its fundamental rights guarantees, through the procedure for which Article 177 of the EC Treaty provides in the manner described at paragraphs 96-99 above. While the ECJ's role is limited to responding to the interpretative or validity question referred by the domestic court, the response will often be determinative of the domestic proceedings (as, indeed, it was in the present case - see paragraph 147 above) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the EC treaty provision and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process. It is further recalled that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees.
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> 165. In such circumstances, the Court finds that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, "equivalent" (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC (see paragraph 156).(..)'

To summarize: In this judgment the ECourtHR acknowledged the responsibility *ratione personae* of the Member States when implementing EU law. As to their responsibility *ratione materiae* it established the presumption that under Community Law fundamental rights were protected in a way which could be considered 'equivalent' to that for which the Convention provided, with the consequence that if

a member State did no more than execute legal obligations flowing from its EU membership, it had not departed from the requirements of the Convention. However, any such presumption could be rebutted if, in the circumstances of a particular case, it was considered that the protection of Convention rights was 'manifestly deficient'. Furthermore, a State would remain fully responsible under the Convention for all acts falling outside its strict international obligations, including those by which the Member State uses the amount of discretion left to it in complying with its Community law obligations. To come to that conclusion the Court relied to a considerable extent on the scope of the jurisdiction of the ECJ under Community law.

D. Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights[8]

The above-mentioned report of the CDDH contains a study of technical and legal issues of a possible EC/EU accession to the ECHR. The report deals with three issues:

I. Modalities of accession from the point of view of treaty law

- Amendments to the text of provisions already contained in the ECHR and its Protocols;
- Supplementary provisions e.g. provisions clarifying the scope of terms used in the ECHR; adapting them to the special case of the EC/EU, etc.;
- Any technical and administrative issues not pertaining to the text of the ECHR but for which a legal basis would be useful, such as the conditions of the budgetary contribution of the EC/EU;
- Accommodation in respect of two ancillary agreements (the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, and the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe).
- Two options: an amending protocol to the ECHR or an accession treaty.

8 report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002); this report is prepared with the participation - officially as observer - of officials from the EU.

II. Overview of legal and technical issues and corresponding possible amendments solutions

1. Points on which amendment of the ECHR would be required

- Article 59, paragraphs 1 and 4 ECHR (including the question who should be allowed to accede: the European Communities or the European Union);
- ECHR provisions referring to 'State' or 'States': Article 10, paragraph 1; Article 11, paragraph 2; Article 17; Article 27, paragraphs 2 and 3; Article 38, paragraph 1.a; Article 56, paragraphs 1 and 4; Article 57, paragraph 1;
- Article 46, paragraph 2 ECHR (supervision of judgments); representative of the EC/EU in the Committee of Ministers; need for a Statutory Resolution?

2. Points on which amendment of the ECHR (although such amendment might be deemed advisable) might not be necessary

- Terminology used is some of the ECHR restriction clauses (e.g. 'national security', 'economic well-being of the country', 'territorial integrity', 'national laws'; cf. paragraph 2 of Articles 8, 10, 11 and 12 ECHR) and the reference to 'nation' in Article 15, paragraph 1 ECHR;
- Question of EC/EU contribution to the expenditure on the European Court of Human Rights (cf. Article 50 ECHR);
- Article 35, paragraph 2.b ECHR ('another procedure of international investigation or settlement');
- Participation of the EC/EU in proceedings before the European Court of Human rights (as Respondent, amicus curiae or otherwise); participation as 'co-defendant'?
- Article 33 ECHR ('Inter-state'-cases; question of whether inter-party applications should be possible without limitation)

3. Other issues (NB. Depending on the option(s) retained and modalities to be chosen, amendment of the ECHR might be required

- Status and participation in the European Court of Human Rights of the judge elected in respect of the EC/EU (options: no judge, ad hoc judge for cases involving Community Law, full-time judge with limited participation, full-time judge on equal footing with other judges)
- Introduction of a special procedure whereby the Court of Justice (and the Court of First Instance?) could request an interpretation of the ECHR from the European Court of Human Rights)

4. Other means to avoid any contradiction between the legal system of the European Communities/Union and the system of the ECHR

E. Is it realistic to expect that the ECourtHR can cope with the extra work after a accession of the EU to the ECHR?

The ECourtHR is faced with an enormous and ever-growing workload. 44.000 new applications were lodged in 2004 and the number of cases pending before the ECourtHR is rising each month. In the final Declaration at the Warsaw Summit (2005) the following statement was made:

> "(..) 2. Taking into account the indispensable role of the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights in formulating, promoting and implementing human rights standards, it is essential to guarantee their effectiveness. We are therefore strongly committed in the short term to implement the comprehensive set of measures adopted at the 114th Session of the Committee of Ministers which address the Court's rapidly increasing case-load, including the speedy ratification and entry into force of protocol 14 to the Convention. Furthermore, we are setting up a group of wise persons to draw up a comprehensive strategy to secure the effectiveness of the system in the longer term, taking into account the initial effects of protocol 14 and the other decisions taken in May 2004. (..)"

In the *Action Plan* this is elaborated as follows:

> "1. Ensuring the continued effectiveness of the European Convention on Human Rights
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> We shall ensure the long-term effectiveness of the Convention for the Protection of Human Rights and Fundamental Freedoms by all appropriate means. To this end we shall provide the European Court of Human Rights with the necessary support and implement all the reform measures adopted at the 114th Session of the Committee of Ministers in May 2004, in accordance with all the modalities foreseen. This includes, as envisaged, the ratification of Protocol No. 14 to the Convention, which is essential for the future effectiveness of the European Convention on Human Rights.(..)"

September 2005 the Committee of Ministers installed the group of wise persons. [9] They will come forward with a first report before May 2006. In the meantime the ECourtHR has been given extra financial means to deal with the backlog.

9 The ECourtHR was very pleased that the former president of the ECJ, Gil Carlos Rodriguez Iglesias, was elected chairman of the wise persons. It is another token of the close relationship between the two courts.

F. After the French and Dutch referenda: How do we proceed?

The first thing which is necessary is the entry into force of Protocol 14 to the ECHR. As stated above, this will happen at a later date than originally foreseen.

In my opinion three options are possible:

- To pursue preparations for accession as planned, i.e. to initiate preparatory technical discussions with the EU member states and with the Council of Europe;
- To stop all preparatory work until a final decision on the fate of the Constitutional treaty has been taken in June 2006;
- To continue preparatory work on an informal basis.

Speaking for myself, I would choose the first option: Do – as much as is possible – all the preparatory work, at least at an informal level.

One might even argue that since after the entry into force of Protocol 14 (still foreseen in 2006), all EU-members will also have expressly ratified that the EU may accede to the ECHR, there is some kind of legal basis to continue with the preparations if not with the accession itself.

G. Final remarks

On 18 October 2005 the president of the ECourtHR, Luzius Wilhaber, addressed the Wise Person Group as follows:

> '(…) Yet, devising the European protection system of the 21th century should be undertaken from a sufficiently broad perspective, encompassing not only the essential role played by national jurisdictions in a system based on the principle of subsidiarity, but also the ever increasing importance of the EU legal system in the protection of fundamental rights, notably through the jurisprudence of the European Court of Justice. A major goal here should be to reinforce a harmonious and efficient interplay between the two systems, in other words their complementarity. For that purpose, accession of the EU to the Convention still remains on the agenda of both the Strasbourg and Brussels authorities and rightly so, with the EU currently looking for an alternative legal basis to the one which was provided by the Constitutional Treaty. As I have said many times already, the benefits expected as a result of accession by far outweigh the increased workload which it might represent for the Strasbourg Court.(…)'

A historic achievement for the protection of human rights in Europe – as Bentia Ferrero-Waldner rightly called the accession - should not be postponed (says a Dutchman).