

Setting the Scene for Accession

I. THE EU AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

‘The European courts were never supposed to meet.’¹

GIVEN THE SUBSTANTIAL legal issues the European Union’s accession to the European Convention on Human Rights (ECHR) brings about for the European system of human rights protection, the introductory quotation seems to give a succinct and condensed account of the legal questions the book at hand tries to analyse and solve. Literally speaking, this book will tell the tale of two courts² whose legal regimes are intricately intertwined with each other. The issues examined hereinafter are principally rooted in the fact that European integration rests on two different legal orders.³ Firstly, it is based on the protection of human rights enshrined in the Convention which was drafted by the Council of Europe and which is interpreted and applied by the European Court of Human Rights (ECtHR) in Strasbourg. It is the sole duty of this international court, by virtue of Article 1 ECHR, to observe whether the high contracting parties to the Convention are actually securing to everyone within their jurisdiction the rights and freedoms defined in the Convention. If a high contracting party fails to comply with this requirement, the Court may declare a certain legal act or measure to be in violation of the Convention and that the respondent state is required under its international obligations to redress this human rights violation.

Secondly, the system of European integration rests on the European Union (EU) and its historical predecessors which, in the beginning, merely focused on the economic integration and welfare of the Member States. In contrast to the ECtHR, the Court of Justice of the European Union (CJEU) in Luxembourg ‘shall ensure that in the interpretation and application of the Treaties the law is observed’ (Art 19 (1) TEU)). The broad jurisdiction of the CJEU, which goes far beyond the protection

¹ See Laurent Scheeck, ‘The Relationship between the European Courts and Integration through Human Rights’ (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 837, 843.

² The inspiration for the title of Part I, ‘A Tale of Two Courts’, is indebted to Charles Dickens, *A Tale of Two Cities* (first published 1859; London, Penguin 2012) and Sionaidh Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*’ (2006) 43 *Common Market Law Review* 629, 629ff.

³ See Carl Lebeck, ‘The European Court of Human Rights on the Relation between ECHR and EC-Law: The Limits of Constitutionalisation of Public International Law’ (2007) 62 *Zeitschrift für Öffentliches Recht* 195, 196.

of fundamental rights and encompasses almost the entirety of the Union's policies and legal fields, significantly shaped the Union's legal system. In this context, the Council of Europe and the EU have sometimes been metaphorically referred to as 'twins separated at birth'⁴ since both of them were created as international organisations at approximately the same time, especially for the purpose of reinforcing transnational and intergovernmental cooperation in Europe, but with entirely different objectives. Therefore, one might say that in the past, the landscape of European human rights protection seemed simple and easily comprehensible. The European continent was home to two distinct 'European' organisations and two distinct courts—on the one hand, the ECtHR in Strasbourg to watch over alleged human rights violations by the contracting states, and on the other hand, the CJEU in Luxembourg which had other matters to deal with.⁵

However, even though these two legal regimes are distinct and independent, they do not operate in complete isolation from each other.⁶ Despite their different origins and destinations, these two European 'siblings' have virtually been compelled to grow closer together during the last few decades.⁷ The main reason for this inter-organisational consolidation was the fact that the European Union's precursor organisations started out as purely economic entities. Hence, the Treaties of Paris and Rome established an organisation completely devoid of its own 'Bill of Rights' or any other catalogue of fundamental rights. Any account of the European Union's commitment to human rights thus begins with the absence of any reference to such rights in the Union's founding treaties.⁸ Yet, although the Member States had no difficulty in accepting the supremacy of EU law developed by Luxembourg's case law in its renowned judgment *Costa v ENEL*,⁹ the discussion on the issue of fundamental rights protection within the Union's legal system and the eventual accession to the Convention was mainly triggered by the German Constitutional Court and its *Solange I* decision.¹⁰ This decision did not necessarily imply that the Community had to accede to the Convention,¹¹ but rather it pointed out that the Member States would not allow for Union law to take precedence over national fundamental rights.

Since the European Union became more powerful in terms of political output,¹² the CJEU took recourse to the Convention and developed its own

⁴ See Gerard Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth' (2001) 46 *McGill Law Journal* 849, 849.

⁵ See Douglas-Scott (n 2) 629.

⁶ See Guy Harpaz, 'The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46 *Common Market Law Review* 105, 106.

⁷ A more detailed account of the intricate interplay between Strasbourg and Luxembourg will be given in ch 5.

⁸ See Gráinne De Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649, 649ff.

⁹ See Case 6/64 *Costa v ENEL* [1964] ECR 585.

¹⁰ See BvL 52/71 *Solange I* BVerfGE 37, 271.

¹¹ See Jean-Paul Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *Common Market Law Review* 995, 998.

¹² See Scheeck (n 1) 837.

system of fundamental rights protection, based on its case law in which the Court repeatedly referred to the rights and freedoms enshrined in the Convention.¹³ Thereby, the legal interface between the two courts and between the legal regimes of the Convention and the European Union were established. However, the CJEU's increasing use of the Convention to deduce its own fundamental rights protection turned out to be problematic. In fact, it has led to a situation where the two courts interpret the same text in different contexts and in different ways, without possessing any formal instruments for mutual coordination. A divergence in the courts' human rights jurisprudence seemed inevitable.

Moreover, after the EU continued to acquire competences in fields which had previously been the *domaine réservé* of the Member States but without acceding to the Convention, it became apparent that individuals seeking a judgment from Strasbourg were deprived of this right once these powers had been transferred into Union law. More precisely, in cases where an EU Member State was obliged to implement Union law in violation of the Convention, the legal status quo would not lead to a conviction of the actual 'perpetrator', namely the Union, but of the Member State implementing Union law. Thus, given the ECtHR's lack of jurisdiction *ratione personae* over the Union and the enduring desire for its own fundamental rights catalogue for the European Union, accession seemed a viable option to close the lacunae within the European system of human rights protection. Most importantly, by acceding to the Convention, the European Union and its institutions would become subject to the same system of external judicial review which all EU Member States are already subject to. Yet, first and foremost, it is contradictory that the Union, without itself being a contracting party to the Convention, urges candidate countries aspiring to EU membership to ratify the Convention and to protect human rights in accordance with it.

Accession would accordingly remove the increasing contradiction between the human rights commitments requested from future EU Member States and the Union's lack of accountability vis-à-vis the ECtHR.¹⁴ Otherwise, it remains highly hypocritical to make ratification of the Convention a condition for EU membership, when the Union itself is entirely exempt from Strasbourg's judicial review.¹⁵ As a result, in 1979 the European Commission issued a Memorandum on the then-Community's possible accession to the Convention. Since all the EU Member States were already contracting parties to the Convention, the Commission argued in this document that the EU itself should also accede to the Convention in order to restore the legal position in which the citizens of Member States found

¹³ See especially Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; and Case 4/73 *Nold v Ruhrkohle Aktiengesellschaft* [1977] ECR 1.

¹⁴ See Hans Christian Krüger, 'Reflections Concerning Accession of the European Communities to the European Convention on Human Rights' (2002) 21 *Penn State International Law Review* 89, 94.

¹⁵ See Philip Alston and JHHWeiler, 'The European Union and Human Rights: Final Project Report on an Agenda for the Year 2000' in Antonio Cassese (ed), *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (Florence, European University Institute, 1998) 55.

themselves before the transfer of certain powers to the European Union.¹⁶ This proposal was unheeded and hence lay dormant until 1993 when an ad hoc working group was formed under the Belgian Presidency to examine the following three key issues of accession: The competence to accede, the preservation of the autonomy of European Union law, and the exclusive jurisdiction of the CJEU.¹⁷ However, the Luxembourg Court's seminal *Opinion 2/94* dealt a detrimental blow to these efforts. In this opinion, the Court simply held that, as the law stood back then, the Union had no competence to accede to the Convention,¹⁸ and disregarded the other aforementioned issues such as its own exclusive jurisdiction and the autonomy of European Union law.

But now, after several decades of discussions and setbacks, accession is finally legally possible. With the entry into force of the Treaty of Lisbon on the part of the European Union and Protocol No 14 to the Convention on the part of the Council of Europe, both the EU Treaties and the Convention have been amended to the effect that the EU is now in the legal position to accede to the Convention. Article 6 (2) TEU sets out the obligation that the European Union shall accede to the ECHR, while Article 59 (2) ECHR¹⁹ now reads that the European Union may accede to the Convention. Eventually, after it was agreed that 'the rapid accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is of key importance',²⁰ the European Union and the Council of Europe began negotiations on accession in summer 2010.²¹ At the time of writing, these negotiations have principally been concluded and resulted in a Draft Agreement on Accession²² which will be thoroughly and critically explored in Part III of this book.

¹⁶ See Commission of the European Communities, 'Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms' Bulletin Supplement 2/79, COM (79) 210 final, para 15.

¹⁷ See Commission of the European Communities, 'Memorandum from the Commission to the Working Group' SEC (93) 1678. See also Jacqué, 'Accession' (n 11) 1001f.

¹⁸ See *Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, para 36.

¹⁹ See also art 17 of Protocol No 14 to the Convention.

²⁰ See European Council, 'The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C115/1, 8.

²¹ See, inter alia, Council of Europe, 'Press Release 545 (2010)'; Council of the European Union, 'Draft Council Decision Authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)' Doc 9689/10 (partly classified); Council of Europe, '1st Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission' CDDH-UE(2010)01.

²² See Council of Europe, '8th Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission' CDDH-UE(2011)16. For the official report of this agreement, see Council of Europe, 'Steering Committee for Human Rights—Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights' CDDH-UE(2011)009.

By mid-2012, the Council of Europe's Committee of Ministers is still awaiting the conclusion of the internal discussions between the EU and its Member States on the Draft Accession Agreement,²³ which have been described as 'very intense'.²⁴ For instance, the United Kingdom and France proposed several substantial amendments and modifications to the Agreement, which, however, have been dismissed by the other Member States.²⁵ Therefore, it seems unlikely that these proposals will be integrated into the final Accession Agreement and thence they will not be taken into consideration in the legal analysis of this book.

In a nutshell, there are many reasons why the European Union's accession to the ECHR would enhance the protection of human rights in Europe. Firstly, by rendering the Convention legally binding for the Union, potential divergences in human rights standards between the Convention and European Union and between the case law of the Luxembourg and Strasbourg courts can be prevented.²⁶ Secondly, the Union and its institutions will become subject to external judicial supervision where the respect for and the protection of human rights is concerned. This also means that even though fundamental rights are now well protected by means of the EU's own Charter of Fundamental Rights, accession is still necessary. In fact, accession will guarantee that alleged human rights violations will be reviewed externally, whereas the Charter will internally ensure that the EU and its court, the CJEU, may prevent such violations in the first place, according to the Convention's principle of subsidiarity.²⁷ Lastly, and most importantly for the effective judicial protection of individuals, EU citizens will have direct access to the ECtHR and may bring complaints against European Union institutions before the Strasbourg Court directly.²⁸

II. ACCESSION AND AUTONOMY: THE RESEARCH QUESTION OF THIS BOOK

At this point, critical readers might ask why an entire book on this very matter is necessary when accession just seems to be a walk in the park for European human rights law. Yet, this book does not primarily deal with the benefits and

²³ See Stian Øby Johansen, 'The EU's Accession to the ECHR: Negotiations to resume after 7 Month Hiatus', available at <<http://blogg.uio.no/jus/smr/multirights/content/the-eus-accession-to-the-echr-negotiations-to-resume-after-7-month-hiatus#sdfootnote10sym>> accessed 1 November 2012.

²⁴ Council of the European Union, 'Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms—State of Play' 18117/11, FREMP 112, para 9.

²⁵ See Council of the European Union, 'Accession of the EU to the ECHR—Working Document from the Presidency' DS 1675/11, paras 8, 10, 11, 14 and 17.

²⁶ See Siegbert Alber/Ulrich Widmaier, 'Die EU-Charta der Grundrechte und ihre Auswirkungen auf die Rechtsprechung' (2000) 27 *Europäische Grundrechte-Zeitschrift* 497, 503f.

²⁷ See Hans Christian Krüger/Jörg Polakiewicz, 'Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa' (2001) 28 *Europäische Grundrechte-Zeitschrift*, 100f.

²⁸ See Krüger, 'Reflections' (n 14) 94.

advantages of accession, but rather with the objections which have been raised against accession and its legal consequences. Sceptics have primarily argued that accession would bring about considerable risks for the autonomy of the European Union's specific legal order, including the possible incompatibility of a CJEU subordinated to the ECtHR, the external judicial control of the Union,²⁹ loss of jurisdiction and competences, and possible Treaty amendments by means of the final Accession Agreement, which would bypass the Union's internal revision procedure under Article 48 TEU.

In this context, it is trite to say that questions of jurisdiction and competence are questions of authority and power.³⁰ Certainly, the European Union and its Court of Justice in Luxembourg are anxious about the ramifications of the impending accession on their competences and jurisdiction vis-à-vis the Strasbourg Court. It would be naïve to expect these institutions to willingly forfeit their comprehensive competences which they have acquired from sovereign nation states over the last 50 years. As a result, certain provisions have been inserted into European Union law by means of the Treaty of Lisbon³¹ which demand that the Union's competences are not affected by the accession and that the specific characteristics of European Union law are preserved. Nevertheless, despite these legal safeguards which have been put in place to prevent any loss of competence or jurisdiction on the part of the Union, sceptics still fear that Strasbourg may detrimentally encroach upon the EU's legal order after accession, for example by reviewing Union law allegedly in violation of the Convention. If this assumption was indeed true, the Union's legal autonomy, vigilantly guarded by the Luxembourg Court, would be in serious danger and accession could not be achieved in a smooth, rapid and uncomplicated manner.

It is therefore evident that accession in general and the Accession Agreement in particular have to be compatible with the EU Treaties and must not obstruct the autonomy of Union law—requirements which several past draft agreements have failed to satisfy.³² The book at hand thus examines whether the European Union's accession to the ECHR is in fact compatible with the specific characteristics of the Union's autonomous legal order. Accordingly, it is the objective of this book to answer the central research question with regard to accession, namely *whether and how accession and the system of human rights protection under the Convention can be effectively reconciled with the autonomy of European Union law*. It must be

²⁹ See eg, Court of Justice of the European Union, 'Discussion Document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms', 5 May 2010, paras 4f.

³⁰ See eg, Ingolf Pernice, 'Kompetenzabgrenzung im Europäischen Verfassungsverbund' (2000) 55 JZ 866, 866, and Christian Starck, 'Der Vertrag über eine Verfassung für Europa' in Reinhard Hender/Martin Ibler/José Martínez Soria (eds), *Für Sicherheit, für Europa. Festschrift für Volkmar Götz* (Göttingen, Vandenhoeck & Ruprecht, 2005) 79.

³¹ In particular art 6 (2) TEU and Protocol No 8 to the Treaties.

³² See Tobias Lock, 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1025, 1028.

understood at this point that the accession of one international organisation (the European Union) to another international treaty regime (the Convention) and its judicial enforcement machinery (the Strasbourg Court) represents an unprecedented step in the history of international law. Under these special circumstances, several legal problems and challenges are expected to arise, especially in the light of the EU's prominent legal autonomy. This book aims to explore the question of how accession and autonomy can effectively be reconciled with one another, which is crucial to the future multi-level architecture of European human rights protection. The reader will therefore come across this leading question in every single chapter and, of course, the respective answers to it as well, with particular regard to individual legal issues in the context of the EU's accession to the Convention.

As the European Union's legal autonomy is upheld and preserved by the CJEU, the essence of this book's research question can be reduced to a potential jurisdictional conflict between Strasbourg and Luxembourg over which court has the last say in human rights cases involving European Union law. In other words, it is a tale of two courts struggling for the upper hand in interpreting and applying human rights law and particularly Luxembourg's efforts in shielding European Union law from any external interference. Hence, the legal analysis in this book is not principally concerned with the *vertical* jurisdictional relationship between the domestic courts of the Member States and the European courts, but with the *horizontal* jurisdictional competition³³ between the CJEU and other international courts and tribunals in general (especially Part II) and between the CJEU and the ECtHR in particular, both before (Part II) and after accession (Part III). Thereby, the two protagonists in this tale of two courts are the CJEU in Luxembourg as the observant guardian of the Union's legal autonomy, and the ECtHR in Strasbourg which is entrusted with the judicial protection of human rights by virtue of the Convention.

The importance of the European Union's legal autonomy, as developed by Luxembourg's case law, is a given and self-evident fact. This principle thus represents the crucial premise this book builds upon. This also means that the EU's autonomy principle is not called into question, since a critical review of this concept would firstly go beyond the scope of the analysis at hand and secondly deserve its own scientific and analytical examination. With respect to the autonomy of European Union law, the CJEU has emphasised in its respective decisions and opinions that the EU's legal order is a self-referential system which means that the interpretation and application of its legal rules exclusively depend on the system of which these rules constitute an indispensable part.³⁴ However, the reader's attention must be drawn to an important *caveat* at the beginning: This

³³ See also Nikolaos Lavranos, *Jurisdictional Competition. Selected Cases in International and European Law* (Groningen, Europa Law Publishing, 2009) 4.

³⁴ See René Barents, *The Autonomy of Community Law* (The Hague, Kluwer Law, 2004) 171.

very autonomy is, of course, of utmost importance for the future development of the European Union's legal system and thus the further economic, legal and political integration of the EU's Member States. However, when bearing in mind that the Union's legal autonomy is merely a means of achieving this noble end, it becomes clear that—in the reverse words of *Immanuel Kant*³⁵—autonomy itself does not hold any intrinsic value. Autonomy itself is merely the vehicle by which to attain the objective of legal and political integration. The aforementioned research question must hence be broadened and extended to the effect that it must also encompass the addendum whether and how accession and the system of human rights protection under the Convention can be effectively reconciled with the autonomy of European Union law *without jeopardising the current system of individual human rights protection under the Convention*. One must not forget that accession is not an end in itself. The objective and purpose of accession is rather to enhance the legal protection of human rights in Europe, and not to adjust the Convention system to the legal order of the European Union. In the end, it is the EU acceding to the Convention and not vice versa. But on the other hand, the specific characteristics of European Union law must be taken into account as accurately as possible, in order to allow for a smooth, rapid and effective integration of the Union into the Convention system.

In other words, this book investigates how both the EU's legal autonomy and the effective protection of individuals can be upheld after accession at the same time. If, at the end of the day, accession preserved the autonomy of Union law, but lowered the standards of human rights protection guaranteed by the Convention system, the entire procedure of integrating the European Union into an external judicial monitoring system would be to no avail and run afoul of the original purpose of accession—closing gaps in the European system of human rights protection and subjecting the Union to the control of a specialised international court. This book hence aims at presenting viable solutions in order to reconcile the EU's legal autonomy and the effective protection of human rights under Strasbourg's judicial protection machinery in order to make this accession as viable and efficient as possible.

Therewith, this introduction has come full circle, back to the introductory statement that the two European courts were never supposed to meet. *Prima facie*, the Union's accession to the ECHR is a welcome and worthwhile step in the right direction, but the legal issues involved cannot be easily dismissed. They deserve a thorough, detailed and systematic analysis in order to reconcile two unruly principles and to bring about a new and improved landscape of human rights protection in Europe. This book will take up this task.

³⁵ See Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (first published 1785; Berlin, Walter de Gruyter Akademie-Ausgabe, 1900) 429.

III. A CAVEAT ON LEGAL DEFINITIONS

An extensive study such as this comprises a plethora of legal terms and thus a comprehensive and characteristic terminology. At the outset, this short subchapter thence advises the reader on the book's specific terminology in order to avoid confusion or uncertainty, as legal precision and clarity are of utmost importance for a thorough understanding of the issues presented here.

It is a well-known fact that the legal construction of the European Union's predecessor organisations was, even for legal professionals, intricate and difficult to grasp. After the entry into force of the Treaty of Maastricht in 1993, the EU's three pillar structure was introduced which led to the distinction between the European Union itself (virtually as an 'umbrella organisation') and its three constituent pillars, among them the European Communities and the European Community (EC) itself. In fact, it was the Community which enjoyed legal personality and which was the main protagonist of European integration and legal communitarisation. However, the deconstruction of the Union's pillar structure via the Treaty of Lisbon and the EU's newly won international legal personality by virtue of Article 47 TEU left the European Union as a single international organisation,³⁶ without the further need for temples, roofs, pillars or any other architectural metaphors. Today, the European Union is not merely the successor of the European Community, but rather it has absorbed both the Community and the former 'umbrella' or 'temple' construction of the EU.³⁷ Therefore, and for the sake of clarity and legibility, only the European Union (and its abbreviated form EU) are referred to in this book, even if the terms 'European Economic Community' (EEC) or 'European Community' (EC) were legally and historically correct in lieu thereof. The only exceptions to this rule are explicit references, for instance in judgments. Otherwise, the historical terms are encompassed by the term EU.

Furthermore, it must be clarified beforehand that this tale of two courts actually tells the tale of even more courts or quasi-judicial organs. When there is reference to the Court of Justice of the European Union (CJEU) or to its toponymic designation 'Luxembourg' or 'the Luxembourg Court', this term, in general, not only includes the Court of Justice itself, but also the General Court (GC; the successor of the Court of First Instance (CFI))³⁸ and specialised courts within the meaning of Article 19 (1) TEU. Only in cases where the GC or the former CFI have adjudicated on a case, explicit reference to those courts will be

³⁶ See Matthias Ruffert, 'Art 47 EUV' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV. Kommentar*, 4th edn (Munich, Beck, 2011) para 1, and Rudolf Geiger, 'Art 1 EUV' in Rudolf Geiger, Daniel-Erasmus Kahn and Markus Kotzur (eds), *EUV/AEUV. Kommentar*, 5th edn (Munich, Beck, 2010) paras 6f.

³⁷ See Bruno De Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) 65 *Zeitschrift für Öffentliches Recht* 141, 143.

³⁸ See European Convention, 'Final Report of the Discussion Circle on the Court of Justice' CONV 636/03, 25 March 2003, para 14.

made. If not, the reader must be aware that CJEU or 'Luxembourg' stands for the Union's entire judicial system, not for one single court. The wording 'Court of Justice of the European Union' might not be a favourable choice for a regime of various courts,³⁹ but it nonetheless describes the Union's judicial system which comprises the Court of Justice, the General Court and specialised courts.

The same is true for the European Court of Human Rights (ECtHR) and its toponyms 'Strasbourg' or 'Strasbourg Court'. Regarding past cases, this term covers the now defunct two-tiered system of the Court itself and the former European Commission of Human Rights which was abolished in 1998 by Protocol No 11 to the Convention.⁴⁰ For more current cases and of course all cases after 1998, the terms ECtHR and 'Strasbourg' only denote the Court itself. The use of these toponymic or sometimes personalising notions—'Luxembourg' and 'Strasbourg'—is not a mere didactic device. In fact, these designations might help people to understand that these courts are composed of real human beings, ie judges, who (although they are prohibited from deciding on cases *contra legem*) are still more or less free to further develop the respective legal order they are working in by means of judicial activism. As a result, the personifications used in this book should exemplify that courts occasionally act like one single personal entity (when disregarding dissenting opinions) which aim at strengthening and consolidating the legal system which created them in the first place.

The last aspect to be clarified at this point pertains to the terms 'human rights' and 'fundamental rights'. Usually, the term 'human rights' is used within the context of international law and thus refers to the external dimension of this notion. The term 'fundamental rights', conversely, is generally used within the legal framework of national or domestic legal orders and thence denotes the internal dimension of this term. In this book, these terms will be used in this traditional manner, except for ambiguous situations in which it is indeterminate what term would be the correct one. In these cases, these two terms will be used interchangeably and without the established dichotomy of distinguishing between rights under international or national law.

³⁹ See Bernhard W Wegener, 'Art. 19 EUV' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV. Kommentar*, 4th edn (Munich, Beck, 2011) para 5.

⁴⁰ See generally on this topic David Harris, Michael O'Boyle, Ed Bates and Carla Buckley (eds), *Law of the European Convention on Human Rights*, 2nd edn (Oxford, Oxford University Press, 2009) 4, and Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, 4th edn (Munich, Beck, 2009) § 6, para 2.

Scope of this Book

I. A SURVEY OF THE STATUS QUO

A PROJECTION OF the new legal order to come is, without doubt, not easy to imagine. For that reason, it is essential to examine the past and current relationship between the two European courts in order to extrapolate the future impact of accession. By analysing past events, the current and future development of European human rights law will become clearer and easier to understand.

Part II of this book thence examines the legal status quo, ie the situation before accession and the relationship between the autonomy of European Union law, international law and international courts in general in order to identify Luxembourg's attitude vis-à-vis external influences and courts. The notion 'legal autonomy' is defined in chapter three in order to understand what the term means and how it is devised and used in the CJEU's case-law. After that, chapter four provides an insight into the complicated and almost opposing relationship between the Luxembourg Court and other international courts and tribunals which may or may not give a foretaste of the relationship between the CJEU and the European Court of Human Rights (ECtHR) after accession. Beyond that, this chapter illustrates Luxembourg's seminal case law which is also of utmost significance for the accession procedure and which is constantly referred to in the later parts of this book. The most prominent decisions which accompany the reader throughout this entire legal analysis are, inter alia, *Opinion 1/91*,¹ the *Commission v Ireland (MOX Plant)* case² and the famous *Kadi and Al Barakaat v Council and Commission* judgment.³ These decisions and opinions represent the theoretical backbone of the European Union's legal autonomy and must be taken into consideration for the successful preservation of the EU's autonomy principle.

¹ See Opinion 1/91 *EEA I (Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area)* [1991] ECR I-6079.

² See Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] I-4635.

³ See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I- 6351.

A major portion of Part II, however, is dedicated to the current relationship between Luxembourg and Strasbourg and their ‘cross-fertilising’⁴ judicial interplay. Accordingly, chapter five illustrates how the CJEU took recourse to the Convention in order to establish the Union’s case law-based fundamental rights catalogue; what role the European Union’s Charter of Fundamental Rights plays in light of accession; how the ECtHR reacted to alleged human rights violations by EU institutions, especially in its decisions in *Matthews v United Kingdom*⁵ and *Bosphorus v Ireland*;⁶ and how Luxembourg’s *Opinion 2/94*⁷ might still be relevant for accession and the legal issues involved. As aforementioned, this profound analysis of past and current cases illustrates the ambiguous relationship between Strasbourg and Luxembourg. Beyond that, chapter six raises questions regarding the EU’s accession to the Convention which Part III eventually examines in detail.

II. THE SHAPE OF THINGS TO COME

Part III, the centrepiece of this book, follows the road from Luxembourg to Strasbourg and goes into more detail regarding the abovementioned research question, namely how accession and autonomy can effectively be reconciled. Over the course of five chapters, this research question is broken down into more specific questions which are then answered within the respective line of reasoning and with due reference to the theoretical findings of Part II.

Chapter seven (‘The Accession Agreement and the Status of the Convention after Accession’) analyses what rank the Convention and the Accession Agreement—as international treaties—will have within the European Union’s legal order after accession. Clarifying the Convention’s future status within EU law is crucial in terms of its possible legal consequences, which are dependent on the Convention’s rank, be it primary law, secondary law, something in between or none of the above. The general research question is therefore adapted to the issue of whether the Convention’s legal rank after accession may jeopardise the autonomy of Union law or may even help overcome some legal problems of the past, for example alleged human rights violations by EU law itself.

Chapter eight (‘External Review by Strasbourg: A Subordination of the Luxembourg Court?’) examines the question of whether the European Union’s subjection under Strasbourg’s external review may violate the Union’s autonomy principle. To this end, the general research question is split up into two parts; the

⁴ See Francis G Jacobs, ‘Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice’ (2003) 38 *Texas International Law Journal* 547, 548f, and Laurent Schieck, ‘The Relationship between the European Courts and Integration through Human Rights’ (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 837, 868f.

⁵ See *Matthews v United Kingdom* App no 24833/94 (ECtHR, 18 February 1999).

⁶ See *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005).

⁷ See *Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

first debates whether the ECtHR would have to interpret Union law in a binding manner (which would in fact interfere with the EU's legal autonomy), and the second dealing with the issue of whether a judgment by Strasbourg, ruling that EU legislation infringed the rights enshrined in the Convention, would be compatible with the autonomy of EU law. Moreover, this chapter scrutinises to what extent EU primary law and secondary law are subject to Strasbourg's judicial review.

Chapter nine ('Individual Applications after Accession: Introducing the Co-Respondent Mechanism') explores how the system of individual applications under Article 34 ECHR will be arranged and organised after accession. To be exact, this chapter takes a closer look at the issue of individuals wishing to challenge a legal act allegedly in violation of human rights who may not know against which entity (Member State and/or the European Union) their applications must be directed. Therefore, it presents and critically analyses the solution found in the Draft Accession Agreement, namely the so-called 'co-respondent mechanism' which allows the Union and the Member States to join proceedings as equal respondent parties. Nevertheless, this chapter also asks what dangers this new mechanism may trigger for the EU's legal autonomy and through which legal safeguards these risks can be reduced or even entirely eliminated.

Chapter 10 ('Inter-Party Cases after Accession') deals with disputes between the high contracting parties under Article 33 ECHR (the so-called inter-state cases) in a twofold manner: Firstly, the book investigates the internal dimension of Article 33 ECHR after accession and the problem of inter-state cases (or *inter-party* cases as they should appropriately be called after the EU's accession to the Convention) potentially causing a major jurisdictional conflict between Luxembourg and Strasbourg. Since both courts claim exclusive jurisdiction for disputes between their Member States or contracting parties, respectively, a clash between them seems unavoidable. In its reformulated version, the general research question thus asks whether the provisions of the Draft Accession Agreement are capable of solving this conflict and whether the internal Union mechanisms for dispute settlement may hold the key to this solution. Secondly, chapter 10 examines the external scope of Article 33 ECHR and asks whether the European Union has the competence to emerge as a prominent human rights litigator after accession, in order to remind candidate countries of their obligations under the so-called *Copenhagen Criteria*, for example, and thus to put them on the right track towards EU accession.

The last chapter of Part III, chapter 11 ('The Exhaustion of Domestic Remedies and the Prior Involvement of the Luxembourg Court'), looks into the intricate interplay between the 'exhaustion of local remedies rule' under Article 35 ECHR and those situations in which Strasbourg may end up adjudicating on alleged human rights violations by European Union law, but where the CJEU had no prior opportunity to pronounce itself on the said violations. In the past, it has been argued that such a situation would gravely endanger the EU's legal autonomy, since an external court would decide on Union law without the involvement of the Luxembourg Court, which would, in turn, violate the CJEU's exclusive

jurisdiction. This book therefore suggests various solutions to this problem by taking into account both the autonomy principle and the effective protection of individuals. Furthermore, this chapter also analyses whether individuals, claiming a human rights violation by Union law, are obliged under Article 35 ECHR to first exhaust all internal Union remedies, ie the action for annulment or a reference for a preliminary ruling, before calling upon the Strasbourg Court.

III. CONCLUSIONS AND OUTLOOK

The last part, Part IV, summarises and assesses the findings of the previous parts. Most importantly, it will answer the research question of this book and conclude that the EU's legal autonomy is in fact reconcilable with the European Union's accession to the ECHR and its subjection to Strasbourg's external review. Beyond that, it shows what impact the accession will have on the European Union's legal order; on the relationship between the Luxembourg and Strasbourg Courts; on the role of the domestic courts; and, above all, on the existing and complicated multi-level framework of human rights protection in Europe. It also depicts potential weaknesses identified within this book, for example the effective yet complicated mechanisms introduced by the Accession Agreement, and calls upon the European Union and its Member States to adopt internal rules particularly designed to address and solve these issues in order to make the EU's accession to the Convention as effective as possible for the protection of human rights in Europe.