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THE TREATY OF LISBON: SOME HUMAN RIGHTS ISSUES

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Principal Recent Publications

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[London: Sweet & Maxwell. 2007 with commentary. l + 1316 pp. inc. index ISBN 978 1847032591]

'The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?' in A Arnull, P Eeckhout and T Tridimas, *Continuity and Change in EU Law. Essays in honour of Sir Francis Jacobs*, [Oxford: Oxford University Press. 2008. lxviii + 474 pp. ISBN 9780199219032} at 139-56.

'Free movement of persons and sport' in A Cygan, B Bogusz and E Szyszczak, *The Regulation of Sport in the European Union*, [Cheltenham: Edward Elgar, 2007 ISBN 978 1847203632] at 33-47.

'The citizen's right to free movement' (2005) 16 EBLR 547-58.

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'Conflicting competences: free movement rules and immigration laws' (2004) 29 ELRev 385-96.

THE TREATY OF LISBON: SOME HUMAN RIGHTS ISSUES

ROBIN C A WHITE*

Introductory Remarks

The history of human rights[1] in the European Community and European Union makes a fascinating study. Prompted by the constitutional courts of Germany and Italy, the Court of Justice took its first tentative steps towards a system of human rights protection for those affected by decisions of the institutions. In the *Stauder* case[2] the Court of Justice recognised that the general principles of law which are a source of Community law[3] include protection for human rights which would be safeguarded by the Court. Those first steps were elaborated in the *Internationale Handelsgesellschaft* case.[4] There the Court ruled that respect for human rights forms an integral part of the protection provided by the general principles of law recognised as a source of Community law. The Court added that the protection of these rights, 'whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and

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[1] Community law prefers the term fundamental rights, but what is at issue are human rights. Throughout this essay, the term human rights is used except when quoting material or using the title of a Community document which uses the term fundamental rights. Note that certain amendments introduced by the Treaty of Lisbon use the term human rights rather than fundamental rights.

[2] Case 29/69, *Stauder v Ulm*, [1969] ECR 419.

[3] See, generally, T Hartley, *The Foundations of European Community Law*, Oxford: Oxford University Press, Fifth edition, 2003, ch. 5.

[4] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.

objectives of the Community.' The *Nold* case[5] was the first in which direct reference was made to international treaties to which the Member States are parties, or in which they have collaborated, as providing guidelines which should be followed within the framework of Community law. The need to refer to international agreements in which Member States had collaborated rather than referring expressly to the European Convention arose because at the time France had not yet ratified the European Convention. In the *Rutili* case[6] the Court concluded that a particular provision of Community law was a 'specific manifestation of the more general principles' enshrined in the European Convention. This was a significant statement because strictly the recognition of the provisions in the European Convention was not necessary for its decision.

In the *Hauer* case,[7] the Court made specific reference to constitutional provisions in Germany, Ireland, and Italy, as well as to the European Convention, in concluding that the control of the use of property in issue in the case did not exceed the limitations allowed under any of these regimes.

The approach taken in the case law of the Court of Justice was endorsed by the political institutions in their Joint Declaration of 5 April 1977 which stressed the importance they attached to the protection of human rights as derived from the constitutions of the Member States and from the European Convention, and confirmed the respect of all the institutions for such rights. This was followed by the inclusion in the Preamble to the Single European Act of 17 February 1986 of a reference to the European Convention. The Treaty on European Union, which entered into force on 1 November

[5] Case 4/73, *Nold v Commission*, [1974] ECR 491.
[6] Case 36/75, *Rutili*, [1975] ECR 1219.
[7] Case 44/79, *Hauer*, [1979] ECR 3727.

1993, incorporated reference to the European Convention in Article F.2,[8] which reads:

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

This provision takes over the language of the Court itself in its case law.[9] Despite this progress, the context in which human rights questions have arisen in Community law remains rather meagre. It is, however, now the position that the Court will review measures of the institutions for their compatibility with human rights protected by the European Convention.

The Court of Justice has, however, not ignored the question of the extent to which the conduct of Member States may also be subject to review for compatibility with human rights standards when they are acting within the field of Community law. In such cases, the conduct of Member States can be called to account by the Court of Justice where they are directly implementing Community provisions.[10] Where the Member States are implementing Community law, the review

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[8] Said in Opinion 2/94 on accession by the Community to the European Convention on Human Rights, [1996] ECR I-1759 to give constitutional status to the existing case law of the Court of Justice on human rights.

[9] The location of this provision in the Treaty on European Union (rather than its insertion into the EC Treaty) coupled with the limitations on the Court of Justice's jurisdiction under what was then Art. L of the Treaty on European Union, avoids the incorporation of the European Convention (at least in relation to matters within the scope of the EC Treaty) by the back door.

[10] See Case C-5/88, *Wachauf*, [1989] ECR 260; see further Case C–2/92, *Bostock*, [1994] ECR I-955.

may go further. So in the *ERT* case,[11] which concerned a Greek television monopoly, the Court took the view that any derogation by a Member State from the freedom to provide services under the EEC Treaty had to be compatible with the freedom of expression recognized under the European Convention on Human Rights. This formulation suggests that in any regulation by Member States of matters falling within the scope of Community, measures taken by Member States must as a matter of *Community law* comply with the Convention.[12]

Differential interpretation is one risk of having two independent systems of human rights protection based upon the same set of rules and traditions.[13] In the *Hoechst* case,[14] the Court of Justice held that there was no human right to the inviolability of the home in the Community legal order in regard to the business premises of undertakings on the grounds that there was insufficient common practice in the legal orders of the Member States on the protection afforded to business premises against intervention by the public authorities. But in three cases[15] the Court of Human Rights held that Article 8 was wide enough to encompass both the

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[11] Case C-260/89, *ERT*, [1991] ECR I–2925. See also Opinion of Advocate General Jacobs in Case C-168/91, *Konstantinidis v. Altensteig-Standesamt*, [1993] ECR I–2755, and Case C-368/95 *Familiapress*, [1997] ECR I-3689.

[12] See also Case C-112/00 *Schmidberger*, [2003] ECR I-5659, for a case in which the fundamental freedoms in the EC Treaty (interference with transit through the Brenner Pass caused by an environmental protest) and human rights (freedom of association and expression) had to be balanced.

[13] R. Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg' in R. Lawson and M. de Blois (eds.) *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Dordrecht, 1994), at 219.

[14] Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 2859.

[15] *Chappell v. United Kingdom*, Judgment of 30 March 1989, Series A, No. 152; (1990) 12 EHRR 1; *Niemetz v. Germany*, Judgment of 16 December 1992, Series A, No. 251-B; and *Funke and others v. France*, Judgment of 25 February 1993, Series A, No. 256-A; (1993) 16 EHRR 297.

home when used for business purposes and professional premises. Despite this difference of interpretation, the Court of Justice went on to rule that there was a general principle of Community law which required that any intervention in the private activities of any natural or legal person must have a legal basis, be justified on grounds laid down by law, and not be arbitrary or disproportionate in its application.

The cumulative effect of the case law of the Court of Justice is that the Court must have regard to national constitutions and to international instruments, especially the European Convention. The Convention is not formally binding on the Community, but its provisions can and must be given effect as general principles of Community law. The result is much the same as if the Community were bound by the Convention. There are, however, circumstances where the Convention will apply but Community law does not. An example is provided in the *Koua Poirrez* case,[16] in which the Strasbourg Court concluded that the disability benefit in issue constituted a possession within Article 1 of Protocol 1, and that there was discrimination on the grounds of nationality contrary to Article 14 when read with Article 1 of Protocol 1. Some years earlier, the Luxembourg Court had concluded that the claim made by the applicant did not come within the scope of the law on the free movement of workers, since the applicant was a member of the family of a Community national who had never exercised the right to freedom of movement within the Community.[17]

The decisions of the Court of Justice on respect for human rights inevitably led to the question of whether the Community should accede to the European Convention,

[16] *Koua Poirrez v. France* (App. 40892/98), Judgment of 30 September 2003; (2005) 40 EHRR 34.
[17] Case C-206/91 *Koua Poirrez v. Caisse d'allocations familiales de la region parisienne*, [1992] ECR I-6685.

which was initially proposed by the Union's European Commission.[18] The Council of the European Union responded by asking the Court of Justice, in accordance with the procedure in Article 228 of the EC Treaty,[19] for an Opinion on certain questions in connection with the proposed accession.[20] The Court of Justice ruled that 'as Community law now stands, the Community has no competence to accede to the European Convention.' The only possible basis for competence was Article 235 (now 308) of the EC Treaty.[21] Some Member States had argued that the Community was competent to accede to the European Convention because of the penetration of the protection of human rights through the general principles of law. This is referred to in the Court's reasoning, but accession would, in the Court's view, require the integration of two separate systems for the protection of human rights. Such changes 'would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235' and could only be brought about by way of amendments to the EC Treaty. The Opinion is very clever; it is argued that the response is legally correct in the context of the timing and the question asked. It serves to preserve in full the power of protection of human rights by way of the

[18] See Memorandum adopted by the Commission, 4 April 1979 *Bulletin EC*, Supp. 2/79. The European Parliament has also on several occasions made statements in favour of accession, for example, by a resolution of 18 January 1994 on Community accession to the European Convention on Human Rights, adopted on the basis of a report of the Committee on Legal Affairs and Citizens' Rights [1994] OJ C44/32.

[19] Now Art. 300 of the EC Treaty.

[20] Opinion 2/94 on accession by the Community to the European Convention on Human Rights, [1996] ECR I-1759. See J Weiler and S Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences' in P. Alston, (ed), *The EU and Human Rights*, (1999) 3, at 147.

[21] This provides: 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

application of the general principles of law. Few reading the Opinion can be left in any doubt about the complexities of integrating the European Community system and the Strasbourg system.[22]

However, a problem with the Community system for the protection of human rights was the uncertainty as to which rights were protected; there was a need for some readily accessible catalogue of human rights.[23] That catalogue could be said to have come into existence with the signing of the Charter of Fundamental Rights in December 2000.[24] This document has no legally binding force for the Member States,[25] and there remain intriguing questions about its impact on the protection of human rights within the European Union. It is divided into six sections[26] and includes rights for citizens of the European Union as well as certain rights which are to be applicable to all within the jurisdiction of the Member States. The rights are said to be based on the rights guaranteed by the European Convention, but in many cases there are significant differences of wording.[27] Its scope is

[22] See also Study of the Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights. Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting 25-28 June 2002, DG-II(2002)006 (CDDH(2002)010 Addendum 2) (referred to in this essay as 'the Lathouwers Study').

[23] See generally K Lenaerts, 'Fundamental rights to be included in a Community catalogue' (1991) 16 ELRev 367; and K Lenaerts, 'Fundamental rights in the European Union' (2000) 25 ELRev 575.

[24] See below for further comment on the status of the Charter under the provisions of the Treaty of Lisbon.

[25] Though it can be argued that it binds the political institutions since they signed it.

[26] Dignity, freedoms, equality, solidarity, citizens' rights, and justice.

[27] For example, Art. 9 of the Charter provides, 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.' This could be interpreted as decoupling the right to marry and the right to found a family which are coupled in Article 12 of the Convention. Elsewhere there is a more sweeping approach to limitations which may be applied to certain rights.

considerably wider than the rights protected in the European Convention. A limited welcome can be offered to the Charter. As a declaratory document standing behind the legal recognition of human rights, it is probably as good as it could be given that its purpose was not formally decided in advance of the Nice Council and given the manner in which it was constructed.[28] Following a number of references to the Charter by Advocates General and the Court of First Instance, the Luxembourg Court itself referred to the Charter for the first time in June 2006 in an inter-institutional case[29] in which the European Parliament challenged the compatibility of provisions of Directive 2003/86 on the right to family reunification[30] with requirements in Articles 8 and 14 of the Convention. The Court concluded that there was no incompatibility. On the Charter, the Court said:

> The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of

[28] See G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 ELRev 126.
[29] Case C-540/03 *European Parliament v Council*, [2006] ECR I-5769.
[30] Directive 2003/86 on the right to family reunification, [2003] OJ L251/12.

> Europe and the case-law of the Court … and of the European Court of Human Rights'.[31]

So the Charter joined the European Convention and the constitutional traditions of the Member States as a source of inspiration in determining the human rights protected by the Union.

Treaty of Lisbon Provisions on Human Rights

The Treaty of Lisbon amends the Treaty on European Union, and we will in due course have a new set of numbers to take into account in the consolidated version of the Treaty. The EC Treaty is renamed the Treaty on the Functioning of the European Union. The centrality of human rights is recognised by the insertion of a new Article 1a into the Treaty on European Union:[32]

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

There is an external commitment to the protection of human rights in Article 2(5):

> 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and

[31] Case C-540/03 *European Parliament v Council*, [2006] ECR I-5769, para. 38 of the Judgment.
[32] See also Article 10A in the new chapter on the external relations competence of the Union.

contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

There is a new Article 6 to the Treaty on European Union:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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 competences as defined in the Treaties.

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.

Protocol No 30 makes special provision for the application of the Charter of Fundamental Rights in Poland and the United Kingdom. The substantive provisions provide:

Article 1

> 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
> 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

The Charter of Fundamental Rights under the Treaty of Lisbon

Consistent with the commitment to the protection of human rights, the Charter of Fundamental Rights is stated to have the same legal value as the Treaties, but it will remain a separate document.[33] The Charter to which the Treaty of Lisbon refers is a slight variant of the Charter which was signed in December 2000 at Nice. On 12 December 2007 the Presidents of the Commission, the European Parliament and the Council signed and solemnly proclaimed an amended Charter in Strasbourg. The President of the Commission explained that by signing and proclaiming the Charter the presidents of the political institutions 'were publicly signaling their indelible wish to make it legally binding on the Union's institutions.'[34]

The variation in the text of the 2007 Charter is to be found in Article 52 in the scope and interpretation of the rights and principles. The paragraphs in the article are numbered and the following provisions are added:

> 4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
>
> 5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be

[33] Unlike its incorporation as part of the ill-fated Treaty establishing a Constitution for Europe.
[34] Press Release IP/07/1916, Brussels, 12 December 2007.

judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

The Charter of Fundamental Rights is the subject of several declarations appended to the Treaty. A declaration by the Czech Republic 'stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law.' A declaration by Poland states that it 'does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.'

Poland also adds a declaration to the Protocol on the application of the Charter in relation to Poland and the United Kingdom indicating that 'it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter …'

As noted in an earlier section of this paper, the Charter of Fundamental Rights is a document which demands separate study. It raises many questions because of its expansive drafting in some areas, and its apparent extension of some of the rights protected by the European Convention.[35] Despite

[35] See generally A Ward and S Peers (eds), The EU Charter of Fundamental Rights, Oxford: Hart Publishing. 2004. See also J de la Rochère, 'The EU

the uncertainties about its legal status, the Advocates General and the Court of First Instance have already found that it provides assistance in the interpretation of human rights protected under Community law.[36] The Charter has also been referred to by the Court of Justice in an inter-institutional case.[37] It has already formed part of the material from which the judicial institutions draw inspiration when considering the substantive content of human rights protection in Community law.

In its new guise, there will be no inhibitions in making more explicit reference to its contents in addressing issues which come before the judicial institutions of the Union. The provisions of Protocol No 30 will also require interpretation. They are not simply an opt out. How could they be? There is a Community *acquis* on human rights which affects the Member States when they are acting within the scope of application of the treaties. The protection of human rights as part of the general principles of law has not been wiped out by the provisions of the Treaty of Lisbon on the Charter of Fundamental Rights.[38] The unwritten law on human rights within Union law will continue to develop and the Union's courts are unlikely to separate out those matters which flow from the legal effect of the Charter and those which flow from general principles of law.

Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in A Arnull, P Eeckhout and T Tridimas, *Continuity and Change in EU Law. Essays in honour of Sir Francis Jacobs*, Oxford: Oxford University Press. 2008 at 157.

[36] See, for example, Case C-173/99 *BECTU*, [2001] ECR I-4881, and Case T-54/99 *max.mobil*, [2002] ECR II-313.

[37] Case C-540/03 *European Parliament v Council (Familiy Reunion Directive)*, [2006] ECR I-5769.

[38] Rather it has been explicitly re-inforced in the new wording to be found in Article 6(3) TEU.

Accession to the European Convention

Specific provisions of the Treaty of Lisbon on accession to the European Convention

Article 188N added to the EC Treaty provides that the Council shall act unanimously for the agreement on accession of the Union to the European Convention. There is also a Protocol relating to Article 6(2) which contains the obligation to accede to the Convention. This is in effect a negotiating mandate in relation to the accession arrangements. It requires that the agreement must make provision for preserving the specific characteristics of the Union and Union law. Specific reference is made to the Union's 'possible participation in the control bodies of the European Convention, and 'the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.' Furthermore the agreement must ensure that accession to the Convention does not affect the competence of the Union or the powers of its institutions.
A declaration attached to the Treaty indicates that the Member States expect accession to be arranged in such a way as to preserve the specific features of Union law, and notes that there is regular dialogue between the two courts, and that such dialogue could be reinforced when the Union accedes to the European Convention.[39]

Although the Treaty of Lisbon commits the Union to accession to the European Convention on Human Rights,

[39] Such as the visit of a delegation of the Court of Justice to the Court of Human Rights in November 2007. See Court of Human Rights Press Release of 13 November 2007, and presentations at: http://www.echr.coe.int/ECHR/EN/Header/Press/Events/Meetings+and+Official+Visits/

there is some merit in considering the arguments for and against accession.

The Arguments for Accession

The arguments for accession operate principally at the political and philosophical level. As the Union increasingly holds itself out as a human rights institution, it is anomalous that it is not formally a party to the human rights treaty which has been described as 'part of the cultural self-definition of European civilization'.[40] Alston and Weiler have noted:

> As the Council of Europe grows, as the European Convention on Human Rights adapts and absorbs new member States and new legal traditions and understandings, it is regrettable that there will be no explicit Community voice within the European Convention on Human Rights. Such a voice would have enabled the sensibilities and experiences of the Community to form an integral part of the evolving jurisprudence and extra-juridical activity of the European Convention system. This, almost as much as any other reason, requires that accession to the European Convention remain a live objective.[41]

In addition to this contribution to the development of European human rights law, the Union's willingness to submit itself to scrutiny by the Strasbourg Court would indicate a genuine commitment to human rights in relation to matters at

[40] P Alston and J Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in P. Alston, (ed), *The EU and Human Rights*, (1999) 3, at 30. See also S Besson, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution' (2006) 6 HRLRev 323.

[41] P Alston and J Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in P. Alston, (ed), *The EU and Human Rights*, (1999) 3, at 30-1.

the core of human rights protection within Europe. It would reinforce the status of the European Convention as 'a constitutional instrument of European public order'.[42] It would reflect the core values of the Union as expressed in new Article 1a of the Treaty on European Union quoted in full earlier in this essay.

On the practical side, the necessary accommodations to enable the Strasbourg Court to deal with applications against the Union can, it is argued, be readily overcome.[43]

The Arguments against Accession

Much of the argument against accession relates to the status of the Luxembourg Court and the Strasbourg Court as courts of equal standing in the international legal order, each with constitutional functions. Each should retain its own supreme position in its sphere of influence. Furthermore the political institutions of the Union have now committed themselves, through their signature to the Charter of Fundamental Rights to a modern catalogue of rights applicable to the Union, and pay due regard to the content of the European Convention in developing its own standing as a human rights institution. The Luxembourg Court has developed its own approach to the protection of human rights in the Union legal order, which respects the significant position of the European Convention in the constitutional orders of each of the Member States setting the base line of human rights protection.

Perhaps more significantly it is argued that virtually all of Community law is implemented through the actions of the

[42] *Loizidou v Cyprus (Preliminary Objections)* App No 15319/89, Judgment of 23 March 1995, (1995) 20 EHRR 99; para. 75 of the Judgment.
[43] The Lathouwers Study, n.22 above. This sets out the practicalities and indicates that amendments to the Convention do not, of themselves, present an insuperable problem.

Member States, which are, following the exhaustion of domestic remedies, subject to international supervision by the Strasbourg Court when someone within their jurisdiction raises before that court a complaint of a violation of Convention rights. If the Union becomes a party to the European Convention, there are likely to be demarcation issues. The Union would only be responsible for a violation of Convention rights which arose from action of the Union. In other words, the Convention would only apply when the Union was exercising its own competences. But the prudent applicant may, following accession, choose to make the application against the Member State and the Union. That would then add to the work of the Strasbourg Court, because there would be argument about whether one or other, or both, of the respondents bore responsibility for the alleged violation of the Convention. Indeed the Lathouwers Study[44] went so far as to suggest that there might be a need to oblige the Union to intervene in cases concerning an alleged violation of the Convention by a Member State by reason of action it had taken in implementing Community law. The alternative which was canvassed was of joining the Union as a co-defendant in such cases.

On substance, the European Convention (and its Protocols) contains a somewhat restricted list of human rights. The rights in the Protocols are not binding on all the Member States. Whereas the case can be made for the Convention as providing minimum standards for States, its application to the work of an international organisation is more questionable. It may be better for the Union to develop its own internal standards which build on the foundations of the European Convention.

[44] The Lathouwers Study, n.22 above.

Key Issues Arising from Accession

The Lathouwers Study[45] suggested that the accommodations required for the Union to accede to the Convention could be achieved through a Protocol or through an accession treaty. The preference in the report would seem to be for an accession treaty.[46] If a protocol procedure were adopted, that would require ratification by all the Contracting Parties to the Convention before accession by the Union could follow. An accession treaty could combine amendments to the text of the Convention and its Protocols, supplementary provisions clarifying the scope of terms in the Convention,[47] and technical and administrative issues, such as the contribution to the running costs of the Strasbourg Court to be paid by the Union. However, the presence of Article 17 of Protocol 14 amending the Convention to permit the accession of the Union might be taken to suggest a preference on the Council of Europe side for a protocol as the vehicle for accession.

Other issues relate to the ability of the Union to use the inter-State procedure in Article 33 of the Convention, or to be a respondent in such cases. The Lathouwers Study[48] regarded the option of having no judge on the Strasbourg Court representing the Union as one which should be discarded. The possibility of using an ad hoc judge was canvassed but was seen potentially to be impracticable if a significant number of cases involved the Union as respondent. The preferred option seems to be for a full-time judge representing the Union who would participate on an equal footing with other judges on the Strasbourg Court. The Lathouwers Study[49] expresses some

[45] The Lathouwers Study, n.22 above.
[46] This is also the expectation reflected in the provisions of the Treaty of Lisbon.
[47] Which currently uses the language of States throughout, with corresponding references to nationals of the States which are Contracting Parties.
[48] The Lathouwers Study, n.22 above
[49] Ibid.

distaste for the idea of special panels composed only of judges from the Member States of the European Union and of the judge appointed in respect of the Union, since this would 'run counter to the philosophy of the Convention system.'[50]

The final idea which is canvassed is the introduction of a new procedure[51] permitting either of the Luxembourg Courts to request an interpretation of the European Convention from the Strasbourg Court. The principal purpose of such a procedure would be to avoid divergences in the case law. There is, of course, a case which can readily be made for the introduction of such a procedure for the current Contracting Parties.

The current treaty amendments on both sides refer to the Union acceding to the European Convention. The Union, however, has a much broader range of competences than the Communities, and some competences and actions of the Union are not subject to the same level of judicial review as actions of the Communities. This presents a further area in which demarcation issues are likely to arise. However, accession on this basis would extend the human rights protection of the European Convention to areas which are now within the zone of the human rights deficit of the Union. It would enable direct challenges to be made to aspects of Community and Union action which are currently outside the judicial review competence of the Luxembourg Court. The actions of the Luxembourg Court itself could be subject to scrutiny under the wide case law under Article 6 of the European Convention. As the United Kingdom found when it

[50] Ibid, para. 74

[51] Distinguishable from the advisory opinion procedure in Art. 47 of the Convention, on which see C Ovey and R White, *The European Convention on Human Rights* (4th ed., 2006), at 12-14. The first substantive advisory opinion was given on 12 February 2008 in connection with the Maltese nominations for election as judge of the Strasbourg Court: *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights.*

incorporated the European Convention under the Human Rights Act 1998, applications tend to increase rather than decrease because of the higher profile the Convention enjoys in the national legal order.
It has to be acknowledged that it is taking significant periods of time for Protocols to the European Convention which require ratification by all Contracting Parties to come into force. Protocol 11 was first proposed in 1993, was signed on 11 May 1994 and entered into force on 1 November 1998. Protocol 14 was first proposed in 2001, was signed on 13 May 2004, and has yet to come into force because of the intransigence of Russia.

Finally, it must be remembered that the human rights competence of the Union is not coterminous with the rights guaranteed by the European Convention. The legally binding Charter of Fundamental Rights goes beyond the rights enumerated in the European Convention. It will remain the case that the Luxembourg Court is the final arbiter of human rights protection in those areas where the Charter goes beyond the rights contained in the European Convention.

Could We Live with the Status Quo?

It will be some years at the earliest before the Convention regime could apply to the Union even if the process leading to the Union's accession to the European Convention begins in 2009. So the status quo is with us for some time come what may.

From rather humble beginnings, the Luxembourg Court has developed a significant case law on human rights.[52] Bruno de

[52] See generally D Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities' and B de Witte, 'The Past and Future Role of the European Court of Justice in the

Witte has described accession to the European Convention and the creation of a Community catalogue of rights as spectacular reforms attractive to some but repulsive to others, which have failed to prove attractive to the Member States.[53] There is now a catalogue of rights in the Charter, and the obligation to accede is part of the Treaty of Lisbon. But sceptics will be able to argue convincingly that the status quo may well be better than accession, and that the arrival of the Charter obviates the need for accession to the European Convention. There would remain a human rights deficit, since failings at Union level would continue to be subject to Strasbourg scrutiny only where an applicant could show that action by a Member State in implementation of requirements under Community or Union law was the source of the violation. Such a situation would leave some actions of the Union exempt from scrutiny by the Strasbourg Court.[54] In some cases, such as access to a court for the action for annulment, the imagination of the Court is hidebound by the text of the EC Treaty.[55]

Could the Strasbourg Court Cope?

The cultural shift which the Strasbourg Court would face if the Contracting Parties included a supranational organisation as significant as the European Union would be enormous. There is universal agreement that the current workload of the

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Protection of Human Rights' in P. Alston, (ed), *The EU and Human Rights*, (1999), at 757 and 859.

[53] B de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in P. Alston, (ed), *The EU and Human Rights*, (1999), 859, at 889-90.

[54] But that will be true even if the Union become a party to the European Convention in those cases where the alleged violation of human rights falls outside the scope of the European Convention.

[55] Notwithstanding efforts by Advocate General Jacobs to persuade the Luxembourg Court to take a different approach to the interpretation of Article 230 EC. See R White, 'Citizenship of the Union, Governance, and Equality' (2006) 29 Fordham ILJ 790, at 802-6.

Strasbourg Court is way beyond its current capacity. As at 1 May 2008, the Strasbourg Court had 88,200 pending cases.[56] That includes the following applications against some of the Member States of the European Union:

Romania:	9,600
Poland:	3,600
Italy	3,600
France:	3,300
Slovenia	3,250
Czech Republic:	2,800
Germany:	2,600[57]

The backlog which was growing at a rate in excess of 1,000 cases per month, is beginning to fall. It is already acknowledged that the changes to be brought about by Protocol 14 are not enough to address the problem of the Court's growing case load, and the Council of Europe has undertaken work on longer term measures to address the problem. Protocol 14, like Protocol 11, is only a partial remedy to the problems presented by the exponential increase in applications to the Strasbourg Court.[58] For this reason the Declaration at the end of the Third Summit of the Council of Europe held in Warsaw in May 2005 included a commitment to the establishment of a group of 'wise persons to draw up a comprehensive strategy to secure the effectiveness of the system in the longer term' but these proposals are to preserve

[56] Source: statistical information available on the Court's website www.echr.coe.int Russia accounted for 22,050 of the pending cases, and Turkey for 9,850 pending cases as at 1 May 2008.

[57] Cases against the other Member States of the European Union form part of a figure of 20,400 cases for all other Contracting Parties.

[58] See address by Luzius Wildhaber at the at the high level seminar on the reform of the European human rights system, held at Oslo on 18 October 2004: available on www.echr.coe.int. See also Final Declaration of the Heads of State and Government of the Member States of the Council of Europe, and its accompanying Action Plan (CM(2005)80 final), of 17 May 2005.

the basic philosophy underlying the Convention.[59] In his speech at the Summit, the then President of the Court said:

> We therefore need to look beyond Protocol No. 14 and address the issue of the long-term future of the system, and we should start doing so now. What kind of international protection mechanism do we need in the Europe of the 21st century? Are the present procedures still adjusted to the pan-European character which the system has acquired since its creation? What will be the impact of the projected accession of the European Union to the Convention? How can the system best provide the guidance expected from it by authorities and citizens alike in an ever faster changing world? These are some of the crucial questions which we urgently need to start addressing, if we want to have a chance to enable the system to face up in time to the new challenges awaiting it.
>
> Now is not the time for a quick fix, but for vision. A vision on how to ensure that the European Court of Human Rights remains what it has been since its creation, for the benefit of nearly two generations of citizens: the tangible symbol of the effective pre-eminence on our continent of human rights and the rule of law.[60]

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[59] See *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203, 15 December 2006; H Woolf, *Review of the Working Methods of the European Court of Human Rights (the Woolf Report)*, December 2005; and Council of Europe, *Future Development of the European Court of Human Rights in the light of the Wise Persons' Report*, (Council of Europe, 2007).

[60] Address by the President of the European Court of Human Rights, Luzius Wildhaber, to the Third Summit of the Council of Europe, 16-17 May 2005: available on www.coe.int.

Although the political will at the institutional levels is there on both sides,[61] the practical capacity of the Strasbourg Court may not be available. The case for extending the jurisdiction of the Strasbourg Court accordingly needs to be especially compelling if accession is to go ahead. Neither the Council of Europe, nor the Union has yet put in place the legal basis for accession, though the Council of Europe is ahead of the European Union since Protocol 14 will come into force once it has been ratified by Russia.[62] The Union may well overtake the Council of Europe once the Treaty of Lisbon enters into force. There is currently no sign of imminent ratification of Protocol No. 14 by Russia, and that may yet prove to be a serious stumbling block to progress.

Conflicting Human Rights Regimes

The constitutionalisation of principles to be found in the treaties has been a feature of the developing Community legal order. In 1986 the Court of Justice acknowledged that the Community is 'based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'[63] In its Opinion on the EEA Agreement, the Court said that the 'EEC Treaty … constitutes the constitutional charter of a Community based on the rule of law.'[64]

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[61] As distinct from the political will of the Member States of the Union and all but one of the Contracting Parties to the European Convention.

[62] The continuing failure of Russia to ratify Protocol 14 gives rise to serious concerns about that country's commitment to the protection of human rights under the Convention system. It is arguable that its unreasoned and unreasonable failure to ratify an essential procedural protocol could expose it to the risk of sanctions being imposed under the Statute of the Council of Europe.

[63] Case 294/83 *Les Verts*, [1986] ECR 1339, para. 23 of the Judgment.

[64] Opinion 1/91 Re a Draft Treaty on a European Economic Area. [1991] ECR I-6079, para. 21 of the Opinion.

In the protection of human rights, the European legal space has, as Lenaerts has observed,[65] two regimes based on entirely different underlying approaches. Lenaerts says of the Community legal order:

> [It] is characterised by a distribution of law-making powers between the central government (the Community) and the component entities (the Member States). The dividing line between the several spheres of powers is either substantive (distribution of law-making powers according to the subject matter involved) or normative (legislative function for the Community, executive function for the Member States. Both varieties can be seen as a kind of federalism prevailing in the Community legal order.[66]

In contrast the regime under the European Convention on Human Rights is based upon the international law model of calling States to account for failing to guarantee the rights set out in the Convention. The original system has moved from a position where individuals were not centre stage to one in which they now are, and where submission to the jurisdiction of the Court was optional to one in which it is required. Nevertheless the respondent in cases brought before the Court of Human Rights is always a State. The role of the Court is subsidiary to that of the national courts and is essentially supervisory. The tension in developments which subject the Luxembourg Court to the supervisory jurisdiction of the Strasbourg Court (even just in the field of the human rights guaranteed by the Convention) is that it places two courts with arguable claims to supreme constitutional competence in potential opposition to one another. To date each of the two

[65] K Lenaerts, 'Fundamental rights to be included in a Community catalogue' (1991) 16 ELRev 367.
[66] Ibid. 372.

courts has shown considerable respect for the role and function of the other.[67] Proposals for the adaptation of the Strasbourg system to accommodate participation by an international and supranational organisation may succeed in avoiding difficulties in the future, but there is a risk that the character of the Strasbourg system will evolve in unexpected ways as a consequence of this development. For example, if membership of one international organisation is considered appropriate, why not membership by other international organisations operating in the region?

The Union as a Human Rights Organisation

Central to the issues raised by the human rights provisions of the Treaty of Lisbon is the very nature of the evolving Union. The increasing competences of the Union and its emergence as an international player mean that its commitment to the protection of human rights cannot be simply something which is a check on institutional failure, or Member State failure in implementing Community law. An organisation with pretensions for the development of its own foreign policy cannot ignore the human rights dimension to that policy. Writing nearly a decade ago, Philip Alston commented that the Union could not be a credible defender of human rights unless it asserted a general competence in the human rights sphere:

[67] This theme is explored in more detail in R White, 'The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?' in A Arnull, P Eeckhout and T Tridimas, *Continuity and Change in EU Law. Essays in honour of Sir Francis Jacobs,* Oxford: Oxford University Press. 2008 at 139-56.

> In short, the Union must have a human rights policy, albeit one that takes appropriate account of the various principles upon which it has been established.[68]

In a penetrating article, Samantha Besson has argued that the Union is uniquely placed to establish itself as a 'post-national human rights protection institution'.[69] Besson argues that the creation of citizenship of the Union has signalled a move from activity as providing the link with entitlement in Community law to personal status as citizen giving rise to a more inclusive form of social and political membership that is in line with universal human rights guarantees.[70] In other words, it is not what you do (engaging in economic activity) that counts but simply who you are (a citizen of the Union). Besson concludes that the Union has the capacity to became a significant post-national human rights agency in a world where the significance of individual statehood is on the wane and globalisation on the rise. This suggests the need for a general Union human rights competence, which is currently anathema to some Member States.

Concluding Remarks

Back in the real world, the immediate need is to secure ratification of the Treaty of Lisbon. The target date for the entry into force of the Treaty of Lisbon is 1 January 2009-in time for the next elections to the European Parliament in June 2009. As at 11 June 2008 18 Member States[71] had approved

[68] P Alston and J Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in P Alston (ed), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, 1-66, at 15

[69] S Besson, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution' (2006) 6 HRLRev 323.

[70] Ibid., 351

[71] Austria, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, and Slovenia.

the Treaty; only Ireland plans to hold a referendum.[72] Then the hard work will begin. On the Council of Europe side, there can be no progress until Protocol No 14 is ratified by Russia. That would open the door to the detailed negotiations about the way in which Strasbourg supervision of Union human rights compliance would operate.

The nervousness about increased human rights competence which has required a special Protocol in relation to the application of the Charter of Fundamental Rights in Poland and the United Kingdom may be understandable. But it is misplaced. The Union can only develop as a political organisation if human rights sits well in the foreground of its consciousness and activities both internally and externally. Whether there is a need to join up the system of judicial protection offered by the Luxembourg Court and the Strasbourg Court to move forward might be questioned. Other ways of guaranteeing the protection of human rights in the Union legal order can certainly be envisaged.

[72] On 12 June 2008. Editor's Note: Ireland has since voted 'No' in this Referendum.