Ladies and Gentlemen,
Dear colleagues and friends,

I would like to begin by saying that I feel honoured and happy to be here with you.

1. On this important and sensitive question of the EU accession to the ECHR, I am going to develop three points. First, the reason of the accession; second, the necessity of the accession; third, the modalities of the accession.

I. The reason of the accession

2. The question of accession of the European Union to the European Convention on Human Rights has been discussed for at least 30 years now.

3. As we all know, the European Convention provides in its Article 1 that all States party to it have the obligation to secure to everyone within their jurisdiction all the rights and freedoms provided for by its text. It is their primary responsibility to apply the Convention while acting within their jurisdiction, and redress violations if they occur. This provision – and all the other relevant provisions of the Convention – was drafted at a time (late 40’s) where the European States had almost full control of their jurisdictional capacity concerning the acts or omissions of the State organs.

A new situation

4. The situation has, in the meantime, changed radically: the development of international organisations, and more particularly the creation of the European Community in 1957 (now the
European Union), has led to a gradual transfer of a number of competences from the States themselves to the latter international / supranational entity, and to a dependence of the national decision-making to decisions taken outside their territory and jurisdiction. As a result the 27 Member States of the Union, which, at the same time, are all parties to the Convention either have lost altogether their capacity to control decisions, hitherto belonging to their jurisdiction, or at least their jurisdictional freedom has been diminished. This loss of jurisdictional capacity is not, most of the times, without incident for the protection of human rights. Decisions taken by the Union in lieu of States, or acts or omissions of its institutions may indeed entail transgressions of human rights protected by the Convention.

_The reaction of the Court_

5. How has the Court reacted to this relatively novel and increasingly frequent phenomenon? There has already been established case-law dealing with the issue. The main principles that we can detect from it are the following.

6. First, the Court does not discourage States to participate in international organisations, which are considered by it as an indispensable tool for the furtherance of international cooperation.

7. Second, it has admitted that it cannot control acts or omissions of the European Union, if they are produced by institutions of the organisation, since the Union is not a party to the Convention. However, the situation is different when the acts of the Union result in the taking of specific measures in a State party to the Convention, which violate a protected human right. In these circumstances, the State-party, acting in application of a Union’s command, can be held responsible for the impugned act.

_The equivalent protection_

8. Still the Court has been very cautious to sanction such acts, and compromise, in a way, the smooth operation of the Union’s legal order. In a landmark judgment, _Bosphorus Airways v. Ireland_ of 30 June 2005, where the main problem was an alleged violation of Article 1 of Protocol 1, as a result of a seizure of an aircraft taken by the Irish authorities in execution of a Union’s decision, the Court found that the legal order of the Union offered satisfactory means to deal with alleged violations of the Convention, that “State action taken in compliance with such legal obligations [i.e. obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty] is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see _M. & Co._, an approach with which the parties and the European
Commission agreed). By ‘equivalent’ the Court means ‘comparable’; any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international cooperation pursued (...). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights (...). In other words, if in the concrete circumstances of a case, the Court finds that this equivalent protection is not applied in a manner which satisfies the requirements of the Convention, and that there is a “manifest deficiency” in the way that the Union has dealt with the protection of human rights in the case, it can proceed to the examination of its merits, and find potentially a violation.

9. Against this background, the judgment of the European Court of Human Rights in the case of Michaud v. France of 6 December 2012 is highly significant because it is the first time that the Court concluded that there was no equivalent protection. The applicant submitted that the European Union had adopted three Directives in succession aimed at preventing the use of the financial system for money laundering. The first (91/308/EEC; 10 June 1991) targets the financial establishments and institutions. It was amended by a Directive of 4 December 2001 (2001/97/EC) which, among other things, widened its scope to include professions outside the financial sector, including “members of the independent legal professions”. The third Directive (2005/60/EC; 26 October 2005) repealed the Directive of 10 June 1991, as amended, and reproduced and added to its content. The laws transposing these Directives – Law no. 2004-130 of 11 February 2004 in the case of the Directive of 10 June 1991 as amended – and the regulations implementing that law – Decree no. 2006-736 of 26 June 2006 – have been incorporated into the Monetary and Financial Code. These texts place lawyers under an “obligation to report suspicions” which the legal profession, who see it as a threat to professional privilege and the confidentiality of exchanges between lawyers and their clients. The Government submitted that the obligation for lawyers to exercise due diligence and report suspicions was the result of the fact that France, as a member of the European Union, was required to transpose European Directives into French law. Referring to the Bosphorus Airways judgment, they contended that France must be presumed to have respected the requirements of the Convention as all it had done was comply with its obligations, and it was established that the European Union afforded protection of fundamental rights equivalent to that provided by the Convention.

1. ECtHR (GC), Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, judgment of 30 June 2005, §§ 155-156.
10. In reply to this argument, the Court recalls, as a general principle, that the “presumption of equivalent protection is intended, in particular, to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which is not party to the Convention and to which it has transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership vis-à-vis the Convention. It also serves to determine in which cases the Court may, in the interests of international cooperation, reduce the intensity of its supervisory role, as conferred on it by Article 19 of the Convention, with regard to observance by the States Parties of their engagements arising from the Convention. It follows from these aims that the Court will accept such an arrangement only where the rights and safeguards it protects are given protection comparable to that afforded by the Court itself. Failing that, the State would escape all international review of the compatibility of its actions with its Convention commitments”\(^2\). Moreover, concerning the protection of fundamental rights afforded by European Union law, the Court deems that “although individual access to the Court of Justice is far more limited than the access private individuals have to the Court under Article 34 of the Convention, the Court accepts that, all in all, the supervisory mechanism provided for in European Union law affords protection comparable to that provided by the Convention. Firstly, because private individuals are protected under Community law by the actions brought before the Court of Justice by the member States and the institutions of the European Union. Secondly, because they have the possibility of applying to the domestic courts to determine whether a member State has breached Community law, in which case the control exercised by the Court of Justice takes the form of the preliminary referral procedure open to the domestic courts”\(^3\).

11. Turning to the application in the present case of the presumption of equivalent protection, the Court observes that the present case differs from that of *Bosphorus Airways* for two main reasons. Firstly, as the latter case concerned a Regulation, which was directly and fully applicable in the member States, Ireland had no margin of manoeuvre at all in the execution of the obligations resulting from its membership of the European Union. In the present case France implemented Directives, which are binding on the member States as regards the result to be achieved but leave it to them to choose the means and manner of achieving it. Secondly, and above all, in the *Bosphorus Airways* case the control mechanism provided for in European Union law was fully brought into play. The Irish Supreme Court applied to the Court of Justice for a preliminary ruling on the alleged violation of the right of property of which the applicant subsequently complained to the Court. Conversely, in the present case the *Conseil d'État* refused to submit the applicant's request to the Court of Justice for a preliminary ruling on whether the obligation for lawyers to report suspicions was compatible with Article 8 of the Convention, even though the Court of Justice had not had an

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3. Ibid., § 111.
opportunity to examine the question, either in a preliminary ruling delivered in the context of another case, or on the occasion of one of the various actions mentioned above which were open to the European Union’s member States and institutions. “The Court is therefore obliged to note that because of the decision of the Conseil d’Etat not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the Conseil d’Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply. The Court is therefore required to determine whether the interference was necessary for the purposes of Article 8 of the Convention”.

II. The necessity of the accession

12. As we can see, for a long time now, the Convention system has suffered from an imbalance, which is also an anomaly. Whereas all the EU Member States are subject to external supervision by the European Court of Human Rights, including when they implement EU law, the Union itself is not. As a result, the Member States individually have to “defend” the Union. Furthermore, the Union cannot act as a party to proceedings before the Court, and this can lead to problems in the execution of judgments in which EU law is found to have breached the Convention, as was evident in the execution of the Matthews judgment. Citizens have long been promised that these difficulties would be remedied. Now that it is finally possible to do so, this must happen quickly and no more time should be wasted.

13. But there is also a second reason which makes accession an urgent requirement. With the Lisbon Treaty, the EU Charter of Fundamental Rights has also come into force. As we know, the Charter reproduces many of the rights set forth in the European Convention on Human Rights and provides that those rights, as interpreted by the European Court of Human Rights, are the minimum to be observed by Union law. This means that since 1 December 2009 the Court of Justice of the European Union has had the task of interpreting or applying, through the Charter, provisions of the European Convention on Human Rights that are often important and sensitive. However, the Convention entrusted our Court with the duty to provide the authentic interpretation of the Convention at final instance. Without the accession of the EU, the Strasbourg Court will be unable to discharge this responsibility in situations where the Court of Justice interprets the Convention when applying the Charter in cases examined on the merits. I am touching on a crucial point here. Our two courts must be able to perform their fundamental tasks. On the one hand, the Court of Justice is the guarantor of the interpretation of European Union law; it has a monopoly and exclusive competence in this sphere. On the other hand, the European Court of Human Rights is, in

4. Ibid., §§ 115-116.
5. ECtHR (GC), Matthews v. the United Kingdom, judgment of 18 February 1999.
the same way, the guarantor of the interpretation of the Convention and this must also be respected. However, it is clear that, in interpreting the Convention, our Court cannot take the place of the national authorities or of the bodies of the European Union as regards the interpretation of domestic law or treaties.

14. Finally, as a combined effect of the increase in the competencies of the Union – notably in areas that are sensitive in terms of fundamental rights, such as precisely the area of freedom, security and justice – and the existence of the Charter, the Court of Justice will have to consider cases concerning fundamental rights more often than in the past. In order to give concrete effect to Article 52 § 3 of the Charter, which provides that the meaning and scope of the rights contained in the Charter shall be the same as those laid down by the Convention, it is of course essential that this identity of meaning and scope can be subject to external scrutiny by the European Court of Human Rights\(^6\). Moreover, without accession, one can concretely also expect an increasing risk of contradictions in the case-law between the two Courts, in spite of all efforts to the contrary. The main losers will be the citizens which must again be put at the heart of the process and of our concerns. Accession is thus the best means of ensuring the harmonious development of the case-law of the European Court of Justice and the European Court of Human Rights in human rights matters and of achieving a coherent framework of human rights protection throughout Europe. Lastly, while the Union is reaffirming its own values through its Charter of fundamental rights, its accession to the European Convention on Human Rights will send a strong political signal of coherence between the European Union and the "greater Europe". The incorporation of the Charter of Fundamental Rights of the European Union into the Lisbon Treaty and the accession are thus complementary measures ensuring full respect of fundamental rights in the legal order of the European Union.

15. From the previous analysis it clearly transpires, I think, why accession to the Convention is necessary, even imperative. And this is also the conviction of the 27 States, which is reflected in the text of the Lisbon Treaty. Article 6 § 2 of the Treaty of the European Union provides that: “The Union shall accede to the European Convention on Human Rights. Such accession shall not affect the Union’s competences as defined in the Treaties”. At the same time, the coming into force of Protocol 14 to the European Convention on Human Rights, as from the 1\(^{st}\) of June 2010, settled the problem of accession of the Union, insofar as the Convention itself is concerned. Article 56 § 2 of the Convention – as amended by the Protocol – provides that: “The European Union may accede to the Convention”.

\(^6\) Regarding Article 52 § 3, see the excellent analysis by J. CALLEWAERT, "« Leur sens et leur portée sont les mêmes »", Journal des tribunaux, n° 6489, 2012, p. 598.
III. The modalities of the accession

16. It is clear from the description of the situation that I have just made, that the provision of the Lisbon Treaty and that of Protocol 14 to the Convention does not automatically suffice to secure accession. Negotiations are needed to determine the modalities of the accession.

17. In a Protocol relating to Article 6 § 2 of the Lisbon Treaty, reference is made to a specific agreement which must be adopted. This one, \textit{inter alia}, “shall make provisions for preserving the specific characteristics of the European Union and Union law, in particular with regard to: (a) the specific arrangements of the Union’s possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-member States and individual applications are correctly addressed to Member States or/and the Union as appropriate.”

A. The negotiations process

18. Negotiations started in 2000 between the European Commission (mandated by the European Council) and the Council of Europe Steering Committee for Human Rights (CDDH) which has set up a working group (CDDH-UE – Informal Group on Accession of the European Union to the Convention). They have led to the adoption on 19 July 2011 of draft legal instruments on the Accession of the European Union to the European Convention on Human Rights including a \textit{Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms} and a \textit{Draft Explanatory report}\footnote{The Union could admittedly have acceded unilaterally but an Accession Agreement was considered preferable in order to enable for the necessary changes to the ECHR to be considered to "accommodate" the legal system of the Union. See, for a first analysis, GROUSSOT, T. LOCK and L. PECH, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", \textit{European Issues}, no. 218, 7 November 2011, p. 7 (available at: www.robert-schuman.eu).} based on three core principles: equality before the European Convention on Human Rights; autonomy of Community law; subsidiarity.

19. This text, which was considered to be very balanced, was submitted to the Committee of Ministers of the Council of Europe on 14 October 2011, but had not been finalized at that time, due to the absence of a common position among the Member States of the Union\footnote{At the conclusion of this discussion, "it appeared that given the political implications of some of the pending problems, they could not be solved at this stage by the CDDH itself nor by the CDDH-UE. For this reason, the CDDH considered that in the present circumstances it had done all it could, as a steering committee, and agreed to transmit the present report and the attached revised draft instruments to the Committee of Ministers for consideration and further guidance." See the 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 of 14 October 2011, document CDDH(2011) R Ex (available at: www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/CDDH_2011_009_en.pdf).}. However, in April 2012, after discussions took place within, in particular, the Council of the European Union Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), political
decisions have been taken and the Council Presidency concluded that negotiations should resume without delay on the basis of the Draft Agreement of 2011.

20. EU accession negotiations resumed on 17-19 September 2012. The process moved from legal/technical discussion to a more political negotiation. In contrast to the first round of discussions (the 7 + 7 format), the process now involved all 47 States and the European Commission (47 + 1), with the Commission as the sole voice for the EU and its Member States. On the EU side, the imperatives were to preserve the autonomy of EU law and not to disturb the division of powers and competences between the EU and its Member States. The aim of non-EU States was to keep any changes to the present Convention mechanism to a minimum. There were four key points in the discussion: scope of the accession (EU foreign and security policy to be excluded); co-defendant status; prior involvement of the Court of Justice; voting in the Committee of Ministers in the context of execution. In terms of their relevance, the significance of these “sticking points” is rather modest. We are talking here about no more than 5% of the potential cases against the EU.

21. After a third negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on 7-9 November 2012, a fourth negotiation meeting took place on 21-23 January 2013. On the agenda was the Draft explanatory report to the Agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms and also a chairperson’s proposal on outstanding issues. What is interesting to note is that 16 Member States of the Council of Europe which are not member of the European Union decided to take part in the discussion. They produced and submitted a Common paper on major concerns regarding the Draft revised Agreement on the accession of the European Union to the European Convention on Human Rights.

22. On 3-5 April 2013, there will be a fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights. On the table, there will be a Secretariat proposal for a Draft additional Rule for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party and also a document on the

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10. The group was composed of 7 experts from EU States plus 7 experts from non-EU States who were elected by the CDDH and acted in a personal capacity.
12. Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine.
Participation of the EU in the Committee of Ministers when the latter takes decisions other than those expressly provided in the Convention: implications of the various options under discussion.

B. Some resistance

23. There have always been opponents to accession. As observed by J. Callewaert, allowing control from the outside always entails a risk and it seems that despite the Lisbon Treaty, which orders the EU to accede, some are still not prepared to take that risk, because it would entail change towards more transparency, more accountability and thus more progress within the EU.\(^\text{13}\)

24. In the meantime, a kind of double trend seems to be developing in the case-law of the ECJ on fundamental rights. There are two aspects to it. First of all, it would appear that the Convention is now being more or less systematically ignored by the ECJ, even where Art. 52 § 3 of the Charter comes into play.\(^\text{14}\) Secondly, the ECJ seems to be advocating a kind of distribution of powers or division of labour between the two European Courts rather than cooperation, the ECJ suggesting that the Convention would not apply where EU law applies.\(^\text{15}\) In other words, the ECJ tends to interpret the Charter in isolation from the jurisprudence emerging from other human rights instruments.

25. Should this trend be confirmed in the future, what may happen is that it will increasingly look like there are two sets of European fundamental rights, two worlds of fundamental rights in Europe. This would go against the whole European legal tradition and thinking in this area. It would also mean that Europe would lose much of its credibility on the international scene as a promoter of the universality of fundamental rights. Accession could prevent this from happening, could prevent such a European break-up from taking place, as it would clearly indicate that beyond all diversity there is also a common set of fundamental rights, called Human Rights, which are shared by all States and by the EU. But if this is to succeed, it should happen soon.\(^\text{16}\)

C. Three main principles

26. Having this in mind, I discern three main principles which should / could inspire and guide the negotiations.

\(^\text{13}\) J. CALLEWAERT, “EU accession to the European Convention on Human Rights”, op. cit.

\(^\text{14}\) Latest example: ECJ (GC), Case C-199/11, Europese Gemeenschap v Otis NV and Others, judgment of 6 November 2012.

\(^\text{15}\) ECJ (GC), Case C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, judgment of 15 November 2011, § 72; opinion of AG Mengozzi, of 29 September 2011, § 40.

Equality before the Convention

27. The EU’s accession to the Convention requires it to become a Contracting Party in its own right, in the same way as the other Contracting States. It will thus join a group of States bound by the same rights and obligations in the application of the Convention, and as we know, all are “equal before the Convention”. The purpose of the EU’s accession to the Convention has always been precisely to subject the EU to the same external supervision as States; it is therefore necessary to ensure, as far as possible, that it is subject to the same rights and obligations vis-à-vis the Convention as the States, so that “equality before the Convention” also extends to the EU.

28. Of course, the EU is not a State, and this must be taken into account, particularly as regards the manner in which the Convention operates. Indeed, Protocol No. 8 to the Lisbon Treaty explicitly requires the specific characteristics of Union law to be taken into account, as is only natural. Absolute equality between the EU and the other Contracting States is therefore neither possible nor even desirable. Nevertheless, in preparing for accession, we should be guided as much as possible by the principle of equality before the Convention and we should depart from it only where – and only to the extent that – this is essential in order to respect the particular nature of the Union.

29. In other words, an effort must be made, as far as possible, to apply the same system to the Union as is applicable to States, because we cannot give the impression that, within the Convention system itself, privileges are being created for the Union’s benefit. That would be the worst possible favour to grant the Union, as it would undermine its credibility at a time when it is seeking precisely to strengthen it through accession, by subjecting itself to the same external supervision as its Member States.

The specific features of European Union law

30. Obviously, regard must be had to the specific features of European Union law. This goes without saying. In fact, I would say that this would have happened even if the Lisbon Treaty had not required it, as is indicated by the study carried out by the Council of Europe as far back as 2002 on the legal and technical aspects of accession.

31. Thus, for example, the fact that in a series of fields the Union shares competences with its Member States is an undeniable and typical feature of the EU legal system which must be taken into account. Take for instance a court decision ordering someone’s detention with a view to
executing a European Arrest Warrant against him\textsuperscript{17}. We know that Article 6 of the Convention, which lays down the right to a fair trial, in principle does not apply to the European Arrest Warrant but we also know that Article 5, the safeguard against arbitrary detention, does. So imagine there is indeed something wrong with that court decision ordering the detention of the applicant and a violation is found. The question will then immediately arise where the problem lies: at domestic level or at the level of the EU? In other words, was it the domestic judge who wrongly applied the domestic law transposing the Framework Decision on the European Arrest Warrant, or the domestic legislature who wrongly transposed the Framework Decision, or is the flaw to be found in the Framework Decision itself? This is important to know with a view to properly executing the Court’s judgment in case a violation is found: who should remedy the defect?

32. Here is another example. We currently have, pending before the Court, a case against Bulgaria filed by an applicant of Chechen origin, who is to be deported to Russia. The applicant challenges, under Article 3 of the Convention, the expulsion order and, under Article 5, the court decision ordering his detention for the purpose of his expulsion\textsuperscript{18}. Meanwhile, in the same case, the ECJ gave a preliminary ruling\textsuperscript{19} on how to interpret some provisions of Directive 2008/115 on the standards and procedures to be followed for returning illegally staying third-country nationals, which is applicable to the case. But the ruling by the ECJ did not cover all the issues raised in the application which are also relevant under EU law.

33. However, it is certainly not the task of the European Court of Human Rights to state a position on the distribution of powers between the Union and its Member States. This explains the proposal to introduce a mechanism allowing them both to become “co-respondents” before the Strasbourg Court. The judgment would be handed down against both of them taken together (“in solidarity”) and it would be left to them to agree on who should act in order to execute the judgment. Such an arrangement would have the advantage of ensuring that the final judgment will be directly enforceable against both defendants, without the Strasbourg Court having to make any ruling on the allocation of competences between the Union and the member State in question (which is an internal EU issue).

34. This is the gist of Article 3 of the Draft Agreement which adds a paragraph 4 to Article 36 of the European Convention on Human Rights: “The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the

\textsuperscript{17} Art. 12 of the Framework Decision on the European Arrest Warrant: “When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.”

\textsuperscript{18} Kadzoev v. Bulgaria, application no. 56437/07.

\textsuperscript{19} ECJ (GC), Case C-357/09 PPU, judgment of 30 November 2009.
circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings”.

35. The introduction in that form of the co-respondent mechanism seems to me fully in line with Article 1 (b) of Protocol No. 8 to the Treaty of Lisbon, which requires the Accession Agreement to provide for “the mechanisms necessary to ensure that ... individual applications are correctly addressed to Member States and/or the Union, as appropriate”. This co-respondent mechanism is however not a procedural privilege for the Union or its member States, but a way to avoid a gap in the Convention system which may arise from the fact that the author of a norm, the compatibility of which with the Convention is called into question, would not be a party to the proceedings before the European Court of Human Rights, with all the rights and obligations that this entails, notably in the context of the execution of judgments. Now, we must be realistic. Following this minimalist approach, the co-respondent mechanism will be required to be applied only in a limited number of cases. In this context, it has been estimated that, in recent years, the only cases where a co-respondent would have been required are Matthews v. the United Kingdom (1999), Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi (“Bosphorus Airways”) v. Ireland (2005) and Cooperatieve Producen­t enorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands (2009).

36. These and many other proposals need to be examined in depth during the negotiations on accession, in order to find solutions that satisfy all parties around the table. For while Union law has specific characteristics that must be taken into account, the same is true of the Convention system. Admittedly, the Convention may be adjusted to take account of the Union’s specific features, but only if its underlying nature is not affected.

37. Finally, I hear that there is currently talk, in this context, of the possibility of removing the Union’s primary law (treaty law) from the scope of the accession in order to preserve the specific nature of EU law. Without going into the substance of this debate, I believe that it would be a serious mistake to resort to exclusionary measures of this kind. There must be room for proper negotiations in which all the relevant particularities can be taken into account.

Subsidiarity

38. The question of exhaustion of domestic remedies, which is a fundamental admissibility criterion for applications to the European Court of Human Rights and which expresses the philosophy of subsidiarity which is at the heart of the Convention, will obviously have to be examined and discussed.
39. What would be the equivalent of exhaustion of domestic remedies in the new landscape? We have to distinguish between direct and indirect actions.

40. Whenever individuals challenge EU measures directly (legal acts or individual decisions) with the EU institutions as defendants, the case will first have to be brought before the Court of Justice. It is only after the final ruling of the Court of Justice that the individual may bring a case before the Strasbourg Court on account of any possible violation of the ECHR.

41. Whenever individuals challenge a national measure implementing or executing EU law, they will first have to apply to the ordinary national courts. In accordance with EU law, national courts may (or in certain cases must) refer the matter to the ECJ in Luxembourg for a preliminary ruling on the validity of interpretation of EU law. After that preliminary ruling, the case returns to the national courts for decision. Following the final judgment by the national court, the case could then be brought before the Strasbourg Court.

42. Given the fact that most of the cases will concern member States of the Union giving effect to the Union’s acts through their implementation, it is reasonable to consider that the requirement of exhaustion can be satisfied when a complaint goes first to the national courts for a remedy of the alleged violation. Such a requirement may also satisfy the Union, and particularly the Luxembourg court, which will also have the possibility of getting involved in the procedure through the prejudicial pronouncement, if the national courts refer the case to them.

43. One question remains, however, to address situations that may well arise if domestic courts, in breach of Article 267 of the Treaty, refuse to refer a question to the Court of Justice of the European Union for a preliminary ruling.

44. Still I should mention, at this juncture, the necessity of the prior involvement of the Court of Justice: “In order to preserve the characteristic of the Union’s system of judicial protection, the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union of the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on that point”\(^\text{20}\). The answer can be found in Article 3 § 6 of the Draft Agreement on the Accession, the scope of which is modelled on that of the co-respondent: “In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for

the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court”.

45. Now, here also one must remain modest. In none of the recent cases before the European Court of Human Rights that I mentioned did the question arise of the need of a prior involvement, as in Bosphorus Airways and Kokkelvisserij the ECJ had already acted and in Matthews the matter fell outside its jurisdiction.

46. If this proposal is accepted, and reflected in the final agreement, then exhaustion of local remedies should be finalised only when the matter of human rights violation which was raised at the domestic level is also scrutinised by Luxembourg. But, in any event, relations between the Court of Justice of the European Union and the European Court of Human Rights cannot be viewed in terms of competition or priorities; they involve complementarity and interaction and require a climate of mutual trust.

47. There are still two points I would like to raise.

48. First, what about the presumption of equivalence. This brings me to a next much discussed item: the question whether this presumption will or should be upheld after accession

49. Actually, this is very difficult to predict and basically only for the Strasbourg Court to decide, when time has come. There are arguments in both ways: on the one hand, the principle of equality between the Contracting parties would point towards not upholding the presumption, as none of the Contracting States currently enjoy the privileged position resulting from it, even though the record of many of them in applying the Convention is as good as that of the EU and the ECJ; on the other hand, it is clear that the very reason underlying the presumption, the need not to hamper European integration through a requirement of systematic control by the Member States of compliance by the EU with the Convention – assuming that they can do so under EU law, which is far from certain – this reason will not cease to exist, and will indeed remain relevant, after accession.

50. Second, some institutional issues.

51. One institutional issue of importance is the appointment of a Union’s judge, the extent of his participation in the works of the Court, together with the more general problem of the composition of the Court’s organs which will deal with the Union’s cases.

52. Equally, important to be resolved is the participation of the Union in the Committee of Ministers of the Council of Europe, since it is this body which monitors the execution of judgments of the Court, and proposes general or individual measures to the respondent party in order for the latter to better comply with the Court’s pronouncements. Today the voting rights of the EU in the Committee of Ministers have hardly any practical relevance, as voting is extremely rare in the Committee of Ministers. But there are symbolic power games between the EU and its Member States on the one hand and the non Member States, on the other.

53. These issues have already been extensively referred to in the Resolution of the European Parliament of 19 May 2010 on the institutional aspects of the accession, where some interesting and, I would say, realistic recommendations have been made.

54. Against this background, I would like to say a few words on an issue that is often raised, namely the substantial workload of the European Court of Human Rights. What impact does this have on accession and is there a risk that accession might exacerbate the situation? These questions require an answer covering a range of aspects, and I shall stick to the essentials here.

55. Firstly, in my view the increase in work that is to be expected as a result of the EU’s accession will, all in all, be fairly modest. It must be borne in mind that the Court already reviews judgments given by domestic courts following a preliminary ruling by the Court of Justice of the European Union. The additional work generated by accession will therefore stem solely from judgments on the merits delivered by the Court of Justice, the number of which remains fairly limited.

56. Furthermore, the EU’s accession and the Strasbourg Court’s workload are two distinct problems which require distinct solutions. For our part, Protocol No. 14 to the Convention, which entered into force on 1 June 2010, will provide us with useful tools to speed up our proceedings. Furthermore, at the recent Interlaken Conference on the future of the Court, we started discussions on the post-Protocol No. 14 situation, and in particular on strengthening subsidiarity. An action plan is being implemented. In addition, paradoxically, accession may itself form part of the solutions to this problem. Once the Union has acceded to the Convention, it will become an integral part of the system. It will not only be subject to the Convention but, together with the other Contracting States, it will also be responsible for it, and on that account it will have the opportunity to influence its future, by adapting, modernising or improving it. Comments to this effect were also made by Commissioner Viviane Reding at the Interlaken Conference, and, like her, I have no doubt that cooperation between Strasbourg and Brussels can be highly productive in this sphere too, through the sharing of experience and expertise. In any event, we should not forget that, regardless of the workload of the European Court of Human Rights, accession will also produce immediate benefits, in particular
the increased credibility it will give the EU and the opportunity for the Union to participate in proceedings before the Court.

57. Lastly, and more fundamentally, and I will conclude with that, the impact of accession cannot be measured in terms of workload. The outcome of accession will be to create a situation that is more coherent and consistent with our principles, both in terms of equality between States and the Union and from the standpoint of protecting human rights and citizens. In this respect, the decision of the Member States of the Union for the latter’s accession to the European Convention on Human Rights contributes undoubtedly to the strengthening of the protection of human rights in Europe.

Conclusion

58. The accession of the European Union to the European Convention on Human Rights will ensure the coherence and legal certainty among the different sources of fundamental rights which coexist on the European continent, in the "common home" Europe. This will progressively lead to the harmonious construction of a European Constitutional area "inviting to a global vision of fundamental rights in Europe, a vision which integrates all dimensions: national, conventional and EU dimension\(^{22}\). We hope it strongly as this is how the notion of fundamental rights will assume its full signification and we will get even more committed to what characterizes them above all, that is universality. What is at stake is worth the effort since I believe that the argument can ultimately be made – without much risk of being proven wrong – that the quality of the relationship between the European Convention on Human Rights and Union law will determine to a large extent the future of European law in general and of the legal culture inspiring it.

\(^{22}\) L. WILDHABER et J. CALLEWAERT, « Espace constitutionnel européen et droits fondamentaux ». Une vision globale pour une pluralité de droits et de juges », Une Communauté de droit, Berlin, Berliner Wissenschfts, 2003, p. 62.