

Working Group II

Working document 08

Working group II "Incorporation of the Charter/ accession to the ECHR"

From: António Vitorino, President

To: Working Group II

Subject : Study carried out within the Council of Europe of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights

Following a request by the Secretary-General of the Council of Europe, the Chairman of the Group has the honour to bring to the attention of members a report, adopted by the Steering Committee on Human Rights (CDDH) of the Committee of Ministers of the Council of Europe, containing a study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights. A reference to that study had already been made in document CONV 116/02 WG II 1 (page 19, footnote n°2).



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**STUDY OF 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)**

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GENERAL INTRODUCTION

It is recalled that, at their 747th meeting (28 March 2001, item 2.3b), the Ministers' Deputies decided to give ad hoc terms of reference to the Steering Committee for Human Rights (CDDH) to carry out "a study of the legal and technical issues that would have to be addressed by the Council of Europe in the event of possible accession by the European Communities/European Union to the European Convention on Human Rights, as well as of the other means to avoid any contradiction between the legal system of the European Communities/Union and the system of the European Convention on Human Rights".

At its 52nd meeting the CDDH decided to this end to set up a working group on legal and technical issues of possible EC/EU accession to the European Convention on Human Rights (GT-DH-EU). The Group, which was chaired by Mr Jan LATHOUWERS (Belgium), held two meetings in Strasbourg (Human Rights Building), on 30 January-1 February 2002 and on 11-13 March 2002. At the end of its second meeting, it adopted an activity report (GT-DH-EU(2002)012). This report was examined and approved by the CDDH at its 53rd meeting (25-28 June 2002). The present document contains the activity report as adopted by the CDDH.

At the outset, the CDDH wishes to stress that, in accordance with its terms of reference, it has refrained from addressing political issues concerning the advisability of such accession. It also avoided to examine questions which are really for the EC/EU to decide upon. It has limited its work to considering what legal and technical adjustments would be necessary in the context of the Council of Europe, particularly in terms of amendments to the ECHR, to make accession possible. The purpose of this Activity Report is merely to identify and clarify those legal and technical issues, which might be useful in the context of any future decisions on the question of accession.

For clarification purposes, some drafting examples are included in Appendix I to this report. They are not to be regarded as proposals of the CDDH.

CHAPTER I – MODALITIES OF ACCESSION FROM THE POINT OF VIEW OF TREATY LAW

I. Introduction

1. Accession must be distinguished from signature and ratification as means of expressing consent to be bound by a treaty (Article 11 of the Vienna Convention on the Law of Treaties). In accordance with Article 59, paragraph 1 of the Convention the member States of the Council of Europe become parties to the Convention through signature followed by ratification. However, when existing Council of Europe treaties have been opened to the participation of the EC/EU, it was usually provided that the latter expresses its consent to be bound by means of accession (eg. the Protocol to the Convention on the Elaboration of a European Pharmacopoeia, ETS 134). The CDDH has taken accession as its working hypothesis.

2. The CDDH has identified three broad categories of provisions that may be necessary or desirable in the event of accession by the EC/EU to the European Convention on Human Rights (ECHR) and its Protocols:

- a) amendments to the text of provisions already contained in the ECHR and its Protocols;
- b) supplementary provisions e.g. provisions clarifying the scope of terms used in the ECHR; adapting them to the special case of the EC/EU, etc. (e.g. terms with a “national” connotation; see Chapter II, point B.1 and A2 option 2);
- c) any technical and administrative issues not pertaining to the text of the Convention but for which a legal basis would be useful, such as the conditions of the budgetary contribution of the EC/EU.

3. In addition, some accommodation in respect of two ancillary agreements would be necessary to accompany EC/EU accession to the ECHR (see under point IV below).

II. Option 1: An amending protocol to the ECHR

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4. All provisions of the type mentioned under a) could be included in an amending protocol. Protocol No. 11 to the ECHR (ETS 155) amended provisions of the Convention itself and of all additional protocols existing at that time (Protocols No. 1, 4, 6 and 7).

5. An amending protocol may also contain supplementary and/or transitional provisions that do not amend the text of the original treaty itself, but remain in force even after the entry into force of the amended text of the Convention. A good example is again Protocol No. 11 to the ECHR. Its Article 5 provided the necessary transitional provisions for the treatment of applications lodged before its entry into force. Article 6 made clear that temporal restrictions made with respect to declarations under former Articles 25 and 46 of the ECHR (which were both abrogated by Protocol No. 11) remained valid for the jurisdiction of the new Court.

6. Inclusion of provisions of the type mentioned under b) in an amending protocol could therefore also be envisaged. There is an advantage in doing so. If these provisions were not included in the amended version of the Convention, the EC/EU would not give its formal consent to be bound by them, because the amending protocol would only be signed and ratified by the current States Parties to the ECHR.¹

7. Provisions of the type mentioned under c) are perhaps less suitable for inclusion in an amending protocol. They could be included in a separate agreement to be concluded directly between the Council of Europe and the EC/EU. Since it would only contain provisions of a technical character, it would not be necessary that all States Parties become Parties to such an agreement. However, it would be useful if a general legal basis for such an agreement be included in the Convention, as amended, at least as far as the EC/EU's financial contribution is concerned (cf. mutatis mutandis, Article 50 of the Convention). Such a legal basis could be provided in a supplementary provision of the type mentioned under b).

¹ Unless, of course, a provision were made to append b)-type provisions to the amended Convention (ie. making them part of the Convention as amended).

Modalities for the entry into force of an amending protocol

8. Every amending Protocol to the ECHR concluded to date has provided for entry into force after signature and ratification or acceptance by all the States Parties to the Convention, which typically takes a few years.² For a drafting example see below in Appendix I (Part V. - Entry into force of the amending protocol/accession treaty).

9. In theory, in order to speed up the entry into force of an Amending Protocol, a “tacit acceptance clause” might be envisaged. Such a clause has for example been introduced into the Protocol amending the European Convention on Transfrontier Television (ETS 171, 1998) providing for automatic entry into force following the expiration of a period of two years, in the absence of any objection. The use of such a clause does not prevent States from using their traditional domestic procedures and from depositing an instrument of ratification or acceptance. However, after a fixed period of time (e.g. two years), the Protocol would enter into force automatically unless a Party to the Convention notifies the Secretary General of the Council of Europe of an objection to its entry into force.

10. On the other hand, such tacit acceptance procedures have only been used in the Council of Europe, and more generally in international treaty practice, for relatively technical instruments raising few or minor issues of policy. That is far from the situation here. EC/EU accession would on any view, be a major innovation with important consequences for the Convention control mechanism and it clearly raises many significant policy issues. For such an instrument to enter into force without the positive consent to be bound of all the parties would be unprecedented, and accordingly unlikely to be considered appropriate or acceptable by the High Contracting Parties to the Convention.

III. Option 2: An accession treaty

11. Instead of concluding an amending protocol between the current States Parties to the ECHR, it could be envisaged to conclude an accession treaty between all States Parties to the ECHR and the

² E.g. *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS 155) was opened for signature on 11 May 1994 and, having obtained all necessary ratifications in October 1997, entered into force on 1 November 1998.

EC/EU. Such a procedure is used within the European Union for the admission of new member States. Article 49 paragraph 2 of the EU Treaty provides that the conditions of admission and the adjustments to the EU Treaties “shall be the subject of an agreement between the member States and the applicant State”. The accession agreement usually consists of a rather short text and – annexed – an Act concerning the conditions and adjustments to the Treaties, forming an integral part of the accession agreement. Furthermore, the Act contains single and joint Declarations made by the Contracting States when signing the agreement. All States concerned, i.e. the EU member States and the candidate countries, ratify the accession agreement in accordance with their respective constitutional requirements. They do not sign or ratify the EU Treaties as such, but are considered automatically Parties to them upon entry into force of the accession agreement.

12. The main differences between the use of the traditional procedure of an amending protocol and the use of an accession treaty are that:

- ❑ the EC/EU as such would be directly bound by all the provisions of the accession treaty, including those that do not amend the original Convention or its Protocols;
- ❑ instead of having a two-tier procedure (first adoption and ratification of the amending protocol by all States Parties to the ECHR, then accession by the EC/EU to the amended Convention), there would be a single procedure which would result in the EC/EU being a Party to the revised ECHR upon entry into force of the accession treaty³. Provision could be made for EC/EU accession to the additional protocols simultaneously or at a later date.
- ❑ an accession treaty could more easily contain all the different types of provisions a), b) and c) mentioned in the introduction above. It could also contain the necessary amending and other clauses concerning the ancillary treaties (See Chapter III below and Appendix I Part VI – Amendments to ancillary agreements).

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³ In other words, the EC/EU would not have to wait for the entry into force of an amending protocol before starting the procedures required under Union law to accede to the Convention. According to Opinion 2/94 of the ECJ, accession would require amendments to the Treaty. Such amendments would have to be adopted in accordance with the procedure laid down in Article 48 of the EU Treaty before accession (Article 300 paragraph 5 of the EC Treaty).

13. An accession treaty could contain all the different types of provisions mentioned in the introduction. It could contain separate chapters for each type:

- a) Chapter I: Amendments to the ECHR;
- b) Chapter II: Amendments to the Protocols;
- c) Chapter III: Supplementary provisions;
- d) Chapter IV: Technical and administrative issues;
- e) Chapter V – Clause relating to ancillary agreements;
- f) Chapter VI – Entry into force of the accession treaty.

Entry into force of an accession treaty

14. See paragraphs 8-10 above. In addition, entry into force of an accession treaty would also require that the EC/EU expresses its consent to be bound by the treaty, by way of ratification.

15. For a drafting example see below in Appendix I (Part V - Entry into force of the amending protocol/accession treaty)

IV. Ancillary treaties

16. The ancillary agreements that would need to be amended are: (i) the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights (ETS No. 161) and (ii) the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 162).

17. With respect of the first of these treaties the changes could be included either in an amending protocol containing also the amendments suggested for the Convention and its Protocols or in an accession treaty. The solution indicated below for the Sixth Protocol could also be used.

18. The situation is different with respect to the Sixth Protocol to the General Agreement on Privileges and Immunities, which can only be ratified by member States to the Council of Europe which are also Parties to the General Agreement. This Protocol would therefore need to be amended

in a separate text or, alternatively, which would be the simplest solution, a clause could be included in an accession treaty to the effect that the European Communities (European Union) shall respect the provisions contained in the Protocol. That solution could also be used in respect of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights.

19. A drafting example for the latter alternative is contained in Appendix I (Part VI – Accommodations in respect of ancillary agreements).

V. Final remarks

20. The CDDH noted that both solutions mentioned above are technically feasible as modalities of accession from the point of view of treaty law. It also noted several advantages in opting for an accession treaty. It considered that which option to choose was a matter that extended beyond the remit of the current terms of reference given to the CDDH.

CHAPTER II – OVERVIEW OF LEGAL AND TECHNICAL ISSUES AND CORRESPONDING POSSIBLE AMENDMENTS SOLUTIONS

A. Points on which amendment of the ECHR would be required:

1. Article 59, paragraphs 1 and 4 ECHR (including the question of who should be allowed to accede: the European Communities or the European Union)

21. According to Article 59 only member States of the Council of Europe may sign and ratify the ECHR. This provision would have to be amended in order to enable the EC/EU to accede.

22. It is recalled that of the three pillars that constitute the European Union, for the time being, only the first pillar, the European Communities, undoubtedly enjoys legal personality and can conclude international agreements with States or international organisations. However, there is a

debate within the EU on the question of legal personality of the EU (second and third pillars: Common Foreign and Security Policy; Police and Judicial Cooperation in Criminal Matters) and as to whether or not the distinction between EC and EU should be reviewed (cf. *inter alia*, the Laeken Declaration).

23. Since the situation is uncertain in this respect, three different solutions could be envisaged all of which would allow for the necessary flexibility in case the EU would be authorised to accede to the Convention. These are:

(i) to amend Article 59, paragraph 1 by adding a phrase to the effect that the European Communities⁴/Union may accede to the Convention;⁵

(ii) to amend Article 59, paragraph 1 by adding a phrase to the effect that the European Communities may accede to the Convention. In a separate paragraph, or in a separate provision in the amending protocol, to provide that the European Union may accede in the event of it having been authorised to do so;

(iii) to include a reference in Article 59, paragraph 1 to the possibility for international organisations to accede to the Convention. Under this solution, it would probably be advisable to provide that such accession would be open only to organisations so invited by the Committee of Ministers (cf., *mutatis mutandis*, e.g. Article 29, paragraph 1 of the Framework Convention for the Protection of National Minorities).

24. All three alternatives would imply amendments to Article 59, paragraph 4 as well, by mentioning “accession” in addition to “ratification” and by adding “and the European Communities/Union” (options (i) and (ii)) or “and any other Contracting Parties” (option (iii)).

⁴ The normal practice within the Council of Europe when the European Communities have acceded to a Convention has been to refer to “the European Communities” in the provision opening the treaty for accession.

⁵ See Appendix I below.

25. Whether in actual fact only the European Communities or also, possibly at a later stage, the European Union would accede will depend on decisions within the European Union, as regards both the legal personality of the latter and the question of its legal capacity to accede.

26. The “scope” of EC/EU accession would be limited to issues in respect of which the EC/EU has competence. This has always been the understanding in respect of Council of Europe Conventions to which the EC has acceded. Nonetheless, it might in respect of the ECHR be considered useful to make this understanding explicit either in a general declaration of competence (analogous to the declaration made in connection with the UN Convention on the Law of the Sea) or, alternatively, in the text of the provision allowing accession, for example by adding the words: “... to the extent of its competences”.

27. The solutions indicated above could be adapted also to allow for EC/EU accession to the protocols to the Convention.

28. Hesitations were expressed as to the question of whether the EC/EU would be able to accede to protocols that were not ratified by all its member States. However, it was considered that this should not be an obstacle for at least preparing the instruments so as to make accession possible. It was stressed that the question of accession to the protocols must ultimately be left to the EC/EU.

29. For reasons of simplicity, the drafting examples included in Appendix I below reflect only alternative (i) above. The entity that would accede to the Convention is designated as the (European Communities) (European Union). A definitive designation will have to be made at the moment of the negotiation of accession with the EC/EU.

2. ECHR provisions referring to “State” or “States”: Article 10, paragraph 1; Article 11, paragraph 2; Article 17; Article 27, paragraphs 2 and 3, Article 38, paragraph 1.a, Article 56, paragraphs 1 and 4, Article 57, paragraph 1.

30. In the above-mentioned provisions the term “State” can be considered as a synonym for the term “High Contracting Party” used elsewhere in the Convention.

Option 1: These provisions could be amended, adding an explicit reference to the “*European Communities/Union*” or using the neutral term “*High Contracting Party*”, which would cover both States and the European Communities/Union.⁶

Option 2: It might be preferable from a point of view of legislative technique to include a general interpretation clause in the amending Protocol which would eg provide that “References to a “State” or to “States” shall be understood as references to the broader notions of a “High Contracting Party” and “High Contracting Parties” respectively.” This option would have the advantage of avoiding amendments to a series of individual ECHR provisions.⁷

31. These would be formal amendments which would not entail any substantive change in the nature or scope of obligations under the Convention.

32. The solutions indicated above could be adapted also to allow for EC/EU accession to the protocols to the Convention.

33. Drafting examples are contained in Appendix I (for Option 1: Parts I and II; for Option 2: Part III).

3. Article 46, paragraph 2 ECHR (supervision of execution of judgments); representative of the EC/EU in the Committee of Ministers; need for a Statutory Resolution?

34. The current situation as regards participation in the Committee of Ministers meetings generally is as follows. Following an exchange of letters between the President of the European

⁶ As to the expression “Inter-State cases” in the title of Article 36, ECHR, see under point B.5 below. However, an individual amendment to Article 57, paragraph 1 would probably still be necessary but for another reason: in order to allow the EC/EU to make reservations upon accession, the words “or accession” should be inserted after the word “ratification” (see Appendix I, Part I).

Commission and the Secretary General of the Council of Europe⁸, representatives of the European Commission have been authorised to attend the meetings and activities of the Council of Europe's Committee of Ministers. However, the exchange of letters stated that the Commission will not enjoy voting rights and will not be involved in the Organisation's decision-making process.

35. According to Article 14 of the Statute of the Council of Europe, only member States may be present and vote in the Committee of Ministers, each member State having one vote. Article 46, paragraph 2 of the Convention should therefore be amended to allow the EC/EU to participate with the right to vote in meetings of the Committee of Ministers when the latter exercises its functions under this provision.

36. The question arises whether the Statute of the Council of Europe also needs to be amended. However, from the point of view of treaty law, it could be considered that an amendment to Article 46, paragraph 2 of the Convention would have the status of a later *lex specialis*, which would take precedence over the general rules contained in the Statute of the Council of Europe.⁹ On the other hand, the opposite view could also be defended.

37. The amendment of the Convention might be accompanied by the adoption of a statutory resolution authorising the participation of the EC/EU, although this might not be strictly necessary. Thus, the cumbersome procedure of an amendment to the Statute of the Council of Europe could be avoided.

38. It would seem logical that, as any other Party to the Convention, the EC/EU would be entitled to one vote. It could be argued that the EC/EU's sphere of competence is more limited than the sovereignty of States and that this would justify some limitation of EC/EU participation in the supervision of execution of judgments. This argument might carry more weight here (Article 46, paragraph 2) than in the context of participation of an EC/EU judge in the Court (see point C.1

⁸ Exchange of letters agreed upon at the 575th meeting of the Minister's Deputies (14-17 October 1997).

⁹ See Article 30 (3) of the 1969 Vienna Convention on the Law of Treaties: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

below) since the role of the representative in the Committee of Ministers can not be compared to that of an independent judge. However, it could also be argued that, in view of the principle of collective enforcement of the rights contained in the Convention, it would be unjustified to limit the right to vote only to the supervision of judgments involving EC/EU law, which would give rise to an asymmetrical situation *vis-à-vis* other Contracting Parties.

39. For a drafting example (Article 46, paragraph 2) see Appendix I (Part I).

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

1. Terminology used in some of the ECHR restriction clauses (eg: “national security”, “economic well-being of the country”, “territorial integrity”, “national laws”; cf. paragraph 2 of Articles 8, 10, 11 and Article 12, ECHR) and the reference to “nation” in Article 15, paragraph 1, ECHR

40. It would appear to be justified to apply these terms, where applicable, *mutatis mutandis*, to the European Communities/European Union. In its 1979 Memorandum, the European Commission took the position that “it should be sufficient to lay down in an accession protocol (...) that the Convention, when it uses terms relating specifically to States, also applies *mutatis mutandis* to the European Communities”. It is understood that this solution would not entail discretion as to the applicability of these terms to the EC/EU.

41. Such a solution would certainly be preferable to attempting to redefine each term so as to tailor them to the EC/EU, which would be a highly complicated exercise.

42. It could be envisaged that a provision to this effect appear only in the amending protocol to the ECHR or in an accession treaty, and not in the amended text of the Convention itself.¹⁰

¹⁰ There are precedents for such provisions, e.g. Articles 5 and 6 of Protocol No. 11 to the ECHR.

43. *The solutions indicated above could be adapted also to allow for EC/EU accession to the protocols to the Convention.*

44. *Drafting examples are contained in Appendix I (Part III).*

2. Question of the EC/EU contribution to the expenditure on the Court (cf. Article 50, ECHR)

45. According to Article 50 of the Convention, the expenditure on the Court shall be borne by the Council of Europe. The question of the EC/EU's contribution to the expenditure on the control system of the Convention (which also includes supervision of execution of judgments, cf. Article 46, paragraph 2 ECHR) in case of accession would need to be negotiated between the Council of Europe and the EC/EU.

46. In fact, as the Court's budget is not separate from that of the Council of Europe, an EC/EU contribution should be made via the ordinary budget of the Council of Europe from which all expenses linked to the Convention control mechanism were paid. It may be necessary to create a legal basis, although it may be of a general character, for this contribution.

47. Such a provision could be included in an amending protocol to the Convention or in an accession treaty in a general formula, with more specific details, notably about the basis for calculation of the contribution, provided in a separate agreement. For a drafting example for a general provision, see below in the Appendix (Part IV – Technical and administrative questions). This would be a supplementary provision; Article 50 itself would not have to be amended.

3. Article 35, paragraph 2.b, ECHR (“another procedure of international investigation or settlement”)

48. Irrespective of the question of whether the procedure before the Luxembourg Court should today be considered as a procedure of “*international investigation or settlement*” in the sense of

Article 35, paragraph 2.b of the ECHR¹¹, it is clear that the answer would be negative as a necessary consequence of accession. Indeed, application of the ECHR control system would be an important object and purpose of accession by the EC/EU to the ECHR and the mere fact that a case has been dealt with by the Luxembourg Court should not prevent the Strasbourg Court from accepting an application as admissible.

49. After accession by the EC/EU, the remedies existing in the legal system of this Contracting Party would have to be considered as domestic remedies within the meaning of Article 35, paragraph 1 of the ECHR. On this point, one could have in mind, *inter alia*, the procedures before the Court of First Instance and the European Court of Justice.

4. Participation of the EC/EU in proceedings before the Court (as Respondent, *amicus curiae* or otherwise)

50. First of all, the EC/EU would, in case an application is brought against it before the Court, participate in the proceedings like any other Respondent.

51. Secondly, the EC/EU could, like other Contracting Parties, be invited under Article 36, paragraph 2, ECHR to submit written comments or take part in hearings.

52. On both of these points, no amendment of the ECHR would be required.

53. Thirdly, a question arises in connection with respect to Article 36, paragraph 1, ECHR. This provision gives a right of third party intervention to a High Contracting Party one of whose “nationals” is an applicant.

54. The Treaty establishing the European Community uses the term “citizens of the Union” which is defined by reference to the nationality of a member State (Article 17 of the EC Treaty). It is not considered necessary to replace the term “nationals” by “citizens” in Article 36 of the ECHR or to specify, in the amending Protocol, that the term “nationals” in this provision shall include

¹¹ The issue has been raised in a case pending before the European Court of Human Rights (the case DSR-Senator Lines).

“citizens of the Union” within the meaning of EC/EU law. The term “nationals” would already cover the “citizens of the Union”.

55. It must be underlined that giving the EC/EU the right to intervene each time one of its citizens is applicant in a case, might, in theory, lead to a large number of interventions.¹² It would have to be decided whether the EC/EU should be allowed to intervene in cases brought against any State. This would mean a “double” right of intervention: one for the EC/EU and one for the member State of which the applicant is a national. Another possibility could be that the EC/EU be given the possibility to intervene only in cases brought against non-member States of the European Union. This question could possibly be solved by an agreement between the EC/EU and its member States, or through an accession agreement between all parties concerned. It is noted that Article 36, paragraph 1 reflects the notion of diplomatic protection and that, within the EU, it is not the Organisation but its component member States that provide such protection for their nationals.

56. In view of the fact that the member States of the Union already have the right to intervene on behalf of their nationals under Article 36, paragraph 1, it may be that the possibility provided for in Article 36, paragraph 2, to request that the President of the Court enable, in this case, the EC/EU to intervene in a particular case, would be sufficient.

Participation as “co-Defendant”?

57. In the fourth place, a separate issue is whether it would be advisable to introduce special rules for the EC/EU, allowing it to participate in the proceedings whenever issues of Community law are at stake in a case before the Strasbourg Court, taking into consideration, in particular, the desirability of giving an opportunity to the EC/EU to defend itself in such a case as well as the fact that with a view to a possible execution of a judgment, it might be useful to ensure the co-operation of the EC/EU (enforceability). This would perhaps be useful in cases concerning an alleged violation of the ECHR by an EC/EU member State on account of a measure taken by that State in implementation of EC/EU law. There might even be a need to oblige the EC/EU to intervene in such a delicate situation.

¹² In accordance with current practice, the EC/EU would be informed about all cases in which it could in principle intervene.

58. It would seem difficult to regulate this question in the context of Article 36, since the idea here would be that the EC/EU take part in the proceedings not by way of a third party intervention, but as a co-Defendant, a fundamentally different situation.

59. Consideration was given to the possibility of introducing a mechanism under which the EC/EU could be invited or even obliged to join the case as a co-Defendant, alongside the EC/EU member state against which the application was initially brought. In principle, various options for such a scheme could be envisaged, depending on whether the EC/EU would have a right or an obligation to join the proceedings as co-Defendant, and on whether acquiring co-Defendant status would be the consequence of an unilateral decision by a Defendant State, of a decision *proprio motu* by the EC/EU, or of an initiative taken by the Court. It would probably be difficult to give the Court the power to oblige the EC/EU to join a case as co-Defendant, for this might be seen as prejudging questions relating to the respective responsibilities of the Contracting Parties or in effect render inoperative certain admissibility criteria in respect of the EC/EU (eg: 6 months rule). It might be more appropriate merely to provide a legal basis in the Convention, by virtue of which the EC/EU may, in cases which appear to raise an issue involving Community or Union law, with the leave of the Court, join the EC/EU member State against which the case had been brought as a party to the proceedings. It was understood that the Court's decision to grant leave would be of a purely procedural nature, in the interest of the proper administration of justice. It was also understood that the EC/EU and its member States would normally not be precluded from coordinating among themselves whether or not leave should be sought under such a mechanism, in a given case or in a more general fashion. This could be explained in an Explanatory Report. It could be envisaged that such a mechanism apply only in respect of cases pending before a Chamber or the Grand Chamber (cf., *mutatis mutandis*, Article 36, paragraph 1 of the Convention).

60. Since such a mechanism would cover, in particular, situations in which there is, arguably, a question of "mixed" responsibility under the Convention between the EC/EU and one of its member States, it would appear logical to open the same possibility, also for the inverse situation: ie: giving a EC/EU member State the possibility to seek leave to join the proceedings as a co-Defendant where the case has been brought against the EC/EU.

61. The question arises whether possibilities should be created for an *individual applicant* to seek to have the EC/EU (in case the application was brought against an EC/EU member State) or an

EC/EU member State (in case the application was brought against the EC/EU) joined to the proceedings as co-Defendant. This could be relevant where applicants had possibly erred in their decision to introduce their application only against the EC/EU or only against an EC/EU member State. The point could be made that, formally at least, the individual has the choice against which Contracting Party he or she wishes to introduce an application. In this respect the applicant's position is not comparable to that of the Defendant. Furthermore, it was noted that, during the initial stages of the introduction of an application, the individual might be given some possibility to "redirect" the application or specify that the application is also directed against a second (or more) Contracting Party/Parties. For the same reasons as set out in paragraph 59 above in relation to the idea of empowering the Court to oblige a Contracting Party to join the proceedings as co-Defendant, it would probably be difficult to give the Court a power to "redirect" the case so as to involve another or an additional Defendant. It should also be noted that introduction of a mechanism allowing for the addition of co-Defendants or for one Defendant to call another as outlined above would also be beneficial to applicants who are in the situation described here.

62. A drafting example for a provision containing a mechanism as described above (a possible "Article 35bis" of the Convention) is contained in Appendix I, Part III. Some indication is also given of implementing provisions (communication of cases to which such a system would apply; time-limits for seeking leave) which could possibly be taken up in the Rules of Court.

5. Article 33, ECHR ("Inter-State" cases; question of whether inter-Party applications should be possible without limitation)

63. Article 33 of the ECHR, while entitled "*Inter-State cases*", uses the term "*High Contracting Party*". The heading was introduced by means of Article 2 of Protocol No. 11, ECHR and, as with other headings so introduced, it should not be understood as an interpretation of the Article itself or as having any legal effect. The headings have been added in order to make the text of the Convention more easily understandable (see the Explanatory report to Protocol No. 11, § 114). Therefore, the legal position under the ECHR is that accession would mean that all States Parties to the Convention, including EU member States, could bring a case against the European Communities/Union and vice versa, in line with the principle of collective enforcement of the ECHR. Changing the heading to "*Inter-Party cases*" would make it correspond better to the content of Article 33.

64. On the other hand, it is recalled that EU member States are prohibited from submitting disputes “concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein” (Article 292 of the EC Treaty)¹³. The Treaty of Amsterdam introduced a special procedure in cases of “serious and persistent breach by a Member State of principles mentioned in Article 6 (1)”. Article 6 (1) of the EU Treaty refers to “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”.

65. The question may therefore arise whether there would be a need for an amendment with a view to excluding any ECHR disputes involving EC/EU law from the scope of application of Article 33. Such an amendment would probably not be necessary since the issue is really one of EC/EU law and both EU member States and the EC/EU may in practice be expected to use Article 33 only to the extent that such use is compatible with their obligations under EC/EU treaties. It would be for the EC/EU and its member States to decide whether or not this matter should be addressed in an agreement between themselves, as long as such an agreement would not institute a system of submitting, by way of petition, a dispute arising out of the interpretation or application of the ECHR, to a means of settlement other than those provided for in the ECHR (cf. Article 55, ECHR (exclusion of other means of dispute settlement)).

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

1. Status and participation in the European Court of Human Rights of the judge elected in respect of the EC/EU

66. Under the current provisions of the ECHR, the Court consists of a number of judges equal to that of the High Contracting Parties (Article 20) and each High Contracting Party nominates three candidates, one of which is elected by the Parliamentary Assembly with respect to that Party (Article 22, paragraph 1).

¹³ It is noted that the Court of Justice Opinion 2/94 left open the question of compatibility of accession with Article 292.

67. This principle of one judge in respect of each Contracting Party is based on the following main considerations and advantages: representation of each legal system in the Court; expertise on each legal system in the Court, participation of each Contracting Party in the system of collective enforcement set up by the Convention which entailed duties but also certain prerogatives; it contributes to the legitimacy of the decisions taken by the Court.

68. Whether or not there should be a judge elected in respect of the EC/EU and, if so, whether that judge should participate on an equal footing with the other judges in the work of the Court depends on an evaluation of the relevance and weight of the above-mentioned considerations in regard to the EC/EU as a Contracting Party, in combination with the significance attached, respectively, to features that distinguish the EC/EU from States Parties, and features that make the EC/EU comparable to a State Party. On the latter point, the view was advanced that the EC/EU did not possess the fullness of sovereign competence which is the attribute of a State. On the other hand, the view was also expressed that the EC had a distinct legal personality from its member States, that its actions do enter the human rights field and that member States of the EC/EU did no longer have full sovereign competence since they had transferred competences to the EC/EU.

69. The – rather theoretical - argument could be made that there would be no need for a judge elected in respect of the EC/EU as there were 15 judges on the Court elected in respect of its member States. However, this option of having no EC/EU judge was discarded since it would not be justified in the light of the main considerations mentioned in paragraph 67 above.

70. A second option, based on the same somewhat theoretical argument, could be to appoint an EC/EU judge on an ad hoc basis, for cases involving Community law. This option would perhaps partly meet the expertise argument, but be difficult to justify in the light of the other main considerations mentioned in paragraph 67 above. It also presented several other disadvantages, some of a more or less practical character:

- it would have to be decided for each case whether it involved Community law or not, which may cause difficulties in practice;
- if there were many cases requiring the participation of an EC/EU judge, ad hoc appointments would need to be made continuously which would be an extra burden for the Court;

- as ad hoc judges are not elected by the Parliamentary Assembly, there would be a problem of legitimacy with respect to the EC/EU judge if systematic recourse were to be had to ad hoc judges in respect of that Contracting party alone.

71. A third option would be to provide for a full-time EC/EU judge with limited participation (only in cases involving EC/EU law). In support of this option, it could be argued that it would be awkward for a member State of the EC/EU to be judged by an EC/EU judge in cases concerning areas for which the EC/EU did not have competence (eg: child care cases). Against this, it could be said that, already now, States with a tradition of a comparatively high level of State intervention are being judged by a judge elected in respect of a country where the State plays a less prominent role.

72. An argument against this option would again be that it may be difficult in practice to establish which cases would require the presence of the EC/EU judge and which cases would not. Also, it was highly doubtful whether this option would be justifiable in the light of some of the main considerations mentioned in paragraph 67 above (notably that relating to the participation of the Contracting States in a collective system of enforcement).

73. Most arguments could be made for a fourth option, which would be the presence of a full-time EC/EU judge participating on an equal footing with other judges. This solution would fully meet the main considerations mentioned in paragraph 67 above, and be most in line with the spirit of the Convention system. Judges do not “represent” any country or area: they are impartial and independent. Providing for special rules in the Convention in respect of the EC/EU judge might carry with it the unfortunate suggestion that that judge might be less impartial and independent. It is true that this solution would not reflect the features that distinguish the EC/EU from States Parties to the Convention, notably its more limited competence. However, as stated above, some of the current Parties to the Convention (the EU member States) no longer possess full competence in matters governed by the Convention. Making a distinction between the EC/EU judge and the other judges based on the limited and attributed competence of the EC would be problematic also because the division of competence between the EC/EU and its member States is constantly evolving.

74. It could be considered that, ultimately, the manner in which the Court would organise the participation of judges, including that of an EC/EU judge, in its judicial decision-making is a matter

that is more appropriately left to the Court itself¹⁴. The same would apply to the question of whether a “special chamber” should be set up within the Court in order to deal with cases against the EC/EU or involving EC/EU law. However, it should be noted that a chamber composed exclusively of judges elected in respect of the EC/EU and its member States would run counter to the philosophy of the Convention system.

2. Introduction of a special procedure whereby the Court of Justice (and the Court of First Instance?) could request an interpretation of the ECHR from the European Court of Human Rights?

75. Consideration could be given to the question of whether it would be advisable, in addition to the operation of the ECHR complaints system (the contentious jurisdiction of the Court), to introduce a special procedure under which the ECJ (and possibly the Court of First Instance) would be authorised to request an interpretation of the ECHR from the European Court of Human Rights. This idea is further elaborated in document DGII(2001)02, paragraph 2.b. Introduction of such a procedure would obviously require amendments to the Convention, for example to Article 47, the wording of which would depend on the precise modalities retained.

76. The main argument in favour of this would be that it would assist in avoiding divergences in case-law. Another advantage could be that it might lead to a lower number of individual applications.

77. On the other hand, it must be pointed out, however, that this idea presents a number of disadvantages, such as:

- (i) It would create an imbalance between the EC/EU and the other Contracting parties to the Convention, the supreme courts of which are not able to benefit from a system of references.

¹⁴ Within the limits, of course, of the rules of the Convention itself: e.g. Article 27, paragraph 2, ECHR provides that the judge elected in respect of the State Party concerned shall sit as an ex officio member of the Chamber and the Grand Chamber. The same would apply with regard to the judge elected in respect of the EC/EU concerning the consideration of cases brought against the EC/EU.

- (ii) Although time-limits may be laid down, it would lead to a prolongation of the procedures before the Luxembourg Court. This would be particularly awkward in the case of successive preliminary reference procedures.
- (iii) If time-limits were laid down it may adversely affect the treatment of other cases before the ECHR.

i) CHAPTER III – OTHER MEANS TO AVOID ANY
CONTRADICTION BETWEEN THE LEGAL SYSTEM OF
THE EUROPEAN COMMUNITIES/UNION AND THE
SYSTEM OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS

78. The terms of reference of the CDDH require it to study not only issues relating to a possible accession by the EC/EU to the ECHR but also “other means to avoid any contradiction between the legal system of the European Communities/union and the system of the European Convention on Human Rights.”

79. During the examination of this question, the suggestion was made that one “other means” could consist of maintaining the status quo, i.e.: a situation where the main legally binding human rights instrument in Europe was the ECHR, where this instrument and the Court’s case-law were also applied by the Luxembourg Court as general principles of Community Law, with only a small number of cases so far raising the issue of possible contradictions between the case-law of the Strasbourg and Luxembourg Courts. The consistency of the case-law is not accidental and is the result notably of the obligation of Article 6 of the Treaty on the European Union.

80. As was also noted by President Rodriguez Iglesias of the Court of Justice of the European Communities in his Strasbourg speech on 31 January 2002, it must be recognised that that situation could change considerably if the EU Charter of Fundamental Rights were to become legally binding¹⁵. Indeed, in the view of the CDDH, experience tends to show that it is difficult to avoid

¹⁵ Both this speech and that of President Wildhaber of the European Court of Human Rights are reproduced in document GT-DH-EU(2002)11 and published on the Court’s website (www.echr.coe.int).

contradictions where two differently worded texts on the same subject-matter are interpreted by two different courts. The provisions of Articles 52 and 53 of the EU Charter will probably not be sufficient to avoid the risk of contradictions, certainly not where the application and interpretation of the Charter and the ECHR by national courts is concerned. However, the question of whether the EU Charter should be made legally binding or not is, of course, for the EU to decide, not for the Council of Europe. More generally, the point was made that the risk of contradictions might arise independently of whether the EU Charter becomes binding or not.

81. Two potential further means to avoid contradictions were noted, other than accession by the EC/EU to the ECHR. The first was the introduction of a preliminary rulings-procedure whereby the Luxembourg Court could seek a ruling from the Strasbourg Court on the interpretation of the ECHR. Attention was drawn to the question of whether such a ruling by the Strasbourg Court could or should be binding upon the Luxembourg Court, if the EC/EU itself is not a Party to the ECHR. Reference is also made, *mutatis mutandis*, to Chapter II, point C.2. above, where the idea is further discussed, albeit in the context of accession¹⁶.

82. The last idea mentioned was that of setting up a common chamber or “panel” between the Luxembourg and Strasbourg Courts, along the lines of the joint panel that exists between the highest federal courts in Germany. That joint panel decides if one of the highest federal courts intends to adopt an interpretation of the law which diverges from the interpretation adopted by another of the highest federal courts.

*

* *

¹⁶ The CDDH also recalls that the Reflection Group on the reinforcement of the Human Rights Protection Mechanism set up by the CDDH in 2001 had decided not to retain the idea of establishing a system of preliminary rulings, because it would imply additional work for the Court and possibly interfere with the contentious jurisdiction of the Court (see document CDDH-GDR(2001)10, Appendix II, paragraph 31).

APPENDIX I: DRAFTING EXAMPLES

NB. These drafting examples are given for clarification purposes only. They are not to be regarded as proposals of the CDDH.

I. AMENDMENTS TO THE CONVENTION

NB The amendments appearing in square brackets could be avoided if reference to the provisions concerned were to be included in the general interpretative clauses suggested under III below.

[In Article 27, paragraphs 2 and 3, “State Party” shall be replaced by “Party”.]

[In Article 38, paragraph 1.a, "States" shall be replaced by "Party".]

In Article 56, paragraph 1, "State" shall be replaced by "State or the (European Communities) (European Union)". [After "its ratification" add "or accession".]

[In Article 56, paragraph 4, "State" shall be replaced by "Party "].

In Article 57, paragraph 1, "State" shall be replaced by "State or the (European Communities) (European Union)". [After "instrument of ratification" add "or accession".]

Article 46, paragraph 2, shall have the following wording¹⁷:

“The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. *In the event of their accession*¹⁸, *the (European Communities) (European Union) shall be entitled to participate in meetings of the Committee of Ministers when the latter exercises its functions under this paragraph. The*

¹⁷ Another possibility would be to limit the right to vote to cases where judgment has been given against the EC/EU.

¹⁸ The preceding six words could be omitted in case this provision were to be included in an accession treaty.

representative of the (European Communities) (European Union) shall be entitled to one vote.”

Article 59, paragraphs 1 and 4 shall have the following wording:¹⁹

“1 This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. *(The European Communities) (The European Union) may accede to this Convention*²⁰. Instruments of ratification or accession shall be deposited with the Secretary General of the Council of Europe.

(...)

4 The Secretary General of the Council of Europe shall notify all the members of the Council of Europe *and (the European Communities) (the European Union)* of the entry into force of the Convention, the names of the High Contracting Parties who have ratified *or acceded to* it, and the deposit of all instruments of ratification *or accession* which may be effected subsequently.”

II. AMENDMENTS TO THE PROTOCOLS

NB The amendments appearing in square brackets could be avoided if reference to the provisions concerned were to be included in the general interpretative clauses suggested under III below.

Final clauses:

Territorial application:

Protocol No. 1 Article 4 [– paragraph 1 add as follows: "at the time of signature, ratification or *accession*"]

¹⁹ This amendment would not be necessary in the case of an accession treaty for the EU/EC would become bound by the ECHR by virtue of the entry into force of the accession treaty (a provision to that effect could be included in the accession treaty).

²⁰ A subvariant could be added to this sentence: “*to the extent of (their) (its) competences*”.

- Protocol No. 4 Article 5 [– paragraph 1 add as follows: "at the time of signature, ratification or *accession*"]
[– paragraph 4 add as follows: "ratification, *accession* or acceptance"]
[– paragraphs 4 and 5 “State” – replace by “Party”]
- Protocol No. 6 Article 5 – paragraph 1 add as follows: "Any *State or the (European Communities) (European Union)* may at the time of signature or when depositing its instrument of ratification, *accession*, acceptance or approval"
[– paragraph 2 “Any State” – replace by “Any Party”]
- Protocol No. 7 Article 6 – paragraph 1 add as follows: "Any *State or the (European Communities) (European Union)* may at the time of signature or when depositing its instrument of ratification, *accession*, acceptance or approval"
[– paragraph 5 add as follows: "by virtue of ratification, *accession*, acceptance or approval"]
[– paragraphs 2, 5 and 6 “State” – replace by “Party”]
- Protocol No. 12 Article 2 – paragraph 1 add as follows: "Any *State or the (European Communities) (European Union)* may at the time of signature or when depositing its instrument of ratification, *accession*, acceptance or approval"
[– paragraphs 2 and 5 “Any State” – replace by “Any Party”]

Protocol No. 13 Article 4 – paragraph 1 add as follows: "*Any State or the (European Communities) (European Union)* may at the time of signature or when depositing its instrument of ratification, *accession*, acceptance or approval"

[– paragraph 2 “Any State” – replace by “Any Party”]

[Relationship to the Convention:

Protocol No. 6 Article 6 “the States parties” replace by “the Parties”

Protocol No. 7 Article 7 “the States parties” replace by “the Parties”

Protocol No. 12 Article 3 “the States parties” replace by “the Parties”

Protocol No. 13 Article 5 “the States parties” replace by “the Parties”]

Signature and ratification/Entry into force:

Protocol No. 1 Article 6 paragraph 1 add: “*The (European Communities) (European Union)* may accede to this Protocol following accession to the Convention.” “*With respect to the (European Communities) (European Union)* it shall enter into force at the date of the deposit of the instrument of accession.”

Protocol No. 4 Article 7 paragraph 1: same as for Protocol No. 1 Article 6 paragraph 1.

Protocol No. 6 Article 7: add before the last sentence: “*The (European Communities) (European Union)* may accede to this Protocol following accession to the Convention.” Then the last sentence shall read: “Instruments of ratification, *accession*, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.”

Article 8 paragraph 1: no change.

Article 8 paragraph 2 shall read: In respect of any member State *or the (European Communities) (European Union)* which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, *accession*, acceptance or approval.

Protocol No. 7

Article 8: same as for Protocol No. 6 Article 7

Article 9 paragraph 1: no change.

Article 9 paragraph 2: same as for Protocol No. 6 Article 8 paragraph 2 (but add after “the first day of the month”: ”following the expiration of a period of two months after the date...”).

Protocol No. 12

Article 4: same as for Protocol No. 6 Article 7.

Article 5 paragraph 1: a change is perhaps not strictly necessary (it may be assumed that the Protocol will have entered into force by the time of any EC/EU accession to it)

Article 5 paragraph 2: same as for Protocol No. 6 Article 8 paragraph 2 (but add after “the first day of the month”: ”following the expiration of a period of three months after the date...”).

Protocol No. 13

Article 6: same as for Protocol No. 6 Article 7.

Article 7 paragraph 1: same remark as for Protocol No. 12, Article 5 paragraph 1

Article 7 paragraph 2: same as for Protocol No. 6 Article 8 paragraph 2 (but add after “the first day of the month”: ”following the expiration of a period of three months after the date...”).

Depositary functions:

Protocol No. 1, Article 6, paragraph 2 and Protocol No. 4, Article 7, paragraph 2 shall have the following wording:

“The instruments of ratification *or accession* shall be deposited with the Secretary General of the Council of Europe, who will notify all members *and the (European Communities) (the European Union)* of the names of those who have ratified *or acceded*.”

Protocol No. 6, Article 9, Protocol No. 7, Article 10, Protocol No. 12, Article 6 and Protocol No. 13, Article 8 shall have the following wording:

" shall notify the member States of the Council of Europe *and the (European Communities) (the European Union)* of:

(...)

(b) the deposit of any instrument of ratification, *accession*, acceptance or approval;"

III. SUPPLEMENTARY PROVISIONS (notably: general interpretative clauses)

- concerning the Convention :

a) The terms “State”, “State Party” or “States” contained in Article 10, paragraph 1, Article 11, paragraph 2, Article 17, Article 27, paragraphs 2 and 3, Article 38, paragraph 1.a, Article 56, paragraphs 1 and 4, Article 57, paragraph 1, shall be understood as referring to “a High Contracting Party” or “High Contracting Parties”, respectively.

b) The term “ratification” in Articles 56, paragraph 1 and 57 paragraph 1 of the Convention shall be understood as referring also to “accession”.

c) The terms “national security”, “economic well-being of the country”, “territorial integrity”, “national laws” contained in Articles 8, 10, 11 and Article 12 of the Convention and the term “nation” contained in Article 15, paragraph 1, of the Convention shall apply *mutatis mutandis* to the (European Communities) (European Union).

d) Article 35bis: (*Possible new provision to be inserted between Articles 35 and 36 ECHR*:)

“1. In cases before a Chamber or the Grand Chamber against a member State of the (European Communities) (European Union) which appear to raise an issue involving (Community) (Union) law, the (European Communities) (European Union) may, with the leave of the Court, be joined to the proceedings as a defendant.

2. In cases before a Chamber or the Grand Chamber against the (European Communities) (European Union), any member State of the latter may, with the leave of the Court, be joined to the proceedings as a defendant.

3. In the event of application of paragraphs 1 or 2 above, Article 27, paragraphs 2 and 3, shall apply accordingly.”

Comments

- It is stressed that this text is just one example of how the idea of a “co-Defendant” status could be introduced in the ECHR system. Other drafting examples could also be elaborated (eg. merging paragraphs 1 and 2 above; or qualifying paragraph 2 above by specifying that, in cases “which appear to raise an issue involving the implementation of (Community) (Union) law by a member State of the (European Communities) (European Union), that member State may, with the leave of the Court....” etc.)

- In the Rules of the Court, more detailed rules could be laid down, for example concerning the communication of cases to Contracting Parties having the possibility to join the proceedings by virtue of Article 35bis, paragraph 1 or 2, and the fixing of a time-limit (eg: three months) for seeking leave to do so.

- concerning the Protocols :

a) The terms “State”, “States” or “States Parties” contained in Articles 1 and 2 of Protocol No. 1, Articles 3 and 5 (paragraphs 4 and 5) of Protocol No. 4, Articles 5 (paragraph 2) and 6 of Protocol No. 6, Articles 3, 4 (paragraphs 1 and 2), 5, 6 (paragraphs 2, 5 and 6) and 7 of Protocol No. 7, Articles 2 (paragraphs 2 and 5) and 3 of Protocol No. 12 as well as Articles 4 (paragraphs 1) and 5 of Protocol No. 13, shall be understood as referring to “a High Contracting Party” or “High Contracting Parties”, respectively.²¹

b) The term “ratification” in Article 4 (paragraph 1) of Protocol No. 1, Article 5 (paragraphs 1 and 4) of Protocol No. 4, Article 5 (paragraph 1) of Protocol No. 6, Article 6 (paragraphs 1 and 5) of Protocol No. 7, Article 2 (paragraph 1) of Protocol No. 12 and Article 4 (paragraph 1) of Protocol No. 13 shall be understood as referring also to “accession”.

²¹ In addition, Protocol No. 6, Article 2 (death penalty in time of war) only refers to States. While it is possible to include a reference to this provision in the present interpretative clause, it may be neither necessary nor politically advisable to do so.

c) The terms “territory of a/the State” and “national security”, contained in Articles 2 (paragraphs 1 and 3) and 3 (paragraphs 1 and 2) of Protocol No. 4 as well as Article 1 (paragraphs 1 and 2) of Protocol No. 7 shall apply *mutatis mutandis* to the (European Communities) (European Union).

- *Legal basis for the financial participation of the EC/EU*

A draft provision to be included in an amending protocol to the Convention or in an accession agreement/treaty could read as follows:

“The conditions of the financial participation by the (European Communities) (European Union) shall be determined by agreement between the Council of Europe and the (European Communities) (European Union).”

IV. TECHNICAL AND ADMINISTRATIVE QUESTIONS

Any more detailed rules concerning the conditions for the financial participation of the EC/EU could be set out either in this chapter or in a separate agreement.

As concerns the ancillary treaties, see under VI below.

V. ENTRY INTO FORCE OF THE AMENDING PROTOCOL / ACCESSION TREATY

Traditional clauses:

“Article X

- 1 This Protocol/[Treaty]²² shall be open for signature by member States of the Council of Europe signatories to the Convention [and the (European Communities) (European Union)], which may express their consent to be bound by

²² Option 1 (Amending Protocol) would exclude the text between square brackets; Option 2 (Accession Treaty) would include that text.

- a signature without reservation as to ratification, acceptance or approval; or
 - b signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
- 2 The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe. »

« Article Y

This Protocol/[Treaty] shall enter into force on the first day of the month following the expiration of a period of six months²³ after the date on which all Parties to the Convention [and the (European Communities) (European Union)] have expressed their consent to be bound by the Protocol/[Treaty] in accordance with the provisions of Article X.”

Possible tacit acceptance clause for an amending protocol:

- “1 This Protocol shall enter into force on the first day of the month following the date on which the last of the Parties to the Convention has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
- 2 However, this Protocol shall enter into force following the expiry of a period of two years after the date on which it has been opened to acceptance, unless a Party to the Convention has notified the Secretary General of the Council of Europe of an objection to its entry into force.
- 3 Should such an objection be notified, the Protocol shall enter into force on the first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council of Europe. Any objection shall be without prejudice to the other Parties’ tacit acceptance in accordance with the preceding paragraph.”

²³ To provide time for the election of a judge.

VI. ACCOMODATIONS IN RESPECT OF ANCILLARY AGREEMENTS

Option 1: A clause to be included in the accession treaty to the effect that:

“The (European Communities) (European Union) shall respect the substantive provisions of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights and the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe.”

Option 2: Introducing a series of technical amendments to the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights and the Sixth Protocol to the General Agreement on Privileges and Immunities, similar to the amendments to the protocols to the ECHR, by two separate amending protocols (see Part II of this Appendix above).
