Foreword

It is a privilege to introduce this book on accession of the European Union to the European Convention on Human Rights. Accession would be the culmination of many years of debate about the relationship between the EU and the ECHR—a debate in which it is not always easy to weigh the pros and cons of accession. What is not open to debate, however, as this book brilliantly demonstrates, is that, contrary to first impression, accession of the European Union to the ECHR raises issues of the greatest importance.

My own interest in the subject goes back to the first stages, and I had the good fortune to act, over the years, in a variety of capacities,[1] and I can attest that the debate has developed in ways which were totally unforeseeable.

The earlier debates were provoked by the European Commission's bold proposal for accession, issued as early as 1979. In the early stages of consideration of this idea, views were divided on the significance, the import, of accession. On the one hand, accession could be seen as something of a constitutional revolution. That was part of the background of Opinion 2/94, in which, long before the Lisbon Treaty amendment expressly providing for accession, the European Court of Justice ruled in 1996 that the then European Community had no implied competence to accede to the ECHR.

On the other hand, accession could, and can, be seen, more modestly, as simply filling a gap in the protection of human rights. The nature of the gap can be simply stated. In the absence of accession of the EU to the ECHR, in every instance where Member States act directly, or where they give effect to EU measures, their acts can be challenged before the Strasbourg Court. Yet, where the EU, its institutions, or its 'bodies, offices and agencies' act directly on individuals, groups or corporations, no such challenge is possible. The suggestion that the gap can be filled by proceedings brought against the EU Member States collectively must be rejected; the EU certainly has a separate legal personality, and has its own responsibility for its acts.

The potential gap in the protection of human rights under the existing law is well illustrated whenever a new Member State joins the EU, with the result that many competences exercised by that Member State are transferred to the EU. All measures taken prior to joining the EU, are subject to challenge before the Strasbourg Court; after that State joins the EU, the exercise of those competences by the EU, if exercised directly, may escape such challenge.

The size of this gap in the system of protection is hard to quantify. On the EU side, it sometimes seems difficult to maintain that the gap is large, because to do so would be to

[1] I was involved in various aspects of the relationship between the EC/EU and the ECHR, inter alia, as a barrister, introducing before the ECJ one of the earliest cases in the area: Case 130/75 *Prais v Council* [1976] ECR 1589; as a professor, lecturing annually in a course on European Integration at the Europa Institute, Amsterdam on the European Community and the ECHR (at a period when there was less to say on the topic); as a special adviser to the House of Lords Committee reporting on the Commission's proposal, launched in 1979, for Community accession to the ECHR; as an Advocate General at the ECJ, hearing the request by the Council for the Court's Opinion on accession to the ECHR, Opinion 2/94 [1996] ECR I-1759; again as Advocate General, delivering my Opinion in the *Bosphorus* case, Case C-84/95 [1996] ECR I-3953; and in various capacities since then.

accept a serious deficiency in the existing system. So it is sometimes argued that the case for accession is primarily symbolic. But it can be maintained that, on the contrary, the gap is substantial, and could be significantly filled by accession. True, the European Court of Justice has in recent years developed a body of case law which enables it to review EU measures for breach of fundamental rights; and the ECJ now follows closely the Strasbourg case law. But there has been, in the past, criticism of the ECJ for, as it seemed, giving high priority to the goal of European integration, sometimes at the expense of fundamental rights. And there are some areas where the ECJ lacks jurisdiction: eg where the measure is outside its jurisdiction.[2]

The answer perhaps is that the size of the gap will become apparent only after accession. One good reason for that view is that it will depend on how the Strasbourg Court exercises its new jurisdiction in cases brought against the European Union. Which in turn raises the question: Will it continue to apply the '*Bosphorus* presumption'[3]?

This is one of the many key questions discussed fully in this book. In the *Bosphorus* case, after the ruling of the ECJ, the European Court of Human Rights decided in effect that, so long as the EU offered equivalent protection to the ECHR, there was a presumption that a State had not departed from the ECHR when it did no more than implement the obligations flowing from membership of the EU.

It seems unlikely that, after the accession of the European Union, the Strasbourg Court will treat the EU more favourably than the Contracting States by giving the EU the benefit of this presumption. After all, accession is predicated, very reasonably, on the notion that the European Union and the Contracting States will be treated on the basis of equality. However, could a modified version of the *Bosphorus* presumption be applied to both the EU and the Contracting States? Discussion of this question gives, as they say, food for thought.

Two other key issues may be singled out for mention, simply by way of illustration: both issues are of a technical character, but both raise important issues of principle.

The first is the mechanism for prior involvement of the ECJ: the objective here is to enable the ECJ to rule on the interpretation or validity of the EU provisions arising before the Strasbourg Court, if the ECJ has not already had the opportunity to do so. Although there was agreement of principle between the two Courts on the desirability of such a mechanism, both the principle and its mode of implementation remain controversial.

The second is known as the 'co-respondent mechanism': What is the procedure to be followed where it is unclear, at least at the outset, whether the EU or its Member State is responsible for a particular alleged violation of the ECHR? To resolve that question may involve difficult questions on the allocation of competence between the EU and its Member States. How, and by whom, are such questions to be resolved?

Another question of great general importance is raised in this book. Currently the ECHR has a varying legal and constitutional status in different Contracting States. When, as a result of accession, the ECHR is fully integrated into EU law, it may be expected that the ECHR will have the same status as other EU law, applied uniformly in all EU Member States, and benefiting from the principle of primacy, at least in cases where EU law is in

[2] For instance, the Act on direct elections to the European Parliament was not a measure which could be challenged before the ECJ

[3] See the *Bosphorus* case, above, n 1.

issue. Will the same hold true, in due course, in all cases where the ECHR is invoked in national courts, even where EU law is not in issue?

A further large question which deserves to be asked is what the effect of EU accession will be on the Strasbourg Court itself, apart from some addition—hard to quantify in advance—to its excessive case-load. Is accession likely to strengthen, or to weaken, the Court? This question assumes all the more importance at the present time, when the Court is in some quarters being undermined—most notably, and most regrettably, by the United Kingdom, inter alia by deplorable delay in the execution of the Court's judgments.[4]

If the Court is not seriously damaged by current developments, EU accession might be seen as strengthening its position. It will become the final arbiter on human rights for the European Union as well as for the States Parties to the Convention. And the acceptance by the European Union of the Court's jurisdiction—acceptance of supervision by an external court—should also strengthen the Union. First, it may lead to some genuine improvement in human rights protection by the Union institutions and other entities. Second, the willingness of the Union to accept the jurisdiction, and to respect—it is to be hoped—its outcomes, may redound, rightly, to the credit of the Union.

There could be further, long-term advantages for Europe, including those resulting from a closer relationship between the Union and the Council of Europe. It is not altogether far-fetched to see, one day, those Council of Europe States which do not aspire to join the Eurozone as an outer ring of the European Union. It is, after all, not very long since it was almost unthinkable that States in the former Soviet empire would join the Council of Europe, still less the European Union. The possibility should not be excluded that the remaining European States which are not in the European Union, including a future reformed Russia, might join such an outer circle of the European Union.

The progress of accession has not been smooth. After complex negotiations, the current phase includes further proceedings before the ECJ on the Commission's request for an opinion on the question whether the Draft Agreement on the Accession of the European Union to the Convention is compatible with the Treaties. Further negotiations might be necessary to comply with the Court's opinion, when delivered (Opinion 2/13).

To return to this book: many aspects of the issues mentioned above are fully discussed in the following pages. But the contributions also raise, and explore, a host of other fundamental questions. This book will be essential reading for all those interested in the future judicial and legal organisation of Europe. The editors, the contributors and the publishers are to be warmly congratulated on a splendid achievement in legal scholarship.

February 2014 Francis G Jacobs

[4] For the most recent developments in this miserable saga, see the report of the Joint Committee (House of Lords and House of Commons) on the Draft Voting Eligibility (Prisoners) Bill (HL Paper 103, HC 924, published on 18 December 2013) dealing with the United Kingdom's reaction to several judgments of the Strasbourg Court on prisoners' voting rights. The executive summary contains the following significant statement: 'Underlying our inquiry is a far-reaching debate about the United Kingdom's future relationship with the European Court of Human Rights, the Convention system as a whole, and our attachment to the rule of law.'

1

Introduction

The EU Accession to the ECHR Ante Portas*:* *Questions Raised by Europe's New Human Rights Architecture*

I. SETTING THE SCENE

THE QUESTION OF the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) is rather old. The first academic debates regarding this date back to the early years of integration.[1] These have been regularly recurring, with landmark events in the evolution of fundamental rights protection in Europe triggering renewed academic reactions. This was so when *Opinion 2/94* was pronounced,[2] after the *Bosphorus* ruling[3] and when the EU Charter of Fundamental Rights emerged.[4] The Treaty of Lisbon evidently brought the debate again to the spotlight to an even greater degree than before.[5]

[1] See, for example, H Schermers, 'The European Communities under the European Convention on Human Rights' (1978) *Legal Issues of Economic Integration* 1; P Pescatore, *The Court of Justice of the Communities and the European Convention on Human Rights, Mélanges Wiarda* (Cologne, Karl Heyman Verlag, 1988); JP Jacqué, 'The Convention and the European Communities' in J McDonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Leiden, Martinus Nijhoff, 1993).

[2] J Kokott and F Hoffmeister, 'Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (1996) 90 *American Journal of International Law* 664.

[3] See, for example, S Douglas-Scott, 'Case Comment on Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland' (2006) 43 *CMLR* 243; C Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6(1) *Human Rights Law Review* 87, 94.

[4] F Jacobs, 'The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice—The Impact of European Union Accession to the European Convention on Human Rights', available at www.ecln.net/elements/conferences/book_berlin/jacobs.pdf; HC Kruger, 'The European Union Charter of Fundamental Rights and the European Convention on Human Rights: An Overview' in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Oxford, Hart Publishing, 2004) xvii.

[5] See, for example, J Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *CMLR* 995; G Gaja, 'Accession to the ECHR' in A Biondi et al (eds), *EU Law after Lisbon* (Oxford, Oxford University Press, 2012), 180; O De Schutter, 'L'adhésion de l'UE à la Convention européenne des droits de l'homme: feuille de route des négociations' (2010) 83 *Revue trimestrielle des droits de l'homme* 535; T Lock, 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *CMLR* 1025; X 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', *Fondation Robert Schuman, European Issues*, No 218, 7 November 2011, available at www.robert-schuman.eu/en/doc/questions-d-europe/qe-218-en.pdf; A Potteau, 'Quelle adhésion de l'Union européenne à la CEDH pour quel niveau de protection des droits et de l'autonomie de l'ordre juridique de l'UE?' (2011) 115 *Revue générale de droit international public* 77.

Yet, things are different this time. For the first time, the Treaty on European Union (TEU) provides not only for an express legal basis for accession in its Article 6(2), but also for a legal obligation, evidenced in the phrasing that the Union *shall* now accede to the Convention. Protocol No 8 of the Treaty of Lisbon sets the 'red lines' that the EU is not allowed to overstep when acceding to the Convention system. Also on the ECHR side, there was a treaty amendment in order to allow for EU accession. Under Article 59(2) ECHR,[6] the EU *may* accede to the Convention. Indeed, after more than two years of negotiations (the modalities of which are very eloquently presented by Drzemczewski in the very first chapter in Part I of this volume), an agreement at the negotiators' level has been reached on a number of draft documents,[7] forming a 'package' that is necessary for accession.[8] The key document is the draft accession agreement,[9] which has been given the form of an international treaty. This aims to add one extra party (ie, the EU) to the system of Strasbourg. For that reason, it shall equally modify the text of the ECHR in parts. The draft agreement is currently being reviewed internally by the contracting parties. On the EU side, the European Commission requested an Opinion on the draft agreement from the Court of Justice of the European Union (CJEU) on the compatibility of that instrument with the Treaties on the basis of Article 218(11) TFEU.[10] The European Parliament and the Council, along with the national parliaments of the contracting parties, will then be asked to consent to the instrument. The agreement will not enter into force until all[11] contracting parties have consented to be bound by it, in accordance with their respective constitutional provisions.

The process is still ongoing and its fate is uncertain. In particular, it is not clear when and under what specific terms the Member States of the Council of Europe (CoE), some of which are also Member States of the EU, and the EU itself will agree on the latter's accession to the Convention system. What is certain, however, is that once this materialises, we will witness a landmark moment in post-war European history: a dynamic supranational entity with integrational ends will be included in a normative and institutional framework that has been equally designed to promote integration,[12] albeit by different means. Undoubtedly, this is not a trivial change of context for the relations of these two regional regimes that share common historical origins and, ultimately, serve contiguous purposes as well. The CJEU in Luxembourg and the European Court of Human Rights (ECtHR) in

[6] As amended by Protocol No 14 of the Convention, which entered into force on 1 June 2010.

[7] All five documents are contained in the appendixes of Doc 47+1(2013)008rev2 (10 June 2013, *Council of Europe, 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: Final Report to the CDDH*), which is available at www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf. Not all of them create legal obligations as such (see, for instance, the draft explanatory report); one of these documents aims at modifying the internal rules of the CoE (draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party) and another looks like a unilateral act by the EU (draft declaration by the EU to be made at the time of signature of the accession agreement), which, inter alia, will be expected to ensure that it shall request to become a co-respondent or accept an invitation to that effect when the conditions established by Article 3(2) of the accession agreement are met.

[8] Doc 47+1(2013)008rev2 (n 7) 3, para 9.

[9] Ibid 4, Appendix I.

[10] Pending Opinion 2/13. Application lodged with the CJEU on 4 July 2013.

[11] Article 10(3) of the draft Accession Agreement, Doc 47+1(2013)008rev2 (n 7).

[12] Preamble and Article 1, Statute of the Council of Europe.

Strasbourg have been (at least in the relatively recent past) interacting relatively closely,[13] despite their institutional disjunction. The role of human rights within the EU is well known and does not need to be discussed here. Despite the EU's initial economic focus, the evolution of fundamental rights protection in the EU has been spectacularly dynamic.[14] It has contributed to the constitutionalisation of an entity presenting quasi-federal features. Human rights, including the ECHR's 'constitutional'[15] public order,[16] form part and parcel of the EU's system, which is increasingly moving towards the establishment of a proper, full *état de droit*.[17]

One may suggest that the ECtHR appears to appreciate this—especially if one adopts a rather 'innocent' reading of *Bosphorus*, that is, if one chooses to see no other motivations behind its famous presumption of equivalent protection[18] than genuine comity—under conditions reminiscent of *Solange*.[19] Before *Bosphorus*, but also now in cases falling outside the presumption's ambit,[20] especially when states enjoy discretion in the way they implement EU law,[21] the ECtHR is only exercising an indirect 'constitutional' control over the EU legal order through scrutiny of the common Member States' practice in instances of implementation of EU law within their domestic legal order. If one wants to draw the big

[13] S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) 43 *CMLR* 629. See also C Timmermans, 'The Relationship between the European Court of Justice and the European Court of Human Rights' in A Arnull et al (eds), *A Constitutional Order of States?* (Oxford, Hart Publishing, 2011); A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 *European Journal of Legal Studies* 1; FG Jacobs, 'Judicial Dialogue and the Cross-fertilization of Legal Systems: The European Court of Justice' (2003) 38 *Texas International Law Journal* 547, especially 550–52; G Harpaz, 'The European Court of Justice and its Relation with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46 *CMLR* 105.

[14] S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11(4) *Human Rights Law Review* 643; G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd ed (Oxford, Oxford University Press, 2011) 465.

[15] The literature on the constitutional functions of the ECtHR is voluminous. Among others, see L Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23(5–7) *Human Rights Law Journal* 161; W Sadurski, *Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments*, EUI Working Paper Law No 2008/33, available at http://cadmus.iue.it/dspace/handle/1814/9887; R Harmsen, 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform' in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition, and Human Rights* (Oxford, Oxford University Press, 2007), especially 41 et seq; and the more critical contribution by L Favoreu, 'Cours constitutionnelles nationales et Cour européenne des droits de l'Homme' in L Condorelli (ed), *Libertés, Justice, Tolérance* (Brussels, Bruylant, 2004), especially 796 et seq.

[16] See, for instance, European Commission of Human Rights, *Chrysostomos, Papachrysostomou and Loizidou v Turkey*, decision on the admissibility (4 March 1991) [20].

[17] See, eg, L Pech, 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Paper 04/09.

[18] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, App No 45036/98, ECHR 2005-VI, [149] et seq.

[19] Among others, see N Lavranos, 'Towards a *Solange*-Method between International Courts and Tribunals' in Y Shany and T Brouder (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity. Essays in Honour of Ruth Lapidoth* (Oxford, Hart Publishing, 2008); G Gaja, 'The Review by the European Court of Human Rights of the Member States' Acts Implementing European Union Law. "Solange" Yet Again?' in PM Dupuy et al (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (Kehl, Engel, 2006).

[20] Lock gives the example of EU primary law: T Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 *Human Rights Law Review* 529, 531 and 538. See also *Matthews v UK*, App No 24833/94, ECHR 1999-I, especially [31] et seq.

[21] *Michaud v France*, App No 12323/11, 6 December 2012 [103].

picture, the tale of the two European courts contains elements of both complementarity[22] and fragmentation,[23] that is, institutional co-operation and competition.[24] The accession of the EU to the ECHR is expected to usher in a new chapter in terms of their interaction. The European system for the protection of human rights will be centralised and formal (both normative and institutional) hierarchies will be established. This will frame within a new structure that story of pluralism, informal judicial dialogue but maybe also implicit 'hegemonic struggle'[25] between Europe's two judicial authorities. In this respect, the future[26] of the *Bosphorus* presumption is a key question. It is discussed in this book by Judge Timmermans and especially by De Schutter, who finds in it inspiration to present a thought-provoking scenario/suggestion. De Schutter envisages the expansion of the *Bosphorus* doctrine, which could be redeployed to redefine a more horizontal relationship between the ECtHR and the states parties to the Convention. This would work to the detriment of the hierarchy and the model of full scrutiny that currently exists.

Yet, irrespective of the fate of this presumption or the intensity of scrutiny more generally, the draft accession agreement makes it clear that, even if questions of final judicial authority are not fully settled,[27] the post-accession order will be structured on a vertical basis. This will lead to a recalibration of power given that the system's ultimate judge will be sitting in Strasbourg. The EU will be submitted to the external control of the ECtHR, which will have the last word. It may choose to exercise self-restraint on its powers or to fully exercise them, but this is its own choice to make.

II. SCOPE AND LIMITS

A new era is to begin. Some old problems will be solved and new ones will appear. This is the starting point of this book, which has a rather forward-looking focus. The aim is threefold: first, to critically evaluate major features of the accession, such as the famous co-respondent mechanism and the prior-involvement procedures; second, to look beyond the modalities of the accession and identify new questions that may arise from it; and, finally, to investigate the impact that accession may have on human rights protection within the EU, but also beyond it, in the Europe of 47. Outside the institutional dimension of the questions faced by the EU and the CoE, or the more technical legal issues, like those of attribution of conduct and allocation of responsibility between the EU and its Member States, the accession

[22] See above n 13. See also J Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) 6 *European Human Rights Law Review* 768.

[23] One only needs to compare *Behrami* (*Agim Behrami and Bekir Behrami v France and Ruzhdi Saramati v France, Germany and Norway*, App No 71412/01 (2007) 45 EHRR SE10) with *Kadi I* (CJEU, Case C-402/05 P *Yassin Abdullah Kadi* and Case C-415/05 P *Al Barakaat International Foundation* (3 September2008)). *Cf Nada v Switzerland* [GC], App No 10593/08, ECHR 2012.

[24] See, for instance, I Canor, 'Primus Inter Pares. Who is the Ultimate Guardian of Fundamental Rights in Europe?' (2000) 25 *European Law Review* 3.

[25] The term used by M Koskenniemi ('What is International Law For?', in MD Evans (ed), *International Law* (Oxford, Oxford University Press, 2003) 110) to refer to one of the causes of fragmentation in international law.

[26] See, among others, T Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 *Law and Practice of International Courts and Tribunals* 375.

[27] Which, as Halberstam demonstrates, is one of the features of heterarchy, but is also a commonality that the European and the American systems share. D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the States', *University of Michigan Law School, Public Law and Legal Theory Working Paper Series*, Working Paper No 111, 2008.

invites us to examine the impact this may have on the substantive level of human rights protection in Europe. Moreover, it dictates the examination of the way in which the various actors involved, including the national legal orders and their judiciaries, will interact or will be affected by the accession. Is (constitutional) legal pluralism going to recede in favour of the order posited by the accession agreement? How will the relations of the two European regimes evolve after accession? What will be the role of their respective courts and also of the national courts in that respect? More generally, how can multiple legal orders be co-ordinated under the new architecture and how can this shape a new, common space of human rights protection in Europe? Is this new model going to bring more coherence in the protection? What will be the interplay between the ECHR and the Charter of Fundamental Rights, and how will this affect the *effet utile* of fundamental rights in Europe?

However large this list of questions already is, it is not exhaustive. To attempt such an exhaustive analysis in an area that involves as many actors, themes and parameters as the EU accession to the ECHR would be over-ambitious. The scope of this book is therefore inevitably *limited*. Certain questions could not be addressed here, even if they were central to the topic of the accession. To name but a few examples, questions relating to inter-party cases,[28] positive obligations of the EU[29] and responsibility (and allocation of competences) for execution and compliance with judgments[30] have not been included in this book. The topic's complexity and size also explain why more than one classification of the questions discussed in the book may be equally pertinent. There is an inevitable overlap between these classifications that points to the multidimensional nature of the EU's accession to the ECHR. An attempt has been made to classify the chapters into various themes in order to provide for a structured analysis. However, this is neither the sole nor a perfectly comprehensive taxonomy. The paragraph that follows presents the structure that has been finally chosen. Two other strands around which the chapters in the book centre are presented in section IV.

III. THE BOOK'S CONTENTS

As already mentioned, a structured analysis of the EU's accession to the ECHR necessitated the compartmentalisation of the book into six distinct but interrelated sections.

Part I refers to the institutional arrangements, with emphasis being given to the prior involvement mechanism, which aims at protecting the EU's autonomy. However, it also moves beyond this question and discusses more generally certain aspects of the modalities of the accession, such as how the EU will be represented before the CoE, especially with regard to the matter of the election of its judges.

Part II is devoted to questions of responsibility, involving the other 'enfant terrible' of the accession agreement, that is, the co-respondent mechanism. The idea is not only to

[28] P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford, Hart Publishing, 2013) 174–208.

[29] Judge Gaja, who refers to the EU's omissions, and especially de Witte, in his forward-thinking epilogue, explicitly address the question. However, admittedly, the issue of positive obligations could have been further analysed in the course of the present edited volume. See T Lock, 'Accession of the EU to the ECHR. Who Would Be Responsible in Strasbourg?' in D Ashiagbor, N Countouris and I Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge, Cambridge University Press, 2012) 129 et seq and especially 131. See also Doc 47+1(2013)008rev2 (n 7) 24, para 47.

[30] Referring to the means that will be used or developed by the EU and/or its Member States to remedy a breach and guarantee non-repetition in accordance with Article 46 ECHR.

discuss the mechanism as such, but also to place it next to the case law of the ECtHR on the responsibility of Member States for conduct linked to their membership of international organisations. At the same time, the chapters in this part focus on the interrelationship between the mechanism and the rules of international law on the responsibility of international organisations.

Part III attempts to zoom out from the accession agreement and bring into the picture an often-neglected part of the system, that is, its 'basis', the national legal orders of the Member States and their institutions, and in particular their courts. These will continue to implement and interpret both EU law, including the Charter, and the ECHR on the basis of subsidiarity. Therefore, they will be expected to adapt to the post-accession environment, their responsiveness to the new system being one of the preconditions for its success.

Part III is also linked to Part IV, which aspires to offer a universal overview of the post-accession environment from the perspective of pluralism and the co-existence of the various elements, segments and units of what will continue to be a Europe of 47. The discussion on pluralism is linked with suggestions about reforms of the system. This is so given that some of the authors in this volume see accession as an opportunity still to be seized, and others as one that has been missed already.

This leads to Part V, which focuses on substantive issues of human rights. In addition, it sheds light on one of the most important tools, namely interpretation aiming to inquire about the existence of the so-called European consensus as a justification for dynamism in human rights protection. Regarding the first aspect of Part V it goes without saying that the list of the rights discussed here could not be exhaustive by any means, making selectiveness unavoidable. As will be explained further below, the choice has been made to focus not on specific rights but on three areas of economic activities within/of the EU. These are trade, competition and procurement, which, unlike other areas, including the four freedoms, appear to be relatively neglected in scholarship and not to benefit adequately from the 'humanisation' of the EU. Next to these areas, one of the chapters in this part of the book is devoted to a principle, ie, equality, that (should) underpin the policies of the EU, including those with an economic dimension.

Part VI offers certain concluding observations and has the privilege to host the views on the accession of two former judges of the European courts, as well as of the former Special Rapporteur of the International Law Commission (ILC) that codified the Articles on the Responsibility of International Organizations (ARIO) (who is currently a judge at the International Court of Justice). Rather than being an epilogue, the very last chapter critically touches upon the main questions covered in the book with a view to shaping the EU's future human rights agenda.

IV. BEYOND THE BOOK'S CATEGORIES: TWO FURTHER TAXONOMIES

A. Intra-disciplinary Analysis

Notwithstanding the division of the book into six parts, the aim throughout the volume has been to offer an intra-disciplinary[31] approach to the topic of accession. The book does this

[31] Although certain authors in Part V of the book, such as Hoekman and Mavroidis, also employ a multidisciplinary law and economics methodology next to a classic analysis of the law in their chapter.

by looking at it from three perspectives: EU law, public international law and constitutional law. The reason for opting for such an intra-disciplinary approach is to facilitate dialogue and avoid a monothematic analysis. The latter could be understood as a demonstration of zealot fidelity or 'patriotism' to the primacy, autonomy and/or self-sufficiency of a particular area of law. So, the book aims at comparing and juxtaposing, but also building bridges between the various areas of law and orders involved, which after all is the ultimate goal of the accession itself as well.

Evidently, some questions cannot be answered in the absence of a certain expertise. For example, the question of the preservation of the autonomy of the EU legal order (a genuine concern explicitly raised by the aforementioned Protocol 8 of the Treaty of Lisbon) is of course a question to be posed primarily to EU and constitutional lawyers. At the same time, the issue of the co-respondent mechanism and the allocation of responsibility between Member States and the EU (as a *sui generis* type of international organisation) requires engagement with the ILC's recently finalised ARIO.[32] This clearly falls within the expertise of international lawyers. However, this is a rather evident allocation that reinforces the book's primary aim, namely to promote pluralism in the voices, approaches and areas of expertise it hosts. In other words, the project compares the questions raised above from several different yet interconnected points of view.

More importantly, however, such an intra-disciplinary approach is dictated by the fact that the accession of the EU to the ECHR is a case study that allows us to debate the impact this may have on the relevant areas of law. This is, for instance, the question as to whether, post-accession, the ECHR case law on the responsibility of the EU and its Member States can contribute to the development of a *lex specialis* (especially regarding attribution) vis-a-vis the ARIO and the very interesting, although not necessarily fully converging, observations in that respect made by d'Aspremont and Sarvarian. The accession requires the accommodation of multiple actors within a centralised system of international human rights protection. This relates to the EU's external relations,[33] but also to another thorny question, namely responsibility of international organisations and especially the attribution[34] and allocation of responsibility between Member States on the one hand and a *sui generis*, regional economic integration organisation that progressively grows quasi-federal features on the other.[35] The question of the applicable law is of practical importance for the accession itself. The starting point is of course the accession agreement and its co-respondent mechanism, which is discussed in the book, for instance, by Judge Gaja, De Witte and especially Delgado Casteleiro. Yet, as always happens with (allegedly) self-contained regimes, especially in the case of secondary rules regulating responsibility,[36] the

[32] A/66/10, para 87. *Yearbook of the International Law Commission, 2011*, vol II, Part Two.

[33] M Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (2006) 22 *EUI Working Papers, Law* 2 (including the particular questions raised by mixed agreements).

[34] PJ Kuijper and E Paasivrita, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union* (Oxford, Hart Publishing, 2013); E Cannijjaro, 'Beyond the Either/or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union* (Oxford, Hart Publishing, 2013).

[35] See, among others, S Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Brill, 2005) 414. For a comprehensive collection of papers on this topic, see M Evans and P Koutrakos (eds), *The International Responsibility of the European Union* (Oxford, Hart Publishing, 2013).

[36] B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *EJIL* 483.

law may need to expand beyond the accession agreement as well, which raises the question of the pertinence of the principles emanating from the case law of the ECtHR and of the ARIO itself, both aspects being discussed here by Judge Gaja, Sarvarian and d'Aspremont.

A second example to be given, this time from the point of view of constitutional law, is the number of questions raised by the accession with regard to the well-known debates on the concepts of 'intertwined constitutionalism',[37] 'multi-level constitutionalism'[38] and 'constitutional pluralism'.[39] Here the main inquiry is whether, post-accession, the idea of overlapping and non-hierarchical constitutional orders as developed by MacCormick[40] remains a pertinent conception for understanding the relationship between the EU and the ECHR legal orders. It might seem obvious that the new structure favours hierarchy, perhaps to the detriment of more pluralistic dynamics and the consequent cross-fertilisation. However, this is only the case if one limits one's approach to the part of the structure that concerns the EU and the ECHR order alone. Yet, the system remains multi-level, now having an even more complicated basis. Some states will remain entirely disconnected from the EU's order; some others will in certain cases (of reserved competence) directly refer (beyond their national constitutions) to the ECHR, whereas in other cases these states will refer to the EU order, having simultaneously to comply with the ECHR[41] and ultimately falling, together with the EU, under the jurisdiction of the ECtHR. In their contribution to this volume, Claes and Imamović shed light on this new 'geometry'. They draw attention to the fact that, as things stand now, the national courts[42] are first in line when it comes to fundamental rights protection, both in the context of the EU where individuals usually do not have direct access to the European courts in Luxembourg, and in the context of the ECHR, which requires domestic remedies to be exhausted first, with the Strasbourg Court offering only subsidiary protection. National courts are key actors in the complex web of fundamental rights protection in the EU. Even if it is more centralised than is currently the case, Europe's post-accession constitutional space will rest on an equally wide, varied and entangled basis.[43] This is the reason why this book contains a number of contributions discussing the role of national authorities, once again from various perspectives. These include the viewpoint of EU law in the chapter by Morijn, who discusses in a critical manner the use of the EU Charter in national policy practice. Equally, the practice of national authorities is seen through the prism of *sensu lato* European constitutional law in the chapter by Claes and Imamović, but also of comparative constitutional law, which is the method Martinico employs. In fact, Martinico demonstrates that the national courts have already

[37] J Ziller, 'National Constitutional Concepts in the New Constitution for Europe' (2005) 1 *European Constitutional Law Review* 247 and 452.

[38] I Pernice, 'Multi-level Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?' (1999) 36 *CMLR* 703.

[39] N Walker, 'The Idea of Constitutional Pluralism' (2002) 59 *MLR* 517.

[40] N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999).

[41] This may lead to dilemmas for states when EU law violates the ECHR. On this question, see the brief but pertinent comments made on the occasion of the CJEU *Melloni* judgment (C-399/11, 26 February 2013) by Weiler in his editorial note: JHH Weiler, 'Human Rights: Member State, EU and ECHR Levels of Protection' (2013) 24 *European Journal of International Law* 471.

[42] See also O'Meara, who in her analysis on the role of national courts also refers to the *erga omnes* nature of the obligations stemming from the ECHR. N O'Meara, 'A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 *German Law Journal* 1813, 1829–31.

[43] On the interaction between courts in this complex environment, see P Popelier, C Van De Heyning and P Van Nuffel (eds), *The Interaction between the European and the National Courts* (Mortsel, Intersentia, 2011).

played a major role in the approximation of the reception of the regimes of the ECHR and the EU within national legal orders, and the effect that these two are given domestically.

In similar terms—and this is further proof of the circularity between the various disciplinary perspectives and the (case) study of the accession—the idea of constitutional pluralism[44] allows Harmsen to highlight about another aspect of the new scheme, which appears to neglect the continued reform of the ECtHR as a remedy to its workload, and to point to the direction of a primarily 'formative' jurisprudential approach focused on the fostering of dialogue. Central to this process is the role of judges and of the hermeneutic tools they use, such as the aforementioned European consensus. This interpretative method has been created by the ECtHR itself and is discussed in the chapter by Dzehtsiarou and Repyeuski, who argue that the increasingly mathematical and rigorous approach of the ECtHR to the European consensus will turn the EU with its 28 Member States into a key player in European human rights law after its accession. This very same concept of European consensus occupies an essential place in Judge Rozakis' conclusions too. Judge Rozakis evidently departs from the presumption that the ultimate goal of accession is to safeguard and maximise unity in the European protection of human rights, as well as to avoid the emergence of two strong poles (one in Strasbourg and one in Luxembourg) that would be only loosely linked via Article 52 of the Charter of Fundamental Rights. Instead, he resorts to the idea/means of the interpretative method of European consensus as a foundation for an evolutive interpretation of the living instrument that is the Convention, also in accordance with the standards of protection offered within the 28 Member States of the EU, as these will be identified by the CJEU also on the basis of the Charter.

Undeniably, one of the goals of accession is to act as a catalyst for unity and coherence and, thereby, also further integration in Europe in the area of (and by the means of) human rights. This might be a desirable potential outcome, but it is to be greeted with reservations, such as that raised by Harmsen, who draws attention to the 'two Europes' within the ECHR system, ie, the group of the EU member States, as opposed to the other group of the remaining 19 non-EU European states. That the accession will centralise one of the two 'geopolitical entities' in Europe shall not discharge the ECtHR from having to maintain a balance between the different 'tempos' of evolution in human rights protection that will stem from each group, only one of which may be echoed by the case law of the CJEU. There is a concern that the ECtHR may tilt the balance in favour of the EU's 'tempo', given that a common human rights standard across the EU Member States will be readily available to the Strasbourg Court. Besides, this critique may be seen as something that reinforces Lixinski's argument, which emphasises the potential of the accession outside of the judicial arena, defending the idea of a more 'pluralistic' understanding of pluralism that would go beyond courtrooms.

B. Institutional Arrangements and the Substance of Human Rights Protection

A second basis of taxonomy would be the rather straightforward idea of the distinction between the substantive protection of human rights and the institutional arrangements for that protection—and, in our case, the modalities of the accession.

[44] It is worth noting that the term 'constitutional pluralism' is defined/used by the different authors of this book, with different areas of expertise, in a rather varied way.

Starting with the latter aspect, the focus is of course on the two inter-linked innovations that the accession agreement establishes exclusively for the EU, namely the procedural guarantees for prior involvement of the CJEU and the co-respondent mechanism. Yet, before referring to them in further detail, it is necessary to make two points. First, as the chapters by Vogiatzis and especially Drzemczewski (in his contribution discussing the election of the EU Judge to the Strasbourg Court under Article 22 ECHR) show, the modalities of the accession extend well beyond the named two special arrangements for the EU. For instance, Vogiatzis explains that the question of prior involvement may also come into question outside the courts if the applicants opt for avenues of extra-judicial redress. The analysis concludes that, in the case of ombudsmen, prima facie, no gap appears to exist for prior involvement and the relevant provisions of the accession agreement suffice to cover this scenario too. Yet, this does not mean that the agreement is in a position to cover each and every aspect of the accession or that it is impossible for lacunae to appear. In this respect, Delgado Casteleiro, for instance, discusses the Common Foreign and Security Policy[45] from the perspective of the co-respondent mechanism. At the same time, Drzemczewski gives the example of the European Parliament's participation in the Parliamentary Assembly of the CoE whenever the Assembly exercises its functions relating to the election of judges. The necessary arrangements that have to be made in this respect go beyond the accession agreement and require action within and by the institutions themselves (which, in turn, raises a number of other very interesting questions about the legal nature of those acts).

Second, it is obvious that the ECHR has not been initially designed with a view to hosting legal persons other than states, such as the supranational EU. Therefore, for its system to effectively accommodate the EU, it needs to change. The obvious question to be raised at this point is what these changes should be. The answer to this depends on yet another (preliminary this time) question. What needs to be addressed first is what the criteria are for deciding these changes. From the standpoint of international law, the parties to an agreement (such as that for accession) are free to opt for any terms they like (provided that they do not breach *jus cogens*, which seems to be irrelevant to the question at issue). Therefore, the contracting parties have no particular restrictions from this perspective. They may consent to give the EU an entirely privileged position within the new structure or may ask it to limit changes to the current agreement to the extent that these are absolutely necessary for the participation of a non-state entity within the intergovernmental regime of the ECHR. Between these two extremes, a variety of (more or less legitimate) factors may come into play. One preoccupation could be to safeguard the autonomy of the EU (prior involvement) and to allow it to rely on its quasi-federal elements rather than treating it as a 'conglomerate' of sovereigns (as revealed by the logic of joint responsibility and the co-respondent mechanism). These objectives can be juxtaposed to ideas such as effectiveness (and rapidness) in human rights protection and equality (as Harmsen and De Schutter, for instance, argue in this book), or more generally the absence of disparity between the parties to the ECHR system. Apparently, these preoccupations involve a degree of ideology, which then translates into preferences. Depending on what one's priorities are, one should only allow a conflicting objective to be fulfilled to a limited extent, that is, to the degree that this will not (disproportionately?) undermine one's prioritised objectives. Accordingly, for those giving greater weight to human rights, some of the provisions of the accession agreement that

[45] See also R Wessel, 'Division of International Responsibility between the EU and its Member States in the Area of Foreign, Security and Defence Policy' (2011) 3 *Amsterdam Law Forum* 42.

grant a special status to the EU will be thought to be unnecessary and therefore illegitimate. Seen from this angle, the 'existential anxieties' of the EU are nothing more than the 'capriccio' of Europe's 'spoiled child'. They simply undermine human rights protection. Likewise, for those giving merit to the EU's sensitivities, its special status and what this entails will be seen as a fully justified cause, that is, a necessity that ought to be addressed.

The question of the balance that needs to be maintained between these (from the standing point of this introductory note equally legitimate) preoccupations and objectives is very apparent in the case of prior involvement. Apart from the pertinent comments made by De Witte, this book hosts the dialogue between Judge Timmermans and Torres Pérez. Torres Pérez challenges[46] the double rationale of the procedural privilege of the EU (ie, the preservation of the autonomy of EU law on the one hand and respect for the principle of subsidiarity under the ECHR on the other). She also puts forward proposals for ensuring that its operation will not hinder the protection offered to individuals. From his side, Judge Timmermans accepts that the case law of the ECtHR does not threaten the monopoly of the CJEU to assess the validity of EU acts, but defends prior involvement on forceful grounds, mainly on the basis of subsidiarity from the perspective of the Convention. Yet, to a certain extent, Judge Timmermans also gives merit to the argument that there may be alternatives within the EU's order to address the problem that the dual system of legal protection within it creates for subsidiarity under the Convention, without necessarily having to establish a special status that will only apply for the EU.

The very same question regarding the 'necessity' of special treatment in favour of the EU equally applies in the case of the co-respondent mechanism (the logic and function of which are discussed in detail by Delgado Casteleiro in this volume). The difference here is that, as the chapters by Judge Gaja, d'Aspremont and Sarvarian reveal, this relates to a debate that has already taken place within the ILC, when the Commission was discussing the speciality of regional economic integration organisations for the purposes of the codification of the law of international responsibility of international organisations. Delgado Casteleiro explains that the rationale behind the co-respondent mechanism is unity in the representation of the EU. One could, of course, argue that this goal can be reached through different avenues. For instance, the EU could bear the sole responsibility, absorbing the conduct of its Member States (as proper federations do), rather than being jointly[47] responsible with them. Yet, the fact is that its members are called to give effect to its acts and the absence of devices like the co-respondent mechanism would compel the ECtHR to proceed with attribution and allocation of responsibility. Besides, this is the reason why the co-respondent mechanism is linked[48] with the procedure of prior involvement in proceedings to which the EU is a co-respondent. This gives Judge Gaja and Vogiatzis the opportunity to criticise the limitations that currently exist in the extent of the application of this procedure. Such limitations also exist due to the asymmetry in the co-respondent mechanism between the EU and its Member States, with the latter group only being able to join a procedure against the EU if primary law is involved.[49] Both authors suggest that prior involvement should be expanded to all cases where the EU would be a respondent.

[46] Among others, see also T Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 *European Law Review* 777, 793.

[47] Doc 47+1(2013)008rev2 (n 7) 26, para 62.

[48] Ibid 27, para 66.

[49] Ibid 24, para 49.

However, there is another aspect that could be critically discussed here. Joint responsibility means an absence of causality. Under the co-respondent mechanism, in principle,[50] the EU and its Member States will jointly share responsibility, without the ECtHR being able to diagnose causality (who has done what or who has failed to do what) and proceed to attribution. In a sense, both the EU and its Member States are hidden under a common artificial 'veil'. This is the function of the co-respondent mechanism. The Court will identify wrongfulness stemming from the actors behind the veil, but will not allocate responsibility individually to each of them.[51] All actors will be treated as one and as jointly responsible. Attribution may be excluded, yet the other side of the same coin is competence/power to comply with a judgment. In practice this means that the actors behind the veil who are found to be jointly responsible will have to proceed with their own 'domestic' arrangements with regard to compliance. They will also have to decide between them with whom the powers lie to adopt measures of compliance such as changing case law, amending legislation or even developing policies of compliance and taking executive/administrative measures. This is in absolute conformity with the idea of the preservation of the autonomy of the EU, which requires it to deal with these matters and shape its strategy for compliance internally, without having an external agent empowered to assign tasks and attribute wrongfulness, but also—intrinsically—competences and responsibility for compliance too.[52]

However (and this is where the scheme becomes very interesting), because of subsidiarity and prior involvement (linked to the co-respondent mechanism), when the ECtHR will be diagnosing a violation (for which the EU and the respondent states will be held jointly responsible), ipso facto, the breach at issue will also involve a violation of the Convention because of incompatible case law by the CJEU, owning to the mere fact that the Court of Justice will have failed to remedy the violation internally before the case reached the ECtHR. This will equally imply that, for the purposes of compliance, apart from any other pertinent measure (depending on the nature of the particular issues raised by a case), the CJEU too will always have to change its practice in this respect. Particularly in the case of a diagnosed breach owing to the implementation of EU law by a Member State, the CJEU will be proven to have failed to remedy a violation suffered by the victim because of the conduct of the state authorities. It is not the place here to enter into the debate about whether and when the conduct of state authorities (which, as observed by de Witte, enjoy various degrees of discretion, also depending on the degree of harmonisation of an area or policy) is attributable to the EU or to discuss the distinction between factual and normative[53] control as a criterion for attribution. Nevertheless, causality and the relevant criteria would be pertinent for qualifying the EU's breach as either a violation of a negative obligation or a violation of a positive obligation, which implies lack of due diligence (ie the EU failing to prevent/remedy a human rights violation). In a nutshell, there appears to be circularity regarding negative and positive human right obligations. This is inherent to human rights. It cannot but apply within the EU's system as well, that is, behind the veil used as a metaphor earlier. The co-respondent mechanism will prevent (to the extent

[50] Ibid 4; Article 3(7) of the draft Accession Agreement.

[51] C Eckes, 'One Step Closer: EU Accession to the ECHR', *UK Constitutional Law Group*, available at http://ukconstitutionallaw.org/2013/05/02/christina-eckes-one-step-closer-eu-accession-to-the-echr; De Schutter (n 5).

[52] Doc 47+1(2013)008rev2 (n 7) 26, para 62.

[53] Among others, see C Martín, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility' in M Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden, Martinus Nijhoff, 2013) 189 et seq.

that this applies) the ECtHR from proceeding with determining which legal person has breached which dimension in the dipole of positive and negative aspects of a human rights obligation. Yet, this question will return at the stage of compliance, where, apparently, the analysis of the ECtHR and its rationale for diagnosing a violation will be of pertinence. Judgments may be delivered in compliance with the co-respondent mechanism and the amalgamation of the EU and its Member States that this envisages. Thus, they will abstain from naming the author of a breach. However, they will identify its source and *ratio* …

Having discussed the modalities of the accession and the particular institutional arrangements made for accommodating a supranational entity into a by and large intergovernmental regional human rights system, a few words should be noted on the substantive issues of the protection offered. As mentioned above, Part V of this book is devoted to certain dimensions and areas of substantive protection. However, aspects of this discussion can be found in other chapters of the book as well. This is the case, for instance, in the chapter by Vogiatzis, who, for the purposes of his enquiry about subsidiarity and extra-judicial redress, thoroughly compares Articles 6 and 13 of the ECHR with Article 47 of the Charter. This is of course also linked to the question of Articles 51 and 52 of the Charter, which are central to the argument built by Judge Rozakis. More generally, it is linked to the new 'ethos' of human rights protection within the EU, according to the arguments put forth by de Witte, but also by Georgopoulos in what he identifies as the subtler potential impact of accession in the area of procurement law.

Given the space constraints within which any book operates, a choice had to be made regarding the aspects of substantive human rights protection to be included in this volume. With that in mind, the idea has been to focus (apart from the European consensus method of interpretation, which is peculiar to the ECtHR) on the economic dimension of human rights protection, as this forms part of the 'core' of the EU's raison d'etre. It is in this context that Kapotas' discussion of the distinction between full as opposed to formal equality (also on the basis of negative and positive obligations in the context of discrimination) acquires its full meaning for the purposes of this book. The conception of equality defended by the author could justify pro-active protection in labour/employment as well as in socio-economic rights and welfare state policies.

The reference made to the 'core' of EU integration brings to mind the four internal market freedoms. However, this is a topic that has been extensively discussed in the literature. For that reason, this book chooses to navigate new seas and discusses three other areas of economic policy, namely trade (Hoekman and Mavroidis), competition (Sanchez Graells) and procurement (Georgopoulos). The EU exercises different competences (in terms of both type and degree) in each of these areas. However, what these three areas have in common is that, thus far, they all have raised issues of respect for human rights, albeit to different degrees. This is especially so with regard to the protection of property, but also to the guarantees of access to justice and procedural fairness. In different terms, even before accession, the ECtHR has been[54] asked to indirectly review EU law in these areas via the Member States of the EU. The accession will make it possible to bring a complaint directly against the EU. Nevertheless, it will not alter the nature of the complaints. Of course (and this is something shown by Mavroidis and Hoekman, and also by Sanchez Graells), there

[54] Or could have been, as shown by Georgopoulos and especially Hoekman and Mavroidis with their Fedon case study regarding the collateral damages of the well-known saga of the dispute between the EU and the US over the import regime of bananas.

are limits to what human rights courts can do in these areas, for it is difficult for such courts to proceed with a full proportionality test over questions that imply redistribution of income across social groups—involving economics as a complement to legal analysis. Furthermore, the needs of the persons seeking protection in these areas are of a different nature, which allows Sanchez Graells to make a noteworthy normative suggestion that undertakings receive more limited protection than victims of other types of human rights violations. Finally, the chapters on trade and competition by Mavroidis and Hoekman, and Sanchez Graells respectively, offer yet another argument in favour of the idea of circularity between case studies and the theoretical perspective from which these are explored. Human rights protection in these areas gives the authors the opportunity to proceed with suggestions about policy reforms as a means to address the problems identified. In broader terms, this is also linked to the issue of the culture of human rights protection within the EU raised by Georgopoulos in his chapter.

IV. AN EPILOGUE

The TEU tells us that the EU shall accede to the ECHR. The EU now has both a competence and an obligation to proceed with accession. An introduction (especially its concluding observations) is not the place to discuss what 'shall' shall mean. Is it an obligation of means or rather of result? What is the margin of discretion enjoyed by the EU's institutions in this respect? To what extent can or should legitimate concerns, such as those raised by Protocol 8 or others not explicitly mentioned in it, be taken into account when assessing not only the content of the draft agreement, but also the EU's obligation to accede? Obviously, in answering these questions one may have to go beyond law and add political considerations to the analysis. Shall the CJEU limit its opinion to a 'test of constitutionality' of the draft accession agreement or should it rather allow itself to move beyond the concerns it has already expressed[55] and exercise 'veto' power as a means to (re)negotiate its relationship with the ECtHR? Should the *Bosphorus* presumption continue to apply? Does Strasbourg's arsenal only contain carrots or sticks as well? How will non-EU Member States react to the draft agreement? The list with the questions is rather long.

Depending on the outcome of the accession process, some of these questions may in the future find a place in the introduction of another book on the accession of the EU to the ECHR. Some other questions may be forgotten without ever being duly discussed. The process is ongoing. We only know the 'present', that is, the common tale that the two systems share to date and the actual content of the draft documents for the accession. One way or another, this tale will continue to evolve. The accession agreement is simply an instrument of international law. It will be subjected to interpretation according to the socio-political context of each case and will adapt to the evolution taking place within its social milieu. By definition, one of the two judicial instances is better positioned, as shown by its previous case law on indirect scrutiny via common Member States. However, the ECtHR and the CJEU have both proven not to lack imagination as policy makers. The(ir) tale shall go on …

[55] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf.