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The EU Accession to the ECHR

Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection

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Preface

Let me start with this postulation: 'The European Union is often considered and portrayed as a complex institutional structure, on which it is difficult to put a label.'[1] The EU's relationship with international law is even more problematic—probably something for which there does not exist any label at all. The EU's relationship with the European Convention on Human Rights continues to be at the forefront of this debate. A first note is that the European Convention on Human Rights[2] has been one of the core international successes—probably the most successful—in international human rights law and practice. Although originally designed to serve primarily as a benchmark of law, the Convention soon became a benchmark not merely of law, but also of practice. Due to its rapidly increasing legitimacy and mode of promotional growth, the Convention went on to become a system of law, and is now the most effective institutional framework for individual human rights protection in Europe and probably the world.[3] With such bifurcated growth taking place, the Convention became a core instrument of democracy for most of the Western European nations, and an enlightenment method for the largest part of the nations that transformed from communism to democracy.

In its natural format, the Convention system was built to serve as an international-European instrument of human rights law merely for state parties. With Europe undergoing large reforms of common goals and institutional practices, most of the western European nations formed and acceded to a more or less a supranational organization, the European Union.[4] As the latter undertook several reforms which changed its nature from a pure economic organization to an

[1] van Rossem (2009), p. 223.

[2] European Convention on Human Rights and its Protocols 1950 (Rome)—entered into force on 3 September 1953—as amended by Protocols No. 11 and No. 14. Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

[3] *Accord*: Helfer (1993), p. 133/4 (The Convention 'is widely regarded as the most effective international instrument for the protection of individual rights.').

[4] This being a designation for the latest constitutional name of this Union.

organized political system, it necessitated to make its authority covered by human rights law limitations. While the EU gradually transformed into an organization of human rights as a means to keep its supreme law steady in the view of its Member States, the Convention system was somewhat being neglected and ruled out from the possibility to review the EU's human rights performance. Callewaert rightly notes that the EU and ECHR systems have for a long time grown independently.[5] The most rigid argument for this development was the legitimate fact that the EU was not a contracting party to the Convention and was not therefore obliged to submit to it, unless it saw itself bound by the functional succession[6] of its Member States' obligations. In terms of effective human rights protection, this has been especially problematic in some policy areas which have been an exclusive competence of the EU (e.g. competition policy) and where Member States have not participated in the implementation of that law (which certainly resulted in absolutely no external human rights control by Strasbourg).[7]

With the EU increasing its state-like competences and body of human rights law,[8] it became evident that there was an increasing need for the EU to accede to the Convention for two basic reasons: first, the political reason, to strengthen the Union's legitimacy in terms of its international human rights obligations,[9] and, second, the practical reason of equality—to give equal-footing to persons falling under the scope of jurisdiction of the EU to enjoy the same rights of standing before the Convention system with those persons in the Convention's EU Member States,[10] therefore making the European human rights landscape better unified.[11]

[5] Callewaert (2014), p. 13.

[6] An example of functional succession may be found at: Court of Justice of EU, *International Fruit Company v Produktschap voor Groenten en Fruit,* Joined Cases 21 to 24/72 [1972] ECR 1219, para. 18; or, see also: Court of Justice of EU, *Defrenne v Sabena*, Case 43/75 [1976] ECR 455, para. 20; A general account on state succession in international law may be read at: Brownlie (2003), pp. 633 *et seq*.

[7] Analysis (1997), p. 235.

[8] See e.g.: Heringa and Verhey (2011), p. 31/2; See also: Tulkens (2013), p. 2 ('As a result the 27 Member States of the Union, which, at the same time, are all parties to the Convention either have lost altogether their capacity to control decisions, hitherto belonging to their jurisdiction, or at least their jurisdictional freedom has been diminished.').

[9] Sera (1996), pp. 182 *et seq*; Although there is now a human rights instrument, the Charter of Fundamental Rights, explicit in the EU Treaties. See on this: García (2002), p. 500.

[10] Groussot et al. (2011), p. 1/2; See also: Balfour (2007), p. 212; Odermatt (2014), p. 10; Gragl (2013), p. 93; *Contra*: Jacobs (2007) ('. . .while widely regarded as valuable for political and symbolic reasons, will have rather limited concrete effects on the observance of human rights standards. The effects will be limited because the ECHR is already accepted as the fundamental standard of human rights protection in Europe. . .').

[11] Olsen (2009–2010), p. 65; *Accord*: Balfour (2007), p. 212, therefore removing the current difference in the interpretation of human rights that currently exists between the two courts; On the role that the Strasbourg Court has played in the 'common understanding' of human rights law in Europe, see e.g.: Helfer (1993), p. 143; *Cf.*: Busby and Zahn argue that in the field of social rights, there are rather huge discrepancies between the standards of Luxembourg and Strasbourg Court. They argue that it would be really hard to reconcile these two orders, and they propose that

Callewaert rightly notes that 'a legal system which rejected external supervision of its compliance with human rights would be a legal order closed in on itself which, with no input from outside, would be in danger of fossilisation.'[12] While the primary goal was to neutralize criticisms on EU human rights face, the accession of the EU to the Convention became not merely a necessity, but also a complex task to be properly addressed. Accession being the core intention,[13] there was the requirement to ensure that such accession will not hinder or impair any of the core functions or characteristics of the Union,[14] either in terms of its relationship with the Member States' legal orders or its relationship with international tribunals that may produce constitutional consequences for the Union's external features. In addition, Gragl in this regard argues that accession will finally raise the question of who will be the last fundamental rights court in Europe: the Luxembourg or Strasbourg Court. Such question, in Gragl's view, substantively demonstrates the conflict that exists between the effective human rights protection and EU law external autonomy.[15]

It is important to point out that the EU's special nature as a more-or-less supranational organization possessing internal obligations on human rights law—something not common for international organizations—preconditions the accession procedure and fields of law that need be regulated through it with several stipulations. Most of these stipulations would have to preserve the EU law's distinguished feature—its internal and external autonomy. Although the preservation of EU law autonomy remained the core concern,[16] there were other decidedly important problems that could raise tensions not only within the EU institutional

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it is only accession may make that compromise possible. See: Busby and Zahn (2013), pp. 14 *et seq*.

[12] Callewaert (2014), p. 17.

[13] Some suggest that instead of accession, a preliminary review procedure—wherein EU Court would request an opinion from the Strasbourg Court when ECHR questions arise instead of submitting EU law questions to its jurisdiction for review of compatibility with ECHR—would better serve the communication between the two courts. See e.g.: Balfour (2007), p. 226 ('This mechanism would mean that if the ECJ is faced with a question on the interpretation of the Convention in the absence of guidance from the Strasbourg Court, then the ECJ should stall the proceedings and refer the matter for clarification to the ECtHR.'); See also: Joris and Vandenberghe (2008–2009), pp. 3–4, which shows debates in the Council of Europe Parliamentary Assembly in favour of accession of EU to ECHR as a key moment to enhance human rights protection in Europe; On the latter, see also: Krüger (2002–2003), pp. 92/3; See also: Gragl (2013), p. 5, who, referring to Kruger, argues that accession will 'remove the increasing contradiction between the human rights commitments requested from future EU Member States and the Union's lack of accountability vis-à-vis the ECtHR.' Making the Convention a condition for potential EU-membership candidate states seems moot if the Union itself does not accede there (Gragl 2013, p. 5).

[14] See e.g.: Lock (2010), p. 798.

[15] Gragl (2013), p. 85.

[16] *Cf.:* Gragl, referring to Lock, rightly notes that it would not be wise to maintain an 'absolute legal autonomy' in face of human rights law and protection such as the Convention system, as that would not be 'desirable at all.' See: Gragl (2013), p. 25.

balance but also in its internal and external constitutional relationships. One such issue is the share of the burden between the EU and its Member States when they have jointly contributed to a violation of the Convention, the establishment of such joint responsibility by the Convention system being another major dilemma in itself. Offering a favorable environment wherein the Strasbourg regime of law is not given the chance to compete with the Luxembourg Court,[17] whereas the former does hold a normal external authority to protect human rights, was a further difficult assignment to be addressed. No one, therefore, may dispute the notable fact that accession will be a 'highly exceptional development.'[18] However, to put it in Larsen's words, '[t]he crucial question is who the "we" is in particular policy areas and what the content, qualities and aims of this "we" are.'[19] Therefore, tackling *content* and *qualities* of the accession process remains a core objective of this book.

The book is divided into four respective parts, altogether forming 12 chapters. In Part I, the book starts with a brief justification of the research questions raised here (Chap. 1), by delimiting not only the questions themselves but also the substance of the issues that will be analyzed. A very short note on the methodology follows afterwards, accompanied with a section on literature review. Chapter 2 tackles the EU as a human rights organization—from its inception—and the gradual development of its body of human rights law. This section includes an analysis of the inception of the EU human rights, and how it became embedded into a body of human rights law deriving not merely from its internal sources of law, but also from the Convention system. This part also analyzes the initial interaction between the two, the Strasbourg and Luxembourg regimes of law. Following this, the book examines the external outlook of EU law, namely the relationship between the Luxembourg Court and international courts—both from the perspective of their harmony but also ongoing and natural competition. A specific chapter on EU law autonomy follows the latter (Chap. 3). Chapter 4 introduces the Final Draft Accession Agreement (hereinafter referred to as DAA) of the EU to the European Convention on Human Rights, and introduces the core mechanisms that it establishes. At this point, the book also questions the extent of EU treaty-making powers in light of the accession to the Convention system, and examines the internal consequences that this process produces. In addition, a conceptual explanation on each of the key provisions of the Draft Accession Agreement is provided therein. The latter is followed by Chap. 5, which covers the status of the ECHR and DAA within the EU legal order. The co-respondent mechanism, its nature and legal construction, and the means and basis on which the two courts are meant to cooperate and compete are examined in Chap. 6. Chapter 7 examines the inter-party complaint mechanism after accession, and questions how the EU will be

[17] *Cf.*: Quirico (2010), p. 47, who instead proposes an informal dialogue between the two courts to prevent such potential conflicts.

[18] Odermatt (2014), p. 35–37.

[19] Larsen (2009), p. 551.

settled into the new Convention environment for complaints between the contracting parties *inter se*. Following this, Chap. 8 examines the prior involvement review of the Luxembourg Court. This chapter also examines the implications in terms of the remedies as well as the likelihood that parties will access the Luxembourg and Strasbourg courts effectively. The latter is followed by Chap. 9 which tests the functionality and sustainability of using the co-respondent mechanism from the Strasbourg Court's perspective. Chapter 10 examines the admissibility of EU-originated applications and potential exceptional scenarios that may appear from the Strasbourg Court's point of view. Finally, in Chaps. 11 and 12 the book first examines the Luxembourg Court's Opinion 2/13 and, thereafter, concludes with a summary of the core arguments put forth by presenting definite answers to the questions raised. Throughout the book, the principle of *dubia in meliorem partem interpretari debent* is applied as a means to offer reliable and consistent arguments.

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References

Analysis (1997) The European community cannot accede to the European Convention on Human Rights. Eur Law Rev 1:235–249

Balfour ADJ (2007) Eliminating conflicting interpretations of the European Convention on Human Rights by the European Court of Justice and the European Court of Human Rights: the Pdiq system as a preventative solution. Intercult Hum Rights Law Rev 2:183–247

Brownlie I (2003) Principles of public international law, 6th edn. Oxford University Press, Oxford

Busby N, Zahn R (2013) The EU's accession to the ECHR: conflict or convergence of social rights? Paper to be presented at the Labour Law Research Network's Inaugural Conference Barcelona, 13–15th June 2013

Callewaert J (2014) The accession of the European Union to the European Convention on Human Rights. Council of Europe, Strasbourg

García RA (2002) The general provisions of the charter of fundamental rights of the European Union. Eur Law J 8(4):492–514

Gragl P (2013) The accession of the European Union to the European Convention on Human Rights. Hart Publishing, Oxford

Groussot X et al (2011) 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

Helfer LR (1993) Consensus, coherence and the European Convention on Human Rights. Cornell Int Law J 26:133–165

Heringa AW, Verhey L (2011) The EU charter: text and structure. Maastrich J Eur Comp Law 8 (1):11–32

Jacobs FG (2007) Accession of the European Union to the European Convention on Human Rights. Hearing organised by the Committee on Legal Affairs and Human Rights in Paris on 11 September 2007. Available at: http://www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf

Joris T, Vandenberghe J (2008–2009) The Council of Europe and the European Union: natural partners or uneasy bedfellows? Columbia J Eur Law 15:1–43

Krüger HC (2002–2003) Reflections concerning accession of the European Communities to the European Convention on Human Rights. Pa State Int Law Rev 21(1):89–99

Larsen H (2009) A distinct FPA for Europe? Towards a comprehensive framework for analysing the Foreign Policy of EU Member States. Eur J Int Relations 15(3):537–566

Lock T (2010) EU accession to the ECHR: implications for judicial review in Strasbourg. Eur Law Rev 35(6):777–798

Odermatt J (2014) The EU's accession to the European Convention on human rights: an international law perspective. Leuven Center for Global Governance Studies. Working Paper No. 136

Olsen JB (2009–2010) Protecting fundamental rights and the evolving roles of the Court of Justice of the European Union and the European Court of Human Rights; Europeanisation in Action at the Supranational Level. Edinburg Student Law Rev 1(3):54–73

Quirico O (2010) Substantive and procedural issues raised by the accession of the EU to the ECHR. Italian Yearb Int Law 20:31–53

Sera JM (1996) The case for accession by the European Union to the European Convention for the protection of human rights. Boston Univ Int Law J 14:151–186

Tulkens F (2013) EU accession to the European Convention on Human Rights. Speech at: National School of Judiciary and Public Prosecution (KSSIP) – Krakow (Poland), Friday 1 March 2013

van Rossem JW (2009) Interaction between EU law and international law in the light of Intertanko and Kadi: the dilemma of norms binding the Member States but not the community. Netherlands Yearb Int Law 40:183–227

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Contents

Part I
The EU as a *Sui Generis* Human Rights Law Organization: Situating the Roots of the Accession Question

Chapter 1
Introduction to the Book

1.1 Delimitating the Questions of the Book and the Scope of Substance Analyzed

This book presents a very specific and narrow approach to the core questions of the EU accession to the ECHR (compare Fig. 1.1 to Fig. 1.2). First of all, it is important to mention the fact that there is rather limited and mostly general literature—if a few articles and two topic-specific books might be described as literature—covering the Draft Accession Agreement of the EU accession to the ECHR, most of which have been published some time ago to be relevant today. Therefore, as this topic is new this book attempts to consult not merely every possible source on the issue, but also intends to build upon them to produce a novel scientific result at the end of this research project. One assumption nevertheless needs be made: the novelty of the topic itself does not reduce the scientific quality that the arguments need to reflect. Furthermore, the book—at some points and in a rather limited framework—takes on board the task of examining not only how things stand at the theoretical level regarding implications of EU accession to the ECHR, but also how they might (*de lege ferende*) become practically exposed to the current and upcoming legal implications on this field of law and practice. Therefore, central attention is given to examining the factual problems and/or benefits that will result from EU accession to the ECHR. This book aims to provide new, more developed knowledge in the field, and assess concerns within advanced argumentative frameworks to elucidate the mechanics and legal effects of EU accession to the ECHR.

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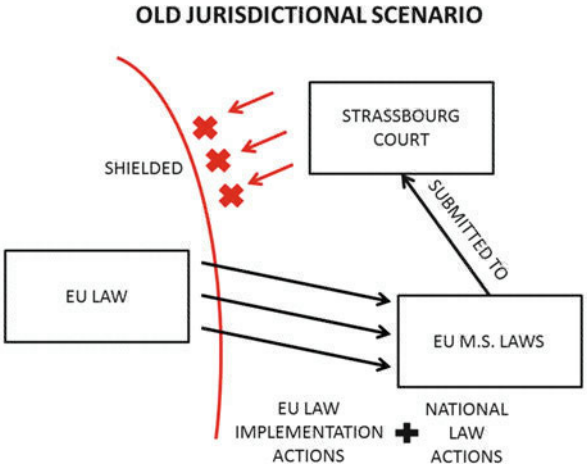

Fig. 1.1 The old jurisdictional picture on the relationship between the EU and ECHR systems

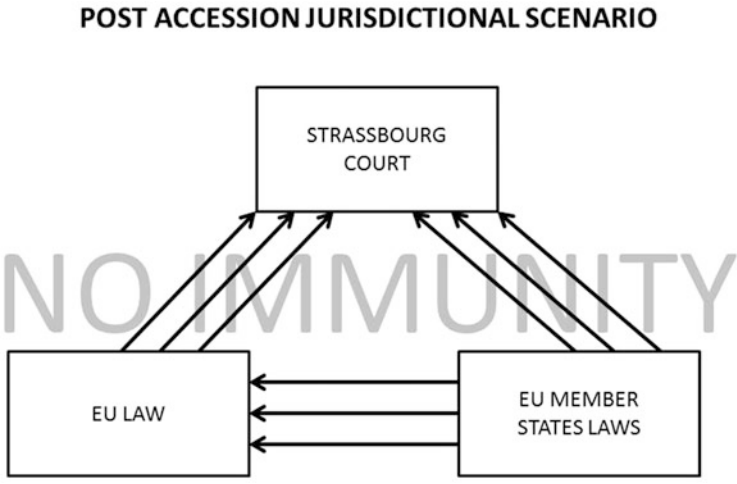

Fig. 1.2 The post-accession jurisdictional picture on the relationship between the EU and ECHR systems

As this book tackles the notion of competition and cooperation between the Luxembourg and Strasbourg regimes of law[1] within the framework of EU accession

[1] *Cf.*: Joris and Vandenberghe (2008–2009), p. 2, who asserts that EU and Council of Europe are natural partners; On the argument that accession will reconcile the two courts, see: Balfour (2005), p. 22; On the potential conflicts between the two courts, see also: Defeis (2000–2001), p. 317; See also: Wetzel (2003), p. 2843, which takes *Hoechst* and *Konstantinidis v. StadtAltensteig-Standesani*cases to demonstrate how Luxembourg Court and Strasbourg Court may prove divergent at interpreting identical rights.

to the ECHR, the vast majority of the analysis encapsulates merely the central issues and problems of this topic, while remaining cautious that existence of such competition may erode trust in the rule of law in the EU and in Europe as a whole.[2] Other, more minor issues are left aside and not included in the analysis. With this being noted, the core research question that this book poses is: What is the legal nature and scope of effect of the cooperation and/or competition between the Strasbourg and Luxembourg regimes of law in the specific context of EU accession to the ECHR (in the framework of the DAA)?[3] The bigger research question, therefore, seeks to solve the problem of how the ECHR would be able to accommodate a modus operandi whereby the EU does not become allergic in its relationship with the Strasbourg Court, whereas the aim of human rights protection is not compromised. To answer this question, this book will: (a) design and validate an adequate doctrinal structure that provides a legal-positive examination on the core issues relating to the DAA and accession process at large, (b) explore and appraise the current and upcoming regulation of the relationship between the two regimes of law, (c) present clear arguments in relation to the principles and guidelines which may elucidate the understanding and positivist application of the DAA, (d) produce a logically and theoretically validated comprehensive framework for identifying problems and implicative outcomes that the two legal regimes may face once

[2] See e.g.: Olsen (2009–2010), p. 56.

[3] Paul Gragl's book on this topic has a rather different research question, namely 'whether and how accession and the system of human rights protection under the Convention can be effectively reconciled with the autonomy of European Union law.' See: Gragl (2013), p. 8/9. Although Gragl does not provide in his book each chapters' specific research questions—namely, the subsidiary research questions to the central research question—one may understand that he undertakes a normative burden to show paths of reconciling both legal regimes. Contrary to this, my central research question—and the specific/subsidiary research questions—have another purpose: that of examining the effect of cooperation/competition between the two regimes of law in the context of EU accession to ECHR (and specifically to the DAA), something that centrally covers also the examination of a) autonomy of EU law in the context of the Convention's credibility of human rights protection, and, b) the functionality of the DAA mechanisms in light of the proclaimed objectives of both legal orders and the DAA itself. My book, therefore, is not that centrally concerned about the 'reconciliation' of EU law autonomy with the Convention's human rights protection, but rather with the examination of loopholes where that autonomy may become encroached, in addition to the question of functionality of the DAA mechanisms (which not always triggers the question of autonomy). The question of my book being more about the examination of the nature and scope of 'effect' that will be produced as a result of cooperation/competition between the two legal orders in the context of the DAA, one may rightly argue that it is moderately different in many aspects with Gragl's research question and intended outcome. In terms of outcome, therefore, these two books come to rather different general conclusions: while Gragl, on basis of his research question, finds way to reconcile and concludes that the DAA does not interfere to EU law autonomy, my book concludes rather the opposite, showing where loopholes remain both in terms of EU law autonomy concerns but also impaired-functionality concerns. One final difference between the two books is the fact that Gragl looks at the DAA very much from a micro perspective, while I also look at it from a macro perspective, taking account of similar experiences and benchmarks from international law and courts (and global law) which Gragl does not.

accession becomes a reality, and, (e) offer theoretical and positivist solutions to these implications with a view to sustaining the proclaimed objectives of the accession process and project. This certainly leads to more detailed research questions which will seek to expound on the theoretical and practical mechanics that form the basis for cooperation and/or competition between the Strasbourg Court and Luxembourg Court. These issues will be organized and functionally established, so that the bigger picture regarding the cooperation and/or competition concerned is scrutinized at its origin, and thoroughly considered when assessing the consequence(s) that it produces. This definitely leads to more substantial—one may also call subsidiary—research questions that this book raises in substance (explained and separately written at the beginning of each chapter): whether and how EU law autonomy will be preserved once the EU accedes to ECHR, and how potential challenges stemming from Strasbourg on its autonomy may be neutralized or counterbalanced? What is the nature of legal effects that the ECHR system will produce upon the EU legal order, the latter's court jurisdiction presumably being immunized from external jurisdictional influence or attack? What is the position of the ECHR and Accession Agreement of EU to ECHR in the EU legal order, and what are the would-be mechanisms to maintain them 'obedient' to the Treaties (if any)? What is the scope of self-restraint that the Strasbourg regime would accept in order to keep Luxembourg's autonomy protected, and the possible guarantees which may assure passive jurisdiction of the former on the latter? How may the distribution of burden on ECHR violations be shared between the EU and its Member States, and what functional role may/should the Strasbourg Court play? What is the level to which the subsidiary nature of the Strasbourg Court will be maintained in the face of the EU? Will the mechanisms resulting from accession assure the same degree of human rights protection for which the ECHR system has been established and demonstrated to date? And, overall, how will the EU's external perspective change as a result of its accession to the ECHR, both within the context of its attitudes toward 'stateness' and with regard to mandatory submission to international law?

Both the bigger/top research question and the subsidiary/subordinate research questions aim to portray the systemic and functional outlook and changes that the EU and ECHR will interdependently witness once the EU accedes to the ECHR, with the scope of such effects questioned against the effectiveness of human rights protection that the ECHR system ought to assure. Therefore, this book examines the core components of the accession procedure and outcomes, that are: the position of ECHR and the DAA in the EU legal order, the nature and effects of the DAA on the EU and ECHR itself, the mechanisms provided for preserving the autonomy of EU law in the face of the ECHR system, the means of burden sharing between the EU and Member States in the face of Convention violations, and the mechanisms to ensure that the Strasbourg Court does in fact remain a subsidiary court even in front of the EU. Some of these substances are examined with deeper scrutiny—some with more conventional analysis—as the primary aim is to provide for deeper assessment in the parts wherein one can observe scarcer knowledge and literature on this topic.

It is also important to note that the book operates on three foundational hypotheses and parameters: first, that the EU legal order will experience substantial changes—at least in legal conceptual context—with its accession to the ECHR and submission to the Strasbourg Court review, which Thym calls a "Trojan Horse"[4] to the EU legal order (Hypothesis 1—*H1*). This hypothesis finds the support in the reasoning of Luxembourg Court's *Opinion 2/94*, which had noted that accession will be of significant constitutional impact to the Union's constitutional architecture[5]; second, that the EU's growing submissive approach towards the ECHR—which is a core international law instrument for Europe—implies its increasing *stateness* attitude that reflects a better embodiment with sovereign acting features (Hypothesis 2—*H2*). This view is supported by the fact that accession will be a novel development in international law, as the EU is undertaking international obligations in a field of law that was previously a state-reserved domain of law. Interacting with international obligations at that level will push the EU towards fortifying its 'stateness' identity in international law. This certainly implies the EU's increasing 'stateness' attitude; and third, that the EU's accession to the ECHR will provoke substantial challenges to the Luxembourg Court's primary and exclusively leading role in the EU hemisphere, and the increasing primacy of the Strasbourg Court—which is approaching human rights law headship—regarding fundamental rights jurisdiction in Europe and upon the EU as well (Hypothesis 3—*H3*). This hypothesis, e.g., is regarded as a general attitude towards the accession by Callewaert,[6] who has generally argued that accession will position the Strasbourg Court as a supreme court in relation to the Luxembourg Court, with the former taking the leadership of human rights law jurisdiction in the European continent. Luxembourg Court's President, Judge Skouris, had supported this same proposition in 2002 by arguing that accession will limit to certain extent EU law autonomy. He has argued in that sense that '[r]egarding the Court of Justice in particular, it will effectively lose its sole right to deliver a final ruling on the legality of Community acts where a violation of a right guaranteed by the ECHR is at issue.'[7] This book therefore will test these three general hypotheses by answering the larger and subsidiary research questions asserted above. In undertaking this research, the book will tackle these topics with a rather exclusive 'legal' eye—a viewpoint that will make the argument more credible and the research answers more reliable.

[4] Thym (2013), p. 1.

[5] *Cf.:* Gragl, from a different perspective, comes to the conclusion that EU accession to ECHR 'will have an unprecedented and enormous impact on the existing multi-level framework of human rights protection in Europe [. . .]'. See: Gragl (2013), p. 278.

[6] Callewaert (2014), p. 22.

[7] Quoted from: Barbera (2012), p. 9.

1.2 A Note on the Methodology

The book uses several methods to elucidate the research questions and convey the issues into the framework of research. It mainly follows a legal positivist approach to examining the problems and explaining the relationship between the two legal orders, namely Luxembourg and Strasbourg. Therefore, the book carries out the research mainly by examining the law as it is. One may legitimately ask why a legal positivist approach has been primarily chosen in this case. Two basic reasons exist for choosing this core approach: first, there is no dispute over the fact that the relationship between the Luxembourg and Strasburg regimes of law within the context of the DAA is so recent that nothing has changed in practice as of yet. A foundational examination on this issue—but also a basic knowledge inquiry—needs be made on a legal positivist basis first, in order to open ways for other methodology works later on. Second, it would be too speculative at this stage of knowledge on this issue to pull the research on the integrity of the regulation of this relationship between the two regimes based on the DAA without there being an empirical evidence of how both courts interact and form their own human rights protection identity with post-accession case-law.

However, in some limited instances, this book also strives to deconstruct the justification for certain rules' existence, and their intended integrity output. Although it is not the intention of this book to embark outside the positivist debate, the author often offers arguments in relation to the justification of certain rules provided in the DAA, in order to make the argument more plausible and to propose an enhanced holistic approach to the arguments presented. It is agued here that an absolute positivist approach to this topic would not make the overall picture of the DAA complete. Two reasons exist for this: first, the DAA was construed in light of certain political objectives of the EU,[8] which needed to be reflected in view of the mechanisms established by the Agreement itself and their intended output, and, second, the DAA has left certain intentional gaps in order to leave certain legal questions answerable to the political momentum of cooperation between the two treaty orders. This said, this book, especially at the beginning, portrays and examines the rationale behind some of the core legal principles established by the DAA, and reflects on their overall legitimizing effect towards the EU and the general European pluralist human rights landscape. This approach has been applied in a very limited context and only where the author thought that it is indispensible for the uniqueness of the book to build in that direction as well.

In addition, this book often relies on the comparative method to contrast comparable situations, norms and analytical results that relate to the EU-ECHR topic. This book will—to that end—observe to what degree legal principles developed within one legal order may perhaps be of advantage to the other. In particular, the comparative method has been regularly applied against some international

[8] On the latter, see e.g.: White (2010), p. 435; See also: Jones (2012), p. 5; Odermatt (2014), p. 9.

instruments such as the American Convention on Human Rights, Statute of the ICJ, the International Covenant on Civil and Political Rights, etc., and a rich body of caselaw deriving from courts and tribunals established by those instruments. Comparative case-law of US Supreme Court has also been used to show how the federal states comply with international human rights law obligations, and contrast them with the EU's supranational engagement in external relations. The selection of these instruments and caselaw of their courts has been made on the basis of their weight in the pool of international human rights law. The two Vienna conventions on the law of treaties[9] have been constantly used to make this even better fitted to the international law debate. Likewise, two similar instruments have been consistently used as comparative methods but also sources of international law that apply in the EU-ECHR relationship, namely the Articles on the Responsibility of States for Internationally Wrongful Acts[10] and the Draft Articles on the Responsibility of International Organizations.[11] Without the comparative use of these instruments it would have not been possible to root this book in a global law discourse. Finally, it must be noted that while examining whether to choose a mixed-method approach, the author consulted a non-exhaustive list of sources covering this topic and similar courts and tribunals. A general conclusion was that there was almost no study that was built merely on a one-method approach, hence this book reflects those experiences and tries to build the methodology in the same light.

This book essentially pursues the theoretical observation of Neil MacCormick, who argues that '[. . .] the most appropriate analysis of the relations of legal systems is *pluralistic* rather than *monistic*, and *interactive* rather than *hierarchical*.'[12] That assumed, the book does not intend to argue for a certain hierarchical relationship and for a one-sided approach to accession issues. It rather builds upon a pluralistic and interactive landscape of legal understandings and arguments, in order to show a

[9] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Done at Vienna on 21 March 1986. Not yet in force. Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II (United Nations publication, Sales No. E.94.V.5); and, Vienna Convention on the Law of Treaties. Signed at Vienna, on 23 May 1969 (UN Doc. No. 18232). Entered into force on 27 January 1980. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[10] ILC Responsibility of States for Internationally Wrongful Acts 2001 (ILC Articles on State Responsibility). Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

[11] ILC Draft Articles on Responsibility of International Organizations. Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). The report will appear in Yearbook of the International Law Commission, 2011, vol. II, Part Two.

[12] Cormick (1995), p. 264.

more dynamic map of the interaction between the two systems post-accession internally and externally, as well as from the Member States' legal orders perspective. Such dynamic framework contributes to making the understanding of functionality of the DAA more suitable with regard to the practical interface that one will witness between the two regimes of law post-accession. Methodologically, this book endeavors to make abstraction where feasible, therefore providing the reader not only with practical analysis, but also with higher-level conceptual accounts.

Seeing that EU accession to the ECHR is an essential indication of the concept of legal pluralism in Europe and beyond, this book operates on a level of illustration wherein the diversity of forms of law within each layer of governance are given appropriate consideration. That being the standpoint, this book will operate through clarifying areas of overlap, inconsistency and ambiguity in the architecture of human rights law from the perspective of the interaction between the EU and ECHR. In addition, this book takes into account the EU and ECHR's distinct approaches in strengthening or softening their response with regard to human rights issues. Such tactics will be judged against the possibility to make the interaction between these layers of human rights law consolidated and integrated from the perspective of their normative development.

This book builds upon a non-exhaustive list of sources available, starting from the core legal acts that establish the constitutional foundations of the two legal regimes, the DAA 'package of acts', secondary-level legal acts of both organizations, case-law of both courts, and most importantly, a large scope of literature covering the relationship between EU and Council of Europe, accession agreement, the legal nature of the jurisdictional portrays of the two courts, but also literature on the competing jurisdictions of international tribunals from a global law perspective. This book makes no departure from the perspective of researching all cases contained in the topic's applicable time-frame, international relevant courts and jurisdictional levels which are associated to the research questions. Political documents of the institutional bodies of both organizations have been used to examine the rationale upon which the foundations of the regulatory framework on the relationship between the two courts have been used. Several policy reports have been considered to ensure that this book builds legal arguments from an informed policy perspective, with the EU and Council of Europe being core policy-makers of human rights law in Europe's appealing legal-pluralism environment. All these discussions have not been made merely in the body of the text, but also in the footnotes attached to the main text. To note—finally—with the purpose of using semi-structured interviews, the author has contacted a number of policy-makers directly engaged in the negotiating process of the DAA and their institutions' media officers, and they have altogether refused to answer to our delicate questions. The refusal to respond to our interview inquiries may be an indication of the sensitivity of the issue, and their lack of willingness to open discussions on issues which may seem problematic from an academic point of view.

It must be noted here that—methodologically—it is not the intention of this book to introduce a new theory on the relationship between the two courts in light of the DAA. Parenthetically, there is no single or authoritative theoretical model that

explains the past relationship on a safe ground. It is not the author's intention to innovate one such theory. However, provided that the DAA is so recent—even not yet enforced legally—the author opined that there is a need to first examine the core components of this agreement from a positivist point of view, combined with scores of explanations on the rationale for certain mechanical choices that were made in the agreement concerned. Having examined the core components of the Agreement and their functional applicability, this book then examines the loopholes which may seem to exist within the context of potential implications that may harm the intended objectives that the EU and ECHR have proclaimed that they expect from this process. However, taken as a whole, the conclusions of this book build a slight theoretical layer of explaining the functionality of the DAA and the legal nature of many of its mechanisms, therefore offering a solid theoretical model of explaining and estimating the functioning of the relationship between the two courts post-accession. It will—in many circumstances—also provide guidance on the acceptable degree of divergence between the two legal orders, at the same time as offering strategies to accommodate and concurrently manage the scale of disparity between their values and mechanisms.

In addition to the previous issue, it must be noted that this book is a product of several years' research. As its relevance from the academic point of view is not linked to the political development or success of the accession process, still the author of this book has been advised by his PhD Committee (before which this book was defended as a PhD thesis) to include a late-hour chapter (Chap. 12) on the latest development on this field, the Luxembourg Court's Opinion 2/13 on the compatibility of the DAA with the EU Treaties. The author was also advised to contrast views—if there are differences—of this book's findings with those of the Opinion (where applicable and necessary). However, the author would like to note—as his PhD Committee has also advised—that this book does not build upon this topic with Opinion 2/13 serving as the 'ground zero'. Rather, it takes the opinion as a comparative tool to superficially flavor the arguments presented in this book. The core arguments of this book—although the Opinion itself is not pragmatic in many respects from the practical perspective of the Luxembourg Court—have been merely supported by the Opinion 2/13 views; the latter being a fact that makes it even more relevant for this book to cohabitate with the Opinion in place.

Finally, one needs to mention that there has been another PhD Dissertation and Book written and published in roughly the same topic in 2013 (Gragl 2013). Although the rough draft of this book has already been written before that book was published, there was the need of academic weightiness to ensure that Gragl's book is considered and contrasted extensively with the findings of this book (wherever possible). It must be mentioned, however, that Gragl's book could have not served again as 'ground zero' for this book, as it got published when this book was almost finalized. However, in order to ensure that this new source of literature has been extensively considered, this book addresses the work of Gragl (2013) by: (a) contrasting the main arguments of Gragl with those of this book, and enlightening on the differences and similarities in almost each of them (either in the body of the text or in the footnotes) with regard to the three most innovative