

European Parliament – Committee on Constitutional Affairs

Hearing on the institutional aspects of the European Union's accession to the European Convention on Human Rights

Brussels, 18 March 2010, 14h00- 14h15

Intervention of Mr **Serhiy Holovaty**,
Vice-Chairperson of the Committee on Legal Affairs and Human Rights
on behalf of Mrs Marie-Louise Bemelmans-Videc,
Chairperson of the Parliamentary Assembly's Sub-Committee on Human Rights
(of the Committee on Legal Affairs and Human Rights),
Council of Europe, Strasbourg

I wish to express my sincere gratitude to the Committee's Chairperson, Mr Carlo Casini, to have invited a representative of the Parliamentary Assembly to take part in today's meeting, and to Mr. Ramón Jáuregui, the Committee's Rapporteur, for the text he has prepared for today's meeting. The text of the draft motion for a resolution is very good and I wholeheartedly congratulate him for this work.

Fifteen minutes is a very short time for an *exposé* on such an important subject. I therefore propose limiting my remarks to only certain issues raised in the text before us. I should add that I am replacing Mrs Bemelmans-Videc, the original invitee, who has, for family reasons, not been able to come to Brussels today.

My principal message to you - fellow parliamentarians - is this:

Article 6 of the Lisbon Treaty, coupled with Article 59 of the European Convention on Human Rights (as amended by Protocol No.14) provide a clear legal mandate to cater for rapid accession of the EU to the European Convention on Human Rights. We, the Parliamentary Assembly of the Council of Europe on one side, and you, the European Parliament on the other, must together ensure that this procedure is started before this summer, and successfully completed within a couple of years, and not in 5 or 10 years time!

This will not be an easy task if one bears in mind that - once a text is finalized - we still have the hurdle of the "Article 218 requirements" of the Lisbon Treaty on your side and the need of consultation of the Assembly, by the Committee of Ministers, on the Council of Europe side. I refer you, in this connection, to paragraph 7 of the LIBE Draft Opinion on this subject, prepared by its Rapporteur, Ms Gál.

The Assembly has – like you in the European Parliament – been quite active with respect to this *dossier*. Here, I refer you to Parliamentary Assembly **Resolution 1610** and **Recommendation 1834** on EU accession to the European Convention on Human Rights. Both these texts, adopted in April 2008, were based on a report presented by Mrs Bemelmans-Videc to the Assembly on behalf of its Legal Affairs and Human Rights Committee.

These texts were transmitted to members of your Constitutional Affairs Committee ten days ago. I will therefore not provide you with details of what can be found in these documents, except to draw your attention to a number of written contributions made therein by eminent experts, some of whom are participating in today's hearing.

Suffice, for present purposes, is to confirm the Parliamentary Assembly's strong endorsement of accession:

"Accession will [and I quote from paragraphs 7 and 8 of Assembly Resolution 1610] convey a strong message of a clear commitment to the protection of human rights not only within the boundaries of the European Union but also Europe-wide, in keeping with the community of values shared by the Council of Europe and the European Union.

[8.] Accession will also confirm the European Union's essence as a "community based on law" and will strengthen the principle of legal certainty, to the extent that the European Union institutions will be subject to the same external review of the conformity of their acts and decisions as are member states".

But why give this *dossier* top priority now? After all, accession of the EU to the European Convention has been discussed for well over 30 years, and from a substantive and practical point of view it could be said that the urgency to accede has diminished, due to the progressive case-law of the Luxembourg Court and "legislative developments" within the EU. But in reality, the opposite is true! I see an added urgency for the EU to accede to the ECHR. Why? Simply because the Union's powers have and are likely to continue to extend to fields which traditionally belong to the 27 member states of the EU. Hence the need for individuals - aggrieved by acts adopted by the EU – to have access to the Strasbourg Court which is competent to determine whether or not a given act infringes fundamental human rights, as guaranteed in the Convention and its protocols.

This leads me onto the issue of the relationship between the Strasbourg and Luxembourg Courts.

For me, the situation is not as complicated as it looks at first sight. In a large measure, this relationship must be perceived as a function undertaken by a specialized human rights court whose role is to exercise external control over the international law obligations of the Union that result from accession to the ECHR. Hence, accession does not threaten the jurisdictional autonomy of the Luxembourg Court. Upon accession, the European Union becomes the 48th "Contracting Party" to the Convention. The Luxembourg Court is then considered by the European Court of Human Rights as a "domestic court", akin to a constitutional or supreme court of any other (States) Party to the Convention. In other words, the ECHR is an instrument of

subsidiary protection and the EU institutions, upon accession, will continue to bear primary responsibility in ensuring respect of rights enshrined in the European Convention. It follows that, in a situation in which the EU Charter of Fundamental Rights becomes, *de facto*, an **internal** 'Bill of Rights' which sets limitations on the Union's institutions' powers, the ECHR mechanism must be perceived as an **external** restraint and check on EU activities. Hence, primary responsibility for ensuring respect of human rights within the EU's (autonomous) legal system remains with the Luxembourg Court. The Strasbourg Court is in no sense a higher court than, for instance, Germany's Federal Constitutional Court. The issue is not one of subordination or primacy of courts. The Strasbourg Court must simply ensure "minimum common standards" guaranteed by the European Convention and its protocols.

That said, the artificiality of the present situation must be put right. At present a potential victim, after exhausting domestic and EU remedies, must lodge an application with the Strasbourg Court, not against the perpetrator of the contested EU act, but against one or more EU member states. And if a breach of the Convention is found, there is no guarantee that the victim's situation will be remedied, as the remedy depends on a third party, the European Union.

This is why accession is necessary.

I am obviously not mandated, nor am I competent – as a member of the Parliamentary Assembly – to deal with the technical details posed by the accession process. This is work which will be undertaken on the “inter-governmental” level. Here I can refer, for example, to the detailed study on the legal and technical questions relating to accession that was undertaken by the Council of Europe’s Steering Committee for Human Rights, as well as the overview of what the “accession process” is likely to entail, which was provided to your Parliament’s Sub-Committee on Human Rights by the Council of Europe’s Special Representative of the Secretary General to the EU, Ambassador Frøysnes, on 22nd February.

It is important for us parliamentarians not to get bogged-down in the details. Our role is to provide a powerful signal for the need to start negotiations in earnest. To maintain the momentum, we should insist that negotiations already commence in July. We are dealing with the accession of a non-State Party, the European Union, to a treaty which was designed for member States of the Council of Europe. All 47 (States) Parties have a collective responsibility under the Convention system and must be included in the accession process. Let the experts decide whether there is a need for a new amending protocol to the Convention or if most issues can be dealt with in an accession treaty, or if both will be necessary. And, in order to ensure a rapid entry into force of, for instance, an accession treaty, consideration ought be given to the provisional application of the text (as envisaged in Article 25 of the 1969 Vienna Convention on the Law of Treaties) and/or use be made of an “opting out” clause to ensure entry into force within a short time-frame, unless a Party to the agreement were to object (opt-out).

Also, EU accession to the ECHR implies accession to the Convention system. As is rightly indicated in paragraph 5 of the text, certain Council of Europe bodies are associated with the Convention: the Strasbourg Court (which ensures respect for the Convention), the Parliamentary Assembly (which elects judges onto the Court) and the Committee of Ministers (which supervises the execution of the Court’s judgments). EU accession implies the need for certain institutional arrangements to be worked out with respect to these matters.

Although I have no mandate to comment on issues which the Assembly has not broached, I would like to make a few comments on the subject of nomination of candidates and election of judges to the European Court of Human Rights.

Judges are elected by the Parliamentary Assembly from a list of three candidates submitted by Contracting [State] Parties to the Convention. A judge elected in respect of the EU would undoubtedly bring additional expertise on the EU legal system to the Strasbourg Court.

In order to ensure that candidates of the highest caliber are put forward, the Assembly expects national selection procedures to be fair and transparent. In several countries, including Belgium, Germany and Latvia, there is parliamentary involvement in the choice of candidates. Indeed, in Slovenia candidates for the Strasbourg Court are elected by the National Assembly by secret ballot. The extent to which you, the European Parliament, may wish to be involved in the internal nomination procedure -

within the EU – is a matter for you to decide upon. But I seize this opportunity to bring to your attention an important Resolution – Resolution 1646 of 2009 – adopted by the Assembly on this subject, based on a detailed report presented to it by the Committee on Legal Affairs and Human Rights.¹

In so far as the election of judges is concerned, Article 22 of the European Convention stipulates that judges are elected by the Parliamentary Assembly from a list of three candidates nominated by the High Contracting Parties. I have therefore noted, with interest, the idea mooted in paragraph 5, last indent, of ensuring the participation of representatives of the European Parliament in the election of judges to the Strasbourg Court. I understand that this is a subject that would probably need to be discussed separately by our two parliamentary bodies, in parallel with the accession negotiations.

Please permit me one final comment on the excellent text of your Rapporteur, Mr Ramón Jáuregui. In my view, the wording of paragraph 6 appears to exclude interstate complaints in too broad a manner. I would propose that it be reworded along the lines of Article 344 of the Treaty on the Functioning of the European Union and restricted to "*disputes concerning the interpretation or application of the Treaties*". That said, this is obviously an internal matter for the EU to decide upon.

I thank you for your attention.

¹ Assembly document 11767, of 1 December 2008: Nomination of candidates and election of judges to the European Court of Human Rights. See AS/Jur Report ([Doc. 11767](#)) and [Resolution 1646](#) (2009). See also document AS/Jur (2010) 12, of 12 March 2010: Procedure for electing judges to the European Court of Human Rights (http://assembly.coe.int/CommitteeDocs/2010/20100312_ajdoc12.pdf).