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

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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-Standesanich* 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. 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)? 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 sub-
mission 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” 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; 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, 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.” 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.

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.
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 Strasbourg 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, 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

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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

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\(^12\) 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
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