

# **Adjudication of International Disputes in Europe: The Role of the European Court of Justice and the European Court of Human Rights**

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## **Abstract**

Over the last 50 years the European Court of Justice and the European Court of Human Rights have built an unprecedented record in the field of international dispute settlement, not only by delivering hundreds of judgments on a diversity of issues every year but also by compelling the compliance of European states with their rulings. The compulsory nature of their jurisdiction, their ability to engage not only states but individuals and national courts in the adjudication process, and the high degree of economic, political and cultural homogeneity of the litigants are some of the factors accounting for such remarkable performance. This Article examines the origin, structure and main features of both courts, as well as their similarities and differences in terms of law applied, jurisdiction and litigation pattern. Mention is also made to the potential for overlapping jurisdiction stemming from recent developments such as the incorporation into European Community law of the human rights standards embodied in the European Convention of Human Rights.

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By all accounts, the role of the European Courts as international dispute settlement mechanisms over the last 50 years has been extremely successful. Indeed, the heavy caseloads of both the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), with each court delivering several hundred judgments every year,<sup>1</sup> show that, to a certain extent, they even are victims of their own success.

There are a number of reasons that account for such a remarkable performance: the ability to engage not only states but individuals and national courts in the process of adjudication, the states' commitment to abide by and enforce the judgments of the Courts and the high degree of economic, political and cultural homogeneity of the countries, citizens and institutions involved are some of them. However, underlying all these factors is the fact that the ECJ and the ECHR are the judicial bodies of two international organizations committed to a common objective: to secure peace and prosperity in Europe and to achieve an ever closer union among its peoples.<sup>2</sup> The emphasis on integration, prosperity and peace should not come as a surprise, since, in some way, both organizations were born of a war. The Council of Europe and what was later to

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<sup>1</sup> In 2005 alone, over one thousand cases were brought to a close by the European Court of Justice (574 by the Court of Justice and 610 by the Court of First Instance) whereas the European Court of Human Rights delivered 1105 judgments. See <http://www.curia.eu.int/en/actu/communiqués/cp06/info/cp060014en.pdf>, for the ECJ, and <http://www.echr.coe.int/Eng/Press/2006/Jan/President'spressconference2006.htm>, for the ECHR (last accessed Apr. 11, 2006).

<sup>2</sup> Preamble of the Treaty of Rome establishing the European Community [hereinafter EC Treaty], Mar. 25, 1957, consolidated text published in O.J. (C 325), Dec. 24, 2002, available at <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/12002E.html> (last accessed Apr. 11, 2006). Similarly, Article 1, paragraph (a), of the Treaty of London establishing the Council of Europe states: "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress", Treaty establishing the Council of Europe, May 5, 1949, E.T.S. No. 1, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm> (last accessed Apr. 11, 2006).

become the European Union were created in the wake of World War II by people who believed that disputes could be best settled by peaceful means and multilateral engagement and were determined to prevent in the future the conditions that led to the war. Therefore, it was only natural that both international organizations came to create permanent judicial structures to which their disputes could be referred to obtain legally binding decisions.<sup>3</sup>

There are, of course, substantial differences between the two European Courts in terms of membership, structure and jurisdiction but the truth remains that they share a pan-European perspective and have been highly successful in dealing with disputes related to the international instruments that created them. This Article briefly examines the origin, structure and main features of both courts and their jurisdiction and analyses some of the reasons behind their success as mechanisms for the settlement of international disputes in Europe.

## **The European Court of Justice**

The Court of Justice of the European Communities (as its full name stands)<sup>4</sup> is based in Luxembourg and is the final arbiter in disputes arising from the EC Treaties and the legislation

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<sup>3</sup> These are the basic elements that, according to J. G. Merrills, define adjudication as a method of international dispute settlement. *See* J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 121 (1998).

<sup>4</sup> The Treaty establishing a Constitution for Europe, signed on October 29, 2004, and not yet into force [hereinafter Constitutional Treaty], changes the Court's name to "Court of Justice of the European Union", O.J. (C 310), Dec. 16, 2004, *available at* <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12004V/htm/12004V.html> (last accessed Apr. 11, 2006).

based upon them. It is one of the 5 institutions<sup>5</sup> of the European Union and, according to Article 220 of the EC Treaty, has a general responsibility “to ensure that in the interpretation and application of the Treaties the law is observed”. The Court consists of 25 judges, one from each Member State, appointed by their governments for a six-year term.<sup>6</sup> The judges are assisted by 8 advocates-general, appointed in the same way and for identical term, whose task is to make “reasoned submissions” in open court on the cases upon which the Court is required to adjudicate.<sup>7</sup>

The origins of the Court can be traced back to the Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris on April 18, 1951.<sup>8</sup> Despite its limited scope, the ECSC was a new type of inter-state entity, quite distinct from the classical model of international organization based on intergovernmental cooperation: it “deliberately broke with the concept of state sovereignty, subordinating its six Member States [...] to the overriding supranational power of its executive organ, the High Authority”.<sup>9</sup> Among the institutions established by the Treaty was a Court of Justice, responsible for settling the disputes arising in the newly created common market for coal and steel.

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<sup>5</sup> The other UE institutions are: the Parliament, the Council, the Commission and the Court of Auditors (Article 7 of the EC Treaty and Article 5 of the TUE). This institutional framework was slightly altered by the Constitutional Treaty, which distinguishes between five main institutions (European Parliament, European Council, Council of Ministers, European Commission and Court of Justice) and two secondary ones (European Central Bank and Court of Auditors). *See* Articles I-19, I-30 and I-31 of the Constitutional Treaty.

<sup>6</sup> EC Treaty, Articles 221 and 223.

<sup>7</sup> EC Treaty, Article 222.

<sup>8</sup> 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

<sup>9</sup> NEVILLE MARCH HUNNINGS, *THE EUROPEAN COURTS* 15 (1996).

The Treaties establishing the European Economic Community (EEC)<sup>10</sup> and the European Atomic Energy Community (EAEC),<sup>11</sup> signed in Rome on March 25, 1957, expanded the scope of the Court's jurisdiction, as wider economic and social objectives were added to the original ones, such as the establishment of a common market based on the so-called four freedoms (free movement of goods, persons and capital and freedom to provide services) and the adoption of common policies in certain fields (from agriculture and fisheries to transportation, state aids and rules on competition).<sup>12</sup>

Since the signing of the EEC Treaty, a number of amendments affecting the Court both directly and indirectly have been made. Some of them were purely technical, such as changes in the number of judges as membership rose from the original six to the current 25. Others were more significant, such as the creation of a Court of First Instance (CFI), attached to the ECJ by the Single European Act (1986),<sup>13</sup> to help reduce its already heavy caseload.<sup>14</sup> In 1992, the scope of European integration was substantially enlarged with the signing of the Treaty on European Union (EU Treaty or TUE).<sup>15</sup> This Treaty “superimposed on the three existing Communities a new structure called the European Union with jurisdiction in two areas falling outside the scope of the original Treaties, namely, foreign and security policy [...] and justice and home affairs”,<sup>16</sup>

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<sup>10</sup> 298 U.N.T.S. 11 [hereinafter EEC Treaty].

<sup>11</sup> 298 U.N.T.S. 167 [hereinafter EAEC Treaty].

<sup>12</sup> EC Treaty, Articles 2 and 3.

<sup>13</sup> Signed on Feb. 17 and 28, 1986, the Single European Act entered into force on Jul. 1, 1987, O.J. (L 169), June 29, 1987, *available at* <http://europa.eu.int/eur-lex/en/treaties/selected/livre510.html> (last accessed Apr. 11, 2006).

<sup>14</sup> This judicial body is renamed “General Court” by Article I-29 of the Constitutional Treaty.

<sup>15</sup> Signed in Maastricht on Feb. 7, 1992, the EU Treaty entered into force on Nov. 1, 1993, O.J. (C 191), July 29, 1992, *available at* <http://europa.eu.int/en/record/mt/top.html> (last accessed Apr. 11, 2006).

<sup>16</sup> ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 5-6 (1999).

practically all of which was initially excluded from the jurisdiction of the Court. The EEC became the European Community (EC), which among its new goals included the establishment of an economic union and the launching of a single currency.<sup>17</sup>

From an international dispute settlement perspective three features of the European Court of Justice are worthy of mention. First of all, the golden rule of international dispute adjudication, the principle of consensuality,<sup>18</sup> does not apply to the ECJ: its jurisdiction is compulsory and its judgments directly enforceable. There is no optional clause in the European Treaties and membership of the Communities entails irrevocable acceptance of the jurisdiction of the Court and the binding nature of its judgments.

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<sup>17</sup> Apart from the four founding treaties (ECSC, EEC, EAEC and EU Treaties) and the Single European Act, two other major instruments (the Treaties of Amsterdam and Nice) brought important institutional changes and introduced new areas of responsibility for the ECJ. The Treaty of Amsterdam (signed on Oct. 2, 1997, and in force since May 1, 1999), amended and renumbered the EC and EU Treaties and widened the Court's powers in new areas such as asylum, immigration, free movement of persons and judicial cooperation. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, O.J. (C 340), Nov. 10, 1997, *available at* <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html> (last accessed Apr. 11, 2006). The Treaty of Nice (signed on Feb. 26, 2001, and entered into force on Feb. 1, 2003), was meant to prepare the European institutions for the accession of 10 new Member States and established a new division of competencies between the ECJ and the CFI. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. (C 80), Mar. 10, 2001, *available at* <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/htm/12001C.html> (last accessed Apr. 11, 2006). As for the jurisdictional structure of the Union, the Treaty of Nice provided for the creation of specialized judicial panels, such as the new European Union Civil Service Tribunal, established on Nov. 2, 2004. This court, composed of seven judges, adjudicates at first instance in disputes between the EU and its civil service. Its decisions are subject to appeal to the CFI on questions of law only and, in exceptional cases, to review by the Court of Justice. *See* Council Decision 2004/752/EC, Euratom, establishing the European Union Civil Service Tribunal, Nov. 2, 2004, O.J. (L 333), Nov. 9, 2004, *available at* <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32004D0752:EN:HTML> (last accessed Apr. 11, 2006).

<sup>18</sup> MERRILLS, *supra* note 3, at 122.

Secondly, the ECJ recognises *ius standi* not only for Member States and EU institutions<sup>19</sup> but also for private parties. Although, as observed by some analysts, individuals cannot “take a case to Luxembourg” to seek redress in the context of a private dispute,<sup>20</sup> they have access to the Court in defense of their rights under the Treaties and therefore can sue for judicial review of Community acts as well as for damages for harm caused by the EU or its civil servants. Coupled with this individual right of access is the fact that private parties are entitled to apply directly to national courts to have EC law enforced,<sup>21</sup> a right which is intimately related to the third main feature of the ECJ dispute settlement system: the close interaction between European and national courts.

Such interaction takes place through the so-called “reference for preliminary rulings” mechanism, provided for in Article 234 of the EC Treaty.<sup>22</sup> Aimed at preventing national courts

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<sup>19</sup> In the so-called infringement cases, a Member State failing to fulfil its obligations under Community law can be brought before the Court by the Commission (most commonly) or by another Member State (proceedings for failure to fulfil an obligation, EC Treaty, Articles 226 to 228). Actions can also be brought against one of the Community institutions by Member States or the other institutions either to review the legality of its acts (proceedings for annulment, EC Treaty, Article 230) or to obtain a pronouncement that it unlawfully failed to act when required to do so (proceedings for failure to act, EC Treaty, Article 232).

<sup>20</sup> HUNNINGS, *supra* note 9, at 17.

<sup>21</sup> EC law is considered to generate rights in favour of individuals directly enforceable before the national courts. *See generally*, Case 26/62, *Van Gend en Loos v. Nederlandse administratie der belastingen*, E.R.C. 1 (1963) [hereinafter *Van Gend en Loos case*].

<sup>22</sup> Article 234 of the EC Treaty states:

“The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

from interpreting and applying the Treaty provisions differently, this mechanism has enabled the Court to develop a set of fundamental principles of the EC law, including direct effect and supremacy of Community law, that truly differentiate the Community legal order from classical public international law.<sup>23</sup> The principle of direct effect was first recognised by the Court in its judgment in the *Van Gend en Loos* case<sup>24</sup> and implies that the Treaties are not mere intergovernmental agreements creating rights and obligations for Member States and EC institutions, but are the foundation of a separate legal order conferring rights and imposing obligations on individuals. In *Van Gend en Loos* the Court not only concluded that individuals, like Member States, had rights, but also granted them the means of giving those rights direct effect at the national level.

The direct effect of EC legislation was reinforced by the principle of supremacy, the goal of which was to prevent national courts from declaring Community rules inapplicable in favor of national ones. In the Court's words, "the law stemming from the Treaty [...] could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".<sup>25</sup> By setting up this principle, the Court established

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Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

<sup>23</sup> See Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE LAW JOURNAL 2419 (1991).

<sup>24</sup> See *Van Gend en Loos* case, *supra* note 20, at 12.

<sup>25</sup> Case 6/64, *Costa v. ENEL*, E.C.R. 585, at 593 (1964).



a doctrine which allowed the new EC legal order to prevail over not only national legislation, but also the constitutions of the Member States.<sup>26</sup>

The national courts have widely accepted these principles and willingly use Article 234 of the EC Treaty to make references to the ECJ, honoring the binding nature of its pronouncements. Indeed, the Court's success has been such that, as Professors Helfer and Slaughter point out, it is "popularly credited with the transformation of the Treaty of Rome from an international agreement into the constitution of the European Union, by convincing national courts to apply European Union law directly and supremely to national law".<sup>27</sup>

Leaving aside the controversy between those who consider the ECJ a state-like constitutional court and those who emphasise its public international law character,<sup>28</sup> the truth remains that the ECJ has played "a substantial role in furthering the objectives laid down in the Treaties, a role similar to that played by the United States Supreme Court with respect to the U.S. Constitution".<sup>29</sup> In this connection, Professor Eeckhout observes that, to a certain extent, the

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<sup>26</sup> The primacy of Community law over constitutional law was established in case 11/70, *Internationale Handelsgesellschaft*, E.C.R. 1125 (1970).

<sup>27</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *YALE LAW JOURNAL* 307-308 (1997).

<sup>28</sup> For a summary of the arguments of both sides, see generally Gil Carlos Rodríguez Iglesias, *Le pouvoir judiciaire de la Communauté européenne au stade actuel de l'évolution de l'Union*, JEAN MONNET CHAIR PAPERS OF THE ROBERT SCHUMAN CENTRE (1996), available at [http://www.iue.it/RSCAS/WP-Texts/96\\_41.html](http://www.iue.it/RSCAS/WP-Texts/96_41.html) (last accessed Apr. 11, 2006) and Jean Allain, *The European Court of Justice Is an International Court*, 68 *NORDIC JOURNAL OF INTERNATIONAL LAW* 261-271 (1999).

<sup>29</sup> TIMOTHY BAINBRIDGE & ANTHONY TEASDALE, *THE PENGUIN COMPANION TO THE EUROPEAN UNION* 99 (1996). On similarities between the ECJ and the U.S. Supreme Court, see generally Steven A. Bibas, *The European Court*

Court has performed an “activist” role in the interpretation of Community law, filling in the gaps and construing the Treaties “so as to render the legal system [created by them] coherent and complete”.<sup>30</sup> As a result, it has gone far beyond its initial functions as a mechanism of inter-state dispute settlement to become one of the driving forces behind the process of European integration.

### **The European Court of Human Rights**

Compared with the ECJ, the role of the ECHR has been much more modest, although it has also succeeded in making its judgments as effective as national court rulings. Many of its singular features result from the specialized human rights jurisdiction distinguishing it from the ECJ, with which it nonetheless shares a European perspective.<sup>31</sup>

The ECHR was set up in 1959 as a structure for the enforcement of the rights enshrined by the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>32</sup> Adopted under the auspices of the Council of Europe, the Convention, like the Treaty of Rome, contained a judicial body for dispute resolution, albeit limited to the specific field of human rights. Indeed, in addition to laying down a catalogue of rights, largely inspired by those embodied in the Universal Declaration of Human Rights adopted two years before, the

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*of Justice and the U.S. Supreme Court: Parallels in Fundamental Rights Jurisprudence*, 15 HASTINGS INT’L & COMP. L. REV. 253 (1992).

<sup>30</sup> Piet Eeckhout, *The European Court of Justice and the Legislature*, 18 YEARBOOK OF EUROPEAN LAW 1 (1998).

<sup>31</sup> See HUNNINGS, *supra* note 9, at 305.

<sup>32</sup> Opened for signature in Rome, on Nov. 4, 1950, the European Convention of Human Rights entered into force on Sept. 3, 1953, E.T.S. No. 5, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last accessed Apr. 11, 2006).

Convention established a structure for the enforcement of those rights.<sup>33</sup> Of the three institutions initially entrusted with this responsibility (the Commission, the ECHR and the Committee of Ministers of the Council of Europe), only the latter two survive. After the coming into force of Protocol No. 11 to the Convention,<sup>34</sup> the existing part-time Court and Commission were replaced by a single, full-time Court.

The ECHR sits in Strasbourg and is composed of as many judges as there are Contracting Parties<sup>35</sup> (all of them, currently 46, also members of the Council of Europe). Judges are elected by the Parliamentary Assembly of the Council of Europe for a term of six years.<sup>36</sup> According to the Convention as amended by Protocol No. 11, any Contracting Party (state application) or private person alleging to be a victim of a violation of the Convention (individual application) may bring legal proceedings against the state deemed responsible for the breach of any of the Convention rights.<sup>37</sup> Under the new regime, all Contracting Parties recognise the compulsory jurisdiction of the Court, whose final judgments are binding on the respondent states concerned.<sup>38</sup> These are indeed two of the most important innovations of the “new” ECHR.

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<sup>33</sup> See HUNNINGS, *supra* note 9, at 11.

<sup>34</sup> The Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, was opened for signature on May 11, 1994, and came into force on Nov. 1, 1998, E.T.S. No. 155, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm> (last accessed Apr. 11, 2006).

<sup>35</sup> Article 20 of the Convention.

<sup>36</sup> Articles 22 and 23 of the Convention.

<sup>37</sup> Articles 33 and 34 of the Convention.

<sup>38</sup> Article 46, paragraph 1, of the Convention states: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”.

Prior to 1998, states could only “be made respondents with their consent, either given *ad hoc* or by means of an optional clause [...] accepting the Court’s compulsory jurisdiction in advance”.<sup>39</sup> On the other hand, the right of individual petition, which permitted individuals to sue any state party to the Convention (including their own), had to be exercised through the Commission (individuals did not have direct access to the Court) and was subject to another optional clause, which meant that such right was only available “if the state against whom an individual sought to bring a complaint had accepted in advance that such individual petitions might be made”.<sup>40</sup> As mentioned before, Protocol No. 11 abolished the two “optional clauses” and both the jurisdiction of the Court and the right of individual application are now compulsory for all Contracting Parties. Further, individuals have direct access to the Court in all cases.

As far as relations with national courts are concerned, Professor Hunnings has observed that “the responsibility for ensuring compliance with the Convention rights lies with the [...] states themselves, through their administrative, legislative and, in the last resort, judicial procedures”.<sup>41</sup> That is why a victim of a violation of the Convention “must first seek remedy through domestic procedures within the state of injury”.<sup>42</sup> The rule of exhaustion of domestic remedies is clearly stated in Article 35 of the Convention, according to which: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken”.

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<sup>39</sup> HUNNINGS, *supra* note 9, at 12.

<sup>40</sup> *Id.*, at 13.

<sup>41</sup> *Id.*, at 343.

<sup>42</sup> *Id.*, at 342

In the ECHR there is no such thing as the EC references for preliminary rulings, which enable the ECJ to interact with the national courts. Rather, the ECHR approach is more hierarchical in that it acts as “a tribunal of last resort concerned only to supervise the [Contracting Parties] and ensure that they administer the Convention rights properly, refrain from breaching them and provide remedies when inadvertently they do”.<sup>43</sup>

In any case, the ECHR has also accumulated an impressive record through the last five decades. First, the high rate of compliance with ECHR judgments have led some commentators to consider them “as effective as those of any domestic court”.<sup>44</sup> Second, just as the ECJ raised the European Community treaties to the constitutional level, the ECHR has established the constitutional status of its founding instrument,<sup>45</sup> while securing its own position “as the final interpreter of the Convention’s provisions”.<sup>46</sup> Third, the ECHR decisions have altered “the shape of domestic law, through both legislative revision and judicial decision”.<sup>47</sup> Indeed, in Professor J. G. Merrills’s words, “the most dramatic impact of the Court’s work is certainly to be found in the

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<sup>43</sup> *Id.*, at 342-343.

<sup>44</sup> BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 309 (2nd ed. 1995).

<sup>45</sup> The ECHR has stressed the “special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings” and declared the Convention “a constitutional instrument of European public order”. *See* *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27, 31 (1995).

<sup>46</sup> Helfer & Slaughter, *supra* note 27, at 293. As for the Court’s position as final arbiter in matters of interpretation, *see generally* *Barfod v. Denmark*, 149 Eur. Ct. H.R. (ser. A) at 12 (1989).

<sup>47</sup> Helfer & Slaughter, *supra* note 27, at 293.

changes in domestic law and practice which have been introduced as a result of cases at Strasbourg”.<sup>48</sup>

### **Luxembourg and Strasbourg Compared**

As we have already mentioned, the ECJ and the ECHR have a great deal in common: they both are international courts with similar historical backgrounds and a common “pan-European mission and perspective”.<sup>49</sup> However, unlike traditional international courts, based on the principle of consensuality, the jurisdiction of the European Courts is compulsory. Enforcement also separates ECJ and the ECHR from other international adjudicatory bodies. Even though, as Professor Louis Henkin puts it, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”,<sup>50</sup> the European Courts go beyond this pattern of usual, spontaneous compliance with international obligations since their judgments are binding and compliance is mandatory. Finally, the ECJ and the ECHR have both engaged in a fruitful relationship with national institutions and private parties, who enjoy direct access to them.

These two latest features have led Professors Helfer and Slaughter to conclude that, rather than international courts, the ECJ and the ECHR should be defined as supranational courts. In their opinion, “although both tribunals have the power to adjudicate state-to-state disputes – the

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<sup>48</sup> J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 12 (1993).

<sup>49</sup> HUNNINGS, *supra* note 9, at 257.

<sup>50</sup> LOUIS N. HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (1979).

province of traditional international adjudication – each has compiled a more successful compliance record in cases involving private parties litigating directly against state governments or against each other”.<sup>51</sup> This has enabled both courts to “penetrate the surface of the state” and “interact directly with the main players in national legal systems”,<sup>52</sup> such as courts, administrative agencies and legislative bodies. As a consequence, the ECJ and the ECHR have been able to resort to “an additional set of potential mechanisms for compelling litigants to appear and to comply with the resulting judgments”.<sup>53</sup>

Nevertheless, together with these similarities there are also striking differences. Both Courts, for example, apply a different type of legislation: the law the ECJ is typically concerned with constitutes an autonomous legal order that creates rights and obligations for states, institutions and private persons,<sup>54</sup> whereas the ECHR deals with a specific body of norms – human rights law – which is “primarily defined by reaction to the national legal systems with which it interacts”.<sup>55</sup> The scope of their jurisdiction is also different, in that the ECJ’s power to adjudicate extends to a vast array of issues with far-reaching economic, social and political

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<sup>51</sup> Helfer & Slaughter, *supra* note 27, at 277.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, at 289.

<sup>54</sup> In *Van Gend en Loos*, the ECJ declared that the EEC Treaty “is more than an agreement which merely creates mutual obligations between the contracting states”, adding that EC law “constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals”. Then, the ECJ went on to observe that Community law “not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community”. See *Van Gend en Loos* case, *supra* note 21, at 3.

<sup>55</sup> HUNNINGS, *supra* note 9, at 257.

implications. The ECHR, for its part, has a more limited jurisdictional function which consists in supervising – and compelling – compliance with a specific catalogue of human rights obligations in 46 countries. As for the pattern of litigation, only states can be sued before the ECHR, either by individuals or, less frequently, by other states. As pointed out by Professor Hennings, “these are precisely the two forms of litigation which are missing from the EC Courts”,<sup>56</sup> either because EC legislation deliberately excludes them, as is the case with claims by private parties against states, or through a long-established practice whereby states tend not to bring infringement actions against each other.

Lastly, mention should be made of the potential for conflict between decisions emanating from both European Courts, particularly after the explicit incorporation into EC law of the human rights standards set forth in the European Convention of Human Rights.<sup>57</sup> This risk for overlapping jurisdiction is compounded by the adoption of the Charter of Fundamental Rights of the European Union and its subsequent inclusion in the Constitutional Treaty.<sup>58</sup> Some analysts

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<sup>56</sup> *Id.*

<sup>57</sup> After declaring, as a general principle, that the European Union must respect human rights and fundamental freedoms, upon which the Union is founded, the TUE provides that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and as they result from the Constitutional traditions common to the Member States, as general principles of Community Law”. See Article 6 (1) and (2) of the TUE, as amended by the Treaty of Amsterdam. Moreover, Article 46 (d) of the TUE establishes that, whenever it has jurisdiction, the ECJ must ensure respect of these human rights standards by the Community institutions. See Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT’L L. 302 (2001).

<sup>58</sup> The European Union Charter of Fundamental Rights was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on Dec. 7, 2000. The Charter was later incorporated into the text of the Constitutional Treaty, making it legally binding not only on the Union and



have perceived these developments as setting the stage for a fracture in the jurisdictional system for human rights protection in Europe.<sup>59</sup> However, as observed by former ECJ Advocate General Francis G. Jacobs, that potential for divergent interpretation, inherent in the very existence of two independent judicial systems,<sup>60</sup> has not led to significant discrepancies between the two Courts.<sup>61</sup> In order to avoid risks of conflicting interpretation of human rights standards it is nonetheless essential that the ECJ and the ECHR become even further acquainted with each other's case-law and increase the mutually enriching interaction that already exists between them.<sup>62</sup>

## Conclusions

Since their inception the ECJ and the ECHR have built a remarkable record in the field of international dispute settlement, not only by delivering hundreds of judgments on a wide variety of issues but also by compelling the compliance of European states with their rulings. As we have mentioned, several factors explain this high degree of compliance: the compulsory nature of the Courts' jurisdiction, the individuals' right of direct access on a similar footing as European

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its institutions but also on Member States in regard to the implementation of Union law. *See* Part II (Articles II-61 to II-114) of the Constitutional Treaty.

<sup>59</sup> Professor Toth, for example, considered such perspective "the worst possible scenario", since it would amount to the creation of "a dual system of human rights protection in Europe and a splitting up of rights which would undermine the authority of the Convention and the Convention system". *See* Akos G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491-92 (1997).

<sup>60</sup> *See* Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEX. INT'L L. J. 551 (2003).

<sup>61</sup> For an overview of inconsistencies in the approach to fundamental rights by the ECJ and the ECHR, *see generally* Defeis, *supra* note 57, at 317-28.

<sup>62</sup> The two courts approach each other's work with deference and respect and are engaged in a fruitful judicial dialogue, which include regular meetings of their members to discuss general issues of mutual interest. *See* Jacobs, *supra* note 60, at 552.

institutions and Member States and the forging of mutually enriching relationships with national courts and institutions, either in the form of a partnership (ECJ) or in a more traditional, hierarchical way (ECHR). Even though, as regards the interpretation of human rights standards, there is certainly a potential for conflict between the decisions of the two Courts, divergences of approach have in fact been few and far between. Once again, the particular background of the process of European integration and the shared political, social, economic and legal values of the states concerned have favored the dialogue and interaction between the two judicial bodies, minimizing possible discrepancies and contributing to their success as dispute settlement mechanisms in Europe.