When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR

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A. Introduction

The Court of Justice of the European Union (the Court of Justice) decided to strike again. On 18 December 2014, for the second time in history, the Court rejected the European Union's (EU) accession to the European Convention on Human Rights (ECHR).[1] Although the judges do not seem to negate the idea as a matter of principle, they made the renegotiation of the Draft Accession Treaty very difficult, to say the least. The message sent by the Court of Justice to the Member States may have surprised some,[2] but for many it was a rather expected development. The Court of Justice has always been a fierce defender and promoter of the autonomy of EU law. For that purpose, the procedure based on Article 218 (11) TFEU has been, among the others, the Court's greatest weapon.[3] Over the years a clear pattern has emerged: Whenever there is a threat to the autonomy and to the Court's exclusive jurisdiction, the judges will not shy away from taking bold decisions

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[1] Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454. See also View of Advocate General Kokott, ECLI:EU:C:2014:2475. For an academic appraisal see, *inter alia*, Steve Peers; Daniel Halberstam; Stian Øby Johansen; and Christoph Krenn in this edition of the German Law Journal. See also A. Łazowski and R.A. Wessel, *The European Court of Justice Blocks the EU's Accession to the ECHR*, CEPS Commentary, 8 January 2015; http://www.ceps.eu/node/9942.

[2] It has been reported that the general feeling after the hearing was that the accession agreement was considered compatible with the EU Treaties. See S.O. Johansen, "Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement"; http://blogg.uio.no/jus/smr/multirights/content/some-thoughts-on-the-ecj-hearing-on-the-draft-eu-echr-accession-agreement-part-1-of-2.

[3] Other procedures may be of importance, too. A good example of the use of infraction procedure in such a context is Case C-459/03 *Commission of the European Communities v Ireland,* ECLI:EU:C:2006:345.

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going against the will of the Member States.[4] For obvious reasons, the *raison d'être* behind the Court's decision is kept secret behind the doors of the deliberation rooms at Kirchberg in Luxembourg. Still, it cannot be denied that *Opinion 2/13* shows that the Court of Justice will not give up its resistance to the ECHR accession so easily. In 1996, in Opinion 2/94, the Court held that the European Community, as the law stood then, had no competence to accede to ECHR.[5] Now that Article 6(2) TEU provides for an obligation to accede, subject to conditions laid down in Protocol No 8 to the Founding Treaties, the Court has opted for strict interpretation of the latter, which, ultimately turns the caveats laid down therein into locks. It is clear that these caveats turned into locks are something that the judges will hold on to in the future and, by the same token, they will happily pursue interpretation that is very different from what the Member States intended when negotiating the Treaty of Lisbon and the Draft Accession Agreement.

This article is divided into two main parts. It begins with an evaluation of *Opinion 2/13* and the view of Advocate General Kokott as well as numerous submissions made by the Member States (Section B). This leads to Section C where the center of gravity moves to the future. On the one hand, the Member States of the European Union will, most likely, ask the other contracting parties to the ECHR to go back to the drawing board and re-start the negotiations aiming at meeting demands made by the Court of Justice. On the other hand, this prolonged road to accession will give the judges in Luxembourg an opportunity to develop further case law based on the Charter of Fundamental Rights and make it less directly dependent on jurisprudence of the Strasbourg Court. This way, by the time the accession to the ECHR is eventually cleared by the Court of Justice, if ever, the EU legal order will be fortified enough with a wall of case law based on the Charter not to allow for undermining of autonomy of EU law. Arguably, the Court of Justice does not negate the need to protect the fundamental rights at the EU level. After all, it has been advocating this for quite a while now. However, one can easily see that the judges in Luxembourg prefer first to develop an internal system based on the Charter of Fundamental Rights before allowing for a more institutionalized external influence in this respect. This, as an idea, is *prima facie* sound and persuasive. Yet, it sits rather uncomfortably with the Court's ruling in case C-399/11 *Melloni*, where the Court of Justice lowered the fundamental rights standards to protect the cornerstone of the Area of Freedom, Security and Justice, that is the principle of mutual recognition.[6] All these issues are analyzed in turn.

[4] See Opinion 1/91 of the Court of 14 December 1991 on the European Economic Area, ECLI:EU:C:1991:490; Opinion 1/09 of the Court of 8 March 2011 on agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123.

[5] Opinion 2/94 of the Court of 28 March 1996: Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1996:140.

[6] Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

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B. *Opinion 2/13*

I. Introduction

The evolution of EU fundamental rights is well known and prolifically documented in academic literature.[7] For purposes of this article, we shall focus on a few rudimentary points that are crucial for the analysis that follows. To begin with, the original European Communities were meant to be economic endeavors only. Neither of the three founding treaties contained references to fundamental rights, which were to remain *spécialité de la maison* of the Council of Europe and its flagship legal instrument—the European Convention for the Protection of Human Rights and Fundamental Freedoms. Early in the evolution of the European Communities it became clear that fundamental rights were missing in the new emerging legal order[8] but, due to the indecisiveness of political circles, it was ultimately the Court of Justice that took the initiative in this respect.[9] It is unclear whether the judges in Luxembourg started to refer to the fundamental rights for the sake of protecting them or rather to defend the primacy of EC law.[10] The judgment of the German Constitutional Tribunal in *Internationale Handelsgesselshaft*,[11] where the German judges conditioned primacy of EC law over the *Grundgesetz* on the improved protection of fundamental rights in the EC, was a major catalyst in this respect. This was reflected in an increased number of references to fundamental rights, constitutional principles and the

[7] See, *inter alia*, M. Mendelson, *The European Court of Justice and Human Rights*, 1 YEL (1981) 121; M. Mendelson, *The Impact of European Community Law on the Implementation of the European Convention on Human Rights*, 3 YEL (1983) 99; A Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 CMLRev. (2000) 1307; I. Butler and O. De Schutter, *Binding the EU to International Human Rights Law*, 27 YEL (2008) 277; R. CA White, *A New Era for Human Rights in the European Union?*, 30 YEL (2011) 100; R. Schütze, *Three 'Bills of Rights' for the European Union, Yearbook of European Law*, 30 YEL (2011) 131.

[8] The term 'new legal order' was coined by the Court of Justice in seminal judgment in case 26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1. See further, *inter alia*, P Pescatore, "Van Gend en Loos, 3 February 1963 - A View from Within" in M P Maduro and L Azoulai (eds) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 3; B de Witte, "The Continuous Significance of Van Gend en Loos" in M P Maduro and L Azoulai (eds) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 9.

[9] Initially the Court of Justice approached this idea with fair amount of trepidation. It very early case-law it rejected outright references to fundamental rights (see Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1959:4). This, however, changed in late 1960s when in Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* (ECLI:EU:C:1969:57) the Court of Justice famously ruled that "the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community Law [now Union law] and protected by the Court" (para. 7).

[10] J. Coppel, A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 CMLRev. (1992) 669.

[11] *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* (No.2, BVL 52/71) [1974] 2 CMLR 540.

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ECHR itself in the Court's jurisprudence that followed.[12] The Court of Justice, step-by-step, established the foundations for the general principles of EC (now EU) law.

Towards the late 1970s a proper discussion commenced on the possibility of accession of the European Communities to the ECHR. This culminated in the first attempt in the early 1990s, which, as already mentioned in the introduction, was famously blocked by the Court of Justice in Opinion 2/94. In that case, the Court of Justice held that Article 235 EC Treaty was not a sufficient legal basis, therefore the European Community had no competence to proceed with accession to the ECHR. In the wake of this ruling the Member States were faced with at least three solutions. The first was to maintain the status quo and to allow the Court of Justice to proceed with development of fundamental rights *qua* general principles of law. The second was to develop the EU's own bill of rights. The third option was to revise the Founding Treaties with the goal of providing an explicit legal basis for participation in the ECHR system. Out of the three, the first solution seemed to be the least persuasive. Not only was the case law of the Court of Justice developing incrementally and did not guarantee legal certainty, it also seemed not to be adequate enough to the Communities and the European Union in the post Treaty of Maastricht environment. The prevalent school of thought was that the Communities and the Union needed a catalogue of fundamental rights of one sort or another. This is how the Charter of Fundamental Rights was born. In the period between the Treaty of Nice and the Treaty of Lisbon it remained a non-binding instrument proclaimed by the presidents of three key EU institutions: The Commission, the Council, and the European Parliament.[13] However, shortly after its adoption a first attempt to turn the Charter into a binding legal act was made by the drafters of the Treaty establishing a Constitution for Europe.[14] Shenanigans associated with its approval and ratification meant that it was only with the entry into force of the Treaty of Lisbon that the Charter became binding.[15] With the view of de-Constitutionalizing the new revision Treaty, the Charter was taken out of its scope. At the same time a cross reference as to its binding effect and primary law status was inserted

[12] See, *inter alia*, Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, ECLI:EU:C:2002:434; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.

[13] More on the history of the Charter of Fundamental Rights see, *inter alia*, G. de Búrca, *The drafting of the European Union Charter of Fundamental Rights*, 26 ELRev (2001) 126.

[14] Treaty establishing a Constitution for Europe, OJ C 310/2004, p. 1. See further, *inter alia*, J-C. Piris, *The Constitution for Europe: A Legal Analysis*, CUP 2006.

[15] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/1. For an academic appraisal see, *inter alia*, J-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge University Press 2010); Paul Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford University Press 2010); Andrea Biondi, Piet Eeckhout, Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012); Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar Publishing 2012).

into Article 6 TEU.[16] Thus, the Charter became the EU's bill of rights, albeit through the kitchen door, on 1 December 2009.[17] Yet, the drafters of both the Constitution and subsequently of the Treaty of Lisbon, agreed it was also fitting to provide for accession of the European Union to the European Convention for the Protection of Fundamental Rights and Freedoms. This is where the journey to *Opinion 2/13* began. From the start it was rather obvious that the accession to ECHR would not be smooth by any stretch of the imagination. Quite to the contrary, ups and downs where in the cards from the start.[18]

The legal basis for the accession to the ECHR is laid down in Article 6(2) TEU.[19] The first thing that stands out is the language employed by the Treaty drafters. The provision in question provides that the EU "shall accede" to ECHR, which may give an impression that the European Union is under an obligation to do so. This is rather intriguing and may lead to divergent opinions. At best, it is *lex imperfecta*.[20] It is well known that for a country or the EU to accede to the ECHR approval of non-EU contracting parties to the ECHR is necessary.[21] Therefore, if one were to interpret Article 6 TEU as an obligation to accede, one would have to admit that the obligation was only on the EU to seek accession. Interestingly enough, this had been exactly the wording of Article 7(2) of the Draft Constitution for Europe, which served as a point of departure for the contemporary Article 6 TEU.[22]

[16] P. Craig, *The Treaty of Lisbon, process, architecture and substance*, 33 ELRev (2008) 137, at 165. See also E.F. Defeis, *The Treaty of Lisbon and Accession of the European Union to the European Convention of Human Rights*, 18 ILSA Journal of International & Comparative Law (2011-2012) 387.

[17] This, as argued in the academic literature, has the same effect that it would have had had the Charter been formally part of the Founding Treaties. See M. Borowski, *The Charter of Fundamental Rights in the Treaty on European Union* in M. Trybus, L. Rubini (eds) "The Treaty of Lisbon and the Future of European Law and Policy", Cheltenham-Northampton 2012, p. 200, at p. 208.

[18] For a comprehensive analysis see P. Gragl, *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing, Oxford-Portland, Oregon, 2013.

[19] Art. 6(2) TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Such accession shall not affect Union's competences as defined in the Treaties."

[20] See Benoit-Rohmer, *L'adhésion de l'Union à la Convention européenne des droits de l'homme*, 19 *Journal de droit européen* (2011) 285 (referred to in R. Barrata, *Accession of the EU to the ECHR: the rationale for the ECJ's prior involvement mechanism*, 50 CMLRev. (2013) 1305).

[21] A brief reminder is fitting that originally the ECHR had been opened to participation of states only. However, Protocol No 14 to ECHR provides now for a possibility of EU's accession.

[22] Draft Treaty establishing a Constitution for Europe, OJ C 169/2003, p. 1. It should be noted, however, that Article I-9 of the Treaty establishing a Constitution for Europe, which was signed a year later, provided for a straightforward obligation to accede (OJ C 310/2004, p. 1).

Of crucial importance are several caveats laid down in Article 6(2) TEU as well as in a tailor-made Protocol 8 to the Founding Treaties.[23] Furthermore, one should not leave aside a Declaration which is, too, annexed to the Founding Treaties. Because these caveats are of crucial importance for *Opinion 2/13* and its analysis that follows later in this article it is pivotal at this stage to evaluate them in more detail.

To begin with, Article 6(2) TEU provides that the accession to the ECHR "shall not affect the Union's competences as defined in the Treaties." This is not surprising, bearing in mind how much attention the Member States pay to the doctrine of attributed powers that underpins the EU legal order. Article 1 of Protocol No 8 clarifies further that the Accession Agreement shall "make provision for preserving the specific characteristics of the Union and Union law." This, in particular, should include a *modus operandi* for division of liability for breaches of the ECHR between the EU and its Member States. Article 2 of the Protocol emphasizes again that the accession shall neither affect competences of the EU nor powers of its institutions. This repetition of a norm stemming anyhow from Article 6(2) TEU may be perceived as a sign of desperation of the Member States as if having such a caveat repeated twice in different parts of the Treaties were to strengthen its force. Article 2 of the Protocol further clarifies that accession to the ECHR does not affect:

> the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

[23] Protocol 8 provides: Article 1: "The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate. "

Article 2: "The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof."

Article 3: "Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union."

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Last but not least, Article 3 of the Protocol aims a guaranteeing the immunity of Article 344 TFEU to participation in the ECHR. Declaration No 2 on Article 6(2) TEU, annexed to the Final Act of IGC that prepared the Treaty of Lisbon, reiterates that accession to the ECHR should "preserve the specific features of Union law" and the need for reinforced dialogue between the Court of Justice in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg.

Bearing in mind all those caveats the European Union started the preparatory work on negotiations soon after the entry into force of the Treaty of Lisbon. They were completed on 5 April 2013 when the negotiations of the Draft Accession Agreement and associated instruments were approved.[24] Following that the European Commission requested opinion of the Court of Justice, as per Article 218(11) TFEU, on the compatibility with the Treaties of the Draft Accession Agreement.

II. Silence Speaks Louder than Words? The Court of Justice and Division of Competences Between the EU and Member States après Accession to the ECHR

Opinion 2/13 is *prima facie* rather long, but this in itself does not translate into robustness and completeness of the analysis conducted by the Court of Justice. As a matter of fact, large parts of the Opinion are limited to a descriptive overview of the ECHR, the Draft Accession Agreement as well as positions of the European Commission and the Member States—a majority of which submitted written and oral observations during the Court proceedings.[25] As far as the substance is concerned, the center of gravity in the Court's analysis is, not surprisingly, on the caveats laid down in Article 6 TEU and Protocol No 8. Further, what may take some by surprise, is the fact that the judges focused only on some but not all of them. Indeed, in sections of the Opinion devoted to the substance, the judges swiftly moved to matters pertinent to autonomy of EU law, which, without a shadow of the doubt, are close to the Court's heart. Often the judges at Kirchberg made that point clear in the past and they equally do so in *Opinion 2/13*. This is discussed further below, but before this analysis addresses the autonomy of EU law it is interesting to delve deeper into what the judges left largely aside. This is particularly fitting as the Court of Justice skimmed though a matter that is of highest importance for the Member States. One of the desires of drafters of the Treaty establishing a Constitution for Europe, and subsequently the Treaty of Lisbon, was to have a transparent delimitation of competences between the Member States and the European Union. This materialized in Articles 2-6 TFEU and, as mentioned above, for the purposes of accession to the ECHR in the already mentioned Article 6(2) TEU and Article 2 of Protocol 8. Both provide unequivocally that participation of the EU in the

[24] The package includes Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, the Draft Declaration by the EU made by the time of signature of the Accession Agreement, the Draft Rules to be added to the Rules of the Committee of Ministers.

[25] Paras. 3–143 of the Opinion.

ECHR framework should not affect in any way the competences of the European Union. The Member States had no intention of allowing the accession to the ECHR to serve as a kitchen door vehicle for increasing the of powers of the European Union. In her View the Advocate General Kokott engaged thoroughly in the analysis of the matter at hand to reach a conclusion that the Draft Accession Agreement in its current form does not change the competences transferred to the EU by its Member States.[26] As already alluded to, the Court of Justice has largely stayed silent in this respect and focused on it only in the context of Article 344 TFEU and the co-respondent mechanism.[27] Some key issues analysed by the Advocate General Kokott are not touched upon at all, for instance, whether as a result of accession to the ECHR competences of the EU curtail, extend or a transfer of further competences from the Member States to the EU is required. The question is how this should be interpreted.

Again, it is worthwhile to emphasize that the deliberations are conducted behind the closed doors, which leaves a lot to commentators' imaginations. The arguments that follow may contain some seeds of truth or they may amount only to pure speculation. Still, even if only for the purposes of intellectual exercise, it is worth drawing a couple of scenarios. One option is to assume that the Court of Justice used a decision to focus on faults of the Draft Accession Agreement, not on its strengths. It may well be that the judges implicitly followed the Advocate General Kokott and assumed that division of competences between the EU and its Member States, following accession to the ECHR, would be largely a non-issue that would raise hardly any doubts *sans* one specific matter: Compatibility of the Draft Accession Agreement with Article 344 TFEU. The other option is that the Court of Justice assumed that because the Member States were ready to sign the Draft Accession Agreement and the Advocate General Kokott raised no doubts, it implied their approval to any consequences for the division of competences. Bearing that in mind the judges focused, as already argued, on their own priorities. Either way, it leaves one disappointed that the Court does not robustly address such a fundamental issue, even if it were to clear the ECHR accession in this respect.

III. Autonomy of EU Law Revisited

The reasoning of the Court starts with a number of preliminary points focusing on the idiosyncratic nature of the European Union and its legal order. Although the Court of Justice states the obvious, the judges found it appropriate to underline some fundamentals. Interestingly, the Court openly confirms that the European Union is not a State, yet at the same time emphasizes that the Treaties forming its legal foundation created "a new legal order," the main characteristics of which are the doctrines of primacy

[26] See paras. 33-55 of the View of Advocate General Kokott.

[27] *See infra* Sections IV and V.

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and direct effect.[28] According to the judges, it is precisely the EU legal order that "has consequences as regards the procedure for and conditions of accession to the ECHR."[29] The Court then adds that "essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged . . . " in creation of the ever closer Union.[30]

These proclamations are of fundamental importance for the analysis of the Court that follows. They serve as a point of departure for a series of powerful arguments that set the stage, or to put it differently, create a fortress EU. It seems as if the Court wishes to convey: This is our point of departure; this is where we stand. The judges are fully aware of the possibility that their rejection of the Draft Accession Agreement may be met with fierce criticism and accusations that the Court of Justice does not take fundamental rights seriously.[31] This may explain why in paragraphs 169 through 177 the judges elaborate on the position of fundamental rights in the EU legal order, as well as the importance and status of the Charter of Fundamental Rights. As if to counterattack that alluded criticism, the Court of Justice argues that "[…] at the heart of that legal structure [of the EU] are the fundamental rights recognised by the Charter."[32] The scope of application of the Charter is referred to as well, though one may be taken by surprise that the Court goes back to the language of Article 51 of the Charter and argues that it applies when Member States "are implementing EU law."[33] This formula is rather unfortunate, not to mention differences between various language versions of the Charter,[34] a different notion used in the Explanatory Note to the Charter,[35] and the fact that the Court of Justice interpreted the provision in question in an extensive fashion in *Fransson*.[36] Taking into account a recent

[28] Paras. 156-157 of the Opinion.

[29] Paras. 158 and 166 of the Opinion.

[30] Para. 167 of the Opinion.

[31] See, for instance, S. Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection', *EU Law Analysis*, 18 December 2014; http://eulawanalysis.blogspot.nl/2014/12/the-cjeu-and-eus-accession-to-echr.html.

[32] Para. 169 of the Opinion.

[33] Para. 171 of the Opinion.

[34] For instance according the Polish version of the Charter it applies when Member States apply ["stosują"] EU law.

[35] It provides: "the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law".

[36] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

judgment in *Dano*, in which the Court also uses Article 51 of the Charter verbatim,[37] one may justifiably question if the judges are reverting to a more restrictive interpretation of that crucial provision.

In this part of *Opinion 2/13*, the Court of Justice seems to attempt to square the respect for fundamental rights with objectives of the Union,[38] the principle of loyal cooperation laid down in Article 4(3) TEU, and the obligations of the Member States stemming therefrom.[39] One of them is application and respect for EU law, which is supported by the Court of Justice and the national courts, whose task is to "ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law."[40] Not surprisingly, the Court of Justice emphasizes the importance of the preliminary ruling procedure in this respect.[41] As stressed by the Court, the autonomy that EU law receives *vis-à-vis* national laws of the Member States, as well as public international law, must be ensured.[42] With that in mind, the Court of Justice in paragraph 178 of the opinion outlines the remit of its analysis.[43] First, it checks if the Draft Accession Agreement is "liable adversely to affect the specific characteristics of EU law," in particular "the autonomy of EU law in interpretation and application of fundamental rights, as recognised by EU law and notably by the Charter." Second, the judges express a desire to verify that institutional *modi operandi* provided for in the Draft Accession Agreement comply with all caveats listed in Article 6(2) TEU and Protocol No 8.

The evaluation of the Draft Accession Agreement starts here with three loud salvos. To begin with, the Court of Justice, rightly so, states that accession to ECHR would make the

[37] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358, para. 87.

[38] Para. 172 of the Opinion.

[39] See on this principle, for instance, M. Klamert, *The Principle of Loyal Co-operation in EU Law*, Oxford: Oxford University Press 2014.

[40] Para. 175 of the Opinion.

[41] See on the preliminary ruling, for instance, M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press, 2014 (2nd ed.).

[42] Para. 170 of the Opinion. See more generally on this question: J.W. van Rossem, 'The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received within the EU Legal Order', in E. Cannizzaro, P. Palchetti and R.A. Wessel (Eds.), *International Law as Law of the European Union*, Leiden/Boston: Martinus Nijhoff Publishers, 2012, pp. 59-89.

[43] Para. 178 of the Opinion: "In order to take a position on the Commission's request for an Opinion, it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law just outlined and, as the Commission itself has emphasised, the autonomy of EU law in the interpretation and application of fundamental rights, as recognised by EU law and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU's accession to the ECHR are complied with."

Convention a part of EU law and, at the same time, subject the EU to external control of compliance, in particular by the European Court of Human Rights. As already mentioned in this article, the Court of Justice has always been on full alert when the Member States and the EU attempt to sign an international agreement providing for another court. In the past, the opinion procedure based on Article 218 (11) TFEU, allowed the Court of Justice to eliminate such competitors *ab initio*. This happened with the EEA Court in opinion 1/91, the European Court of Human Rights in opinion 2/94, and most recently, the Community Patents Court in opinion 1/09. As if to justify its trepidation in this respect, the Court of Justice reiterates in paragraph 182 that subjecting the EU and the Court to an external judicial authority "is not, in principle, incompatible with EU law." This, however, is subject to *conditio sine qua non*. Such an international agreement that provides for the existence of another court will be acceptable, and may affect the Court's powers, "only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order."[44] It does not require a sophisticated legal analysis to realize that meeting such demands is almost impossible, especially because the Court of Justice turns this caveat into a lock in the paragraphs that follow. In the next step, the judges clarify that ECHR bodies, particularly the European Court of Human Rights, may not bind the EU, including its institutions, "to a particular interpretation of the rules of EU law."[45] If the EU were to accede to ECHR as per Draft Accession Agreement, the interpretation of the ECHR by the European Court of Human Rights would bind the Court of Justice but, as the judges explicitly admit, it would not be the other way round.[46] This leads to a very interesting point regarding a potential judicial competition between the two Courts, particularly in relation to interpretation of the Charter of Fundamental Rights. The Court of Justice unequivocally fortifies itself and argues that its counterpart in Strasbourg should not have the jurisdiction to challenge its findings as to the scope of EU law, which is crucial for determination if the Member States are bound by the EU's fundamental rights.[47] To put it differently, the Court of Justice will only clear the accession to the ECHR if it is guaranteed exclusive competence to determine whether EU law, particularly the Charter of Fundamental Rights, applies and whether a particular case falls within the remit of the ECHR.

As widely known, the Charter of Fundamental Rights is largely based on the ECHR.[48] On the one hand, these provisions of the Charter which replicate the ECHR should be interpreted

[44] Para. 183 of the Opinion.

[45] Para 184 of the Opinion.

[46] Para. 185 of the Opinion.

[47] Para. 186 of the Opinion.

[48] See, for instance, S. Peers, T. Hervey, J. Kenner, A. Ward (Eds.), *The Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, 2014.

taking into account the ECHR and case law of the Strasbourg Court.[49] On the other hand, the Court of Justice arguably wishes to be the master of the game and to have the final word in interpreting the Charter. This, in the Court's view, is a consequence of "[t]he fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation." This supports the argument set forth in this article's introduction that one of the aims of the Court may have been to delay the accession to the ECHR in order to build sufficient case law on the Charter of Fundamental Rights and not be directly exposed to the Strasbourg Court's case law. The less-developed the Charter is, the more its interpretation would be influenced by Strasbourg rulings.

The Court's motives are even clearer in paragraphs 187 through 189, where it elaborates on contentious Article 53 of the Charter.[50] Quite controversially, the Court of Justice in *Melloni* ruled that the provision in question should be interpreted in the following manner: "[T]he application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law."[51] This interpretation, however, does not sit comfortably with Article 53 of the ECHR. The latter allows the parties to the Convention to provide higher standards in their national laws than those of the Convention. Arguably, this could lead to a clash of titans. The Member States would be allowed to have higher standards as per ECHR but not as per the Charter of Fundamental Rights. This, in the eyes of the Court of Justice, would potentially affect the primacy, unity, and effectiveness of EU law. Bearing this in mind, the Court of Justice makes in paragraph 189 a demand for a special arrangement.[52] According to the judges, it is necessary to limit the powers of the Member States of the European Union under Article 53 ECHR so that the higher standards of fundamental rights protection can only be provided in national law in the areas where EU law does not apply.[53] In the latter scenario, Article 53 ECHR would apply without restrictions. Although the Court of Justice diplomatically refers to a need for

[49] Article 52(3) of the Charter of Fundamental Rights.

[50] See Bruno de Witte, *Article 53*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, CH Beck-Hart-Nomos, Oxford and Portland, Oregon, 2014, pp. 1523-1537.

[51] Para. 188 of the Opinion.

[52] Para 189 of the Opinion: "In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.".

[53] Ibidem.

"coordination" between Article 53 ECHR and Article 53 of the Charter, this essentially amounts to a request for an opt-out. Arguably, this issue will be one of the most difficult to deal with when re-negotiations of the Draft Accession Agreement commence. Needless to say, this would affect one of the pillars on which the ECHR is based and will most likely raise controversies.

Creation of this major lock takes the Court of Justice back to the *raison d'être* behind its ruling in the *Melloni* case. In *Melloni*, the Court endeavored to balance fundamental rights and the principle of mutual recognition in criminal matters. As well-known, that principle is a cornerstone of the Area of Freedom, Security, and Justice, including its flagship instrument the Council Framework Decision 584/2002/JHA on the European Arrest Warrant.[54] It provides for a fast track, court-to-court procedure for surrender of individuals for the purposes of prosecution or execution of sentences.[55] Following a revision of this Framework Decision in 2009, the power of national courts to refuse surrender is reduced, as far as perpetrators sentenced *in absentia* are concerned, only to cases when the accused was genuinely not aware of criminal proceedings pending against her or him in another Member State.[56] This, however, did not entirely mesh with the Spanish Constitution's fundamental rights standard. Therefore, the Court of Justice was asked to determine which system should prevail. The judges famously ruled that the Framework Decision on the European Arrest Warrant is compatible with the EU's fundamental rights standards, and furthermore, that both the Framework Decision and the Charter of Fundamental Rights benefited from the doctrine of primacy over the Spanish Constitution. Had the latter been followed, it would have undermined the effectiveness of EU law, particularly the Council Framework Decision 584/2002/JHA on the European Arrest Warrant.

This issue arose again in *Opinion 2/13*, where the Court of Justice turned to the principle of mutual trust, the basis and a prerequisite for mutual recognition. According to the Court, the fact that accession to the ECHR would also allow application of this Convention between the EU Member States when they act within the sphere of EU law could undermine the mutual trust by requiring the authorities to check compliance with fundamental rights by fellow Member States. From the perspective of the Court of Justice, it is "liable to upset the underlying balance of the EU and undermine the autonomy of EU

[54] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1.

[55] For an academic appraisal see, *inter alia*, N. Keijzer and E. van Sliedregt, eds., *The European Arrest Warrant in Practice,* T.M.C. Asser Press, The Hague 2009.

[56] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/2009, p. 24.

law."[57] This is the second major lock developed by the Court of Justice, and the question of its interpretation remains. A narrow reading of paragraph 194 of the opinion implies that a tailor-made rule must be developed to exempt application of the ECHR between the Member States when mutual recognition instruments are at stake.[58] Although the Court focuses strictly on criminal matters, the principle of mutual recognition based on mutual trust also applies in other areas falling under the umbrella of Area of Freedom, Security, and Justice. One must remember, however, that the principle of mutual recognition has its limits, and compliance with fundamental rights standards by the Member States is not *fait accompli*. The Court's own judgment in case *N.S.* speaks for itself.[59] A broad reading of paragraph 194 of the opinion may indicate that the Court demands non-application of the ECHR between the EU Member States when their relations are governed by EU law. Either way, negotiators must also address this issue when they revise the mandate for accession talks and eventually attempt to re-negotiate the Draft Accession Agreement.

The third major objection made by the Court of Justice relates to ECHR Protocol 16, which provides for a *modus operandi* allowing national courts of ECHR parties to send requests for advisory opinions to the European Court of Human Rights.[60] Interestingly, neither did Protocol 16 enter into force, nor did the European Union become a party to it. However, the Court of Justice opts for an *ex ante* attack, predicting a potential threat to the autonomy of EU law, particularly to the already mentioned preliminary ruling procedure based on Article 267 TFEU. The Court of Justice openly considers the lack of a provision determining the relationship between the two procedures as something that "is liable adversely to affect the autonomy and effectiveness" of the preliminary ruling.[61] Alas, the judges fail to specify what this lock amounts to and what kind of a solution would satisfy the Court. The extreme, although very likely, expectation is a proviso explicitly excluding the availability of Protocol 16 *modus operandi* when EU law applies to a domestic case at hand. Any softer mechanism may not meet the Court's expectations when (and if) it is asked again to clear the way for the EU's accession to the ECHR.

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[57] Para. 194 of the Opinion: "In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."

[58] *Ibidem*.

[59] Joined cases C-411/10 and C-493/10, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865. For an academic appraisal see, *inter alia*, M. Spreeuw, *Do As I Say, Not As I Do: The Application of Mutual Recognition and Mutual Trust*, 8 CYELP (2012) 505

[60] For an academic appraisal see, *inter alia*, P Gragl, *(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECHR advisory opinions under draft Protocol No 16*, 38(2) ELRev. (2013). 229

[61] Para. 199 of the Opinion.

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On foregoing three grounds, the Court of Justice held in its interim conclusion that the accession would "adversely . . . affect the specific characteristics of EU law and its autonomy."[62]

IV. Article 344 TFEU

The Court next addresses the compatibility of the Draft Accession Treaty with Article 344 TFEU, which provides: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." The Court has consistently used this provision to claim its exclusive jurisdiction whenever the interpretation or application of EU law is at stake.[63] As previously explained, Article 6(2) TEU clearly states that the accession shall not affect the Union's competences as defined in the Treaties. Furthermore, Article 3 of Protocol 8 confirms that nothing in the Agreement shall affect Article 344 TFEU. Therefore, this issue was clearly on the table from the outset.[64]

Yet, Article 344 TFEU merely refers to Member States submitting a dispute. In that respect, the Commission argues that disputes between the Member States in the context of the ECHR would involve interpretation or application of the ECHR, rather than the EU Treaties.[65] Obviously in cases where the content of ECHR and EU provisions is similar, Article 344 TFEU could be infringed.[66] Therefore, a special provision on the inadmissibility of those disputes would not be necessary. This view was shared by Greece, but not by France, which argued that it must still remain possible for a Member State to appear as a third-party intervener in support of one or more of its nationals in a case against another Member State that is brought before the ECtHR, even where that other Member State is acting in the context of implementation of EU law.[67]

As already mentioned, the Court devotes several paragraphs to its exclusive jurisdiction, the autonomy of EU law, the legal structure of the EU (including fundamental rights), the

[62] Para. 200 of the Opinion.

[63] See for instance Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission* v *Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraph 282.

[64] Para. 143 of the Opinion.

[65] Paras. 106-107 of the Opinion.

[66] *Ibidem*.

[67] Para. 143 of the Opinion.

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obligations of the Member States (for instance, on the basis of the principle of sincere cooperation), and the need for consistency and uniformity in the interpretation of EU law.[68] It concludes that "[f]undamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with [this] constitutional framework."[69] While this conclusion should not come as a surprise, given the fact that Article 344 TFEU was referred to in the Treaty (as well as in Protocols and Declarations), it remains difficult to square these starting points with the notion—which is at the heart of the Strasbourg system—that external judicial control is to be accepted once a violation of ECHR provisions is at stake. In fact, the two Courts have debated this issue during the accession process.[70] For instance, in a joint communication from Presidents Costa and Skouris (24 January 2011), the parties recognized that "[a]s a result of that accession, the acts of the EU will be subject, like those of the other High Contracting Parties, to the review exercised by the ECtHR in the light of the rights guaranteed under the Convention."[71] The Presidents pointed to two situations: First, direct actions, in which case the CJEU would have a chance to rule; and second, cases on EU law application/interpretation before domestic courts, where in the absence of a preliminary question, the CJEU would not be in a position to review the consistency of that law with the fundamental rights guaranteed by the Charter of Fundamental Rights. While the Presidents argued that such a "situation should not arise often," they nevertheless proposed "a procedure . . . , in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review."[72] They found in a solution in a prior involvement procedure, laid down in Article 3(6) of the Draft Accession Agreement. Ironically, this procedure is also under attack in the Court's Opinion.[73]

It is notable that the CJEU previously pointed to these issues during earlier stages. In a 2010 discussion document it argued that "the Union must make sure . . . that external

[68] Paras. 163-174 of the Opinion.

[69] Para. 177 of the Opinion.

[70] See more extensively on the role of the two European courts in the accession negotiations L.F.M. Besselink, 'Should the European Union Ratify the European Convention on Human Rights? Some Remarks on the Relations between the European Court of Human Rights and the European Court of Justice', in A. Føllesdal, B. Peters & G. Ulfstein (eds.), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context*, Cambridge: Cambridge University Press, 2013, pp. 301-333.

[71] Available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf (last accessed on 15 January 2015) [at 1].

[72] *Ibidem.*

[73] *See infra* Section VI.

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review by the Convention institutions can be preceded by effective internal review by the courts of the Member States and/or of the Union." [74] The Court added that:

> [t]o maintain uniformity in the application of European Union law and to guarantee the necessary coherence of the Union's system of judicial protection, it is therefore for the Court of Justice alone, in an appropriate case, to declare an act of the Union invalid. . . . In order to preserve this characteristic of the Union's system of judicial protection, the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point.[75]

Hence, the Court has been quite consistent in pointing out some of the consequences of Article 344 TFEU. Yet the interpretation of this provision now seems to affect the very idea of joining the ECHR. As argued above, for all other parties to the Convention, being bound by the fundamental rights in the ECHR in the exercise of their internal powers is the very essence of joining the system in the first place. While the Court seems to acknowledge this in paragraph 185 of the opinion, it nevertheless maintains that "it should not be possible for the ECHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU."[76]

One particular problem in this respect is related to Article 55 of the ECHR, which, in a way, is the counterpart of Article 344 TFEU. It reads:

> The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application

[74] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 7, http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf.

[75] Paras. 7-9.

[76] Para. 186 of the Opinion.

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> of this Convention to a means of settlement other than those provided for in this Convention.

The tension is obvious: Article 344 TFEU calls upon Member States to only bring disputes concerning EU law before the Court of Justice, whereas Article 55 ECHR demands a settlement of disputes relating to the ECHR before the ECtHR by means of the inter-State cases procedure (Article 33 ECHR). How can this be reconciled, particularly when the ECHR is to become an integral part of the legal order of the Union?[77]

This provision is explicitly dealt with in Article 5 of the Draft Accession Agreement. It provides: "Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of national investigation or settlement within the meaning of Article 35, paragraph 2.*b*, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention." Basically, the solution is that the inter-State cases procedure under Article 33 ECHR is not mandatory, and the EU and its Member States may continue to bring before the EU Courts any disputes arising out of interpretation and application of the ECHR. Yet in the eyes of the Court, this is not sufficient to preserve its exclusive jurisdiction. The provision still allows for the possibility that the EU or Member States might submit an application to the ECHR concerning an alleged violation by a Member State or the EU, respectively, in conjunction with EU law. This, according to the Court, forms a violation of Article 344 TFEU. The fundamental basis of this objection is reflected in the statement made by the Court that this "goes against the very nature of EU law."[78] To overcome this problem, one would need an "express exclusion of the ECHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law."[79] In other words—as noted by the Advocate General Kokott—a rule would be needed by which Article 344 TFEU would be unaffected by, and take precedence over, Article 33 ECHR (implying inadmissibility of a claim in a case that would nevertheless be initiated).[80]

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[77] See on this issue also P. Eeckhout, 'The European Convention on Human Rights and Fundamental Freedoms as an Integral Part of EU Law – Some Reflections', in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (Eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden/Boston: Martinus Nijhoff Publishers, 2013, pp. 87-99. See more in general on the relationship between the EU and the Council of Europe: E. Cornu, 'The Impact of Council of Europe Standards on the European Union', in R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*, The Hague: T.M.C. Asser Press/Springer, 2013, pp. 113-129.

[78] Para. 212 of the Opinion.

[79] Para. 213 of the Opinion.

[80] Para. 115 of the View of Advocate General Kokott..

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The problem therefore flows from the risk that the application and interpretation of internal EU law (in disputes between Member States *inter se* or between Member States and the Union) will be by-passed. Though, one must also consider the extent of this risk. Member States are well aware of the Court's case law on this point, and the issue could perhaps be solved on the basis of so-called disconnection declarations.[81]

V. The Co-Respondent Mechanism

While the Court emphasizes that the EU is not a state—a fact, but nevertheless a novum[82]—and that the special characteristics of the EU have not been taken into account, one cannot maintain that there has been no discussion. In fact, the special situation of the accession of an organization with a complex division of competences was at the heart of the debates over the past years.[83] This, for instance, led to the introduction of the so-called "co-respondent mechanism" to ensure that proceedings brought before the ECtHR by non-

[81] The Advocate General Kokott mentioned the possibility used in Article 282 of the United Nations Convention on the Law of the Sea (para. 115 of the View). Kuijper refers to the example of Annex 2 of the UNESCO Convention on cultural diversity, which states that the Member States of the Union which are party to the Convention (next to the EU itself) will apply the provisions of the agreement in question in their mutual relations in accordance with the Union's internal rules and without prejudice to appropriate amendments being made to these rules. P.J. Kuijper, 'Reaction to Leonard Besselink's ACELG Blog', 6 January 2015; http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks's-acelg-blog/.

[82] The discussion on this is well known and the most popular conclusory qualification still seems to be that the EU is a *sui generis* entity. The Court refers to this when it argues:

> The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.

(para. 158 of the Opinion). See recently on this discussion C. Eckes and R.A. Wessel, 'The European Union: An International Perspective', in T. Tridimas and R. Schütze (Eds.), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order*, Oxford: Oxford University Press, 2015 (forthcoming).

[83] See, *inter alia*, P. Gragl, *op. cit.* n. 18; J.P. Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 CMLRev. (2011), 995-1023; C. Timmermans, 'Fundamental Rights Protection in Europe Before and After Accession of the European Union to the European Convention of Human Rights', in M. van Roosmalen *et al.* (eds.), *Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk*, Antwerpen: Intersentia, 2013; P. Polakiewicz, 'The European Union's Charter of Fundamental Rights and the European Convention on Human Rights: Competition or Coherence in Fundamental Rights Protection in Europe', 14 Revue européenne de droit public (2002), 853-878; T. Lock, *EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg*, 35 *European Law Review* (2010), 777-798; T. Lock, *The ECJ and the ECHR: The Future Relationship Between the Two European Courts*, 8 *Law and Practice of International Courts and Tribunals*, (2009), 375-398; as well as the contributions to J. Iliopoulos-Strangas, V. Pereira da Silva and P. Potacs (eds.), *Der Beitrit der Europäischen Union zur EMRK: die Auswirkung auf den Schutz der Grunrechte in Europa*, Baden-Baden: Nomos, 2013.

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EU-Member States and individual applications would be correctly addressed to Member States and/or the EU as appropriate.[84]

The co-respondent mechanism—laid down in Article 3 of the Draft Accession Agreement—foresees the following possibility:

> The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

This provision can be understood in the light of the complex, and dynamic, division of competences between the Union and its Member States. Yet, this mechanism also allows the ECtHR to implicitly decide on the division of competences between the EU and its Member States. In doing so, the ECtHR would have to interpret EU law, something that Court of Justice believes can only be done in Luxembourg. Admittedly, the Court of Justice makes a valid point. As we have seen, Article 344 of the TFEU aims to preserve the autonomy of the EU legal system and the Court is obliged to safeguard this principle.[85] And, as noted in Section B.I, Protocol No. 8 was created to explicitly address these issues.

The Court sees three problems. First, once the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons. This will give the ECtHR the possibility of interfering with the division of powers between the EU and its Member States. Second, in the end, the EU and the Member States may be held jointly responsible. Yet, a Member State may have made a reservation in relation to the issue under review, which would imply a violation of Article 2 of EU Protocol No. 8, according to which the Accession Agreement must ensure that nothing therein affects the situation of Member States in relation to the ECHR. Third, in situations of joint responsibility, the ECHR may decide that only one of them is to be held responsible for that

[84] See further, *inter alia*, P. Gragl, *op. cit.* n. 18, at pp. 138-173; as well as C. Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, 76 Modern Law Review (2013), 254-285, at 267.

[85] For the text of Article 344 TFEU see supra section IV.

violation. Again, this would imply an assessment of the rules of EU law governing the division of powers between the EU and its Member States.

A first assessment of these arguments leads us to conclude that the Court may be overly cautious. This would not be the first time that a "foreign jurisdiction" has had an opinion on the division of competences and responsibilities between the EU and its Member States. The best example is provided by the WTO, where the division of competences is not even followed consistently as to fit the WTO's judicial framework best. And, in the end, the Union would even be able to argue—in line with the *Kadi* cases—that in the implementation it is bound by its own constitutional rules as long as it remains within the limits of its international obligations. More importantly, however, is that the argument seems flawed *in principle*. Shutting out a role of an external court whenever the interpretation of Union law is at stake could violate the very idea of the Strasbourg system. Joining that system implies some vulnerability as well as an acceptance of the fact that one will no longer by definition have the final say on interpretation of internal law in the light of obligations laid down in the Convention.

VI. Prior Involvement Procedure

One of the issues raised in the negotiations was the creation of a prior involvement procedure, allowing the Court of Justice to assess the compatibility of EU law with ECHR law before it is dealt with by the European Court of Human Rights in a case where the EU acts as a co-respondent and the Court of Justice has not had a prior opportunity to make such an assessment.[86] Article 3, paragraph 6 of the Draft Accession Agreement lays down the basic parameters of this procedure while further details are purely a matter of EU law for the European Union to regulate internally. This provision provides, *inter alia*, that such a procedure should facilitate a quick assessment to avoid further delays at the European Court of Human Rights and that the procedure will not affect the latter's powers. There is some controversy surrounding a decision regarding how to regulate such *modus operandi* and in which legal act. For instance, the European Commission—in its submission to the Court of Justice—argued that the prior involvement could be regulated in the Council Decision concluding the Accession Agreement as per Article 218(6)(a)(ii) of the TFEU.[87] The Dutch government argued in its pleadings, however, that for this purpose a revision of the Statute of the Court of Justice was more fitting.[88] Several governments that intervened in the Court proceedings agreed that the introduction of the prior involvement procedure

[86] See further R. Baratta, *op. cit.* n. 20.

[87] Para. 92 of the Opinion.

[88] Para. 139 of the Opinion.

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would confer additional powers on the Court of Justice, yet no prior amendment of the Founding Treaties would be necessary.[89]

The prior involvement mechanism, as regulated in the Draft Accession Agreement, did not survive the Court's scrutiny on two grounds. To begin with, a *conditio sine qua non* for the Court of Justice is that the EU institution takes a decision if the Court of Justice has given a prior ruling on the matter in question.[90] Needless to say, this decision is crucial because it will trigger the prior involvement mechanism. According to the Court of Justice, such a decision should not belong to the European Court of Human Rights because it would cover—by its jurisdiction—interpretation of case law originating at Kirchberg in Luxembourg.[91] The second objection deals with the substance of such procedure. Article 3(6) of the Draft Accession Agreement employs a rather vague term: "[C]ompatibility with the Convention rights at issue of the provision of European Union law." The Draft Explanatory Note provides, however, a clarification. According to the note, the procedure would extend to the interpretation of primary law and the validity of secondary legislation. It is the latter point that raised the objections of both the Advocate General Kokott and the Court of Justice. While the Advocate General was willing to give a green light to the solution at hand—providing a clarification that the procedure would also cover interpretation of secondary legislation[92]—the Court of Justice dismissed outright the proposed arrangement. According to the judges, Article 3(6) of the Draft Accession Agreement—as interpreted in the Explanatory note—is also adversely affecting the competences of the European Union and the Court's powers.[93]

VII. Accession to the ECHR and Common Foreign and Security Policy

One specific argument used by the Court concerns the Common Foreign and Security Policy (CFSP), an area in which it has limited jurisdiction. By stating that "certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice,"[94] the Court of Justice expresses its displeasure with the idea that the ECtHR would be able to rule on the compatibility with the ECHR of "certain acts, actions or omissions performed in the context of the CFSP."[95] The extent to which the Court of Justice has the

[89] Para. 137 of the Opinion.

[90] Para. 241 of the Opinion.

[91] Para. 239 of the Opinion.

[92] Paras. 124-135 of the View of Advocate General Kokott.

[93] Paras. 236-248 of the Opinion.

[94] Para. 252 of the Opinion.

[95] Para. 254 of the Opinion.

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competence to rule on CFSP issues has been widely debated over the years.[96] While there are clear limitations to the Court's jurisdiction, the Court correctly stated it is not the case that CFSP in its entirety would be immune to legal scrutiny.[97] Interestingly, it does not wish to give a final say on the scope of its jurisdiction. In particular, in relation to Article 275 TFEU—allowing for a review of the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty—the Court keeps its options open: "[T]he Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions."[98]

Advocate General Kokott also referred to the issue when she argued that "accession to the ECHR will undoubtedly mean that the EU must respect the fundamental rights protection that stems from the ECHR—and thus also the requirement of effective legal protection in accordance with Articles 6 and 13 ECHR—in all its spheres of activity, including the CFSP."[99] She also raised the key question of whether the legal protection in the CFSP afforded by the EU legal order can be regarded as effective legal protection for the purposes of Articles 6 and 13 of the ECHR. The Commission's view on this is equally interesting:

> It proposes that [Article 275 TFEU] be understood as meaning that the Court of Justice of the EU not only has jurisdiction over actions for annulment brought by individuals against restrictive measures, but it may in addition deal with actions for damages and reply to requests for preliminary rulings from national courts or tribunals in the sphere of the CFSP. It also advocates

[96] See C. Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy', in M. Cremona and A. Thies (eds), *The ECJ and External Relations: Constitutional Challenges*, Oxford: Hart Publishing (2014); R.A. Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?', *European Foreign Affairs Review*, 2015 (forthcoming); S. Griller, 'The Court of Justice and the Common Foreign and Security Policy', in A. Rosas, E. Levits and Y. Bot (Eds), *Court of Justice of the European Union - Cour de Justice de l'Union Européene, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, The Hague: T.M.C. Asser Press (2013) pp. 675-692; G. De Baere and P. Koutrakos, 'The Interactions between the Legislature and the Judiciary in EU External Relations' in P. Syrpis (Ed.), *The Judiciary, the Legislature and the EU Internal* Market, Cambridge: Cambridge University Press (2012), pp. 243-273; L. Saltinyté, 'Jurisdiction of the European Court of Justice over issues relations to the Common Foreign and Security Policy under the Lisbon Treaty', 119 *Jurisprudence* (2010), 261; A. Hinarejos, *Judicial Control in the European Union – Reforming Jurisdiction in the Intergovernmental* Pillars, Oxford: Oxford University Press (2009).

[97] See in particular C. Hillion, 'A Powerless Court?', *op. cit.* n. 96 and R.A. Wessel 'Resisting Legal Facts', *op. cit.* n. 96.

[98] Para. 251 of the Opinion.

[99] Para. 83 of the Opinion.

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> handling the options for the legal protection of individuals in the CFSP in such a way as to cover not only acts, within the meaning of the first paragraph of Article 263 TFEU, which produce binding legal effects, but also mere 'material acts' (Realakte), that is to say, acts without legal effects.[100]

While the Commission may be complemented for its daring view that in certain interpretations the extended jurisdiction of the Court indeed seems to flow from the new EU legal order that emerged after the entry into force of the Lisbon Treaty,[101] Advocate General Kokott is more careful and does not follow the Commission's interpretation. Perhaps even more interestingly, Kokott somewhat cryptically argued:

> [T]he very wide interpretation of the jurisdiction of the Courts of the EU which it proposes is just not necessary for the purpose of ensuring effective legal protection for individuals in the CFSP. This is because the—entirely accurate—assertion that neither the Member States nor the EU institutions can avoid a review of the question whether the measures adopted by them are in conformity with the Treaties as the basic constitutional charter does not necessarily always have to lead to the conclusion that the Courts of the EU have jurisdiction.[102]

The reason is that "national courts or tribunals have, and will retain, jurisdiction."[103] While we do not have reasons to deny this, the fact remains—as acknowledged by the Advocate General Kokott—that it is questionable whether the EU itself can provide effective legal protection in relation to CFSP. At least, the Court argued, "[A]s EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice."[104] And it is this situation that provides the source of the Court's worries. It points to a possibility of not only extending judicial review to CFSP by using the (Strasbourg) back door, but also to the idea of the ECtHR being able to rule on the compatibility with the ECHR of acts in cases where it would itself have no powers. A "non-

[100] Para. 86 of the View of the Advocate General Kokott.

[101] C. Hillion, 'A Powerless Court?', *op. cit.* n. 96 and R.A. Wessel 'Resisting Legal Facts', *op. cit.* n. 96.

[102] Para. 95 of the Opinion.

[103] Para. 96 of the Opinion.

[104] Para. 252 of the Opinion.

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EU body" would, thus, have powers that were consciously left out of the EU Treaties for the CJEU itself. In its opinion, the Court now also aims to prevent other Courts from saying something on possible human rights violations—if I don't have the power, no-one else can have it. It is questionable whether this claim can be made.

The question is whether the choice of the EU Treaty negotiators to maintain a special position for many CFSP norms as far as their judicial review is concerned implies that possible human rights violations in relation to CFSP actions should in general be exempt from judicial scrutiny. Arguably, the reason for the special EU arrangement was to prevent judicial activism in this area of EU competence. Particularly in the early days, the idea was to keep CFSP apart from the "community method" and (certain) Member States were hesitant to allow the Court a position in which it would be able to develop CFSP in unwelcome directions. It is questionable whether the Court of Justice can legitimately claim exclusive jurisdiction in this area. While the Lisbon Treaty may indeed have put the exclusion of the Court in relation to CFSP into perspective, there are still clear shortcomings and allowing the Strasbourg system to fill some of those gaps would have been a welcome improvement. Also for some Member States, it is not at all uncommon to trust the ECHR to play a key role in constitutional protection.[105]

Obviously, another way to get out of this dilemma would be to extend the Court's jurisdiction in relation to CFSP.[106] This would help to address the key "subsidiarity" issue mentioned by the Court: The need for an internal review of a Union act before that act is challenged before the ECHR.[107] While the Lisbon Treaty already led to an (admittedly often implicit) inclusion of CFSP through the stronger connections between the different policy fields,[108] this would nevertheless call for yet another treaty change; one that would perhaps not be acceptable for some Member States once the issue is tabled more explicitly.

[105] In The Netherlands, for instance, both the absence of a constitutional court and the general impossibility of constitutional scrutiny have led the ECHR to fill that gap.

[106] It has even been suggested that "Opinion 2/13 could be seen as a strategic move of the ECJ to provoke such a modification of those unloved provisions of the Treaties that limit its judicial powers;" 'Editorial Comments', 52 CMLRev. (2015), pp. 1-16 at 14.

[107] Admittedly, this point was already mentioned in para. 11 of Discussion Document of the Court, *op.cit.*

[108] See in particular C. Hillion, 'A Powerless Court?', *op.cit.* n. 96.

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C. Does the Court of Justice Take the Fundamental Rights Seriously?

I. Introduction

Having looked at the *Opinion 2/13*, it is fitting to analyze the consequences of the Court's ruling. There is no doubt, *Opinion 2/13* triggers an existential question, *quo vadis*? In the short term, the Court of Justice blocked the accession of the European Union to the ECHR. The Court took a much stronger position than Advocate General Kokott, who recommended that the Court clears the accession subject to a number of conditions being met. The judges opted for a nuclear button instead. *Opinion 2/13*, and the locks laid down therein, are likely to put the Court of Justice on a collision course with the Member States that have invested a lot of efforts into making the accession to the ECHR a reality; not to mention, the other parties to the Convention, who have spent a lot of time and energy debating the special position of the Union. At the same time, it is not surprising to see the Court of Justice once again taking a bold step to protect its exclusive jurisdiction. Through the years it has become a tradition that when a different court appears to be on the horizon, the judges in Luxembourg eliminate the competition in advance.[109] For now, this means that the European Union will most likely ask everyone to come back to the drawing board and to re-open the negotiations of the Draft Accession Agreement. At the same time, the Court of Justice will be given a considerable amount of time to develop further its case law on the Charter of Fundamental Rights. Obviously, this is highly dependent on the direct actions submitted to the Court and the preliminary rulings which come from the national courts. Still however, cases touching upon the Charter are destined to reach the Luxembourg courtrooms sooner rather than later. This, as argued earlier, will allow the Court of Justice to give additional thrust to the Charter, on the one hand, and to prove that it is taking fundamental rights seriously, on the other. Both consequences of *Opinion 2/13* are analyzed in turn.

II. Back to the Drawing Board? Options for Renegotiation of the Draft Accession Agreement

One thing that did not change with *Opinion 2/13* is that the European Union remains under a self-imposed obligation to accede to the ECHR as per Article 6(2) TEU. Since the entry into force of the Lisbon Treaty it is no longer a choice. Obviously, Article 6(2) TEU does not mention a time frame, so theoretically the provision could be ignored for a long time and perhaps even indefinitely. The Commission, as the guardian of the Treaties, would be the one to note the omission, however it would not only need to have the Member States on board, but it would also need to have a clear perspective on a possible way out. At the same time, EU institutions could be sued for a 'failure to act' as per Article 265 TFEU. Again however, while these options are legally interesting, they are most likely politically unrealistic.

[109] See, *inter alia*, P. Gragl, *op. cit.* n. 18 at pp. 31-49.

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While the possibility of solving certain points on the basis of interpretative declarations should not be excluded, it is questionable whether this will suffice to meet the Court's quite fundamental objections. It has been argued by Kuijper that "[i]t is not the text of the Accession Agreement itself that is contrary to the TFEU, but rather the use and the interpretation of the Agreement that the institutions and the Member Sates could make of the Agreement or the gaps that are left in it."[110] On the basis of a number of internal and external declarations and interpretations, a renegotiation could then be avoided. In Kuijper's view these declarations could, for instance, state that the Member States will not avail themselves of their right to go beyond the level of protection required by the ECHR; provided that could put the primacy, unity and effectiveness of EU law in danger. Similarly, disconnection declarations could make clear that in their internal (EU law related) disputes, the EU and its Member States will apply the ECHR in accordance with the Union's internal rules. Finally, in relation to the prior involvement procedure, the Member States could declare that the procedure would be used only exceptionally and under the strictest observance of the requirements of EU law. While Kuijper claims that these types of declarations should constitute sufficient guarantee for the Court, one may wonder whether this is the case, given the quite fundamental nature of some of the Court's objections. In a way, elements of these solutions were also present in the View of the Advocate General Kokott, which obviously did not convince the Court. At the same time, it is questionable whether for instance disconnection declarations would be acceptable to the non-EU parties to the Convention. Such declarations hint at the application of different standards for a selected group of states, and also imply the supremacy of internal "domestic" law—something that is again contrary to the rationale of the ECHR.

If one looks at Article 218(11) TFEU, on which the Opinion is based, the options are twofold. First, the EU may request re-negotiation of the Draft Accession Agreement. Second, it may change the Founding Treaties to accommodate the negotiated text. The latter option was considered, *inter alia*, by Besselink, who proposed to draft a "Notwithstanding Protocol."[111] According to Besselink the following text would be advisable: "'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and *Opinion 2/13* of the Court of Justice of 18 December 2014." Although it is an interesting proposition, it is argued that modifying Article 6 TEU, in order to sideline the Court's Opinion, may not be the best step forward in cases like these. Especially when one takes into account the somewhat reduced appetite among the Member States for further

[110] P.J. Kuijper, 'Reaction to Leonard Besselink's ACELG Blog', *op. cit.* n. 81.

[111] L. Besselink, 'Acceding to the ECHR Notwithstanding the Court of Justice Opinion 2/13', 24 December 2014; http://acelg.blogactiv.eu/2014/12/24/acceding-to-the-echr-notwithstanding-the-court-of-justice-opinion-213/

Treaty revisions. All in all, this option, although intellectually sound and tempting, in reality may turn into a political fantasy.

A more limited modification would be to change Protocol No 8 as to allow for accession despite the Court's limited jurisdiction in relation to CFSP. One could argue that this should not meet any resistance on the side of the Member States because they already agreed that the Draft Accession Agreement was compatible with the ECHR. This would certainly not make the Court happy, but as *Herren der Verträge*, the Member States' wishes are in the end decisive. While it has been argued that the CFSP issue would be the most difficult issue to overcome,[112] the current political climate in Europe does not at all guarantee a speedy treaty modification. Also, it may be difficult to isolate this issue from other ones on the table.

The only way forward seems to be a return to the drawing board and to renegotiate the Draft Accession Agreement.[113] Judging by the experience thus far, it will be a rather tortuous exercise that is likely to take time. It will provide the Court of Justice a chance to continue building its line of case law based on the Charter of Fundamental Rights and, in the long run, minimize the direct impact of the Strasbourg Court on EU law. No doubt, opening the agreed text of the Draft Accession Agreement for further negotiation will not be welcomed by some the Member States, as well as by several non-EU parties to the ECHR. One need only be reminded of, for instance, the reaction by the Russian delegation when a number of EU Member States suggested to reopen negotiations because they could not live with an earlier draft:

> Now, because of the internal problems of the EU, we have received amendments from our European Union colleagues. We are going to study them with great care. But the fact is these amendments reopen the agreed draft. Therefore, we will look at the EU proposals having in mind that we will also have the right to present our own amendments to the draft that was agreed by the CDDH Working Group, as well as to the documents circulated by the EU. We assume that our possible proposals will have the same status as the draft amendments proposed by the EU. We hope as well that future negotiations will really be negotiations between 47 individual member States and the

[112] 'Editorial Comments', 52 CMLRev. (2015), *op.cit.*, n. 106, at 12.

[113] Cf. also T. Lock, 'Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR', *Verfassungsblog on Matters Constitutional*, 18 December 2014; http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#.VK-e08bivs4.

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> European Commission and not between a 'European Union block' and those who are not members of the European Union.[114]

One way out of this could be to use the possibility of reservations mentioned in Article 57 ECHR:

> Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

It is particularly the latter sentence that may cause problems in this regard. While it may, for instance, be tempting to exclude CFSP from the ECtHR's jurisdiction, by including it in a reservation, this would be seen as too general of an exception.[115]

For many Member States the opinion of the Court was not a welcome development. Though, for some Member States, in particular the UK, the opinion may have led to a sigh of relief. [116] At the same time, for the negotiators, particularly those from the European Commission, setting a new negotiation agenda will be the first challenge to be addressed. It goes without saying that finding a balanced compromise will inevitably pose certain difficulties. One key question remains: How to satisfy the Court's demands without undermining the *raison d'être* behind accession? In the end, this will not only be a question on the EU side, but also for the ECtHR, which will no doubt have thoughts on whether the amendments are still in line with the Convention.[117]

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[114] See the Report on the 75th meeting of the Steering Committee for Human Rights (CDDH) of he Council of Europe, Doc. 47+1(2012)002, 4 July 2012: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working_documents/47_1%282012%2902_Extracts_CDDH_Report_EN.pdf.

[115] See also S. Peers, *op. cit.* n. 31; as well as 'Editorial Comments', 52 CMLRev. (2015) *op.cit.* n. 106, at 14.

[116] See for instance the plans made public by the UK's Justice Minister to pull the United Kingdom out of the European Court of Human Rights; http://www.telegraph.co.uk/news/politics/conservative/11137442/Tory-plan-to-leave-ECHR-contains-howlers-and-is-factually-inaccurate-says-partys-ex-Attorney-General.html

[117] See in that regard also the procedure in Article 47 ECHR on the basis of which the Court may give an advisory opinion on the interpretation of the Convention or its protocols, and – arguably – on modifications of the Convention.

III. Charter of Fundamental Rights

One of the consequences of *Opinion 2/13* is that for the foreseeable future the Charter of Fundamental Rights formally remains the EU's only bill of rights. Its presence is evident throughout the opinion, particularly in the general section that opens up the analysis proper. In a symbolic move the judges seem to have elevated the Charter in their discourse as if they were aiming to prove that the Court of Justice takes fundamental rights seriously, and that adequate guarantees are provided within the Charter as well as in general principles of EU law—as per Article 6 TEU. When the Charter entered into force on 1 December 2009 it was to a fair degree *terra incognita*. Back then, as D. Sarmiento puts it, "the prospects of a revolutionary impact in EU law were far from clear".[118] It is unquestionable that the Court of Justice has gone a long way from a mere *en passant* reference in Case C-555/07 *Seda Kücükdeveci*[119] to, what some may call, shooting from the hip as in Cases C-399/11 *Melloni*[120] and C-617/10 *Fransson.*[121] Undoubtedly, the Charter is now a persuasive source of rights that EU judicial institutions are ready to invoke.[122] It merits attention that a great majority of judgments dealing with the Charter are preliminary rulings submitted to the Court of Justice by domestic courts. The Charter has also been invoked in actions for annulment;[123] furthermore it has already served as a yardstick for review of legality under article 267 TFEU.[124] However, the European Commission has been quite reluctant to invoke the Charter in infraction proceedings based on Articles 258 and 260 TFEU. As argued by one of the present authors elsewhere, this trepidation is not accidental, but rather a well thought policy choice which takes into account the lack of clarity stemming from Article 51 which regulates the scope of application of the Charter.[125] It is yet to be seen how the clarification provided in the already mentioned case C-617/10 *Fransson* will make a difference in this respect.

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[118] D. Sarmiento, *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, 50 CMLRev. (2013) 1267, at 1269.

[119] Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21.

[120] Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

[121] See, *inter alia*, Sara Iglesias Sánchez, *The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights,* 49 CMLRev. (2012) 1565.

[122] See, *inter alia*, D. Anderson, C.C.Murphy "The Charter of Fundamental Rights", in A. Biondi, P. Eeckhout, S. Ripley (eds) "EU Law after Lisbon", Oxford 2012, p. 155.

[123] Case C-583/11P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, ECLI:EU:C:2013:625.

[124] See, *inter alia*, Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres,* ECLI:EU:C:2011:100, C-291/12, *Michael Schwarz v Stadt Bochum,* ECLI:EU:C:2013:670.

[125] See further, *inter alia*, A. Łazowski, *Decoding a Legal Enigma: the Charter of Fundamental Rights of the European Union and Infringement Proceedings*, 14(4) ERA Forum (2013) 573.

Arguably, the coming years will allow the Court of Justice to explore the Charter and its potential even further. To venture into fortune telling would exceed the limits of this article, therefore we will limit ourselves to a few issues that are most likely to reach the Court of Justice. To start with, one should expect further clarification on the scope of application of the Charter. Article 51 makes it clear that it is binding on EU institutions, but on the Member States "only when they are implementing Union law." As already alluded to, the latter phrase is rather ambiguous and in case C-617/10 *Fransson,* the Court of Justice clarified it as follows:

> Since the fundamental rights guaranteed by the Charter must […] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[126]

Although this conclusion was controversial and the application of the Charter to the case at hand went against the will of the Member States, it did send, together with message in case *Melloni*, an important signal to the legal community and EU citizens alike. The Court of Justice was willing to apply the Charter of Fundamental Rights extensively and to use its potential as primary law to the full extent.[127] Arguably, it seized the opportunity to start building a wall of case law based on the Charter before the European Union accedes to the ECHR. Looked at from this perspective, *Opinion 2/13* is undoubtedly an important element in this jigsaw puzzle. As already mentioned, in the most recent jurisprudence, including *Opinion 2/13*, the Court of Justice returned to the notion of "implementing EU law". It is questionable if this is in reaction to the criticism that followed the ruling in *Fransson,* or perhaps the Court did not pay much attention to the matter in hand.

The Charter of Fundamental Rights still remains a bit of enigma when it comes to its enforcement in national courts. Although in *Melloni,* the Court of Justice extended the doctrine of primacy to the Charter. It is yet to be seen if other tenets of EU law are applicable, as well. This includes the well-established doctrines of direct and indirect

[126] Para. 21.

[127] See further E. Hancox *The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson*, 50 CMLRev. (2013) 1411.

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effect[128] as well as state liability.[129] The Court of Justice is also likely to be asked to focus on the substance of rights guaranteed by the Charter of Fundamental Rights. The time gained by the rejection of the accession to the ECHR definitely increases the chances in this respect. One should note, although, that while some of those rights may reach the Court, some are very unlikely to do so. As far as the former are concerned, one should not be surprised to see future cases, particularly references for preliminary ruling dealing with the social rights regulated in the Charter. Furthermore, Article 47 of the Charter, which guarantees effective judicial protection, may reach the Luxembourg courtrooms.[130] For the latter, Article 45 of the Charter is a questionable provision the Court of Justice is going to be troubled with. Because the free movement of persons is thoroughly regulated in the TFEU and in EU secondary legislation, the value added by this provision is dubious, to say the least.[131]

D. Conclusion

Opinion 2/13 is without a shadow of the doubt one of the most important rulings of the Court of Justice, certainly not one of the evanescent ones. It has already triggered a heated debate and it is likely to continue to do so in the years to come. In simple terms, the judges in Luxembourg blocked the accession of the European Union to the ECHR at least for a number of years. They set their conditions out rather clearly but the question that remains is if such guarantees are negotiable to the Court's satisfaction. As argued in this article, to achieve a consensus with non-EU countries which are parties to the ECHR appears, at least *prima facie*, to be a potentially uphill struggle. For instance, the current political climate in EU relations with Russia or Turkey is not favorable by any stretch of imagination. Hence, to engage both countries in negotiations of nitty-gritty technicalities may not be the best idea. It boils down to a more general question of whether the demands made by the Court of Justice are a "ransom" worth paying for. Arguably, the caveats laid down by the drafters of the Treaty of Lisbon have been turned into locks, or, to put it differently, they are *conditio sine qua non* for future approval of the revised Accession Agreement.

The arguments made by the Court are so fundamental that one wonders if the negotiators saw it coming. Ensuring that the EU would be subject to external norms on fundamental

[128] See Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2. For an academic appraisal see, *inter alia*, Ni. Lazzerini, *(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS*, 51 CMLRev. (2014) 907.

[129] See A. Ward, *Damages under the EU Charter of Fundamental Rights*, 12 ERA Forum (2012) 589.

[130] See, *inter alia*, M. Safjan and D. Düsterhaus, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, 33 YEL (2014) 3.

[131] E. Spaventa, *Article 45*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, CH Beck-Hart-Nomos, Oxford and Portland, Oregon, 2014, pp. 1161-1176.

rights was the whole purpose of joining the Strasbourg system, and it is inconceivable to think that only now that the Court seems to realize the impact. As we have seen, the Presidents of the two courts have issued joint statements; and they have no doubt addressed the issues during their regular (at least bi-annual) judicial dialogues.[132] Furthermore, a representative of the Court of Justice was present during the discussions on the negotiations, in the capacity of an observer.[133] At the same time the Registrar and Deputy Registrar of the ECHR participated in the negotiating group.[134] One may assume that most of the issues raised by the Court of Justice in its opinion have at some stage been part of the debates. Yet, it is indeed also a mater of interpretation. After all, not only the European Commission in presenting its views, but also the Advocate General Kokott, came to different conclusions on the basis of the same facts.

Against this background and given the interpretative margins, our conclusion is that the Court had a choice. Instead of turning to its natural risk-averse strategy, it could have started by trusting not only the Strasbourg system, the case law of which has already largely influenced EU law, but also the Member States, which by now have been trained to understand the nature of both EU law and the connected jurisdiction of the Court. Accepting an—indeed somewhat—subordinate role the Court could have sent a message that it has itself so often sent to its own Member States: Be willing to accept an interpretation of your domestic law in the light of overarching fundamental principles.[135] Except, in a way the Court held on to the view it presented in Opinion 1/91 (EEA) and Opinion 1/09 (European Patent Court).[136] It is not that the Court is not willing to submit itself to an external court, it simply does not allow that court to affect the exclusive jurisdiction of the CJEU to decide on internal disputes or to have the competence to interpret EU law.

Finally, will it make sense to try and "unlock" the situation? Arguably it does.[137]

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[132] See on the judicial dialogue L.F.M. Besselink, 'Should the European Union Ratify the European Convention on Human Rights?', *op.cit.* n. 70. An interesting (yet admittedly hardly relevant) quote in that article is worth mentioning here: "As one former judge of the ECtHR once remarked, the judges from Luxembourg each travel with their individual car and driver provided by the ECJ; the judges from Strasbourg go by bus." (at 306).

[133] "On 7 January 2010, the Permanent Representatives Committee, approved the participation, as an observer, of a delegate from the Court of Justice of the European Union in the meetings of the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons, throughout the duration of the discussions on the draft recommendation for the opening of the negotiations for the accession of the European Union to the European Convention on Human Rights, on the basis of document 17807/09 JAI 948 INST 255."

[134] Ibid, at 318.

[135] As argued by S. Peers: "the Court is seeking to protect the basic elements of EU law by disregarding the fundamental values upon which the Union was founded." See S. Peers, *op. cit.* n. 31.

[136] See references in section A of this article.

[137] Cf. also M. Kuijer, *The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or*

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Irrespective of the further (and important) developments and use of the Charter of Fundamental Rights, the accession of the EU to the ECHR will have a number of important implications. First, in the light of the continuing transfer of competences rights of individuals will be better guaranteed when the acts of the EU Institutions are subject to the same scrutiny as the acts of Member States' organs. Second, the current state of constitutional development of the EU legal order not only allows for, but perhaps even demands, external scrutiny. The EU should be self-confident enough to accept external checks and balances, and—more importantly—accept criticism in the case where things are not up to standards. Third, accession will contribute to more uniformity in the rights that are to be respected by all actors involved and will prevent the CJEU and the ECtHR to develop diverging interpretations on the same or similar provisions. Fourth, a continued protection of its own jurisdiction by the CJEU in this area may trigger domestic Constitutional Courts to do the same.[138] Finally, with further development of the Union's external action, fundamental rights are in need of protection when they are related to CFSP.[139] It is one thing to prevent judicial activism in that area; it is quite another thing to deliberately leave gaps in the protection of fundamental rights.

an Unwelcome Intruder at the Party?, 3 Amsterdam Law Forum (2011), 17, 20–21; as well as 'Editorial Comments', 52 CMLRev. (2015), *op.cit.* n. 106, at 3-4.

[138] In a similar vein: 'Editorial Comments',52 CMLRev. (2015), *op.cit.* n. 106 at 15.

[139] Cf. also P. Gragl, *A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights*, 51 CMLRev. (2014), 13-58.

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