ACCESSION OF THE EUROPEAN UNION TO THE ECHR

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ABSTRACT[675]

Based on a universal understanding of the importance of fundamental human rights and the protection thereof, activists, academics and legal professionals alike have often pondered whether the European Union should accede to the European Convention of Human Rights. It is argued that accession would serve to ensure the protection and respect of these fundamental rights for and by all, yet numerous obstacles have halted the accomplishment of this ideal.

This paper delves into these obstacles by primarily focusing on principles emerging from the case law of the Court of Justice of the European Union, as well as the European Court of Human Rights. It then proceeds to discuss Opinion 2/13 of the Court of Justice of the European Union and looks through the crystal ball to consider the consequences of this Opinion. It concludes by questioning whether accession under the terms posed by the Court of Justice of the European Union would indeed be beneficial for the protection of fundamental human rights in Europe.

KEYWORDS: HUMAN RIGHTS – EUROPEAN UNION – COUNCIL OF EUROPE – ECHR – OPINION 2/13

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Discussions relating to the role of fundamental human rights within the European Union (Hereinafter referred to as 'EU') are far from new. Although the founding treaties of the Union contained no specific provisions on the protection of fundamental rights, due to the prevailing focus, at the time, on the creation of a common market, in the decades following its inception a clear need to protect human rights within this steadily expanding new legal order emerged. This led the Court of Justice of the European Union (Hereinafter referred to as 'CJEU') to start developing a line of jurisprudence on human rights issues. The first reference to human rights related matters by the CJEU was made in 1969 in ***Stauder***.[676] Moreover, in order to strengthen the protection of fundamental human rights within Europe in general and the EU specifically, the idea of the EU's accession to the European Convention on Human Rights (Hereinafter referred to as the 'ECHR') emerged in 1979 when the European Commission issued a Memorandum and officially recommended formal accession.

A considerable amount of time and political prestige has been invested in the accession of the EU to the ECHR, by both the EU and the Council of Europe. This paper seeks to shed light on the *status quo* of the EU vis-à-vis its accession to the ECHR, particularly in the light of developments which have taken place in this regard since the question of accession was first brought to the table by the European Commission.

1. The Origin of the Debate and the Apparent Lacunae in the Protection of Fundamental Human Rights

An analysis of early judgments of the CJEU reveals that the Court refused to exercise judicial review over human rights standards as these could not, at the time, be inferred from Community Law. This is exemplified in ***Geitling vs. High Authority,***[677] wherein it was stated by the CJEU that: 'Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.'[678]

The CJEU's approach changed in time with the increase of competences transferred by the Member States to the EU. An important milestone was

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676 Case 29-69 *Erich Stauder vs. City of Ulm – Sozialamt* [1969] ECR 1969 - 00419.

677 Case 37/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH vs. High Authority of the European Coal and Steel Community* [1960] ECR 1960 - 00423.

678 ibid 439.

reached in the ***Nold II*** judgment,[679] where the Court held that: 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures.'[680]

In its determination of the scope of these fundamental rights, the Court referred to the domestic law of the Member States as well as to international treaties, and notably, explicitly referred to the ECHR.[681] This showcased the CJEU's acceptance of the ECHR and of the principles contained therein. In time, this formalised judicial acknowledgement of the ECHR's norms has prompted the drafters of the Treaty of the European Union (Hereinafter referred to as 'TEU') to expressly stipulate that fundamental rights, as guaranteed by the ECHR, constitute a part of EU law as general principles.[682] This is in turn mirrored within the text of the Charter of Fundamental Rights of the European Union (Hereinafter referred to as the 'Charter') which states that without prejudice to the possibility of more extensive protection, insofar as the Charter corresponds to the rights under the ECHR, the meaning and scope of those rights shall be the same.[683]

Notwithstanding the existent acknowledgements of human rights norms in various European laws and judicial pronouncements, the passage of time has brought to the fore lacunae in human rights protections within Europe. Given the fact that the EU is not a signatory to the ECHR, it cannot at present be held accountable for human rights violations under the ECHR.

This problem is illustrated in ***Confederation Française Démocratique du Travail***.[684] The case was declared inadmissible *ratione personae*, as applications brought against the Council of the European Communities fall outside the European Commission of Human Rights' competence.

This gap in European human rights protection has led scholars to claim that EU acts enjoy some kind of 'immunity from the convention'.[685] Indeed, EU institutions are not subject to an external and independent review by the European Court of Human Rights (Hereinafter referred to as 'ECtHR') whilst Member States that are both members of the Council of Europe and of the EU

679 Case 4/73 J. Nold v Commission of the European Communities [1974] ECR 1974 - 00471.
680 ibid para. 13.
681 ibid para. 12.
682 Treaty on European Union (Maastricht Treaty) art 6 (3).
683 Charter of Fundamental Rights of the European Union [2000], OJ C 364/01, art 52 (3).
684 *Confederation Francaise Democratique du Travail vs. The European Communities* (1978) App no 8030/77 [Commission Decision,10 July 1978].
685 Ioanna Kosmidou, 'The Accession of the European Union to the European Convention on Human Rights: Accountability for Human Rights Violations before and after the Accession' (MA in Human Rights, Central European University 2012) <http://www.etd.ceu.hu/2013/kosmidou_ioanna.pdf> accessed 27 November 2016.

remain liable to the ECtHR to ensure that their human rights obligations, as signatories to the ECHR, are continuously met.

The European Commission of Human Rights first attempted to address this issue in ***X vs. Germany,***[686] where the Commission conveyed the message that obligations undertaken by a State under the ECHR cannot be undermined by other international agreements.[687] It stated that even if a State is unable to perform its obligations due to other international agreements, it will nevertheless be answerable for any resulting breach under the ECHR.[688]

Moreover, in ***M & Co vs. the Federal Republic of Germany,***[689] the European Commission of Human Rights reiterated that,

> [A] transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character[690]

The European Commission of Human Rights also pointed out that the ECHR, as an instrument for the protection of the fundamental rights of individual human beings, requires an interpretation and application of its provisions that renders its safeguards both practical and effective. Most importantly, the Commission stated that the transfer of powers to an international organisation is not incompatible with the ECHR provided that within that organisation fundamental rights receive an equivalent protection.[691]

The relationship between the judges of the CJEU and ECtHR is one of mutual respect, however, the EU's absence from the ECHR has inevitably led to certain inconsistencies in the case law of the two Courts. Instances of differing interpretations of human rights norms have been scarce, yet are nevertheless significant as they exemplify a different standard of protection. One illustration

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686 *X vs. Germany* (1958) App no 235/56 [Commission Decision, 10 June 1958].

687 The European Commission of Human Rights was a special tribunal of the ECHR, whose mandate to determine whether individuals' cases were well-founded, and to pursue a case before the ECtHR on behalf of the individual if the case indeed is well-founded, continued in force until the coming into force of Protocol 11 of the ECHR in 1998 which allowed individuals to apply directly to the Court.

688 European Court of Human Rights, Press Unit, Factsheet – Case-law concerning the EU [July 2015] <http://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf> accessed 30 October 2015.

689 *M & Co vs. the Federal Republic of Germany* (1990) App no 13258/87 [Commission Decision, 9 February 1990].

690 ibid.

691 ibid.

of such an occurrence can be seen in the judgments of ***Hoechst***,[692] and ***Niemietz***,[693] which centred on the right to private and domestic life as protected under Article 8 of the ECHR. Whilst the CJEU in ***Hoechst*** decided that this Article should be interpreted as excluding activities of a professional or business nature, the opposite approach was taken by the ECtHR in ***Niemietz***.

Furthermore, ***Matthews vs. United Kingdom*** illustrates an instance where the ECtHR found that EU law did not provide equivalent protection with the ECHR concerning the right to participate in the elections for the European Parliament.[694] In this case the UK was condemned for something decided at European Community level. It is important to note that since the violation had its source in primary EU law, the UK alone could not in principle decide to comply with the judgment of the ECtHR.[695] For this reason, this case brings to the fore the potential problems arising from the absence of direct accountability of EU institutions to the ECtHR.

The doctrine of equivalent protection was further elaborated in ***Bosphorus vs. Ireland***.[696] In ***Bosphorus***, the ECtHR held that the protection given by the EU is equivalent to that of the ECHR and specified that *'equivalent'* should be interpreted as meaning *'comparable'*, not *'identical'*.[697] The position taken by the Court means that a Member State can in principle presume that it is not breaching the ECHR by fulfilling its international obligations, provided the international organisation itself ensured adequate protection of human rights.[698] In exceptional cases, where the protection is manifestly deficient, this presumption can be rebutted.[699]

This doctrine was created in the framework of international co-operation between the two Courts and represents the most important contribution of the ECtHR towards the maintenance of legal certainty and harmony with CJEU jurisprudence by taking a default position that the EU's protection of human

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692 Joined cases 46/87 and 227/88 *Hoechst AG vs. Commission of the European Communities* [1989].

693 *Niemietz vs. Germany* (1992) App no. 13710/88 (ECHR, 16 December 1992).

694 *Matthews vs. United Kingdom* (1999) App no. 24833/94 (ECHR, 18 February 1999).

695 Olivier De Schutter, 'Accession of the European Union to the European Convention on Human Rights' (2007) <http://www.statewatch.org/news/2007/sep/decchutte-contributin-eu-echr.pdf> accessed 23 October 2015.

696 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi vs. Ireland* (2005) App no. 45036/98 (ECHR, 30 June 2005).

697 ibid para. 155.

698 Martin Kuijer, 'The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?' [2011] 3 Amsterdam Law Forum 17, 17-32.

699 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2005) App no. 45036/98 (ECHR, 30 June 2005) para. 156.

rights is equivalent to that of the ECHR.[700] It must be noted that the doctrine of equivalent protection as it stands today serves to avoid holding a state accountable for following a rule created by an International organisation, even without the consent of the specific state and also to avoid reviewing EU law. Accordingly, the doctrine is not to be applied in cases where the Member State has a large margin of discretion regarding the implementation of EU law.

The doctrine can be criticized as shielding EU law from ECtHR scrutiny. Indeed, this presumption of equivalence, that is rebuttable only by a manifestly deficient protection of rights, only considers an abstract review of the circumstances of the case. As a group of concurring judges pointed out in ***Bosphorus***,[701] this was 'in marked contrast to the supervision generally carried out by the ECHR'.[702] Moreover, it is important to note that through this doctrine the ECtHR does not take into consideration the fact that the access of individuals to the CJEU is limited. Individuals are characterised as non-privileged applicants by the CJEU and must thereby satisfy strict criteria in order to challenge EU measures. Additionally, CJEU decisions are not scrutinised by any other independent body thus adding to the feeling that the EU is immune. In accordance with the ***Plaumann*** test (which has been criticized as overly restrictive and challenged without success), in order for an individual to be able to have *locus standi* in front of the CJEU he must have a direct and individual concern. This means that applicants must be affected by the measure by: 'reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'[703]

This makes it very difficult for individuals who wish to challenge EU measures of general application to be awarded *locus standi*. In fact, Craig and De Burca state that the Plaumann test has made it impossible for an applicant to succeed in obtaining standing before the CJEU, except in very limited cases.[704]

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700 Viktoria Tsvetanova, 'The EU's Accession to the ECHR: The Courts' Relationship Prior to Accession' (2014) <http://www.gulawreview.org/entries/eu/the-eu%E2%80%99s-accession-to-the-echr-the-courts%E2%80%99-relationship-prior-to-accession> accessed 23 October 2015.

701 Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki.

702 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi vs. Ireland* (2005) App no. 45036/98 (ECHR, 30 June 2005)., Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para 4.

703 Case 25-62 *Plaumann & Co. vs. Commission of the European Economic Community* [1963] ECR 1963 - 00253.

704 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 494-496.

These lacunae are evident and it is for this reason that the discussion on the EU's accession to the ECHR is not a new one – it was first proposed over thirty-five years ago by the European Commission in 1979.[705] Many obstacles have nonetheless stood in the way of accession. One such obstacle was Opinion 2/94. On the 30 November 1994, the Council decided to seek the advice of the CJEU regarding the issue of accession. However, in Opinion 2/94 the CJEU observed that accession was impossible in the light of Community law as it existed at the time, since there was no firm legal basis for it: 'as Community law now stands, the Community has no competence to accede to the Convention.' [706]

The matter resurfaced in 2002 when President of the Court M. Gil Carlos Rodriguez Iglesias declared himself to be personally in favour of accession and observed that accession would: 'reinforce the uniformity of the system for the protection of fundamental rights in Europe.'[707]

This can be seen to have led to the obligation of the EU to accede to the ECHR as drafted in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

2. A New Era for the EU after the Treaty of Lisbon

There can be no doubt that today, close to six years after the coming into force of Europe's new treaty framework, the Treaty of Lisbon has fundamentally amended the character of the EU, albeit not without having first trudged through lengthy political hurdles until reaching its final form. Among the significant changes brought about by the Treaty of Lisbon, a string of new provisions that on the face of it enhance human rights protection in the EU can be traced. Accession to the ECtHR has been rendered more feasible than ever.

The term *'Community'* was replaced by *'Union'* throughout the treaty texts, and the treaty now makes the EU one single legal entity at international law. In addition, the Treaty of Lisbon notably incorporated the Charter as EU primary law, thereby resolving an issue that had been left unanswered since the Charter was first drafted and published in the Official Journal of the European Communities in 2000.[708] The politico-legal consequences of the Lisbon

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[705] Bulletin of the European Communities, Supplement 2/79, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM (79) 210 final, 2 May 1979.

[706] Court of Justice, Opinion 2/94 (28 March 1996), para 39.

[707] Address given by Gil Carlos Rodríguez Iglesias (31 January 2002) <http://www.cvce.eu/content/publication/2003/9/23/c201f6b4-21c4-408b-9a72-3b083048d5ec/publishable_en.pdf> accessed 30 October 2015.

[708] Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

developments in relation to human rights throughout the EU polity are several, and shall be analysed with due care in this article.

Article 6 of the TEU has a tripartite structure. Firstly, the text recognises the principles contained within the Charter and gives it binding force, which had since its proclamation in 2000 been overshadowed by an 'apparent lack of importance'.[709] The Treaty of Lisbon does not itself incorporate the Charter, however, it accords the Charter with a legal standing that is on par with that of the treaties. In a separate Declaration annexed to the Treaty of Lisbon,[710] Member States have additionally reiterated that the Charter does not broaden the scope of EU law beyond the powers already conferred to the EU, nor does it establish any new task or prerogative other than those in the Treaties. The deliberate decision to exclude the Charter from being a part of the Treaty fabric itself, however, demonstrated a conscious reluctance to endow the Charter with a constitutional status,[711] regardless of the fact that it has been accorded the same legal value as the treaties, and hence any political adviser or legal draftsman would necessarily be bound to bear due attention to the Charter text in the EU law-making process or in considering the legality of national law that implements EU law.[712]

In the post-Lisbon years, it has become notable that the CJEU increasingly chooses to refer to the Charter in pronounced judgements, to the detriment of mention of human rights protection as arising in the context of the ECHR.[713] This observation is itself supported by an analysis of all cases decided by the CJEU since the Charter became binding until the end of 2012 carried out by Gráinne de Búrca,[714] in which she presented figures demonstrating that in the 122 cases in which the Charter was referred to, only 18 of these cross-referred to the ECHR.

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709 Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' [2011] 11 HRLR 650.

710 Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Declaration concerning the Charter of Fundamental Rights of the European Union, (13 December 2007).

711 Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

712 Paul Craig, *The Lisbon Treaty: Law Politics, and Treaty Reform* (OUP 2010) 200.

713 Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

714 Gráinne De Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' [2013] Maastricht JI European and Comparative Law, 168 <http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0168.pdf> accessed 30 October 2015.

The implications of this is a pattern of divergence and autonomy between the EU human rights protection regime as opposed to the protection regimes derived from other human rights instruments, not least the ECHR. This is a reflection that confirms the findings of the CJEU in the ***Kadi*** ruling, wherein it was held that,

> the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.[715]

Further observation may be drawn with respect to the fact that the EU's role over human rights remains somewhat ambivalent, in that the EU's competence over human rights is at present solely limited to oversight of actions undertaken by EU institutions, and to Member States in certain circumstances.[716] Arguably, ensuring EU competence in the field of human rights protection is acquiring more pressing importance than ever before. The EU's competence 'creeps' further with every treaty extension, from its inception under the European Coal and Steel Community having competence to facilitate inter-state trade in coal and steel, to the EU as we know it today having undergone a functional spill-over allowing it to legislate not only in relation to trade and the internal market, but also in various matters ranging from environmental and fisheries policies, to data protection and citizen privacy, to toy safety and consumer rights standards.

Accession of the EU to the ECHR is envisaged in the Treaty of Lisbon where the chosen wording foresees an EU that has become a fully-fledged member of the ECHR in the very manner in which the treaty-drafters selectively utilised the imperative 'the Union shall accede'. The chosen wording in the second part of the Treaty of Lisbon's Article 6 thus evidently goes beyond providing a mere legal basis for accession, but inherently implies that a failure to proceed with accession would constitute a breach of the treaty.

3. Measures Taken to Enable the EU to Accede to the ECHR

The Fourteenth Protocol to the ECHR, which entered into force on 1 June 2010, just over six years after it was opened for ratification by Member States, arriving

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715 Case C-402/05 *Yassin Abdullah Kadi et. vs. Council of the European Union* [2008] ECR I-06351, paras. 298-299.

716 Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

at the culmination of a lengthy process of deliberation aimed at reforming the Convention system by preserving its long-term effectiveness through mechanisms that will seek to alleviate the current backlog of applications to the Court, and to pre-empt the foreseen increased caseload should the EU eventually accede to the ECHR. Most crucially, it paved the way for EU accession to the ECHR, by amending Article 59 to state that, 'The European Union may accede to this Convention'.[717]

The process of accession of the EU, according to the text of the Treaty of Lisbon, entails the carrying out of a highly technical and complex procedure, under Article 218 of the Treaty on the Functioning of the European Union (Hereinafter referred to as the 'TFEU'), that governs all EU agreements with third countries and international agreements. In order for the EU to conclude such an agreement, this Article mandates the unanimity of the Council of Ministers, the consent of the European Parliament through a qualified majority vote of two thirds, and the subsequent ratification in all EU and Council of Europe Member States. In the light of this contextual background, in April 2013 a draft and revised accession agreement (Hereinafter referred to as the 'DAA') was signed on behalf of the Council of Europe and the European Commission.[718] This agreement was reached despite initial reservations from some Member States on the particular terms of the EU's participation within the ECHR and has been described as an 'achievement'.[719]

Possibly the most significant innovation in the DAA is the introduction of the co-respondent mechanism. The intended purpose of this mechanism is to aid in the determination of which particular Member State or other body is to be held responsible in the ECtHR for a human rights violation in the context of EU law. Thus, allowing for the joint participation of the EU and of the EU Member State or States concerned in the alleged breach. Inclusion of such a provision is a logical solution where the majority of EU legislation is implemented by the Member States themselves, yet simultaneously Member States may or may not, in specific circumstances, be able to exercise discretion as to how a law is to be

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[717] The Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 14, art 17.

[718] Fifth Negotiation Meeting Between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, 'Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (10 June 2013), <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf> accessed 30 October 2015.

[719] Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

implemented and the problematic rule may originate from the EU measure. On the other hand, a possible breach may arise from the Treaties themselves, which owing to their very nature as primary law of the EU cannot be easily amended following a finding of a human rights breach without the unanimous consent of the Member States. The determination of the appropriate respondent has proved to be a controversial point,[720] and a key question to be answered after having been raised in Article 1(b) of Protocol No. 8 to the Treaty of Lisbon which requires the accession agreement to make provision: 'in particular with regard to: [...] 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."

The provisions within the DAA that set out to deal with this concern do so by stipulating that a 'High Contracting Party shall become a co-respondent only at its own request and by decision of the Court',[721] and where an application is directed against one or more Member States of the Union, the EU may itself become a co-respondent where the allegation calls into question the compatibility of a provision of EU law with the ECHR. In the case of allegations relating to the Treaties or of any other provision having the same legal value as the Treaty instruments, the DAA further provides that the EU Member States may all become co-respondents.[722] As amendments cannot be carried out to the Treaties by the EU institutions acting alone, Member State involvement is required *ad necessitatem.*

Under EU law, the CJEU has historically only had very limited jurisdiction to review Common Foreign and Security Policy (Hereinafter referred to as 'CFSP') acts, and even after the enactment of the Treaty of Lisbon, the competence of the EU itself to legislate in this field remains limited and subject to special rules and specific procedures.[723] Judicial actions undertaken pursuant to Article 275 TFEU do not apply with respect to CFSP. This is subject to two exceptions in relation to the delimitation of EU competences and the CFSP, and where actions for annulment are brought against decisions providing for restrictive measures against natural or legal persons adopted by the Council in connection with, for instance, terroristic acts. However, while the CJEU has declared that certain acts adopted in the context of the CFSP fall outside the ambit of judicial review

720 Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 HRLR 664.

721 Fifth Negotiation Meeting Between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, 'Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (10 June 2013), art 3(2).

722 ibid art 3(3).

723 Bríd Moriarty and Eva Massa, *Human Rights Law* (4th edn, OUP 2012) 173.

allowed to the Court under EU law, it has never clearly defined the extent to which its jurisdiction is limited in CFSP matters.[724]

Human rights breaches unfortunately occur in foreign policy operations, ranging from violations of the right to life, to arbitrary detention, and to human trafficking by foreign forces. It is generally recognised that CFSP acts themselves are not immune to possibly breaching human rights protection enshrined within the ECHR, and it is for this reason that the DAA includes rules to allow for the review of: 'acts, measures, or omissions, regardless of the context in which they occur, and including with regard to matters relating to the EU CFSP'.[725]

Other points of contention requiring some measure of attention which were dealt with within the DAA include draft rules on the appointment of the EU judge to the ECtHR, which judge is upon appointment to have equal status to that of the other judges, and whose election is also to involve the European Parliament.[726] According to this same Article, the EU shall be 'entitled to participate in the Committee of Ministers'. The DAA also establishes that the EU is to contribute to expenditure undertaken by the Council of Europe towards the proper functioning of the ECtHR. Fundamentally, throughout the entire text of the DAA and the negotiations that surround it, a demonstrable intrinsic complexity arising from the simple fact that the ECHR was not originally intended to cater for the accession of a large supranational entity, and as a result of which providing for EU accession shall continue to be fraught with stumbling blocks for years to come, not least after the publication of Opinion 2/13, and until which time the EU shall continue to lack a source of external human rights accountability.

4. Court of Justice: Opinion 2/13

The CJEU was tasked by the European Commission to give its opinion on the compatibility of the DAA with EU Law, in accordance with Article 218(11) of the TFEU, which it carried out through its Opinion 2/13, delivered on the 18 December 2014. Unexpectedly, it was held by the judges in Luxembourg that the

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724 The CJEU has the opportunity to properly define the contours of its jurisdiction in CFSP matters in the cases of *Rosneft Oil Company OJSC vs. Her Majesty's Treasury* (Case C 72/15) and *H vs. Council of the European Union, European Commission* (Case C 455/14 P)

725 Fifth Negotiation Meeting Between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, 'Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms', (10 June 2013), para 23 <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf> accessed 30 October 2015.

726 ibid art 7.

DAA as presented was not compatible with the EU treaties and that it undermined the autonomy of EU law. Although several experts had voiced concerns over certain aspects of the DAA, an opinion as critical and uncompromising as Opinon 2/13 was hardly expected.

The CJEU took a strong and decisive stance on the matter, going against the opinions of major EU institutions as well as EU Member States. The Judges in Luxembourg were heavily criticised for their unyielding stance. The arguments of the CJEU where divided under the following headings,

a) The specific characteristics and the autonomy of EU law;
b) Article 344 TFEU;
c) The co-respondent mechanism;
d) The procedure for the prior involvement of the Court of Justice; and
e) The specific characteristics of EU law as regards judicial review in CFSP matters.

These will each be considered in turn, however, it is apparent that the key theme in Opinion 2/13 is the autonomy of EU law.

5. The Specific Characteristics and the Autonomy of EU Law

First, the CJEU was concerned that Article 53 ECHR might compromise EU law. This Article allows Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR. Although Article 53 of the Charter appears to state something very similar to Article 53 ECHR, its scope was curtailed by the CJEU in the 2013 ***Melloni*** judgement where the Court held that Member States could not adopt higher standards than the Charter in cases where the EU has fully harmonized the relevant law.[727]

The CJEU opined that Article 53 ECHR should be coordinated with Article 53 of the Charter, as interpreted by the CJEU.[728] This means that where the rights recognised by the Charter correspond to those guaranteed by the ECHR, the power granted to Member States to exceed the level of protection in the ECHR must be limited 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. The CJEU is seeking to prevent the scenario where the EU

[727] Joakim Nergelius, 'The accession of the EU to the European Convention on Human Rights' [2015] SIEPS <http://www.sieps.se/sites/default/files/Sieps%202015_3%20web.pdf> accessed 20 September 2015.
[728] Court of Justice, Opinion 2/13, para 189.

Member States use Article 53 ECHR to adopt higher standards in areas covered by harmonised EU law.[729]

Secondly, the CJEU was concerned that the principle of mutual trust under EU law established earlier in ***Melloni*** could be undermined.[730] According to this principle, a Member State may only check whether another Member State has observed fundamental rights guaranteed by the EU in 'exceptional circumstances'.[731] The principle of mutual trust therefore consists in an assumption that fundamental rights are being respected in other Member States. The reasoning laid down in ***Melloni*** has elicited controversy, and indeed some authors are of the opinion that fundamental rights standards in the EU were lowered due to this principle. Nevertheless, the CJEU continues to stress in Opinion 2/13 that it considers this principle to be of fundamental importance for EU Law.[732] Moreover, a recent judgment concerning the European Arrest Warrant has prompted the CJEU to revaluate and restate the importance of mutual trust between Member States for the creation and maintenance of an area without frontiers. While referring to the case law of the ECtHR, the CJEU stated that when evidence of a real risk of inhuman and degrading treatment exists, that risk must first be ascertained and it is necessary to demonstrate that there are substantial grounds for believing that the individual concerned will in fact be exposed to inhuman or degrading treatment because of detention conditions.[733]

The CJEU has clearly attached great importance to the notion of mutual trust, as it is one of the common values on which the EU is founded. The DAA was considered by the CJEU to endanger this principle due to Member States being required to check that another Member State is observing its fundamental rights obligations. This according to the CJEU would upset the underlying balance of the EU and undermine the autonomy of EU law. According to the Court the key flaw lies in the fact that the EU's intrinsic nature is being disregarded in order for it to be given a role identical to that of other contracting parties. In the Court's opinion, the DAA fails to take into consideration the fact that the Member States have, by reason of their membership to the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of

729 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

730 Court of Justice, Opinion 2/13, paras 191-195.

731 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

732 Court of Justice, Opinion 2/13, para 191.

733 Joined Cases C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru vs. Generalstaatsanwaltschaft Bremen* [2016] (Grand Chamber, 5 April 2016) para 78.

any other law.[734]

The Court further noted that Protocol No. 16 to the ECHR permits the Highest Courts and Tribunals of the Member States of the EU to seek advisory opinions from the ECtHR on questions of interpretation or application of the rights and freedoms guaranteed by the ECHR and its Protocols.[735] The mechanism established by the Protocol was seen as a threat to the autonomy of EU Law as a preliminary reference might be made to the ECtHR rather than the CJEU.[736] Interestingly, Protocol 16 has not entered into force and the EU is not a party to it. In its Opinion, the CJEU cautiously opted for an *ex ante* attack, fearing the circumvention of the preliminary ruling procedure under Article 267 TFEU. The Court's concerns indicate a level of misunderstanding by the Court, since Article 3(6) DAA shows that the prior involvement mechanism is only possible where there is a co-respondent.[737]

6. Article 344 TFEU

Article 344 TFEU safeguards the CJEU's monopoly of dispute settlement as it prohibits EU Member States from submitting any dispute concerning the interpretation of EU law to any method of dispute settlement other than those provided in the EU Treaties.

There is a clear tension between Article 344 TFEU and Article 55 ECHR. The former calls upon Member States to bring disputes concerning EU law before the CJEU, whereas Article 55 ECHR demands a settlement of disputes relating to the ECHR before the ECtHR by means of the ECHR's inter-State procedure under Article 33.[738] According to the CJEU's interpretation, Article 33 ECHR could also be applied to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.[739]

Article 5 of the DAA reduces the scope of the obligation laid down in Article 55 of the ECHR but still allows for the possibility that the EU or Member States might submit an application to the ECtHR under Article 33 ECHR, concerning an alleged

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734 ibid para 193.
735 ibid para 196.
736 ibid paras 198-199.
737 Tobias Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?', (2015) European Constitutional Law Review 239-273.
738 Adam Łazowski and Ramses A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) No.1 German Law Journal <https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf> accessed 20 September 2015.
739 Court of Justice, Opinion 2/13, para 205.

violation thereof by a Member State or the EU, respectively, in conjunction with EU law.[740] However, it must be noted that the procedure under Article 33 is not mandatory and that the EU and its Member States may continue to bring before the CJEU any disputes arising out of interpretation and application of the ECHR. Nevertheless, this was not enough according to the CJEU, which considered it a threat to the CJEU's exclusive jurisdiction and it was thus considered to be in violation of Article 344 TFEU.[741]

The CJEU demands the inadmissibility of all State complaints in front of the ECtHR as far as the relevant provisions of the ECHR also fall within the scope of EU law and on the applicant and the respondent side there are Member States of the EU or the EU itself. However, this demand does not seem to consider the agreements already concluded by the EU which do not contain exception provisions as noted by the Advocate General.[742]

Advocate General Kokott traced a problem in regards to Article 344 TFEU, yet stated that it would be sufficient to start infringement proceedings in accordance with Articles 258 to 260 TFEU against EU Member States if they settle their disputes before other international instances.[743] Moreover, the same Advocate General envisaged that if a higher degree of protection was required to ensure the effectiveness of Article 344 TFEU, then EU Member States could be required, prior to accession, to declare with binding force under international law, that they will not engage in proceedings under Article 33 ECHR where the object of dispute falls within the material scope of EU law.[744] This would ensure that Member States would be bound and liable to respect the exclusive jurisdiction of the CJEU.

6.1 *The Co-Respondent Mechanism*

The Court found fault in two aspects of the co-respondent mechanism: the procedure for involvement and the allocation of responsibility.

Firstly, in regards to the procedure for involvement, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must prove that certain conditions are met, with the ECtHR deciding on that request in the light of the reasons given. In order to review this matter, the ECtHR would necessarily be required to assess rules of EU law, falling within the

740 ibid para 207.
741 ibid paras 212-214.
742 Court of Justice, Opinion 2/13, View of Advocate General Kokott, para 117.
743 ibid para 118.
744 Ibid para 120.

exclusive domain of the CJEU.[745] Furthermore, the ECtHR could adopt a final decision that would be binding on the Member States as well as the EU.[746] The Advocate General took a similar standpoint to that taken by the CJEU as both considered the design of the co-respondent mechanism to be problematic. However, the Advocate General was of the opinion that appropriate safeguards could be put in place to remedy the situation.[747]

Secondly, the DAA conferred upon the ECtHR the right to allocate responsibility in accordance with Article 3(7). This in the eyes of the CJEU would risk adversely affecting the division of powers between the EU and its Member States. A further problem was also identified by both the CJEU and the Advocate General, as Article 3(7) of the DAA does not account for situations in which Member States have made a reservation.[748] In their view, this could lead to a scenario in which a Member State is held responsible despite having made a reservation. Admittedly, this would be a rare problem due to the very nature of the procedure, yet the fact remains that the DAA is silent as to the effect of reservations on the co-respondent. It may be argued, as has been done by Tobias Lock, that when the DAA is silent, the standard rules of the ECHR would be applied, which would mean that the reservation would be given effect.[749] However, the CJEU has clearly required the modification of the procedure envisaged in the DAA.

6.2 *The Procedure for the Prior Involvement of the Court of Justice*

The 'Prior Involvement' procedure is a mechanism that was demanded by the CJEU itself. Nevertheless, the mechanism as envisaged in the DAA did not survive the Court's scrutiny and was considered to be incompatible with the treaties. According to the CJEU there are essentially two reasons for this. Firstly, it was considered that it was not for the ECtHR to decide whether prior involvement should take place but for the competent EU institution. According to the CJEU, allowing the ECtHR to decide whether the CJEU has already given a ruling on a question of law would be tantamount to conferring to the ECtHR jurisdiction to interpret the case law of the CJEU.[750] Consequently a procedure that ensures that in any case pending before the ECtHR, the EU is informed so that the competent institution can inquire whether the Court has already given a ruling on the

745 Court of Justice, Opinion 2/13, para 221.
746 ibid para 224.
747 Court of Justice, Opinion 2/13, View of Advocate General Kokott, para 235.
748 Court of Justice, Opinion 2/13, paras 226-235.
749 Tobias Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?' (2015) European Constitutional Law Review 239-273.
750 Court of Justice, Opinion 2/13, para 239.

question at issue or whether the prior involvement procedure should be initiated, is required.

Secondly, the CJEU considered that the agreement envisaged excluded the possibility of bringing a matter before the CJEU in order for it to rule on a question of interpretation of secondary law through the prior involvement procedure. This was considered to adversely affect the competences of the EU and the powers of the CJEU. [751]

7. The Specific Characteristics of EU Law as Regards Judicial Review in CFSP Matters

In regards to CFSP, it has already been noted that the CJEU's jurisdiction is generally excluded. At the time of writing, the CJEU has only considered within the remit of its jurisdiction the monitoring of compliance with Article 40 TEU and the reviewing of the legality of certain decisions as provided for by Article 275(2) TFEU. The ECtHR on the other hand, would be empowered by the DAA to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of CFSP. This would lead to a situation whereby exclusive judicial review would be given to a non-EU body. This was rejected by the Court and considered prejudicial to the EU's framework.

Nonetheless, it must be questioned whether this discrepancy between the jurisdictions of the two courts would *de facto* violate the autonomy of EU Law. Advocate General Kokott also referred to the issue when arguing that accession would undoubtedly mean that the EU must respect the fundamental rights protection stemming from the ECHR and thus also the requirement of effective legal protection in all its spheres of activity, including the CFSP. The Advocate General further stated that the principle of autonomy does not preclude the EU joining an international judicial mechanism which extends further than that of the CJEU.[752] Indeed the principle of autonomy has only ever arisen in cases in which there was reason to fear a conflict between the two Courts and not in a case in which the powers of the CJEU were less extensive than those of an international court.[753] Furthermore, it should be noted that like the Advocate General, the Member States, the Council and the European Commission all agreed that such discrepancy did not violate the EU's autonomy, albeit for different reasons.[754]

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751 ibid paras 242-247.

752 Court of Justice, Opinion 2/13, View of Advocate General Kokott, paras 189-191.

753 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

754 ibid.

Through its rejection, the CJEU is essentially demanding that CFSP be excluded from the remit of the ECtHR, or that Treaties are amended to provide the CJEU with jurisdiction over CFSP acts. The authors consider the first option to be unsatisfactory for the proper protection of human rights in an area where it is questionable whether the EU can provide effective legal protection. A proposal in 2013 to introduce this exclusion by way of specific clause or reservation was in fact rejected.[755] The latter option, as noted by Jed Odermatt, also causes difficulties due to the sensitive political nature of CFSP and the reluctance of the Member States to allow the CJEU to exercise judicial review in that field.[756]

8. The Reaction to Opinion 2/13

The general reaction to Opinion 2/13 was overwhelmingly negative. Indeed, even President Spielmann was critical of the Opinion calling it a 'great disappointment' and stated that it is the citizens of EU who will be the principal victims.[757] Others, in their disapproval, went as far as to claim that the CJEU's decision was actually a political decision disguised in legal arguments. This opinion is shared by many yet the authors of this article do not believe this is the correct position. The Court did in fact concede in Opinion 2/13 that it was open to subjecting itself and EU law to external review.[758]

The criticism that surrounds Opinion 2/13 is understandable given the importance tied to accession and the fact that the view of Advocate General Kokott demonstrated that a different solution was indeed possible. Despite her criticism of certain points, the Advocate General suggested that the CJEU ought to avoid pronouncing the DAA incompatible with the Treaties, but instead hold that it was compatible if certain amendments were undertaken following the Court's opinion.[759]

It may also be questioned if the Court's approach is justifiable in light of Article 6 of the Treaty of Lisbon which can be read as encompassing a duty of best efforts

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755 Council of Europe, Fourth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights (2013).

756 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

757 Tobias Lock, 'Will the empire strike back? Strasbourg's reaction to the CJEU's accession opinion', (Verfassungs Blog 30 Jan 2015) <http://www.verfassungsblog.de/en/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/> accessed 12 October 2015.

758 Court of Justice, Opinion 2/13, para 182.

759 Court of Justice, Opinion 2/13, View of Advocate General Kokott, para 279.

towards accession.[760] The Opinion does indeed present a significant obstacle in carrying out the commitment undertaken under the Treaty of Lisbon. Nonetheless, it must be noted that although Article 6 provides an obligation to accede, this is subject to conditions laid down in Article 6(2) and Protocol No. 8. Indeed, the CJEU in Opinion 2/13 did not seem to emphasise its obligation but rather that accession is subject to limitations. These limitations essentially consider that accession must not affect the EU's competence as defined by the Treaties or interfere with the specific characteristics of the EU.

9. Is the Accession of the EU to the ECHR Still Being Sought?

The EU could not simply ignore the Court's opinion and accede to the ECHR as this would be in violation of Article 218(11) TFEU. In accordance with this article, the EU had two options if it wished to continue to seek accession: the re-negotiation of the DAA or changing the founding treaties to accommodate the CJEU's views. An extreme version of the latter option was considered by Besselink who proposed to draft a 'Notwithstanding Protocol'. 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.[761]

Although this is interesting from an academic perspective, sidelining the CJEU's opinion is not the best course of action. Indeed, this would be an extreme response and would show disrespect towards the judicial branch. Moreover, not all EU Member States would be likely to agree with this measure.

The EU chose to proceed with what the authors consider to be the most sensible option: renegotiating the DAA in order to make it compliant with the requirements set out in Opinion 2/13. In Council Meeting 3401 of 23 June 2015, the Council reaffirmed its commitment to the accession to the ECHR and invited the European Commission as the EU negotiator to bring forward its analysis on ways to address Opinion 2/13. Moreover, on the 20 of April 2016 the European

[760] Stefan Reitemeyer and Benedikt Pirker, 'Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back' (European Law Blog, 31 March 2015) <http://europeanlawblog.eu/?p=2731> accessed 10 September 2015.

[761] Adam Łazowski and Ramses A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) No.1 German Law Journal <https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf> accessed 20 September 2015.

Parliament hosted a meeting with representatives of the institutions to discuss the way forward following Opinion 2/13. Juncker has himself held that accession is a political priority for the Commission, and that the Commission will not rest until a solution is found for the EU's accession to the ECHR.

However, it may come as a surprise to none that the re-negotiation of a new agreement is likely to be a timely and convoluted exercise in political discourse. This will in turn give the CJEU a chance to continue building its line of judgments based on the Charter and in the long run minimise the direct impact of accession.[762]

9.1 *Would Accession be Beneficial Under the Conditions Imposed by the CJEU in Opinion 2/13?*

It is prudent to question whether accession under the Court's terms would be beneficial in strengthening the human rights protection in Europe, if the CJEU's demands can be met. All this is far from certain, due to the fact that Opinion 2/13 requires the sacrifice of certain elements that have led to current human rights standard, and would have the overall effect of possibly shielding the EU from human rights claims being brought against it, most importantly within the CFSP and Area of Freedom, Security and Justice. These amendments must be questioned and closely scrutinised due to their sensitive political nature and the consequent negative impact on human rights protection should they indeed come to fruition. From a human rights perspective, excluding CFSP is non-justifiable as it disallows the ECtHR from remedying potential violations of the ECHR. It is for this reason that the authors believe that the Council of Europe cannot accept all the amendments proposed by the CJEU in order to properly protect the existing safeguards for fundamental human rights.

The authors of this article consider that the requirement to protect the principle of mutual trust is one of the thorniest points raised in Opinion 2/13, due to it requiring a far-reaching exclusion of the ECtHR's powers. It must be emphasised that there is no effective internal EU mechanism allowing it to compel Member States to comply with ECHR standards. Creating the impossibility for the ECtHR to hold a Member State of the EU responsible for extraditing a person to another Member State where they would be facing a real risk of human rights violations would clearly deteriorate the current safeguards set forth in the ECHR. Indeed, the amendment would most evidently prevent the ECtHR from interfering in

[762] Adam Łazowski and Ramses A. Wessel, The European Court of Justice blocks the EU's accession to the ECHR' (2015) <http://aei.pitt.edu/59218/1/CEPS_Commentary_Lazowski_and_Wessel_on_ECHR._docx.pdf> accessed 12 September 2015.

Dublin Regulation cases and thus reduce the human rights protection of asylum seekers. Furthermore, in its recent revisitation of the Bosphorus doctrine, the ECtHR found that the CJEU's stance that review of observance of fundamental rights by the state of origin must be limited to exceptional cases was unacceptable. The ECtHR held that the domestic court being requested to trust the acts of another State must at the very least be empowered to conduct a review of any serious allegations of fundamental human rights brought to its attention, in order to ensure that the protection of those rights is not manifestly deficient.

10. Conclusion

Irrespective of the stumbling blocks delaying the progression of the EU towards ECHR accession, the European Commission has confirmed its commitment to accession,[763] in the firm belief that it will strengthen fundamental rights protection, improve the effectiveness of EU law, and enhance the coherence of fundamental rights protection in Europe.

The legal obligation for the EU to take affirmative steps to conclude an accession agreement to comply with the requirements laid down in the Treaties still stands. It is however self-evident that the conditions for accession which the CJEU laid down in Opinion 2/13 will be both legally and politically challenging to meet. The difficulties surrounding accession have also been acknowledged by President Spielmann, who has recognised that a possible manner with which to alleviate the concerns raised in Opinion 2/13 is by carrying out amendments to Treaties of the EU.[764]

The CJEU focused its Opinion largely on the EU legal order, without expressly acknowledging that the full implications of the accession of a supranational body such as the EU alongside individual State parties to the ECHR. In sum, the DAA together with the intricate complexities revealed in Opinion 2/13 have together shown that the original intention of acceding to the ECHR is very far from straightforward. The creation of a single, comprehensive and coherent human rights framework has given rise to complex legal problems which can only be solved through careful analysis by specialist legal minds, however, the *status quo* is inefficient for the proper protection of fundamental human rights.

The EU's accession to the ECHR would complete,

[763] European Commission, 2014 Report on the Application of the EU Charter of Fundamental Rights, COM(2015) 191 final.

[764] Andrew Duff, 'EU Accession to the ECHR: Politicians to the Rescue?' (14 March 2015) <http://andrewduff.blogactiv.eu/2015/03/14/eu-accession-to-the-echr-politicians-to-the-rescue/> accessed 30 October 2015.

> a cycle begun at the end of the second world war when human rights visionaries, such as French lawyer and Nobel prize winner Rene Cassin, drew up the world's first international texts and the Council of Europe began its work to establish democracy and the rule of law across the continent.[765]

Should the EU accede to the ECHR, it will join a family of 47 countries, including non-EU members and global powers such as Russia and Turkey, in a system that brings them all under the same legal standards, to be monitored by the same Court. Furthermore, on a symbolic level, the EU's accession to the ECHR would give a strong political signal of coherence between the EU and Europe thereby increasing the EU's credibility at a time when it is most needed. This may allow the EU to connect with members of population that have criticized its competences.

Despite the arduous power struggle between the different Courts' competences and the intricacies tied to the points of contention in the DAA, the CJEU shall continue to take ECtHR judgements into account when interpreting corresponding Charter provisions, and all EU Member States are bound at international law to continue to adhere to the provisions of the ECHR and the jurisprudence of its Court, in the same manner as they did before the delivery of Opinion 2/13.

The current geo-political context of an increasingly divided Europe also plays a significant role in this power struggle, particularly in the light of the unfortunate outcome which the non-accession of the EU could have on the human rights perceptions across the different Member States.[766] Due to the fact that at present it is widely agreed that the Council of Europe remains the yardstick for human rights,[767] it would be in the EU's interest as much as it is in the interest of the ECtHR and of victims of human rights breaches to accord the Strasbourg Courts with the competence to look into matters of EU law and its institutions' competences.

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765 Thorbjørn Jagland, 'We must look deeper for Europe's future' (4 July 2010), <http://www.coe.int/en/web/secretary-general/opinion-articles-2010/-/asset_publisher/Ihk8YVHjRPzN/content/we-must-look-deeper-for-europe-s-future?inheritRedirect=false> accessed 30 October 2015.

766 Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial dialogue: Autonomy or Autarky?' (2015) JMWP 01/15, <http://jeanmonnetprogram.org/wp-content/uploads/2015/04/JMWP-01-Eeckhout1.pdf> accessed 30 October 2015.

767 The Juncker Report, published in March 2006, for instance, saw the Council of Europe as having a distinct pioneering role.