

***Accession to the European Convention on Human Rights (ECHR):  
stocktaking after the ECJ’s opinion and way forward***

Prof. Jörg Polakiewicz\*

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\* Director of Legal Advice and Public International Law (Legal Adviser), Council of Europe.

## Introduction

1. This contribution presents general observations on the way forward, as well as specific comments on some of the ECJ's objections. It has been prepared by the Council of Europe's Legal Adviser who personally participated in the negotiations of the draft 'Agreement on Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' ("DAA").<sup>1</sup>
2. This contribution does not reflect an official Council of Europe position. Council of Europe member states have so far not adopted any conclusions on opinion 2/13 or its consequences other than to reiterate "*their commitment to accession, aiming to enhance coherence in the protection of human rights across the continent for the benefit of all.*"<sup>2</sup>
3. On 5 April 2013, all 47 Council of Europe member states and the European Commission approved the DAA at negotiators' level. With opinion 2/13, the ECJ went against the unequivocally expressed views of your Parliament, all intervening EU member states, the European Commission and Council. Since the delivery of the opinion no negotiations have taken place in Strasbourg.
4. It is certainly not for the Council of Europe to tell the EU how it should settle its internal problems. However, whatever proposals the European Commission will eventually come up with, they will be subject of negotiations in Strasbourg. As Prof Jacqué remarked in a comment to opinion 2/13, it "*needs two to tango.*"<sup>3</sup>

## General observations

5. The Union's accession to the ECHR will ensure the necessary coherence of human rights standards all over Europe. As the EU Convention's Working Group II on the EU Charter and accession emphasised already in 2002, "*accession would be the ideal*

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<sup>1</sup> The text of the draft accession agreement its explanatory report as well as related instruments can be consulted at [link](#). On background and initial stages of the negotiations see J. Polakiewicz 'The European Union's Accession to the European Convention on Human Rights' in W Meng/G Röss/T Stein *Europäische Integration und Globalisierung* (Nomos Baden-Baden 2011), 375-391.

<sup>2</sup> '[Co-operation with the European Union – Summary report](#)' 125th Session of the Committee of Ministers (Brussels, 19 May 2015), para. 6.

<sup>3</sup> J P Jacqué '[L'avis 2/13 CJUE - Non à l'adhésion à la Convention européenne des droits de l'homme ?](#)' (23 December 2013).

*tool to ensure a harmonious development of the case-law of the two European Courts in human rights matters.*” It “*would give a strong political signal of the coherence between the Union and the ‘greater Europe’, reflected in the [Council of Europe] and its pan-European human rights system.*”<sup>4</sup>

6. Making the EU Charter of Fundamental Rights (“CFREU”) binding was a major step in further enhancing human rights protection in the EU. At the same time, the resulting complexity of the overall system of fundamental rights protection in Europe may cause some confusion, not only for citizens, but also for judicial authorities in the member states. The mere existence of two different texts, to be interpreted by two distinct courts, operating in different and yet overlapping contexts is not conducive to legal certainty. In their report on the longer-term future of the ECHR system, governmental experts from all 47 Council of Europe member states concluded that “*[i]n case of non-accession, there is a real risk of the two main European legal systems drifting apart.*”<sup>5</sup>
7. Against this background, it becomes obvious why already the Laeken Declaration (2001), the subsequent EU Convention (2001-2003) and Intergovernmental Conferences (2003 and 2007) established a *junctim* between the incorporation of the CFREU into the Treaties and accession of the EU to the ECHR.
8. In opinion 2/13 the ECJ concluded that the accession agreement is not compatible with EU law.<sup>6</sup> While some amendments, required by the ECJ, are rather technical in nature, others concern central issues such as the need to coordinate the EU Charter with the ECHR, EU legislation in the area of justice and home affairs (“JHA”) or the EU’s common foreign and security policy (“CFSP”).
9. What is particularly striking in opinion 2/13 is the absence of any argument referring to the constitutional significance of article 6 (2) TEU which formulates an obligation to accede. Instead, the ECJ confirms its previous case-law, in particular the *Melloni*

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<sup>4</sup> Final report of Working Group II, CONV 352/02, WGII16, Brussels, 22.10.2002, at 12

<sup>5</sup> [CDDH\(2015\)R84](#) of 11 December 2015, para. 179.

<sup>6</sup> Opinion 2/13 (Full Court) (18 December 2014); this Opinion should be read together with the comprehensive ‘View’ of Advocate General J Kokott (13 June 2014).

judgment,<sup>7</sup> insisting that “*the unity, primacy and effectiveness of EU law*” must not be affected by EU accession.

10. It is difficult to escape the impression of a profound ‘clash of perspectives’ between the ECJ judges on the one hand, the member states, Commission, Council and Parliament on the other, about the objectives and scope of accession. This clash was already palpable during the hearing before the ECJ on 5/6 May 2013, where several judges questioned the added value and expediency of accession. It is also reflected in a recent comment by a ECJ judge concluding that “[l]’*Accord d’adhésion constitue une oeuvre pleine d’improvisation, dépourvue de précédents en droit international, qui, partant, risque d’avoir des conséquences imprévisibles.*”<sup>8</sup>
11. The accession agreement had been painstakingly negotiated and approved by experts from 47 European states and the European Commission who were fully aware of the EU and international law implications. Academic experts generally acknowledge that “[t]he provisions of the Draft Accession Agreement on attribution and responsibility are generally in line with the existing case law of the ECtHR and the work of the ILC on the topic of international responsibility.”<sup>9</sup> Like in all international negotiations, the solutions eventually found were sometimes the result of difficult compromises. The negotiators had to strike a fair balance between accommodating “*the specific characteristics of the Union and Union law*”<sup>10</sup> and preserving the essential features of the Convention system, such as the authority and prerogatives of the ECtHR, the equal treatment of High Contracting Parties and, last but not least, the subsidiary nature of the protection mechanism. From the outset, there was agreement between all the negotiating parties that amendments and adaptations should be limited to what is strictly necessary for the purpose of the accession of the EU as a nonstate entity.

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<sup>7</sup> C-399/11 *Stefano Melloni v Ministero Fiscal* (26 February 2013). See also C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* (6 March 2013).

<sup>8</sup> J Malenovský ‘Comment tirer parti de l’avis 2/13 de la Cour de l’Union européenne sur l’adhésion à la Convention européenne des droits de l’Homme’ 119 RGDIP 705, at 739 (2015).

<sup>9</sup> SHARES Briefing Paper – A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights (2014), at 18, available at [www.sharesproject.nl](http://www.sharesproject.nl).

<sup>10</sup> See article 1 of Protocol No. 8 to the Treaty on the Functioning of the European Union.

12. The following are general recommendations how to deal with the various ECJ objections:

- *Keep formal amendments to the text of the DAA to a minimum.* At the end of the negotiations in Strasbourg, non-EU member states had the impression that they had gone as far as possible in accommodating “*the specific characteristics of the Union and Union law*”. Any further exceptions risk being perceived as undue privileges for the EU.
- In particular, *do not use so-called “disconnection clauses”*<sup>11</sup>. They are out of place in treaties guaranteeing human rights (minimum) standards.<sup>12</sup>
- *Avoid including provisions on internal EU matters into an international treaty to which non-EU member states will become parties and which will ultimately be interpreted by the ECtHR.*
- *Instead use, wherever possible, the EU’s internal rules to codify provisions whose purpose it is to ensure that EU member states comply with EU law when implementing the accession agreement.*
- *Interpretative declarations by the EU and its member states or, where absolutely necessary, reservations may be used to overcome certain objections.* The DAA allows the EU to make reservations “*in respect of any particular provision of the Convention, to the extent that any law of the European Union, then in force is not in conformity with the provision. Reservations of a general character shall not be permitted.*”<sup>13</sup> Reservations may be made in respect to both EU ‘primary’ and ‘secondary’ law.<sup>14</sup>

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<sup>11</sup> CAHDI ‘Report on the Consequences of the So-Called “Disconnection Clause” in International Law in General and for Council of Europe Conventions, Containing such a Clause, in Particular’ (2008), available at [link](#).

<sup>12</sup> It is noteworthy that the EU did not request the inclusion of such a clause during the negotiations on EU accession to the ECHR or in the amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108, 1981), which the Committee of Ministers adopted in 1999.

<sup>13</sup> Article 57 (1) of the ECHR, as amended by the DAA.

<sup>14</sup> Draft explanatory report to the accession agreement, para. 34.

13. If all ECJ objections are met by formal amendments to the DAA, there is a real risk that, as a result, the ECtHR's jurisdiction over EU legal acts will be more restricted than it is today. Such a solution would not only undermine the whole purpose of accession, but may also be unacceptable to non-EU member states.
14. In that context, it must be recalled that even without accession, individual applications may be brought against EU member states which, under article 1 ECHR, remain collectively responsible for ensuring that powers conferred to the EU are exercised in conformity with the ECHR. The ECtHR has interpreted the “*securing*” of the Convention guarantees referred to in article 1 ECHR as applying comprehensively not only to the direct exercise of powers at national level but also to the exercise of powers conferred to supranational EU institutions.<sup>15</sup> When opening the judicial year in January 2015, then ECtHR President Dean Spielmann declared:

*“For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention’s territory, whether the violation can be imputed to a State or to a supranational institution. Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations.”*<sup>16</sup>

15. The ECtHR currently exercises jurisdiction over national acts fully or partially determined by EU law. External supervision by the ECtHR fully applies to the transposition and execution of EU law by national authorities and courts. Even national laws which are, word for word, identical with EU directives can be referred to the Strasbourg Court. Only the question whether it is also possible bring before the ECtHR applications concerning the exercise of powers directly by EU institutions themselves has so far remained open. Without accession, such applications cannot be brought against the EU as such, but applications have been brought against the EU member states collectively. One example is the application by *DSR-Senator Lines* alleging that the imposition of fine by the European Commission had violated articles 6 and 13 ECHR. The CFI and the ECJ had rejected the applicants’ request for interim

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<sup>15</sup> See the ECHR factsheet ‘[Case-law concerning the European Union](#)’ (September 2015).

<sup>16</sup> Solemn hearing for the opening of the judicial year of the European Court of Human Rights, [Opening speech by President Dean Spielmann](#) (Strasbourg, 30 January 2015).

relief against the provisional execution of the fine, totalling 13.75 million euros.<sup>17</sup> Although this case clearly concerned the direct application of Community law by EU bodies, the ECtHR referred the application to the EU member states' governments in July 2000. It was however ultimately settled before the ECtHR could give judgement.

## **Observations on particular objections raised by the ECJ**

### **Necessity to coordinate article 53 ECHR with article 53 CFREU**

16. As article 53 of the ECHR allows High Contracting Parties to apply higher standards of protection than those guaranteed by the ECHR, the ECJ requires “*that provision should be coordinated with Article 53 of the Charter (...) 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.*”<sup>18</sup>
17. This assertion came as a surprise even for many EU lawyers because it is difficult to understand how ratification of the accession agreement can resurrect powers that EU member states have already lost under the EU treaties.<sup>19</sup> Moreover, article 53 of the ECHR is not about powers or competences. It is a rule of construction that purports to limit the pre-emptive effect of the remaining ECHR provisions. In its case law, the ECtHR has invoked this provision to argue that states which create rights going beyond Convention obligations are prevented from taking, on that basis, discriminatory measures within the meaning of article 14 of the ECHR.<sup>20</sup> However, article 53 of the ECHR does not grant High Contracting Parties any right they did not already have prior to concluding the ECHR.

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<sup>17</sup> *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.) [GC], no. 56672/00.

<sup>18</sup> ECJ Opinion 2/13, para. 189.

<sup>19</sup> See, e.g., D. Halberstam ‘It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’ 16 *German Law Journal* 105 (2015).

<sup>20</sup> *E.B. v France* [GC], no. 43546/02, §§ 48-50 (22 January 2008); *P.B. and J.S. v. Austria*, no. 18984/02, § 34 (22 July 2010).

18. Moreover, the Charter is already coordinated with the Convention. Article 52 (3) of the Charter provides that, insofar as the rights in the Charter correspond to rights guaranteed under the ECHR, the meaning and scope of those rights, including authorised limitations, should be the same as those laid down by the ECHR. While having sometimes interpreted EU fundamental rights in isolation from the jurisprudence emerging from other human rights instruments, including the ECHR,<sup>21</sup> it is encouraging that the CJEU reaffirmed these important principles unequivocally in a recent judgment.<sup>22</sup>

### **Risk to undermine obligations of mutual trust between EU member states**

19. Since one of the declared purposes of accession is to close the existing gaps in legal protection by giving European citizens the same protection *vis-à-vis* acts of the Union as they presently enjoy *vis-à-vis* all EU member states, the ECJ's objection against the ECtHR's human rights scrutiny in JHA's matters appears particularly problematic. The ECJ argues that such scrutiny would be incompatible with the obligation of mutual trust between EU member states and accession liable to upset the underlying balance of the EU to undermine the autonomy of EU law.<sup>23</sup>
20. As explained elsewhere, this argumentation is questionable even from an EU law perspective.<sup>24</sup> Under the EU treaties, mutual recognition is merely a 'principle' to be used to facilitate judicial cooperation among EU member states. It should not be weighed against, or, even worse, used to escape compliance with legal obligations to respect fundamental rights. Respect for fundamental rights constitutes a key component of the area of freedom, security and justice, as explicitly foreseen by article 67 (1) TFEU.

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<sup>21</sup> G. De Búrca 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' 20 *Maastricht Journal of European and Comparative Law* (2013) 168 (171).

<sup>22</sup> CJEU, C-601/15 PPU, *J.N. v Staatssecretaris van Veiligheid en Justitie* (15 February 2016).

<sup>23</sup> ECJ Opinion 2/13, para. 194.

<sup>24</sup> On the following see already See J Polakiewicz 'EU law and the ECHR: Will the European Union's accession square the circle?' *European Human Rights Law Review* (2013), 592-605; H-H Herrfeld 'Der Vorrang hält – aber noch eine Frage offen? Grundrechtsschutz und gegenseitige Anerkennung im Lichte des EuGH-Urteils in der Rs. Melloni' in Becker/Hatje/Potacs/Wunderlich *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze* (Nomos 2014), 81.

21. The ECHR and EU law are thus based on the same values and principles. Striking a fair balance between effective international cooperation in the suppression of crime and the fundamental rights protection, the ECtHR has consistently held that certain ECHR rights may under strictly defined conditions be opposed to requests for extradition or mutual legal assistance. In that context, the ECtHR looks at the *individual* situation of each applicant, verifying for example whether there are substantial grounds for believing that if returned, the individual will face a real risk of being subjected to torture or inhuman or degrading treatment or punishment or will or has suffered a flagrant denial of the right to a fair trial.<sup>25</sup> Similarly, the ECtHR examines whether requests for the return of children under the Brussels IIbis regulation comply with the Convention, in particular its article 8.<sup>26</sup> The relevant ECHR case law takes the objectives and importance of EU mutual recognition instruments duly into account.<sup>27</sup>
22. It is significant that the *Bundesverfassungsgericht* reached in its European Arrest warrant (“EAW”) judgment of 15 December 2015<sup>28</sup> the same conclusion as the ECtHR in *Tarakhel* in the context of ‘Dublin’ returns,<sup>29</sup> namely that national authorities have a duty to ensure *in every individual case* that the rights of the requested person are respected.<sup>30</sup> For national courts, it is normal practice to review whether the unfettered application of ordinary legislation violates fundamental rights. Where necessary, such legislation can be disregarded or given a restrictive

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<sup>25</sup> J Dugard & C van den Wyngaert ‘Reconciling Extradition with Human Rights’ 92 American J. Int’l L. 187 (1998); R Weyeneth ‘Die Menschenrechte als Schranke der grenzüberschreitenden Zusammenarbeit der Schweiz’ recht – Zeitschrift für juristische Weiterbildung und Praxis 114 (2014).

<sup>26</sup> E.g. *Povse v. Austria*, no. 3890/11, decisión of 18. June 2013; see generally ECHR factsheet ‘[International Child Abductions](#)’ (March 2016).

<sup>27</sup> *Stapleton v. Ireland*, no. 56588/07 ( 04 May 2010); *Sneerson and Kampanella v. Italy*, no.14737/09 (12 July 2011). *Avotiņš v. Latvia*, no. 17502/07, Chamber judgment of 25 February 2015. The Grand Chamber judgment is due shortly. The hearing took place on 8 April 2015 with the European Commission having been authorised in accordance with article 36 (2) ECHR to participate as a ‘third-party’.

<sup>28</sup> [Order of 15 December 2015 - 2 BvR 2735/14](#).

<sup>29</sup> *Tarakhel v Switzerland*, no. 29217/12, judgment of 4 November 2014.

<sup>30</sup> Order of 15 December 2015 - 2 BvR 2735/14, marginal note 110.

interpretation in compliance with fundamental rights. This applies not only to cases of systemic or structural, but also to individual instances of human rights violations.

23. Under EU law, the various mutual recognition schemes allow the invocation of fundamental rights-based refusal grounds to varying degrees and the ECJ's case law in this field is evolving. While fundamental rights can be invoked as regards the recognition of civil judgments via the public policy ("*ordre public*") exception, ECJ case law regarding the EAW or the Dublin refugee and asylum system has so far been more restrictive. It is maybe a fruit of judicial dialogue that the ECJ eventually recognised in a judgment of 5 April 2016 that the execution of an EAW must be deferred if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the EU member state where the warrant was issued.<sup>31</sup> In that context, the ECJ specifically acknowledged that the risk analysis may be based on ECtHR judgments, judgments of other international and national courts as well as decisions or reports of organs of the Council of Europe or the United Nations.
24. Although it is not entirely clear whether, according to the ECJ, such individual risk analysis is only required in the presence of systemic deficiencies, the judgment of 5 April is certainly a step in the right direction. From Strasbourg perspective, it would be ideal if the JHA objection could be overcome by ECJ case law development. Another option might be to make reservations in respect of specific provisions of EU mutual recognition legislation. Finally, the Meijers Committee has recently made an interesting proposal for a mutual trust provision to be added to the DAA.<sup>32</sup>
25. However, any attempt to exempt JHA matters wholly or partially from the scope of the ECtHR's external control would be a cut-back of existing ECHR jurisdiction in

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<sup>31</sup> Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru* (5 April 2016). The ECJ did not follow Advocate General Y. Bot's [opinion](#) of 3 March 2016.

<sup>32</sup> "When implementing European Union law, the Member States may, under European Union law, be required to presume that fundamental rights have been observed by the other Member States. The Member States remain obliged to refuse cooperation with another Member State if there are substantial grounds for believing that such cooperation results in a serious breach of human rights and fundamental freedoms as recognized in the Convention or the protocols." See Meijers Committee '[Note on mutual trust and opinion 2/13 on accession of the European Union to the European Convention on human rights](#)' (April 2015).

one of the core areas where fundamental rights protection is most precious. Even without accession JHA issues are already before the ECtHR. The challenge to the conception of mutual trust in JHA matters could hardly become more severe than it already is. Rather on the contrary, accession and a strong co-respondent mechanism provide the possibility for comprehensive external scrutiny of the JHA system as a whole, with the active participation of protagonists from both the supranational and the national levels, thereby enhancing both trust in the various mutual recognition systems and human rights protection for the individuals concerned.<sup>33</sup>

### **Protocol 16 to the ECHR and the ECJ's preliminary ruling procedure**

26. This is again an objection which is difficult to understand. Under article 267 TFEU, domestic courts of EU member states are, under certain conditions, obliged to refer issues of EU law to the ECJ. Advisory opinions under Protocol 16 are not binding.<sup>34</sup> They cannot prevail over binding EU law including the interpretations given by the ECJ in preliminary reference proceedings under article 267 TFEU.
27. As also Advocate General Kokott pointed out,<sup>35</sup> this objection concerns merely the interpretation of article 267 (3) TFEU, especially the scope of the “*acte clair*” theory. It seems preferable to treat such an internal EU issue in the EU's internal rules rather than in an international agreement.
28. It should also be noted that already three EU member states have ratified Protocol 16 without making any declaration.<sup>36</sup> Reservations are not allowed under this Protocol.<sup>37</sup>
29. However, if the intention were to restrict the use of the advisory opinion procedure through an amendment to Protocol 16 and/or its explanatory report, it would be a matter for the Council of Europe member states alone, the EU having neither participated in the drafting of Protocol 16, nor is it covered by the DAA.

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<sup>33</sup> Steve Peers ‘[The ECJ and the EU's accession to the ECHR: a clear and present danger to human rights protection](#)’ Blog on *EU Law Analysis* (18 December 2014).

<sup>34</sup> Article 5 of Protocol 16 provides as follows: “*Advisory opinions shall not be binding.*”

<sup>35</sup> AG Kokott ‘View’, para. 141.

<sup>36</sup> Finland, Lithuania and Slovenia, see [link](#).

<sup>37</sup> Article 9 of Protocol 16 provides as follows: “*No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.*”

**Providing expressly that EU member states are prevented from bringing any disputes connected with EU law before the ECtHR<sup>38</sup>**

30. This issue was deliberately and for good reason excluded from the DAA, as paragraph 64 of the DAA's explanatory report explains: "*An issue not governed by the Accession Agreement is whether EU law permits inter-Party applications to the Court involving issues of EU law between EU member States, or between the EU and one of its member States. In particular, Article 344 of the Treaty on the Functioning of the European Union (to which Article 3 of Protocol No. 8 to the Treaty of Lisbon refers) states that EU 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'.*"
31. It has been proposed that intra-EU disputes could be excluded from the jurisdiction of the ECtHR, either by adding a paragraph at the end of article 33 ECHR or using some kind of 'disconnection clause' in the accession agreement.<sup>39</sup> However, regardless of the question whether one excludes all intra-EU disputes alleging a breach of the ECHR or only those "*within the scope of application of EU law*", such a proposal is in itself problematic because it entails the risk that the ECtHR, when deciding on the admissibility of applications, would have to interpret EU law, which would be contrary to the ECJ's opinion.
32. Again, the EU's internal rules or a unilateral declaration on the part of the EU and its member states, as suggested by AG Kokott,<sup>40</sup> may be more appropriate tools to deal with this issue. The accession agreement should not be used for provisions which concern primarily relations between the EU and its member states.

**Objections relating to the co-respondent mechanism and the ECJ's prior involvement**

33. All these issues are primarily technical and may be addressed relatively easily by amendments and/or additions to the DAA and its explanatory report.

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<sup>38</sup> Opinion 2/13, paras. 208-214.

<sup>39</sup> S Øby Johansen 'The Reinterpretation of TEU Article 344 in Opinion 2/13 and Its Potential Consequences' 16 German Law Journal 169-178 (2015), 178.

<sup>40</sup> AG Kokott 'View', para. 120.

34. We are aware that the European Commission has made a series of proposals, which are currently being discussed within FREMP. It would not be appropriate to comment these proposals without being asked to do so by either the Commission or the member states.
35. It should, however, be recalled that the co-respondent mechanism and the prior involvement were discussed at length during the negotiations. The provisions were drafted in order to accommodate to fullest extent possible the autonomy of the EU's legal order as well as to ensure that the ECtHR pronounces itself only as far as absolutely necessary to fulfill its functions under the Convention on issues of EU law. Going beyond what has been achieved during the negotiations must not sacrifice the role and status of the ECtHR under the Convention. If EU non-member states are asked to make further concessions regarding this point, they may ask for concessions by the EU on other points, for example regarding the rules applicable to the EU and its member states in the process of supervision of judgments and friendly settlements.

#### **Joint responsibility and member states' reservations to the ECHR**

36. The ECJ requires guaranteeing that joint responsibility of the EU and its member states for ECHR breaches cannot impinge upon member state reservations to the ECHR.<sup>41</sup> This point is also made by AG Kokott, without her or the ECJ giving any concrete examples how findings of joint responsibility in co-respondent procedures could affect the existing reservations of individual member states. This reasoning is again difficult to understand from the perspective of international law.
37. Article 3 (3) of the DAA covers situations "*where the alleged violation notified by the ECtHR calls into question the compatibility of a provision of (primary or secondary) EU law with the Convention rights at issue. This would be the case, for instance, if an alleged violation could only have been avoided by a member State disregarding an obligation under EU law (for example, when an EU law provision leaves no discretion to a member State as to its implementation at the national level).*"<sup>42</sup> A reservation made by an individual member state can only refer to national legislation

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<sup>41</sup> Opinion 2/13, paras. 227-228.

<sup>42</sup> Para. 42 of the draft explanatory report.

in force when that reservation was made (article 57 (1) ECHR), but not to “a provision of (primary or secondary) EU law.”

38. Even in the exceptional case that the subject-matter subsequently falls within EU competence,<sup>43</sup> it is difficult to imagine a situation where joint responsibility of the EU and its member states would affect existing reservations by individual member states. It would seem that there are only two options:

- The EU law modifies the national law to which reference is made in the reservation; in this case, the reservation would be obsolete because the law to which reference was made in the reservation is no longer the “*law in force in its territory*” (article 57 (1) ECHR).
- The EU law does not modify the national legislation to which reference is made in the reservation; in this case, the reservation made by the EU member state would not be the “*subject of the dispute*” and should not be considered in the correspondent mechanism. It seems therefore unnecessary to foresee any additional provision in the DAA safeguarding member states’ reservations.

### **Common Foreign and Security Policy**

39. This objection goes to the very heart of the compromise reached in the DAA. Creating an exception for CFSP matters in the draft accession agreement is difficult to reconcile with the idea of comprehensive and effective supervision by the ECtHR and the principle that the EU should accede to the ECHR on an equal footing with the other High Contracting Parties.

40. It seems almost impossible to overcome this objection on the basis of the existing EU treaties. Short of treaty amendment, Prof Halberstam has suggested that EU member states may agree that the ECJ already has jurisdiction over all foreign and security policy measures that are subject to the ECtHR’s jurisdiction.<sup>44</sup>

41. It must be recalled that legislative and other measures (“*Realakte*”) taken in the CFSP policy framework will only exceptionally affect the rights of individuals personally, directly and immediately in such a way that they can claim to be “*victims*” of a

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<sup>43</sup> A full list of reservations made to the ECHR can be found at [link](#).

<sup>44</sup> D Halberstam ‘[Foreign Policy and the Luxembourg Court: How to Address a Key Roadblock to EU Accession to the ECHR](#)’ (12 June 2015).

Convention violation within the meaning of article 34 of the ECHR. Concrete measures that may potentially interfere with human rights will typically be taken by EU member states and are consequently already now subject to judicial review before national courts and ultimately the ECtHR.

42. A possible solution could be a declaration by an Intergovernmental Conference to the effect that the EU treaties should be construed in a way that the ECJ has jurisdiction in respect of all EU acts that can possibly come under review by the ECtHR.

## Conclusion

43. We very much welcome yesterday's statement by the President of the European Commission, Mr Jean-Claude Juncker, before the Parliamentary Assembly that the accession is "*a political priority for the Commission...It is also a personal commitment. We are working on a solution to that accession and we will not rest until we find a solution.*"<sup>45</sup>
44. The ECJ has certainly not facilitated this task. The challenge is to overcome objections which are not only of an exceptional magnitude, but also, as demonstrated above, at least partially, of questionable legal relevance. A former ECtHR judge has described the opinion as "*a political decision disguised in legal arguments.*"<sup>46</sup>
45. It is therefore not surprising that it been proposed to overcome the current deadlock through amendments to the EU treaties, allowing for EU accession notwithstanding opinion 2/13.<sup>47</sup> This is a legally possible solution, but it would neither be respectful of the ECJ's role under the EU treaties nor realistic in political terms.

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<sup>45</sup> See also the statement by V Šipošová, Deputy to the Head of the Delegation of the European Union to the CDDH that "*accession of the EU to the ECHR is a binding treaty obligation, introduced and assumed by the Member States of the European Union in the Lisbon Treaty. This project, while by no accounts not challenging, is thus one of constitutional importance for the European Union. In this line, the pursuit of EU accession to the ECHR has been identified as one of the priorities of the European Commission Work Programme 2015 and reaffirmed as such again in the Commission Work Programme for 2016*", Appendix VII to [CDDH\(2015\)R84](#), para. 2.

<sup>46</sup> The former Icelandic judge D T Björgvinsson, see G Butler '[A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights](#)' 31(81) Utrecht Journal of International and European Law 104, at 106 (2015).

<sup>47</sup> L Besselink '[Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13](#)' (23 December 2013).

46. What remains realistically possible is to address the objections one by one, identifying solutions which respect both the requirements of EU constitutional law and the integrity of the ECHR system. Since it seems inevitable to ultimately return to the ECJ for a new opinion, the finalisation of a revised package of legal instruments should be accompanied by a strong political message, to be adopted at the highest level, for example by the Council of the EU or even a European Council, that these instruments have the political backing of all EU member states, the European Parliament and the European Commission.
47. The Council of Europe stands ready to do whatever possible to facilitate accession and to assist already now, within the limits of its competences, the EU institutions in their search for solutions. Immediately after the publication of ECJ opinion 2/13, in January 2015, Secretary General Thorbjørn Jagland declared before the Committee of Ministers: *“I remain fully committed and will continue to do what I can to help bring the process forward.”* The CDDH has also reiterated its readiness to assist in achieving the EU’s accession to the ECHR.<sup>48</sup>

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<sup>48</sup> ‘Comments from the Steering Committee for Human Rights (CDDH) on Parliamentary Assembly Recommendation 2065(2015) “European institutions and human rights in Europe’, adopted by the Committee at its 83rd meeting (17–19 June 2015), document CDDH(2015)R83, Appendix III, para. 2.