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Making Possible into Impossible
The EU Accession to the European Convention on Human Rights

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The European Union accession to the European Convention on Human Rights represents an obligation under the Treaty of Lisbon. However, the CJEU has concluded in the 2/13 Opinion that the draft agreement of this accession is incompatible with the EU Law. The outlooks of the Luxembourg Court decision underline that the EU's relationship with the European Convention on Human Rights remains at the forefront of the problematic debate regarding how the EU approaches international law. Since it has been previously underlined in the academic literature that there is somewhat limited and primarily general evidence covering the accession subject, this investigation aims to shed light on the current stock of progress towards the EU accession to the ECHR. In light of the CDDH (re)launched dialogue in 2020, the article argues that the overused EU law autonomy protection argument defended by the CJEU in Opinion 2/13 cannot deliver adequate answers to human rights pluralistic law sources that operate in the European continent. The accession remains an essential indication of the concept of legal pluralism in Europe.

Introduction

Unsurprisingly or not, the European Union's founding fathers had not included a 'bill of rights' in the cornerstone principles of the Communities. Therefore, the debate of the EU's accession to the European Convention on Human Rights (ECHR) has a long history, almost since the beginning of the European Communities (EC). Throughout the years, the fundamental rights gap became

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too necessary to address. In this perspective, to cover the lack of expertise about fundamental rights in the Treaties, the European Commission took the initiative to set the EC's accession to ECHR. However, the EU institutions' political desire was hampered twice hampered twice by the CJEU in the 2/94[1] and 2/13[2] Opinions touching the accession debate.

The Court defended its position in the name of preserving its jurisdictional sovereignty, which the CJEU understands in absolute terms, obstructing in this way the opportunity to make the European human rights framework better unified.[3] The accession's main goals were to settle political and technical disputes regarding protecting human rights throughout the European continent. In a political rationale, the accession was intended to end any double protection standard at the EU level and to strengthen the Union's legitimacy in terms of its international human rights obligations.[4] On the other hand, in technical terms, it was designed to bring an end to the divergences in the case law between the ECtHR and the CJEU.[5] Conceivably the most significant attempt to solve this backlash between law and politics came with Lisbon's Treaty, which introduced Article 6 (2) TEU that regulates: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competencies as defined in the Treaties'.

This paper calls into question: which reasons oversee the Court of Justice of the European Union's unwillingness to give a favourable ruling to the EU accession to the ECHR? The CJEU normative position in Opinion 2/13 outlines, without a doubt, the conflict that exists between the effectiveness of

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

[2] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.

[3] Fisnik Korenica, *The EU Accession to the ECHR. Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015) 30.

[4] Eleanor Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd end, OUP 2017).

[5] Jean-Paul Jacque, 'What Next After Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?' (Directorate-General for Internal Policies 2016) 30.

human rights protection and EU law external autonomy.[6] This article draws on three general hypotheses. Firstly, the CJEU is reluctant towards the EU accession to ECHR because this movement exposes the EU legal order to a substantive change. The constitutional impact of the accession was mentioned by the CJEU not only in Opinion 2/13 but also in Opinion 2/14. Secondly, the Court explicitly says in the reasoning that 'the European Union is not a state'. Some legal scholars mentioned below duly acknowledge that the Court has highlighted this aspect for the first time. From this rationale, the accession will represent a novelty in the international law practice as the EU will undertake international law obligations explicitly designed for the states. Thirdly, the accession throws in danger one of the leading EU law privileges carefully nurtured by the Court - the primacy of the EU law. After the accession, the Strasbourg Court will play the leading role over the human rights jurisdiction, which, in turn, would lead to the increasing primacy of the Strasbourg Court.

As a general argument, such an approach towards human rights subject may have consequences for the EU law, as Callewaert highlights 'a legal system which rejects external supervision of its compliance with human rights would be a legal order closed in on itself which, with no input from outside, would be in danger of fossilisation'.[7] In addition, the intrusive and closed legal order the Court is trying to defend all the time makes the Luxembourg Court weak in the light of pluralist legal order discourse. In these circumstances, 'the Court is placed in a dilemma to which it cannot reply'.[8]

Because the CJEU considers the EU accession to the European Convention of Human a threat to the specific characteristics of the EU legal order, which for the CJEU entails primacy[9], direct effect,[10]unity and effectiveness, the Court denounces several aspects that had not been sufficiently addressed during the

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[6] Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) 85.

[7] Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe 2014) 17.

[8] Daniel Sarmiento, 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice' (*EJIL: Talk!*, 7 May 2018) <https://www.ejiltalk.org/a-court-that-dare-not-speak-its-name-human-rights-at-the-court-of-justice> accessed 10 January 2022.

[9]Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

[10]Case 26/62 *Van Gend & Loos* ECLI:EU:C:1963:1.

negotiations on the Draft Accession Agreement (DAA), leading to its incompatibility with the EU Treaties. Most importantly, in Opinion 2/13, the Court raised objections on the co-respondent mechanism and prior involvement procedure; it also held that the DAA had not adequately protected Article 344 and the preliminary ruling mechanism. The CJEU was also concerned that allowing Member States to apply higher human rights protection standards, as stated in Article 53 ECHR, could impose serious hindrance to the primacy of the EU law. It also fears that the EU principle of mutual trust cannot be guaranteed based on current ECtHR case law. Finally, the Luxembourg Court objected that in as much as its competence is limited regarding Common Foreign Security Policy (CFSP), allowing the ECtHR to hear cases concerning it would amount to submitting effective control of this policy-field to a non-EU body. Equally essential to mention here is that the DAA was designed around some political objectives and the rationale behind the legal principles established by the DAA aimed to legitimize the EU in the general European pluralist human rights framework.[11]

For the sake of keeping the monopoly on the final interpretation,[12] one can understand that the accession might be possible in the practice of politics, but it is impossible in law.

The research highlights that preferences defended by the CJEU outline its desire to be 'above the law'. the interests play a significant role both in law and politics. Frieden[13] highlights that actors, no matter at which level they perform, have preferences, and they apply a wide range of strategies to fulfil these aims and increase their reputation. Opinion 2/13 reinforces the assumption that the law performed by the CJEU is not neutral, and the interests of judicial actors play an essential role in shaping a particular type of outcome. In light of the CDDH (re)launched dialogue in 2020, the overused EU law autonomy protection argument defended by the CJEU in Opinion 2/13 and the defence

[11] Korenica (n 3) 8.

[12]Turkuler Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 European Journal of International Law 565.

[13] Jeffry A Frieden, 'Actors and Preferences in International Relations' in David A Lake and Robert Powell (eds), *Strategic Choice and International Relations* (Princeton UP 1999).

of a 'closed law' cannot deliver adequate solutions to human rights pluralistic law sources that operate in the European continent.

The article is organised as follows: the first section gives a brief overview of the theoretical puzzle; the second section presents the analytical framework of Opinion 2/13 given by the Court; the third section seeks to introduce the stock of progress towards the EU accession to ECHR after Opinion 2/13; and the last section concludes.

1. Theoretical Puzzle

Scholars have concentrated their efforts on explaining the legal system in the European Union by looking at the institutional design and the constitutional peculiarities of the rulings delivered by the CJEU and the Member States' constitutions.[14] As Bianchi[15] remarks, 'the interdisciplinary dialogue is hardly a natural course to follow', especially when the debate touches the European Court of Justice, a judicial body famous in the international legal order for its activism and teleological manner of Treaty interpretation. The Luxembourg court received many critiques from the Member States, particularly those in whose the constitutional tradition is significant. This precedent occurs because the rights protected by states constitutions and the catalogue of rights developed by the Court are not eminently the same.[16]

Various approaches have been proposed to explain how the judicial power of the CJEU shaped politics. In the classical process of legal neo-functionalist literature, the Court is described as an actor with considerable autonomy. Because of its legitimacy as a legal player, the CJEU can use the autonomy to

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[14] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168; Cesare PR Romano, 'A Taxonomy of International Rule of Law Institutions' (2011) 2 Journal of International Dispute Settlement 241; Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (Routledge 2012) ch 2.

[15] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 110.

[16] Aida Torres Pérez, *Conflict of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009)

rule against the interests promoted by the Member States.[17] On the contrary, a growing body of literature has used the Principal-Agent Theory (P-A) to support the idea that states still control the authority of CJEU. This approach considers that principals create agents and confer them the power to make binding decisions.[18] The key focus of this theoretical approach is on how to control the agents. In this vein, political control represents an important tool to achieve power. However, the P-A theory's pitfall is that political control might be incomplete, and the theory lacks a conception of preferences.[19]

To clarify the actions of the CJEU, scholars have developed the theory of trusteeship (fiduciary delegation). As Karen Alter[20] underlines, 'trustees are created through a revocable delegation where the trustee is selected because of their personal and professional reputation, given authority to make meaningful decisions according to the trustee's professional criteria, and making these decisions on behalf of a beneficiary.' In the view of Sweet et al.,[21] the trusteeship aspect is responsible for the constitutionalisation path taken by the CJEU. Their work stresses that the CJEU's treaty rulings are insulated from override. First, no such judgement has ever been reversed. Secondly, the Member State governments are not able to block noncompliance litigation. And lastly, the Commission under Article 258 TFEU can impose infringement proceedings against states if they do not comply with the Court's judgments.

From an intergovernmental perspective, the Court follows the member states' instructions and preferences[22]. Although, by looking at the decision trap disputes

[17] Karen J Alter, 'Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) 52 International Organization 121, 121.
[18] Alec Stone Sweet and Thomas L Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention of Human Rights, the European Union, and the World Trade Organization' (2013) 1 Journal of Law and Courts 61, 64.
[19] Karen J Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 European Journal of International Relations 33.
[20] ibid 39.
[21] Sweet and Brunell (n 18) 70.
[22] Mikael Rask Madsen, 'The European Court of Human Rights: From the Cold War to the Brighton Declaration and Backlash' in Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018).

in EU history[23] one can easily observe the member states' ability to control the CJEU remains weak.[24] The requirement of unanimity in decision making (especially in high politics) and the lack of political consensus gives the Courtroom to override the so-called 'political control' imposed by states.

In the lenses of judicial competition theory, the CJEU is an actor who intends to diminish the external sources of authority and power, which might affect its special relationship with the Member States. The political context influences judicial bodies, and sometimes the Court's rational-legal authority is unable to explain the position taken in a specific political context.[25] In international politics, one of the primary concerns of the judicial bodies is their reputation and authority. For them, a reputation is a key tool that 'improves their chances that parties will comply with their future judgments'[26] Even though the CJEU is a regional adjudicative body, its system is very different from a classical model of the International Court; this institution is famous in the international legal order as 'the most powerful supranational court in world history'.[27] It becomes evident that one of the Court's leading interests is to keep this status. In this regard, the Court is engaged diplomatically in a race of judicial competition with the ECtHR to defend the autonomy of the EU legal order at the heart of its functioning. The CJEU' understands autonomy to signify that the EU may be the construction of international law, but that in its internal order its own rules displace the principles and mechanisms of international law'[28]

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[23] Fritz Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1998) 66 Public Administration 239; Fritz Scharpf, 'The Joint-Decision Trap Revisited' (2006) 44 Journal of Common Market Studies 845.

[24] Alter, 'Who are the "Masters of the Treaty"? …' (n 17) 129–33.

[25] Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' in Alter, Helfer and Madsen (eds) (n 22).

[26] Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (CUP 2014) 114.

[27] R Daniel Kelemen, 'The Court of Justice of the European Union: Changing Authority in the Twenty-First Century' in Alter, Helfer and Madsen (eds) (n 22) 223.

[28] 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) <https://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/> accessed 20 October 2021.

On many occasions, scholars stressed that legal fields are generally characterised by contestations of ideas and clashes of power and interests.[29] Concerning human rights, Member States are bound by the litigation of CJEU but also by the ECtHR, where 'the European Convention on Human Rights is the most effective human rights regime in the world'.[30] The ECtHR, a human rights judicial body, fears the CJEU to lose the opportunity to enhance the connection with national judicial actors. On this aspect, Karen Alter[31] suggests that 'the more attractive the alternatives, the fewer cases a court is likely to receive and the less likely it is to gain any level of authority in fact, especially if there is a disjuncture between litigant preferences and international priorities.' Additionally, the human rights subject is salient in substance; in many cases, the overlap and conflict between legal rules are bound to happen. Therefore, the Court pursues its legal rationale and political preferences. The Courts' interests are not neutral and unbiased, and sometimes the judicial actors can be seen as better decision-makers than politicians.[32] One possible solution to clarify choices and their consequences is the 'environment within which the behaviour takes place'[33] In so doing, the unique nature of the EU law and the privileges derived from it for the CJEU might help to analyse the preferences of this actor and their effects on the EU's accession to ECHR.

2. Judicial Competition in a Nutshell: Opinion 2/13 – 'A Legal Bombshell'[34]

In Europe are at least three spheres of human rights protection – national venue, supranational (the Charter of Fundamental Rights and Freedoms) and the

[29] Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' in Alter, Helfer and Madsen (eds) (n 22) 35.

[30] Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).

[31] Alter, Helfer and Madsen (n 29) 40.

[32] Alter, 'Agents or Trustees? …' (n 19) 46.

[33] Frieden (n 13) 70.

[34] Martin Scheinin, 'CJEU Opinion 2/13 – Three Mitigating Circumstances' (*Verfassungsblog* 26 December 2014) <http://www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances/> accessed 19 May 2020).

international stage (the ECHR).[35] Concerning the supranational level, the CJEU role as a human rights adjudicator is relatively recent.[36] In many cases, the Charter of the Fundamental Rights has confirmed the need to interpret the EU rights according to the Convention.[37] However, an empirical study conducted by Kuijer[38] shows the contrary:

> '[I]n the period between December 2009 and December 2012, the Court referred to or drew on the Charter's provisions in at least 122 judgments. In 27 cases, the CJEU dealt with arguments based on the Charter substantively. Out of the 122 cases mentioned above, the Court referred to the ECHR in just 20, and it did not refer at all to the other sources of human rights jurisprudence. One may conclude that the CJEU has become orientated towards the Charter at the expense of the Convention and the Strasbourg Court case law.'

On the other hand, the ECtHR has exploited its notoriety and willingness to cooperate in the *Bosphorus case.*[39] The presumption of equivalent protection stress that States that are part of an international organisation and implement their duties from the membership must observe human rights' protection equivalently to the provisions stated in the Convention. The Bosphorus establishes a presumption of equivalent protection of EU law with the ECHR in general terms. Thus, the ECtHR compromised with the CJEU because of its specific characteristics of law. Despite the competitive nature of these two regional courts, the EU is still privileged by the ECtHR. For example, the accession agreement recognises the EU's particular position and institutional design. For this reason, with the accession, the EU will become *primus inter*

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[35] Pérez (n 16) 27.
[36] de Búrca (n 14) 170.
[37] Pérez (n 16) 33.
[38] Martin Kuijer, 'The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' (2020) 24 The International Journal of Human Rights 998, 1002.
[39] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim S,irketi v Ireland* ECHR 2005-VI 107.

pares, having all rights of a Convention party and beyond.[40] The EU law's overall framework acknowledges the importance of the ECHR and its monumental contribution when interpreting human rights law. Nevertheless, the legal and political concerns are still present because the ECtHR jurisdiction does not apply to the EU.

2.1 The Autonomy of the EU Law

After the first lecture of Opinion 2/13, one can conclude that more than half of the judgment is built on legal justifications concerning the EU law autonomy. However, fundamental rights are closely linked to 'constitutional pluralism' [41] which means that it requires considerable openness to adaptation.

Notably, the Court motivates its position by emphasising two types of objections: procedural (Protocol 16 and preliminary ruling mechanism) and substantive (Common Foreign Security Policy). Consequently, Opinion 2/13 is just another signal from the CJEU that it would not tolerate in any circumstances 'being deprived of the possibility of preliminary scrutiny over the compatibility with fundamental rights of EU law'.[42] The CJEU considers essential to explain the peculiarities of the EU legal system because 'the European Union is not a state' and the amendments of ECHR are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State'.[43] As Steve Peers duly notes,[44] it is for the first time when the Court notably asserted that the EU is not a state. But what CJEU is missing by continuously emphasising the autonomy of EU law and biasing its rulings with the provisions regulated by the Charter of

[40] Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 The Modern Law Review 254, 265.
[41] Pérez (n 16).
[42] Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 Maastricht Journal of European and Comparative Law 35, 44.
[43] Opinion 2/13 (n 2) para 157.
[44] Steve Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (*EU Law Analysis*, 18 December 2014) <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html> accessed 19 May 2020.

Fundamental Rights is the opportunity of developing informed expertise in the field of human rights.[45] The decision not to use the comparative international legal sources in the human rights jurisprudence supports the CJEU to have the exclusive authority to rule on matters of EU law.

From the CJEU perspective, the ECHR accession disturbs EU competencies and the Court's interpretation monopoly of the EU law.[46] Although Protocol No. 8, Article 1, ensures the accession will consider Union Law's distinctive characteristics. Further, Article 2 enhances that accession will not affect the Union's competencies and the power of its institutions. Yet, the legal arguments provided by the CJEU suggest that the accession agreement is still breaching the competencies of the EU law. One of the Court's primary concerns is Article 53 of the Convention, which gives the High Contracting Parties the power to ensure higher protection standards than those outlined in the Charter of Fundamental Rights and Freedoms. Article 53 of the Convention is in line with Article 53 of the Charter of Fundamental Rights and Freedoms, which stress 'nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised [...] including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'[47] Though, the position taken by the CJEU in *Melloni*[48] is considerable different. The reluctance to accede to ECHR provides more concern on the sovereignty of CJEU than the human rights protection. In this vein, the 'accession has been discussed for over fifty years and is yet to happen indeed indicative of the EU's general unsuitability to be a contracting party to the ECHR was traditionally understood as the limitless power to rule; without being bound by any rules.'[49]

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[45] de Búrca (n 14) 184.

[46] Sionaidh Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice' (*Verfassungsblog*, 24 December 2014) <https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/> accessed 19 May 2020.

[47] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

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

[49] Pérez (n 16) 44.

2.2 *Melloni* Doctrine

The Court stated in the 2/13 Opinion 'it should not be possible for the ECtHR to call into question the Court's findings of the scope *ratione materiae* of EU law, for the purposes of determining whether fundamental rights of the EU bound a Member State'.[50] The *Melloni* case is particular within the jurisprudence of the CJEU because it questioned Article 53 of the Charter of Human Rights. Therefore, the Member States are not allowed to apply standards of protection of fundamental rights as guaranteed by their constitutional provisions when the standard is higher than those stated in the Charter.[51] For this reason, the Charter cannot fall below the ECHR standard, but it can ensure the same level of protection. While, according to the Convention, Member States can provide higher security standards, they are deprived of acting in the same manner under the primacy of EU law. In this regard, Melloni challenged the national constitutional provisions and the Convention.

2.3 Special Relationship of the CJEU with National Courts

Another reason behind the opposing opinion is depicted in Protocol 16 ECHR[52] called by the experts 'the protocol of the dialogue.'[53] In a summary, it 'permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto'[54] but it gives a considerable amount of discretion. The CJEU fears that in the case of accession, the mechanism established by the Protocol could affect the autonomy and effectiveness of the preliminary mechanism procedure regulated in Article 267 TFEU. So, the CJEU is considering the probability that

[50] Opinion 2/13 (n 2) para 186.
[51] Vanessa Franssen, 'Melloni as Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights Protection' (*European Law Blog*, 10 March 2014) <https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/> accessed 20 May 2020.
[52] Opinion 2/13 (n 2) paras 196–99.
[53] Johan Callewaert, 'Protocol No 16 and EU Law' in Josep Casadevall and others (eds), *Essays in Honour of Dean Spielmann* (Wolf Legal Publishers 2017).
[54] Opinion 2/13 (n 2) paras 198–99.

national courts may be tempted to address preliminary questions, where the cases are touching the subject of human rights, to the Strasbourg Court. Nonetheless, as pointed out by some authors, the agreement on EU-accession is not primarily intended to apply to the EU Member States but rather to the EU as such.[55]

2.4 Article 344 TFEU

The Court has consistently assessed that an international agreement cannot affect the allocation of powers fixed by the Treaties of the EU legal system's autonomy. This principle is enshrined in Article 344 TFEU, according to which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any settlement method other than those provided for therein.[56] Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law – and to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system – must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU.[57]

2.5 The Co-Respondent Mechanism

The mechanism 'provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by the ECtHR's decision upon the request of that Contracting Party. However, carrying out such a review would require the ECtHR to assess EU law rules governing the division of powers between the EU and its Member States.[58] The co-respondent mechanism permits the ECtHR to refrain from determining the correct respondent or how responsibility should be apportioned between them.[59] Most importantly, the co-responded mechanism intends to enforce principles such as participation, accountability, and enforceability in the ECHR system.

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[55] Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (n 7) 13.
[56] Opinion 2/13 (n 2) para 200.
[57] ibid, para 201.
[58] Douglas-Scott (n 46).
[59] Eckes (n 40) 26.

From a normative perspective, it can enhance the legitimacy of the acts and actions taken by the Member States, the CJEU, and the Strasbourg Court. However, from the normative perspective of the CJEU, it might burden the division of competences between EU and the Member States because the ECtHR should not have the power to allocate responsibility for the breach of the ECHR between the EU and the Member States since only the CJEU can rule on the EU law.[60] The mechanism privileges the CJEU to intervene as a co-respondent in cases where there is uncertainty in interpreting the legislation. But the reversal might also happen because the Member States can be co-responded in cases directed against the EU if they found a violation of the Treaty provisions.[61] In *Matthews*[62] was found a breach of primary law because the EU oversaw extending the liaison for the European Parliament to EU citizen residents in Gibraltar.[63]

2.6 Common Foreign and Security Policy – A Competition Race

One of the last and most important is the Court's concern regarding the EU law specific characteristics concerning judicial review in CFSP. Foremost, it is worth mentioning that the CFSP is given separate treatment from all other Union policies because of its location in the TEU instead of in the TFEU.[64] On this matter, the Court has jurisdiction to review two categories of measures 'reviewing the legality of decisions providing restrictive measures against natural or legal persons adopted by the Council based on Chapter 2 of Title V of the EU Treaty'[65] The second duty is to ensure that measures adopted here do not

[60] Peers (n 44).
[61] Spaventa, 'Fundamental Rights in the European Union' (n 4) 255.
[62] *Matthews v UK* ECHR 1999-I 251.
[63] Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (n 42).
[64] Kieran St C Bradley, 'Legislating in the European Union' in Barnard and Peers (eds) (n 61) 110.
[65] Opinion 2/13 (n 2) para 250.

encroach on the Union's competencies under the general regime.[66] Based on the accession agreement, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the CJEU cannot, for want of jurisdiction, review in the light of fundamental rights.[67] According to Opinion 2/13, a non-EU court cannot be given the power of judicial review over EU acts. This approach applies to the ECtHR and other international adjudicatory bodies like the International Court of Justice (ICJ). In a scenario where a Member State brings a CFSP dispute to ICJ, the CJEU would state that it violates EU law.[68]

3. Beyond Judicial Competition – The Ongoing Trends

Article 6(2) TEU does not mention a time frame for the EU accession to ECHR. In theory, the provision could be ignored for a long time, even indefinitely.[69] After Opinion 2/13, many considered that accession is politically unrealistic, but, as mentioned at the beginning of this paper, 'actors no matter at which level they perform have interests and preferences.' In this regard, it is imperative to consider that in a letter by 31 of October 2019, co-signed by the President and the First Vice-President of the European Commission, the Secretary-General of the Council of Europe was informed that the EU 'stood ready to resume the negotiations on its accession to the European Convention on Human Rights'[70] Consequently, at its 92nd meeting[71], in November 2019, the Steering Committee

[66] Bradley (n 64) 111.
[67] Opinion 2/13 (n 2) para 254.
[68] Peers (n 60)
[69] Adam Łazowski and Ramses A. Wessel, 'When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR' (2015) 16 German Law Journal 179, 204.
[70] EU accession to the ECHR' (Council of Europe) <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> accessed 20 October 2021.
[71] Steering Committee for Human Rights (CDDH), 'Report, 92nd meeting, Strasbourg, 26–29 November 2019' (CDDH(2019)R92, Council of Europe 20 December 2019).

for Human Rights (CDDH) proposed a series of arrangements to continue the negotiations within an *ad hoc* group composed of representatives of the 47 Member States of the Council of Europe and a representative of the European Union (47+1 format).

Equally important to acknowledge is that in an informal meeting held in June 2020, the EU Commission underlines that the new CDDH working arrangements should focus on the objections raised by CJEU in Opinion 2/13. In light of the current developments, it is essential to emphasise that the DHH working meetings do not constitute a new accession initiative but rather a continuation of the abandoned talks in 2013. Paradoxically, 24 out of 28 EU Member States, the institutions, and the non-EU Council of Europe Member States – unanimously agreed on the 2013 DAA. Their position towards the accession has not changed (Johansen 2021). In addition, the non-EU Council of Europe Member States have the task now to find solutions for the objectives raised by CJEU in Opinion 2/13 that primarily deals with the internal affairs of the EU law.

At time when Opinion 2/13 was delivered, some experts argued that the Court's position is 'a political decision disguised as a legal argument.'[72] Relevant for this argument is the political pressure the CJEU received from some national governments, notably from the UK, which, at that time, was recognised as one of the strongest voices in the Union.[73] As Steve Peers duly notes, 'the Court's judgment is essentially a more articulate and EU-specific version of the document recently produced by the UK's Justice Minister, which sought changes to the law to ensure that the UK would be free to do as it wished as regards human rights issues, while (possibly) nominally remaining a signatory of the ECHR'.[74] Historically, the United Kingdom was unwilling to accept the Strasbourg Court's jurisdiction. Throughout the years, the ECtHR tried to harmonise its relationship with the members of the Council of Europe. Still,

[72] Graham Butler, 'A Political Decision Disguised as a Legal Argument? Opinion 2/13 and EU Accession to the ECHR' (2015) 31(81) Utrecht Journal for International and European Law 104.

[73] European Scrutiny Committee, *Subsidiarity and Proportionality and the Commission's Relations with National Parliaments* (HC 2014–15, 219-XXIX) 23 ff.

[74] Peers (n 44).

even the UK accepted the ECtHR judgments its compliance was sometimes partial or delayed.[75] On the other hand, the British legal system was also reluctant to the EU law, with Brexit it is not the case regarding the political pressure on the Court.

In October 2020, the CDDH (re)launched the dialogue for the first time since 2013.[76] Even though in the context of the EU accession, some voices in the academia stressed the sensitive nature of the EU legal order - the current political dialogue emphasises that the current circumstances demand constructive work to make a reconciliation between the Strasbourg and the Luxembourg Court human rights jurisdiction. On another note, the ongoing work of the CDDH could be considered a response to the CJEU overused arguments in favour of the EU law autonomy, which are no longer sufficiently sound 'to excuse' the EU from taking substantive measures to fulfil its obligations expressed in Article 6(2) of the Lisbon Treaty. In this regard, discussions about the co-responded mechanism, the prior involvement procedure and the principle of mutual trust between the Member States and the exchange of views on CFSP represents the centrepiece of CDDH ad-hoc meetings.[77] It is worth emphasizing that case law since 2014 had 'steadily widened the scope of the counter-exceptions which granted jurisdiction to the CJEU in the CFSP area and established that the exclusions from the general jurisdiction of the CJEU must be given a narrow interpretation. Additional cases which could further widen the CJEU's jurisdiction were currently pending'[78] One of the proposals during the CDDH meetings was to ensure that 'an explicit attribution clause in the draft Accession Agreement for the relevant CFSP situations could be an avenue to pursue.'[79] Tonje Meinich, a former chair of

[75] Madsen (n 22) 244.

[76] Council of Europe, '6th Meeting of the CDDH Ad Hoc Negotiation on the EU Accession to the ECHR' (OJ06rev, Council of Europe 3 September 2020).

[77] Council of Europe '6th Meeting Report of the CDDH Ad Hoc Negotiation Group on the Accession of the EU to the ECHR' (47+1(2020)R6, Council of Europe 22 October 2020).

[78] ibid 9.

[79]Council of Europe, '8th Meeting Report of the CDDH Ad Hoc Negotiation Group (47+1) on the Accession of the EU to the ECHR' (47+1(2021)R8, Council of Europe 4 February 2021).

CDDH - UE and 47+1 group, stressed in 2019 that the CFSP was the 'challenging question to solve.' The CFSP remains a sensitive topic in the current working meeting format since the CJEU has limited jurisdiction in this field and, concerning ECHR, no party to the ECHR is entitled to exclude a policy area from the ECtHR jurisdiction.[80]

The EU stated that maintaining the criteria in Article 3 of the draft Accession Agreement would carry the legal consequences that the ECtHR retained the final authority on the application of the requirements for the triggering of the co-respondent mechanism, and therefore would rule incidentally on the internal distribution of powers, which had triggered the concern raised by the CJEU in Opinion 2/13.[81] Some delegations suggested that the criteria could be removed to other places in the draft accession instruments, such as the draft declaration by the EU in Appendix II or the explanatory report. The EU indicated openness to this proposal, while other delegations preferred to keep it in the DAA.[82] However, the complexity of the mechanism should not disguise the fact that its use in practice would be infrequent.[83] In addition, the Group considered a proposal by the EU on the coordination of Article 53 ECHR and Article 53 of the EU Fundamental Rights Charter.[84] There was some support on the proposal's substance if it was amended with a clarification that the minimum protection as enshrined in the ECHR was maintained, and the proposal would not be included in Article 5 of the draft Accession Agreement.[85] One delegation raised the question about whether the EU should have a vote on any matters in the Committee of Ministers, bearing in mind that the EU will not become a member of the Council of Europe.[86]

[80] Rules of Strasbourg Court, October 2021.
[81] ibid 4.
[82] ibid.
[83] Council of Europe, '9th Meeting Report of the CDDH Ad Hoc Negotiation Group on the Accession of the EU to the ECHR' (47+1(2021)R9, Council of Europe 25 March 2021) 9.
[84] ibid 4.
[85] ibid 5.
[86] ibid 6.

Among other things, the principle of mutual trust concerned most of the delegations.[87] The Group discussed proposals related to the EU's specific procedure mechanism before the ECtHR and the operation of inter-party applications (Article 33 of the Convention) and requests for advisory opinions under Protocol No. 16 to the Convention. The Group considered a proposal for a new Article 5a.[88] According to this proposal, the EU would be given the opportunity, in the case, a court or tribunal of an EU member state makes a request to the ECtHR for an advisory opinion, to clarify in an EU-internal procedure whether the procedure under Article 267 of the TFEU had been circumvented by such request. If this was to be confirmed, the ECtHR should exercise its discretion under Protocol No. 16 not to accept the request as far as it was violating EU law. The EU welcomed the approach of the proposal.[89]

It seems that one of the most challenging aspects to adjust after Opinion 2/13 remains at the substantive level – namely, the CFSP matter. From this standpoint, one of the main concerns for the CDDH in the ongoing ad-hoc meetings remains: how to adjust the Court's requirements without touching the cornerstone of the EU law autonomy?

Conclusion

The EU-accession to the ECHR rights represents a great occasion to observe the Union itself bound by international law. But, unfortunately, the position articulated by the CJEU in Opinion 2/13 shows that ordinary citizens have to wait to benefit from the privileges of such an act. This paper has given an account of the judicial competition between two powerful Courts – on the one hand, the CJEU defending its autonomy over EU legal interpretation; on the other hand, ECtHR militating for synergies between the two human rights legal sources – the ECHR and the EU Charter of the Fundamental Rights and Freedoms.

In a nutshell, the 2/13 Opinion highlights the argument that the reasons behind blocking the accession reveal that CJEU cares more about its status than

[87] Council of Europe, '8th Meeting of the CDDH Ad Hoc Negotiation Group 47+1 on the EU Accession to the ECHR' (n 79).
[88] Council of Europe, '10th Meeting of the CDDH Ad Hoc Negotiation Group 47+1 on the EU Accession to the ECHR' (47+1(2021)R10, Council of Europe 2 July 2021) 3
[89] ibid 5.

the effectiveness of human rights law. Noticeably, the preferences defended by the CJEU outlines its desire to be 'above the law'. This normative conflict throws the harmonisation and effectiveness of the human rights system at the EU level. Even one of the former presidents of the EU Court of Justice declared at the FIDE Conference in 2014, 'the Court is not a human rights court', which gives the impression that the human rights subject is not among the Luxembourg Court's priorities. The different interpretation of the human rights law given by the ECtHR and CJEU represents the conflict's primary source, which might increase further. Since the Court refers more to the Charter of the fundamental rights in its rulings, in time, the Strasbourg Court's jurisprudence might be marginalised, making a real risk 'of the two central European legal systems drifting apart'.[90] The normative conflict could be fostered if the ECtHR may respond to CJEU. Secondly, the continued protection of its jurisdiction by the CJEU in this area may trigger domestic Constitutional Courts to do the same.[91] This statement seems to be plausible more than ever for the EU legal order considering the current Polish Constitutional Tribunal ruling stating that the country's constitution takes precedence over the EU law.[92] Lastly, the notion of autonomy and effectiveness should be accommodated in a manner to reflect that these concerns are not EU *sui generis*, but constitutional concerns common to all ECHR Contracting Parties.[93] As Professor David Thór Björgvinsson outlines - 'if you have political preferences, ways can be found to accommodate that within legal reasoning'.[94]

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[90] Jörg Polakiewicz, 'Legal Challenges and Opportunities Raised by EU Participation in Council of Europe Treaties' <https://www.coe.int/en/web/dlapil/-/legal-challenges-and-opportunities-raised-by-eu-participation-in-council-of-europe-treaties> accessed 25 May 2020.

[91] Stian Øby Johansen, 'EU Accession to the ECHR: Details of the Relaunched Negotiations' (*EU Law Analysis*, 30 January 2021) <http://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html> accessed 1 July 2021.

[92] European Commission Press Statement, October 7, 2021. <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5142> accessed 23 October 2021.

[93] Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) 16 German Law Journal 147.

[94] Butler (n 72) 108.

On a final note, the law is not a fixed ground. In this regard, the EU accession to ECHR depends on the political will and of the willingness of the judiciary bodies to build a standard system of 'Europe of Rights'[95] Even though the Court, with its 2/13 Opinion, provided more questions than solutions, at least one aspect remains clear – the European Union, under Article 6 (2) of the Lisbon Treaty, is obliged to accede to the ECHR. Ultimately, seeing that EU accession to the ECHR is an essential indication of the concept of legal pluralism in Europe and beyond.[96]

[95] Alec Stone Sweet and others, 'The Reception of ECHR in National Legal Orders' in Hellen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).
[96] Korenica (n 3) 10.