OPINION 2/13

Balancing Constitutionalism and a Human Rights Perspective

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Abstract

Through qualitative legal research, this paper will answer the question: '*How can constitutionalism be balanced with a human rights perspective, in EU accession to the ECHR?'* We hypothesize that this balance is possible. From the current academic debate, three theories applicable to this research are distilled: *constitutionalism*; a *human rights perspective;* and *institutionalism.* Through application of the first two theories, a concrete proposal for the way forward in EU accession to the Convention is constructed. The legal options for this proposal consist of Treaty revisions (including the adoption of a 'notwithstanding' protocol), unilateral measures (reservations, declarations, and agreements), and renegotiation of the Draft Accession Agreement. Thirteen amendments are proposed: eleven to the Draft Accession Agreement; one to the Draft Explanatory Report; and one to the TEU. Furthermore, it is argued throughout this research that institutionalist tendencies matter, but cannot serve as sole explanations for the Court's reasoning. As the key conclusion, we find that a way forward in accession, that considers both constitutional demands and a human rights perspective, exists. Appended to this paper, a comprehensive proposal for this way forward is introduced.

Key terms

Opinion 2/13 – CJEU – ECtHR – Constitutionalism – Human Rights – Institutionalism – Draft Accession Agreement – Charter – Convention

List of Acronyms

AFSJ – Area of Freedom, Security and Justice

AG – Advocate-General

CEAS – Common European Asylum System

CFSP – Common Foreign and Security Policy

CJEU – Court of Justice of the European Union

DAA – Draft Accession Agreement

DER – Draft Explanatory Report

EAW – European Arrest Warrant

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECJ – European Court of Justice

ECtHR – European Court of Human Rights

EU – European Union

EUChFR – Charter of Fundamental Rights of the European Union

FDEAW – Framework Decision on the European Arrest Warrant

IR – International Relations

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

Introduction

After France's ECHR-ratification in 1974, the idea of EU accession to the ECHR first came to light. However, in 1996, the ECJ held that accession required Treaty amendment.[1] In Lisbon, the Treaties were indeed amended to include Article 6(2) TEU: "[t]he Union shall accede to the [Convention]."[2] Additionally, Protocol (No 8) set out different aspects of accession.[3] After years of negotiation between *inter alia* EU Member States, the Commission and the Convention's High Contracting Parties, a Draft Accession Agreement (DAA) on accession was concluded.[4] The Commission requested the CJEU's opinion on the DAA's Treaty-compatibility, pursuant Article 218(11) TFEU. Subsequently, in December 2014, 'Opinion 2/13' blocked accession on several legal issues.[5]

Member States are required to ratify the ECHR before acceding to the EU,[6] meaning that cases of fundamental rights infringements by Member States can be brought before Strasbourg. However, the EU and its institutions are not subject to ECtHR scrutiny, and cannot be addressed as a respondent here. The design of EU law further complicates this. For example, when a Member State while implementing an EU directive infringes (individual) fundamental rights, is the infringement a product of the directive, or of the way the Member State implements it? This type of legal uncertainty could be remedied by accession. Alas, Luxembourg decided that on the DAA's terms, accession would be impossible.[7]

[1] Opinion 2/94, ECR, EU:C:1996:140, 28/3/1996.

[2] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, Article 6(2) Treaty on European Union (*hereafter:* TEU).

[3] TEU, Protocol (No 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the [ECHR].

[4] Council of Europe, Final report to the CDDH, Strasbourg, June 10th, 2013, 47+1(2013)008rev2 (*hereafter: DAA).*

[5] Opinion 2/13, EU:C:2014:2454, 18/12/2014, (*hereafter:* Opinion 2/13).

[6] 'Copenhagen Criteria' SN-180/1/93-REV1.

[7] Opinion 2/13.

This decision staggered human rights lawyers[8] and faced heavy initial critique.[9] Numerous theoretical approaches are applicable to Opinion 2/13, as it is central to contemporary human rights protection. For IR scholars, the Opinion represents an almost glaring case of institutionalism.[10] Luxembourg seemingly rejects the possibility of another Court removing it from its 'European Supercourt' position. And although there are *prima facie* indicators, it is not evident that institutional considerations are the sole explanatory factor behind the Opinion. Indeed, realist theoretical approaches seem to focus on constitutionalism, pluralism, federalism, and human rights when analyzing the Opinion.[11] But there seems to be a theoretical gap concerning the idealist interpretation of the text. In analyzing how Opinion 2/13 affects not only human rights, but also EU law autonomy, we must not only focus on how it *is,* but also how it *should be*. From this perspective, two main concepts can be balanced: a human rights perspective and constitutionalism.[12]

The Commission announced its intention to continue working on accession in its 2016[13] and 2017[14] work programs, and in its May 2017 staff working document, accession was deemed a "priority".[15] However, it only reported it was "making good progress".[16] The initial outrage and criticism has somewhat simmered down. But accession has not come to a full stop, and it is important to keep providing the necessary input. Therefore this research focuses on how accession should look, considering the constitutional objections raised by the CJEU on the one hand, and the level of human rights protection in Europe on the other.

[8] See, *inter alia,* Douglas-Scott, S. 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice'. U.K. Const. L. Blog (24th December 2014)(available at http://ukconstitutionallaw.org).

[9] Elaborated upon in 'Literature Review'.

[10] Barnard, C. 'Opinion 2/13 on EU accession to the ECHR: looking for the silver lining' EU Law Analysis, (16th February 2015) (available at http://eulawanalysis.blogspot.nl/2015/02/opinion-213-on-eu-accession-to-echr.html).

[11] Halberstam, D. '"It's the Autonomy Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward.' Michigan Law, Public Law and Legal Theory Research Paper Series No. 432 (2015).

[12] *Supra* n. 9.

[13] European Commission, COM(2015) 610 final, Strasbourg, 27.10.2015.

[14] European Commission, COM(2016) 710 final, Strasbourg, 25.10.2016 .

[15] European Commission, COM(2017) 239 final, Brussels, 18.5.2017 SWD(2017) 162 final.

[16] Ibid.

Is it possible, post-Opinion 2/13, to accede without compromising fundamental rights protection? Some believe that accession upon Luxembourg's terms would "only appeal to those who don't like human rights very much."[17] These comments might appeal, but should not imply that no way forward is possible without "significantly diminishing"[18] fundamental rights protection. Our objective must therefore be to find such a way.

Specifically, our objective is to construct a proposal balanced between the two above-mentioned approaches, with concrete recommendations for accession. To achieve this balance, we define the human rights perspective as being in favor of maintaining an adequate level of human rights protection in Europe upon accession. Constitutionalism, in our research, is understood as maintaining, or not detrimentally impairing, EU law autonomy.[19] Concretely, we address the following research question:

> *How can constitutionalism be balanced with a human rights perspective, in EU accession to the ECHR?*

We hypothesize that there is indeed a way forward that respects constitutional demands on the one hand, and a human rights perspective on the other. Through analyzing the Opinion with this hypothesis in mind, we aim to construct a proposal for accession, which, if successful, would confirm our hypothesis.

The following sections provide a review of the literature on Opinion 2/13 including a theoretical framework (Literature Review), the approach and methodology (Methodology), and the legal framework (Legal Framework). In the main section (Analyses) we critically analyze the seven main objections in Opinion 2/13 using our theoretical framework, and propose specific amendments (diverging slightly from the order presented by the Court, for reasons of readability). In the conclusion we critically discuss present research, and make recommendations. In Appendix I, we present a concrete, comprehensive proposal.

[17] Peers, *supra* n. 8.

[18] Ibid.

[19] *Supra* n. 9.

Literature Review

As of 2017, much has been written on the subject of the Opinion, from which we can distill three main theories applicable to this research: *constitutionalism,* a *human rights perspective,* and *institutionalism*. Most contributions appeared throughout 2015 and 2016.

The *constitutional perspective* mostly offers a defense of Luxembourg's objections. Prominently voiced by Halberstam, it firmly advocates a constitutional approach, for the EU's legal order is "geared to vindicating all three constitutional values (including rights)."[20] An institutionalist or human rights perspective alone somewhat disregards the context of EU law autonomy. In possibly the most favorable view of the Opinion, Halberstam argues, for example, that granting Strasbourg jurisdiction over CFSP could undermine the constitutional CJEU, which has limited jurisdiction in this area.[21] Therefore, he argues, the EU should not be treated as a sovereign state. Furthermore, every Contracting Party has a court of first instance, and the EU should be entitled to a consolidating court of their own. In the same constitutional line of argument, Protocol No. 16 ECHR represents an attack upon EU law autonomy – advisory opinions from Strasbourg could involve interpretations of EU law.[22] Constitutionalists would argue that mutual trust should be preserved, as it is instrumental to EU law autonomy.[23] Critics of this constitutional pluralism dub this radical pluralism: Eeckhout argues for enhanced judicial dialogue, because the legal space in which national courts, Luxembourg, and Strasbourg operate is the same; the different sets of laws governing this area cannot be seen as completely autonomous.[24] He argues for a softer approach to pluralism, and rather focuses on the legal aspects of the Opinion.[25] Furthermore, Callewaert argues,[26] Article 52(3) EUChFR already limits EU law autonomy in fundamental rights, as "in so far as this Charter contains rights which correspond to [the Convention], the meaning and

[20] Halberstam, *supra* n. 11, p. 4.

[21] Ibid., p. 34.

[22] Ibid., p. 17.

[23] Ibid., p. 23.

[24] Eeckhout, P. 'Opinion 2/13 on EU accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' Jean Monnet Working Paper 01/15 (www.jeanmonnetworkingprogram.org).

[25] Ibid.

[26] Callewaert, J. 'Protocol 16 and the Autonomy of EU Law: Who is Threatening Whom?' European Law Academy of Trier (2014).

scope of those rights shall be the same as those laid down by the said Convention."[27] However, as the CJEU's arguments largely concern EU constitutional autonomy, we argue throughout this research that any proposal that does not acknowledge this autonomy, will not be a feasible solution to the CJEU.

Secondly, we apply a *human rights perspective*. This perspective is grounded in the level of individual protection guaranteed by international agreements, such as the Charter and the Convention. It often views the Opinion unfavorably. For example, according to Storgaard, Luxembourg "chose conflict".[28] Mohay euphemizes when calling the Opinion's "contribution to an enhanced protection of fundamental rights in the EU […] questionable."[29] De Witte calls the concerns "radical" and "unjustified".[30] Some critics applying a human rights perspective even argue that accession on Luxembourg's terms must be rejected.[31] Peers, for example, sees it as a "danger to human rights protection",[32] and Douglas-Scott refers to the Opinion as a "bombshell".[33] Eeckhout warns of the reductionist effect of mutual trust preservation as *ratione materiae*: it would render future *M.S.S.*-type cases impossible.[34] However, a constitutional approach can overlap with a human rights perspective: the Opinion might empower the CJEU to assert itself as a stronger human rights court, which might lead to higher standards in the EU.[35] It could even be argued Opinion 2/13 is a tool for the CJEU to postpone accession, in order to build EUChFR case law, and ultimately "prove the Court

[27] European Union, Charter of Fundamental Rights of the European Union, 26/10/2012, 2012/C 326/02, Article 52(3), (*hereafter:* EUChFR).

[28] Storgaard, L.H. 'EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR' Human Rights Law Review 15 (2015) p. 485-521.

[29] Mohay, Á . 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR – Case note' Pécs Journal of International and European Law (2015) p. 28-36.

[30] De Witte, B. 'Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court' European Law Review (2015) p. 683-705.

[31] Not to imply a lack of human rights perspective in Halberstam's work, who himself calls his analysis "charitable" towards Luxembourg. However: "we must [..] move away from an exclusively human rights focused interpretive approach and towards constitutional analysis".

[32] Peers, *supra* n. 8.

[33] Douglas-Scott, S. 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice'. U.K. Const. L. Blog (24th December 2014)(available at http://ukconstitutionallaw.org).

[34] Eeckhout, *supra* n. 24.

[35] Barnard, *supra* n. 10.

takes human rights seriously."[36] Lock poses the question: "is it still desirable for the EU to accede to the ECHR in light of the Opinion?"[37] Ultimately, under the Court's demands, accession might surpass the idea of improving human rights protection in Europe. It is evident that critics applying a human rights perspective advocate maintaining an adequate level of protection. In our research we will apply this interpretation to any proposal we make. We will see that often this aim brings significant considerations to the table. However, certain measures might not impact the level of protection we wish to uphold.

Although Halberstam firmly rejects the assertion,[38] the Opinion cannot be viewed without regarding the classic IR theory of *institutionalism*.[39] In short, "institutions […] structure action".[40] This institutionalist view is often applied alongside accusations of the Opinion being an "unfortunate case of judicial activism."[41] Luxembourg would be "legislating from the bench", or guilty of "result-oriented judging."[42] According to Barnard, the Opinion can be seen as a political decision "dressed up in lawyers' clothing."[43] From this perspective, it is easy to see why the institutionalist character of the Opinion has not gone unnoticed: it can be seen as a strengthening of the CJEU's position.[44] In fact, David Thór Björgvinsson, a former ECtHR Judge, stated:

[36] Łazowski, A., Wessel, R.A. 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' 16th German Law Journal (2015) p. 179-212.

[37] Lock, T. '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?' European Constitutional Law Review (2015)11 p. 239-273.

[38] Halberstam, *supra* n. 11.

[39] Aspinwall, M., Schneider, G. 'The Rules of Integration: Institutionalist Approaches to the Study of Europe' Manchester University Press (2001).

[40] Clemens, E.S., Cook, J.M. 'Politics and Institutionalism: Explaining Durability and Change.' Annual Review of Sociology 25 (1999), p. 441–466.

[41] De Witte, *supra* n. 30.

[42] Kmiec, K.D. 'The Origin and Current Meanings of Judicial Activism' California Law Review Volume 92(5), Article 4 (2004), p. 1441-1478.

[43] Barnard, *supra* n. 10.

[44] Ibid.

> "… I think you have to look at it from the historical perspective – institutions adapt to the political environment in which they are operating […] it is about the survival of an institution."[45]

So, through this judicial activism, Luxembourg supposedly seeks to maintain its position as 'European Supercourt'. Not only externally, i.e., towards Strasbourg, but also EU-internally. For example, in the Opinion EU law principles such as the preliminary rulings procedure are extended.[46] Arguably, by postponing accession, the CJEU offers itself the chance to build upon the Charter and EU case law.[47] This would supposedly allow Luxembourg to further expand the EU's *sui generis* legal system. Morijn even deems this Luxembourg's "unstated primary aim".[48] Isiksel goes even further, by describing the Opinion as exemplary "European Exceptionalism":[49] Luxembourg finds itself the most capable fundamental rights adjudicator, and therefore exceptional. Throughout present research the reader will notice that institutionalist considerations appear to have played a role in CJEU's judgment. It is important, however, not to ascribe the Opinion in its entirety to this line of reasoning, as it is shown that considerations which seem institutionalist can still be constitutionally significant. We argue that institutionalist tendencies matter, but cannot serve as sole explanations for Luxembourg's objections. For the specific aim of constructing our balanced proposal therefore, we will mostly apply a human rights perspective, and constitutional approach.

Finally, some contributors offered proposals for accession. Legally, this mainly involves the following options; Treaty revisions, unilateral measures, and DAA renegotiation. Lock argues for the latter, as Treaty revisions seem highly unlikely, while unilateral measures

[45] David Thór Björgvinsson, in Butler, G. 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights'. Utrecht Journal of International and European Law (2015) 31(81), 104-111.

[46] Daminova, N. 'Protocol No. 16 of the ECHR in CJEU Opinion 2/13: Analysis and perspectives', DIRPOLIS Institute, Pisa (2016) p. 2.

[47] Łazowski, Wessel, *supra* n. 36.

[48] Morijn, J. 'After Opinion 2/13: how to move on in Strasbourg and Brussels', Eutopia Law Blog, Matrix Chambers' EU Law Group, (Jan 2015) (*available at:* https://eutopialaw.com/2015/01/05/after-opinion-213-how-to-move-on-in-strasbourg-and-brussels/).

[49] Isikel, T. 'European Exceptionalism and the EU's Accession to the ECHR' The European Journal of International Law Vol. 27 no. 3 (2016) p. 565-589.

might not be enough to satisfy either Court.[50] Halberstam conversely argues unilateral measures such as binding declarations would be far more likely considering the political environment, and could serve to defend EU constitutional principles.[51] Besselink proposes a 'notwithstanding' protocol: "The Union shall accede to the [ECHR], notwithstanding Article 6(2) [TEU], Protocol (No 8) […] and Opinion 2/13[…]."[52] These legal tools prove essential to our research, and for constructing a proposal. They are discussed extensively in our 'Legal Framework' section.

Through a brief literature review, we see numerous theoretical approaches applicable to the Opinion. Throughout our analyses we return to these prominent voices, as they prove crucial to understanding the Opinion's complexities. However, what appears to be missing from the academic debate to date, and the subject of present research, is a constructive approach to the Opinion: *How can constitutionalism be balanced with a human rights perspective, in EU accession to the ECHR?*

[50] Lock, *supra* n. 37.

[51] Halberstam, *supra* n. 11.

[52] Besselink, L.F.M. 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' Verfassungsblog (Dec 2014) (*h*ttp://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2*/)*.

Methodology

Legal analysis will form the larger part of our approach, as the Opinion contains mostly legal objections to accession. The seven[53] main objections of the Court – mutual trust, Articles 53, Protocol 16, Article 344, the co-respondent mechanism, the prior involvement procedure, and CSFP jurisdiction – will be analyzed in terms of compatibility with EU accession to the ECHR. For example, Article 6(2) TEU can be interpreted either as an absolute obligation to accede, or as a conditional obligation with regard to Protocol (No 8).[54] Close scrutiny of the Article, the Protocol, and the CJEU's arguments, can clarify this. In our attempt to consolidate our two main theoretical approaches, we look for opportunity in the legal space suitable to both.

Through this legal research we attempt to establish a sound proposal on how accession should look from a human rights perspective, whilst respecting constitutional autonomy. This proposal's success will be measurable by critically examining the balance of these two perspectives. Throughout this research the legal framework presented in the following section is consistently recognized. To achieve a balanced view of our theories, a form of *theoretical comparative analysis* comes in to play. *Discourse analysis* can be applicable in both the Opinion and the relevant case law. For example, the language used by Advocate-General Kokott differs vastly from that in Opinion 2/13. Where the AG's arguments in reaction to the prior involvement mechanism are basically stated as 'Yes, but…', the Court reasons along the lines of 'No, unless...'.[55] Furthermore, *content-* and *discourse analysis* applied to the Opinion, and the academic debate, gives us thorough insight into the diverging approaches applied by the CJEU, the Advocate-General, and scholars – which will allow us to fully understand the complications at hand. Through these analyses we can establish a sound understanding of different theoretical approaches, such as constitutionalism,[56] classic IR institutionalism,[57] and a human rights perspective. Integrating these facets of different analyses into the general

[53] Depending on how the arguments are sub-categorized. We will use a categorization similar to that of Douglas-Scott, *supra* n. 33.

[54] Barnard, *supra n.* 10.

[55] Halberstam, *supra* n. 11.

[56] Halberstam's *plural constitutionalism* seems best fit for the purposes this research. *See:* Halberstam, D. 'Local, Global, and Plural Constitutionalism: Europe Meets the World' Michigan Law, Public Law and Legal Theory Working Paper Series No. 176 (2009).

[57] Aspinwall, Schneider, *supra* n. 39, p. 75.

approach of classic qualitative legal research provides us with in-depth considerations for the construction of a proposal that reconciles constitutionalism with a human rights perspective. In the following section, we will discuss our legal framework and instruments.

Legal Framework

Before analyzing the Court's arguments, it is important to define the legal framework on which the Opinion and DAA are based, and to which our proposal must be suited. ECJ Opinion 2/94 established the necessity of Treaty amendment for accession,[58] and heralded the adoption of Article 6(2) in the Lisbon Treaty, which reads: "The Union Shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."[59] The Article provides a caveat: "accession shall not affect the Union's competences as defined in the Treaties."[60] Thus, legal obligation for the EU's accession is established. Note however, that this obligation is at best *lex imperfecta,*[61] as it is obviously also for the non-EU Contracting Parties to the Convention to decide whether accession takes place.[62] Article 59(2) ECHR serves as the Convention-counterpart to Article 6(2) TEU, as it opens up accession for the EU by means of Protocol No. 14, stating that "the European Union may accede to [the] Convention", after previously only being open to states.[63] The ECHR binds all 47 Contracting Parties of the Council of Europe, whereas EU law, including the EUChFR, naturally only binds the 28 (*still*) EU Member States.

Article 6(2) TEU must be read together with Protocol (No 8), which specifies the DAA "shall make provision for preserving the specific characteristics of the Union and Union law", "shall ensure that accession […] shall not affect the competences of the Union or the powers of its institutions", and that "nothing in the agreement […] shall affect Article 344 [TFEU]".[64] Declaration (No 2) on Article 6(2) doubles the call for preservation of the "specific features of Union law".[65] Significantly, Article 344 TFEU, referred to in Protocol (No 8), compels Member States "not to submit a dispute concerning the interpretation or

[58] Opinion 2/94, *supra* n. 1.

[59] TEU, Article 6(2).

[60] Ibid.

[61] Benoit-Rohmer, F. 'L'adhésion de l'Union à la Convention européenne des droits de l'homme' 19 Journal de droit européen, (2011) p. 285 (in Łazowski, Wessel, *supra* n. 36)

[62] Lazowski and Wessel therefore argue that the only obligation is to *seek* accession. (*see:* s*upra* n. 36).

[63] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 59(2), (*hereafter:* ECHR).

[64] TEU, Protocol (No 8).

[65] TEU, Declaration (No 2) on Article 6(2).

application of the Treaties to any method of settlement other than those provided for therein."[66,67] Taken together with relevant Luxembourg and Strasbourg case law,[68] the above-mentioned articles provided the framework for Luxembourg to assess the DAA's Treaty-compatibility.[69] Our proposal must fit this framework.

Legal Instruments

Our proposal's legal options include Treaty revisions (including the 'notwithstanding' protocol), unilateral measures (reservations, declarations, and agreements), and DAA revision. We consider Treaty amendment a drastic measure. Nevertheless, the TFEU allows for it: "Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."[70] We consider two types of Treaty amendment. First, we (briefly) consider adopting Besselink's 'notwithstanding' protocol.[71] However, our research question requires consideration of Luxembourg's constitutional demands. Apart from being nothing short of a nuclear option, such a protocol would not address the Court's concerns – and is therefore unfit for our research. Secondly, we could propose 'tailor-made' Treaty revisions. We could, for instance, consider Articles upon which the mutual trust reasoning is based, and amend these to suit accession. Considering Treaty revision inherently involves considering the ramifications of the Article 48 TEU ordinary revision procedure, and it is widely accepted that unanimity among Member States is improbable.[72,73] Therefore, we must not consider it lightly.

We could propose unilateral reservations to the Convention.[74] The DAA stipulates how these would work: the law reserved upon must be in force at the moment of accession

[66] European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, Article 344, (*hereafter:* TFEU).

[67] On first glance, the reader notes how subjecting the EU to ECtHR review might collide with this Article.

[68] Addressed in appropriate sections.

[69] Assessment requested pursuant Article 218(11) TFEU.

[70] TFEU, Article 218(11).

[71] Besselink, *supra* n. 52.

[72] *e.g.:* Lock, *supra* n. 37, p. 245.

[73] Treaty revision can also be applied to the Convention – which is at least equally drastic.

[74] ECHR, Article 57.

(no future reservations are permitted), and reservations of a too "general character" are inacceptable.[75] Strasbourg reviews Article 57 compliance, and interprets reservations.[76] This complicates proposing reservations in our research. Furthermore, reservations are often revealed to have detrimental effects for human rights protection.

Interpretive declarations[77] could be adopted to clarify some of the issues found by Luxembourg. These declarations by Member States would only bind Strasbourg if all other parties to the DAA accept these interpretations.[78] But they might appease Luxembourg in some of the inter-EU problems the Opinion describes. Disconnection clauses or agreements between Member States could establish the same EU-internal effect, by reaffirming agreements between Member States take favor over Convention law.[79] But they also do not automatically bind Strasbourg to recognition. We will see that 'disconnecting' from Convention law could, just as reservations, have a reductionist effect on fundamental rights protection.

Lastly, we have the option of DAA renegotiation. It would entail all parties to the agreement to accept a new outcome. This would, just as Treaty revision, be a cumbersome process. However, as we will show, it is often the most effective remedy to the CJEU's constitutional objections. It is also where the potential of present research lies: it allows us to propose revisions that take constitutional demands and a human rights perspective into account. However, for the quality of our proposal it is important to consider all available legal tools, as DAA amendment might not solve all the Opinion's issues. In the following sections, we will analyze Luxembourg's seven main objections.

[75] Ibid.

[76] Lock, *supra* n. 37, p. 245.

[77] Article 31 of the Vienna Convention on the Law of Treaties stipulates this possibility.

[78] Cameron, I. 'Treaties, Declarations of Interpretation' (2007), in Lock, *supra* n. 37.

[79] Smrkolj, M. 'The Use of the "Disconnection Clause" in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?' GARNET Conference, Brussels, (2008).

Analyses

Protocol No. 16

Protocol No. 16 ECHR, which allows the "[h]ighest courts and tribunals of a High Contracting Party [to] request the [ECtHR] to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention",[80] was introduced to create a more cooperative relationship between the ECtHR and domestic courts, to improve efficiency (by caseload reduction), and to enhance legitimacy in subsidiarity-principles.[81,82] It would allow Strasbourg to provide guiding interpretations to domestic courts in the application of Convention rights. And although the Protocol appears to be inspired by the EU preliminary reference procedure,[83,84] there are significant differences, such as the non-binding and voluntary nature of the ECtHR-references.

The CJEU argued the DAA offered insufficient protection for EU law autonomy and the preliminary rulings procedure against Protocol 16.[85] This provides a core constitutional argument to consider for this research. Notably, Protocol 16 had only been signed by nine Member States in December 2014[86] – and ratified by none.[87] By September 2017, three out of seven Contracting Parties that have ratified the Protocol are Member States[88] – which means it has not yet entered into force.[89] This would prompt human rights critics to assess the Court's objections as extremely protective. From an institutionalist perspective it could be

[80] ECHR, Protocol No. 16, Article 1(1).

[81] Specifically, domestic courts apply Convention rights under the subsidiarity principle.

[82] Voland, T., Schiebel, B. 'Advisory Opinions of the European Court of Human Rights: Unbalancing the System of Human Rights Protection in Europe?' Human Rights Law Review 17(2017) p. 73-95.

[83] TFEU, Article 267.

[84] Gragl, P. '(Judicial) Love is Not a One-way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No 16' 38 European Law Review (2013).

[85] Opinion 2/13, par. 197.

[86] Estonia, Finland, France, Italy, Lithuania, the Netherlands, Romania, Slovakia, and Slovenia (*infra* n. 88).

[87] Lock, *supra* n. 37., Voland, Schiebel, *supra* n. 82.

[88] Finland, Lithuania, and Slovenia (*source: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=bcyYglbk*).

[89] This happens upon ratification by ten Contracting Parties (Protocol No. 16, Article 8[1]).

argued that Luxembourg is fending off any possibility of Strasbourg impinging on its jurisdiction. Either way, the DAA predates the Protocol, presumably reason for negotiators to omit it. The CJEU found this insufficient on constitutional grounds.

Obviously, Luxembourg fears the possibility that Member States could seek alternative resolve in cases of EU law interpretation in fundamental rights, a situation Article 344 TFEU prohibits. Particularly when a "request for an advisory opinion [..] could trigger the procedure for the prior involvement of the Court of Justice"[90] would circumvent the EU preliminary rulings procedure. However, Article 3 DAA explains the proposed procedure should only be triggered where the EU is a co-respondent. But in Protocol No. 16's advisory opinions, there are no respondents.[91] Luxembourg did not explain how the prior involvement procedure could be triggered here.[92] Furthermore, the *optional* advisory opinion would be non-binding, and Member States remain under the obligation of referral to Luxembourg under Article 267 TFEU. However, the Court seems to take a protective constitutional approach towards Protocol 16. The Court's reasoning builds on the role of preliminary reference held in *Melki and Abdeli,*[93] and *A v B,*[94,95] and now regards the procedure as "keystone of the judicial system."[96] We must therefore not take Luxembourg's constitutional arguments lightly in our analysis.

An effective and legitimate ECtHR is undoubtedly in the interest of sound fundamental rights protection. Otherwise, accession would not be considered to begin with. And although the Protocol's functioning has faced criticism, it would still reduce Strasbourg's long-term workload, and enhance legitimacy.[97] Especially when regarding future ECtHR developments (based on Protocol 14 and 15[98]), it could be considered detrimental would

[90] Opinion 2/13, par. 198.

[91] Lock, *supra* n. 37.

[92] Elaborated upon in *'Co-respondent Mechanism'*.

[93] C-188/10 *Melki and Abdeli* ECLI:EU:C:2010:363.

[94] C-184/14-A *A v B* ECLI:EU:C:2015:479.

[95] Daminova, *supra* n. 46, p. 2.

[96] Opinion 2/13, par. 198.

[97] Voland, Schiebel, *supra* n. 82.

[98] Ibid.

Luxembourg's request for a "provision in respect of the relationship between […] Protocol 16 and the preliminary ruling procedure"[99] limit domestic court's access Strasbourg's advisory opinions. It is therefore essential to our proposal that Member States can access Protocol 16, without impairing EU law autonomy.

Advocate-General Kokott offers perspective: the 'Protocol 16 problem' does not originate from accession, as domestic courts may request opinions from Strasbourg regardless of it (i.e. accession).[100] Furthermore, Member States remain bound by Article 267 in cases involving fundamental EU law matters, which takes precedence over international agreements ratified by Member States.[101] Lastly, the CJEU's supposed conflict with the preliminary rulings mechanism is hardly of substance: the DAA nor the Protocol provide the EU a co-respondent status.

The main issue is that Member States should refer to Luxembourg once a question involves the interpretation of EU law. It appears the legal structure to resolve this is already present, and that accession without compromising human rights protection is possible. And, the ECtHR itself also recognizes that failure to adhere to Article 267 TFEU is an ECHR violation for Member States.[102] Adopting binding declarations not to ratify Protocol 16[103] could compromise ECtHR effectiveness and legitimacy – and would also come too late.[104] Treaty revision could adversely affect EU law autonomy, as the preliminary reference procedure is considered "keystone."[105] Our proposal must consist of a DAA amendment, to provide a restatement or clarification of Member States' 267 obligations, as this would respect EU constitutional autonomy, without compromising fundamental rights protection by

[99] Opinion 2/13, par. 199.

[100] View of Advocate-General Kokott in *Opinion 2/13*.

[101] Voland, Schiebel, *supra* n. 82.

[102] Ibid.

[103] Suggested by Lock, *supra* n. 37.

[104] *Supra* n. 88.

[105] Opinion 2/13, par. 198.

eliminating access to Protocol 16.[106] The following amendment would fit our research question, and confirm our hypothesis:[107]

Article 5 DAA – Protocol No. 16

"In the event of a request for an advisory opinion from the Court, in the meaning established in Protocol No. 16 of the Convention, EU Member States shall recognize their obligation for preliminary reference to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union, in all questions relating to the interpretation, application, and validity of European Union law."[108]

[106] We prefer not to apply a drastic measure, as Protocol 16 is not in effect. However, we cannot disregard the future potential of Protocol 16.

[107] *See:* p. 7.

[108] In our in-text amendments, italicized text is new. Non-italicized text is from the original DAA. In DAA amendments, 'the Court' refers to the ECtHR.

Articles 53

In *Melloni*, the CJEU (controversially[109]) ruled: "the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity, and effectiveness of EU law."[110] And in Opinion 2/13, it held: "Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR", and that "[this] provision should be coordinated with Article 53 of the Charter."[111] However, there is "no provision […] to ensure such coordination."[112] The CJEU apparently fears that, in a *Melloni*-situation before the Court, Member States could claim liberty to provide "higher"[113] levels of protection than the Charter, derived from the Convention.

Obviously, Luxembourg's intention in *Melloni* and the Opinion is not to constrain Member States to lower standards of protection. From a constitutional perspective, the decisions are a means to remove potential loopholes for Member States to question EU law primacy.[114] As Eeckhout admits, theoretically, there is a conflict between Articles 53 of the Charter and the Convention, as the Convention potentially allows a certain level of protection which the Charter disallows.[115] It is however unthinkable Strasbourg would *force* Member States to apply a level of protection higher than the Convention standard. The Convention simply *allows*. And as Member States remain subject to EU law primacy, which *disallows* this potentially higher standard – there seems to be no problem to begin with. Contracting Parties, including Member States, are not granted any powers they did not have before ECHR-accession.[116] So from a legal, constitutional perspective, accession would not affect EU law

[109] See: Łazowski, Wessel, *supra* n. 36.

[110] C-399/11 *Stefano Melloni v Ministerio Fiscal,* ECLI:EU:C:2013:107, restated in Opinion 2/13, par. 188.

[111] Opinion 2/13, par. 189.

[112] Opinion 2/13, par. 190.

[113] Luxembourg's phrasing in Opinion 2/13 – which Halberstam dubs 'strange', *supra* n. 11.

[114] Korenica, F., Doli, D. '"Not Taking Rights Seriously" Opting for the Primacy of EU Law over Broader Human Rights Protection: Court of Justice of the European Union (CJEU) Opinion 2/13's 'Unserious' Stance on Article 53 EU Charter of Fundamental Rights' Relationship to Article 53 ECHR' International Human Rights Law Review, Volume 4, Issue 2 (2015) p. 277-302.

[115] Eeckhout, *supra* n. 24.

[116] Halberstam, *supra* n. 11.

autonomy, or the *Melloni*-principles.[117] In our balancing exercise, we must merely satisfy the Court's demand for coordination.

From a human rights perspective, one can criticize the *Melloni*-decisions, effectively ruling EU law effectiveness to prevail over Member States' abilities to provide higher standards of protection than the Treaties.[118] However, when taking the *Melloni*-principles as they are, the CJEU's objection seems inconsequential. The current situation limits the level of protection applicable by Member States under EU law primacy. Post-accession, there would be no discernable difference in level of protection. Article 53 ECHR would not affect the *Melloni*-principles. Article 53 EUChFR explicitly binds its interpretation to the minimum Convention-standard.[119] This allows us to safely argue that assuming our proposal does not fundamentally alter Article 53 EUChFR, or the *Melloni*-principles – all other resolves would be acceptable from a human rights perspective.[120]

Our only hurdle is the demand for a "provision […] to ensure […] coordination". As Lock argued, unilateral interpretive declarations might not suffice to appease Luxembourg: there are no guarantees that the ECtHR respects these declarations.[121] Reservations on Article 53 ECHR seem unlikely, as they would affect one of the pillars on which the Convention is based,[122] be too general and broad in scope for Strasbourg to accept,[123] and therefore be no decent proposal. Treaty amendment would for the purpose of Articles 53-coordination be drastic – and, as established, could shift fundamental rights standards. Therefore, we propose a clarifying provision in the DAA, coordinating the Articles. This could easily be done,[124] by affirming that Member States upon accession still adhere to EU law primacy (which is

[117] Note: Advocate-General Kokott did not consider this at all.

[118] Korenica, Doli, *supra* n. 114.

[119] EUChFR, Article 53: *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and […] the [ECHR], and by the Member States' constitutions."*

[120] (Safely) assuming that the *Melloni*-principles remain unaltered, to preserve "specific characteristics of […] Union law" (Protocol [No 8]).

[121] Lock, *supra* n. 37.

[122] Łazowski, Wessel, *supra* n. 36.

[123] Korenica, Doli, *supra* n. 114.

[124] *Melloni* already established the primacy-idea Luxembourg wants to see confirmed.

uncontested by the Convention). This would effectively balance fundamental rights protection with the Court's constitutional demand, and thus confirm our hypothesis.

Article 7 DAA – Interpretation of Articles 53 of the Charter and the Convention

"EU Member States, when interpreting Article 53 of the Convention, shall respect the primacy, unity, and effectiveness of EU law. In particular, they shall not interpret Article 53 of the Convention as an obligation to provide higher domestic standards of fundamental rights protection than guaranteed by the Convention."

Article 344 TFEU

Article 344 TFEU binds Member States "not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."[125] The Convention similarly excludes Contracting Parties' submission "to a means of settlement other than those provided for in [the] Convention."[126] But upon accession, Convention and Union law would partially overlap.[127] The DAA negotiators attempted to resolve this potential conflict in Article 5 DAA, establishing that "proceedings before the [CJEU] are [not] means of dispute settlement within the meaning of Article 55 of the ECHR."[128] This allows Member States to settle Convention-related disputes in Luxembourg. Unfortunately, the CJEU was not satisfied, as there was no provision forbidding the settlement of such disputes before the ECtHR, which is "liable […] to undermine the objective of Article 344 TFEU".[129] The Court dedicated a staggering 14 paragraphs to its 344-objections.[130] To many critics, this is exemplary of the CJEU's lack of trust in the EU legal order.[131] From an institutionalist perspective, Øby Johansen argues the strict reasoning of the CJEU on Article 344 "leaves us with the perception that the Court is reining in the member states—perhaps in an attempt to bolster its claim of being the one and only apex court of Europe."[132] Furthermore, numerous other mixed agreements involve external dispute settlement mechanisms that were never subjected to these strict safeguards.[133] This was specifically noted by the Advocate-General,[134] and subsequently ignored by the Court.[135] Moreover, the Advocate-General believed Article 344 would suffice to keep Member States

[125] TFEU, Article 344.

[126] ECHR, Article 55.

[127] International agreements signed by the EU fall between primary and secondary law.

[128] DAA, par. 57.

[129] Opinion 2/13, par. 212.

[130] Opinion 2/13, par. 201-214.

[131] See, *inter alia*: Mohay, *supra* n. 29, Lock, *supra* n. 37.

[132] Øby Johansen, S. 'The Reinterpretation of TFEU Article 344 in *Opinion 2/13* and Its Potential Consequences' German Law Journal, Vol. 16, No. 1 (2015) p. 176.

[133] *Inter alia* the Aarhus Convention, and the UNCATOC (*see:* Ibid., p. 169-178).

[134] View of Advocate-General Kokott in *Opinion 2/13*, par. 177.

[135] Øby Johansen, *supra* n. 132.

from seeking external settlement. The CJEU appears to be worried Member States might violate EU law, and wants an outside remedy. Furthermore, violating Article 344 is obviously problematic regardless of accession.

From a constitutional perspective, Halberstam notes that Article 33 ECHR (allowing Contracting Parties to bring alleged breaches of Convention provisions before the ECtHR) demands Strasbourg to entertain the above-mentioned type of suit.[136] And although Advocate-General Kokott claims any such suit could be declared inadmissible,[137] it remains unclear whether the ECtHR would accept inadmissibility based on violation of external Treaties. Furthermore, if Strasbourg reviews admissibility, it might be reviewing matters of EU law. But Member States bringing such a case to Strasbourg would be in violation of the Treaties to begin with, the severity of which they have been reminded of in the *MOX Plant* case (the most prominent Article 344-case prior to the Opinion).[138] However, Luxembourg takes a protective stance, which from a constitutional point of view is imaginable. It demanded exclusion:

> ".. only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU."[139]

Hence, the theoretical possibility of Member States breaching EU law is unacceptable to the Court. This we must factor into our proposal.

Gragl approaches the issue from a human rights perspective, opining that the EU will be unaffected in its ability to promote human rights in its external relations upon accession under the CJEU's conditions.[140] And regarding EU-related inter-party applications, Article 35

[136] Halberstam, *supra* n. 11.

[137] View of Advocate-General Kokott in *Opinion 2/13*.

[138] Case C-459/03 *MOX Plant* ECLI:EU:C:2006:345. The Commission commenced an action against Ireland under Article 226 EC for bringing proceedings against the UK under UNCLOS XV. The Commission (and Court) held that Ireland failed to respect the ECJ's exclusive jurisdiction under Article 292 over any dispute concerning the interpretation and application of Community law.

[139] Opinion 2/13, par. 213.

[140] Gragl, P. 'A reminiscence of Westphalia: inter-party cases after the EU's accession to the ECHR and the EU's potential as a human rights litigator' Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR' Routledge Publishing (2014) p. 35-54.

ECHR allows Luxembourg to remedy alleged Convention-violations before Strasbourg may adjudicate.[141] But it seems as if this jurisdictional issue has a minimal effect on the level of individual protection. As argued, disputes between Member States regarding violations in the implementation of EU law should already be brought before Luxembourg – accession would not change this. A solution proposed by Lock (a "pre-clearing mechanism similar to the prior involvement procedure"[142]) could be procedurally too complicated, which could impair the CJEU-ECtHR system in dealing with applications,[143] so for our research this proposition is unfit. To find a solution that respects both the Court's constitutional concerns, and upholds human rights standards, we turn to our legal tools.

Advocate-General Kokott suggested a binding declaration in which Member States agree not to initiate or engage in proceedings under Article 33 ECHR, when the object of the dispute falls within the material scope of EU law.[144] According to Halberstam, this would allow the Strasbourg to declare Article 344-cases inadmissible.[145] He believes this could appease Luxembourg, "depending on how the [its] other concerns are addressed."[146] But depending on the Court's favorable intentions in this case seems impractical. Treaty amendment seems drastic, although Øby Johansen advocates for this option: "a paragraph at the end of ECHR Article 33" clarifying "applications by an EU Member State, or the European Union, alleging a breach of the Convention by another EU Member State, or the European Union, are inadmissible".[147] He calls this legally trivial, and politically feasible, but there is no guarantee that non-EU Contracting Parties will agree to this.[148] Therefore, to achieve a sound balance between the constitutional demand, without unduly delaying proceedings through a pre-clearing mechanism, we again propose DAA revision. Specifically, the following would confirm our hypothesis:

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[141] ECHR, Article 35(1): "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law[…]."

[142] Lock, *supra* n. 36, p. 256.

[143] Lock acknowledges these complications – but for the purposes of our research this is considered detrimental.

[144] View of Advocate-General Kokott in *Opinion 2/13*.

[145] Halberstam, *supra* n. 11.

[146] Ibid.

[147] Øby Johansen, *supra* n. 132.

[148] Imagine Russia and Turkey accepting a revision demanded to ensure EU autonomy.

Article 4(3) DAA

"The Court of Justice, under Article 344 of the Treaty on the Functioning of the European Union, has sole jurisdiction in questions between the EU Member States, or between the EU Member States and the European Union, that fall within the scope ratione materiae *of EU law."*

Mutual Trust

Opinion 2/13 reaffirms the EU's principle of *mutual trust*, according to which Member States cannot judge another Member States' compliance with fundamental rights obligations when implementing EU law – save rare occasions. I.e., Member States work upon the assumption of compliance.[149] The Convention however, requires Contracting Parties to check each other's compliance. Therefore, Luxembourg found that:

> "In so far as the ECHR would […] require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[150]

The Advocate-General neglected to address this problem.[151] But arguing constitutionally, the CJEU essentially wants a mutual trust carve out upon accession.[152]

To understand the scope of this issue, and its place in present research, it is necessary to review the provisions and case law that govern this principle, and how they were shaped by their respective institutions. First, the Dublin Regulation explicitly justifies mutual trust: all Member States, "respecting the principle of non-refoulement, are considered as safe countries for third country nationals".[153] However, Strasbourg found Belgium and Greece in violation of the Convention when applying mutual trust to asylum seekers, in the 2011 *M.S.S.* case.[154] Subsequently, in *N.S.*, Luxembourg attempted to (partially) remedy this tension from its own constitutional perspective, by introducing *systemic deficiencies*:[155]

[149] However, violations do occur. *See:* Alegre, S., Leaf, M. 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant' European Law Journal 10 (2004) p. 200-217.

[150] Opinion 2/13, par. 194.

[151] View of Advocate-General Kokott in *Opinion 2/13*.

[152] Eeckhout, *supra* n. 24.

[153] European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention"), 15 June 1990, Official Journal C 254, 19/08/1997, Preamble Recital (2).

[154] C-30696/09 *M.S.S. vs Belgium and Greece* ECtHR 21:1:11.

[155] C-411/10 *N.S.* ECLI:EU:C:2011:865.

> "Member States […] may not transfer an asylum seeker to the 'Member State responsible' where they cannot be unaware that *systemic deficiencies* […] in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 [EUChFR]."[156]

Following *N.S.* (and *Abdullahi*[157]), Strasbourg issued its *Tarakhel*-judgement (one month prior to Opinion 2/13), effectively disagreeing with Luxembourg on the systemic deficiencies-approach as a 'full solution': the Convention should also be applied in its full extent to individual cases.[158] Strasbourg proffered *diplomatic assurances*: Swiss authorities in this case had to "obtain assurances from their Italian counterparts,"[159] ensuring conditions would be adapted to children and the family.[160] So in the absence of systemic deficiencies, individual circumstances still require Contracting Parties to obtain assurances.[161] The two Courts' diverging approaches of *individual examination*, and general *systemic deficiencies,* form the basis of the mutual trust problem in Opinion 2/13 – and the starting point for our proposal's reconciliation effort.

Now that we have established the depth of the mutual trust disconnect, we should critically analyze the CJEU's constitutional claim that due to mutual trust, accession is liable to upset EU law autonomy and its underlying balance.[162] From a constitutional point of view, Halberstam approaches the subject surprisingly: he claims accession would *dissolve* some of the constitutional tension in the EU's vertical judicial system that exists today.[163] Basically, the *Solange* doctrine applied by Member States' High Courts, disallows review of individual applications claiming violations, assuming the EU provides an equivalent standard of

[156] Ibid., par. 94 (*Emphasis added*).

[157] C-394/12 *Abdullahi v. Bundesasylamt* EU:C:2013:813.

[158] C-29217/12 *Tarakhel vs Switzerland* ECtHR 4:11:14.

[159] Ibid.

[160] However, it neglected to define what 'sufficient' assurances would consist of.

[161] Vicini, G. 'The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust', European Journal of Legal Studies, 8, (2015), p. 50-72.

[162] Opinion 2/13, par. 194.

[163] Halberstam, *supra* n. 11.

protection.[164] Strasbourg's well-known *Bosphorus* doctrine allows for rebuttal of the equivalence-assumption in cases where protection of Convention rights appears "manifestly deficient."[165] Halberstam theorizes that an individual denied application at, e.g., the *Bundesverfassungsgericht*, against the application of mutual trust, can seek remedy in Strasbourg. This is constitutionally problematic, as the ECtHR would then have to review matters of EU law. But after accession, the EU can step in[166] and take responsibility for the violation, while preserving the mutual trust principle.[167] This observation is significant, as Halberstam's contribution to the constitutional side of the debate is considered generous (i.e. towards the CJEU).[168] This potentially useful tool could convince Luxembourg (which neglected this issue) of the constitutional benefits of reconciliation. For our research, it proves that preservation of mutual trust is not per se constitutionally beneficial.

From a human rights perspective, mutual trust's positive effects on individual protection must be acknowledged. Shorter administrative and judicial procedures benefit the individual.[169] Mutual trust removes judicial hurdles Member States face when processing asylum seekers. The system ensures speed in application-processing,[170] prevents forum shopping, and allocates responsibility among Member States.[171] However, Luxembourg's suggested mutual trust carve out entails obvious fundamental rights problems. Here we present three arguments that require examining for our balancing exercise. First, we open the Charter to recall how it was supposed to interact with the Convention:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the [Convention], the meaning and scope of those rights shall be the same as those laid down by the said Convention."[172]

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[164] (22/10/1986) BVerfGE, [1987] 3 CMLR 225.

[165] C-45036/98 *Bosphorus vs. Ireland* ECtHR 30:6:05.

[166] Using the co-respondent procedure, but only *after* our amendments (see: *'Co-respondent Procedure'*).

[167] Halberstam, *supra* n. 11.

[168] See: *supra* n. 31.

[169] Established in '*Protocol No. 16'*, applied to Strasbourg's effectiveness.

[170] Vicini, *supra* n. 161.

[171] Ibid.

[172] EUChFR, Article 52(3).

Clearly Luxembourg's interpretation is inconsistent with this Article, as the systematic deficiencies approach departs from the Convention's (intended, according to Strasbourg) individual approach. As mentioned above, Callewaert noted that due to this provision, Luxembourg's autonomy is limited in interpreting Charter rights.[173] So again, constitutionally speaking, mutual trust might not deserve the almost absolute status Luxembourg ascribes it.

Secondly, it can be argued that mutual trust is only warranted *because* the possibility for individuals to lodge complaints with Strasbourg exists.[174] The ECHR provides the institutional guarantees that allow the Dublin system to function without detrimentally impairing individual protection. If mutual is be preserved, this option disappears, abolishing this justification for its application in the first place. Furthermore, the Charter reads:

> *"*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, *including the [Convention]*, and by the Member States' constitutions."[175]

A mutual trust carve out would abolish Member States' ability to scrutinize compliance: the '*M.S.S.* option' disappears. This restricts fundamental rights as recognized by the Convention, and is therefore incompatible with Article 53 ECHR, and our proposal. Furthermore, non-EU Contracting Parties would probably reject carve outs of this magnitude (and, Strasbourg would probably disallow a reservation of such a general nature[176]). If the idea of accession was improving fundamental rights protection, this definitely has an adverse effect.

Finally, we argue that although mutual trust is prominent in EU law, specifically in AFSJ, it should not outweigh fundamental rights protection.[177] The opposite: the TFEU specifically envisions "an area of freedom, security and justice with respect for fundamental

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[173] Callewaert, *supra* n. 26.

[174] Battjes, H. 'The Principle of Mutual Trust in European Asylum, Migration, and Criminal law: Reconciling Trust and Fundamental Rights' Meijers Committee, FORUM, Institute for Multicultural affairs. (2011) p. 11.

[175] EUChFR, Article 53 (*Emphasis added*, *translated to American English*).

[176] ECHR, Article 57(1): "Reservations of a general character shall not be permitted […]".

[177] Peers, *supra* n. 8.

rights."[178] Moreover, Article 2 TEU reads: "[t]he Union is founded on the values of respect for human dignity, freedom, […] and respect for human rights".[179] Eeckhout and Peers argue this should trump mutual trust as a "specific characteristic of Union law".[180] Although particularly relevant here, this argument reflects on all the Opinions objections, and should weigh heavily in our proposal.

Let us pause here. In the preceding paragraphs, we focused on asylum law (CEAS),[181] and neglected the European Arrest Warrant (FDEAW).[182] But a recent decision in the FDEAW establishes an interesting shift in Luxembourg's mutual trust approach, which offers an opportunity for reconciliation in our proposal. In *Aranyosi,*[183] an EAW was issued for the Hungarian Pál Aranyosi's surrender to Hungary.[184] Upon referral, Luxembourg departed from its narrow mutual trust approach, and constructed a 'two-stage test':[185,186]

The judicial authority executing the EAW surrender must assess:

1) *The general detention circumstances of the issuing Member State, and establish if there is a substantial risk of violation of Article 4 EUChFR.*[187]
2) *Whether or not the individual in question runs a real risk of an Article 4 violation.*[188]

[178] TFEU, Article 67(1).

[179] TEU, Article 2.

[180] Eeckhout, *supra* n. 24., Peers, *supra* n. 8.

[181] Including, but not limited to the Dublin Regulation, and the Reception Conditions Directive (https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en).

[182] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (FDEAW) [6].

[183] Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru* EU:C:2016:198, par. 29.

[184] Following Aranyosi's arrest in Bremen, Bremen's *Generalstaatsanwaltschaft* requested Miskolc's *Miskolci járásbíróság* to clarify in which facility Aranyosi would be detained, to which Miskolc responded that Hungarian authorities have the competence to decide on means of sanctioning. The Generalstaatsanwaltschaft generally accepted this – but Bremen's *Hanseatische Oberlandsgericht* held surrender would expose Aranyosi to conditions violating his fundamental rights.

[185] Bovend'Eerdt, K. 'The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?' Utrecht Journal of International and European Law 32(83)(2016) p.112-121.

[186] This 'test' can be distilled from *Pál Aranyosi and Robert Căldăraru*, *supra* n. 183, par. 88-94.

[187] *Prohibition of torture and inhuman or degrading treatment or punishment.*

Aranyosi has been interpreted to mean two things: 1) FDEAW mutual trust is not unconditional, and 2) a new level of convergence between Strasbourg and Luxembourg case law exists.[189] Notice its comparability to asylum law's *general* versus *individual* approach. Since the Opinion, Luxembourg revisited its strict constitutional mutual trust approach, at least concerning FDEAW, and is edging towards Strasbourg's individualized approach. Here lies an opportunity for reconciliation in our research.

We return to our legal tools to construct a proposal. Although Treaty amendment could clarify the workings of mutual trust, Member States would be required to touch upon this sensitive issue in the Treaties. Legally it must be considered an option. But it remains the question if, even after ratification, this would solve our problem. And, amendment of this principle for purposes of accession would to the CJEU (and the Member States) seem to conflict with Declaration (No 2) on Article 6(2),[190] and Protocol (No 8).[191,192] Unilateral measures might not appease either Court, and therefore be unfit to our research. Reservations on mutual trust under Article 57(2) ECHR would probably be too general for the ECtHR, and could detrimentally affect individual protection.

Hence, we propose a DAA provision adopting the FDEAW *Aranyosi* 'two-stage test' to apply in CEAS as well. This would follow, preserve, and respect Luxembourg's own mutual trust interpretation. As it comes closer Strasbourg's interpretation, it could appease the ECtHR. Once the 'two-stage test' is applied correctly, fundamental rights protection should remain adequate. Halberstam's *Bosphorus-Solange* conflict would be resolved, as the EU could be party to mutual trust cases in Strasbourg. Furthermore, by narrowing the interpretation-gap, it would remedy tension surrounding Articles 52(3) and 53 EUChFR. Finally, by respecting fundamental rights, Article 67(1) TFEU, and Article 2 TEU regain their significance as specific characteristics of Union law. This would require flexibility from Luxembourg's side. But in light of *Aranyosi,* this might be presumed reasonable. In any case, there appears to be a way forward respecting both constitutional demands and a human rights perspective – so our hypothesis is confirmed. We propose:

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[188] Both requirements have to be met for EAW-deferral.

[189] Bovend'Eerdt, *supra* n. 185.

[190] Preserving "specific features of Union law", Declaration (No 2) on Article 6(2) TEU.

[191] "[P]reserving the specific characteristics of the Union and Union law", Protocol (No 8).

[192] Making it less politically feasible.

Article 8 DAA – Application of the principle of mutual trust

"In cases concerning a violation of fundamental rights related to the principle of mutual trust between the EU Member States, in the area of freedom, security, and justice, the application of said principle is only permissible under the following conditions:

i) The general circumstances of the EU Member State in question do not resemble a real risk of violation of Article 4 of the Charter;
ii) The individual in question does not run a real risk of violation of Article 4 of the Charter."

The Co-Respondent Mechanism

The intricate EU division of powers required[193] negotiators to propose a co-respondent mechanism that guarantees the correct respondent (i.e. the EU, and/or its Member State[s]) is addressed in Strasbourg. Recall the question: 'if a Member State when implementing an EU directive infringes (individual) fundamental rights, is the infringement a product of the directive, or of the way the Member State implements it?' The co-respondent mechanism allows Contracting Parties to become party to proceedings in Strasbourg either by a request to the ECtHR, or by invitation from it. In both situations Strasbourg decides upon *plausibility,*[194] i.e. whether conditions to become a co-respondent are met. Although the mechanism could solve some of the above-mentioned complexities, the CJEU and the Advocate-General found certain aspects inadequate in their "preservation of specific characteristics of EU law."[195]

The Court's constitutional objections run threefold. First, it found that the *plausibility check* requires the ECtHR to "assess the rules of EU law governing the division of powers between the EU and its Member States",[196] which would be "liable to interfere with [it]."[197] Secondly, Luxembourg found no provision excluding the possibility of a co-respondent intervening, even if "that Member State may have made a reservation"[198] resulting in a Protocol (No 8) violation.[199] Thirdly, the Court objects that Strasbourg, under the DAA, could decide as an exception to the rule of joint responsibility, that only one respondent will be held accountable for a violation: "the question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law, and be subject to review, if

[193] Protocol (No 8), Article 1(b).

[194] DAA, Article 3(5): "*When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is* plausible *that the conditions in paragraph 2 or paragraph 3 of this article are met.*" (*Emphasis added*).

[195] Opinion 2/13, par. 215-235, View of Advocate-General Kokott in *Opinion 2/13*.

[196] Opinion 2/13, par. 223-224.

[197] Ibid., par. 225.

[198] Ibid., par. 227.

[199] *"[The Agreement] shall ensure that nothing therein affects the situation of Member States in relation to the […] Convention, in particular in relation to […] reservations […]",* Protocol (No 8), Article 2.

necessary, by the [CJEU], which has exclusive jurisdiction […].”[200] Allowing Strasbourg to review this is supposedly “tantamount to allowing it to take the place of the [CJEU] in order to settle a question that falls within [its] exclusive jurisdiction.”[201] The following sections assess these arguments, and propose balanced solutions.

Plausibility check (Article 3(5) DAA)

The Draft Explanatory Report[202] explains the intent of the plausibility check:

> “In the event of a request to join the proceedings as a co-respondent made by a High Contracting Party, the Court will decide, having considered the *reasons stated in its request* as well as *any submissions by the applicant and the respondent*, whether to admit the co-respondent to the proceedings […]. [T]he Court will limit itself to assessing whether the reasons stated by the High Contracting Party […] are plausible in the light of the criteria set out in Article 3, paragraphs 2 or 3, as appropriate, without prejudice to its assessment of the merits of the case.”[203]

Additionally, Articles 3(1) and 3(2) DAA stipulate that assessment should be made based on the reasoning of the requesting party, and not on EU law.[204] The drafters probably expected these safeguards to satisfy Luxembourg. Luxembourg, however, saw a problematic impingement on its jurisdiction as constitutional Court in determining the EU division of competences:[205] Strasbourg would have to “assess the rules of EU law governing the division of powers”,[206] which it deemed unacceptable. Advocate-General Kokott sympathizes with this conclusion, and opts for a system similar to the EU’s own rules of procedure, which grants Member States the right to intervene in all pending actions, unconditionally.[207]

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[200] Opinion 2/13, par. 234.

[201] Ibid.

[202] Council of Europe, Final report to the CDDH, Strasbourg, June 10th, 2013, 47+1(2013)008rev2, Appendix V, (*hereafter:* DER*),* at 55 (*Emphasis added*).

[203] Ibid.

[204] DAA, Articles 3(1) and 3(2), in, Storgaard, *supra* n. 28.

[205] Opinion 2/13, par. 223-224.

[206] Ibid.

[207] View of Advocate-General Kokott in *Opinion 2/13*, par 234.

Although there are notable differences between the two forums,[208] the solution seems feasible. From a human rights perspective, the possibility of intervening as co-respondent is a positive development. Recall, one of the purposes of accession is to ensure the EU can be held responsible for violations. Increasing access to proceedings inherently increases the possibility of addressing the correct respondent, and serving justice appropriately. But only, as discussed below, if the (co-)respondent cannot avoid responsibility through the addition of a co-respondent.[209] This adversely affects individual protection, which is unacceptable to our balanced equation.

This problem requires no Treaty amendment, and unilateral declarations would not bind Strasbourg to accept a co-respondent. The only way to appease the CJEU (and confirm our hypothesis) is DAA amendment. As determined, accepting the CJEU's (and AG's) demands to remove the plausibility check would not compromise human rights standards, given the right conditions.[210] We propose these amendments:

Article 3(1) DAA

"b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

> "4. The European Union or a member State of the European Union may become a co-respondent to proceedings in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case.""

Article 3(5) DAA

"A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, the Court shall seek the views of all parties to the proceedings."

[208] E.g., interventions in actions before the CJEU do not automatically grant Member States the status of party to the proceedings, *See:* Storgaard, *supra* n. 28.

[209] See: *'Allocation of Responsibility (Article 3(7) DAA)'*.

[210] *Supra* n. 209.

Reservations

The CJEU found no safeguards against the possibility of a co-respondent with a reservation intervening, resulting in a Protocol (No 8) violation.[211] Indeed, this situation is technically possible in DAA. Again, we see Luxembourg's institutionalist tendencies in the strict procedural interpretation it applies to dismiss the DAA. For perspective, consider the number of reservations made by Member States. Currently, 33 Articles have been reserved upon by Member States – 1.18 per Member State. Post-*Brexit*, 28 Articles would remain – 1.04 per Member State on average.[212] Furthermore, these reservations are of limited importance.[213] For the purposes of our research however, we must take the Courts argument into account, lest we disregard its constitutional demands.

From a human rights perspective, the effect of this situation on individual fundamental rights protection is not evident. Contracting Parties cannot be held accountable for violations of Articles reserved upon, regardless of accession. The only discernable difference is the possibility to become party to proceedings concerning such Articles, without the possibility to be held accountable (under Convention law). It is even arguable this would constitute a change in the "situation of Member States in relation to the [Convention]"[214] at all.

So for the purpose of this research, if Luxembourg needs a verification that Strasbourg will not hold Contracting Parties accountable for violations of Articles reserved upon, we could easily include a clarifying provision in the DAA. No need for Treaty amendment, no use for unilateral declarations.[215] We propose:

Article 3(8) DAA

"The Court will not hold EU Member States responsible for violations of Articles or Protocols upon which they have made a reservation, including situations where EU

[211] Protocol (No 8), Article 2.

[212] Overview: (http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=rmiXpQfo)

[213] De Witte, *supra* n. 30, p. 697.

[214] Protocol (No 8), Article 2.

[215] *E.g.:* Member States could unilaterally declare not to take part in proceedings as a co-respondent if they have made reservations. This solution seems redundant. Furthermore, Luxembourg might still consider this to affect the ECHR-MS relationship.

> *Member States act as a co-respondent as stipulated in Article 3 of the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms."*

Allocation of responsibility (Article 3(7) DAA)

From a constitutional perspective, the Court's objections to Strasbourg allocating responsibility are understandable. The argument goes that this would require the ECtHR to establish an interpretation of the EU division of powers. Note, however, this clause was added upon request of EU Member States.[216] But it is *prima facie* fair to assume Strasbourg might have to impinge on Luxembourg's exclusive jurisdiction. So for our research question it is essential that allocation of responsibility happens at least without binding interpretations on the EU division of power.[217]

However, from a human rights perspective, this is tricky. As Lock theorized: once an applicant brings a case to a respondent, and a third party joins as a co-respondent which then takes full responsibility for the violation, the applicant is deprived of its original respondent.[218] No Contracting Party should be able to escape responsibility without the applicant's approval. Eeckhout sympathizes, and sees a "high risk that any arrangements which comply with [these] conditions will affect the position of victims of human rights violations".[219] Most critics applying a human rights perspective agree it is inherently necessary for Strasbourg to look into EU law at least minimally, to properly exercise its function.[220] The question central to our balancing exercise is however, whether Strasbourg actually has to look into the EU division of power to allocate responsibility. Arguably, this is not the case:[221] Strasbourg would only have to determine whether an EU law provision forced a Member State into violating the Convention. In this review (part of the core idea of

[216] "Both FR and UK delegations proposed to amend Article 3(7) of the DAA to allow for an exception to the general rule whereby judgements against […] co-respondents should be pronounced joint." Council of the European Union 16385/11, Accession of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR): - State of play', Brussels, p. 5.

[217] Ibid.

[218] Lock, *supra* n. 37, p. 249 (*paraphrased*).

[219] Eeckhout, *supra* n. 24, p. 27.

[220] Łazowski, Wessel, *supra* n. 36, De Witte, *supra* n. 30.

[221] Gaja, G. 'The 'Co-respondent Mechanisms According to the Draft Agreement for the Accession of the EU to the ECHR', The EU Accession to the ECHR, Hart Publishing (2015), in Eeckhout, *supra* n. 24.

accession) Strasbourg would not have to determine competence, but rather determine on a case by case basis the compatibility of a provision of EU law with Convention rights, and establish whether it is at the origin of the breach. If it appears incompatible, the EU is responsible. If the provision is compatible, the EU is not.

Constitutionally, the EU division of power is exclusively Luxembourg's jurisdiction. Unilateral declarations would in this case not bind the ECtHR, and probably not satisfy the CJEU. Treaty amendment would not fix this issue. But Strasbourg could allocate responsibility without touching upon competences, and at least be expected to recognize its jurisdictional limits. Therefore, an explanatory provision which clarifies that the EU's division of power is outside Strasbourg's jurisdiction might suffice to resolve this matter, without detrimentally impairing Strasbourg's capacity in allocating responsibility. Obviously, this would entail Luxembourg partially reversing the Opinion's reasoning. It might also somewhat complicate Strasbourg's ability to assess responsibility. But the fact that the EU can be addressed as a respondent, and held accountable, should be considered a positive outcome for fundamental rights protection. Therefore it is an acceptable solution, fit for our balanced proposal.

Article 3(7) DAA

*"*7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible. *When applying such an exception to the rule of joint responsibility, the Court will respect the jurisdiction of the Court of Justice in relation to the division of power between the EU and its Member States, and restrict itself to matters of compatibility with the Convention of the provision of EU law in question."*

The four amendments presented here would confirm our hypothesis on the co-respondent mechanism: there is indeed a balanced way forward. Only the joint application of these amendments work: the plausibility check's solution relies on the allocation of responsibility remaining under Strasbourg's jurisdiction. In the following section, we return to the co-respondent mechanism, for its role in the prior involvement procedure.

Prior Involvement Procedure

Created at Luxembourg's request,[222] the prior involvement procedure proposed in Article 3(6) DAA intended to remedy the situation where a Member State's national court refers a question concerning acts or omissions of EU Member States to Strasbourg – thus bypassing Luxembourg on possible questions of EU law. Although this situation would arise "rarely",[223] it is necessary for Luxembourg to assess the Convention-compatibility of EU law before Strasbourg pronounces itself on the merits of a case. This much seems uncontested.[224] However, Luxembourg saw two problems with the procedure. First, the ECtHR would have to 'accept' an application for prior involvement from the EU. Luxembourg holds that, constitutionally, the decision "whether the [CJEU] has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR [can] be resolved only by the competent EU institution, whose decision should bind the ECtHR."[225] It added that the EU should be "fully and systematically informed"[226] of any case pending before the ECtHR, to ensure the "competent EU institution is able to assess"[227] the necessity for prior involvement. Secondly, Luxembourg found issue with the scope of CJEU review under the procedure. The DAA supposedly allows for prior assessment on the *interpretation* of primary law, and the *validity* of secondary law. But Luxembourg demands the ability to *interpret* secondary law as well.[228] The following sections deal with these issues individually.

Initiation of the procedure

From a constitutional perspective, Luxembourg's demand for EU responsibility in determining whether the question at hand has been ruled on, is not surprising. Note the specific wording in Article 3(6) DAA only ensures "sufficient time […] for the [CJEU] to

[222] Joint Communication from Presidents Costa and Skouris, 24/1/2011, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf

[223] DER, par. 66.

[224] *Supra* n. 222.

[225] Opinion 2/13, EU:C:2014:2454, 18 December 2014, par. 238.

[226] Ibid., par. 241.

[227] Ibid.

[228] Ibid., par. 243-247.

make such an assessment, and thereafter for the parties to make observations to the Court."[229] The CJEU is merely concerned that the possibility of rejection of prior involvement is not excluded.[230] This is where Halberstam observes a difference in tone: the much-lauded View of the Advocate-General agrees with the basic findings of the heavily criticized Opinion of the Court, but is phrased as "yes, but only if…" instead of "no, unless…".[231] But in detail, both parties demand a different remedy: although the Advocate-General only wants the EU to be able to state its view, the CJEU wants sole jurisdiction for the EU on this decision. And for our research question, convincing the CJEU is our main concern. The secondary demand however, is remarkable. Luxembourg wants the EU to be systematically informed of pending cases that could require prior involvement. It neglects to notice that co-respondent status is a *condicio sine qua non* for prior involvement.[232] Surely we can expect the EU to be aware of any pending case to which they are a party. The Advocate-General offers a more reasonable demand: Strasbourg must systematically inform Member States if the EU is eligible as co-respondent, or the EU if a Member State is.[233] If Luxembourg would accept this trade-off as sufficient to ensure the proper co-respondents are aware, and thus aware of possible, *additional* prior involvement, constitutionally speaking the CJEU's demands would be met in our proposal.

From a human rights perspective, such a procedural autonomy question *prima facie* hardly affects individual level of protection: the merits of the applicant's case would, either way, be assessed by Strasbourg. But one phrase in Article 3(6) weighs into the equation: "The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed."[234] Delayed proceedings do not equal a detrimental reduction in protection per se – but they matter. This must be a condition to any recommendation we propose in our balanced equation: a reasonable time-limit for the procedure must be kept in. To the secondary demand it can be said that from a human rights perspective there are clear merits to ensuring the correct co-respondents are addressed, so if

[229] DAA, Article 3(6).

[230] Opinion 2/13, par. 240.

[231] Halberstam, *supra* n. 11, p. 12.

[232] Lock, *supra n.* 37, De Witte, *supra* n. 30, p. 697.

[233] View of Advocate-General Kokott in *Opinion 2/13*.

[234] DAA, Article 3(6).

that requirement (derived from Protocol [No 8]) is met by Advocate-General Kokott's proposal, this can be considered a solution fit for our research (and a confirmation of our hypothesis).

> **Article 3(6) DAA**
>
> "In proceedings to which the European Union is a co-respondent, if the *relevant EU institution decides that the* Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, *this decision shall bind the Court*, and sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court."
>
> **Article 3(4) DAA**
>
> "Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met. *The Court shall fully and systematically inform the EU if it appears eligible as co-respondent in a pending case involving an EU member State, and EU member States if they appear eligible as co-respondent in a pending case involving the EU, in order to ensure proper functioning of the co-respondent procedure, and the prior involvement procedure stipulated in Article 3(6) of the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms."*

Scope of Aricle 3(6) DAA

The Court's second argument concerns its scope. The CJEU interpreted paragraph 66 DER to only allow for assessment of interpretation of primary law, and validity of secondary law.[235] This was deemed insufficient, and a "breach of the principle that the [CJEU] has

[235] Opinion 2/13, par. 243.

exclusive jurisdiction over the definitive interpretation of EU law".[236] Basically, the CJEU wants to extend the scope of review. The Advocate-General found the scope sufficiently broad,[237] but the constitutional demand from the Court is clear: the scope must be clarified within the DER to include interpretation of secondary law.

On this point, no-one is disagreeing with Luxembourg that interpretation of secondary EU law should fall within Luxembourg's scope of review. We can therefore be short in our arguments. From a human rights and institutionalist perspective the Court may have applied an "overly formalistic approach"[238] which conveys a certain lack of trust towards Strasbourg. However, this hurdle can be easily overcome without an enormous impact on individual rights protection,[239] especially considering the situation pre-accession. This would confirm our hypothesis. As we have no reason to amend Treaties, or make reservations, we can simply amend the relevant DER paragraph:

Paragraph 66 Draft Explanatory Report

"… Assessing the compatibility with the Convention shall mean to rule on the *interpretation* of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments…"

[236] Opinion 2/13, par. 246.

[237] View of Advocate-General Kokott in *Opinion 2/13*.

[238] De Witte, *supra* n. 30, p. 697.

[239] Ibid, p. 698, and Storgaard, *supra* n. 28, p. 502, Halberstam, *supra* n. 11, p.14.

CFSP Jurisdiction

The Court's final argument concerns jurisdiction over the intergovernmental area of common foreign and security policy. In CFSP, pursuant Articles 24(1) TEU, 40 TEU, and 275 TFEU, the CJEU is limited to review of the division of competences between CFSP and other areas of EU competence, and review of restrictive measures, respectively.[240] Upon accession, Strasbourg was envisioned to adjudicate on Convention-compatibility of CFSP measures. The CJEU held this creates a gap between Strasbourg's and Luxembourg's jurisdictions, liable to "entrust the judicial review of those acts, actions, or omissions on the part of the EU exclusively to a non-EU body'.[241] This problem is of key importance to our research. On the one hand, bringing an actor such as CFSP under the Strasbourg-umbrella would be a grand achievement for fundamental rights protection, and some might argue the general idea of accession. On the other hand, the Court provides us with core constitutional arguments on why this cannot be realized in the manner proposed in the DAA.

First we must consider this problem from an institutionalist perspective, to provide the context of the CFSP-CJEU relationship. The original reason for exempting some areas of CSFP from CJEU judicial scrutiny, was to prevent judicial activism in this area, it can be safely argued.[242] With Opinion 2/13, some see a revitalized attempt of Luxembourg to extend its CFSP-jurisdiction through constitutional arguments. Or at least, as Peers claims: "[S]ince it isn't allowed to play, it's taking the football away from everyone else. It's the judicial politics of the playground."[243] Institutionalism also offers a lens through which Member States might look at this problem (and our proposed solution). If Member States feel Luxembourg's objections are mostly offered in order to extend its jurisdiction, or limit another international Court's, they may not accept any proposition altering CFSP's institutional boundaries. Fear of judicial activism cannot be ignored in relation to our research. But we must still critically discuss this issue, to see where the potential for reconciliation lies.

[241] Opinion 2/13, par. 255.

[242] Łazowski, Wessel, *supra* n. 36.

[243] Peers, *supra* n. 8.

The CJEU offered its constitutional argument: "the agreement envisaged fails to have regard to the specific characteristics of EU law."[244] It refers to Opinion 1/09, where it held that review of acts, actions or omissions on the part of the EU cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.[245] The focus here should be on the phrase "exclusively". It is undeniably the case that in CFSP matters outside CJEU jurisdiction, Member States' High Courts are conferred jurisdiction under Article 19(1) TEU.[246] The question from a constitutional perspective, however, is if this counts as a sufficient consolidating option within EU law. The CJEU neglected to mention Member States' High Courts' consolidating function altogether, but we cannot ignore this fact. Halberstam offers the following consideration: the fact that Member States courts' *competing* interests in adjudicating on CFSP matters would perform the consolidating function post-accession, over a *harmonized*, EU level court, is "in serious tension with the constitutional idea of the Union."[247] But his argument presumes Strasbourg would review CFSP acts not only on compatibility with the ECHR, but also with EU law.[248] However, there is no specific basis in either the Opinion, the DAA, or the Treaties to come to this conclusion.[249] However, Luxembourg either; *a)* did not consider the role of Member States' High Courts under Article 19(1) TEU as sufficient consolidation, or b) did not consider this role *at all.* It seems to demand an extension of its own jurisdiction to include matters of CFSP on which the ECtHR could potentially come to rule. The options of carve-outs and reservations of CFSP matters will be considered below,[250] but for now, when drafting our proposal we must consider: to properly address the CJEU's constitutional demands, some extension of jurisdiction should be applied.

[244] Opinion 2/13, par. 257., Protocol (No 8).

[245] Opinion 1/09, EU:C:2011:123, par. 78, 80, 90.

[246] Hillon, C. 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' The European Court of Justice and External Relations Law, Hart (2014), in Lock (*Supra* n. 37). *Apart from this view being shared by Regelsberger, E., and Kugelmann, D., as noted by Lock, it is shared by Eekchout, P., Halberstam, D., and Advocate-General Kokott in her View.*

[247] Halberstam, *supra* n. 11 p. 37.

[248] It is beyond our scope to explain Halberstam's reasoning here, *see:* Halberstam, *supra* n.11, p. 37.

[249] Halberstam notes that this assessment indeed is based on a 'good deal of (contestable) predictions about judicial behavior.', *supra* n. 11, p. 40.

[250] Note the inherent problems with reservations here, for the purposes of human rights protection, and the ECtHR.

Indeed, ECtHR external review in general can be considered accession's core idea. And, as mentioned before, to bring CFSP under the Convention-umbrella would be a triumph for human rights protection in Europe. It is undeniably preferable that where the CJEU has no jurisdiction over certain acts "concerning all questions relating to the Union's security, including the […] common defense policy that might lead to a common defense"[251] some other form of human rights adjudication is present. Currently, violations committed under CFSP can come before Strasbourg only for the Member State's act, and not for the EU's part.[252] Accession was meant to remedy this. From a human rights perspective, therefore, a carve-out or reservation of CFSP matters is an unacceptable proposal. This would remove the potential benefit of accession in the first place. Furthermore, from a constitutional perspective, this would prove difficult. A reservation on CFSP would remain under ECtHR scrutiny; it would still have to assess whether or not to adjudicate. Luxembourg would undeniably consider this a review of the EU's division of power. So reservations would be undesirable from a human rights perspective, and probably unworkable from a constitutional perspective.

The throughout this research much-favored option of DAA renegotiation becomes difficult to consider as well. An amendment would have to follow one of two lines of argument. Either, the DAA would specify that in certain cases of limited CJEU jurisdiction in CFSP, the ECtHR also cannot adjudicate. This effect is similar to a reservation, and equally complicated. Or, we could grant the CJEU jurisdiction in CFSP to perform the consolidating function it requires in the DAA. However, this would be incompatible with Article 6(2) TEU and Protocol (No 8).[253]

Exhausting other legal options, it is time to consider Treaty revision. Recall, we consider this a 'drastic' measure. This ties in with the above-mentioned institutionalist arguments considering fear of judicial activism. To amend the Treaties involves considering the ramifications of the ordinary revision procedure, requiring all Member States' signatures. As established, Member States are probably not willing to considerately expand CJEU jurisdiction in CFSP. So before proposing drastic treaty amendments, we must consider what the CJEU demands to begin with.

[251] TEU, Article 24(1) (*translated to American English*).

[252] The implications of which were previously discussed.

[253] The DAA "shall make provision for preserving the specific characteristics of the Union and Union law", and "[…] shall not affect the competences of the Union or the powers of its institutions".

As the Court's argument concerning the 'exclusive' conferral of jurisdiction to Strasbourg omitted consideration Member States' High Courts' consolidating function, we might consider this function, to some extent, provided for by the Treaties (i.e. conferred to the Member States).[254] Luxembourg's remaining concern would be the possibility of Strasbourg ruling on fundamental EU law matters outside Luxembourg's jurisdiction, and outside the Convention-compatibility review. Here we should look for reconciliation. If we would extend the CJEU's jurisdiction in CFSP to include an assessment of whether cases before Strasbourg involve matters purely of EU law, the CJEU might be appeased. This is no full extension of the CJEU's jurisdiction to all matters of CFSP that can be reviewed by the ECtHR, but an explicit and well-defined permission for Luxembourg to assess whether Strasbourg is operating outside its Convention-jurisdiction. Realistically speaking, this would rarely be the case. The gap in jurisdiction is small to begin with, and we can trust Strasbourg to be capable of respecting its jurisdictional boundaries. But in rare instances, Luxembourg would upon our proposed amendment be able to intervene. It would be similar to the role it already assumes in CFSP: the policing of boundaries of EU competences under Article 40 TEU. The CJEU would be systematically informed by the ECtHR on cases concerning CFSP measures (similar to our proposal for the co-respondent mechanism). This limited amendment – as opposed to a sweeping extension of jurisdiction – could be acceptable to Member States. Constitutionally speaking, it allows for extended CJEU jurisdiction. But foremost, it would allow ECtHR review of Convention-compatibility of CFSP acts, which is a positive outcome for fundamental rights protection. Granted, this is no easy fix. But, considering our hypothesis, we can argue that a balanced way forward is possible.

Article 24(1) TEU

"…, *and in cases pending before the European Court of Human Rights, upon notification of said Court, where the Court of Justice of the European Union has found a breach of the scope of review granted to the European Court of Human Rights by the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms."*[255]

Article 10 DAA – Jurisdiction in the area of common foreign and security policy

[254] TEU, Article 19(1).

[255] At the end of the Article.

1. *"The Court will, in cases of limited jurisdiction of the Court of Justice in the area of common foreign and security policy, strictly adhere to review of compatibility with the Convention of measures within that area.*
2. *The Court shall fully and systematically inform the Court of Justice of pending cases concerning the review of compatibility with the Convention of measures in the area of common foreign and security policy. The Court of Justice shall make an assessment of this review.*
3. *If the Court of Justice finds a breach of jurisdiction, this decision shall be binding to the Court."*

Conclusion

The way forward in accession to the ECHR is no easy task. After our analyses, we have advised thirteen amendments in total: eleven to the DAA; one to the DER; and one to the TEU.[256] This shows there is a way forward that maintains the level of fundamental rights protection in Europe. Throughout this research, our arguments took full account of the present legal framework. The proposal ensures "accession shall not affect the Union's competences as defined in the Treaties."[257] Granted, we do advise Treaty amendment to ensure this. "Provision[s] for preserving the specific characteristics of the Union and Union law" are made, and Article 344 is respected. The "specific features of Union law"[258] are preserved, and relevant case law provided reasonable solutions.

Our theoretical approach has proven useful: consideration of Luxembourg's constitutional demands and application of a human rights perspective has led us to a sound proposal.[259] And through examination of the institutionalist perspective, there appears to be more to Opinion 2/13 than plain institutionalist tendencies. In some cases, we see theoretical overlap: constitutional arguments can often be interpreted as institutionalist tendencies, and some constitutional arguments share an end-goal with a human rights perspective. Finding a way forward is no novel achievement – but doing so within limits of fundamental rights protection and constitutionalism as presented here is a perspective new to the debate.

We must address our proposal's feasibility. Considering the largest part of our proposals are DAA amendments ('a cumbersome process') we recognize the complexities at hand. Particularly regarding our TEU-amendment, the proposals would be challenging. However, considering the behemoth task of accession, and Luxembourg's complicated demands, any outcome would be 'challenging'. We have, however, constructed a proposal situated on the intersect of our theories, and consider our hypothesis confirmed: there is a way forward that respects both constitutional demands and a human rights perspective. Considering all the Opinion's arguments, we conclude that Article 6(2) TEU is no absolute

[256] Consult Appendix I for the proposal.

[257] TEU, Article 6(2).

[258] TEU, Declaration (No 2) on Article 6(2).

[259] *Supra* n. 256.

obligation to accede. We therefore hope, in the future, it is also considered conditional to Article 67(1) TFEU,[260] and Article 2 TEU.[261]

The strict theoretical scope of this research has unfortunately somewhat limited our perspective. For example, in some sections, the political 'will' of certain actors has not been fully taken into account. Taken further, one might assess this research to be performed in a vacuum, almost void of (relevant) events such as Brexit. Therefore, future research might assess accession on stricter terms of feasibility in the political landscape. Furthermore, our 'systematic information'-proposals implicitly create new networks of judicial dialogue, with possible additional costs. Future research might include an economic perspective, to uncover accession's implicit costs under Luxembourg's conditions.

Considering accession's positive effects, we recommend negotiators to keep moving forward. Today's climate of immigration, cooperation in international arrest warrants and extradition, and EU-coordinated troops, calls for an externally accountable EU – and a holistic approach to fundamental rights protection in Europe.

[260] "The Union shall constitute an [AFSJ] with respect for fundamental rights."

[261] "The Union is founded on the values of respect for human dignity, freedom, […] and respect for human rights."

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Appendix I

Proposed Amendments to the Draft Accession Agreement[1]

Appendix I

Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

Preamble

The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"), being member States of the Council of Europe, and the European Union,

Having regard to Article 59, paragraph 2, of the Convention;

Considering that the European Union is founded on the respect for human rights and fundamental freedoms;

Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe;

Considering, in particular, that any person, non-governmental organisation or group of individuals should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (hereinafter referred to as "the Court");

[11] Proposed amendments are *italicized*, and *red*. If text is removed, it is ~~stricken through~~.

Considering that, having regard to the specific legal order of the European Union, which is not a State, its accession requires certain adjustments to the Convention system to be made by common agreement,

Have agreed as follows:

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

1. The European Union hereby accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention.

2. Article 59, paragraph 2, of the Convention shall be amended to read as follows:

> "2.*a*. The European Union may accede to this Convention and the protocols thereto. Accession of the European Union to the protocols shall be governed, *mutatis mutandis*, by Article 6 of the Protocol, Article 7 of Protocol No. 4, Articles 7 to 9 of Protocol No. 6, Articles 8 to 10 of Protocol No. 7, Articles 4 to 6 of Protocol No. 12 and Articles 6 to 8 of Protocol No. 13.
>
> *b*. The Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an integral part of this Convention."

3. Accession to the Convention and the protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

4. For the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under

the Treaty on European Union and under the Treaty on the Functioning of the European Union. This shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 36, paragraph 4, of the Convention and Article 3 of this Agreement.

5. Where any of the terms:

- "State", "States", or "States Parties" appear in Article 10 (paragraph 1) and 17 of the Convention, as well as in Articles 1 and 2 of the Protocol, in Article 6 of Protocol No. 6, in Articles 3, 4 (paragraphs 1 and 2), 5 and 7 of Protocol No. 7, in Article 3 of Protocol No. 12 and in Article 5 of Protocol No. 13, they shall be understood as referring also to the European Union as a non-state Party to the Convention;

- "national law", "administration of the State", "national laws", "national authority", or "domestic" appear in Articles 7 (paragraph 1), 11 (paragraph 2), 12, 13 and 35 (paragraph 1) of the Convention, they shall be understood as relating also, *mutatis mutandis*, to the internal legal order of the European Union as a non-state Party to the Convention and to its institutions, bodies, offices or agencies;

- "national security", "economic well-being of the country", "territorial integrity", or "life of the nation" appear in Articles 6 (paragraph 1), 8 (paragraph 2), 10 (paragraph 2), 11 (paragraph 2), and 15 (paragraph 1) of the Convention, as well as in Article 2 (paragraph 3) of Protocol No. 4 and in Article 1 (paragraph 2) of Protocol No. 7, they shall be considered, in proceedings brought against the European Union or to which the European Union is a co-respondent, with regard to situations relating to the member States of the European Union, as the case may be, individually or collectively.

6. Insofar as the expression "everyone within their jurisdiction" appearing in Article 1 of the Convention refers to persons within the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons within the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply. Insofar as this expression refers to persons outside the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons who, if the alleged violation in question had been

attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party.

7. With regard to the European Union, the term "country" appearing in Article 5 (paragraph 1) of the Convention and in Article 2 (paragraph 2) of Protocol No. 4 and the term "territory of a State" appearing in Article 2 (paragraph 1) of Protocol No. 4 and in Article 1 (paragraph 1) of Protocol No. 7 shall mean each of the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply.

8. Article 59, paragraph 5, of the Convention shall be amended to read as follows:
"5. The Secretary General of the Council of Europe shall notify all the Council of Europe member States and the European Union of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently."

Article 2 – Reservations to the Convention and its protocols

1. The European Union may, when signing or expressing its consent to be bound by the provisions of this Agreement in accordance with Article 10, make reservations to the Convention and to the Protocol in accordance with Article 57 of the Convention.

2. Article 57, paragraph 1, of the Convention shall be amended to read as follows:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. The European Union may, when acceding to this Convention, make a reservation 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 under this Article."

Article 3 – Co-respondent mechanism

1. Article 36 of the Convention shall be amended as follows:

a. the heading of Article 36 of the Convention shall be amended to read as follows: "Third party intervention and co-respondent";

b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

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

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met. *The Court shall fully and systematically inform the EU if it appears eligible as co-respondent in a pending case involving an EU member State, and EU member States if they appear eligible as co-respondent in a pending case involving the EU, in order to ensure proper functioning of the co-respondent procedure, and the prior involvement procedure stipulated in Article 3(6) of the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.*

5. A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court ~~or by decision of the Court~~ upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, ~~and when deciding upon a request to that effect,~~ the Court shall seek the views of all parties to the proceedings. ~~When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.~~

6. In proceedings to which the European Union is a co-respondent, if the *relevant EU institution decides that the* Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, *this decision shall bind the Court, and* sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible. *When applying such an exception to the rule of joint responsibility, the*

Court will respect the jurisdiction of the Court of Justice in relation to the division of power between the EU and its Member States, and restrict itself to matters of compatibility with the Convention of the provision of EU law in question.

8. The Court will not hold EU Member States responsible for violations of Articles or Protocols upon which they have made a reservation, including situations where EU Member States act as a co-respondent as stipulated in Article 3 of the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

9. This article shall apply to applications submitted from the date of entry into force of this Agreement.

Article 4 – Inter-Party cases

1. The first sentence of Article 29, paragraph 2, of the Convention shall be amended to read as follows:

> "A Chamber shall decide on the admissibility and merits of inter-Party applications submitted under Article 33".

2. The heading of Article 33 of the Convention shall be amended to read as follows: "Inter-Party cases".

3. The Court of Justice, under Article 344 of the Treaty on the Functioning of the European Union, has sole jurisdiction in questions between the EU Member States, or between the EU Member States and the European Union, that fall within the scope ratione materiae *of EU law.*

Article 5 – Protocol No. 16

In the event of a request for an advisory opinion from the Court, in the meaning established in Protocol No. 16 of the Convention, EU Member States shall recognize their obligation for preliminary reference to the Court of Justice under Article 267 of the Treaty on the

Functioning of the European Union, in all questions relating to the interpretation, application, and validity of European Union law.

Article 6 – Interpretation of Articles 35 and 55 of the Convention

Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.*b*, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

Article 7 – Interpretation of Articles 53 of the Charter and the Convention

EU Member States, when interpreting Article 53 of the Convention, shall respect the primacy, unity, and effectiveness of EU law. In particular, they shall not interpret Article 53 of the Convention as an obligation to provide higher domestic standards of fundamental rights protection than guaranteed by the Convention.

Article 8 – Application of the principle of mutual trust

In cases concerning a violation of fundamental rights related to the principle of mutual trust between the EU Member States, in the area of freedom, security, and justice, the application of said principle is only permissible under the following conditions:

i) The general circumstances of the EU Member State in question do not resemble a real risk of violation of Article 4 of the Charter;

ii) The individual in question does not run a real risk of violation of Article 4 of the Charter.

Article 9 – Election of judges

1. A delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the

Assembly exercises its functions related to the election of judges in accordance with Article 22 of the Convention. The delegation of the European Parliament shall have the same number of representatives as the delegation of the State which is entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.

2. The modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in co-operation with the European Parliament.

Article 10– Jurisdiction in the area of common foreign and security policy

1. "The Court will, in cases of limited jurisdiction of the Court of Justice in the area of common foreign and security policy, strictly adhere to review of compatibility with the Convention of measures within that area.

2. The Court shall fully and systematically inform the Court of Justice of pending cases concerning the review of compatibility with the Convention of measures in the area of common foreign and security policy. The Court of Justice shall make an assessment of this review.

3. If the Court of Justice finds a breach of jurisdiction, this decision shall be binding to the Court.

Article 11 – Participation of the European Union in the meetings of the Committee of Ministers of the Council of Europe

1. Article 54 of the Convention shall be amended to read as follows:

> "Article 54 – Powers of the Committee of Ministers
> 1. Protocols to this Convention are adopted by the Committee of Ministers.
> 2. Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe."

2. The European Union shall be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter takes decisions under Articles 26 (paragraph 2), 39 (paragraph 4), 46 (paragraphs 2 to 5), 47 and 54 (paragraph 1) of the Convention.

3. Before the adoption of any other instrument or text:

> – relating to the Convention or to any protocol to the Convention to which the European Union is a party and addressed to the Court or to all High Contracting Parties to the Convention or to the protocol concerned;
>
> – relating to decisions by the Committee of Ministers under the provisions referred to in paragraph 2 of this article; or
>
> – relating to the selection of candidates for election of judges by the Parliamentary Assembly of the Council of Europe under Article 22 of the Convention,

the European Union shall be consulted within the Committee of Ministers. The latter shall take due account of the position expressed by the European Union.

4. The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply:

> *a.* in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, it derives from the European Union treaties that the European Union and its member States express positions and vote in a co-ordinated manner. The Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances.
>
> *b.* where the Committee of Ministers otherwise supervises the fulfilment of obligations by a High Contracting Party other than the European Union, the member States of the

European Union are free under the European Union treaties to express their own position and exercise their right to vote.

Article 12 – Participation of the European Union in the expenditure related to the Convention

1. The European Union shall pay an annual contribution dedicated to the expenditure related to the functioning of the Convention. This annual contribution shall be in addition to contributions made by the other High Contracting Parties. Its amount shall be equal to 34% of the highest amount contributed in the previous year by any State to the Ordinary Budget of the Council of Europe.

2. *a*. If the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, deviates in each of two consecutive years by more than 2.5 percentage points from the percentage indicated in paragraph 1, the Council of Europe and the European Union shall, by agreement, amend the percentage in paragraph 1 to reflect this new proportion.

b. For the purpose of this paragraph, no account shall be taken of a decrease in absolute terms of the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention as compared to the year preceding that in which the

c. The percentage that results from an amendment under paragraph 2.*a* may itself later be amended in accordance with this paragraph.

3. For the purpose of this article, the expression "expenditure related to the functioning of the Convention" refers to the total expenditure on:

a. the Court;

b. the supervision of the execution of judgments of the Court; and

c. the functioning, when performing functions under the Convention, of the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe,

increased by 15% to reflect related administrative overhead costs.

4. Practical arrangements for the implementation of this article may be determined by agreement between the Council of Europe and the European Union.

Article 13 – Relations with other agreements

1. The European Union shall, within the limits of its competences, respect the provisions of:

a. Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights of 5 March 1996 (ETS No. 161);

b. Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 (ETS No. 2) and Articles 2 to 6 of its Protocol of 6 November 1952 (ETS No. 10), in so far as they are relevant to the operation of the Convention; and

c. Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 5 March 1996 (ETS No. 162).

2. For the purpose of the application of the agreements and protocols referred to in paragraph 1, the Contracting Parties to each of them shall treat the European Union as if it were a Contracting Party to that agreement or protocol.

3. The European Union shall be consulted before any agreement or protocol referred to in paragraph 1 is amended.

4. With respect to the agreements and protocols referred to in paragraph 1, the Secretary General of the Council of Europe shall notify the European Union of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force in accordance with the relevant provisions of those agreements and protocols; and

d. any other act, notification or communication relating to those agreements and protocols.

Article 14 – Signature and entry into force

1. The High Contracting Parties to the Convention at the date of the opening for signature of this Agreement and the European Union may express their consent to be bound by:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature with reservation as to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Agreement shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention mentioned in paragraph 1 and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of the preceding paragraphs.

4. The European Union shall become a Party to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention at the date of entry into force of this Agreement.

Article 15 – Reservations

No reservation may be made in respect of the provisions of this Agreement.

Article 16 – Notifications

The Secretary General of the Council of Europe shall notify the European Union and the member States of the Council of Europe of:

a. any signature without reservation in respect of ratification, acceptance or approval;

b. any signature with reservation in respect of ratification, acceptance or approval;

c. the deposit of any instrument of ratification, acceptance or approval;

d. the date of entry into force of this Agreement in accordance with Article 10;

e. any other act, notification or communication relating to this Agreement.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at ..... the ....., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the European Union.