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EU Accession to the ECHR:

Is it still worth pursuing after

Opinion 2/13?

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Abstract

After the Court's negative Opinion 2/13, it is questionable whether EU accession to the ECHR is still possible. This paper first presents what the most likely scenario is in which accession is still possible, carefully taking into account the interests of all the parties concerned, and the objections raised by the ECJ. It then assesses whether accession on the basis of that scenario is still worth pursuing, in the light of the objectives of EU accession.

1. Introduction

1.1 The Draft Accession Agreement and Opinion 2/13

In December 2014, the European Court of Justice (ECJ) handed down its Opinion 2/13, in which it declared accession of the European Union (EU) to the Council of Europe's 'Convention for the Protection of Human Rights and Fundamental Freedoms' (ECHR) on the basis of the current Draft Accession Agreement (DAA)¹ incompatible with EU law. Outside the bubble of European politics and law, no-one noticed. National newspapers and national television news programme's ignored the issue, perhaps because it is too complicated and too abstract. Indeed, to a non-legal eye, Opinion 2/13 does not seem to be about the protection of human rights at all. Nowhere in Opinion 2/13 is the importance of human rights protection mentioned, and nowhere are the consequences of non-accession taken into account. Instead, it seems to be about one Court defending its territory against another Court on the basis of such abstract notions as the 'specific characteristics of EU law'.

Inside the EU bubble, everyone noticed. Since the ECJ issued Opinion 2/13, scholars and commentators have done their best to outdo each other finding harsh words to criticize it. The Opinion has been described as "total overkill"², "utterly ill-founded"³, "irritating"⁴, "devastating"⁵, full of "blunders and misapprehensions"⁶, "disregarding the fundamental values upon which the Union was founded"⁷, "based on a defensive and territorial attitude"⁸, and proof for the "accusations that the Court of Justice does not take fundamental rights seriously"⁹. Even president Spielmann of the ECHR's Court (the ECtHR) called it "a great disappointment"¹⁰. While a few commentators were understanding of parts of the

¹ DAA 2013

² Scheinin 2015

³ Michl 2014

⁴ Wendel 2014

⁵ Gragl 2015, p. 4

⁶ Michl 2014

⁷ Peers 2015b

⁸ Scheinin 2015

⁹ Łazowski & Wessel 2015, p. 187

¹⁰ Spielmann 2015

judgement¹¹, many have pointed to alleged mistakes in the reasoning of the Court¹². Let us first take a few steps back in order to put Opinion 2/13 into perspective.

Traditionally, the starting point is the 1979 Commission memorandum, in which it proposed that the EU should join the ECHR in order to improve the image of Europe as an area of freedom and democracy, to strengthen the protection of fundamental rights in the Community, and to strengthen the Community's institutions by improving their legitimacy and credibility.¹³ Over the years, EU Member States (EU MS) and the Commission have maintained that EU accession is necessary for a number of reasons. For the Union, the objectives of accession (which will be explored in greater detail below) are to make the EU, the EU MS and the Non-EU Member States of the Council of Europe (NEUMS) all subject to the same system and close the 'gap' in human rights protection; to prevent divergence and foster coherence in human rights case law and ensure minimum protection across Europe; to increase the credibility of the Union, both in Europe and in the rest of the world; and to solve problems of attribution and responsibility regarding human rights violations¹⁴. For the Council of Europe (and especially its NEUMS) EU accession is attractive as it will increase the strength and effectiveness of the ECHR system and the ECtHR¹⁵, thereby constraining the Union's power.¹⁶

However, the first attempt to join the ECHR was halted by the ECJ in 1996 on the grounds that the Community lacked a human rights competence, and thus lacked the competence to accede to the ECHR¹⁷. After this setback, the drafters of the Constitutional Treaty and subsequently the Lisbon Treaty not only added a general competence and obligation for the EU to accede to the ECHR in Art. 6(2) TEU, but also defined the conditions of that accession. Most importantly, accession shall be done in such a way that the specific characteristics of the Union and Union law are preserved; it shall not affect the competences of the Union or the powers of its institutions; it shall not affect the situation of Member States in relation to the ECHR; and it shall not affect Article 344 TFEU.¹⁸

¹¹ Halberstam 2015; Scheinin 2015

¹² See e.g. Krenn 2015, p. 158; Peers 2014; Douglas-Scott 2015; Michl 2015

¹³ European Commission 1979

¹⁴ European Convention 2002; DAA 2013, preamble

¹⁵ Johanson 2012, pp. 18, 83

¹⁶ Johansen 2012, p. 18

¹⁷ Opinion 2/94, paras. 33-35

¹⁸ Lisbon Treaty, Protocol 8 Relating To Article 6(2) Of The Treaty On European Union On The Accession Of The Union To The European Convention On The Protection Of Human Rights And Fundamental Freedoms

Between 2010 and 2013, representatives of the EU and the 47 Council of Europe member states negotiated a Draft Accession Agreement (DAA)¹⁹. The working group that prepared the DAA consisted of 7 experts from EU MS, and 7 from NEUMS. During the negotiation process, all parties acknowledged that special arrangements were necessary since the EU is not an ordinary State, and its multilevel character sits uncomfortably with the ECHR.²⁰ In addition, the DAA also had to take account of the strict conditions imposed on accession by the Treaties. Last, the DAA has to accommodate the interests of the NEUMS, who wish to keep the differences between the EU and 'normal' State Parties to the ECHR as small as possible.²¹

When the DAA was presented in 2013, it was not expected to cause unsurmountable obstacles to accession. Scholars, the Commission and EU MS were confident that the special arrangements in the DAA would be held compatible with the Treaties by the ECJ, perhaps after some minor adjustments.²² Advocate General (AG) Kokott shared this position in her view, stating that "the draft agreement merely requires some relatively minor modifications or additions, which should not be too difficult to secure"²³.

The Luxembourg judges disagreed. Where the AG opinion can be described as 'in principle yes, but a few amendments are needed', the ECJ's Opinion 2/13 was a clear 'no', with very few suggestions for a solution to the issues raised. First, the ECJ stated that it did not have a problem with the EU being bound by an outside Court that rules on its own provisions in principle.²⁴ However, it then held that such accession must be compatible with EU law, and it must not adversely affect the essential character of the Court's powers²⁵, the specific characters of EU law²⁶, and the autonomy of the EU legal order²⁷. The Courts finding that the DAA did not fulfil these conditions surprised many scholars and commentators.²⁸ Given the ECJ's substantive position and its rigid attitude in Opinion 2/13, there is consensus that accession has now become difficult, if not impossible in the short term.²⁹ In any case, the ECJ has set the bar high for any future attempt at accession.³⁰

¹⁹ Draft Accession Agreement 2013

²⁰ Opinion 2/13, paras. 154-158

²¹ Council of Europe 2010b

²² Craig 2014; Lock 2015; Kuijer 2011, p. 22; See also Opinion 2/13, para. 73 (on the Commission's view) & 109 (on the view of the EU MS); AG Kokott 2014, para. 279; Johansens 2012, p. 36; Odermatt 2015, p. 11

²³ AG Kokott 2014, para. 279

²⁴ Opinion 2/13, para. 182

²⁵ Opinion 2/13, para. 183

²⁶ Opinion 2/13, para. 183

²⁷ Opinion 2/13, para. 183

²⁸ Opinion 2/13, para. 258

²⁹ See e.g. Gragl 2015, pp. 4 & 17; Wendel 2014; CMLR 52 2015

³⁰ Wendel 2014

In this paper, I try to resist the temptation to judge Opinion 2/13 on its merits. Many others have offered well founded critiques of the ECJ's Opinion³¹. Instead, this paper treats Opinion 2/13 as a fact, and one that has to be dealt with. Under Art. 218(11) TFEU, whether we like it or not, accession can simply not continue without addressing the Court's objections. Therefore, this paper first explores which avenue towards accession is the most likely one. This analysis is done on the basis of two questions: Which solution is most likely to be accepted by all negotiating parties, and which solution is most likely to be accepted by the Court? After having determined the most plausible accession scenario, it compares that scenario with the current situation in order to answer the research question of this paper: "On the basis of the Court's demands, is EU accession to the ECHR still worth pursuing?". In doing so, it takes account of the various objectives of EU accession to the ECHR, and the extent to which they are achieved in the proposed 'most plausible accession scenario'.

1.2 Introductory remarks

Before commencing with the analysis, a few remarks are in order. First, I assume that the EU and the EU MS still want the EU to accede to the ECHR in principle, albeit not at every cost. This is a necessary assumption for the purposes of this paper: if the EU MS do not want the Union to accede anymore, that is the end of the story. Commission Vice-President Timmermans for example stated that "Accession to the ECHR remains a top priority for the Commission"³². For the EU MS it is less certain whether accession is a top priority. The UK comes to mind, whose recent anti-ECHR attitude casts doubt on its commitment.³³ While assuming that the UK is willing to facilitate some changes to make accession possible, its recent attitude will be taken into account when discussing plausible scenarios.

Second, many scholars have written on EU accession since Opinion 2/13. In my opinion, they have not offered a convincing and comprehensive answer to the question of what the most plausible accession scenario after Opinion 2/13 is. This has three main reasons. First, the likelihood of most proposed solutions to Opinion 2/13 is based on assumptions that are not substantiated by evidence, but rather based on statements. I seek to address that deficiency. Second, others have focused on offering one solution of the four proposed in this paper (Change the Treaties, renegotiate the DAA, solve the problems internally, persuade

³¹ *Supra* note 12

³² Timmermans 2015a

³³ See Jacobs 2014, p. Vii; Conservatives 2014; Dickson 2011; Pinto-Duschinsky 2011; Williams 2013; Harris, O'Boyle, Bates & Buckley 2014; House of Lords & House of Commons 2013

the ECJ) for all issues raised by Opinion 2/13, whereas in my opinion the most likely solution will be a combination of those four. This is because the ten issues raised by the Court vary greatly in gravity, underlying reasons and tone. Third, their solutions are often inspired by what would be desirable: The wish is father to the thought. As explained below, I will focus instead on what is most feasible.

Krenn, Douglas-Scott, Peers and Lock have in some way or another addressed the main question raised in this paper, namely whether accession is still worth pursuing. While Krenn is still positive³⁴, Douglas-Scott and Peers reluctantly conclude that the whole project should be given up for now.³⁵ All three do not provide a comprehensive analysis, do not make an explicit comparison between the current situation and the most plausible avenue to accession, do not take into account all the various objectives that accession has, and do not make clear which goals of accession could still be achieved even when accommodating the Courts concerns. In their comments, the question of 'is it still worth pursuing?' appears more of an afterthought than the basis of their analysis. This paper does put that question central.

Lock also asks the question of whether accession is still desirable. Unfortunately but perhaps inevitably, he does not reach a clear yes or no, but rather 'it depends'.³⁶ Apart from the fact that I will try to reach a more decisive answer, his approach differs from mine in several respects. Lock deals with the central question of this paper rather shortly, and does not explicitly address every concern of the Court. Second, his analysis of the most likely accession scenario differs from mine. Last, his analysis is incomplete: He only poses the 'is it still worth pursuing' question on the basis of the 'level of human rights protection' prior to and after accession. That oversimplifies the matter and overlooks many other relevant accession objectives.

I wish to emphasize that by criticizing their approach I am not implying that their analysis is not solid, or that their work is not a useful contribution to the discussion on Opinion 2/13. Quite the contrary: This paper relies on their work and could not have been written without it. The point is that the abovementioned authors had a different focus, scope, and a different objective when writing their contributions. This paper merely seeks to add to the existing body of work by asking a different question and by choosing a different approach.

³⁴ Krenn 2015, p. 166

³⁵ Douglas-Scott 2015; Peers 2015, p. 222

³⁶ Lock 2015, p. 32

2. How to overcome Opinion 2/13?

2.1 General Remarks

Before asking whether accession is still a goal worth pursuing, this paper first explores the options the EU has in response to Opinion 2/13. Article 218(11) TFEU is clear: The EU can only accede if it either amends the Treaties to the effect that they become compatible with the current DAA, or the DAA has to be amended to become compatible with the current Treaties. Legal scholars and AG Kokott³⁷ propose a third option, namely adjusting the EU's internal rules concerning the use and interpretation of the DAA so that the problems identified by the ECJ will not occur in the first place. A fourth option which should be explored alongside the other three is buying time and waiting for a different and perhaps more favourable composition of the ECJ, which might be persuaded to change the ECJ's position.

I do not set out to find the most elegant, correct or desirable solution to Opinion 2/13. Overcoming Opinion 2/13 will be challenging enough as it is. Therefore, I aim to find the solution that is most likely to be achievable for each of the objections raised by the ECJ, in order to use that as a starting point for further analysis. That 'achievability' is defined by two factors: 'Will the EU MS and/or the NEUMS be able to agree on it?' and 'will the ECJ accept it?'. Before turning to each of the issues raised in Opinion 2/13, some preliminary remarks on each possible solution are in order.

2.1.1 Option 1: Change the Treaties

Simply put, there are two options here. Either the necessary changes will be made during the next comprehensive Treaty revision, or they will be made through an ordinary revision procedure, in accordance with Art. 48 TEU. While the UK and Germany have recently tested the waters for comprehensive Treaty change (albeit for different reasons)³⁸, the process will not be easy and it will certainly not be quick. For example, the French government has already voiced its opposition, pointing to the lack of popular support for Treaty change.³⁹ Furthermore, the Lisbon Treaty took 8 years from start to finish, and there is no reason to expect this time to be quicker.⁴⁰ Given the dim prospects for a comprehensive Treaty change anytime soon, I will focus on the chances of treaty revision on the basis of Art. 48 TEU,

³⁷ AG Kokott 2014; Duff 2015a; Duff 2015b; Kuijper 2015; Łazowski & Wessel 2015

³⁸ BBC 2015

³⁹ The Telegraph 2015

⁴⁰ Independent 2015

which should be easier to achieve given its simpler procedures and its limited scope. The substance of such an amendment will be discussed later in section 2.2.

Whether Treaty amendment is easy or not depends of course on the issue and its circumstances. The Lisbon Treaty has so far been revised twice, and one protocol has been added. Each of these changes was subject to ratification by all EU MS. The revisions do not provide much guidance for the present case, since the circumstances were very different.⁴¹ While Phinnemore argues that “the adoption of Irish and Czech Protocol in 2009 [...] shows that in order to break deadlock amendments are possible”⁴², again, circumstances are very different now. Those Protocols (or rather, the promise of such Protocols⁴³) were needed to ensure Irish and Czech ratification of the Lisbon Treaty. The stakes are arguably lower in the case of EU accession to the ECHR. Phinnemore further argues that a “lack of appetite” for amendment is shown by the fact that even in the face of the Eurozone crisis and the obstacles the Treaties opposed to possible solutions, MS kept Treaty amendments to an absolute minimum.⁴⁴

All EU MS were in favour of the current DAA. However, this does not mean that all EU MS are equally open to Treaty revision in order to accommodate that DAA. The obvious EU MS to highlight in this regard is the UK. While it is open to Treaty revision to decrease supranational powers, it is not likely that it is open to a revision to facilitate an increase in supranational control over the UK judiciary and legislature⁴⁵, as EU accession to the ECHR would.⁴⁶ Given the UK’s current negative attitude towards the EU and especially towards the ECHR⁴⁷, one could imagine the UK seeing Opinion 2/13 as a blessing in disguise. Without the UK being seen as the ‘bad guy’, another step in the process of European integration will be stalled, for now.

An additional obstacle to Treaty amendment is the UK’s European Union Act of 2011, which has made a referendum obligatory in cases of amendments to the TEU and the TFEU (subject to certain exemptions, which do not apply in the case at hand).⁴⁸ Even if the UK

⁴¹ The first revision was not a very contentious issue (temporary extra EP seats), and the second revision took place under immense pressure from financial markets (the amendment of Art. 136 TFEU to allow for the ESM). See Miller 2012, pp. 2-3.

⁴² Phinnemore 2011, p. 8

⁴³ The Irish Protocol was ratified more than five years later, in December 2014. After political pressure from the European Council and the European Parliament, the demand for a Czech Protocol was withdrawn in February 2014

⁴⁴ Phinnemore 2011, p. 12

⁴⁵ See e.g. House of Lords & House of Commons 2013, para. 68

⁴⁶ Gragl 2014, pp. 18-24

⁴⁷ Jacobs 2014, p. Vii; Conservatives 2014; Dickson 2011; Pinto-Duschinsky 2011; Williams 2013; Harris, O’Boyle, Bates & Buckley 2014; House of Lords & House of Commons 2013

⁴⁸ Phinnemore 2011, pp. 12-15

government would be fully in favour of Treaty amendment to allow the EU to accede to the ECHR in principle, it is unlikely to take the gamble of a referendum on this issue.⁴⁹

It should also be noted that Treaty change does not only mean that EU accession will become possible. It also means something will be lost. For example on the issue of mutual trust (discussed below in section 2.2.1.2), if EU MS would agree to abandon this principle in order to make accession possible, a fundamental principle which has been of great importance to the functioning of European integration will be lost. It is not likely that EU MS would abandon such important principles that affect many policies, only to allow for EU accession.

But even if a Treaty amendment could be politically feasible, it might still be difficult to accommodate the Court's concerns through Treaty change. Of all scholarly ideas on how to cope with Opinion 2/13, Besselink's solution is perhaps the most radical.⁵⁰ He argues that given the fact that the Court has many very fundamental objections to the DAA, a solution in the form of an amended DAA is unlikely to be accepted by the Court. Moreover, since the Courts objections are based on principles of EU law that are not found in the Treaty but have been developed by the Court itself (such as the autonomy of EU law, the *Melloni* doctrine and the importance of mutual trust) these principles cannot be changed by Treaty revision. Therefore he proposes to add a "Notwithstanding Protocol", which would expressly circumvent the conditions imposed by the Treaty (including Protocol 8 TEU) and Opinion 2/13 (!). While Besselink finds support for his idea in the fact that many EU MS disagree with the ECJ's Opinion, many scholars disagree and find his solution either illegal or not politically feasible, because it would have to be ratified by all EU MS.⁵¹ I agree and will therefore not consider it further. However, his analysis of the underlying principles the ECJ bases its Opinion on is valuable. Indeed, many of the Court's principles are ones it made itself, which are difficult to circumvent even through Treaty change. It is for that reason that the option of simply taking away the conditions in Protocol 8 TEU and the Declaration on Art. 6 TEU would probably not have the desired effect. The ECJ would most likely still find issue with the DAA's alleged breaches of the abovementioned principles.

In sum, the likelihood of Treaty Change is very low, and the likelihood of the ECJ accepting accession after such Treaty Change is not much better. Therefore, I will consider Treaty change only as a last resort.

⁴⁹ As the Cameron administration is currently campaigning to convince the British population to vote 'yes' in the upcoming in/out referendum on EU membership, it is unlikely that the government is willing to invest further political capital in convincing the UK population to amend the Treaties to accommodate EU accession to the ECHR.

⁵⁰ Besselink 2014

⁵¹ Douglas-Scott 2015; Michl 2014; Łazowski & Wessel 2015, p. 206; Kuijper 2015

2.1.2 Option 2: Renegotiate the DAA

At first sight, amending the DAA seems the most logical way forward. In theory, a new DAA can probably be drafted in such a way that it addresses all of the ECJ's objections. The biggest problem is, of course, that 47 States will have to agree on that amended DAA. For option 1 (Treaty change) and 3 (internal solutions), only the 28 EU MS need to reach an agreement. Moreover, such a DAA would contain new safeguards and exemptions, and it is debatable whether such an alteration will be acceptable to EU MS, the EP and especially the NEUMS.

Scholars and commentators are divided on this issue. Whereas Kuijper⁵², Lock⁵³, Krenn⁵⁴ and Łazowski & Wessel⁵⁵ argue (partial) renegotiation of the DAA is a realistic scenario, Peers finds it is “hard to say”⁵⁶, and Besselink⁵⁷, Duff⁵⁸, Odermatt⁵⁹ and Michl⁶⁰ are highly doubtful or simply believe it will not be successful. At first sight, unfortunately, Peers is right: it is very hard to say. A closer look at the negotiation process of the current DAA might cast light on the chances of renegotiation. While the actual negotiations were secret, the intermediate reports of the working group on accession⁶¹ and statements made by (groups of) States and/or EU institutions do provide insights on this process.

While the process was expected to take 13 months⁶², disagreements both within the EU and between the EU MS and the NEUMS caused difficult and protracted negotiations⁶³, which resulted in a hard fought compromise.⁶⁴ Already during the negotiation process, the NEUMS fired off some warning shots with regards to the special position of the EU in the ECHR. In 2012, the Russian delegation emphasized that the DAA (as it then stood) contained “certain elements [which] were very difficult, but we decided to agree to them”. It then warned that any reopening of the negotiations to address new EU wishes would be met with new demands from the Russian side.⁶⁵ A year later, 14 NEUMS (including Russia) issued a joint statement expressing their concerns on the EU's privileged position, criticizing

⁵² Kuijper 2015

⁵³ Lock 2014; Lock 2015, pp. 6-26

⁵⁴ Krenn 2015, p. 164

⁵⁵ Wessel & Lawoski 2015, p. 210

⁵⁶ Peers 2015, p. 218

⁵⁷ Besselink 2014

⁵⁸ Duff 2015b

⁵⁹ Odermatt 2015, p. 15

⁶⁰ Michl 2014

⁶¹ The Steering Committee for Human Rights (CDDH) Ad Hoc Negotiation Group

⁶² Council of Europe 2010b, Appendix 7, Art. 3

⁶³ Martín & de Nanclares 2013, pp. 3-6; Council of the European Union 2011b, para. 9

⁶⁴ Peers 2015; Łazowski & Wessel 2015, p. 203

⁶⁵ Council of Europe 2012

many elements of the DAA and drawing some red lines in the process.⁶⁶ This detailed critique by the NEUMS is not a good sign for the prospects of renegotiation.

Moreover, a renegotiation should not only take account of EU law, but also of the Convention. A revised DAA that accommodates the Court's concerns by giving primacy to (principles of) EU law over Convention rights, or primacy of the ECJ over the ECtHR, will most likely not be accepted by the NEUMS and the ECtHR.⁶⁷ Another proposed solution, that of making reservations to certain ECHR obligation for the EU under Art. 57 ECHR, is conditional upon those reservations not being of a "general character". Any general reservation will be declared invalid by the ECtHR.⁶⁸

Last, amendments to the DAA might especially be difficult to accept for the NEUMS if they grant extra privileges to the EU and/or the EU MS vis-à-vis the NEUMS, since these undermine the equality principle that is the foundation of the whole system.⁶⁹

In sum, renegotiation of the DAA offers possibilities to accommodate the ECJ's objections, but it will be very difficult to reach an agreement among all 47 States on amending the DAA.

2.1.3 Option 3: Find an Internal EU Solution

Various scholars and commentators have argued that given the many hurdles Treaty or DAA amendment faces, the EU should - as far as possible - unilaterally alter the *use and interpretation* of the DAA by making solemn declarations and by issuing secondary legislation⁷⁰. On the one hand, this has the advantage that it shows a willingness on the side of the EU to accommodate the ECJ's concerns, thereby increasing the chance of the ECJ accepting accession. Another major advantage is the fact that only 28 EU MS have to agree, compared to 47 States in the case of renegotiation. On the other hand, it is not a given that the ECJ will accept solemn declarations as sufficient assurance. The way in which Opinion 2/13 is phrased shows that the ECJ set a high threshold: It wants to be absolutely sure that a breach will not be possible. This is for example shown by the issue of Art. 344 TFEU, where the Court held that the safeguard provided by Art. 5 DAA was not enough, since it still left a

⁶⁶ Council of Europe 2013

⁶⁷ Wessel & Lazowski 2015, p. 210; Peers 2015b

⁶⁸ Peers 2015

⁶⁹ Łazowski & Wessel 2015, p. 190; Halberstam 2015, p. 23

⁷⁰ Kuijper 2015; Duff 2015b; Krenn 2015, pp. 163-166; Gragl 2015, p. 12; Łazowski & Wessel 2015, p. 205

theoretical chance of a breach: “the very existence of such a possibility undermines the requirement set out in Article 344 TFEU”⁷¹.

For some issues, AG Kokott suggested solemn declarations as a solution.⁷² Łazowski and Wessel argue that the fact that these suggestions were not taken up by the ECJ shows that they are not sufficient to solve the ECJ’s objections.⁷³ I believe one cannot infer that from Opinion 2/13. This is because nowhere in Opinion 2/13 does the ECJ refer to the view of the AG: Neither where it reaches the same conclusion, nor where it reaches a different conclusion.

Under international law, unilateral declarations can under certain conditions be capable of creating legal obligations, as held by the ICJ in various cases, such as the *Nuclear tests*⁷⁴ and *Frontier Dispute*⁷⁵. The ICJ’s acknowledgement that declarations can create legally binding effects could be followed by the ECJ. In the past, the ECJ has looked to the ICJ for guidance, most notably in the *Racke* case, where it held that the EU must respect international law.⁷⁶

Authoritative guidance on the conditions under which unilateral declarations create a binding effect is given by the International Law Commission⁷⁷. In short, they are binding if they are made by an authority vested with the power to make binding obligations, they are stated in clear and specific terms, and they do not impose obligations on other States.⁷⁸ While the first two conditions do not pose a problem, the third one could. The ECtHR is not bound by such declarations, and could still make use of its powers granted by the ECHR and the DAA even if the EU MS have declared that that is not possible. Moreover, EU MS declarations that would put the EU MS in a favourable position vis-à-vis NEUMS will not be easily accepted by NEUMS⁷⁹. Last, it should be pointed out that even though only the 28 EU MS need to agree on an internal solution, the DAA in its entirety needs the approval of all 47 States.⁸⁰ This gives the NEUMS leverage to oppose any of the internal solutions advanced by the EU MS.

⁷¹ Opinion 2/13, para. 208

⁷² AG Kokott 2014, para 120, 219, 275

⁷³ Łazowski & Wessel 2015, p. 205

⁷⁴ ICJ, Nuclear Test Case (*New Zealand & Australia v. France*), Judgment of 20 December 1974, paras. 43-45

⁷⁵ ICJ, Frontier Dispute Case (*Burkina Faso v. Mali*), Judgment of 22 December 1986, paras. 39–40

⁷⁶ Case C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, [1998]; see also Joined Cases C-402/05 P and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, [2008], para. 290

⁷⁷ Müller, Geldhof & Ruys 2010, p. 23; for a comprehensive assessment of the issue of unilateral declarations in public international law, see: Eckart 2012.

⁷⁸ International Law Commission 2006

⁷⁹ Łazowski & Wessel 2015, pp. 204-205

⁸⁰ Art. 10(3) DAA

In sum, an internal EU solution would be relatively easy to be agreed upon by all actors, but it is uncertain whether it will be accepted by the ECJ.

2.1.4 Option 4: Persuade the ECJ

As mentioned, the Court has faced harsh criticism on Opinion 2/13 from across the board: Scholars, politicians and civil society were almost unanimous in their denouncement.⁸¹ Some have argued that the ECJ has misinterpreted the DAA and its implications, and expressed hope that as the composition of the ECJ changes, the Court's attitude towards accession becomes more positive.⁸²

First, whether a future ECJ will have a more positive attitude to EU accession than the current one is impossible to assess. Since the ECJ does not allow for dissenting opinions, it is not clear whether there was already much opposition to Opinion 2/13 among ECJ judges. Furthermore, the composition of the Court only changes slowly⁸³, and appointments by MS based on a candidate's attitude towards EU accession are not likely to happen. After all, the EU's accession is only a minor issue (if at all) to be considered among a wide array of determining factors when a judge is appointed.⁸⁴

Even if a future ECJ has a more positive attitude towards accession, it would never approve accession on the same conditions. There will have to be changes, since the ECJ's concerns were based on long held principles such as the autonomy of EU law and the ECJ's exclusive right to interpret EU law. However, how far one has to go (treaty change, an amendment of the DAA or internal solutions) to appease the ECJ is open to interpretation.⁸⁵ And that interpretation will, ultimately, be carried out by that same ECJ. The question is thus whether a future ECJ can and will be pressured into an interpretation more favourable of accession, compared to Opinion 2/13. In that case, minor changes to the DAA and reassurances in the form of unilateral declarations could provide a future opportunity for accession.

⁸¹ *Supra* note 2-11

⁸² Scheinin 2014

⁸³ The average current ECJ judge has been in function for 7.5 years, with the current President even being in office as long as 16 years. Judges serve terms of 6 years, which are renewable without a limit.

⁸⁴ Alter 1998, p. 139

⁸⁵ As evidenced by the very different conclusion reached by the AG and the ECJ on the same question

In theory, a Court can be pressured into changing its stance if there is a credible threat to its position from the legislature.⁸⁶ However, in this case such a threat could only come from far reaching Treaty change, for example by expressly providing for the possibility for outside Courts to interpret EU law. It will be very difficult to find support among the EU MS for such far reaching changes.

This is not to say that the Court never changes its case law. It does, albeit not often, and almost always in a very subtle way without explicitly stating that there is a departure.⁸⁷ In the case at hand, a subtle departure from Opinion 2/13 is not possible, given the very firm and unconditional language used by the ECJ. Indeed, the ECJ's attitude has been described as "constitutional pride" rather than substantial objections⁸⁸ and as "fear of losing even the slightest bit of influence on how things work in the European Union"⁸⁹.

It should also be noted that the Court is not for the first time taking issue with an outside Court having jurisdiction over the EU. For example in the Patent Court case, the ECJ held that such a Patent Court outside the EU legal framework "would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law."⁹⁰

In sum, Opinion 2/13 does not leave much leeway for a future ECJ (perhaps in a different composition) to accept a DAA with only minor and superficial changes. The CJEU has defended its position vigorously, and perhaps overprotective. Still, this means that a new attempt at accession must contain substantial and precise adjustments, since simply making a few superficial adjustments and hoping the Court will change its mind is a recipe for a second failure.

With these considerations in mind, I will now turn to each of the objections raised by the ECJ in Opinion 2/13. For each of those problems, I will present what I consider the most plausible scenario to ensure future approval on that issue from the ECJ. Again, I do not set out to propose the most desirable solution. My aim is to identify the solution that is most likely to be acceptable to the ECJ and to the EU, the EU MS and the NEUMS.

⁸⁶ Alter 1998, pp. 123, 135, 139-140

⁸⁷ Metcalf & Papageorgiou 2005, pp. 80-81

⁸⁸ Krenn 2015, p. 161

⁸⁹ Michl 2014

⁹⁰ Opinion 1/09, para. 89; see also Opinion 1/91 on the EEA Court

2.2 Summary & Solution for each Objection Raised by the ECJ

The ECJ identified five problems, which in total raised 10 problems. In the ECJ's own order, these are the following:

2.2.1 The DAA is incompatible with “the specific characteristics and the Autonomy of EU law”

The ECJ held that the fact that the EU has a “new kind of legal order” has “consequences as regards the procedure for and conditions of accession to the ECHR”⁹¹. Those conditions “are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law”⁹². The ‘specific characteristics’ the Court is referring to are, in particular, the principle of conferral; the fact that EU law stems from an independent source of law (the Treaties); the primacy of EU law over the laws of the EU MS; and the direct effect of certain provisions of EU law.⁹³ These core principles have in turn given rise to a “structured network of principles, rules and mutually interdependent legal relations linking the EU and its MS, and its MS with each other”, which is directed at the “implementation of the process of integration that is the *raison d’être* of the EU itself”⁹⁴. The question was whether the DAA is “liable adversely to affect” that ‘network’ and the “autonomy of EU law in the interpretation and application of fundamental rights”.⁹⁵ According to the ECJ, three parts of the DAA were liable to adversely affect the specific characteristics and autonomy of EU law.

2.2.1.1 Art. 53 ECHR & Art. 53 Charter

Art. 53 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”⁹⁶. Under the ECHR, this provision is not problematic, since the ECHR is not meant to ensure harmonization; it is meant to provide a minimum standard. Art. 53 Charter however, which mirrors the concept of Art. 53 ECHR, is circumscribed by the *Melloni* doctrine, which means that higher national standards in areas that have been fully harmonized by EU law are only

⁹¹ Opinion 2/13, para. 158

⁹² Opinion 2/13, para. 164

⁹³ Opinion 2/13, para. 166

⁹⁴ Opinion 2/13, para. 172

⁹⁵ Opinion 2/13, para. 178

⁹⁶ Opinion 2/13, para. 189

allowed if they do not compromise the “primacy, unity and effectiveness of EU law”⁹⁷. In Opinion 2/13, the ECJ seems to fear that Art. 53 ECHR gives EU MS a way of undermining this *Melloni*-principle, by using it to justify a different fundamental rights standard nationally, thereby compromising the primacy, unity and effectiveness of EU law.⁹⁸ Therefore, the ECJ insists on “coordination” between Art. 53 ECHR and Art. 53 Charter to limit MS power “to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.”⁹⁹

Before turning to a solution, some of the criticisms on the Court should be mentioned. Various scholars, such as Michl, Craig and Wendel argue that accession does not pose any new problem for the *Melloni* principle.¹⁰⁰ This is because in situation that fall under *Melloni*, EU MS are under an obligation to follow the EU fundamental rights regime. Should an EU MS Court disagree with the ECJ on a fundamental right, it can already invoke Art. 52(3) Charter (which incorporates the ECHR as a minimum level of protection but does not exclude higher levels of protection for the Charter) and Art. 53 Charter. The uniform application of EU law, which was at issue in *Melloni*, is protected by the MS Court obligation to make a preliminary reference under Art. 267(3) TFEU to the ECJ in such cases, unless the ECJ has made clear that EU law permits derogations.¹⁰¹ This obligation would not disappear after accession, and the ECJ would still be in a position to safeguard the primacy, unity and effectiveness of EU law.

Thus, the underlying problem is not caused by ECHR obligations, but by EU MS having the possibility of making use of Art. 53 ECHR to escape their ‘*Melloni*’ obligations. This is an internal EU problem, which should be fixed internally. Apparently, the ECJ needs to be reassured that EU Member States would indeed refrain from any action that would endanger the primacy, unity and effectiveness of EU law.

Given the above, and in line with the views of Michl, Krenn, Craig, Kuijper and Halberstam, the best solution to this issue is a binding declaration by the EU MS in which they promise to fulfil their ‘*Melloni*’ obligations.¹⁰² This declaration could further be strengthened by a declaration by the Commission stating that it would start an infringement procedure against any MS who would fail to keep that promise.¹⁰³ Despite and perhaps even

⁹⁷ Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, [2013], para. 57-60

⁹⁸ Krenn 2015, pp. 156, 158; Halberstam 2015, p. 22; Duff 2015a

⁹⁹ Opinion 2/13, para. 189

¹⁰⁰ Craig 2015, p. 9; Michl 2015; Wendel 2014

¹⁰¹ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, [2013]

¹⁰² Krenn 2015, p. 166; Kuijper 2015; Halberstam 2015, p. 23; Michl 2015; Craig 2015, p. 9

¹⁰³ Kuijper 2015

because it can be argued that such a declaration is “redundant”¹⁰⁴ as it would only restate existing obligations, and since the ECJ only asked for “coordination”, it would most likely appease the Court.

2.2.1.2 The Principle of Mutual Trust

The principle of mutual trust governs relations between the MS of the EU, especially in the Area of Freedom, Security and Justice (AFSJ). According to the ECJ, the principle of mutual trust, which requires MS, “to consider all the other MS to be complying with EU law and particularly with the fundamental rights recognised by EU law” is of “fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained”¹⁰⁵. Consequently, MS “may not demand a higher level of national protection of fundamental rights from another MS than that provided by EU law [and] they may not check whether that other MS has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.¹⁰⁶ Since upon accession, the ECHR would require MS to check whether another MS has observed fundamental rights, despite the principle of mutual trust governing that relationship, the ECJ held that “accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law”,¹⁰⁷ and demands that such a development is prevented.¹⁰⁸

At the heart of the matter lies a difference in approach between the ECJ and the ECtHR in the observance of fundamental rights in asylum policy.¹⁰⁹ Put simply, the ECtHR demands that a breach of the ECHR in any individual case warrants the refusal of a transfer of an asylum seeker¹¹⁰, whereas the ECJ uses a “presumption of compliance” in individual cases, allowing a derogation from the principle of mutual trust only in cases of “systemic deficiencies”.¹¹¹ The ECJ seems to fear that upon accession, the approach of the ECtHR will prevail, thereby eroding the principle of mutual trust.¹¹² Even though it can be argued that the doctrine of mutual trust should be abandoned¹¹³, and even has been partially abandoned by

¹⁰⁴ Craig 2015, p. 9

¹⁰⁵ Opinion 2/13, para 191, referring to Joined cases C-411/10, *N.S. v Secretary of State for the Home Department* and C-493/10, *M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011]; Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, [2013]

¹⁰⁶ Opinion 2/13, para. 192

¹⁰⁷ Opinion 2/13, para. 194

¹⁰⁸ Opinion 2/13, para. 195

¹⁰⁹ Morijn 2015; Halberstam 2015, p. 23

¹¹⁰ *M.S.S. v Belgium and Greece*, Application no. 30696/09, [2011], para. 293

¹¹¹ Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, [2013], para. 62; see also Halberstam 2015, pp. 23-24; Douglas-Scott 2015, p. 12; Wendel 2014

¹¹² Halberstam 2015, p. 27; Peers 2015, p. 220

¹¹³ Carrera, De Somer & Petkova 2012, p. 3

the CJEU in its rulings in *N.S.* and *M.E.*¹¹⁴, the ECJ's reasoning and tone is not very accommodating.¹¹⁵ In opinion 2/13, the Court does not seem to accept that external control in the AFSJ inevitably challenges the principle of mutual trust.¹¹⁶ As a result the issue of mutual trust is, together with the issue of CFSP discussed below, the most difficult to accommodate.

Given the rigid stance of the Court, any solution based on a (partial) departure from the principle of mutual trust, as for example advocated by Halberstam¹¹⁷, is not likely to be accepted by the Court. Furthermore, as argued already in section 2.1.1, it is not likely that the EU MS would abandon the principle of mutual trust just in order to allow for EU accession to the ECHR. Instead, some form of exemption in the ECHR must be sought for this principle to accommodate the ECJ's objections.¹¹⁸

Krenn argues that the most straightforward solution to accommodate the ECJ's objection would be to negotiate a reservation under Art. 57 of the ECHR for the AFSJ. He argues that such an opt-out would fulfil the conditions for a reservation, as it is not of 'general character' (it only concerns Art. 3 ECHR) and it contains 'a brief statement of the law concerned' (the Dublin III regulation which has codified the principle of mutual trust). There are two problems regarding such a reservation. Firstly, Krenn initially only considers the EU's asylum policy in relation to Art. 3 ECHR, while it is not clear from Opinion 2/13 that the Court's concerns are limited to just that.¹¹⁹ If the reservation would be extended to encompass Art. 8 ECHR, and "other codified expressions of the principle of mutual trust in EU secondary legislation", as he proposes, it could lose its non-general character. In such cases an opt-out would have to be included in the ECHR itself. Secondly, such a reservation would definitely trigger demands from NEUMS to get opt-outs for certain areas as well.¹²⁰ Despite these difficulties, an EU opt out for the AFSJ seems to be the only acceptable solution to the ECJ.

2.2.1.3 *The problem of Protocol 16*

¹¹⁴ Craig 2015, referring to Joined cases C-411/10, *N.S. v Secretary of State for the Home Department* and C-493/10, *M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011]

¹¹⁵ Peers 2015

¹¹⁶ Wendel 2014

¹¹⁷ Halberstam 2015, pp. 31-34

¹¹⁸ See e.g. Łazowski & Wessel 2015, p. 192; Wendel 2014; Morijn 2015

¹¹⁹ Instead, the ECJ refers to EU Law, and 'particularly with regard to the Area of Freedom, Security and Justice'. It does not further limit this to asylum policy.

¹²⁰ Michl 2014; Storgaard 2015, p. 27; see also Council of Europe 2012, in which the Russian negotiators made clear that any new EU MS demand would be met with new demands from the Russian delegation

When it enters into force¹²¹, Protocol 16 ECHR gives the highest national Courts the opportunity to ask for an advisory opinion from the ECtHR on matters of interpretation or application of the ECHR. Since the ECHR would become an integral part of EU law upon accession, the highest national Courts of EU MS are at the same time under an obligation to ask the ECJ for a preliminary ruling in such an event (Art. 267 TFEU). Therefore, the ECJ held that the advisory opinion mechanism in Protocol 16 could “affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU”¹²². In particular, the Court took issue with the fact that the DAA did not completely rule out the possibility of EU MS circumventing the preliminary ruling procedure, by asking an advisory opinion of the ECtHR under Protocol 16 on the interpretation of the ECHR instead.¹²³

While the ECJ does not tell us how this issue should be resolved, its demand is clear. The option of EU MS resorting to Protocol 16 ECHR rather than Art. 267 TFEU in matters within the scope of EU law (in this case “ECHR-as-EU-law”¹²⁴) must be excluded altogether.¹²⁵

The problem identified by the Court is not one that is caused by accession¹²⁶, and it is not one caused by Convention obligations¹²⁷. Rather, it is an internal problem of the EU and its MS. Thus, it should be solved internally, which again carries the advantage of not having to renegotiate this issue with the NEUMS.

As many others have proposed, an internal solution can be found in a binding unilateral declaration by the EU MS which restates their obligations under Art. 267 TFEU to the exclusion of the options offered by Protocol 16 in cases within the scope of EU law.¹²⁸ Such a binding declaration would even provide the ECtHR the opportunity to reject a request for an advisory opinion under Protocol 16 Art. 2 ECHR.¹²⁹

2.2.2 The DAA violates Art. 344 TFEU

Art. 344 TFEU provides that EU MS “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”, an obligation which extends to relations between EU MS and the EU.

¹²¹ Protocol 16 will enter into force once ten Council of Europe Member States have ratified it. So far, four States (Albania, Georgia, San Marino and Slovenia) have done so

¹²² Opinion 2/13, para. 197

¹²³ Opinion 2/13, paras. 196-200

¹²⁴ Halberstam 2015, p. 18

¹²⁵ For the ECJ, even the ‘risk’ of this happening at some point in the future is problematic. See Opinion 2/13, para. 198

¹²⁶ AG Kokott 2014, para. 140

¹²⁷ Krenn 2015, p. 166

¹²⁸ See also Krenn 2015, p. 166; AG Kokott 2014, para. 140; Michl 2014; Duff 2015a; Łazowski & Wessel 2015; Wendel 2014

¹²⁹ Halberstam 2015, p. 19

Since the ECHR becomes an integral part of EU law upon accession, this principle will apply to disputes relating to the ECHR as well.¹³⁰ According to the ECJ, the safeguard provision in Art. 5 DAA, which excludes proceedings at the ECJ from the obligation in Art. 44 ECHR that all disputes relating to the ECHR should be brought to the ECtHR, is “not sufficient to the preserve the exclusive jurisdiction of the ECJ” as expressed in Art. 344 TFEU. This is because only the obligation to bring proceedings to the ECHR has disappeared. The possibility however, is still there.¹³¹

The Court takes a very strict approach, demanding the exclusion of even the theoretical possibility of a breach of Art. 344 TFEU. A few options are available to accommodate this.

First, the AG proposed a binding unilateral declaration in which the EU and the EU MS declare “vis-à-vis the other contracting parties of the ECHR [...] their intention not to initiate proceedings against each other before the ECtHR pursuant to Article 33 ECHR in respect of alleged violations of the ECHR when the subject-matter of the dispute falls within the scope of EU law”¹³². This could be sided by a declaration from the Commission to bring infringement proceedings against EU MS breaching this declaration, in which case the ECJ could bring EU MS back in line in accordance with its *MOX Plant* case law.¹³³

But will the Court accept such a solution? Halberstam points out that the Court objects the “very existence of such a possibility” of the use of Art. 33 ECHR.¹³⁴ While a binding declaration would give the ECtHR the *possibility* to dismiss applications under Art. 33 ECHR which breach Art. 344 TFEU¹³⁵, this does not impose an obligation on the ECtHR to do so. Moreover, a binding declaration would not change anything compared to the current situation (which the ECJ did not accept): At the moment, EU MS are already obliged to comply with Art. 344 TFEU, and the Commission can start an infringement procedure when this obligation is breached. In other words, the “very existence of such a possibility” that the ECJ opposed would still exist.

Thus, the “express exclusion of the ECtHR’s jurisdiction”, as demanded by the Court in this matter, can only be achieved by an amendment of the ECHR. Johansson proposes to add the following sentence to Art. 33 ECHR: “Applications by an EU member state, or the

¹³⁰ Case 181/73, *R. & V. Haegeman v Belgian State*, [1974]

¹³¹ Opinion 2/13, paras. 201-214

¹³² AG Kokott 2014, para. 120

¹³³ Craig 2015, p. 12; Spielmann 2015; Kuijpers 2015

¹³⁴ Halberstam 2015, p. 15, referring to Opinion 2/13, para. 208

¹³⁵ Halberstam 2015

European Union, alleging a breach of the Convention by another EU member state, or the European Union, are inadmissible.”¹³⁶ He argues that NEUMS would be willing to agree to such amendment since it does not affect their position vis-à-vis EU MS. Moreover, the EU MS and NEUMS already agreed to the principle of EU MS bringing their inter-state disputes at the ECJ rather than the ECHR when they agreed on the safeguard provision in Art. 5 DAA. The proposed amendment would only give that principle a more binding character.

2.2.3 The co-respondent mechanism violates EU law

The co-respondent mechanism, designed to ensure that applications of human rights violations are directed at the correct respondent (the EU, the EU MS, or the two of them together) was found to violate EU law on three grounds.

2.2.3.1 The plausibility assessment

Art. 3(5) DAA gives the ECtHR the task of assessing the ‘plausibility’ of the arguments brought by the EU or the EU MS for invoking the co-respondent mechanism. According to the ECJ, such a plausibility assessment would require the ECtHR to “assess the rules of EU law governing the division of powers between the EU and its MS as well as the criteria for the attribution of their acts or omission”, which “would be liable to interfere with the division of powers between the EU and its MS” as protected by Art. 1 of Protocol 8 EU.¹³⁷

Since in this case the problem stems from the DAA itself, there can be only one solution: Amend the DAA to the effect that the ECtHR no longer has the right to carry out the ‘plausibility’ assessment as provided by Art. 3(5) DAA. The Court will not accept anything less. This is clear from the fact that the current DAA and its explanatory report already limited the plausibility assessment to “assessing whether the reasons stated by the High Contracting Party (or Parties) making the request 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”¹³⁸. Clearly, this was not enough for the ECJ. Again, there is hope that an amendment to the DAA would be accepted by the NEUMS as it does not directly affect their position vis-à-vis EU MS.

2.2.3.2 The Problem of EU MS Reservations

¹³⁶ Johanson 2015, p. 176

¹³⁷ Opinion 2/13, paras. 215-225

¹³⁸ Craig 2015, p. 13, referring to DAA 2013, para. 55

Art. 3(7) DAA provides for joint responsibility if a violation is established in a case where the EU and an EU MS were co-respondents. However, that provision fails to exclude the responsibility of an EU MS if that MS has made a reservation on the provision of the ECHR that was found to be breached. This is incompatible with Art. 2 of Protocol 8 EU, which provides that accession may not affect the relationship between the ECHR and EU MS.¹³⁹

This problem can easily be solved by adding a provision to Art. 3(7) DAA to the effect that a MS with a reservation will not be held responsible for a violation in cases where the EU and a MS are co-respondents. Such a renegotiation of the DAA should not result in opposition from the NEUMS, as it does not affect their position, and it does not grant any privilege to the EU and EU MS that does not exist today.

2.2.3.3 The Allocation of Responsibility

Art. 3(7) gives the ECtHR the power to decide that - on a reasoned proposal from the EU and an EU MS - only one of the respondents is to be held responsible for a violation in cases where the EU and an EU MS are co-respondents. Since the allocation of responsibility should be done on the basis of EU law, granting this power to the ECtHR breaches the autonomy of EU law and the exclusive jurisdiction of the ECJ to rule on EU law.¹⁴⁰

The ECJ therefore held that the “question of appointment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction [...]”¹⁴¹. It seems that this can only be accomplished by amending the DAA to the effect that the ECtHR can no longer decide on the allocation of responsibility between the EU and the EU MS. This is highly problematic, since 14 NEUMS have made clear during the negotiation process that in their opinion:

“a tribunal can in no circumstances be bound by the conclusions presented by one or several parties. In this sense, the proposal appears to be inconsistent with the ECHR system: the [ECtHR] should decide on its own whether to hold the EU liable as a co-respondent and the latter should comply with the ruling”.¹⁴²

¹³⁹ Opinion 2/13, paras. 226-228

¹⁴⁰ Opinion 2/13, paras. 229-235

¹⁴¹ Opinion 2/13, para. 234

¹⁴² Council of Europe 2013, para. 15

Halberstam offers an interesting way out of this impasse.¹⁴³ He argues that what caused the problem is the fact that the DAA sought to fix something that cannot be fixed: The ECJ cannot and will not allow the ECtHR to determine questions of EU law, and the NEUMS are right in arguing that it should be to the ECtHR to determine which Contracting Party is responsible for a violation to the ECHR. Therefore, the matter of the allocation of responsibility should simply be left out of the DAA. Instead, it should be “left to the mutual accommodation between Strasbourg and Luxembourg”. While one cannot be certain that such a solution will be acceptable to the ECJ, there is not much choice, as this seems the only solution that is achievable.

2.2.4 The prior involvement procedure violates EU law

The prior involvement procedure has been introduced specifically for cases in which the EU is a co-respondent, but there has been no opportunity for the ECJ to rule on the matter through the preliminary ruling procedure. In such cases, the ECtHR could be in the position where it has to rule on “the validity of a provision of secondary law or the interpretation of a provision of primary law”, without the Luxembourg Courts having been able to do so.¹⁴⁴ As this was seen as undesirable, the prior involvement procedure ensures that the ECJ gets that opportunity before the ECtHR decides on the merits of the case.¹⁴⁵ For two reasons, the Court held that this prior involvement procedure as envisaged in Art. 3(6) DAA violates Art. 2 of Protocol 8 EU.

2.2.4.1 The Interpretation of EU law by the ECtHR

While it will in many cases be clear whether the ECJ has already ruled on a matter, in some cases it will not. In such borderline cases, interpretation of EU law is necessary to determine whether a matter falls within the prior ruling of the ECJ. Art. 3(6) DAA, by permitting the ECtHR to make that assessment, gives the ECtHR jurisdiction to interpret the case law of the ECJ, thereby violating Art. 2 of Protocol 8 TEU. In order to remedy this breach, the ECJ demands that:

¹⁴³ Halberstam 2015, pp. 13-14

¹⁴⁴ DAA 2013, para. 65

¹⁴⁵ DAA 2013, para. 66

“the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.”¹⁴⁶

Craig¹⁴⁷ and Wendel¹⁴⁸ convincingly argue that such an information mechanism could be arranged internally. Since the prior involvement procedure is only at issue in cases where the EU is a co-respondent, a binding internal rule could place the EU MS under an obligation to ensure the systemic information of the EU and the ECJ in such cases. This obligation would be based on the EU principle of sincere cooperation. Moreover, as suggested by the AG, in order to further reassure the ECJ, that internal mechanism should include a provision that clarifies that when in doubt, the prior involvement procedure should always be initiated.¹⁴⁹

2.2.4.2 The Interpretation of Secondary EU law.

Second, the ECJ held that denying the Court the power to rule on the interpretation of EU secondary law (next to its validity) affects its powers and thereby constitutes a breach of Art 2 of Protocol 8 EU.¹⁵⁰ It is not clear why, in paragraph 66 of the explanatory report, interpretation only refers to primary law and not to secondary law. Perhaps this is based on an “unintended editorial mistake”, as suggested by Gragl.¹⁵¹ In any case, it can be easily remedied by amending the explanatory report to the DAA to the effect that interpretation of secondary law is included. The NEUMS do not have any reason to object such amendment, since it would only grant the ECJ what “all other highest courts in Europe are already granted - a say on the compatibility of domestic, i.e. EU law with the ECHR before the Strasbourg court decides”¹⁵².

¹⁴⁶ Opinion 2/13, para. 241

¹⁴⁷ Craig 2015

¹⁴⁸ Wendel 2014

¹⁴⁹ AG Kokott 2014, paras. 181-184

¹⁵⁰ Opinion 2/13, paras. 236-248

¹⁵¹ Gragl 2015, p. 14

¹⁵² Krenn 2015, p. 154

2.2.5 Review of CFSP matters by the ECtHR is not compatible with the specific characteristics of EU law

The jurisdiction of the ECJ in matters of the EU Common Foreign and Security Policy (CFSP) is limited to monitoring compliance with Art. 40 TEU and to review the legality on restrictive measures against persons (Art. 275 TFEU). Accession would thus empower the ECtHR to review CFSP measures that the CJEU cannot review. The Court relied on its earlier case law to hold that “jurisdiction to carry out a judicial review of [EU acts], cannot be conferred exclusively on an international Court which is outside the institutional and judicial framework of the EU”¹⁵³.

The issue of CFSP is the most criticised and most problematic of all the issues raised by the ECJ. The Advocate General, for example, saw no issue with the jurisprudence of the ECtHR. In quite strong wording, she expressed the view that:

“The absence of sufficient arrangements *within the EU*, by which the autonomy of EU law alone can be protected, can hardly be used as an argument against recognition of the jurisdiction of the judicial body of an international organisation.”¹⁵⁴

Many scholars agree, denouncing the ECJ’s opinion on CFSP.¹⁵⁵ Even though I agree with that criticism, as explained above, this paper seeks ways to accommodate the ECJ, no matter how wrong that Court may be. Therefore, despite widespread pessimism whether there even is such a solution¹⁵⁶, let us see what the options are.

The ECJ’s objection would be taken away if the ECtHR would have no jurisdiction on CFSP matters that fall outside the scope of judicial review of the ECJ. I believe that excluding the CFSP through a provision in the DAA or an amendment of the ECHR will prove impossible because of opposition from NEUMS. During the negotiations, the CFSP was already a sensitive topic¹⁵⁷. When France proposed to exclude CFSP matters from the jurisdiction of the ECtHR¹⁵⁸, 14 NEUMS drew a clear red line: “The proposed exclusion of CFSP causes major concern for different reasons (political sensitivity; restriction of the jurisdiction of the

¹⁵³ Opinion 2/13, paras. 249-257

¹⁵⁴ AG Kokott 2014, para. 193

¹⁵⁵ Halberstam 2015, p. 34; Krenn 2015, p. 160; Gragl 2015, p. 15; Łazowski & Wessel 2015, pp. 202-203; Kuijpers 2015; Odermatt 2015, pp. 15-16

¹⁵⁶ CMLR 52 2015, p. 12; Gragl 2015, p. 15; Odermatt 2015, p. 13; Storgaard 2015, p. 27; Douglas-Scott 2015, p. 7; Wendel 2014; Lazowski & Wessel 2015, p. 183; Lock 2015

¹⁵⁷ Odermatt 2015, p. 8

¹⁵⁸ Council of the European Union 2011a, paras. 9-11

Strasbourg Court) and should be deleted.”¹⁵⁹ Consequently, it was deleted. Moreover, a new proposal to exclude CFSP would trigger similar demands from NEUMS who may have some areas themselves they would like to see excluded. Undoubtedly, Russia would like an exclusion as well for its military action in Chechnya, Georgia or Crimea. Such demands would (hopefully) be unacceptable to EU MS. In short, excluding CFSP from the ECtHR’s jurisdiction does not seem feasible.

The second solution would be to extend the jurisdiction of ECJ to all CFSP matters, by an amendment of Art. 275 TFEU to that effect. A cynical view would be that all along, that was the hidden goal of the ECJ when it objected to jurisdiction for the ECtHR on CFSP matters.¹⁶⁰ Regardless, the obvious practical advantage is that the NEUMS would not have to agree to such a change. But are the EU MS willing to agree? In general, as argued in section 2.1.1, there seems to be little appetite for Treaty revisions that extend rather than limit supranational oversight in such a sensitive area as CFSP. Resistance to ECJ jurisdiction in the CFSP has been around since the early days of European integration,¹⁶¹ and the limitations on the ECJ’s jurisdiction has survived many rounds of Treaty revision due to EU MS opposition.¹⁶² Further evidence for EU MS opposition is in the submissions of the EU MS in Opinion 2/13 itself. The Commission had proposed a very broad interpretation of Art. 275 TFEU, through which the ECJ would have wider jurisdiction over CFSP matters than is currently the case. This proposal received strong opposition from the UK, Spain, Finland, Poland, France and the Netherlands.¹⁶³

Since the two more straightforward solutions do not seem very feasible, perhaps a more creative solution is warranted. Recall Besselink’s suggestion that the MS should ‘overrule’ the Court through a ‘notwithstanding’ protocol attached to the Treaties, which would disregard the ECJ’s objections. While such a complete negation of Opinion 2/13 does not seem politically achievable, perhaps it can be a solution to the CFSP problem.¹⁶⁴ The MS are far more likely to accept an amendment to Protocol 8 which only states that the Union shall accede to the ECHR despite the fact that the ECJ has a limited jurisdiction in CFSP.¹⁶⁵ This is because such an amendment is more limited, and does not change anything compared to what the MS already agreed on. When the MS agreed on the current DAA, they

¹⁵⁹ Council of Europe 2013; see also Odermatt 2015, p. 8, 11

¹⁶⁰ See CMLR 52 2015, p. 14

¹⁶¹ Łazowski & Wessel 2015, p. 203

¹⁶² Šaltinytė 2010, pp. 263-265; CMLR 52 2015, p. 13; Łazowski & Wessel 2015, p. 203; Odermatt 2015, p. 11

¹⁶³ Opinion 2/13, para. 131

¹⁶⁴ See also CMLR 52 2015, p. 14; Łazowski & Wessel 2015, p. 206

¹⁶⁵ CMLR 52 2015, p. 14

agreed to CFSP jurisdiction for the ECtHR but not for the ECJ.¹⁶⁶ Despite all the difficulties surrounding Treaty amendment, this one could perhaps be feasible. Of course, the ECJ would not be thrilled. Still, it would have to accept it, since the EU MS remain the Masters of the Treaties.

The remaining question is whether it is possible to get all 28 EU MS to agree to this solution. As argued by Łazowski and Wessel¹⁶⁷, it will be difficult to isolate the amendment to Protocol 8 from other issues concerning Opinion 2/13 and perhaps broader Treaty change. If MS make their support for such a Treaty revision dependent on other demands, this would diminish the prospect of that revision happening any time soon. Of course, the other two options also suffer from this problem.

The problem of CFSP is indeed the most difficult one. However slim the chances, if the EU MS manage to find a solution, I believe it will be an amendment to Protocol 8, for lack of better options.

2.3 The Most Plausible Accession Scenario

As we have seen, the objections raised by the ECJ vary greatly. Some can be overcome relatively easily, while some are almost impossible to solve. Before proceeding with the main question of this paper, I will give a short overview of the 'most plausible accession scenario' and the changes it brings compared to the 2013 accession attempt.

Out of the ten objections raised by the ECJ, three are not problematic. As argued above, the issue of the Arts. 53, the problem of Protocol 16 and the Interpretation of EU law by the ECtHR in the prior involvement procedure can be solved internally, without having an effect on the position of NEUMS and without significantly changing the conditions of accession. Therefore, these issues will not be considered any further.

Another four issues can be grouped together as well: The issue of Art. 344 TFEU; the plausibility assessment; the problem of EU MS reservations; and the interpretation of secondary EU law in the prior involvement procedure. These issues do require an amendment of the DAA, but not one that grants extra or new privileges to the EU and/or EU MS vis-à-vis the NEUMS, compared to the current DAA. Therefore, they should be acceptable to both the EU MS and the NEUMS.

¹⁶⁶ AG Kokott 2014, para. 194

¹⁶⁷ Łazowski & Wessel 2015, p. 206

Furthermore, these amendments do not fundamentally change the conditions of accession. Nevertheless, the request for amending the DAA does provide the NEUMS with leverage to make new demands of their own.

Next, two issues require an amendment of the DAA that alters the conditions of accession and further privilege the EU vis-à-vis the NEUMS. These are the principle of mutual trust, and the allocation of responsibility under the co-respondent procedure. Consequently, these amendments are likely to trigger new demands from the NEUMS.

Last, while the issue of CFSP will be very problematic internally, once agreement can be reached among the 28 EU MS, it will not pose a further problem as no further change to the 2013 DAA will be needed. Given its problematic character, I will nevertheless return to this issue at the end of this paper.

3. Is EU Accession to the ECHR still Worth Pursuing?

3.1 Art. 6(2) TEU: An impossible obligation?

I will now turn to the question of whether accession on basis of the scenario described above is still worth it and should still be pursued. To some, this question is redundant, since the answer is already in Art. 6(2) TEU:

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”

That provision does not seem to leave much of a choice. However, the second sentence of Art. 6(2) TEU provides that “such accession shall not affect the Union’s competences as defined in the Treaties”, and Protocol 8 TEU and the Declaration on Art. 6 (2) TEU impose conditions on this accession. The incompatibility of the obligation to accede and the conditions of accession could lead to an impossible obligation. Is the EU in such a case still bound to its obligation?

Łazowski and Wessel note that the terms imposed by the ECJ do not bind third parties, and if they do not accept them, then accession will not be possible.¹⁶⁸ In such a situation, the EU MS cannot be held responsible for failing to secure EU accession to the ECHR since it is not their fault. From this, Łazowski & Wessel infer that Art. 6(2) only constitutes an obligation to *seek* accession to the ECHR.¹⁶⁹

However, in my opinion, the answer lies more in the realm of politics than in the realm of law. After all, “*If the law doesn’t fit, you use politics*”¹⁷⁰. It would not be the first time that a Treaty obligation is not fulfilled for lack of political will or feasibility. Sweden has managed to avoid its obligation to join the euro by deliberately failing to fulfil the conditions for many years, without any consequences. Moreover, the past years of crises have shown that the EU and its MS are at their most creative when the Treaties seem to stand in the way of what they want. In this case, for example, accession could be postponed indefinitely, since Art. 6(2) TEU does not mention a deadline.¹⁷¹ Since the Courtroom is arguable not the best place to push for EU effort to accede, legal action for a ‘failure to act’ under Art. 265 TFEU is politically unrealistic.¹⁷² Given the above, I take the position that the EU still has a choice to pursue accession or not.

¹⁶⁸ Peers 2014

¹⁶⁹ Łazowski & Wessel 2015, p. 183

¹⁷⁰ Nicolaidis 2015

¹⁷¹ Łazowski & Wessel 2015, p. 204

¹⁷² Peers, 2015

Whether accession on the basis of my 'most plausible accession scenario' is still worth it depends on the extent to which that accession contributes to the objectives EU accession pursues. Therefore, the following section first identifies those objectives. Second, it gives a short overview of the current situation regarding each objective. Third, it describes what my 'most plausible accession scenario' would change, and in how far accession on those terms still contributes to the objectives of EU accession.

3.2 The Objectives of EU Accession

As a general rule, international organisations and their institutions are immune from prosecution in member states' courts and courts of other international organisations. The rationale behind this is to "to ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems"¹⁷³. It can be argued that this general rule does not apply to human rights, since they are not particular to a jurisdiction, but are supposed to be universal or at least regional.¹⁷⁴ If human rights are *truly* universal, immunity should not be possible. Therefore, it cannot be accepted that EU MS circumvent their human rights obligation in the ECHR by conferring powers on the European Union. The ECtHR shared that view in its *Cantoni* ruling in 1999.¹⁷⁵ The EU is thus not completely immune from legal supervision by outside courts at the moment. Scholars, politicians and NGOs however argue, that the current situation is not satisfactory, and that EU accession would be desirable.

The following section presents the objectives of that accession. The first three objectives are deemed most important since they are mentioned in the preamble of the DAA agreed upon by all 47 ECHR States¹⁷⁶, in the European Convention of 2002 in which the EU MS concluded the EU should accede¹⁷⁷, by the president of the ECtHR¹⁷⁸, the president of the ECJ¹⁷⁹, and by many scholars writing on EU accession¹⁸⁰. The remaining two objectives are of lesser importance, but should still be considered.

¹⁷³ Venice Commission 2004, para. 63

¹⁷⁴ Van Dijk 2007, p. 3

¹⁷⁵ *Cantoni v France*, application no. 17862/91, [1996], para. 30

¹⁷⁶ DAA 2013, preamble

¹⁷⁷ European Convention 2002, pp. 11-12

¹⁷⁸ Spielmann 2015

¹⁷⁹ Costa & Skouris 2011

¹⁸⁰ See e.g. CMLR 52 2015; Kuijjer 2011; Douglas-Scott 2015; Craig 2013; Gragl 2014; Jacobs 2014; Kosta, Skoutaris & Tzevelekos 2014; Lock 2010; Martín & de Nanclares; Polakiewicz 2013

3.2.1 Close the 'gap' in human rights protection

In the words of Advocate General Kokott, “the real ‘added value’ of accession is the external judicial control of compliance with basic standards of fundamental rights”.¹⁸¹ Accession would finally make the EU, the EU MS and the NEUMS subject to the same system of human rights protection. Currently, there is a so-called ‘gap’ in legal protection since citizens are not directly protected against EU acts at the ECtHR in the same way as they are protected against acts of a State. Accession seeks to close that gap.¹⁸² This is especially important since the EU has become an “important actor in so many areas of public life”¹⁸³ whose competences are ever increasing.¹⁸⁴

Since the EU is currently not a party to the ECHR, an applicant cannot bring a case directly against an EU act at the ECHR, even if the Convention violation is a direct result of an EU act. Consequently, “EU institutions are the only public authorities in a Council of Europe of 47 member states whose acts are not amenable to challenge at the Strasbourg Court on human rights grounds”.¹⁸⁵ Upon accession, it would finally become possible to hold the EU institutions accountable at the ECtHR.

Currently, EU acts can only be reviewed *indirectly* by holding the EU MS responsible in cases where the EU MS unanimously adopted an EU measure (the rationale being that the EU MS could have prevented adoption with a veto and is thus responsible for its existence) or where an EU MS was implementing an EU act.¹⁸⁶

The latter case is governed by the *Bosphorus* case law¹⁸⁷. In that case, the ECtHR first held that it had jurisdiction to rule on cases where the national measures derived from EU law, thus giving itself jurisdiction to review EU law despite the EU not being a party to the ECHR.¹⁸⁸ Secondly, it held that in cases where state action follows *completely* from an EU obligation, and the act is thus attributable to the EU only, the ECtHR will *presume* that the MS has not breached the ECHR as long as the EU offers fundamental rights protection that is “equivalent” (which is not necessarily equal) to the ECHR (the so-called ‘*Bosphorus*

¹⁸¹ AG Kokott 2014, para 164

¹⁸² European Convention 2002, p. 11-12

¹⁸³ DAA 2013, preamble; see also Council of Europe 2013, para. 4; European Convention 2002, pp. 11-12; Douglas-Scott 2015; AG Kokott 2014, para 1

¹⁸⁴ DAA 2013, preamble; Council of Europe 2013, para. 4; European Convention 2002, p. 11-12

¹⁸⁵ Douglas-Scott 2015, pp. 2-3

¹⁸⁶ Halberstam 2015, p. 29

¹⁸⁷ *Bosphorus Have Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, application no. 35036/98, [2005]

¹⁸⁸ Groussot, Lock & Pech 2011, para. 1.2.2

presumption').¹⁸⁹ This presumption can only be rebutted if the EU's protection of Convention rights was "manifestly deficient".¹⁹⁰ This presumption shows the ECtHR friendliness towards the EU,¹⁹¹ and puts the EU in a very privileged position. This is because for all the State parties to the ECHR (of which most offer fundamental rights protection at least 'equivalent' to that of the ECHR) there is no such presumption.

The 2013 DAA does not specify what will happen with the *Bosphorus* presumption upon accession. The President of the ECtHR even claimed there is no reason to link the future of *Bosphorus* to Opinion 2/13, and declined to give any guidance on its future: "Today I bring the question, but not the answer!"¹⁹².

I respectfully disagree. According to Lock, the ECtHR had two reasons to introduce its presumption: It wanted to express its 'comity' towards the ECJ, and it wanted to steer clear of any potential dispute with the ECJ on human rights issues, thereby returning the favour of the ECJ's willingness to incorporate ECtHR case law.¹⁹³ Once the EU accedes, both justifications disappear as the Union has agreed to subject its legal system to that of the ECHR. Furthermore, the complicated issue of attributability that gave rise to the *Bosphorus* case law will no longer be an issue, as the EU itself can now be held accountable at the ECtHR. Last, a continuation of the current EU privilege will most likely be opposed by the other parties to the ECHR, who have no reason to tolerate any such double standards.¹⁹⁴ Therefore, it can be expected that the *Bosphorus* presumption will be abandoned upon accession.¹⁹⁵

EU accession would thus end the privileged position that the EU currently enjoys. Moreover, it would end the "double standard" that the EU itself currently applies¹⁹⁶. Accession to the ECHR is a condition for EU Membership, yet the EU itself is not a party to the Convention.

Last, accession would close an internal EU gap, providing oversight in CFSP matters by the ECtHR where the ECJ's jurisdiction is very limited.¹⁹⁷

Accession on the basis of my 'most plausible accession scenario' would still achieve these objectives, with one important exception. That is the exemption of the Area of Freedom

¹⁸⁹ *Bosphorus Have Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, application no. 35036/98, [2005], para. 155

¹⁹⁰ *Bosphorus Have Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, application no. 35036/98, [2005], para 156

¹⁹¹ Kosta, Skoutaris & Tzevelekos 2014, p. 3

¹⁹² Spielmann 2015

¹⁹³ Lock 2010, p. 798

¹⁹⁴ Groussot, Lock & Pech 2011; Lock 2010, p. 798; Polakiewicz 2013, p. 10

¹⁹⁵ See also Lock 2009, pp. 26-27; Craig 2013, pp. 1139-1141; Douglas-Scott 2015, p. 10; Morijn 2015

¹⁹⁶ Douglas-Scott 2015; see also AG Kokott 2013, para. 2

¹⁹⁷ CMLR 52, 2015, pp. 13-15

Security, and Justice in order to preserve the principle of mutual trust, as discussed in section 2.2.1.2. Therefore, as the ‘gaps’ described above will be closed, an major one will remain open.

3.2.2 Foster coherence in human rights protection across Europe

Currently, the ECHR and its case law bind all EU MS but they do not directly bind the EU. However, the EU Charter is based on the ECHR¹⁹⁸; “the meaning and scope of [the Charter’s] rights shall be the same as those laid down by the [ECHR]”¹⁹⁹ in case of corresponding rights, and the fundamental rights standards of the ECHR are general principles of EU law²⁰⁰. Consequently, the Luxembourg Courts regularly look for guidance to the ECHR and the case-law of the ECtHR and apply their standards as general principle of EU law.²⁰¹ Yet, there still is some divergence between the human rights case law of the ECJ and the ECtHR.²⁰² This is not surprising, given that the EU and the ECHR have a different purpose: The ECHR seeks to protect fundamental rights through cooperation, whereas the EU has a wide range of objectives which it pursues through the integration of the peoples of Europe.²⁰³ The ECJ, in accordance with Art. 31 VCLT, interprets human rights standards “in the light of the purposes of European integration, while the ECtHR interprets human rights standards in the light of just that: Human rights.”²⁰⁴

Upon accession, the EU will be subject to the ECtHR’s jurisdiction. This should reduce the risk of (further) divergence, incoherence and contradictions in the case law of Luxembourg and Strasbourg. Virtually everybody writing on EU accession has mentioned greater coherence in European fundamental rights protection as one of the most important objectives of accession.²⁰⁵ The presidents of the ECJ and the CJEU for example stated in 2011 that it is “important to ensure that there is the greatest coherence between the Convention and the Charter”²⁰⁶. But is more coherence always better? And is the current

¹⁹⁸ European Convention 2002, pp. 11-12

¹⁹⁹ Charter of Fundamental Rights of the EU, Art. 52(3)

²⁰⁰ Art. 6(3) TEU

²⁰¹ Council of Europe 2010a, p. 2

²⁰² See section 3.3.2 below

²⁰³ Art. 3 TEU: “The Union’s aim is to promote peace, its values and the well-being of its peoples”; see also Martín & de Nanclares 2013, p. 2

²⁰⁴ Van Dijk 2007, p. 5; see also Douglas-Scott 2015, pp. 2-3

²⁰⁵ See e.g. Storgaard 2015, p. 19; Costa & Skouris 2011, p. 1; De Búrca 2013, p. 6, 14; Johansen 2012, p. 16; Kuijjer 2011, p. 21; Carrera, De Somer & Petkova 2012, p. 7; Polakiewicz 2013, p. 2, 5; Douglas-Scott 2015, pp. 2-3; Pavone 2012, p. 2; CMLR 52 2015, p. 4; Van Dijk 2007, p. 5; Council of Europe 2013, para. 4; European Convention 2002, pp. 11-12; AG Kokott 2014, para 1

²⁰⁶ Costa & Skouris 2011, p. 1

situation, where there is some divergence between the case law of the two Courts, really problematic?

On a more abstract level, the case for coherence is based on an idea of fairness: like cases must be treated alike, and this should not be influenced by the jurisdiction one happens to be in.²⁰⁷ Indeed, if human rights are truly universal, this argument makes sense. This however presupposes that the dominant interpretation is the right one. This is not necessarily the case, and for that reason it could be better to have a Court with a divergent but 'better' human rights protection, rather than one coherent but mediocre standard across all jurisdictions.²⁰⁸

Moreover, it should be noted that the aim of the ECHR is not to harmonize all human rights. In the words of the former president of the ECtHR, Luzius Wildhaber:

“The Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide a Europe-wide framework for domestic human rights protection.”²⁰⁹

In my opinion, divergence between the fundamental rights protection as offered by the ECJ and the ECtHR is not a problem, as long as the ECJ's level of protection does not fall below or contradict that of the ECtHR. After all, none of the 28 EU MS and none of the 47 ECHR MS have the same level of protection: All they share is a common minimum. Just as the other parties to the ECHR, the EU would be free under the Convention to have a higher level of protection (Art. 53 ECHR), and it would be granted a margin of appreciation.²¹⁰

Another argument in favour of coherence is that it fosters predictability and legal certainty for national Courts.²¹¹ Currently, national Courts are confronted with two different European human rights standards: Those of the EU, and those of the ECHR. However, this is not necessarily a problem. In all cases, the ECHR provides the minimum. In cases within the scope of EU law, the ECJ could impose a higher level of protection. Therefore, the situation is (again) only problematic if the level imposed by the ECJ is lower than that of the

²⁰⁷ De Búrca 2013, p. 14; Waldron 2008, pp. 18-24; Hol 2012, pp. 1-2

²⁰⁸ Waldron 2008, pp. 18-24; Hol 2012, pp. 2-3

²⁰⁹ Wildhaber 2002, p. 4

²¹⁰ Polakiewicz 2013, p. 11

²¹¹ Waldron 2008, p. 25; Johansen 2012, pp. 17-18; Polakiewicz 2013, p. 2; Burri 2013, p. 102; Pavone 2012, p. 2

ECtHR, or if the two contradict each other. In such cases, national Courts would have to breach their obligations to either one.

So the question is of course: Does the level of protection offered by the ECJ currently contradict or go below that of the ECHR? Since Lisbon, the level of protection offered by the ECJ shall not fall below that of the ECHR (including its interpretation of the ECtHR²¹²) for those rights that are included in both.²¹³ Indeed, the ECtHR itself assumes that the level of protection offered by the ECJ is at least equivalent.²¹⁴ Whether the ECJ strictly follows the case law of the ECtHR is difficult to assess, since it does not always refer to the ECtHR in cases where Charter rights and ECHR rights overlap. According to De Búrca, since the Charter became legally binding with the Lisbon Treaty, the ECJ refers less and less to the ECHR/ECtHR, but instead refers to the Charter.²¹⁵ In the words of Storgaard, in many cases references to Strasbourg are “conspicuously missing”²¹⁶. Other research offers a more mixed picture. A study commissioned by the EP shows that the ECJ does often refer to the ECHR in cases concerned with the right to privacy (Art. 8 ECHR) and the right to a fair trial (Art. 6 ECHR), but not in cases of discrimination.

Whatever the case, a lack of reference does not automatically mean that the ECJ goes below or contradicts the ECHR standard.²¹⁷ In many policy areas, the ECJ offers a similar (e.g. discrimination on the basis of nationality²¹⁸) or a higher level of protection (e.g. gender equality²¹⁹).²²⁰ While the two Courts’ interpretation of human rights is not always the same, Douglas-Scott concludes that in the past forty years, “there has not been a case in which the CJEU has deliberately gone against Strasbourg’s interpretation of the ECHR”²²¹.

Two policy areas are however problematic. First, the line of case law on asylum policy is a troublesome issue. The difference in approach between the ECJ and the ECtHR (as described in section 2.2.1.2) can be seen as a contradiction. Even though the cases (*N.S. & M.E.*²²² and *M.S.S.*²²³) have resulted in the same outcome,²²⁴ and the ECJ shows “a

²¹² Charter of Fundamental Rights of the European Union, Explanation on Article 52: Scope and interpretation of rights and principles

²¹³ Art. 52(3) Charter

²¹⁴ See section 2.3.1 on *Bosphorus*

²¹⁵ De Burca 2013; see also Storgaard 2015, p. 29; Douglas-Scott 2015, p. 18; Polakiewicz 2013, p. 4

²¹⁶ Storgaard 2015, p. 30

²¹⁷ Storgaard 2015, p. 31

²¹⁸ Pennings 2013, p. 129

²¹⁹ Burri 2013, p. 91

²²⁰ Douglas-Scott 2015, pp. 12-13; Lock 2009, p. 7; European Parliament 2012, pp. 13-14; Van de Heyning & Lawson 2011, p. 37; Harris, O’Boyle, Bates & Buckley 2014

²²¹ Douglas-Scott 2015, pp. 12-13; see also Pavone 2012, p. 27; De Witte 2011, pp. 22-25

²²² Joined cases C-411/10, *N.S. v Secretary of State for the Home Department* and C-493/10, *M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011]

²²³ *M.S.S. v Belgium and Greece*, Application no. 30696/09, [2011]

willingness to take note of [the ECtHR's] judgements"²²⁵, the level of protection offered by the ECtHR is arguably higher than that offered by the ECJ.²²⁶ Second, the right to strike is interpreted differently between the two Courts. Whereas the ECtHR offers strong protection to the right to strike (see *Demir & Baykara*²²⁷ and *Enerji Yapi-Yol Sen*²²⁸), the ECJ seeks to balance it with the fundamental freedoms recognised in EU law (see *Viking*²²⁹ and *Laval*²³⁰). In these areas, contradictions between ECJ and ECtHR case law are likely to occur.²³¹

In conclusion, the problems posed by diverging case law should not be overstated. They only occur in case the ECJ's protection goes below or contradicts that of the ECtHR, and that occurs fairly limited. However, there are currently no guarantees that this will stay this way. The risk of further divergence is still present²³², and might even increase as the ECJ continues to develop its own body of human rights case law²³³. Accession would reduce that risk by making the EU subject to the minimum standard provided by the ECtHR.²³⁴

Again, accession on the basis of my 'most plausible accession scenario' would still achieve these objectives, with the same exception, namely the Area of Freedom, Security and Justice. The AFSJ includes asylum policy. This means that in an area where oversight is most needed (namely where the EU standard risks falling below that of the ECHR), the ECJ has demanded an exemption from ECHR scrutiny.

3.2.3 Increase the credibility of the Union

Apart from tangible results, accession sends a political signal that the EU is serious about its own values as expressed in the TEU.²³⁵ Accession would increase the Union's internal credibility, as it would "reassure citizens that the EU, just like its member States, is not 'above the law' as far as human rights are concerned"²³⁶. Upon accession, the EU and the

²²⁴ Douglas-Scott 2015, p. 12

²²⁵ Brouwer 2013, p. 147

²²⁶ Carrera, De Somer & Petkova 2012, p. 19

²²⁷ *Demir and Baykara v. Turkey*, Application no. 34503/97 [2008]

²²⁸ *Enerji Yapi-Yol Sen v Turkey*, Application no 68959/01, [2009]

²²⁹ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007]

²³⁰ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, [2007]

²³¹ Veldman 2013, pp. 114-116

²³² Johansen 2012, p. 16; Polakiewicz 2013, p. 5; Douglas-Scott 2015, p. 19; Lock 2009, p. 7

²³³ Kuijjer 2011, p. 21

²³⁴ Kuijjer 2011, p. 21; Lock 2009, p. 7

²³⁵ AG Kokott 2014, para 2; DAA 2013, preamble; Douglas-Scott 2015; Besselink 2013

²³⁶ European Convention 2002, p. 11-12; see also Jacobs 2014, p. vii

EU MS could argue that they now have the most comprehensive human rights protection system in the world.²³⁷

Accession would also improve the Union's credibility and legitimacy in its own MS and in the rest of the world²³⁸. This enables the EU to deliver more credible and effective human rights criticism towards its own MS (e.g. Hungary²³⁹) and third countries.²⁴⁰ This is especially important given the fact that one of the EU's objectives is to actively promote human rights in its relations with the wider world.²⁴¹

Last, accession would send a signal to NEUMS that the EU is seeking closer relations with them, and the EU is not a world on its own.²⁴²

Accession on the basis of my 'most plausible accession scenario' would strike a serious blow to the objective of increasing the credibility of the Union. The many amendments needed, and especially the opt out for the AFSJ and the special provision regarding the allocation of responsibility, raise the impression that the EU demands to be 'above the law' after all. Because of Opinion 2/13 and its demands, the EU's attitude could now be perceived as: "Yes, of course we care about human rights, but there are some specific circumstances that make the situation different for us". That 'specific circumstances' argument is exactly the excuse used by human rights violators around the world.²⁴³ That is not to say that the EU has a particularly bad track record in human rights: What I mean is that accession on the basis of Opinion 2/13 will worsen rather than improve the Union's human rights image.

3.2.4 Solve problems of attribution and responsibility

Currently, a human rights violation caused by the EU cannot be brought directly against the EU at the ECtHR. An applicant can only bring a claim against a MS. This is problematic for the applicant, who faces an uphill battle to rebut the *Bosphorus* presumption.²⁴⁴ After accession, the applicant can bring a claim directly against the EU. This means that the EU

²³⁷ Duff 2015a

²³⁸ Van Dijk 2007; CMLR 52 2015, p. 4

²³⁹ see Timmermans 2015b

²⁴⁰ De Búrca 2011, pp. 687-690; Kuijjer 2011, p. 22

²⁴¹ Arts. 21(2)(b) and 23 TEU

²⁴² European Convention 2002, p. 11-12

²⁴³ To give two examples: the Chinese ambassador to the UN Commission on Human Rights defended his country's deplorable human rights record by arguing China needs "a path of promoting and developing human rights which fits into the specific circumstances in China" (Zonghuai 2001); and the Singapore government justified its violations of free speech rights citing circumstances specific to the history and culture of Singapore (HRW 2012)

²⁴⁴ Johansen 2012, pp. 58-59

can not only take responsibility, but can also finally defend itself at the ECtHR.²⁴⁵ The EU MS will no longer have to take up the task of defending something that is not necessarily their responsibility.

Upon accession, the co-respondent procedure should ensure that a rights violation is attributed to the one responsible for it: The EU or the EU MS.²⁴⁶ As a result, the enforcement of a judgement should become much more efficient. Currently, a MS can be held responsible for a violation it cannot by itself remedy since it stems from an EU act, which poses problems for the enforcement of a judgement.²⁴⁷ Upon accession, the EU will be directly bound by an ECtHR judgement, and will have to remedy a violation.²⁴⁸

The accession scenario described above poses a serious problem to this objective because of the issue of the allocation of responsibility under the co-respondent procedure. At the demand of the ECJ, the ECtHR will no longer have the right to assess the plausibility of a request to become a co-respondent (as it had before under Art. 3(5) DAA). This means that in cases where an application is directed against the EU it is entirely up to the MS whether it joins the proceedings as a co-respondent. The same goes for cases directed against an EU MS: it is up to the EU whether it joins the proceedings as a co-respondent. Furthermore, at the demand of the ECJ, the ECtHR will no longer have the right to determine whether only one Party should be held responsible in the case of joint responsibility. Since this is left for the ECJ and the ECtHR to reconcile, it could cause problems in the future.

These amendments to the DAA mean that the problem of attribution and responsibility will still not be solved in the most plausible accession scenario. An applicant could still find himself in a situation where his claim is in fact directed at the wrong party, or where the wrong party is held responsible.

3.3.5 Strengthen the ECHR

EU Accession would reaffirm that *the* human rights system in Europe is the ECHR, as it will be the ECHR that sets the minimum standard all over Europe.²⁴⁹ Furthermore, the ECHR could profit from the strengths of the EU legal system. As upon accession, the ECHR would become an integral part of EU law²⁵⁰, it could benefit from the primacy of EU law in the EU

²⁴⁵ AG Kokott 2013, para. 211; Van Dijk 2007, p. 3; Council of Europe 2013, para. 4

²⁴⁶ Johansen 2012, pp. 17-18

²⁴⁷ Douglas-Scott 2015, pp. 2-3; Johansen 2012, p. 41

²⁴⁸ European Convention 2002, pp. 11-12

²⁴⁹ CMLR 52 2015, p. 4; Van Dijk 2007

²⁵⁰ Case 181/73, *R. & V. Haegeman v Belgian State*, [1974]

MS. This could strengthen the ECHR's legal status, which currently varies across EU MS, making the ECHR more effective.²⁵¹

The strengthening of the ECHR is not only positive for human rights protection in Europe. NEUMS could also see it as a way to strengthen the Council of Europe, thereby challenging the dominant position of the EU.²⁵²

In the new accession scenario, the ECHR would at first sight still benefit from EU accession, as the EU would acknowledge the central position of the ECHR. However, the new terms of accession would at the same time severely weaken the ECHR system.

In my most plausible accession scenario, no less than six amendments to the DAA need to be made, and will thus have to be agreed to by the NEUMS. The EU position will become even more 'special' than it was already under the 2013 DAA. This special position signals that the ECHR system is not a one-size-fits-all, but allows for tailor made human rights protection. The new EU demands (especially the exemption for AFSJ) will offer the NEUMS an opportunity to make their own demands for issues where they would like a special position. This poses a very real risk to the biggest strength of the ECHR: providing a universal standard across jurisdictions in Europe.

²⁵¹ Jacobs 2014, p. vii & vii

²⁵² Johansen 2012, p. 18

5. Conclusion

After resisting that temptation for many pages, the time has finally come to criticize the ECJ. As we have seen, the ECJ seems to ignore a number of important issues. First, it ignores that - to use the Commission's words - it is "inherent in the nature of negotiations" with 47 States that the EU cannot get a DAA that is exactly the way it wants it.²⁵³ The Court has not shown any willingness to take that into account. Second, the ECJ ignores that allowing an outside Court to interpret EU law is an inevitable result of subjecting oneself to the jurisdiction of that Court.²⁵⁴ Third, the ECJ ignores that accession serves a loadable goal. Nowhere in Opinion 2/13 does it seem to have the protection of human rights in mind, or does it provide any positive suggestions to overcome potential problems.

Because of this attitude, a very high price will have to be paid in order to make accession still possible. Unfortunately, I have to conclude that that price is in fact too high: Accession on these terms is no longer worth pursuing. As I have shown, the changes necessary to accommodate Opinion 2/13 have a negative impact on each of the five objectives of accession. Especially the exclusion of the AFSJ from the jurisdiction of the ECtHR is a very severe problem. Not only does it affect many objectives of accession, it is also one of the areas where human rights protection is most needed. The AFSJ contains such contentious issues as asylum policy and judicial cooperation (including the European Arrest Warrant), where individuals are particularly vulnerable to human rights violations.²⁵⁵

In addition, the negative impact on the ECHR system should not be overlooked. As argued above, demanding extra special treatment (on top of the special treatment already received in the 2013 DAA) could open Pandora's Box, as other Parties certainly have a wish-list concerning the ECHR as well. This would risk eroding the ECHR system as it is today.

Two issues remain. First, I promised to come back to the issue of CFSP. I am the first to admit that the solution I deemed most plausible is in practise not that plausible: I would be somewhat surprised if it would actually happen that way. However, that does not affect my conclusion. If instead, the EU manages to get an opt-out for the CFSP, accession would even be less attractive. This is especially so because the area of CFSP is one which carries

²⁵³ Johansen, 2014; Odermatt 2015, p. 13

²⁵⁴ See Lazowski & Wessel 2015; Kuijpers 2015; Morijn 2015; Wendel 2014

²⁵⁵ Michl 2014; Douglas-Scott 2015, p. 8, 12; Wendel 2014

the risk of serious human rights violations.²⁵⁶ Furthermore it would provide the NEUMS with even more arguments to seek their own exemptions.

The other scenario was the extension of the jurisdiction of the ECJ to all areas of the CFSP, which would allow judicial oversight by the ECtHR. In that highly unlikely case, the analysis carried out in this paper would remain the same, since it was carried out on the assumption that the ECtHR would have jurisdiction in all matters of the CFSP.

In my opinion, once the Commission is done reflecting, it should not pursue accession anymore. But is that the end of the matter? It was clear that the EU MS wanted accession. Apparently they believed something was missing. While a comprehensive analysis is beyond the scope of this paper, a few scenarios are worth mentioning.

First, it will be very interesting to see how the ECtHR will respond. ECtHR president Spielmann has already taken the gloves off, stating that “the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation”²⁵⁷. Could this mean that the ECtHR will abandon or re-interpret its *Bosphorus* doctrine, to the effect that it will scrutinize the EU’s fundamental rights protection more thoroughly?

Second, Morijn offers an interesting alternative to accession, namely “de facto accession”²⁵⁸. He argues that the status of the ECHR in the EU legal system (as expressed in Art. 52(3) Charter) could be “upgraded [...] to the effect that the Charter and Union law general principles can only be given meaning by explicitly referring to (and taking on board the substantive content of) the ECHR and the Strasbourg Court’s interpretation of it”²⁵⁹. This could achieve at least some of the objectives of accession, without having to go through the cumbersome process of renegotiation, and without having to fulfil the conditions set by Opinion 2/13.

Last, the Commission and the EU MS could use the saved time, energy and resources to further improve the existing EU human rights protection. Lampedusa would be a great place to start.

²⁵⁶ Peers 2015, p. 220; Polakiewicz 2013, p. 7

²⁵⁷ Spielmann 2015

²⁵⁸ Morijn 2015

²⁵⁹ Morijn 2015

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