The EU's Accession to the ECHR: The Dream Becomes a Nightmare

By Steve Peers[*]

A. Introduction

Just before Christmas 2014, the Court of Justice of the European Union (CJEU or the Court) gave its long-awaited ruling on the European Union's accession to the European Convention on Human Rights (ECHR).[1] This ruling, *Opinion 2/13*, is a complex judgment that raises many legal questions. This case comment sets out: A summary of the ruling; an assessment of the consequences of the ruling; and an initial critique of the Court's reasoning.[2] On the latter point, the Court's ruling is fundamentally flawed. In short, the Court is seeking to protect the basic elements of EU law by disregarding the fundamental values upon which the Union was founded.

B. Background

Back in 1996, in *Opinion 2/94*,[3] the CJEU ruled that as European Community (EC) law stood at that time, the EC could not accede to the ECHR. Only a Treaty amendment could overturn this judgment. In 2009, the Treaty of Lisbon did just that, inserting a new provision in the Treaties that required the EU to accede to the ECHR.[4] That treaty also added Protocol 8 to the Treaties, regulating aspects of the accession, as well as a

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[1] Opinion Pursuant to Article 218(11) TFEU, CJEU Case C-2/13 (Dec. 18, 2014), http://curia.europa.eu/ [hereinafter Opinion 2/13]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

[2] This comment is based upon my blog post: Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU LAW ANALYSIS (Dec. 18, 2014), http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html.

[3] Opinion Pursuant to Article 228 EC Treaty, CJEU Case C-2/94, 1996 E.C.R. I-1759.

[4] Consolidated Version of the Treaty on European Union art. 6(2), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

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Declaration requiring that accession to the ECHR must comply with the "specific characteristics" of EU law.[5]

More precisely, Article 1 of the Protocol stated that the accession treaty would have to:

> make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.[6]

Furthermore, Article 2 stated that the agreement:

> shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.[7]

Finally, Article 3 of the Protocol stated that "[n]othing" in the accession agreement "shall affect" Article 344 TFEU, which rules out Member States submitting a dispute on EU law issues to any method of dispute settlement other than those provided for in the Treaties.[8]

For its part, the Declaration states that accession "should be arranged in such a way as to preserve the specific features of Union law," and notes the existing "regular dialogue

[5] Protocol No. 8 Relating to Art. 6(2) TEU on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter Protocol No. 8]; TEU art. 1.

[6] TEU art. 1.

[7] Protocol No. 8; TEU art. 2.

[8] Protocol No. 8; TEU art. 3; TEU art. 344.

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between" the CJEU and the European Court of Human Rights (ECtHR), which "could be reinforced when the Union accedes to" the ECHR.[9]

Though, these new Treaty provisions could not by themselves make the EU a contracting party to the ECHR. To obtain that outcome, it was necessary for the EU to negotiate a specific accession treaty with the Council of Europe. After a long negotiation process, this accession treaty was agreed in principle in 2013.[10] *Opinion 2/13* concerned the compatibility of that treaty with EU law.

C. Summary

At the outset, the CJEU ruled that the case was admissible,[11] even though the internal rules that would regulate the EU's involvement in the ECHR had not yet been drafted. In fact, the CJEU said that these internal rules could not be the subject matter of the opinion, even if they had been drafted.[12]

Next, the Court made some preliminary points,[13] asserting for the first time expressly that the EU is not a state,[14] and (in effect) that the EU system is *sui generis*.[15] The Court also asserted that it was important to ensure the primacy and direct effect of EU law, referring also to the EU's goal of an "ever closer union."[16]

The Court then ruled that the draft agreement was incompatible with EU law, for five main reasons. Firstly, it did not take account of the specific characteristics of EU law[17] in three respects. It did not clearly curtail the possibility of Member States having higher human rights standards than EU law, even though the CJEU had ruled, in the 2013 *Melloni* judgment, that Member States could not have higher standards than the EU Charter of Rights when the EU has fully harmonized the law and the EU legislation is itself compatible

[9] TEU art. 6(2).

[10] For the text, see *Accession of the European Union to the European Convention on Human Rights*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp (last visited Mar. 8, 2015).

[11] Opinion 2/13 at paras. 144–52.

[12] *Id.* at para. 71.

[13] *Id.* at paras. 153–77.

[14] *Id.* at para. 156.

[15] *Id.* at para. 158.

[16] *Id.* at para. 167.

[17] *Id.* at paras. 179–200.

with the ECHR and the Charter.[18] Similarly, the draft agreement did not provide for the application of the rule of "mutual trust" in Justice and Home Affairs (JHA) matters, which allows Member States to presume that all other Member States are "complying with EU law and particularly with the fundamental rights recognized by EU law," except for "exceptional circumstances."[19] Also, the agreement failed to rule out the possibility that when applying Protocol 16 to the Convention, which provides for national courts to send questions to the ECtHR on interpretations of the ECHR, those national courts would ask the ECtHR to rule on EU law issues before they asked the CJEU.[20] This would circumvent the EU's preliminary ruling procedure.

Secondly, contradicting Article 3 of Protocol 8, the draft accession agreement violated Article 344 of the TFEU,[21] because it failed to rule out the possible use of the ECtHR to settle disputes between Member States on EU law matters instead.

Thirdly, the co-respondent system set up in the draft agreement, that creates a new type of procedure where both the EU and a Member State could be (in effect) parties to an ECtHR case, was incompatible with EU law.[22] There were several problems with this process: It would give the ECtHR the power to interpret EU law when assessing the admissibility of requests to apply this process; a ruling by the ECtHR on the joint responsibility of the EU and its Member States could impinge on Member State reservations to the Convention; and the ECtHR should not have the power to allocate responsibility for breach of the ECHR between the EU and Member States, since only the CJEU can rule on EU law.

Fourth, the rules in the draft treaty on the prior involvement of the CJEU before the ECtHR ruled on EU law issues were also incompatible with EU law.[23] First, they did not reserve to the EU the power to rule on whether the CJEU has already dealt with an issue. Second, they did not permit the CJEU to rule on the interpretation, not just the validity, of EU law.

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[18] Melloni v. Ministerio Fiscal, CJEU Case C-399/11, paras. 60–61, 63 (Feb. 26, 2013), http://curia.europa.eu.

[19] Opinion 2/13 at para. 191.

[20] *See* Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Oct. 2, 2013, C.E.T.S. No. 214 [hereinafter Protocol No. 16]. The Protocol was opened for signature in 2013 and will enter into force after ten ratifications. So far it has been signed by sixteen States, including nine Member States, but no State has ratified it.

[21] Opinion 2/13 at paras. 201–14.

[22] *Id.* at paras. 215–35.

[23] *Id.* at paras. 236–38.

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Finally, the rules on the Common Foreign and Security Policy (CFSP) were incompatible with EU law[24] because a non-EU court cannot be given the power of judicial review over EU acts, even though the CJEU has no such jurisdiction itself with regards most CFSP issues.

D. Consequences

First and foremost, EU accession to the ECHR obviously cannot go ahead on the basis of the 2013 draft agreement. The CJEU has in effect provided a checklist of amendments to the accession agreement that would have to be enacted to ensure that accession is compatible with EU law. The amendments would address the following ten issues:

(1) Ensuring Article 53 ECHR does not give authorization for Member States to have higher human rights standards than the EU Charter, where the EU has fully harmonized the law;
(2) Specifying that accession cannot impact upon the rule of mutual trust in JHA matters;
(3) Ensuring that any use of Protocol 16 ECHR by national courts cannot undermine the EU preliminary ruling system, presumably by ruling out the use of Protocol 16 where EU law issues are involved;
(4) Specifying expressly that Member States cannot bring disputes connected with EU law before the ECtHR;
(5) Ensuring that, in the co-respondent system, the ECtHR's assessment of admissibility does not extend to the power to interpret EU law;
(6) Guaranteeing that the joint responsibility of the EU and its Member States for ECHR breaches cannot impinge upon Member State reservations to the Convention;
(7) Preventing the ECtHR from allocating responsibility for ECHR breaches as between the EU and its Member States;
(8) Ensuring that only the EU institutions can rule on whether the CJEU has already dealt with an issue;
(9) Providing that the CJEU should be allowed to rule on the interpretation, not just the validity, of EU law, during the "prior involvement" procedure; and
(10) Curtailing the role of the ECtHR to rule on EU foreign policy matters.[25]

It is conceivable that some of these changes could be addressed by changing the explanations to the accession agreement, by reservations to the agreement by the EU, or by unilateral EU statements. But it is unlikely that most of them could be successful. And any changes to the accession agreement will have to be negotiated by all forty-seven of the signatories to the ECHR. The revised accession agreement would, if agreed upon, then

[24] *Id.* at paras. 249–57.

[25] *See id.*

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have to be ratified by all of these States to come into force. It would also have to be agreed upon unanimously by the EU Council, and ratified by the European Parliament.

How difficult would such a renegotiation be? It is hard to say in the abstract. Suffice it to say that the compromise found in the 2013 accession treaty was very difficult to reach, and it is difficult to imagine that the EU's demand for a ten further amendments to that text—which would necessarily be non-negotiable—would be received happily.

Some of the Court's objections probably correspond with the intentions of the parties to the accession agreement, and it should be easy to accept amendments reflecting that. Except, some of the objections insist on either the primacy of the EU Courts over the ECtHR, or would give priority to EU law over the substance of the rights protected by the Convention. Those amendments would be difficult to agree to in principle, and it might even be doubted whether they would be compatible with the intrinsic nature of the ECHR.

If those amendments were indeed found to be incompatible with the ECHR, there would be no point in wasting further time and effort on negotiating them. So, it would be best for the Council of Europe's Committee of Ministers to invoke Article 47 ECHR, which allows the Council of Ministers to ask the ECtHR to give an advisory opinion on the interpretation of the Convention or its protocols.[26] Arguably, this does not extend to the draft accession agreement. That agreement in its current form would amend the ECHR; any revised agreement would likely amend the ECHR even more. The ECtHR ought in principle to have a chance to rule on whether the CJEU's preferred amendments to the ECHR violate the fundamentals of the Convention system.

Could the Court's objections—or some of them—be met by the EU making reservations to the ECHR? According to Article 57 ECHR, reservations to the Convention are permitted, provided that they are not of a "general character."[27] The ECtHR has ruled in the past that some reservations were invalid for breaching that rule. Much legal pain would be avoided if the ECtHR ruled in advance (using the advisory procedure) on whether possible reservations by the EU would be valid. At the very least, reservations relating to CFSP or JHA matters would indeed be invalid, due to their "general character."

What if the process of EU accession stalls as a result of this judgment? This is hardly an unlikely scenario. As a matter of EU law, accession of the EU to the ECHR is an obligation: The EU "shall accede" to the Convention.[28] According to Article 265 TFEU, the EU

[26] ECHR art. 47.

[27] ECHR art. 57.

[28] TEU art. 6.

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institutions can be sued for any "failure to act" to comply with their legal obligations.[29] So, arguably, the Commission is under an obligation to request an amendment to its negotiation mandate, the Council is under an obligation to grant it, and the Member States are obliged to support the EU position—a breach of the latter obligation could be punished by means of infringement proceedings.

But a legal obligation deriving from the EU Treaties cannot bind third parties. If the ECtHR rules that the CJEU's demands are not compatible with the Convention system, or one or more non-EU Member States refuse to continue with negotiations for accession on the basis of those demands, the EU institutions and the Member States could not be held liable for that.

The legal obligation to continue the accession process is, of course, distinct from the question of principle here: Whether the accession process *ought* to continue on the basis of the CJEU opinion. I now turn to that question, as part of my assessment of the Court's reasoning.

E. Comments

There are two categories of objections to the ECHR accession in the Court's judgment: Procedural and substantive. The former are, for the most part, much less problematic than the latter. Let us consider them in turn.

The procedural objections are essentially those in points (3) to (9) in the list above, concerning: Protocol 16 ECHR and the preliminary ruling process; inter-state dispute settlement; the co-respondent procedure; the prior involvement procedure; and CFSP matters. Seven of these eight points have one thing in common—preserving the CJEU's power to rule on EU law. The exception is point (9), because, to a large extent, the CJEU has no power to rule on CFSP matters.

From the point of view of substantive human rights protection, that first group of seven objections is not problematic in principle. It is reasonable for the CJEU to ensure that issues relating to EU law remain within its jurisdiction (where that jurisdiction currently exists), leaving the ECtHR jurisdiction to rule on the interpretation of the ECHR. Of course, it will be hard, if not impossible, in practice, to separate the two issues, particularly when it comes to ruling on the liability for breach of the Convention and the admissibility of the special procedures set up by the draft agreement.

[29] Consolidated Version of the Treaty on the Functioning of the European Union art. 265, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

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But that is a minor problem compared to the Court's objections relating to CFSP, and to the substance of the ECHR. On the CFSP point, the Court's objection is, with great respect, highly problematic. Human rights breaches unfortunately occur in foreign policy operations, ranging from violations of the right to life, to arbitrary detention, to human trafficking by foreign forces. The CJEU has no jurisdiction to protect, as regards most CFSP matters, but it rules that the ECtHR cannot have judicial review powers either.[30] By analogy, the CJEU's ruling on this point necessarily means that it would also breach EU law for Member States to bring a CFSP dispute to the International Court of Justice, or indeed any other international court or tribunal, although presumably national courts could still have jurisdiction.[31]

This goes beyond setting a dividing line over which Court has jurisdiction to interpret EU law. The CJEU's position is that if it cannot have jurisdiction over CFSP, then no other international court can either. This could have major consequences, leaving the victims of serious human rights violations without an effective remedy at the international level.

This brings us to the two substantive points: The need to ensure that Member States do not set higher standards within the field of EU law, and the need to protect the principle of mutual trust in JHA matters. On the first point, the Court's ruling is not really necessary, given that the *Melloni* ruling is predicated on the assumption that the EU's harmonizing rules are already compliant with the ECHR.[32] It is not particularly surprising that this rule, which applies in the context of the EU Charter of Fundamental Rights, also applies to the ECHR.

The Court's ruling on this point would be less problematic if it were not for its ruling on mutual trust in JHA matters. After all, if it were possible to resist removal to another Member State on human rights grounds despite the Dublin rules on asylum responsibility, or to resist the execution of a European Arrest Warrant on such grounds, then many violations of human rights in individual cases would be avoided. But the Court reiterates, in very strong terms, its established presumption that the EU is built on the principle of mutual trust in this area, which can only be set aside through exceptions. One can infer that the CJEU is objecting to the ECtHR's recent judgment in *Tarakhel*,[33] which conspicuously failed to defer to the CJEU's defense of the Dublin system in the earlier *Abdullahi* judgment.[34]

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[30] *See* View of Advocate General Mengozzi, Segi and Others v. Council, CJEU Case C-355/04 (Feb. 27, 2007), 2007 E.C.R. I-1657.

[31] *Id.*

[32] *Melloni*, CJEU Case C-399/11.

[33] Tarakhel v. Switzerland, ECHR App. No. 29217/12 (Nov. 4, 2014), http://hudoc.echr.coe.int/.

[34] Abdullahi v. Bundesasylamt, CJEU Case C-394/12 (Dec. 10, 2013), http://curia.europa.eu/.

On the JHA point, the Court is insisting that its own conception of the EU JHA system must prevail over human rights protection as defined by the ECtHR. The underlying theme of both of these substantive points is that the ECHR should adapt to EU law as defined by the CJEU, not the other way around.

Is that fundamentally justifiable? The "values" of the EU as set out in Article 2 TEU—which are conditions for EU membership and might support suspension of a Member State in serious cases—include human rights and related principles.[35] There is no mention of the primacy of EU law, of mutual trust in JHA matters, or of divesting any international court of having jurisdiction over CFSP matters. Indeed, in excluding the jurisdiction of an international court without any legal justification,[36] the CJEU's judgment shows disregard for the "rule of law," another founding value mentioned in Article 2 TEU.[37] And for JHA in particular, the Treaty drafters provided in Article 67(1) TFEU that the EU must "constitute an area of freedom, security and justice *with respect for fundamental rights*."[38] The Treaty does not give priority to mutual trust over human rights—quite the opposite.

The underlying problem with the Court's analysis is its stress on protecting its view of the basic components of EU law, rather than the effective protection of human rights. In fact, the need to protect human rights is strongly emphasized in the Treaties: Not only threefold in Article 6 TEU (as regards the Charter, the ECHR, and the general principles),[39] but also in the suspension mechanism in Article 7 TEU,[40] the common values referred to in Article 2 TEU,[41] the enlargement criteria in Article 48 TEU,[42] and the specific rules in Article 21 TEU relating to the CFSP,[43] and JHA in Article 67 TFEU.[44]

[35] TEU art. 2.

[36] Article 344 TFEU only rules out awarding jurisdiction to non-EU courts as regards matters over which the CJEU has jurisdiction. An *a contrario* interpretation obviously suggests that this is possible where the CJEU does *not* have any jurisdiction. TFEU art. 344.

[37] TEU art. 2.

[38] TFEU art. 67(1).

[39] TEU art. 6.

[40] *Id.* art. 7.

[41] *Id.* art. 2.

[42] *Id.* art. 48.

[43] *Id.* art. 21.

[44] TFEU art. 67.

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In contrast, the features of the EU legal system referred to by the CJEU have been developed by that Court itself and are, for the most part, not expressly referred to in the Treaties. While the Treaties do refer to mutual recognition in JHA matters, they do so in the context of criminal and civil law, not asylum law. The criminal law provisions of the Treaties give the EU the power to harmonize rules on criminal procedure if necessary to facilitate mutual recognition.[45] This power would not exist if the Treaties contained an inherent obligation of mutual trust as strong as that which the Court asserts exists. More fundamentally, the evidence of divergent recognition rates for refugee claims and the existence of pushbacks and refusals of asylum-seekers at the border in several Member States undercut the Court's assumption that such a strong degree of mutual trust is justifiable.

The Court justifies its emphasis on the underlying features of EU law by referring to Protocol 8 to the Treaties, with its reference to the essential characteristics of EU law.[46] But the Court's description of those characteristics goes well beyond the issues mentioned in Protocol 8 and the Declaration and includes the ECHR control bodies, the respondents to ECHR applications, the competences of the EU and its Member States, Member States' derogations and reservations, and Article 344 TFEU.[47] It seems clear from the wording of the Protocol and Declaration that the Member States, as "masters of the Treaties," wanted to facilitate EU accession to the ECHR and did not believe that there fundamental underlying incompatibility between the ECHR and EU systems like the CJEU makes out.[48]

In light of all this, setting aside the legal obligation to accede to the ECHR, is it still worth advocating EU accession to the Convention?

Frankly, it is not. For many years, human rights advocates have supported EU accession to the ECHR in order to ensure effective external control of the failings of the EU and (within the scope of EU law) its Member States as regards human rights. But EU accession to the ECHR, on the terms defined by the CJEU in its opinion, would actually reduce the standard of human rights protection as regards JHA matters in particular. Also, it would prevent the ECtHR from exercising jurisdiction over human rights aspects of CFSP operations, which it might otherwise assert (via means of ruling against Member States). So, it has unfortunately become necessary to oppose the EU's accession, instead of supporting it.

[45] TFEU art. 82.

[46] Protocol No. 8.

[47] *Id.*

[48] *Id.*

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