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Legal aspects of the accession of the European Union to the European Convention on Human Rights

Report[1]
Committee on Legal Affairs and Human Rights
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1. Reference to committee: Doc. 15014, Reference 4488 of 16 December 2019.

A. Draft resolution[2]

1. The European Convention on Human Rights (ETS No. 5, "the Convention"), which is marking its 75th anniversary in 2025, can be considered as the most outstanding achievement of the Council of Europe and the cornerstone of all its activities. Although ratification of the Convention is a precondition for accession to the European Union and the fundamental rights guaranteed by the Convention are part of the Union's general principles of law, the European Union is not yet a party to the Convention and its institutions are not directly bound by it. This means that the European Union member States – all member States of the Council of Europe and parties to the Convention – can be held responsible for breaches of Convention rights before the European Court of Human Rights ("the Court") even when implementing or applying European Union law, while the actions of the European Union institutions themselves are not subject to the same external judicial review. This is problematic given the increasingly broad competences transferred to the European Union, which makes it more difficult to accept that the European Union institutions should be the only public authorities and "legal space" operating in Council of Europe member States that are not subject to external oversight by the Court. This imbalance may lead to confusion and to perceived or actual disparate legal protection, to the detriment of European Union citizens and human rights protection in Europe.

2. Referring to its previous resolutions and recommendations, which for more than forty years have called on the then European Communities and later the European Union to accede to the Convention, most recently its Resolution 2430 (2022) "Beyond the Lisbon Treaty: strengthening the strategic partnership between the Council of Europe and the European Union" and its Recommendation 2245 (2023) "The Reykjavik Summit of the Council of Europe – United around values in the face of extraordinary challenges", the Parliamentary Assembly considers that European Union's accession to the Convention will:

2.1. strengthen the protection of human rights in Europe by giving European Union citizens and persons within the jurisdiction of the European Union the right to lodge an application with the Court when they consider that their fundamental rights have been violated by an European Union institution. They will therefore enjoy the same protection vis-à-vis acts of the Union as they presently enjoy vis-à-vis all European Union member States;

2.2. be the best way to ensure the harmonious development of the case law of the European Court of Human Rights and the Court of Justice of the European Union in human rights matters, thereby securing a coherent system of human rights protection across Europe, based on common minimum standards, for the benefit of public authorities, in particular courts, in all member States;

2.3. confirm the essence of the European Union as a Union based on the rule of law, and strengthen the principle of legal certainty, given that the European Union institutions will be subject to the same external judicial review on human rights matters as the member States;

2.4. resolve the problems resulting from the fact that currently the European Union cannot be party to proceedings before the Court, in cases where the implementation or application of European Union law by member States is at stake, and facilitate the execution of the Court's judgments requiring amendments to European Union law;

2.5. convey a strong political message of clear commitment to the protection of human rights and international law not only within the European Union boundaries but also Europe-wide and worldwide, at a time when war has returned to Europe and the common values shared by the Council of Europe and the European Union are under threat. The accession will therefore enhance the credibility of the European Union, its neighbourhood policies and external relations;

2.6. reinforce synergy, complementarity and co-operation between the Council of Europe and the European Union, which is the main institutional partner of the Council of Europe, in line with the Reykjavik Declaration.

3. The Assembly recalls that the Treaty of Lisbon, which entered into force on 1 December 2009, created a legal obligation for the European Union to accede to the European Convention on Human Rights. On the Council of Europe side, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194), which entered into force in 2010, amended Article 59 of the Convention in order for the European Union to be able to accede. Consequently, negotiations for accession opened in 2010, and a draft Accession Agreement was agreed in April 2013. However, in December 2014, the Court of Justice of the European Union concluded in its Opinion 2/13 that the draft Accession Agreement was incompatible with the EU treaties, triggering disappointment and

2. Draft resolution adopted unanimously by the committee on 30 January 2025.

some criticism. It was not until 2020 that negotiations on the accession resumed, with the aim of overcoming the objections identified by the Court of Justice of the European Union in its opinion and revising the draft accession instruments to the extent necessary.

4. The Assembly warmly welcomes the fact that the *ad hoc* negotiation group "46 + 1" established under the Council of Europe Steering Committee for Human Rights (CDDH) reached a unanimous provisional agreement on revised draft accession instruments in March 2023. This is a collective achievement which shows a considerable sense of compromise by all parties involved, including non-European Union member States, to overcome the numerous legal obstacles found by the Court of Justice of the European Union. The Assembly considers that the provisional agreement reached on most issues (co-respondent mechanism, prior involvement procedure, inter-party applications, principle of mutual trust, advisory opinions under Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (CETS No. 214) accommodates the position of the Court of Justice of the European Union on the specificities and autonomy of European Union law, while preserving the integrity and effectiveness of the Convention system, the role of the Court as the ultimate master of its proceedings and the position of individual applicants before the Court. Furthermore, the new rule on majority requirements in the Committee of Ministers of the Council of Europe when supervising the execution of judgments in cases against the European Union duly protects the interests of non-EU member States.

5. With regard to the revised provision on the election of judges to the Court (new Article 7 of the draft Accession Agreement), the Assembly notes that the amendments to the 2013 version of the draft agreement do not alter the substance and purpose of the original provision, which was to provide a basis for the participation of the European Parliament in the sittings of the Assembly and the meetings of its relevant bodies when the latter exercise their functions under Article 22 of the Convention. However, the agreement on the modalities of this participation reached in June 2011 between representatives of the Assembly and of the European Parliament within a Joint Informal Body will need to be updated in view of the developments since then, in particular the fact that the then Sub-Committee on the Election of Judges to the European Court of Human Rights (of the Committee on Legal Affairs and Human Rights) is now an Assembly committee in its own right. The updated agreement will then have to be approved by the Assembly and the European Parliament in due course, in accordance with their own internal procedures. The Assembly also understands that the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights and its own resolutions and practice on the election of judges will apply to the European Union internal procedure for the selection of the candidates to be submitted in respect of the European Union. In this regard, it also expects that the European Union will duly consult the Advisory Panel of Experts before submitting its list of candidates to the Assembly, as all Parties to the Convention do.

6. The Assembly notes with satisfaction that, with respect to the "Basket 4" issue (Common Foreign and Security Policy-related acts), the Court of Justice of the European Union, in a judgment delivered on 10 September 2024, has clarified the scope of its jurisdiction in relation to these acts. The Court of Justice found that the limitation of its jurisdiction in this area can be reconciled both with Article 47 of the Charter of Fundamental Rights of the European Union (right to an effective remedy and to a fair trial) and with Articles 6 and 13 of the Convention. This judgment has generally been perceived as a positive step that could potentially solve the problem of the limited scope of jurisdiction of the Court of Justice of the European Union in this area and help overcome what appears to be the last remaining obstacle to accession. The CDDH welcomed the judgment "as a promising avenue to be explored for resolving the outstanding issue" and encouraged the European Union to take the necessary decisions at the earliest opportunity. In fact, the only way to be sure that this judgment fully resolves the issue would be to ask the Court of Justice of the European Union for an opinion on the new draft Accession Agreement.

7. In view of these considerations and in order to maintain the current momentum after the provisional agreement on revised draft accession instruments, the 2024 judgment of the Court of Justice of the European Union, and the entry into office of the new European Commission, the Assembly:

7.1. invites the European Union institutions, in particular the European Commission and the Council of the European Union, to take the necessary decisions aimed at facilitating the European Union accession process to continue advancing, including by submitting a request for an opinion on the compatibility of the revised draft accession instruments with the European Union Treaties to the Court of Justice of the European Union without delay and, if the opinion is positive, to proceed with the conclusion of the agreement as soon as possible in accordance with their internal procedures;

7.2. invites the European Parliament to support the draft Accession Agreement and start the consultations with the Assembly with a view to updating the 2011 agreement on arrangements related to the participation of the European Parliament representatives in the sittings of the Assembly and the meetings of its relevant bodies when the Assembly exercises its functions concerning the election of judges to the Court;

7.3. calls on the member States of the Council of Europe that are also members of the European Union to exercise their influence within the European Union institutions to enable the rapid conclusion of the accession agreement, as well as its entry into force, including by submitting observations in support of the current draft Accession Agreement before the Court of Justice of the European Union in the context of any opinion sought;

7.4. urges the parliaments and governments of member States of the Council of Europe to take all measures within their areas of competence to facilitate the conclusion of the accession agreement and its entry into force, in particular by signing and ratifying it in accordance with their national procedures in a timely manner;

7.5. calls on parliaments and governments of member States of the Council of Europe, in particular those that are also members of the European Union, as well as all European Union institutions, to raise awareness among citizens about the strengthened protection of their fundamental rights that would result from European Union's accession to the Convention;

7.6. in the meantime, invites the Court and the Court of Justice of the European Union to maintain and further develop their well-established judicial dialogue in order to avoid any inconsistencies in the interpretation of the Convention that would undermine the protection of fundamental rights, by showing mutual respect, cross-referencing each other and harmonising their positions to the extent possible.

B. Explanatory memorandum by Mr Titus Corlăţean, rapporteur

1. Introduction

1. The present report is based on a motion for a resolution tabled by the Committee on Legal Affairs and Human Rights on 16 December 2019, which was referred by the Parliamentary Assembly to this committee for report on 27 January 2020.[3] The committee appointed me rapporteur at its meeting on 29 June 2020.

2. The motion recalled that in 2013, the European Commission, acting on behalf of the European Union (EU), and negotiators from the Council of Europe's 47 member States had concluded a draft agreement on EU accession to the European Convention on Human Rights (ETS No. 5, "the Convention"; "the accession agreement"). In 2014, the Court of Justice of the European Union (CJEU) issued Opinion 2/13, in which it found that certain elements of the draft agreement were not compatible with EU law. In 2019, the President and Vice-president of the European Commission wrote to the Secretary General of the Council of Europe informing her that the EU was ready to resume negotiations.

3. The motion further noted that EU accession to the Convention would require technical changes to the control mechanism (procedures before the European Court of Human Rights ("the Court") and the Committee of Ministers), and would have implications for the Assembly, notably in its role to elect the judges of the Court. The motion therefore called on the Assembly to "follow the resumed negotiations and prepare a report on their legal aspects, with a view to taking necessary decisions in accordance with its competences under the Statute of the Council of Europe and the Convention."

4. In the context of the preparation of this report, the Committee on Legal Affairs and Human Rights held a hearing in November 2021 with the participation of Ms Tonje Meinich, Chair of the *ad hoc* negotiation group on the accession ("47+1") of the Steering Committee for Human Rights (CDDH), Mr Juan Fernando Lopez Aguilar, Chair of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament, and Mr Giuliano Pisapia, Vice-Chair of the Constitutional Affairs Committee of the European Parliament. In March 2023, it held an exchange of views with Ms Meinich, who updated the committee on the negotiations and the provisional agreement on the draft accession instruments reached within the "46+1" group.

2. The origins and history of the proposal

5. The origins of the idea that the EU should accede to the Convention can be said to lie in the 1970 judgment by the European Court of Justice (as the CJEU was then called), that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[4] In a 1974 judgment, the ECJ reiterated that "fundamental rights form an integral part of the general principles of law, the observance of which [it] ensures", and took as its sources of inspiration for the content of these rights the "constitutional traditions common to the Member States" and "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories" – of which the Convention is probably the most significant.[5]

6. The accession process, on a political level, can be said to have begun with the European Commission's memorandum of 1979.[6] This memorandum resulted from a judicial crisis within the European Communities (EC), caused by the insistence of the German Constitutional Court (Bundesverfassungsgericht) on retaining the right to control the compatibility of EC law with fundamental rights as guaranteed under the German Constitution, since EC law contained no codified catalogue of rights.[7]

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3. Doc. 15014.
4. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, ECJ judgment of 17 December 1970.
5. *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, Case 4-73, ECJ judgment of 14 May 1974. The "special significance" of the Convention in this respect was explicitly recognised by the ECJ in its 18 June 1991 judgment in Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*.
6. See "The accession of the European Union/ European Community to the European Convention on Human Rights", written comments by Pieter van Dijk for the Committee on Legal Affairs and Human Rights, 20 August 2007.

7. In its 1979 memorandum, the Commission implicitly recognised the force of the Bundesverfassungsgericht's argument, noting that "The European Community has an increasing number of direct legal relations with individuals. Its activities no longer only concern a certain number of economic categories … but also each individual citizen. It is, therefore, not surprising to see today a demand expressed for the powers which belong to the Community to be counterbalanced by their formal subjection to clear and well-defined fundamental rights. The Commission believes that the best way of replying to the need to reinforce the protection of fundamental rights at Community level, at the present stage, consists in the Community formally adhering to [the Convention]. … [This] seems desirable for a whole series of reasons. None of the difficulties which have appeared in this context seems insurmountable."[8] Due to opposition from certain EC member States, notably France and the United Kingdom, however, the Commission's memorandum was "not seriously examined".[9]

8. Despite this, the importance of fundamental rights within the EC legal order continued to increase in the following years. Reference to respect for human rights began to appear in the applicable treaties, beginning with the preamble of the 1986 Single European Act. The 1992 Treaty on European Union (TEU) went further, its article F(2) stating that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." This did not, however, establish the Convention as a part of EU law, binding on the EU institutions and applied by the CJEU.

9. In 1994, the Council of the European Union asked the ECJ whether the EC's accession to the Convention would be compatible with the Treaty establishing the European Community (TEC). This request followed the publication of further Commission documents that argued in favour of accession.[10] The ECJ, however, came to the conclusion that the institutional implications of accession would be such as to go beyond the scope of provisions of the TEC that might have provided a legal basis for accession, and thus it "could be brought about only by way of Treaty amendment".[11]

10. Since treaty amendment was not an immediate prospect, an alternative approach was taken to strengthen respect for human rights by the EU – the elaboration of an internal EU catalogue of protected rights. This resulted in the EU Charter of Fundamental Rights ("the Charter"), which was solemnly proclaimed by the European Parliament, the EU Council of Ministers, and the European Commission on 7 December 2000. The Charter did not initially have binding legal force, however, although its political status meant that the ECJ began to refer to it as another source of "inspiration" for the fundamental rights that were enforceable under EU law.

11. It can be noted that Article 52(3) of the Charter states that where Charter rights correspond to those set out in the Convention, their meaning and scope shall be the same as the corresponding Convention rights. Furthermore, Article 53 of the Charter states that nothing in the Charter shall restrict or adversely affect rights and freedoms as recognised *inter alia* in the Convention. This does not, however, mean that different bodies will always agree on their interpretation of corresponding provisions of the two instruments: the Court may say one thing about the interpretation of a Convention right, whilst the CJEU may say something else about the corresponding provision of the Charter, even though the content of both provisions should be the same.

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7. See "Solange I" judgment of the Bundesverfassungsgericht, BVerfGE 37, 271 2 BvL 52/71, 29 May 1974. In the "Solange II" judgment of 1986, the Bundesverfassungsgericht found that EC law now ensured effective protection of rights that could be regarded as "substantially similar" to that required under the German Constitution, and so it would itself no longer be required to ensure fundamental rights compatibility: BVerfGE 73, 339, 22 October 1986.

8. "Accession of the Communities to the European Convention on Human Rights", Commission Memorandum, Bulletin of the European Communities, Supplement 2/79.

9. "What next after Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR", Jean-Paul Jacqué, study for the European Parliament, 2016.

10. It also coincided with the Council of Europe's finalisation of Protocol no. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (ETS No. 155), which created the single, permanent Court with compulsory jurisdiction – a milestone in the development of the Convention system.

11. "Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms", Opinion 2/94 of the ECJ, 28 March 1996.

3. The arguments for European Union accession to the European Convention on Human Rights

12. Over the years, a number of arguments have been raised for and against EU accession to the Convention. Their relevance has changed over time, notably as a result of the evolution of the EU's competences and of the internal systems for human rights protection.

13. Amongst the principal arguments in favour of EU accession to the Convention are the following:[12]

– the Convention is binding on all EU member States, since they are also all members of the Council of Europe, but not on the EU institutions to which they have transferred significant competences that were previously exercised by domestic authorities. The exercise of these competences by the EU institutions may have an impact on enjoyment of individual rights by persons within the jurisdiction of EU member States. Transfer of these competences to the EU complicates the attribution of responsibility for violations of rights resulting from their exercise, thereby restricting the jurisdiction *ratione materiae* of the Court and the availability of remedies for those violations. This lacuna would be filled by the EU's accession to the Convention;

– the CJEU upholds human rights in its jurisprudence, nowadays on the basis of the EU Charter of Fundamental Rights. As the final instance within the EU legal order, however, there is no mechanism to ensure that its interpretation of fundamental rights does not diverge from that of the Court. Accession would give this final interpretative authority to the Court;

– EU accession to the Convention would thus ensure consistent interpretation and application of common human rights standards by all public bodies exercising authority at domestic level in Council of Europe member States;

– the EU has long required its member States, including those that acceded in 2004, 2007, and 2013, to be parties to the Convention. It also strongly advocates in favour of human rights in third countries, whether non-EU member States of the Council of Europe, or others, around the world. Its credibility and influence as a human rights advocate would be strengthened were it to submit to external judicial oversight of its own actions in relation to individuals.

14. Many of the arguments against EU accession relate to the fact that the Convention was designed to be applied by States, whereas the EC/EU is not a State and does not have the same status under international law, powers, or institutional apparatus. It was argued that since the EC/EU is not a State, many Convention rights will be of at best limited relevance; on the other hand, the Convention does not directly protect socio-economic rights, which would be of greater importance given the nature of the EC/EU's activities. These arguments have become significantly less relevant over time, as the competences of the EU have expanded. For example, in the 1970s and 1980s, the prospect of the EC being potentially responsible for violations of the prohibition of inhuman and degrading treatment might have seemed fanciful. Since 2013, however, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has been monitoring flights returning migrants to their countries of origin operated by the EU's Frontex agency. The EU has also been involved in numerous military and security operations outside the territory of its member States, as part of its Common Foreign and Security Policy. It is still not a State, but it exercises a wide range of powers that have been transferred to it by its member States, many of which may have an impact on the enjoyment of individual rights and freedoms. Related to the EC/EU not being a State, the question of its capacity to accede to a treaty such as the Convention was settled by the 2007 Lisbon Treaty, which amended the Treaty on European Union to include a provision stating that "[t]he Union shall have legal personality".

15. The Assembly has long been convinced of the importance of EU accession to the Convention and has adopted texts addressing most, if not all of the arguments made for and against it. In its Resolution 745 (1981) "Accession of the European Communities to the European Convention on Human Rights", the Assembly considered that "although the convention is in force in all member states of the European Communities, it does not formally apply to the Community institutions and to their legal acts", a situation considered to be

12. I do not mention here the argument relied upon by the Commission in its 1979 memorandum, that accession to the Convention would provide the EC with a binding catalogue of rights, since that issue was resolved when the EU Charter of Fundamental Rights became binding in 2009 following the Lisbon Treaty. As Johan Callewaert wrote of EU accession to the Convention, "what was once an alternative to a catalogue of fundamental rights of the European Union has become a complement to such a catalogue. In this respect, the situation of the European Union is similar to that of states, most of which have their own catalogue of fundamental rights, usually enshrined in the constitution, as well as being Contracting Parties to the Convention" (Callewaert, "The Accession of the European Union to the European Convention on Human Rights", Council of Europe, 2014).

"contrary to the intentions of the originators of both the [Convention] and the treaties establishing the European Communities". It noted that accession would "eliminate the risk of diverging interpretations of the convention", whilst forming "an important bond between the European Communities and the member states of the Council of Europe in the specific field of human rights and fundamental freedoms". On this basis, it called on the then European Communities to make a formal application to accede to the European Convention on Human Rights in the near future. The Assembly has repeated its call for EU accession on numerous occasions since then.[13]

4. The legal basis for European Union accession to the European Convention on Human Rights

16. Two obstacles had to be overcome in order to allow for EU accession to the Convention. In response to the 1996 opinion of the ECJ, the necessary revision of the TEU was undertaken through the 2007 Lisbon Treaty. It was also necessary to amend the Convention, which provided for accession only by member States of the Council of Europe – of which the EU was not one, nor did it have the intention of becoming one.[14] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194) therefore amended Article 59 of the Convention by adding a provision simply stating that "the European Union may accede to this Convention".

17. The situation under the TEU is more complex. Article 6(2) provides that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." This is supplemented by Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 118), whose Article 1 states that any accession agreement "shall 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." In addition, Article 2 of Protocol no. 8 states that any accession agreement "shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions", and that "nothing therein affects the situation of Member States in relation to the European

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13. See *inter alia* Recommendation 2114 (2017) "Defending the acquis of the Council of Europe: preserving 65 years of successful intergovernmental co-operation", Resolution 2041 (2015) "European institutions and human rights in Europe", Resolution 2029 (2015) "Implementation of the Memorandum of Understanding between the Council of Europe and the European Union", Resolution 1836 (2011) "Impact of the Lisbon Treaty on the Council of Europe", Recommendation 1834 (2008) "Accession of the European Union/European Community to the European Convention on Human Rights", Resolution 1339 (2003) "Council of Europe and the Convention on the Future of Europe", Resolution 1228 (2000) "Charter of Fundamental Rights of the European Union", Recommendation 1365 (1998) "Relations with the European Union (follow-up to the European Union's Amsterdam Summit)", Resolution 1068 (1995) "Accession of the European Community to the European Convention on Human Rights", and Recommendation 1017 (1985) "Future of European co-operation: first report of the Commission of Eminent Personalities (Colombo Commission) (General policy of the Council of Europe)". In Resolution 2273 (2019) "Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights", the Assembly called on the EU to "resume the negotiation process of accession to the European Convention on Human Rights in order to ensure the convergence of human rights standards all over Europe"; and in Resolution 2277 (2019) "Role and mission of the Parliamentary Assembly: main challenges for the future", it considered that "promotion of European Union accession to the European Convention on Human Rights should remain at the forefront of its political dialogue with the various European Union institutions as it will lead to a common legal space for human rights protection across the continent in the interest of all Europeans". Most recently, in its Resolution 2430 (2022) "Beyond the Lisbon Treaty: strengthening the strategic partnership between the Council of Europe and the European Union", the Assembly welcomed the resumption, in 2020, of the negotiations on the European Union's accession to the European Convention on Human Rights and noted with satisfaction that moving forward with this process was a priority for the European Union and the Council of Europe. The Assembly reaffirmed its confidence that "accession will help guarantee coherence and consistency between European Union law and the Convention system and will lead to a single legal space in which the European Union is also subject to the European Convention on Human Rights". In its Recommendation 2245 (2023) "The Reykjavik Summit of the Council of Europe – United around values in face of extraordinary challenges", the Assembly called on the 4th Summit to give "a decisive push to finalising the negotiations for European Union accession to the European Convention on Human Rights". In the view of the Assembly, the European Union should also be invited "to become a party to other Council of Europe instruments, including the revised European Social Charter (ETS No. 163), the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, "the Istanbul Convention") and the partial and enlarged agreement establishing the Group of States against Corruption".

14. That said, in 2006, Luxembourg prime minister (and later president of the European Commission) Jean-Claude Juncker had argued in favour of EU accession to the Council of Europe: Juncker, "Council of Europe – European Union: 'A sole ambition for the European continent'", report to the Heads of State or Government of the member States of the Council of Europe, 11 April 2006.

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." It should be noted that Article 6(2) establishes a legal obligation on the EU to accede to the Convention ("shall accede").

18. The Lisbon Treaty entered into force on 1 December 2009 and Protocol No. 14 to the Convention, on 1 June 2010 (following its ratification by the final State party in February 2010).

5. The 2010-2013 accession negotiations

19. On 26 May 2010, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to elaborate, in co-operation with the European Commission, an agreement on EU accession to the Convention. On 4 June 2010, the EU ministers of justice gave a negotiating mandate to the European Commission to participate on behalf of the EU in the negotiations. The CDDH initially established an *ad hoc* group, the CDDH-UE, composed of representatives of 7 EU member States, 7 non-EU member States (NEUMS), and one representative of the European Commission. This group held eight meetings between July 2010 and June 2011. In October 2011, the CDDH submitted the report drafted by the CDDH-UE to the Committee of Ministers.

20. Having examined the implications of this report, the Committee of Ministers then instructed the CDDH to continue its work in a "47+1" context, with representatives of all Council of Europe member States, along with a representative of the European Commission. The 47+1 group met a further five times before finalising a package of instruments intended to form the basis for EU accession to the Convention.[15] This package consisted of a draft agreement on the accession, a draft declaration by the European Union on the co-respondent mechanism (see below), a draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party, a draft model of memorandum of understanding between the European Union and x (State which is not a member of the European Union), and a draft explanatory report to the Agreement on the Accession. In its final report, the 47+1 group underlined that all of these instruments were "equally necessary for the accession of the EU to the Convention".

21. The accession package was particularly attentive to the provisions of Protocol No. 8 relating to Article 6(2) TEU. It contained the following main proposals:

– various amendments to the Convention (some terminological, others substantive) to accommodate the fact that the EU is not a State with its own sovereign territory;

– the co-respondent mechanism, under which the EU may participate equally in proceedings brought against one or more of its member States, and vice versa. According to the explanatory memorandum, "This mechanism was considered necessary to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States. … With the accession of the EU, there could arise the unique situation in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another." It corresponds to Article 1 of Protocol No. 8, by seeking to "ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate";

– alongside the co-respondent mechanism, a "prior consultation procedure" would be established, for situations in which a case involving EU law would have been submitted to the Court without any domestic court having requested a preliminary ruling from the CJEU.[16] This would allow the CJEU to assess the compatibility of the relevant provisions of EU law with the rights at issue, and thus to provide an interpretation of that law on which the Court could later rely. This corresponds to Article 2 of Protocol No. 8, which requires that "accession of the Union shall not affect the competences of the Union or the powers of its institutions";

– the CJEU would be excluded from the scope of Article 35(2)(b) of the Convention, which precludes the Court from examining cases that have previously been submitted to other international tribunals, and that of Article 55, which prohibits the High Contracting Parties from submitting cases concerning the interpretation or application of the Convention to other international means of settlement;

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15. See doc. 47+1 (2013) 008rev2, 10 June 2013. See also the web page EU accession to the ECHR ("46+1" Group).
16. Such cases were expected to arise "rarely", as domestic courts are obliged to request a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU).

– a delegation of the European Parliament would be entitled to participate in the election of judges to the Court by the Assembly, according to modalities to be defined by the Assembly, in co-operation with the European Parliament;[17]

– a special provision for the Committee of Ministers' supervision of the execution of the Court's judgments to reflect the potentially distorting effect of EU member States being obliged under EU law to co-ordinate their voting in cases where the EU is a (co-)respondent.

22. Furthermore, the EU itself would have to decide on additional internal rules for the application of some of the procedures that would be established, and would not be able to sign the accession agreement until these rules were adopted. Signature by the EU would also first require ratification by the EU member States, as well as the consent of the European Parliament. The Committee of Ministers would have to seek the opinion of the Assembly on the draft Accession Agreement prior to its adoption, after which it would have to be ratified by all of the States Parties to the Convention. Before any of this process could begin, however, the European Commission had committed itself to first seeking the opinion of the CJEU on the accession package, under article 218(11) of the Treaty on the Functioning of the European Union (TFEU).

6. The opinion of the Court of Justice of the European Union

23. In December 2014, the CJEU issued its opinion on the draft Accession Agreement. It concluded that "[t]he agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on the European Union". The CJEU proved to be critical to the point of hostility. This was very unexpected, given that the CJEU had been indirectly involved in the negotiating process and that the Advocate-General, whose views are very often followed by the CJEU, had considered the agreement, subject to certain clarifications and interpretations, to be compatible with the EU treaties.[18]

24. In a presentation to the 47+1 group, the European Commission has grouped the CJEU's objections into four "baskets":[19]

– those relating to the EU-specific mechanisms of the procedure before the Court, where the CJEU considered that the Court may be led incidentally to interpret provisions of EU law. In particular, the co-respondent mechanism would require the Court to determine whether an alleged violation actually called into question the compatibility of a provision of EU law with Convention rights, which would involve interpretation of EU law, and potentially to rule on the EU's internal division of competences between its institutions and its member States; and the prior consultation procedure would require the Court to assess whether the CJEU had examined such compatibility, which would require interpretation of the CJEU's case law;

– those relating to "inter-party" (currently known as "inter-state") applications, under article 33 of the Convention, and domestic courts' requests to the Court for an advisory opinion, under Protocol no. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (CETS No. 214). Under EU law, the CJEU has exclusive competence to rule on compliance with fundamental rights in disputes between EU institutions and member States, or between EU member States, where these relate to acts of the institutions or situations where EU member States implement EU law. EU member States' courts are also obliged to make preliminary references to the CJEU where interpretation of a provision of EU law is required in order to decide a case. The inter-party and advisory opinion procedures could allow such disputes or issues to be brought before the Court without the CJEU having examined them;

– that relating to the principle of "mutual trust" between EU member States, described as being "of constitutional significance for the EU, in that it allows an area without internal borders to be created and maintained". This implies a presumption on the part of each EU member State that all other EU member States respect fundamental rights;[20]

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17. The "Joint Informal Body" of the Assembly and the European Parliament reached a provisional agreement on these modalities at its meeting on 15 June 2011: see AS/Bur/AH (2011) 04, 17 June 2011. This agreement will have to be approved by the Assembly and the European Parliament before it can enter into force.
18. "Opinion procedure 2/13, View of Advocate General Kokott", 13 June 2014.
19. See the report of the virtual meeting of the 47+1 group of 22 June 2020, doc. 47+1(2020)Rinf, Appendix VI.
20. There has been some divergence in the case law of the Court and the CJEU on whether and how this presumption may be disapplied. Whilst this divergence has tended to narrow with successive judgments over time, it reveals an important difference in approach: the Court ensures the protection of individual rights under the Convention, whilst the CJEU also ensures application of other principles of EU law.

– that relating to the EU's common foreign and security policy. Most action taken under this policy falls under the jurisdiction of EU member States' domestic courts alone and is outside the CJEU's jurisdiction. The CJEU considered that the Court, as an international tribunal, could not have jurisdiction in this area, since the CJEU itself was still in the process of clarifying the extent of its own jurisdiction.

25. In addition, the CJEU was concerned that EU member States might rely on Article 53 of the Convention, which permits the High Contracting Parties to establish higher standards in domestic law than those set out in the Convention, to circumvent its own case law whereby EU member States may not establish higher human rights standards than those of the Charter (this being necessary in order to ensure the uniformity of EU law across its member States). The CJEU also felt that the co-respondent mechanism did not sufficiently ensure respect of any reservations made to the Convention by EU member States, contrary to Article 2 of Protocol No. 8.[21]

26. Opinion 2/13 was immediately the subject of often harsh criticism. One expert even argued that "[f]ar from enhancing the protection of human rights within the EU legal order, the EU's accession to the ECHR, on the terms which the CJEU insists upon, would significantly diminish it, for the EU would be compelled to ensure that it insulates itself against many human rights claims that might be brought against it. … We now have a moral duty to reject the EU's accession to the ECHR."[22] Less dramatically, the Council of Europe's Legal Adviser argued that "If you take all the ECJ's objections at face value and try to overcome them one by one by formal amendments to the draft Accession Agreement, there is a real risk that, as a result, the ECtHR's jurisdiction over EU legal acts will be more restricted than it is today. Such a solution would not only undermine the whole purpose of accession but would also be unacceptable to non-EU member states (NEUMS)."[23] The then President of the European Court, Dean Spielmann, also reacted a few weeks after the delivery of the Opinion: "Let us be clear: the disappointment that we felt on reading this negative opinion mirrored the hopes that we had placed in it – hopes shared widely throughout Europe. … The Union's accession to the Convention is above all a political project and it will be for the European Union and its member States, in due course, to provide the response that is called for by the Court of Justice's opinion".[24]

7. The resumed negotiations and the revised draft accession instruments (2020-2023)

27. In October 2019, the President and First Vice-President of the European Commission wrote to the Secretary General of the Council of Europe indicating the EU's readiness to resume negotiations on its accession to the Convention. This letter stated that the EU's aim in these negotiations was to revise the accession package only insofar as strictly necessary to address the issues raised in CJEU Opinion 2/13. In January 2020, the Committee of Ministers instructed the CDDH, through the 47+1 group, to resume negotiations with the European Commission, and to finalise the accession instruments as a matter of priority, on the basis of the work already undertaken.

28. It is regrettable that the Committee of Ministers, when adopting the *ad hoc* terms of reference for the 47+1 group in 2010, did not see fit to associate the Assembly with its work, despite the Assembly having played an important part in the drafting of the Convention itself, being a participant in the 47+1 group's "parent committee", the CDDH, and having been a constructive participant in the drafting of many other Council of Europe treaties and instruments. I am aware however that the Assembly's secretariat has been consulted on the new wording of Article 7 of the draft Accession Agreement, which governs the election of judges by the Assembly.

29. Negotiations were resumed at a virtual informal meeting of the 46+1 group in June 2020, which was followed by a further 13 meetings.[25] The group examined issues raised by Opinion 2/13 bundled into the four baskets mentioned above (see paragraph 24). It also examined the issue of the relationship between Article 53 of the Convention and Article 53 of the EU Charter of Fundamental Rights, along with issues in relation to different provisions of the draft Accession Agreement.

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21. Interestingly, the European Commission did not raise these issues in its presentation to the 47+1 group, although it may be that they were addressed in the (confidential) document that it submitted to the group (doc. 47+1(2020)1).
22. "The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection", Steve Peers, EU Law Analysis blog, 18 December 2014.
23. "EU accession to the ECHR: How to square the circle?", Jörg Polakiewicz, presentation to the EU's FREMPO/ COHOM committee, 9 March 2020.
24. Speech by President Spielmann, opening of the judicial year 2015.
25. 46+1 (instead of 47+1) format following the expulsion of the Russian Federation from the Council of Europe in March 2022.

30. At its March 2023 meeting, the 46+1 group reached a unanimous provisional agreement on solutions to the issues arising under Baskets 1, 2 and 3, in relation to Articles 6, 7 and 8 of the draft Accession Agreement of 2013, and in relation to Article 53 of the Convention. The group considered that this agreement satisfied the general principles on which it had agreed, namely to preserve the equal rights of all individuals under the Convention, the rights of applicants in Convention proceedings, and the equality of all High Contracting Parties. It also considered that the current control mechanism of the Convention would be preserved and, as far as possible, applied to the EU in the same way as to other High Contracting Parties. The EU representative informed the group of the EU's intention to resolve the Basket 4 issue (the exclusion from the jurisdiction of the CJEU of EU acts in the area of the common foreign and security policy) internally. The group noted that it would be necessary for all parties to the negotiations to be informed of and consider the manner in which the Basket 4 issue has been resolved before they would be able to give their final agreement to the whole package of accession agreements.[26]

31. In April 2023, the CDDH transmitted the revised accession instruments and the 46+1 group report to the Committee of Ministers for information. At the same time, the EU said that it would keep the CDDH informed of any progress on the outstanding Basket 4 issue. In May 2023, the Deputies took note of the interim report submitted by the CDDH on the negotiations on the accession of the EU to the European Convention on Human Rights.[27] Neither the CDDH nor the Committee of Ministers have yet formally approved the revised package of accession instruments. At the Reykjavik Summit on 16-17 May 2023, the Heads of State and Government of the Council of Europe welcomed the unanimous provisional agreement of the revised draft accession instruments "as an important accomplishment in the process of accession of the European Union to the Convention" and expressed their commitment to the timely adoption of that agreement.

32. The most relevant and substantial changes/additions to the draft Accession Agreement of 2013 can be summarised as follows:[28]

– adding a provision that clarifies that Article 53 of the Convention shall not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights and fundamental freedoms, provided that it does not fall short of the level of protection guaranteed by the Convention (and as relevant its Protocols), as interpreted by the Court (new Article 1(9));

– as regards the co-respondent mechanism, the assessment whether the material conditions for applying this mechanism are met will be made by the European Union itself, through a reasoned declaration that will be provided to the European Court of Human Rights in writing. According to the draft explanatory report, "[t]he conclusion of this assessment by the EU will be considered as determinative and authoritative". This is explained by the fact that the determination of whether the mechanism should apply presupposes an assessment of the applicable rules of EU law governing the division of powers between the EU and its member States. This procedure applies both to the admission of a co-respondent and to the termination of the co-respondent mechanism during the proceedings. In its judgment on the merits, the Court will hold the respondent and the co-respondent jointly responsible for any violation found (see all additions in Article 3);

– alongside the co-respondent mechanism, a "prior involvement procedure" with the CJEU is established as in the 2013 package, in cases where the EU is a co-respondent and where the CJEU has not yet assessed the compatibility of the provision of EU law with the rights at issue (see Article 3(7)). The draft explanatory report adds that determining whether it is necessary to initiate the prior involvement of the CJEU will be made by the EU itself, whose finding will be considered as determinative and authoritative;

– as regards the inter-party (currently known as inter-state) applications under Article 33 of the Convention, a new provision (Article 4(3)) provides that the EU and its member States shall not avail themselves of Article 33 of the Convention in their relations with each other. This applies to disputes between EU member States and the EU, as well as disputes between EU member States insofar as the dispute concerns the interpretation or application of EU law. Article 4(4) contains a safeguard clause which provides the opportunity for the EU to request sufficient time to assess whether that dispute concerns the interpretation or application of EU law;

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26. CDDH ad hoc negotiation group ("46+1") on the accession of the European Union to the European Convention on Human Rights, Report to the CDDH, 30 March 2023, 46+1(2023)35FINAL.
27. See CM/Del/Dec(2023)1465/4.1 (coe.int).
28. Doc. 46+1(2023)06 (all changes compared to 2013 in bold or strike-through).

– a new clause (new Article 5) precludes recourse to the advisory opinion procedure before the Court under Protocol No. 16 where EU law requires a court or tribunal of an EU member State to submit a request to the CJEU for a preliminary ruling under Article 267 of the TFEU. This only applies if the question raised falls within the field of application of EU law;

– a new clause (new Article 6) stipulates that "accession of the EU to the Convention shall not affect the application of the principle of mutual trust within the EU", while adding that "[i]n this context, the protection of human rights guaranteed by the Convention shall be ensured". This reflects the increasing convergence between the case law of both the Court and the CJEU with regard to the importance of mutual recognition mechanisms within the EU and their limits, as recalled in the draft explanatory report.

33. Most of these changes have been introduced to overcome the obstacles raised by the CJEU in its Opinion 2/13. In my view, the Assembly should support these amendments as an appropriate solution and compromise aiming to preserve both the specificities of EU law and the EU as a supranational organisation and the integrity and effectiveness of the Convention system.[29] This does not of course prejudge the position that the Assembly will express in its future opinion on the final text of the draft Accession Agreement (once seized by the Committee of Ministers), although it would be desirable that the Assembly also support the final text for the sake of coherence.

34. Two further important issues have been addressed in the revised draft Accession Agreement. One concerns the participation of the EU in the meetings of the Committee of Ministers of the Council of Europe (Article 8). The second concerns the election of judges by the Assembly (Article 7). As regards the first question, new Article 8 clarifies that the majority requirements under the Statute of the Council of Europe (ETS No. 1) and Article 46 of the Convention shall not apply in cases where the Committee of Ministers supervises the fulfilment of obligations by the EU or the EU and one or more of its member States. In such cases, the applicable majority requirements are laid down in a new Rule to be added to the Rules of the Committee of Ministers (Rule 18), which is part of the accession package. This is intended to give effect to the principle that the co-ordinated vote of the EU and its member States cannot prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Article 46 of the Convention. According to Jörg Polakiewicz and Irene Suominen-Picht, the rather complex provisions of the revised draft Accession Agreement on this particular issue "strike a fair balance between the requirements of legal certainty, efficiency and protection of the interests of non-EU Member States".[30]

35. The issue of the election of judges, which is the most relevant to the Assembly, is regulated in the new Article 7 of the draft Accession Agreement. The 2013 provision read as follows:

> *"1. A delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the Convention. The delegation of the European Parliament shall have the same number of representatives as the delegation of the State which is entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.*
>
> *2. The modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in co-operation with the European Parliament."*

36. The agreed new Article 7 reads as follows (changes in bold):

> *"1.* ***When the Parliamentary Assembly of the Council of Europe exercises its functions in accordance with Article 22 of the Convention, which are limited to the election of judges, a*** *delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the* ***Assembly****. The delegation of the European Parliament shall have the same number of representatives as the delegation of the State which is entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.*

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29. See also Jörg Polakiewicz and Irene Suominen-Picht, "A Council of Europe perspective on the European Union's accession to the European Convention on Human Rights", *European Papers,* Vol. 9, 2024, No 2; see, for a general overview of the revised draft Accession Agreement and the negotiating process, Tonje Meinich, "From Opinion 2/2013 to the 2023 Draft Accession Agreement: the Chair's Perspective" and Felix Ronkes Agerbeek, "EU Accession to the European Convention on Human Rights: A New Hope", *European Papers,* Vol. 9, 2024, No 2.

30. Jörg Polakiewicz and Irene Suominen-Picht, ibid., p. 742.

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

37. As it can be observed, the changes are rather minimal and do not alter the substance and purpose of the original provision. The Secretariat of the Assembly confirmed to the 46+1 group that this wording was acceptable (without prejudice to the decision-making powers of the Assembly itself) and would allow for the continuation of normal co-operation between the Assembly and the European Parliament on other issues, whilst still providing a basis for reviewing and updating the agreement on the modalities of the EP's participation in the election of judges that was reached between the two bodies in 2011 (within the Joint Informal Body established by both bodies).[31] According to this agreement, the EP would be entitled to participate in the Assembly with the same number of representatives as States entitled to the highest number of representatives, currently 18. The EP would be entitled to four seats when participating in the Committee on Legal Affairs and Human Rights, “whenever need for this were to arise”. One representative of the EP with a right to vote would take part in the relevant meetings of the Assembly's Bureau, “whenever the election of judges is on the agenda”. The EP would also be entitled to one seat with the right to vote in the then Sub-Committee on the Election of Judges of the Committee on Legal Affairs and Human Rights “when the Sub-Committee … provides confidential recommendations to the plenary Assembly to enable the latter to make an informed choice when it elects judges”. This informal agreement would now require at least two updates: first the Sub-Committee is now an Assembly committee in its own right and second, its recommendations to the plenary Assembly are no longer confidential. The question also arises as to whether the representation of the EP would need to be maintained in the Committee on Legal Affairs and Human Rights, since now the Committee on the Election of Judges to the European Court of Human Rights is fully independent from this committee. But one can also think of situations where the need would arise, for instance when the Committee on Legal Affairs and Human Rights would deal with the implementation of judgments of the Court in cases where the EU is respondent or co-respondent (for instance in the context of the bi-annual reports on the implementation of judgments that the committee prepares for the Assembly). This however goes beyond the scope of Article 7 of the draft Accession Agreement, as it does not relate to the election of judges by the Assembly under Article 22 of the Convention. All the modalities of participation will need to be re-negotiated with the EP and introduced in the Assembly's Rules of Procedure. They will also need to be reflected in the EP's internal rules in accordance with its procedures.

38. Another aspect of the election of judges which is worth paying attention to is the internal procedure for the selection of the candidates in respect of the EU to be submitted to the Assembly. Although Article 7 is silent on this question, the draft explanatory report clarifies that the EU internal rules will define the modalities for the selection of the list of candidates and that these internal rules will be consistent with the modalities defined by the relevant instruments adopted within the Council of Europe, in particular the Committee of Minister's Resolution on the Advisory Panel and its Guidelines on the selection of candidates for the post of judge at the Court. As the Council of Europe Directorate of Legal Advice and Public International Law rightly pointed out to the 46+1 group, the guidelines are sufficiently wide to accommodate any special requirements the EU might have and the consultation with the Panel should also be acceptable to the EU.[32] Jörg Polakiewicz and Irene Suominen-Picht are of the opinion that the principle of equality of parties could have been fostered even more by introducing a clause in the draft Accession Agreement providing generally that such Council of Europe instruments (addressed in principle only to member States) will be binding upon the EU. It would therefore be important to remind and state expressly (in the future resolution of the Assembly based on this report as well as in the future opinion on the draft Accession Agreement as a possible proposed amendment) that the EU internal rules on the selection of candidates should also comply with any future instruments adopted by the Committee of Ministers on this topic and with the Assembly's resolutions and practice on the election of judges. While the draft Accession Agreement (Article 8(3)) establishes an explicit obligation for the Committee of Ministers to consult the EU before the adoption of any such new instrument, the Assembly could also set up a similar prior consultation procedure with the EP for the adoption of any new rules and resolutions on the election of judges to the Court or the national selection procedures. In any case, the presence of an EP member with the right to vote in the Committee on the Election of Judges to the

31. The Group had previously discussed other wordings (“whenever” or “only when”) when describing the right of a delegation of the EP to participate in the sittings of the Assembly. All participants had agreed that the provision should not preclude any possible future participation of the EP in the Assembly's activities beyond the election of judges of the Court, which was the only matter covered by the draft Accession Agreement.

32. https://rm.coe.int/cddh-46-1-2022-24-en/1680a7bf8a.

European Court of Human Rights, not only when addressing recommendations on specific lists of candidates, but also when considering general reports on the election of judges (which may contain proposals for changes to the procedure and rules), could also be considered sufficient to take due account of the EU position.

8. The outstanding Basket 4 issue: European Union acts in the area of the common foreign and security policy

39. The Basket 4 issue stems from the limited jurisdiction of the CJEU over EU acts in the area of the common foreign and security policy (CFSP), based on the EU treaties.[33] In its Opinion 2/13 the CJEU stated that "the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights"; and reiterated that "jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU" (paragraphs 254 and 256).

40. During the negotiations, the EU proposed a system with a so-called re-attribution clause which would enable the EU to allocate responsibility for an EU CFSP act to one or more member State(s) if such an act would be excluded from the jurisdiction of the CJEU.[34] The proposal was met with criticism. The European Commission had also proposed to resolve this issue by an interpretative declaration on the Lisbon Treaty extending the CJEU jurisdiction over the CFSP. But in March 2023, the French Senate adopted a resolution against this proposal and invited the French Government to follow this position in the EU internal negotiations.[35] It found that such an interpretative declaration would modify the EU treaties, violate the rule of law and set a dangerous precedent. Some French senators also considered that granting the CJEU jurisdiction over the CFSP would be politically undesirable as it could hamper the EU's executive freedom of action in this field and have operational consequences on the choice of member States to take part in certain CFSP operations.[36]

41. In June 2024, the CDDH was informed by the EU representative about the EU developments regarding the Basket 4 issue. EU member States and the European Commission were waiting for the CJEU to deliver its judgment in two cases concerning fundamental rights and the CFSP (*KS and KD v Council and Others* and *Commission v. KS and Others* (joined cases C-29/22 P and C-44/22 P)). In these cases, the Advocate General had delivered an Opinion (on 23 November 2023) which could facilitate solving the problem. In her Opinion, Advocate General Tamara Capeta considered that the relevant provisions of the EU treaties "should be interpreted as not limiting the jurisdiction of EU Courts to hear an action for damages brought by individuals based on an alleged breach of fundamental rights by any type of CFSP measure. Such an interpretation follows from the constitutional principles of the EU legal order, principally the rule of law, which includes the right to effective judicial protection, and the principle requiring respect for fundamental rights in all EU policies. The constitutional role of the EU Courts that follows from those principles can be limited only exceptionally. … That is so because the breach of fundamental rights cannot be a political choice in the European Union, and the EU Courts must have jurisdiction to ensure that CFSP decisions do not cross 'red lines' imposed by fundamental rights".[37] The Advocate General explicitly framed these issues in the broader context of the resumed negotiations on the accession of the EU to the Convention. It is worth noting that the Advocate General's opinion coincided in part with the position expressed by the European Commission before the

33. See Article 24(1) TEU and Article 275 TFEU. See also https://rm.coe.int/non-paper-basket-4-003-/1680a170ab.
34. https://rm.coe.int/cddh-47-1-2021-r9-en/1680a1f302.
35. Convention de sauvegarde des droits de l'homme et des libertés fondamentales (senat.fr), 7 March 2023: "notes that such a declaration would be contrary to the Treaties which have been ratified by the member States in accordance with their respective constitutional rules and that it would in fact amount to a revision of the Treaties, outside the control of the national parliaments, according to the terms not provided for in Article 48 of the Treaty on the European Union, which would constitute a violation of the rules of the Rule of law".
36. See Commission des affaires européennes: compte rendu du 17 octobre 2022 (senat.fr).
37. CURIA – Documents (europa.eu), paragraphs 154-155. These cases concern an action for damages by two individuals who complained that Eulex Kosovo had not properly investigated the murders and disappearances of their relatives in the aftermath of the Kosovo* conflict [All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo]. See also her Opinion in the Case C-351/22 (EUR-Lex – 62022CC0351 – EN – EUR-Lex (europa.eu)), *Neves 77,* which concerns a request for a preliminary ruling in the context of restrictive measures adopted in view of the Russian Federation's actions in Ukraine; and the judgment delivered in this case on 10 September 2024 (EUR-Lex – 62022CJ0351 – EN – EUR-Lex).

CJEU, supported by the Austrian, Belgian, Finnish, Luxembourg, Netherlands, Romanian, and Swedish Governments, while the opposite position (lack of jurisdiction) was defended by the Council and the French Government.

42. At the CDDH meeting of June 2024, the EU representative suggested that if the CJEU followed the opinion of its Advocate General in full, the EU would first discuss the outcome in the EU Council and with non-EU member States and could then request the opinion of the CJEU on the revised package of accession instruments. If the CJEU did not entirely follow the Advocate General's opinion, the EU would try to work with this outcome; if the judgments were very negative and treaty change appeared necessary to resolve the Basket 4 issue, the situation would be very different.

43. On 10 September 2024, the CJEU delivered its much-awaited judgment in the joined cases *KS and KD v. Council and Others* and *Commission v. KS and Others* (European Union Rule of Law Mission in Kosovo (Eulex Kosovo)). The Grand Chamber clarified the scope of the limitation of the jurisdiction of the Courts of the EU in relation to the CFSP based on the Treaties. It found that such a limitation of jurisdiction can be reconciled both with Article 47 of the Charter of Fundamental Rights of the EU (right to an effective remedy and to a fair trial) and with Articles 6 and 13 of the European Convention on Human Rights. According to this interpretation, based in particular on the right to an effective remedy and the principles of the rule of law, the Courts of the EU have jurisdiction to assess the legality of acts or omissions coming under the CFSP that are not directly related to political or strategic choices or to interpret them. By contrast, the CJEU does not have jurisdiction to assess the legality of, or interpret, acts or omissions directly related to the conduct, definition or implementation of the CFSP, and especially the CSDP (Common Security and Defence Policy), that is to say, in particular the identification of the EU's strategic interests and the definition of both the actions to be taken and the positions to be adopted by the EU as well as of the general guidelines of the CFSP. Applying this distinction to the cases at hand, the CJEU considered that the Courts of the EU had jurisdiction over decisions taken by Eulex Kosovo as to the choice of appropriate personnel or the establishment of review measures or remedies (described as "day-to-day" or "administrative management" of the mission), as well as the alleged failure to adopt remedial or effective review measures in the individual cases, but not with respect to issues such as the resources made available to the mission and the decision to remove its executive mandate, which were considered by the CJEU as being directly related to political or strategic choices.[38]

44. In its reasoning, the CJEU quoted the case law of the European Court of Human Rights and recalled that Articles 6 and 13 of the Convention are not absolute and allow for certain limitations. In particular, it noted that the European Convention on Human Rights has held that it is not its task to interfere with the institutional balance between the executive and the national courts, for instance in the context of a limitation of jurisdiction of national courts as regards acts that cannot be detached from the conduct by a State of its international relations.[39] It is also worth noting that the CJEU rejected the arguments (some put forward by the Commission) that the Courts of the EU should have jurisdiction on the sole ground that the acts or omissions in question infringe the individual's fundamental rights, or on the basis of an interpretation in the light of the first sentence of Article 6(2) TEU (obligation for the EU to accede to the ECHR).[40]

45. Although the CJEU judgment did not follow in full the position put forward by the Advocate General and the Commission,[41] it was generally perceived as a positive step that could potentially solve the Basket 4 issue and facilitate EU's accession to the Convention to continue its course.[42] At the last CDDH meeting held on 25-29 November 2024, the representative of the European Commission informed the Committee on behalf of the EU about the judgment and its possible consequences. He stated that the only way to be sure that this judgment fully resolved the outstanding Basket 4 issue would be to ask the CJEU for an opinion on the

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38. CURIA – Documents.
39. European Court of Human Rights, *H.F. and Others v. France,* 14 September 2022, paragraph 281.
40. See paragraphs 73 and 82 of the judgment. The CJEU recalled that the accession of the EU to the ECHR shall not affect the competences of the Union or the powers of its institutions; accordingly, the interpretation of Article 6(2) TEU cannot have the effect of extending the jurisdiction of the CJEU in relation to the CFSP.
41. "The Final Episode of a (Never-Ending) Series? CFSP Damages Claims and the ECHR Accession", European Law Blog; "An EU external relations political question doctrine that suffers no human rights exception: Joined cases C-29/22 P and C-44/22 P KS and KD on the Court's jurisdiction in CFSP matters", European Law Blog, where Areg Navasartian Havani argues that the judgment will not guarantee legal certainty as it gives little guidance on the criteria to determine what constitutes a "political or strategic choice". The author also considers that the judgment does not address the fundamental question, raised by the appellants, the intervening Member States and the Advocate General, of whether a human rights breach can constitute a political or strategic choice and therefore be excluded from the CJEU's jurisdiction.
42. See "EU Accession to the European Convention on Human Rights. An EU Law Scholars' Perspective", edited by Federico Casolari, Weekend Edition Nº211 by Eu Law Live, 13 December 2024. See also Felix Ronkes Agerbeek, "EU Accession to the European Convention on Human Rights: A New Hope", *European Papers,* Vol. 9, 2024, No 2.

revised draft Accession Agreement. The Commission was minded to take this step, subject to the decision of the incoming College of Commissioners, and was also working on the internal rules that would be needed for the implementation of the accession agreement, once in force.[43] These rules would likely cover the issue of the participation of the EU in the proceedings before the Court and in the Committee of Ministers when it supervises the execution of the Court's judgments. The representative of the Commission indicated a possible sequence of events involving a timely proposal to the incoming College of Commissioners as a first step, followed by a request for opinion to the CJEU, then a process allowing all EU member States to submit observations to the CJEU, concluding with the opinion being delivered between 18 and 24 months after the request. He recalled that any EU institution or member State was entitled to submit a request for opinion to the CJEU but there was an internal understanding that the European Commission would do so for the revised draft Accession Agreement. He added that "the Commission did not want to act precipitously but rather be confident of the outcome". In response, the CDDH welcomed the judgment of the CJEU "as a promising avenue to be explored for resolving the outstanding issue". On this basis, it encouraged the EU "to take the necessary decisions at the earliest opportunity, recalling the commitment of all Council of Europe member States to the timely adoption of the accession agreement, as expressed in the Reykjavik Declaration".[44]

9. Conclusions

46. It has taken well over 40 years for the idea of EU accession to the European Convention on Human Rights to reach its current state of fruition. Whilst some of the initial arguments in favour of accession are no longer valid, others remain so, and some of the arguments against accession have been turned on their heads by subsequent developments. To summarise the situation today, it remains true that unlike its member States, the EU's institutions are subject to no external judicial control of their compliance with fundamental rights. At the same time, the scope and potential impact of their activities have expanded into areas of acute human rights sensitivity, which has only increased the potential for the CJEU to develop case law that is inconsistent with that of the European Court of Human Rights. The agreement in 2013 on a package of instruments intended to allow for EU accession to the Convention was thus a cause for celebration.

47. CJEU Opinion 2/13 came as a surprise and a disappointment to the supporters of EU accession to the Convention. It is encouraging however, to see that negotiations resumed and that all parties concerned – the member States of the Council of Europe on the one hand, and the EU and European Commission on the other – managed to reach a unanimous provisional agreement on almost all issues raised by Opinion 2/13. This shows that all parties involved were creative enough to find an acceptable compromise, and that they remain committed to see EU accession to the Convention – an obligation under the TEU – become reality. Nevertheless, there is still one remaining issue to be resolved internally within the EU: the scope of the EU Courts' jurisdiction in the area of the CFSP. I tend to think that the Eulex Kosovo judgment of 10 September 2024 clarifies this issue in the sense that the CJEU defines which CFSP cases fall within its jurisdiction and in doing so, considers that the EU's system of judicial protection in this area complies with the Convention standards, in particular with Articles 6 and 13 of the Convention. It can therefore be interpreted as suggesting that the limited jurisdiction in the CFSP area is no longer an obstacle to accession in the CJEU's view.

48. To maintain the current momentum after the Eulex Kosovo judgment and the beginning of the mandate of the new European Commission, the Assembly should invite the Commission and the EU institutions as a whole to take the necessary decisions, including submitting a request for an opinion on the compatibility of the revised accession instrument with the EU Treaties to the CJUE under art. 218(11) TFEU as soon as possible. Although, as indicated by the EU representative in the CDDH, the CJEU opinion may take an average of 18-24 months to be delivered, this would be the first step to trigger the relevant procedures, within the EU and the Council of Europe, for final approval, adoption and signature of the Accession Agreement. According to Article 218(6) TFEU, the European Parliament's consent to the Accession Agreement (with a two-thirds majority) is required. Only then can the Council of the EU adopt a decision concluding the agreement. The Council must do so unanimously, and this decision will enter into force only after the EU member States have approved it in accordance with their constitutional requirements (Article 218(8) TFEU). Within the Council of Europe, after the CJEU Opinion and once the final agreement is submitted, the Committee of Ministers will in turn have to seize the Assembly for a statutory Opinion on the draft Accession Agreement before adoption and opening for signature. Although at some point in the negotiations it was suggested that the Committee of

43. In the mission letter to the new Commissioner for Democracy, Justice, the Rule of Law and Consumer Protection, Michael McGrath, President Von der Leyen entrusts the new Commissioner with the task of taking forward and concluding the EU's accession to the Convention, in the context of strengthening the rule of law: Michael McGrath – European Commission.

44. https://rm.coe.int/steering-committee-for-human-rights-cddh-meeting-report-101st-meeting-/1680b2cb4d.

Ministers could also use Article 47 of the Convention to ask the European Court of Human Rights itself to give its opinion on the draft Accession Agreement, I have doubts whether Article 47 provides the right legal basis for such an opinion. Article 47 of the Convention was not designed to confer advisory jurisdiction on the Court on proposed amendments to the Convention, but on "legal questions concerning the interpretation of the Convention and the protocols thereto" (Article 47(1)).[45] In any event, the whole process may still take some years before entry into force, as it will also require the ratification of the agreement by all the member States of the Council of Europe and States Parties to the Convention.

49. The European Convention on Human Rights has rightly been described as a "constitutional instrument of European public order", being fundamental to human rights protection and essential for legal co-operation in many different fields. The Assembly was not only the driving force behind the original drafting of the Convention, it has also been a stalwart defender of the system over the decades, plays a continuing role in its effective functioning (including, but not only, by electing the judges to the Court), and has consistently advocated in favour of EU accession. The time has come for the Assembly to send again a strong political message to all relevant stakeholders and call for action, in order to keep up the momentum for EU accession following the Reykjavik Summit and the 2024 EP elections and to avoid any further delays. The Assembly should also call on all member States which are also EU member States to support the accession agreement before the CJEU and within the EU institutions; and on all member States to support the agreement within the Committee of Ministers and to ratify it according to their national procedures in a timely manner. In the meantime, it should invite the European Convention on Human Rights and the Court of Justice of the European Union to maintain and enhance their well-established judicial dialogue in order to avoid any clashes in the interpretation of the Convention and the protection of fundamental rights.

45. For instance, on procedural points concerning the election of judges and the procedure followed by the Committee of Ministers in monitoring the execution of judgments, and excluding matters that could arise out of contentious proceedings before the Court (see Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (no. 2), 22 January 2010, paragraph 29).