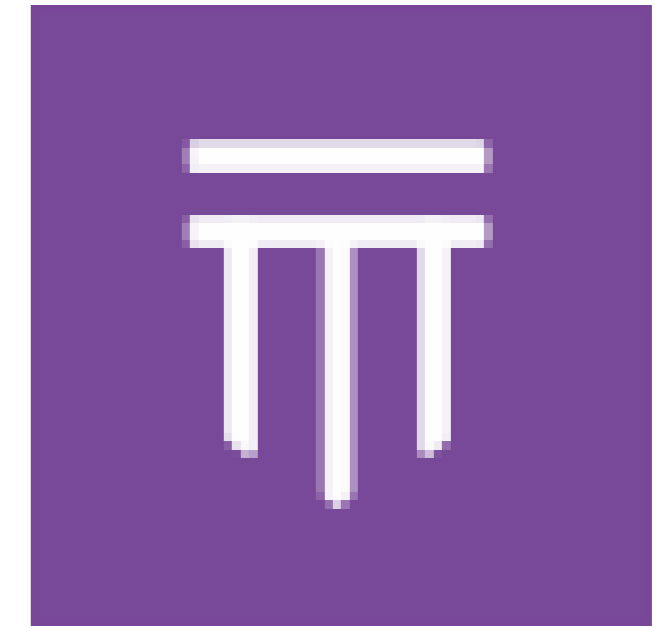


Brno, 25 November 2024

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# Accession to ECHR



JUSTIN  
Judicial Studies Institute  
Masaryk University

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Katarína Šipulová

*Article 6*  
**(ex Article 6 TEU)**

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

**The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.**

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

**2. 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.

**3. Fundamental rights**, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, **shall constitute general principles of the Union's law.**



# History of the Accession to ECHR

- 1970s
- ECHR vs own charter
- **Opinion 2/94**
- Constitutional Treaty
- Lisbon Treaty
- **Opinion 2/13**



# Opinion 2/94

		ADMISSIBILITY	
		NO	YES
Legal Basis for the Accession	No	United Kingdom, Ireland	France, Portugal, Spain
	Yes	Denmark, Finland, Sweden	EC, EP, Belgium, Germany,, Italy, Greece, Austria

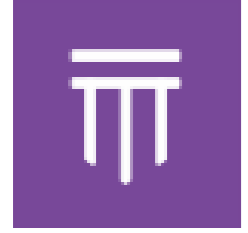


## Opinion 2/94

34 Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

35 Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

36 It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention.



# Opinion 2/94

- Only with amendment of Treaties
- Hence Lisbon inserts A6.2
- Plus accession treaty



# CJEU and ECtHR

- Commission as a competition authority
- Connolly situation
  - 1995 book The Rotten Heart of Europe
- ECtHR: Matthews, Bosphorus
- ECtHR, CJEU: N.S. and MSS – Dublin II Regulation



# Matthews vs The United Kingdom (24833/94)

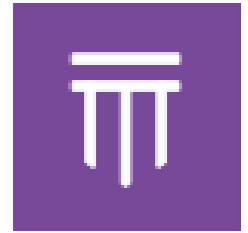
- 32. The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a contracting party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer.
- 33. In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the UK, together with the extension to the EP’s competence brought about by the Maastricht Treaty. The Council Decision, and the 1976 Act and the Maastricht Treaty ... all constituted international instruments which were freely entered into by the UK. Indeed, the 1976 Act cannot be challenged before the ECJ for the very reason that it is not a “normal” act of the Community, but is a treaty by which a revision of the EEC Treaty was brought about. The UK, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and ,in particular, under Article 3 of Protocol No. 1, for the consequence of that Treaty.





# Matthews vs The United Kingdom (24833/94)

- 34. **In determining to what extent the United Kingdom is responsible for “securing” the rights in Article 3 of Protocol No. 1 in respect of elections to the European Parliament in Gibraltar**, the Court recalls that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, for example, the above-mentioned United Communist Party of Turkey and Others judgment, pp. 18-19, §33). **It is uncontested that legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly.** To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to “secure” the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be “secured” in respect of purely domestic legislation. In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom’s responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act. Further, the Court notes that on acceding to the EC Treaty, the United Kingdom chose, by virtue of Article 227(4) of the Treaty, to have substantial areas of EC legislation applied to Gibraltar (see paragraphs 11 to 14 above).
- 35. It follows that the United Kingdom is responsible under Article 1 of the Convention for securing the rights guaranteed by Article 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European.



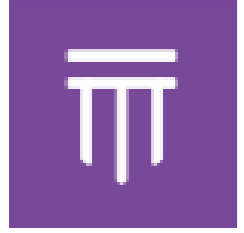
# Accession to ECHR – Opinion 2/13

- 18 December 2014
- **Draft Agreement is incompatible with EU Law.**
- **Key points:**

## 1. EU is not a state

- Only states are member parties of the Convention (ECHR). The accession agreement (AA) treats the EU as a state, which is not adequate. **EU is a new legal order**
- under international law, **the EU is precluded by its very nature from being considered a State**

## 2. Autonomy of EU law



# Accession to ECHR – Opinion 2/13

## 1. Autonomy of EU law

- Needs to be preserved; this could be undermined by subjecting the EU to external judicial review
- Strasbourg interpretation of ECHR would bind the EU, but ECtHR cannot review interpretations and scope of EU law. Yet, it would be required to assess also those matters that relate to distribution of competence between EU and MS
  - A53 ECHR allows MS to lay down higher standards of HR protection than ECHR. But A53 Charter (Melloni): MS cannot have higher standards than EU Charter in fully harmonised area.
  - Principle of mutual trust would be compromised
  - Protocol 16 is a threat to autonomy of EU law (PR to Strasbourg instead of Luxembourg)



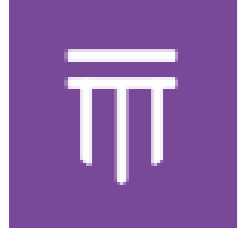
# Accession to ECHR – Opinion 2/13

## 2. Treaty interpretation/application: CJEU.

- but, AA does not exclude the possibility of the ECtHR to settle such disputes

## 3. Co-respondent mechanism

- EU law implemented by MS – hence applicant will mostly go against the state. But MS have little discretion over EU actions.
- How to split responsibility between MS and EU?
  - C-R on request of the ECtHR or the contracting party
  - But, ECtHR would need to assess the rules of EU law governing the division of powers between EU and MS.



# Accession to ECHR – Opinion 2/13

## 4. Prior involvement of the CJEU

- CJEU must have a chance to interpret and rule on the issue of EU law before it reaches the ECtHR (the ultimate interpreter of EU law).
- But national courts sometimes might not refer PR to CJEU.
  - Costa and Skouris: joint communication that part of AA would be an internal procedure for indirect actions (allowing CJEU to make a ruling).
  - CJEU did not find the procedure sufficient:
    - CJEU has not reserved right to rule whether it already dealt with an issue (it allowed to do so for ECtHR)
    - Did not permit the CJEU to rule on the interpretation (only validity of EU law)

## 5. Specific characteristics of EU law as regards the judicial review in CFSP matters

- Limited powers of CJEU in CFSP => no interpretation of EU law prior to ECtHR ruling.
- E.g. HR violation due to EU military action -> exclusive JR for ECtHR



# Accession to ECHR – Opinion 2/13

## 6. Protocol 16 to ECHR

- could lead to ECtHR bypassing the CJEU Th

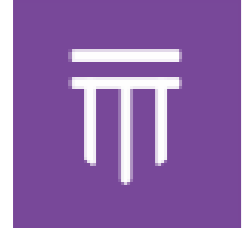


# Accession to ECHR – Opinion 2/13

=> AA incompatible with EU Law.

## Repercussions:

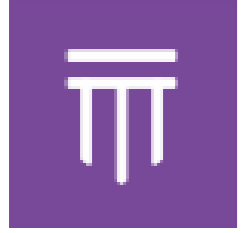
- Commission can initiate infringement if the EU does not accede to ECHR
- Amendment of the Treaties: explicitly asking the EU to proceed notwithstanding A 6.2 TEU, Protocol 8 and Opinion 2/13?
- Courts try to engage more in a dialogue
- More considerations to application of some doctrines (mutual trust)
- Core issue: for EU, FR still only instrumental to achieving other policy goals
- Sn: how to solve the increasing caseload?



# Accession to ECHR – 2024 Update

- Negotiations since 2020, 14 meetings between working groups
- 46+1 working group reached a deal on 17 March 2023
- Most of the CJEU objections have been solved
  
- Doctrine of positive obligations?
- New admissibility?
  - Who will bring the case against the EU? Individuals, NGOs, groups of individuals
  - After they exhaust all remedies under the EU law
  - Co-respondent mechanism
    - The European Union or a member State of the European Union may become a correspondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings





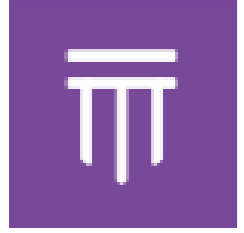
# Accession to ECHR – 2024 Update

- Unresolved issues:
  - CFSP still excluded from the jurisdiction of the CJEU
  - EU committed to address this internally.
- New positive opinion of CJEU needed + ratification by the EP and national parliaments of CoE
- Impact
  - EU subjected to external control
  - Same HR standards within the EU and in MS
  - Coherence between ECHR and EU law



# Kadi case

- Can EU courts review the legality of EU acts implemented on the basis of SC's resolutions?
- Interaction between commitments from international law vs EU law
- **KADI I (2008)**
- Facts
  - Yassin Abdullah Kadi, a Saudi businessman listed under SC Resolution 1267 (Oct 1999) for allegation of links to terrorism. The Resolution aimed to freeze funds of Taliban.
  - EU implemented the UNSC Resolution as Regulation 337/2000, imposing flight ban and freezing of funds of Taliban of Afghanistan, including Mr Kadi's assets without prior notification or access to judicial review
  - Resolution 1333 – strengthened, both adopted in Common Position and Regulation. Annex I – list of persons...affected by freezing.
  - Kadi seeks annulment of regulations: argues a breach of his FR: to be heard, to respect for property, proportionality, effective judicial review



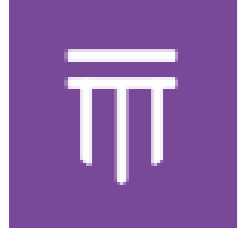
# Kadi case (I)

- Tribunal
  - EC may not infringe the obligation imposed on MS by the Charter.
  - But it also cannot review implementation of UN obligation.
- CJEU
  - UN Charter has no primacy over the EU law
  - International obligations of UN have no precedence over EU legal order
  - Sanctions against Kati were indeed in breach with EC law
  - the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty (like a right to an effective judicial protection, due process, etc.).
  - **Annulled the EU regulation insofar as it applied to Kadi**



# Kadi case II (2013)

- KADI II
  - Commission adopted the contested regulation...but, in view of all comments received from Mr Kadi and given the preventive nature of the freezing of funds...it considered that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaida network.
  - I.e. Commission relisted Kadi, Kadi challenges the new listing:
  - FR in EU – breach of Kadi’s right of defense.
- CJEU:
  - The contested regulation could not be afforded any immunity from jurisdiction on the ground that its objective is to implement resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
  - ...none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.



# Kadi case - summary

- Pluralist approach to the relationship between EU law and international law
- Departure from traditional embrace of IL by the EU law
- What is the message for domestic courts on the enforcement of SC's resolutions?
- Risk of undermining the image of EU
  
- But judgment warmly welcomed
- 2020 Schrems II
  - CJEU invalidated EU-U.S. Privacy Shield framework on transatlantic exchanges of personal data
  - US Surveillance X sufficient safeguards against access by public authorities -> violation of EU citizens FR on privacy
  
- Commission v Hungary (C-821/19)
  - HUN legislation criminalizing assistance to asylum seekers violates EU law.



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