The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession

*By Francesco Cherubini**

A. Introduction

The jurisdictional control systems (or, to be more accurate, the quasi-jurisdictional control systems) created within the European Convention on Human Rights (ECHR)[1] and the European Union (EU)[2] considerably differ one from each other, besides reflecting the different origin of the treaties in which they have been fashioned; the first, in fact, is a "third system" with respect to States Parties, a system whose unique competence is the subsidiary protection of fundamental rights; the second is instead in charge of safeguarding the uniform implementation and interpretation of norms being mainly targeted at the creation of an Area of Freedom, Security and Justice, developed from the original idea of a "common market" envisaged in the 1957 Treaty of Rome.

Admittedly, the contact between the then European Economic Community (EEC) and human rights happened almost accidentally, when the Court of Justice (CJEU) assumed competence over the latter in order to avoid serfdom to domestic judges, and specifically to Constitutional Courts. Since 1965, when the Italian Constitutional Court first outlined the theory of "counter-limits" in the *Acciaierie S. Michele* ruling,[3] the CJEU has radically

* Assistant Professor of EU Law, Luiss "Guido Carli" (Rome, Italy).

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and entered into force on 3 September 1953, UNTS, vol. 213, 221.

[2] As is commonly known, the process of European integration (apart from sector-based treaties, such as the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community) started with the Treaty of Rome (Treaty Establishing the European Economic Community, adopted Rome 25 March 1957 and entered into force 1 January 1958, UNTS, vol. 294, 17), then coupled with the Treaty on European Union, adopted Maastricht 7 February 1992, OJ 1992 C 191/1, both lastly modified by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed Lisbon, 13 December 2007, OJ 2007 C 306/1.

[3] Judgment of the Italian Constitutional Court of 27 December 1965, no. 98, *Acciaierie S. Michele*, IL FORO ITALIANO, vol. I, 8 (1966). On this point, *see* Ugo Villani, I diritti fondamentali tra Carta di Nizza, *Convenzione europea dei diritti dell'uomo e progetto di Costituzione europea*, IL DIRITTO DELL'UNIONE EUROPEA, 73 (2004), now in UGO VILLANI, STUDI SU LA PROTEZIONE INTERNAZIONALE DEI DIRITTI UMANI 131, 132 (2005).

modified its case law, introducing human rights into the (then) community law and taking upon itself the competence to assess the conformity of the (then) community acts with such rights.[4]

From then on, the issue of the protection of human rights in community law (and then in EU law) has marked a share of the debate on the potential developments of European integration, even though the major efforts have been concentrated on how to guarantee respect of the democratic principle.[5] In fact, the circle connecting the law-making process and its source of legitimacy – popular sovereignty – was still far from coming full, for two main reasons. First, the European Parliament (EP) – the institution representing that popular sovereignty – did not participate in the legislative process, instead only being assigned a merely advisory role. Second, the very nature of the EP, whose members were not elected by direct universal suffrage, was problematic. The resulting so-called "democratic deficit", which characterized the original institutional structure of the EEC, was filled, though only partially, by the introduction of direct elections to the EP in 1976[6] (firstly implemented during the elections of 1979) and by the strengthening of its powers (perfected with the Maastricht Treaty), in particular by the adoption of the co-decision procedure.

Following the consolidation of this process – and particularly following the codification of the human rights-related jurisprudence of the CJEU, introduced by the Maastricht Treaty[7] – and with a view to its further enhancement, attention has been directed to the system of rights protection.[8] This has involved determining the formal inclusion of a binding catalogue of rights in the treaty framework (which only occurred with the reform of Article 6 TEU introduced by the Lisbon Treaty),[9] on the one hand, and the development of a

[4] Case 29–69, Erich Stauder v. Stadt Ulm – Sozialamt, 1969 E.C.R. 419.

[5] *See* Ugo Villani, *Principi democratici e diritti fondamentali nella "Costituzione europea,"* LA COMUNITÀ INTERNAZIONALE 643 (2005).

[6] *See* decision of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, 76/787/ECSC, EEC, Euratom, OJ 1976 L 278/1.

[7] Article F(2) of the Maastricht Treaty reads, "[t]he 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."

[8] See, at the outset, European Commission, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM (79) 210 final 2 May 1979, BULLETIN OF THE EUROPEAN COMMUNITIES, 1 (Supplement 2/79).

regulation aimed at bridging the EU legal order and the specialized system of human rights protection centered on the European Court of Human Rights (ECtHR), on the other.[10]

Pending the conclusion of the process of EU accession to the ECHR, which was initially ruled out by the CJEU[11] and then made feasible by the Lisbon Treaty reform of Article 6 TEU,[12] the interplay between the two Courts has been inspired by a tendency to avoid open conflicts on the occasion of decisions involving adjudication on the scope of fundamental rights.[13] Since the EU is not yet party to the ECHR, what is seen more ostensibly than open conflict is State Parties difficulty with compliance when the courts of the EU and ECHR legal systems take different stances on an issue.

In the following pages, we will outline the relationship between the two Courts in three different scenarios: I) prior to the EU's accession to the ECHR; II) following the (possible) accession; and III) pending the accession process, particularly in the light of the negative opinion given by the CJEU in December 2014.

B. The Relationship Between Luxembourg and Strasbourg

I. Pre-Accession

In the vast majority of cases thus far, the CJEU has sought to avoid the risk of conflict. This has often inspired an alignment of its interpretation of human rights with the jurisprudence of the Strasbourg Court; one may bear in mind, in this context, the ruling in the *Baustahlgewebe GmbH v. Commission* case.[14] There, the CJEU aligned its case law to

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[9] The Charter of Fundamental Rights of the European Union was solemnly proclaimed at Nice by the EP, the Council, and the Commission on 7 December 2000 (OJ 2000 C 364/1). A second version of the Charter (with few modifications) was then again proclaimed by the same institutions at Strasbourg on 12 December 2007 (OJ 2007 C 303/1), with a view to the entry into force of the Lisbon Treaty, whose Article 1(8) has replaced Art. 6 TEU so as to make the Charter binding ("[t]he 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*," (emphasis added)).

[10] Article 6(2) TEU reads: "[t]he 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." On alternative (and then set aside) solutions, different from the accession, see Jean Paul Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, COMMON MKT. L. R. 995, 998 (2011).

[11] *See* Advisory Opinion 2/94 of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I–1759.

[12] *See supra* footnote 10.

[13] *See* PAUL GRAGL, THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 50 (2013).

[14] Case C185/95, Baustahlgewebe GmbH v. Commission of the European Communities, 1998 E.C.R. I–8417.

the jurisprudence of the ECtHR not only regarding the reasonable duration of legal process, but also regarding Article 41 ECHR – the provision that foresees the possibility for the ECtHR to afford just satisfaction to the applicant whose fundamental rights have been violated. In fact, the CJEU reduced the amount of the fine which had initially been imposed on the appellant by the (then) Court of First Instance, following its decision that the procedure before that Court had violated Article 6 ECHR.

Another case worthy of mention is the ruling in *Krombach v. Bamberski*,[15] in which the CJEU recalled the Strasbourg jurisprudence on the right of every person charged with an offence to be effectively defended by a lawyer. It did so in order to endorse the possibility for a domestic judge to deny the enforcement of a ruling passed by a judge of another State on the basis of Article 27(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. [16]

Another significant example is the *Carpenter* judgment,[17] in which the CJEU resorted to the case law of the Strasbourg Court on Article 8 ECHR (right to respect for private and family life) to declare that the removal of a third country national, married to a provider of services who was a national of a Member State, was contrary to Article 49 TEC (freedom to provide services).

More recently, and stressing the necessity of jurisdictional supervision over the United Nations Security Council system of targeted sanctions against alleged Al-Qaeda terrorists, the CJEU invoked the Strasbourg jurisprudence which made the same point, and it considered the inadequacy of that system of sanctions with particular reference to the effectiveness of its judicial review.[18]

Whilst these cases are all instances of CJEU deference to – or alignment with – the Strasbourg Court, there are, at the same time, also instances of ECtHR deference to the Luxembourg Court. This can be noticed in its numerous cross-references to CJEU jurisprudence, used *ad adiuvandum*, such as the one concerning the non-retroactivity of judicial decisions to the detriment of the principle of legitimate expectation,[19] and that regarding the notion of "civil right" set forth in Article 6 ECHR, in which the ECtHR made

[15] Case C–7/98, Dieter Krombach v. André Bamberski, 2000 E.C.R. I–1935.

[16] According to which "[a] judgment shall not be recognised: 1) if such recognition is contrary to public policy in the State in which recognition is sought."

[17] Case C–60/00, Mary Carpenter v. Secretary of State for the Home Department, 2002 E.C.R. I–6279.

[18] Joined Cases C–584/10 P, C–593/10 P, and C–595/10 P, European Commission and Others v. Yassin Abdullah Kadi, 2013 E.C.R 518.

[19] Eur. Court H.R., Marckx v. Belgium, Judgment of 13 June 1979, Series A, No. 31.

explicit mention of the notion of "public service" elaborated by the CJEU.[20] Most importantly, this deference is demonstrated by the great caution exercised by the ECtHR when ruling on EU actions, which, of course, fall virtually outside its jurisdiction. Indeed, although the ECtHR has (rightly) always avoided any direct judicial review of EU acts, it has sometimes found itself adjudicating on the conduct of EU Member States implementing EU legislation. At such times, the Strasbourg Court has, on one hand, resorted to self-restraint, by elaborating the "equivalent protection" criterion (which, where not satisfied, opens to an indirect judicial review of EU law);[21] on the other hand, the ECtHR did not even acknowledge the prerequisites of this criterion, consequently proceeding with such an indirect judicial review very rarely.[22]

In reality, as legal scholars have emphasized,[23] there have been cases in which the attitude of reciprocal deference manifested by the two Courts has given way to an evident contrast between their interpretations of certain human rights. This occurred, at least initially, with reference to the extension of the right to respect for private and family life to business premises, which was excluded by the Luxembourg Court and subsequently upheld by the Strasbourg Court.[24] It also happened in relation to the prohibition to disclose information on foreign medical clinics practicing abortion, which was deemed legitimate by the CJEU in the light of the dispositions on the free movement of services, but was judged illicit by the ECtHR, on grounds of conflict with Article 10 ECHR.[25] Finally, a conflict has emerged between the two Courts over the issue of the impossibility for parties to submit written observations in response to the Advocate General's submissions. Whilst the Luxembourg

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[20] Eur. Court H.R., Pellegrin v. France, Judgment of 8 December 1999, Reports of Judgments and Decisions 1999–VIII.

[21] Eur. Court H.R., Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, Judgment of 30 June 2005, Reports of Judgments and Decisions 2005–VI, and, quite before it, Eur. Comm. H.R., M. & Co. v. Germany, Decision of 9 February 1990, Decisions and Reports 64. On this issue see Alessandra Gianelli, *L'adesione dell'Unione europea alla CEDU secondo il Trattato di Lisbona*, IL DIRITTO DELL'UNIONE EUROPEA 678, 681 (2009); Nicola Napoletano, *L'evoluzione della tutela dei diritti fondamentali nell'Unione europea*, in LA TUTELA DEI DIRITTI UMANI IN EUROPA 3, 40 (Andrea Caligiuri, Giuseppe Cataldi, & Nicola Napoletano eds., 2010).

[22] To tell the truth, the ECtHR has scrutinized indirectly EU law only in cases where Member States had a certain discretionary power in implementing it. *See* Eur. Court H.R., Matthews v. United Kingdom, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999–I.

[23] Villani, *supra* footnote 3, at 152.

[24] *See*, respectively, Joined Cases C–46/87 and C–227/88, Hoechst AG v. Commission of the European Communities, 1989 E.C.R. 2859, and Eur. Court H.R., Niemitz v. Germany, Judgment of 16 December 1992, Series A, No. 251–B.

[25] *See* Case C–159/90, The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others, 1991 E.C.R. I–4685; *see* Eur. Court H.R., Open Door and Dublin Well Woman v. Ireland, Judgment of 29 October 1992, Series A, No. 246–A.

Court has held this to be in line with the right to a fair hearing, in a similar case (concerning the reply to an opinion of the Public Prosecutor before the Belgian Court of Cassation), the Strasbourg Court declared it to be contrary to the right to adversarial proceedings.[26]

The risk of divergent interpretations, albeit not destined to materialize systematically, has not been erased by the Charter of Fundamental Rights of the EU, which became binding following the entry into force of the Lisbon Treaty. Article 52(3) of the Charter[27] does not guarantee with absolute certainty the complete consistency of the jurisprudence of the CJEU with that of the ECtHR.[28] As is well known, the criterion of the more extensive protection is not always a feasible way to resolve a contrast deriving from the potentially different scopes of the conflicting human rights in question. In fact, they are often in a relation of reciprocal opposition, so that a broader expansion of one right implies a heavier limitation of the other (one may consider, for example, the interplay between freedom of expression and the right to privacy),[29] thus rendering the criterion of the more extensive protection an indecisive one.

II. Accession Scenarios

Confronted with this situation, which is at most inadequate to guarantee the full respect of human rights by the EU (and by its Member States, when implementing EU law), its Members opted, after a long and laborious route, for (EU) accession to the ECHR. This was going to be regulated, at first, by the Draft Revised Accession Agreement elaborated by the EU and the Council of Europe.[30] It raises the question of the kinds of effects that accession would have had on the relationship between the two Courts, and of whether accession, as set out in the Agreement, was capable of finally and completely settling the existing lack of external control over the respect of human rights by the Union.

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[26] *See* Case C–17/98, Emesa Sugar (Free Zone) NV v. Aruba, 2000 E.C.R. I–665; *see* Eur. Court H.R., Vermeulen v. Belgium, Judgment of 20 February 1996, Reports of Judgments and Decisions 1996–I.

[27] "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[28] *See* Villani, *supra* note 3, at 151.

[29] *Id.* at 159.

[30] *Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, in *Fifth Negotiations Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final report to the CDDH*, 10 June 2013, 47+1(2013)008rev2, at 4, *available at* www.coe.int/cddh.

EU accession to the ECHR has unquestionable advantages that, nonetheless, presuppose a new balance of interplay between the two Courts. The relationship between the two Courts could not, for instance, only be based on so-called "cross-fertilization", even if this has been and will be fundamental. Whilst the two Courts would continue to influence each other, from the moment of accession the last word would surely rest with the Court of Strasbourg, and it would be for the EU to implement its judgments under the supervision of the Committee of Ministers. This is a fundamental premise, since the norms of the ECHR – to which Member States have resolved to make the EU accede and which acknowledge the ECtHR as ultimate judge of human rights norms – do away with any doubt as to the "supremacy" of the Court of Strasbourg. It suffices to look at the effect of the Strasbourg jurisprudence on the legal systems of Member States to understand that the latter have undergone adjustments to comply with the former and not vice versa. As far as Italy is concerned, for example, one may mention, among many instances, the case law regarding the reasonable duration of process,[31] the case law concerning the so-called reverse accession in the expropriation procedure,[32] and, perhaps even more significantly, the case law on the overturning of final decisions following a later ruling by the ECtHR.[33]

Nevertheless, the "primacy" of the ECHR system should not be exaggerated. On one hand, the ECtHR, as it is commonly known, has a subsidiary nature, with the primary responsibility for the enforcement of human rights norms resting on High Contracting Parties. On the other hand, Strasbourg judges have the use of a tool that allows them to avoid imposing excessive pressure on the monitored legal orders (included the EU one), providing national (and Union) authorities with a relevant discretionary space, or – in other words – with a margin of appreciation. After all, in case of irreparable conflicts (that in any case happen very rarely), the constitutional jurisprudence of domestic courts has deemed it possible to resort to the theory of counter-limits, even towards the ECHR, as interpreted by the Court of Strasbourg. This happened recently – and, as far as we know, for the first

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[31] *See* Michelangela Scalabrino, *L'irragionevole durata dei processi italiani e la L. 24 marzo 2001, n. 89: un commodus discessus*, RIVISTA INTERNAZIONALE DEI DIRITTI DELL'UOMO 365 (2001); Anton Giulio Lana, *I tempi del processo e l'equa riparazione a quattro anni dall'entrata in vigore della c.d. legge Pinto*, *in* LA TUTELA INTERNAZIONALE DEI DIRITTI UMANI. NORME, GARANZIE, PRASSI 496 (Laura Pineschi ed., 2006).

[32] *See* Ugo Villani, *L'occupazione acquisitiva dinanzi alla Corte europea dei diritto dell'uomo*, STUDI SULL'INTEGRAZIONE EUROPEA 23 (2006).

[33] Andrea Saccucci, *Obblighi di riparazione e revisione dei processi nella Convenzione europea dei diritti umani*, RIVISTA DI DIRITTO INTERNAZIONALE 618 (2002); Pietro Pustorino, *Esecuzione delle sentenze della Corte europea dei diritti umani e revisione dei processi penali: sviluppi nella giurisprudenza italiana*, DIRITTI UMANI E DIRITTO INTERNAZIONALE 678 (2007); Marina Castellaneta, *La riapertura dei processi penali a seguito di pronunce della Corte europea dei diritti dell'uomo*, in STUDI IN ONORE DI V. STARACE vol. I, 59 (2008); Gli effetti del giudicato italiano dopo la sentenza n. 113/2011 della Corte Costituzionale, Roudtable with contributions by Giovanni Canzio, Roberto E. Kostoris, Antonio Ruggeri, RIVISTA AIC (2011), *available at* www.rivistaaic.it.

time – in the jurisprudence of the Italian Constitutional Court, which held that a disposition of the Finance Law 2007 on the pension calculation was compliant with the principle of fair trial, notwithstanding that the same disposition had been judged contrary to Article 6 ECHR by the ECtHR in *Maggio*.[34] The CJEU, which is no stranger to recourse to the theory of counter-limits, has also, as the *Kadi* case has clearly shown,[35] availed itself of this last-resort defense mechanism.

Having said that, the Court of Strasbourg will be able to shed light on certain aspects of EU law that are still in the shade, at least in connection with respect for human rights. There are multiple examples and they are far from being of ancillary nature. In some cases, the same competences of the CJEU within the EU represent an impediment to its supervision over the respect of such rights; in these instances, the contribution of the ECtHR (virtually the only judge enabled to hold a pronunciation) will be fundamental. This is the case of the Common Foreign and Security Policy (CFSP), a field in which the Luxembourg Court is (almost) deprived of any competence.[36] It is also the case of the activity of the Agencies, which with difficulty could be brought to the consideration of the Court of Luxembourg. An example is Frontex, the European Agency charged with managing operational cooperation

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[34] Judgment of the Italian Constitutional Court of 28 November 2012, n. 264, RIVISTA DI DIRITTO INTERNAZIONALE, 616 (2013), with a comment of Benedetto Conforti, *La Corte costituzionale applica la teoria dei controlimiti* (see also Pietro Pustorino, *Corte costituzionale, CEDU e controlimiti*, GIURISPRUDENZA ITALIANA 769 (2013)); Eur. Court H.R., Maggio and others v. Italy, Judgment of 31 May 2011.

[35] Joined Cases C–402/05 P and C–415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I–6351. On the use of counter-limits by the CJEU see, among others, Juliane Kokott & Christoph Sobotta, *The Kadi Case—Constitutional Core Values and International Law—Finding the Balance?* EUR. J. INT'L L. 1015, 1017 (2012).

[36] According to Article 24(1) TEU, "[...] [t]he Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [in matters of CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union." Article 40 TEU refers to the dividing line between CFSP and the remaining competences of the EU ("]t]he implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter"); Article 275 TFEU to the "restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union"—measures whose implementation is devolved upon Article 215 TFEU ("1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities [...]").

at the external frontiers of EU Member States, and that, as further proof of the powerlessness of the CJEU, has only recently been subject to an investigation by the European Ombudsman – which highlighted the non-compliance with human rights of certain aspects of its activities.[37]

In other cases, the jurisprudence of the Court of Luxembourg has caused concern regarding its conformity with human rights, meaning that an external check by the Court of Strasbourg would be useful here too. One may think of the case law concerning the standing of natural and legal persons to challenge EU acts, often accused – even by the same Advocates General of the CJEU – of curtailing the right to jurisdictional protection of rights;[38] or, again, of the jurisprudence on the direct effect of EU rules that, at least with regard to directives, has been narrowed by the CJEU so as to cover only vertical legal relationships, leading to a potential violation of the non-discrimination principle;[39] or, eventually, of the case law on the illegitimacy of a norm of EU secondary law in contrast with a disposition set forth in an EU agreement, which the CJEU has made contingent upon the circumstance in which the latter is provided with direct effect.[40]

Nonetheless, EU accession would also imply some risks linked to the new relationship in which the two Courts would find themselves. First of all, notwithstanding all the precautions set out in the Draft Revised Accession Agreement, one may not exclude that the Court of Strasbourg could interfere in the structure of the division of competences between the EU and its Member States. Indeed, the co-respondent mechanism does not fully protect against this risk; Article 3(5) of the Draft Revised Accession Agreement foresees the putting in place of a filtering mechanism by the Court of Strasbourg which, in accepting a request of a High Contracting Party to become co-respondent, would have to consider whether some criteria (set out in Article 3, paragraphs 2 or 3 as appropriate) are met.[41] The ECtHR would, in other words, determine whether an alleged violation by a

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[37] On this point we take the liberty to refer to our *La cooperazione fra Unione europea e paesi del Nordafrica nella lotta all'immigrazione irregolare*, in ATLANTE GEOPOLITICO DEL MEDITERRANEO 15 (Francesco Anghelone & Andrea Ungari, 2014).

[38] UGO VILLANI, ISTITUZIONI DI DIRITTO DELL'UNIONE EUROPEA 345 (3 ed. 2013).

[39] *Id.* at 287.

[40] *Id.* at 354.

[41] "When deciding upon such a request [to become co-respondent], the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met." According to para. 2, "[w]here an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been

Member State results from the implementation of an obligation imposed by the Union, or whether an alleged violation by the EU is consequential on the implementation of an obligation stipulated in the Treaties, which have been agreed upon by Member States. This means that the ECtHR could incidentally end up evaluating the division of competences between the EU and its Member States, which is exactly what the Draft Revised Accession Agreement seeks to avoid.

In addition, proceedings regarding alleged violations by the EU would last longer than those regarding potential breaches by Member States. Indeed, in instances in which the conduct of the EU could not be brought directly before the Luxembourg judges to challenge its compatibility with human rights,[42] and in which there is then eventually resort to the subsidiary protection under the ECHR, it would be necessary to satisfy not only the prerequisite of the full exhaustion of domestic remedies but also the request of a preliminary ruling before the Court of Luxembourg. Indeed, the Draft Revised Accession Agreement (Article 3(6)) stipulates that where (for whatever reason)[43] the case has not yet been referred for a preliminary ruling before being brought to the Court of Strasbourg, the latter shall adjourn the examination of the case to await the pronunciation of the Court of Luxembourg. All in all, (certain) proceedings involving the protection of human rights against EU breaches would have to pass through both domestic judges and the Luxembourg Court before finally reaching the Court of Strasbourg. Such lengthy proceedings would almost certainly result in a potential (and paradoxical) violation of Article 6 ECHR. And this is in the best case scenario; for the length of the process could, indeed, be further stretched by other incidental procedures, such as the deferment of the case to the Constitutional Court by a trial judge doubting that a EU act whose conformity

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

[42] One may refer, for example, to an action for annulment against an act of the Commission on the safeguard of competition.

[43] The reference for preliminary ruling is not compulsory in the case of the lower courts and even, in some cases, for the upper courts, although where it is compulsory there is always the possibility that the judge will rule the matter not relevant and therefore not refer it for preliminary ruling. On this point, see VILLANI, *supra* note 38, at 373.

to human rights has been already asserted by the Luxembourg Court can also stand the domestic obstacle of "counter-limits".[44]

III. In the Aftermath of Advisory Opinion 2/13 of the CJEU

As is well known, the Draft Revised Accession Agreement was submitted to the scrutiny of the CJEU, which was called, by virtue of Article 218(11) TFEU, to give its opinion. Predictably, it was negative,[45] though the range and depth of the doubts expressed by the Court of Justice was unexpected. However, in the Opinion handed down by the CJEU, it is possible, from many points of view, to discern a validation of the crucial point of the analysis presented in this article.

What emerges in the Opinion is the CJEU's clear perception of the role that the Strasbourg Court would play upon accession. The CJEU isolates, with surgical precision, the spaces left open by the Agreement to possible intrusions of the ECtHR, acting as a judge of "last resort". These are spaces created in the absence of a coordination between Article 53 ECHR and Article 53 of the Charter;[46] in the decisions with which the ECtHR decrees (i) on

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[44] This scenario is most likely to further complicate with the entry into force of the ECHR Protocol No. 16 that allows Constitutional Courts (and, more generally, high courts and tribunals indicated by the High Contracting Parties) to request the Strasbourg Court to give advisory opinions in the context of a case pending before them.

[45] Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), http://curia.europa.eu/. For the first comments, see Sionaidh Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, U.K. CONSTITUTIONAL LAW BLOG, *available at* ukconstitutionallaw.org (2014); Henri Labayle, *La guerre des juges n'aura pas lieu. Tant mieux? Libres propos sur l'avis 2/13 de la Cour de justice relatif à l'adhésion de l'Union à la CEDH*, RESEAU UNIVERSITAIRE EUROPEEN DEDIE A L'ETUDE DU DROIT DE L'ESPACE DE LIBERTE, SECURITE ET JUSTICE, *available at* www.gdr-elsj.eu (2014); Tobias Lock, *Oops! We did it again—the CJEU's Opinion on EU Accession to the ECHR*, VERFBLOG, *available at* www.verfassungsblog.de (2014); Walther Michl, *Thou shalt have no other courts before me*, VERFBLOG, *available at* www.verfassungsblog.de (2014); Steve Peers, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, EU LAW ANALYSIS. EXPERT INSIGHT INTO EU LAW DEVELOPMENTS, *available at* eulawanalysis.blogspot.it (2014); Lucia Serena Rossi, *Il Parere 2/13 della CGUE sull'adesione dell'UE alla CEDU: scontro fra Corti?*, SIDIBLOG, *available at* www.sidi-isil.org/sidiblog/ (2014); Martin Scheinin, *CJEU Opinion 2/13—Three Mitigating Circumstances*, VERFBLOG, *available at* www.verfassungsblog.de (2014); Simone Vezzani, *"Gl'è tutto sbagliato, gl'è tutto da rifare!": la Corte di giustizia frena l'adesione dell'UE alla CEDU*, SIDIBLOG, *available at* www.sidi-isil.org/sidiblog/ (2014).

[46] Opinion 2/13, 187–195, 189, which reads, "[i]n so far as Article 53 of the ECHR [stating that 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party'] essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter ['Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'], as interpreted by the Court of Justice, so that the power granted to Member States by Article 53

the request of Member States or the EU to become co-respondent,[47] (ii) on the apportionment of responsibility between the Union and its Member States *in the presence* of an ostensible identity of views between the latter,[48] (iii) on the nature of the question of law at issue in the proceedings before the ECtHR which, if identical to a question which has already been solved by the CJEU, prevents the latter to be priory involved;[49] and finally, and most of all, insofar as the CJEU affirms that, exactly in a field which is taken away from its scrutiny – and, therefore, in which the ECtHR can play an incisive role, *in respect to the protection of human rights* –, the exclusive nature of the control the latter would exercise could jeopardize "the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters."[50]

The Opinion of the CJEU, aside from its content (which is destined to create many problems on the way to the accession), has many chances to negatively influence *even the current* relationship between the two Courts, most of all due to the *animus* it shows. As legal scholars have not failed to point out,[51] the horizon perhaps conceals a break in the spirit of reciprocal deference that, as we earlier noted, has characterized their relationship. This could involve, firstly, the possible desertion, by the Court of Strasbourg, of the doctrine of equivalent protection, which has, thus far, prevented it from scrutinizing (indirectly) acts of the Union. Moreover, it has to be considered that this "narcissistic" Opinion has been delivered by the CJEU in the midst of what is a very critical climate for the Union, whose detractors have now been supplied with another element of disapproval: the fact of facing a legal order which shelters behind its uniqueness, certified by "its" Court, with the purpose of escaping an external system of control – a system which, on the contrary, has been accepted, and with many advantages for the protection of human rights, by the very same States which have given life to the European legal order.

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of the ECHR *is limited* [...] *to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised*", emphasis added.

[47] *Id.* at 222–25, 224 ("[...] in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.").

[48] *Id.* at 229–35.

[49] *Id.* at 236–41.

[50] *Id.* at 249, 257.

[51] Rossi, *supra* note 45. On this point see, e.g., Olivier De Schutter, Bosphorus *Post-Accession: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention*, in THE EU ACCESSION TO THE ECHR 177 (Vasiliki Kosta, Nikos Skoutaris, & Vassili P. Tzevelekos eds., 2014).