

Editorial Comment

Opinion 2/13 on the Accession of the European Union to the European Convention on Human Rights – Foreign Policy Implications

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Twenty years ago, in its Opinion 2/94, the European Court of Justice (ECJ) dismissed the possibility of the European Community adhering to the European Convention for the Protection of Human Rights (ECHR), on the grounds that the European Community lacked the required competence to enter into this agreement. The competence issue was solved by the Treaty of Lisbon, which requires accession in Article 6(2) TEU and also endows the European Union (EU) unambiguously with a legal personality. With the entry into force of the Treaty, accession having become a legal obligation, an agreement was negotiated by the European Commission and submitted to the Council and the European Parliament for approval. However, the Commission also initiated the procedure under Article 218(11) to obtain an opinion of the ECJ on the compatibility of the proposed arrangements with primary EU law. It is in this connection that, on 18 December 2014, the Court decided for the second time round against EU accession to the ECHR – this time not on grounds of lack of competence, but on grounds related to the modalities of accession. The draft agreement providing for the accession of the EU to the ECHR was not compatible with primary EU law (the TEU, the TFEU and the Charter of Fundamental Rights). Presently, the Court's decision is the subject of a growing body of often very critical scholarly comment. What are the aspects of this opinion that are of interest to observers of EU foreign affairs?

No doubt, scholars and practitioners will in the years to come shed light on many intended and unintended effects of this ruling for EU foreign policy. In the meantime, here are some short reflections intended to stimulate further research.

First of all, the judgment may in part be the result of judicial politics of the ECJ on the international level. It can be observed, especially in points 153–176 of the Opinion, that the ECJ is sending a powerful message that will be read not just

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by an internal audience, but by the international community as a whole. The message is *that the EU is not a State, and that it should not be treated as such; instead it is a particular kind of international organization with its own quest for legal and political autonomy*. The Opinion then centres on the role and function of the ECJ in the constitutional structure in the Union, as the guardian of the specific nature of the EU and the characteristics of the EU's legal order, which requires that the division of competence can only be judged by the EU institutions, not by an external judicial body such as the ECHR (or the Council of Ministers for that matter). It is a message that is addressed not just to the Commission who asked for the Opinion, and for good reason. When making affirmations on the subject of the Union's nature or identity, the ECJ gives voice to the objective of enhancing the EU's external profile in the world, and it contributes to shaping the content of public international law.

Second, the fact that the opinion is negative has its own implications. One may seriously ask whether the Opinion and the questions raised therein are additional obstacles in the way (not only of accession but also) of a harmonious interpretation and application of the ECHR and EU law. In itself, the procedure of compatibility contained in Article 218(11) TFUE aims first and foremost at eliminating conflicts and tensions arising from the incompatibility of an international treaty to which the EU intends to become a party with primary law or acts taken by the EU or the Member States for their implementation. However, because the Court found that the draft accession document was incompatible with EU law, the EU will not now be able to accede to the ECHR, unless the text is amended (and the Court gives little indication in what way) or alternatively and much less likely, that EU primary law is revised. As long as a new, more acceptable instrument remains to be drafted, the implications of non-accession, both for the protection of human rights and for the harmonious interpretation of the law will persist. Arguably, however, accession by the EU to the Convention is the best possible contribution to a harmonious interpretation of the law, because it allows a formal interaction between the EU and the Strasbourg institutions.

Third, the opinion and its most direct implications (most likely no accession any time soon), will reflect on the EU's image and credibility as a defender of human rights protection, as it raises questions about the sincerity of its actions for the protection of human rights anywhere in the world. This is because its discourse and actions do not fully correspond. Even assuming that the EU and its Member States act in accordance with the Convention and adopt human rights to an equivalent standards as they would do in their capacity of signatories to the Convention, it remains the case that justice needs not only to be done, but it would also need to be seen to apply. This is one of the reasons why both academics and policy makers have advocated since many years the accession by the European

Community and later the Union to the ECHR, just as the EU requires accession to the ECHR as one of the preconditions of States for becoming a member to the EU. In fact, all EU Member States are parties to the ECHR. If Member States are held responsible for actions required in the implementation of EU law and politics, this may be satisfactory from the viewpoint of human rights, but does not reflect well on the image of the EU at home and abroad, especially when the EU proclaims to be an institution that is to a large extent autonomous from its Member States. Even if one would consider Membership to the ECHR a mere technicality, then still the symbolic impact of accession is not to be neglected.

Fourth, there may be distinct implications in the field of the Common Foreign and Security Policy (CFSP), more so than in the case of other policies. Because the ECJ has hardly any competence in the field of CFSP, it is more likely that complaints are initiated in Strasbourg against the Member States, acting in the implementation or even in breach of CFSP decisions. This is so, for the simple reason that (except in the rather restricted case of the annulment of sanctions against individuals) there are no apparent alternative remedies that must be exhausted first, such as an action for annulment of an EU act or a request for a preliminary ruling. In the absence of EU accession to the ECHR it is the Member States who have to respond to alleged breaches of human rights and the findings of the ECHR may enter into conflict with EU law when their implication is that the Member State's actions in the implementation of EU law are a breach of the ECHR. The implications for the image of the EU, pointed out above, clearly apply in this context.

Fifth, it cannot be excluded that there are implications also for the external aspects of the Area of Liberty, Security and Justice. By comparison to the CFSP, this area is fully integrated into the jurisdiction of the ECJ. However, it is not the first time that the ECHR has functioned as a corrective mechanism for the Member States. In the *Michaud* case, of 6 December 2012, the Strasbourg court has already established that the insufficiently motivated refusal of a reference to the ECJ by the highest court of a Member State of the EU could constitute a breach of human rights, thus indicating that the EU judicial system may have weaknesses the consequence of which may be condemnation of a Member State.

For all these reasons, it is clear that the Opinion of the Court of Justice has a series of implications in the field of external relations and foreign policy that merit closer attention by policy makers as well as by scholarly research of an interdisciplinary nature. It is suggested that although the EU is now clearly endowed with international legal personality, the Union will continue having difficulties to fully profit from it unless it finds ways to take part in international dispute settlement bodies. On this matter, it remains to be seen what solutions can be found in the future, and how near that future will be.