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The First Attempt at EU Accession to the ECHR: Opinion 2/94

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Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1996:140, delivered 28 March 1996.

KEYWORDS

EU accession to the ECHR – Competences – Implied powers – Flexibility clause – Opinion procedure – Admissibility – Fundamental rights.

I. INTRODUCTION

In the historical development of fundamental rights in the European Union, *Opinion 2/94* is a familiar milestone.[1] Following the development of fundamental rights as general principles of Union law, beginning in the late 1960s, accession to the European Convention on Human Rights (ECHR) was seen by many as the logical next step. However, the Court saw it otherwise, finding that the Union did not have the competence to accede. It took a decade before the Member States filled this competence gap, by conferring upon the Union the explicit competence to accede to the ECHR in the Treaty of Lisbon.[2]

In retrospect, it is tempting to view *Opinion 2/94* as a relic of legal history. It decided a narrow and now obsolete issue of competence, and thus delayed the Union's accession to the ECHR, but is of no further importance. However, while the main contribution of *Opinion 2/94* was the clarification of the (lack of) competence to accede to the ECHR, it has also had broader implications. From the perspective of general EU law, it is an important precedent for the admissibility of requests for an Opinion, as well as a demonstration of the limits of

[1] *Opinion 2/94*, EU Accession to the ECHR (I), ECLI:EU:C:1996:140. The Opinion of the Court is prefaced by a separate introduction summarising the request for an Opinion, the procedure, the history of fundamental rights in Community law, and the arguments of the parties on the admissibility and merits of the case. In the following, this chapter will refer to the latter as 'Introduction to *Opinion 2/94*', and the Opinion of the Court as simply '*Opinion 2/94*'.

[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (adopted 17 December 2007, in force 1 December 2009), [2007] OJ C306/1; TEU, Art 6(2).

the 'flexibility clause' (Article 352 TFEU). With regard to the (troubled) relationship between the Union and human rights, *Opinion 2/94* was a turning point in the process of constitutionalising fundamental rights within the Union, and a foreshadowing of what was to come in *Opinion 2/13*.[3] Moreover, *Opinion 2/94* is so far the only case tackling the difficult issue of whether international organisations have implied powers in the human rights field.

II. FACTS

The request for an Opinion was lodged by the Council on 26 April 1994,[4] and was phrased in straightforward terms as follows: 'Would the accession of the European Community to the [ECHR] be compatible with the Treaty establishing the European Community?'[5]

At the time the question was submitted, the Council had yet to take a decision on the opening of negotiations. Indeed, the Council submitted that no such decision could be taken before the Court had 'considered whether the envisaged accession is compatible with the Treaty'.[6] Although the process towards the Union's accession to the ECHR was at a preliminary stage, it had been contemplated for more than a decade. After first rejecting the need for accession in 1976,[7] the Commission in 1979 reached the conclusion that 'the best way of replying to the need to reinforce protection of fundamental rights at Community level' was to accede to the ECHR.[8] The creation of a Union catalogue of fundamental rights as part of the EU Treaties was considered a longer-term project.[9] After some discussion of ECHR accession in both the Parliament and the Council, without substantial progress, the Commission again proposed accession in 1990.[10] This time, the Commission explicitly requested to be authorised to negotiate the details of accession, and proposed negotiation directives.[11] It then took more than three years before the Council requested an Opinion of the Court pursuant to what is today Article 218(11) TFEU.

Since no formal decision to open accession negotiations had been made by the Council, several Member States challenged the admissibility of the request for an Opinion. Ireland and the UK were particularly adamant that the request was inadmissible. Denmark, Finland and Sweden also considered the question premature, but appeared willing to accept that the Court could deliver an Opinion on the general issue of whether the Union had the competence to accede to the ECHR before the negotiations commenced. Then, once the negotiations had concluded, a second request for an Opinion would allow the Court to rule on the legal and technical details of the final accession agreement.[12]

[3] See this volume, ch 70.

[4] *Opinion 2/94* is one of only three cases where the request for an Opinion has been made by the Council. See K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford, Oxford University Press, 2015) 555 fn 26.

[5] Introduction to *Opinion 2/94* (n 1) 'I – The request for an Opinion', para 1.

[6] ibid para 2.

[7] 'The Protection of Fundamental Rights in the European Community' (4 February 1976) COM (76) 37, Bulletin of the European Communities Supplement 5/76, para 28, http://aei.pitt.edu/5377/1/5377.pdf.

[8] Commission of the European Communities, 'Accession of the Communities to the European Convention on Human Rights – Commission Memorandum' (2 May 1979) COM (79) 210 final, Bulletin of the European Communities Supplement 2/79, Introduction and para 7, http://aei.pitt.edu/6356/4/6356.pdf.

[9] ibid Introduction and para 17.

[10] 'Commission Communication on Community Accession to the European Convention on Human Rights and Fundamental Freedoms and Some of Its Protocols' (19 November 1990) SEC (90) 2087 final, http://aei.pitt.edu/3680/1/3680.pdf.

[11] ibid para 6 and Annex I.

[12] Introduction to *Opinion 2/94* (n 1) 'IV – Admissibility of the request for an Opinion', para 1.

On the other hand, the Commission, the Parliament, Belgium, France, Germany, Italy and Portugal argued that the request for an Opinion was admissible. They relied heavily on the text of Article 228(6) EC (now Article 218(11) TFEU)), which defined the object of an Opinion procedure as an 'agreement envisaged'. They emphasised that the Court had interpreted this concept broadly in *Opinion 1/78*,[13] and found that it was in the interest of all Member States concerned by an envisaged agreement that the question of competences be settled when negotiations were commenced. Italy, in particular, stressed that even if the Court considered it premature to assess the compatibility of ECHR accession with the specific rules of the EU Treaties, it 'could not decline to give an Opinion' on the Union's general competence to accede to the ECHR.[14]

The Member States were also split when it came to the merits of the question of competences and legal basis, though along slightly different lines. On this point, Austria took the most radical position in favour of accession. It argued that, since the exercise of all the Union's powers involved the respect for fundamental rights, it constituted a horizontal competence that was mirrored externally.[15]

Austria also joined the Commission, the Parliament, Belgium, Denmark, Finland, Germany, Greece, Italy and Sweden in arguing that, in any case, the so-called 'flexibility clause' in Article 235 EC (now Article 352(1) TFEU) was a suitable legal basis, in the absence of a specific provision authorising accession to human rights treaties. In support of this approach, they alleged that the protection of fundamental rights was a Union objective, and that accession was necessary to protect individuals against violations of the ECHR by the Union institutions, as well as to avoid divergent interpretations between the Court and the European Court of Human Rights (ECtHR). Finally, the Parliament contended that it considered ECHR accession to fall under the second subparagraph of Article 228(3) EC (now Article 218(6)(a) TFEU), so that its assent was required for the conclusion of an accession agreement.[16]

Against this, France, Portugal, Spain, Ireland and the UK submitted that the Union lacked competence to accede to the ECHR. They asserted that neither the TEU nor the EC Treaty contained any provision providing the Union specific competences in the human rights field. Moreover, they dismissed the applicability of the flexibility clause, since respect for fundamental rights was not among the objectives of the Union explicitly set out in Articles 2 and 3 EC (replaced, in substance, by Article 3 TEU and Articles 3–6 TFEU).[17]

The third and final issue at play was the compatibility of ECHR accession with the Court's monopoly to interpret Union law, laid down in Articles 164 and 219 EC (now Article 19(1) TEU and Article 344 TFEU). The Commission, the Parliament, Austria, Belgium, Denmark, Germany, Finland, Italy and Sweden argued that accession would not be contrary to those provisions, since the ECHR laid down 'classic international-law control machinery', and that the ECtHR would not rule on the division of competences between the Union and its Member States. Nor could accession be contrary to the autonomy of the EU legal order, they argued, since the control machinery under the ECHR had not been considered contrary to the constitutions of the Member States. *Opinion 1/91* and *Opinion 1/92*[18] were extensively discussed by

[13] *Opinion 1/78*, Natural Rubber, ECLI:EU:C:1979:224. See this volume, ch 11.

[14] Introduction to *Opinion 2/94* (n 1) 'IV – Admissibility of the request for an Opinion', para 2.

[15] ibid 'V – The legal basis of the envisaged accession', para 1.

[16] ibid para 2.

[17] ibid para 3.

[18] Opinion 1/91 *EEA Agreement (I)*, ECLI:EU:C:1991:490; Opinion 1/92 *EEA Agreement (II)*, ECLI:EU:C:1992:189. See this volume, ch 20.

this group of parties. The recurring theme among them was that the EEA agreement constituted a special risk to the Union's legal autonomy, since EEA law was a carbon copy of Union law. By contrast, the ECtHR would, post-accession, merely be empowered to interpret and apply the ECHR vis-à-vis the Union.[19]

France, Portugal, Spain, Ireland and the UK disagreed. In their view, accession to the ECHR called into question the autonomy of the EU legal order and the Court's monopoly of jurisdiction, as defined in *Opinion 1/91* and *Opinion 1/92*. Led by Spain, the crux of their argument was that the ECtHR would not simply interpret the ECHR, but also 'examine the legality of Community law in light [thereof]' – which, in turn, would have an impact on the case law of the Court. They also worried that the Court would essentially surrender, within the scope of the ECHR, its ultimate authority to interpret Union law to the ECtHR. Portugal in particular argued that it would be difficult to establish mechanisms to resolve questions of the division of competence between the Union and its Member States. Portugal also alleged that, to determine whether local remedies had been exhausted, the ECtHR 'could even rule on the jurisdiction of the Court'.[20]

III. THE COURT

The Opinion of the Court in *Opinion 2/94* opened with its assessment of the admissibility of the request for an Opinion, finding that only the issue of competence to accede is admissible (section IIIA). Consequently, this is the only question the Court then dealt with on the merits (section IIIB).

A. Admissibility

After presenting the wording of Article 228(6) EC (now Article 218(11) TFEU), the Court swiftly emphasised that the purpose of the provision was 'to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community'.[21] In support of this teleological argument, the Court referenced *Opinion 3/94*, which was handed down after the oral hearing in *Opinion 2/94* had concluded.[22] Echoing *Opinion 3/94*, the Court elaborated the point further, emphasising that a later finding that a binding agreement is incompatible with the EU Treaties would cause 'serious difficulties' for all interested parties – within and outside the Union.[23]

Then, tackling the issue of the lack of 'firm information regarding the terms of the [accession] agreement' head on, the Court held that the purposes of the request had to be distinguished.[24] Like the institutions and all the Member States, the Court concluded that Union accession to the ECHR raised two main issues: (i) the competence of the Union to

[19] Introduction to *Opinion 2/94* (n 1) 'VI – Compatibility of accession with Articles 164 and 219 of the Treaty', para 1.
[20] ibid para 2.
[21] *Opinion 2/94* (n 1) para 3.
[22] *Opinion 3/94*, Framework Agreement on Bananas, ECLI:EU:C:1995:436.
[23] ibid para 17; *Opinion 2/94* (n 1) para 4.
[24] *Opinion 2/94* (n 1) para 8.

conclude an accession agreement; and (ii) the compatibility of such an agreement with the provisions of the EU Treaties – in particular, those relating to the Court's jurisdiction.[25]

In discussing the admissibility of *the competence issue*, the Court leaned heavily on *Opinion 1/78*, in which it had held that it is in the interest of the institutions, Member States and other envisaged parties to the agreement that the question of competence be clarified 'from the outset of negotiations and even before the main points of the agreement are negotiated'.[26] According to the Court, the 'only condition' laid down in *Opinion 1/78* was that the purpose of the envisaged agreement is known.[27]

The Court found this condition to be fulfilled when it came to the envisaged ECHR accession agreement. Regardless of how the Union's accession would be arranged for, 'the general purpose and subject-matter of the Convention and the institutional significance of such accession for the Community [were] perfectly well known'.[28] That the Council had yet to formally decide to open negotiations did not render the request inadmissible, as the Council may have legitimate concerns about the extent of its powers before taking such a decision.[29] Finally, the Court added that to ensure the effectiveness (*effet utile*) of Article 228(6) EC (now Article 218(11) TFEU), it must be possible to request an Opinion even before negotiations have formally begun.[30] For those reasons, the Court found the question of competence to be admissible.

With regard to *the issue of compatibility*, the Court came to the opposite conclusion. It stated that, in order to answer that question, the Court had to have sufficiently detailed information about how the Union would be subject to the 'judicial control machinery' established by the ECHR.[31] In the pleadings and during the oral hearings, the Court was not given any detailed information on the potential technical arrangements that would be laid down in the accession agreement. Rather, it was merely provided with vague (and partially conflicting) thoughts and wishes.[32] Consequently, the Court held that it was not in a position to give an Opinion on the compatibility of ECHR accession with the provisions of the EU Treaties.[33]

B. Merits: The Lack of Competence to Accede to the ECHR

The Court needed only 14 succinct paragraphs to present its reasons why the Union lacked the competence to accede to the ECHR. The initial paragraphs were devoted to reiterating the principle of conferred powers, which had to be respected in both the internal and international action of the Union.[34] That said, the Court added that those conferred powers do not necessarily have to be expressly spelled out in the provisions of the EU Treaties, 'but may also be implied from them'.[35] Such implied powers may include the competence to enter into

[25] ibid para 9.
[26] ibid para 19; *Opinion 1/78* (n 13) para 35.
[27] *Opinion 2/94* (n 1) para 11.
[28] ibid para 12.
[29] ibid paras 13–15.
[30] ibid para 16.
[31] ibid para 20.
[32] ibid para 21; Introduction to *Opinion 2/94* (n 1) 'VI – Compatibility of accession with Articles 164 and 219 of the Treaty'.
[33] *Opinion 2/94* (n 1) para 22.
[34] ibid paras 23–24.
[35] ibid para 25.

international agreements, notably, when the Community institutions already have internal powers to attain a specific objective.[36] Not finding further reasoning necessary, the Court jumped straight to its two single-sentence conclusions that '[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field' and that such powers could not be implied either.[37]

The Court then turned to the remaining question: whether accession could be based on the flexibility clause in Article 235 EC (now Article 352(1) TFEU). In doing so, the Court first emphasised the connection between the flexibility clause and the objectives of the Union: powers can only be created using this provision if they are necessary to attain an objective specified by the EU Treaties.[38] Then it turned to explaining the status of fundamental rights in Union law, ostensibly to determine whether they constituted such an objective.[39] It emphasised that the 'importance of respect for human rights' had been emphasised in various declarations by the Member States and the institutions, in the preamble to the Single European Act and in some of the articles of the TEU.[40] Referring to its earlier judgment in *ERT v DEP*, the Court stated that it was 'well settled' that fundamental rights were part of the general principles of Community law, and that the ECHR had 'special significance' as a source in this regard.[41] It also added that respect for human rights was 'a condition of the lawfulness of Community acts'.[42]

Accession to the ECHR would therefore, in the Court's view, 'entail a substantial change' in the EU system of human rights protection, because the Union would be subjected to a 'distinct institutional system' and because the provisions of the ECHR would be integrated into the EU legal order. Since this change would have fundamental institutional implications for both the Union and its Member States, the Court considered it to be of 'constitutional significance'.[43] Consequently, accession would go beyond the scope of Article 235 EC (now Article 352(1) TFEU), and thus 'could be brought about only by way of Treaty amendment'.[44] The Court therefore ultimately concluded that, 'as Community law now stands, the Community has no competence to accede to the [ECHR]'.[45]

IV. THE IMPORTANCE OF THE CASE

In *Opinion 2/94*, the Court gave a rather brief, narrow and decisive reply to the question it had been asked. On its face, its main importance is its (negative) conclusion, which firmly shut the door to ECHR accession until the EU Treaties were revised (section IVA). However, as alluded to in the introduction, the legacy of *Opinion 2/94* is greater. As explained in the following, it is a key precedent for the admissibility of requests for an Opinion of the Court prior to the commencement of negotiations (section IVB). It was also a key turning point in the history of EU fundamental rights protection (section IVC). Moreover, the pleadings of the parties

[36] ibid para 26.
[37] ibid paras 27–28.
[38] ibid para 30.
[39] Though the Court in the end neither confirmed nor denied that fundamental rights were a Union objective, see J Kokott, F Hoffmeister and JH Bello, 'Case Note: Opinion 2/94' (1996) 90 *American Journal of International Law* 664, 667.
[40] *Opinion 2/94* (n 1) para 32.
[41] ibid para 33; Case C-260/89, *ERT v DEP*, ECLI:EU:C:1991:254, para 41.
[42] *Opinion 2/94* (n 1) para 34.
[43] ibid para 35.
[44] ibid para 35.
[45] ibid para 36.

foreshadowed many of the central issues that arose almost 20 years later, in connection with *Opinion 2/13*[46] (section IVD). Finally, *Opinion 2/94* remains relevant for international organisations law generally, due to its unique discussion of implied powers in the human rights field (section IVE).

A. No Competence to Accede to the ECHR without Treaty Amendment

The Court's unequivocal conclusion that the Union did not have competence to accede to the ECHR effectively halted the embryonic accession process. Although the EU Treaties were amended twice in the years immediately following *Opinion 2/94*, no competence to accede was conferred upon the Union.

The Treaty Establishing a Constitution for Europe constituted the first attempt to confer upon the Union the competence to accede to the ECHR.[47] But it was when the Treaty of Lisbon entered into force in 2009 that the competence hurdle identified by the Court in *Opinion 2/94* was finally overcome. Since then, Article 6(2) TEU has stated that the Union 'shall accede' to the ECHR. Today, notwithstanding *Opinion 2/13*, the Union thus has both the competence and a duty to accede.

B. Admissibility Criteria for Opinion Requests

Opinion 2/94 is also a key decision defining the admissibility criteria for requests for an Opinion, and in this connection it is referred to in at least four later Opinions of the Court. One of them used *Opinion 2/94* as the only precedent for the admissibility of a request for an Opinion when a Commission proposal to enter into an agreement has been submitted to the Council, insofar the request concerns competences.[48] The three others used *Opinion 2/94* to establish the test for the admissibility of questions concerning the compatibility of an envisaged agreement with the EU Treaties, namely, that the Court must have 'sufficient information' on the actual content of that agreement.[49]

It is particularly worth noting that later case law adopted the distinction drawn up in *Opinion 2/94* between competences and compatibility.[50] By developing this crucial dichotomy, *Opinion 2/94* constituted an innovative step in the clarification of the admissibility criteria for Opinion requests.

C. Importance for the Development of Fundamental Rights within EU Law

As long ago as the 1970s, the Court held that fundamental rights were among the general principles of Union law, and that Union measures inconsistent with fundamental rights were

[46] *Opinion 2/13*, EU Accession to the ECHR (II), ECLI:EU:C:2014:2454. See this volume, ch 70.

[47] Treaty establishing a Constitution for Europe (adopted 29 October 2004, not in force), [2004] OJ C310/1, Art I-9(2).

[48] *Opinion 1/13*, Convention on the Civil Aspects of International Child Abduction, ECLI:EU:C:2014:2303, para 46. See this volume, ch 69.

[49] *Opinion 2/94* (n 1) para 20; *Opinion 2/00*, Cartagena Protocol, ECLI:EU:C:2001:664, para 6 See this volume, ch 39; *Opinion 1/09*, Unified Patent Court, ECLI:EU:C:2011:123, para 49; *Opinion 2/13* (n 46) para 147. See this volume, ch 70.

[50] This dichotomy is also used in the literature: see eg Lenaerts et al (n 4) 557–58.

invalid.[51] *Opinion 2/94* thus did not break new legal ground with regard to the status of fundamental rights or the importance of the ECHR. However, its succinct summary of these matters was often referenced in later cases.[52]

Opinion 2/94 is more interesting when viewed from a historical perspective. That is because it shifted the focus to what had up to that point been the Commission's second priority: the development of a written Union catalogue of fundamental rights. *Opinion 2/94* also made it clear that such a catalogue of fundamental rights could not be enacted as binding secondary law through the use of the flexibility clause.[53] As predicted by the editors of the *European Law Review* at the time, *Opinion 2/94* thus extended the shelf life of the general principles of law considerably.[54]

Following *Opinion 2/94*, there was a 'constitutional coming-of-age of human rights *within* the EU legal and constitutional framework' (emphasis added).[55] Just over a year after *Opinion 2/94*, the Treaty of Amsterdam established the 'suspension of rights' procedure and enshrined the so-called Copenhagen Criteria in the EU Treaties.[56] Not long thereafter, the Charter of Fundamental Rights was drafted, and was then proclaimed in 2000.[57] With the entry into force of the Treaty of Lisbon in 2009, the Charter became a legally binding part of EU primary law.[58]

D. Importance for Subsequent Attempts to Accede to the ECHR

The entry into force of the Treaty of Lisbon was also the starting point for a renewed attempt at EU accession to the ECHR. The Commission's negotiation directives were drafted, and subsequently approved, by the Council in June 2010.[59] The drafting of an accession agreement then commenced the following month.[60] The negotiations were protracted, partly due to the lack of a common position of the EU Member States on certain issues, and it was not until 2013 that the parties finally agreed on a Draft Accession Agreement.[61]

[51] See, eg Case 4/73, *Nold v Commission*, ECLI:EU:C:1974:51, para 13; Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para 4.

[52] *Opinion 2/94* has, particularly in combination with Case C-299/95, *Kremzow*, ECLI:EU:C:1997:254, been presented in a long list of cases as authority for the proposition that it 'is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures [and that the] ECHR has special significance in that respect'.

[53] Kokott, et al (n 39) 668–69.

[54] 'Community Accession to the European Convention on Human Rights' (1996) 21 *EL Rev* 185, 186.

[55] G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 3rd edn (Oxford, Oxford University Press, 2021) 491.

[56] Treaty of Amsterdam (adopted 2 October 1997, in force 1 May 1999), [1997] OJ C340/1; TEU, Art 7; TEU, Art 49 *cf* Art 2.

[57] G de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26 *EL Rev* 126.

[58] See Art 6(1) TEU.

[59] Unpublished Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the ECHR (3 June 2010). A partially declassified version of the draft decision is available as Council Doc 10602/10.

[60] '1st Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission' (7 July 2010), CoE Doc CDDH-UE(2010)05.

[61] Annex to CDDH 47+1 Ad Hoc Negotiation Group, 'Final Report to the CDDH' (5 April 2013) CoE Doc 47+1(2013)008. For overviews over the negotiation process, see eg A Drzemczewski, 'EU Accession to the ECHR: The Negotiation Process' in V Kosta, N Skoutaris and VP Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford, Hart Publishing 2014); T Meinich, 'EU Accession to the European Convention on Human Rights – Challenges in the Negotiations' (2020) 24 *International Journal of Human Rights* 993.

However, in 2014, the Court rejected it in *Opinion 2/13* as being incompatible with the EU Treaties.[62]

The links between the two Opinions on accession to the ECHR – *Opinion 2/94* and *Opinion 2/13* – deserve to be highlighted. Since the competence issue was resolved by Article 6(2) TEU, the Court's reason for rejecting the Draft Accession Agreement in *Opinion 2/13* was its incompatibility with the EU Treaties. In this connection, it is remarkable how well the arguments of the parties from *Opinion 2/94* line up with the objections of the Court nearly two decades later. In *Opinion 2/13*, it was essentially the arguments submitted in connection with *Opinion 2/94* by France, Portugal, Spain, Ireland and the UK that won the day. Interestingly, though, the views of those very Member States had shifted in the time between the two Opinions. In their submissions related to *Opinion 2/13*, all of them argued that the Draft Accession Agreement was compatible with the EU Treaties.[63]

At the time of writing, renewed negotiations on EU accession to the ECHR have gone on for over a year. Progress appears to be slow, with further negotiation meetings planned through July 2022. If and when a renegotiated Draft Accession Agreement is ready, the Court will likely be asked to give a third Opinion. The key arguments *pro et contra* the compatibility with the EU Treaties of such a renegotiated agreement will likely echo, again, those voiced by the parties in connection with *Opinion 2/94*.

E. Importance for the Doctrine of Implied Powers

At its core, *Opinion 2/94* is a case about (the limits of) implied powers. Indeed, the flexibility clause in Article 235 EC (now Article 352(1) TFEU) is considered an example of an 'explicit implied powers provision'.[64] This makes *Opinion 2/94* of interest to the broader field of international organisations law. From this perspective, *Opinion 2/94* may be read as suggesting that international organisations do not have implied powers in the field of human rights.[65] However, given the specific nature of the flexibility clause – in particular the link between powers and objectives that is emphasised in *Opinion 2/94* – it is uncertain whether the Court's reasoning is relevant for the doctrine of implied powers applicable to international organisations generally.[66] Yet *Opinion 2/94* remains the only judicial decision that has directly addressed this difficult implied powers issue, which is likely to arise for other organisations in the future, given the increasing attention paid to their human rights accountability.[67]

[62] *Opinion 2/13* (n 46). See this volume, ch 70.

[63] *Opinion 2/13* (n 46) para 109.

[64] HG Schermers and NM Blokker, *International Institutional Law: Unity within Diversity*, 6th edn (Leiden, Brill/Nijhoff, 2018) 200.

[65] SØ Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge, Cambridge University Press, 2020) 186 fn 94.

[66] See also G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge, Cambridge University Press, 2011) 76–82; J Klabbers, *An Introduction to International Organizations Law*, 3rd edn (Cambridge, Cambridge University Press, 2015) 62.

[67] See generally, and among others, Johansen (n 65); C Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford, Oxford University Press, 2017); P Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Cheltenham, Edward Elgar 2017).

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