Accession of the EU to the ECHR:

The Permeative Power of Human Rights

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The idea of the constitutionalisation of labour law has been a trend in recent scholarship. In this chapter, the constitutionalisation of labour law refers to the view that some labour rights are to be protected as fundamental human rights.[1] Morally, human rights are stringent entitlements that resist trade-offs when they conflict with other considerations. In law, human rights usually have a special status, higher than ordinary legislation, and constitute standards against which state and private action are assessed. The tendency towards constitutionalisation is evident both at national and supranational level. At European level, which is our focus, evidence of the constitutionalisation of labour rights is found in the EU Charter of Fundamental Rights (EUCFR). At Council of Europe level, it is found in the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), with all the relevant materials of the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR). In addition, EU law now provides that the EU must accede to the ECHR.[2]

All member states of the EU are already signatories of the ECHR, but the EU and its institutions cannot be directly challenged in Strasbourg. Accession is about subjecting the EU and its institutions to external control by the ECtHR, as to respect for Convention rights. Twenty years ago, in 1994, the Court of Justice of the EU (CJEU) issued an opinion on accession that stated that the EU had no competence to accede to the ECHR.[3] The Treaty of Lisbon of 2009 addressed this by requiring accession. In its latest opinion of 2014, the CJEU accepted accession in principle, but considered that the particular arrangements for accession, as contained in the Accession Agreement drafted by the Council of Europe and the European Commission, undermine, in essence, the autonomy of EU law. In this chapter, we discuss the EU accession to the ECHR, its challenges and possible implications for labour rights.

We first present certain important human and labour rights documents that are binding on EU Member States that have been adopted by different organisations with different rationales, as well as the overlap and conflicts in their interpretation by different monitoring bodies. We then

[1] See H Arthurs, 'The Constitutionalisation of Employment Relations: Multiple Models, Pernicious Problems', (2010) 19 *Social & Legal Studies* 403; ACL Davies, *Perspectives on Labour Law* (2nd edition), CUP, 2009; H Collins, 'Utility and Rights and Common Law Reasoning: Rebalancing Private Law through Constitutionalisation', (2007) 30 *Dalhousie Law Journal* 1; J Fudge, 'Constitutionalising Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes', (2015) 68 *Current Legal Problems*; V Mantouvalou, 'Are Labour Rights Human Rights?', (2012) 3 *European Labour Law Journal* 151.
[2] ACL Davies, *EU Labour Law*, Edward Elgar, 2012, p 20.
[3] Opinion 2/94.

turn to the accession of the EU to the ECHR, which is a long and tortuous process that has recently come to somewhat of a standstill, and examine the implications of accession for the protection of EU labour rights by the ECtHR and the CJEU. EU and labour law scholars often argue for the autonomy of their respective areas of law. The final section suggests that through the constitutionalisation of labour rights, we see that human rights can and must permeate all areas of law, including European labour law. Human rights can be used to challenge relations of power by holding state and private actors accountable for their actions. Accession of the EU to the ECHR is an important step to this effect, which ought to be taken. It will prove that the EU is willing to be subject to scrutiny by the expert Strasbourg Court for potential violations of labour and other human rights. Accession can also constitute a first step towards fuller integration of civil, social and labour rights at European level, and help address in this way some of the concerns on the EU's social deficit.

1. Labour Rights in Europe

There is a plurality of supranational sources of labour rights in Europe that have been adopted by different supranational organisations.[4] These organisations had, and to a degree continue to have, different expertise and rationales. The Council of Europe is the oldest regional political organization. It was founded in 1949 with the aims of protecting human rights, democracy and the rule of law. The Third Summit of Heads of State of the organization that convened in 2005 re-iterated the political mandate of the organization, namely the protection of common European values.[5] The ECHR, a treaty that protects civil and political rights mainly, is probably the most influential supranational human rights document. The ECHR is monitored by the ECtHR. The Convention only protects explicitly two labour rights: freedom of association, including the right to form and join trade unions (article 11) and the prohibition of slavery, servitude, forced and compulsory labour (article 4). The ECtHR has over the years developed a significant body of norms that involve aspects of the employment relation. For example in the context of article 11, the Court has examined the right to strike and the right to collective bargaining; through article 4, it has explored exploitative working relations that have been classified as domestic servitude and human trafficking. Other more traditional civil and political rights have also been applied to the employment relation: workplace privacy (article 8 of the ECHR), freedom of religion and expression in the workplace (articles 9 and 10), the right to a fair trial in labour law litigation, protection of workers' salaries and pensions as property (article 1 of Additional Protocol 1 that protects the right to property).[6]

The EU, in turn, was initially established in order to facilitate market integration and promote economic prosperity. The protection of human rights was not part of the initial steps of the project. The role of human rights in the EU legal order has changed gradually over the decades,

[4] For this reason, the protection of labour rights in Europe has also been discussed through the theoretical framework of legal pluralism. See A Bogg, '*Viking* and *Laval*: The International Labour Law Perspective', in Freedland and Prassl (eds), *Viking, Laval and Beyond*, Hart, 2014, p 41. For a counter-argument on pluralism at EU level, see G Letsas, 'Harmonious Law', in P Eleftheriadis and J Dickson (eds), *Philosophical Foundations of EU Law*, OUP, 2012, p 77.

[5] Available at https://wcd.coe.int/ViewDoc.jsp?id=860039&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[6] See, generally, F Dorssemont, K Lorcher and I Schomann (eds), *The European Convention on Human Rights and the Employment Relation*, Hart Publishing, 2013.

though, and is today central in EU law.[7] The formal sources of human rights in the EU are listed in article 6 of the Lisbon Treaty: first, we have the EUCFR; second, the ECHR; third, the general principles of EU law. Article 6(2) provides that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'. The EUCFR, which was adopted in 2000 and became legally binding in 2009, brings together civil, political, economic and social rights, and contains several labour rights.[8] In recent years, the CJEU has been referring to the Charter in its case law.[9] However, it is important to appreciate that the Charter is addressed to the institutions of the EU, and to Member States only insofar as they implement EU law.[10]

The discussion of labour rights in Europe cannot be complete without reference to the ILO. The ILO that was founded in 1919 and is now a specialised agency of the United Nations in the area of labour rights, is grounded on the belief that 'universal and lasting peace can be established only if it is based on social justice'.[11] Its main slogan, which we find in the Declaration of Philadelphia of 1945, is that 'Labour is not a commodity'. All member states of the European Union are also members of the ILO. The ILO specializes in the protection of labour rights and has developed a long list of international labour standards through its many Conventions and Recommendations to which many European states have signed up. All member states of the ILO are also bound by the ILO Declaration of Fundamental Principles and Rights at Work of 1998, which protects four core labour rights: freedom of association and collective bargaining, the elimination of discrimination at work, the abolition of forced labour and the abolition of child labour.[12] The Conventions and the Declaration of Fundamental Principles and Rights at Work are not directly enforceable in European courts. However, the ILO is a specialist organisation in the area of labour rights, and its standard-setting is influential at international and national level.[13]

2. Conflict or Integration?

The Council of Europe, the EU and the ILO have adopted legal documents that protect a range of civil, political, economic and social rights, and there is some overlap in the content of these documents. Against the background of the plurality of sources of human and labour rights in Europe, the EU has approached the ECHR as a source of rights that are binding on it. The Lisbon Treaty explicitly refers to ECHR rights as general principles of EU law.[14] Yet only

[7] See the discussion in S Douglas Scott, 'The European Union and Human Rights After the Treaty of Lisbon', (2011) 11 *Human Rights Law Review* 645.
[8] See chapter x, this volume. See also T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart, 2003.
[9] See eg Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*. For analysis, see E Frantziou, 'Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*', (2014) 14 *Human Rights Law Review* 761. In the labour law context, see eg Case C-155/10, *Williams v British Airways*.
[10] Article 51(1). See further P Eeckhout, 'The EUCFR and the Federal Question', (2002) 39 *Common Market Law Review* 945; C Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', (2006) 6 *Human Rights Law Review* 87.
[11] ILO Constitution, Preamble.
[12] See P Alston, "'Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal of International Law* 457.

[13] On the institutional dynamics of the EU's relationship with the ILO, see Bogg, above n 4, p 62.
[14] Article 6(3).

some of these are particularly pertinent in the context of the present chapter on labour rights and accession of the EU to the ECHR. In the legal protection of some labour rights, we may have harmonious evolution in the interpretation and implementation between the EU and the ECtHR. For example, the ECtHR ruled in the case *Rantsev v Cyprus and Russia*[15] that human trafficking is prohibited under article 4 of the Convention, and developed a list of positive state obligations that can serve to address the problem.[16] The EUCFR also prohibits slavery, servitude, forced and compulsory labour, and human trafficking in article 5. In addition, the EU adopted a Human Trafficking Directive.[17] In its Report on 'The EU Strategy Towards the Eradication of Trafficking in Human Beings 2012-2016', the European Commission referred to the importance of the *Rantsev* judgment of the ECtHR.[18] In the area of labour trafficking, in other words, there is convergence in the evolution of the law by the Council of Europe and the EU, which may be due to the fact that the prohibition of slavery, servitude, forced and compulsory labour, is absolute in international law, including the ECHR and the EUCFR. The fundamental status of the right may make it more amenable to convergent evolution.

The monitoring bodies of the EUCFR, the ECHR, and the ILO have also, over the years, shown an increasing willingness to take note of each others' decisions. For instance, the CJEU has frequently referred to the ECHR and taken account of Strasbourg Court decisions.[19] ILO documents too have figured in judgments of the Luxembourg Court.[20] The ECtHR itself referred to the EUCFR in its case law even at a time that the Charter was not legally binding,[21] and continues to do so.[22] Unsurprisingly, though, we do not always find harmony in the interpretation of labour rights in Europe. There are also conflicting interpretations of human and labour rights by the different monitoring bodies, and there have in fact been some inconsistencies in the interpretation by the Strasbourg and Luxembourg courts.[23] Similarly, the ILO monitoring bodies, on the one hand, and the ECSR and the ECtHR, on the other, sometimes diverge in their approach to the balancing exercise when examining restrictions to labour rights.[24]

The real difficulty emerges, though, when the conflicting interpretations between monitoring bodies are due to the different rationale of each organisation that has founded them. In the

[15] *Rantsev v Cyprus and Russia*, App No 26965/04, Judgment of 7 January 2010.
[16] See further V Mantouvalou, 'Slavery, Servitude, Forced and Compulsory Labour in the European Convention on Human Rights', in Dorssemont et al (eds), above n 6, p 143.
[17] Directive 2011/36/EU of 5 April 2011.
[18] Available at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf

[19] See eg Case C-34/13, *Kušionová* [2014] ECR I-2189. For an early account of the interplay between the CJEU and the ECtHR, see S Douglas Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', (2006) 43 CMLR 629. See also the more recent, cited above n 7.

[20] See eg Case C-214/10 *KHS* EU:C:2011:761. For a general discussion see A Seifert, 'The Still Complex Relationship between the ILO and the EU: The Example of Anti-Discrimination Law' (2013) 29 IJCLL 39.
[21] *Christine Goodwin v UK*, App No 28957/95, Judgment of 11 July 2002.

[22] See eg *Schalk and Kopf v Austria*, App No 30141/04, Judgment of 24 June 2010.

[23] See the discussion of D Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities', in Alston (ed), *The EU and Human Rights*, OUP, 1999, p 757.
[24] See the discussion in Bogg, above n 4.

context of labour rights, this becomes evident in transnational collective action (labour rights that are central in the rationale of the ILO and the Council of Europe) that may be viewed as an obstacle to economic integration (which is traditionally viewed as a central aim of the EU). In this area, there is a vast amount of literature that criticizes the CJEU for subordinating labour rights to economic freedoms. The notorious *Viking* and *Laval* line of cases illustrate this.[25] In these cases, the CJEU ruled that industrial action that limits employers' free movement rights[26] is a fundamental right, and was welcomed for this reason. However, the CJEU found that industrial action is compatible with EU law only when it is exercised proportionately to EU free movement rights.[27] The judgments of the Court were firmly grounded on its concern for economic integration, and have been heavily criticised because, on the view of many scholars, they paid insufficient attention to the particularities of the employment sphere and the role of transnational collective action for the protection of workers' rights in the context of economic integration.[28] A key concern is that this line of cases can lead to a race to the bottom between EU member states, to which workers and their organisations will be unable to resist if they have extremely limited rights to collective action.

The approach of the CJEU has been contrasted with the approach of the ECtHR in a line of cases under article 11.[29] Starting with the judgment in *Wilson and Palmer v UK*,[30] the ECtHR has generally been open to claims brought by workers and their unions. It has recognised that the right to collective bargaining and the right to strike fall in the scope of article 11 of the ECHR, and that any restrictions of these rights have to pursue a legitimate aim and satisfy a test of proportionality under the second paragraph of article 11. The ECtHR has found that several Council of Europe member states breach their obligations under article 11 of the Convention because of the restrictions on the exercise of collective labour rights.[31] In this case law the Court adopted what has been described as an 'integrated approach to the interpretation' of the Convention, because it integrated certain social and labour rights in a civil and political rights document.[32] By integrating ILO and ESC materials in the ECHR, the Court recognised the expertise of these bodies in relation to labour law matters, and offered support to the position that there is no sharp dividing line between civil and social or labour rights. The integration of ILO materials in the scope of the Convention was discussed extensively by the Strasbourg Court in the 'epoch making', in the words of Ewing and Hendy, *Demir and Baykara v Turkey*,[33] 'a decision in which social and economic rights have been fused permanently with

[25] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* (Judgement 11 December 2007) and Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* (Judgement 18 December 2007).
[26] Freedom of movement in Article 43 and freedom of establishment in article 49.
[27] See ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', (2008) 37 ILJ 126.
[28] There is a vast amount of literature on the judgments. See the contributions in M Freedland and J Prassl (eds), *Viking, Laval and Beyond*, Hart, 2014. The book also contains an extensive bibliography.
[29] K Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*', (2010) 39 ILJ 2; V Velyvyte, 'The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence', (2015) 15 *Human Rights Law Review* 73.
[30] *Wilson and Palmer v UK*, App Nos 30668/96, 30671/96 and 30678/96, Judgment of 2 July 2002. See K Ewing, 'The Implications of *Wilson and Palmer*', (2003) 32 *Industrial Law Journal* 1.
[31] See eg *Danilenkov v Russia*, Application no 67336/01, Judgment of 30 July 2009; *Enerji Yapi- Yol Sen v Turkey*, Application no 68959/01, Judgment of 21 April 2009.
[32] V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', (2013) 13 *Human Rights Law Review* 529.
[33] *Demir and Baykara v Turkey*, App No 34503/97, Grand Chamber Judgment of 12 November 2008.

civil and political rights, in a process which is potentially nothing less than a socialisation of civil and political rights'.[34]

While the ECtHR has, in the above line of cases, protected trade union activities from disproportionate interference by state authorities and employers, the CJEU has shown little willingness to do so. In a recent ECtHR concurring opinion in a judgment on the right to strike, Judge Pinto de Albuquerque pointed to the inconsistency in the approach of the CJEU and the ECtHR, and suggested that after the Lisbon Treaty that gave the EUCFR binding effect, the CJEU may interpret the right to strike in a way that is more in line with ECHR case law.[35] After the EU accedes to the ECHR, the interpretation of collective labour rights of the CJEU will be liable to challenge before the Strasbourg Court. Where do things stand in the process of accession?

3. The Accession Saga and Mutual Trust

We will first briefly consider some potential benefits of accession, which are not limited to issues of labour rights, before turning to recent developments. First, at the moment, the actions of the institutions of the EU cannot be challenged directly by individuals before the ECtHR. Individuals can only challenge actions of Member States when they implement EU law. This leaves a gap in human rights protection. This gap is particularly important to address because the CJEU has at times been criticised for not taking rights seriously.[36] The record of the CJEU in this area may be due to the fact that it does not have the lengthy experience of the ECtHR in human rights adjudication, or because the protection of human rights was not until recently the central focus of the EU. The example of labour rights discussed in the above section illustrates this latter point well. A second reason why accession is important is that there is a criticism of double standards, which is due to the fact that the EU requires all Member States to sign up to the ECHR, but is not a signatory itself.[37] A third reason involves external relations: the EU seeks to play a role as a global human rights actor by having a human rights agenda in its external relations.[38] This role cannot be convincingly pursued if the EU itself is reluctant to be held accountable by the ECtHR. There is little doubt that accession of the EU to the ECHR would be an important step towards proving and strengthening the credibility of the EU in the area of human rights. Further attractions become visible if one scrutinises the evolving EU system of fundamental rights protection somewhat more in depth, as we will do in the sections that follow.

However, the process of accession has not been straightforward. The least that we can say is that it is protracted. The CJEU's 1996 rejection appeared to have been overcome by the Lisbon Treaty, which mandates EU accession.[39] However, that Treaty also introduced a Protocol on accession, instructing the negotiators to ensure that the specific characteristics of EU law be

[34] Ewing and Hendy, as above n 29. Cf *National Union of Rail, Maritime and Transport Workers v United Kingdom*, Application No 31045/10, Judgment of 8 April 2014, discussed below.

[35] Concurring opinion, footnote 21.
[36] See, for instance, J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669; see also the literature on *Viking* and *Laval*, cited above.
[37] See Douglas Scott, as above n 7, p 658.
[38] See the discussion in G de Burca, 'The Road Not Taken: The European Union as a Global Human Rights Actor', (2011) 105 *American Journal of International Law* 649.
[39] Opinion 2/94 re Accession to the ECHR EU:C:1996:140 and Art 6(2) TEU.

preserved and that the EU's competences or the powers of its institutions not be affected. [40] Those conditions gave the CJEU the chance to issue a further negative Opinion, which has received much commentary - most of it highly critical. [41] There is no need for this chapter to explore that commentary in general. We do consider that the Opinion, which the President of the ECtHR, Judge Spielmann, described as a 'great disappointment',[42] constitutes a missed opportunity from a labour law perspective, for endorsing a further integration of European human rights law, including social rights and labour law.[43] This integration paradigm is discussed below.

At this point in time it is unclear whether accession is postponed *ad calendas graecas*, or whether the EU institutions and the negotiators of the accession agreement will find a way forward to overcome the CJEU's objections. None of them expressly concerned social rights or labour law issues. The CJEU was primarily worried about safeguarding the autonomy of EU law, a concept which in the Opinion is mostly a proxy for the Court's own exclusive jurisdiction. This autonomy concept is long established in the CJEU case law, and was originally focused on ensuring that EU law is autonomous vis-à-vis the Member States' domestic laws. As such, it is closely connected to the foundational rules of the direct effect and primacy of EU law. However, in more recent years the CJEU has increasingly also spoken of the autonomy of EU law viv-à-vis international law. [44] There are nevertheless aspects of the Opinion, and statements by the Court, which may have consequences for social rights.

One of the CJEU's principal concerns, it seems, is that accession should not affect the principle of mutual trust (or mutual recognition).[45] In a nutshell, that principle means that the EU Member States must accept each other's laws and procedures as equivalent, and that they cannot check whether another Member State complies with its EU law obligations, even as regards fundamental rights. The Opinion's analysis is focused on how that principle operates in the EU policies concerning the Area of Freedom Security and Justice (AFSJ). The Court

[40] See Arts 1 and 2 of Protocol No 8 EU.

[41] Opinion 2/13 re Accession to the ECHR EU:C:2014:2454. See for the critical literature S Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and its Potential Consequences', (2015) 16 German Law Journal 169; A Lazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR', (2015) 16 *German Law Journal* 179; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', (2015) 16 *German Law Journal* 213; X, 'Editorial Comments: The EU's Accession to the ECHR - A 'NO' from the ECJ!', (2015) 52 CMLRev 1; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue - Autonomy or Autarky?' Jean Monnet Working Paper 1/15; E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union After Opinion 2/13' (2015) 22 MJ 1; and the following blogs: S Peers at <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>; L Besselink at < http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/>; S Douglas-Scott at <http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>: P J Kuijper at <http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks's-acelg-blog/>.
More positive are D Halberstam, ' "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights', (2015) 16 *German Law Journal* 105; and C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13', (2015) 16 *German Law Journal* 147.

[42] http://www.law.cam.ac.uk/press/news/2015/03/echr-president-dean-spielmann-speaks-on-accession-of-the-eu-to-the-echr/3009

[43] V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRLR 529 and P Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 CLP 169.

[44] See B de Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) 65 ZÖR 141.

[45] Opinion 2/13, paragraphs 190-195.

considers that instruments such as the Dublin Regulation (asylum) and the European Arrest Warrant (EAW) could not properly function without restricting the ability for Member States to review whether the Member State to which they return an asylum seeker or surrender an accused/convicted person risks violating fundamental rights. The CJEU is concerned that the ECtHR does not currently accept this principle of mutual trust, [46] and wants the accession agreement to prevent the ECtHR from interfering with it.[47] In its analysis of this objection (as in other places in the Opinion) the CJEU considers that 'the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law *to the exclusion, if EU law so requires, of any other law*'. [48]

The above statement is rather enigmatic, in the context of accession. It suggests that the Convention ought not to apply to certain matters governed by EU law; in the section of the Opinion in which the CJEU makes the statement, it appears to mean that the Convention ought not to apply to the return of an asylum seeker or the execution of an EAW, issues which are governed by EU law, to the exclusion of any other law. But there is no basis for this exclusionary claim, which would amount to a partial accession: not all of EU law and not all acts of the EU institutions would be subject to the ECtHR's scrutiny. It is a claim which appears to reach substantially further than the terms of Protocol 8, which merely require that the EU's specific characteristics be preserved. Nor are there any clear parameters for determining the boundaries of this exclusionary approach. The statement that would lead to partial accession also has no parallel in the jurisdiction of the ECtHR over member states of the Council of Europe. All state action (with rare exceptions in the area of state immunity)[49] is subject to control by the ECtHR for compatibility with the Convention. It is far from clear why the EU should enjoy this kind of special treatment as a member of the ECHR.

The principle of mutual trust or recognition is not confined to the AFSJ. It in fact originates in EU internal market law. In that context, too, an exporting Member State cannot check whether the importing Member State complies with its EU law obligations.[50] It is but a small step from this principle to the much debated interface between EU internal market law and fundamental social rights: *Viking* and *Laval*. The question therefore arises whether accession, under the conditions imposed by the CJEU, might affect the *Viking* and *Laval* case law. Would the CJEU consider that this too is a matter governed by EU law, to the exclusion of the Convention? If that were the case, the CJEU would not allow the ECtHR to intervene where internal market freedoms collide with rights to collective action, or social rights more generally. As was said earlier, the ECtHR's case law on collective action is generally regarded to be more protective than that of the CJEU, so the exclusion of *Viking* and *Laval* type of cases from Strasbourg control would lead to lack of accountability of the EU in an area where free movement may have a very significant effect on workers' rights.

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[46] See in particular *M.S.S. v Belgium and Greece*, Application No 30696/09, ECHR 2011 and *Tarakhel v Switzerland [GC]*, Application No 29217/12, ECHR 2014. On *Tarakhel*, see C Costello and M Mouzourakis, 'Reflections on Reading Tarakhel : Is 'How Bad is Bad Enough' Good Enough?', (2014) *Asiel en Migrantenrecht* 404. See also C Costello, 'The Ruling of the Court of Justice in NS/ME on the Fundamental Rights of Asylum Seekers under the Dublin Regulation: Finally, an End to Blind Trust across the EU?' (2012) *Asiel en Migrantenrecht* 83.

[47] Opinion 2/13, paragraph 195.

[48] Opinion 2/13, paragraph 193, italics added; see also paragraph 212.

[49] See eg *Al-Adsani v UK*, App No 35763/97, Judgment of 21 November 2001.

[50] See inter alia Case C-1/96 *Compassion in World Farming* EU:C:1998:113.

The example shows the uncertainties surrounding the CJEU's insistence to protect the principle of mutual trust, as well as its conceptual weakness. What is specific to how that principle operates in the sphere of the AFSJ, so as to distinguish it from internal market law? The CJEU considers that there are limits to the ability of a Member State to rely on human rights, in a cross-border AFSJ context. It is not clear in what way that is any different from a Member State (or indeed a trade union) relying on human rights in an internal market case - or indeed any other case involving EU law. It is further worth noting that the interface between EU internal market law and human rights is not limited to fundamental social or labour rights, but extends to civil and political rights. [51]

At any rate, a wide construction of the CJEU's mutual-trust objection must be resisted, as it would affect the very aim of accession: to subject the EU institutions, including the CJEU, to scrutiny by the ECtHR. The negotiators of a new accession agreement should find a way to circumscribe any specific mutual-trust regime.

What is the way forward for accession? The Opinion contains another general statement which, when further analysed, points to a potential solution. In the first section of the Opinion, in which the CJEU speaks generally about the aims and scope of accession, and about the nature and autonomy of EU law, the Court considers that 'the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of ... fundamental rights be ensured *within the framework of the structure and objectives of the EU*'. [52] This is another statement which needs to be handled with care. There is indeed a danger that this is read as meaning that the protection of fundamental rights, in and by the EU, is subordinated to the EU's policy objectives. To put it bluntly: the protection of human rights is fine, as long as it does not interfere with the EU's objectives - such as the creation of the AFSJ, or the establishment of the internal market. That however cannot be the right reading of this statement. It is clear from Art 2 TEU that the EU is *founded* on respect for human rights, a value which is common to the Member States. This foundational value must always be respected, and takes priority, conceptually and structurally, over the EU's aims and objectives (listed in Art 3 TEU, which refers to the AFSJ and the internal market). The CJEU itself emphasised, particularly in *Kadi I*, that all acts of the institutions, whichever their objectives, must respect fundamental rights.[53]

There is however a more narrow reading of this 'objectives' statement, which is to be preferred, and which may also inspire the drafting of a clause in the accession agreement protecting the mutual trust principle. This reading is equally relevant to the interface between fundamental freedoms and fundamental social/labour rights. It focuses on the kinds of public interests which are capable of limiting those fundamental rights that are not absolute - which are most of the rights in the ECHR and in the EUCFR. Trade union rights in article 11 of the ECHR, for instance, may be subject to limitations for reasons of public interest. In an EU context, those public interests may be different from a particular national context. Where the EU legislates, the EU public interest which is capable of justifying limitations to fundamental rights, can be readily identified. For example, in the *Kadi* litigation, that interest is international security. [54]

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[51] See inter alia Case C-112/00 *Schmidberger* EU:C:2003:333; Case C-36/02 *Omega Spielhallen* EU:C:2004:614. (Commentary?)

[52] Opinion 2/13, paragraph 170, italics added.

[53] Joined Cases C-402/05 P and C-415/05 P *Kadi I* EU:C:2008:461, paragraph 284.

[54] See Joined Case C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518, paragraph 131 for the Court's focus on finding the right balance.

In a case such as *Schecke*, on the publication of farmers' subsidies data, it is transparency. [55] But there is also an EU public interest in cases involving internal market freedoms and fundamental rights: quite simply the EU's interest in establishing a well-functioning internal market. This is the public interest which the CJEU balanced against collective labour rights in *Viking* and *Laval*.

We are not suggesting that the CJEU found the right balance in *Viking* and *Laval*, which have also been criticised from an EU internal market perspective[56] or that the answer to the question posed in these cases is an easy one to address. The cases brought to the fore the social deficit of the EU,[57] a very sensitive political issue which cannot easily be addressed by a court. It can be said that, as these fundamental social rights are not absolute, and article 11 of the ECHR contains a limitation clause for specific reasons, the EU's internal market interest is capable of justifying limitations. That interest is to some degree different from the kind of public interests which may limit those rights at a national level. The right of establishment and freedom to provide services are arguably more than mere private rights in the EU context. They have an integration aim, which transcends pure economic efficiency considerations.[58] This EU public interest is also at work in other cases involving conflict between internal market freedoms and human rights. *Schmidberger* is a good example: the rights of Austrian demonstrators (freedom of expression and right of assembly) have to be balanced against the EU interest in ensuring free movement of goods.[59] This is a specific EU public interest, which was clearly in issue in the case (which concerned the blocking of a vital motorway connecting Germany and Italy), and which was different from any domestic interest capable of justifying limitations. The legitimate aim pursued and the outcome of the balancing exercise which the CJEU performs may therefore be different from any purely domestic analysis.

We would suggest that the CJEU's emphasis on the EU's objectives, and its desire to protect mutual trust, should be read along the above lines: as a reminder that the EU has public interests of its own, which need to be taken into account, also by the ECtHR, when reviewing the CJEU's fundamental rights case law. In the context of the AFSJ, this would mean identifying the principle of mutual trust as an EU public interest capable of limiting the extent to which a Member State checks another Member State's respect for fundamental rights in matters of asylum or criminal justice. In the context of fundamental social/labour rights, it would amount to a recognition that the internal market is an EU public interest the protection of which is capable of constituting a legitimate aim in a test of proportionality. This does not seem to be incompatible, as a legitimate aim, with the second paragraph of article 11, which permits limitations to rights for reasons of 'national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'.[60] That the protection of the internal market may constitute a legitimate aim does not, of course, mean that any restrictions to workers' rights in order to promote this aim will be legitimate.

[55] Joined Cases C-92/09 and C-93/09 *Schecke* EU:C:2010:662.
[56] See S Weatherill, 'Viking and Laval: The EU Internal Market Perspective', in Freedland and Prassl, p 23.
[57] C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future', (2014) 67 *Current Legal Problems* 199.
[58] M Maduro, *We the Court - The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998).
[59] Cited above.
[60] Cf the approach of the ILO on this matter.

4. Accession and the EUCFR

At face value it may seem that EU accession to the ECHR would yield few gains in terms of enhanced protection of fundamental social or labour rights, given that the EUCFR acquired legally binding effect in the Lisbon Treaty. In contrast with the Convention, the EUCFR expressly includes social and economic rights. In at least some areas of social policy, such as aspects of anti-discrimination law, the EU has played an important role and has influenced national equality law in European legal orders.[61] Accession would seem to add little to fundamental rights protection in the field of labour law. Nevertheless, there are attractions, and they are not limited to what many commentators perceive to be the greater willingness of the ECtHR to safeguard collective labour rights.[62]

The entry into force of the EUCFR has not always achieved the original aims of simply providing for a clear catalogue of rights, making them more visible. Instead, it has triggered a series of questions and debates which are mainly of a constitutional and institutional nature, and which do not as yet result in a more coherent or extensive system of rights protection. Those questions and debates concern the following.

First, what is the scope of the EUCFR in relation to national law, which is subject to the Charter only when Member States are 'implementing' EU law (Art 51(1))? The CJEU case law has not brought much clarification, as it has simply confirmed the long-established principle that Member States are bound by EU fundamental rights when they act within the scope of EU law.[63] The case law has veered from a wide conception, such as in the case of a criminal prosecution involving VAT fraud, [64] to a much narrower conception in cases involving third-country family members of EU citizens, [65] and Eurozone bail-out measures, which we discuss below.

Second, Art 52(3) of the Charter introduced a problematic distinction between rights and principles, of particular relevance to social and economic rights.[66] This distinction is problematic in two ways: it is not clear at all which Charter provisions embody rights, and which express principles; and the apparent lesser status of those principles is ill-defined. Again, the CJEU case law has not as yet managed to bring greater clarity. [67]

Third, the relationship between the Charter, on the one hand, and the ECHR and national constitutional law, on the other, is contested. The CJEU appears to prefer the Charter over the ECHR, even if the Charter replicates Convention rights and provides that it in no way derogates from the Convention (Art 52(5)).[68] Its *Melloni* judgment, holding that higher standards of

[61] See eg the analysis in M Bell, *Anti-Discrimination Law and the European Union*, OUP, 2002; M Bell, *Racism and Equality in the European Union*, OUP, 2008; C O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law', (2011) 11 *International Journal of Discrimination and the Law* 7.
[62] See literature in note 29 above.
[63] Case C-617/10 *Fransson* EU:C:2013:105, paragraphs 21-22.
[64] Ibid.
[65] See eg Case C-256/11 *Dereci* EU:C:2011:734.
[66] See for a comprehensive discussion, D Gudmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is A Doctrine of Judicial Restraint More Appropriate?' (2015) 52 CMLRev 685. See also the Opinion of Advocate General Cruz Villalón in Case C-176/12 *Association de médiation sociale* EU:C:2013:491.
[67] See Case C-176/12 *Association de médiation sociale* EU:C:2014:2.
[68] G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 MJ 168.

constitutional protection cannot apply when Member States apply uniform EU legislation, is controversial. [69]

Following Greer and Williams, the EU system of fundamental rights protection can be said to be built on an 'institutional justice' model, rather than an 'individual justice' one. [70] This is not to say that the above-mentioned issues and questions are insignificant. They require analysis and answers. We nonetheless fear that the current EU law debates about them are excessively orientated towards finding institutional answers, rather than focusing on what is invariably, in a human-rights context, a basic question: what ought to be the rights of the person claiming them? Let us illustrate this a little further. The debate about the scope of the EUCFR has a clear institutional focus. It looks at when the Member States are implementing EU law, and at how close the connection between what Member States do and EU law needs to be for the Charter to apply. Instead, the aim could be to look at the individual who claims her rights, and whether her case is sufficiently connected to some form of EU action to make the EU responsible for her protection and to trigger the application of the Charter. A second illustration would be the debate about rights and principles. Here too, the case law appears to have been hijacked by the institutional issue of the lack of horizontal effect of EU directives.[71] Instead, there could be a greater focus on the specific Charter provisions and the nature of the rights or freedoms they proclaim. [72] A third illustration is Opinion 2/13, which hardly mentions the position of individuals, bearers of rights, at all. Its focus is nearly exclusively on institutional issues, in particular the position and jurisdiction of the CJEU.

It is our view that EU accession to the Convention could assist in reorienting these debates towards a model of individual justice - in other words towards a greater focus on the actual rights of victims of human rights violations and the accountability of the authorities. The ECtHR has had to address institutional issues and questions, such as the ones discussed here, in its case law, and has sometimes employed its margin of appreciation doctrine, recognizing discretion to state authorities.[73] However, it can fairly be argued that it cares less about the institutional issues and questions referred to, and its interventions in EU law cases could in this sense have a salutary effect.

Of course this is all in the realm of conjecture, but let us explore the potential for ECtHR intervention a little further, particularly as regards questions of scope of the EU Charter and of EU human rights protection generally, in an area which is of great relevance for social and economic rights, namely bail-outs. Unfortunately, the CJEU has rejected the application of the Charter to Eurozone bail-out policies. In *Pringle*, the Court found that the European Stability Mechanism (ESM), the current principal bail-out funder, was set up outside the scope of the EU Treaties, and concerned economic policy, which is not EU competence.[74] The effect would appear to be that ESM-funded bail-outs, and the consequent MOUs - which as a rule include conditions with grave effects on social and economic rights - are not subject to review under the EU Charter.[75] This would be the case notwithstanding the fact that both the European Commission and the ECB are involved in drafting and implementing these MOUs; and that the

[69] Case C-399/11 *Melloni* EU:C:2013:107; see further A Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10 EuConstLR 308.
[70] S Greer and A Williams, 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?' (2009) 15 ELJ 462.
[71] *Association de médiation sociale*, cited above.
[72] See Gudmunsdóttir, cited above.
[73] G Letsas, 'Two Concepts of the Margin of Appreciation', (2006) 26 OJLS 705.
[74] Case C-370/12 *Pringle* EU:C:2012:756.
[75] Barnard, as above n 57, at 208.

Court also held that these bail-outs must respect EU law conditionality in terms of sound (many would say austere) budgetary policies. [76] Furthermore, the CJEU has rejected references by national courts on bail-out policies and the Charter as inadmissible on the ground that they do not concern the implementation of EU law. [77]

The above findings are hard to defend, and have been convincingly criticised.[78] There is definitely scope, under EU law, for a different approach. This is not the place to develop that approach, other than to say that, from a more general perspective, it makes little sense to argue that Eurozone bail-outs do not involve action by the EU institutions and therefore cannot be subject to scrutiny under the Charter. Just imagine trying to explain to a Greek pensioner whose pension has been cut, that the EU is not involved in this. So what could be the role of the ECtHR in all this? It is clear from Opinion 2/13 that the CJEU is adamant that the ECtHR should not look into questions about the scope of the Charter, or about who is responsible, the EU or an EU Member State. [79] However, it is also clear that, after EU accession to the Convention, the ECtHR could not decline ruling on bail-out issues under the Convention: individuals have rights, if not as against the EU, then against a bail-out Member State. Pension rights are classified as property rights protected under article 1 of Additional Protocol 1 in ECtHR case law, so the ECtHR would have the tools to examine such claims. Given the rivalry between the two European Courts, we think it likely that the CJEU would not accept that it cannot review Eurozone bail-outs, and would leave this to the ECtHR. Such an outsourcing is exactly what the CJEU rejected in the field of the Common Foreign and Security Policy (CFSP).[80]

Overall, we are therefore of the opinion that accession to the Convention would re-orient EU law debates about human rights towards what should always be their primary focus: ensuring that the individual's rights are protected wherever the EU is involved through its own institutions, or through its Member States. This reorientation can only have positive effects, also for labour law.

5. The Permeative Power of Human Rights

As was said earlier, there is a concern in EU law literature and case law about the autonomy of EU law. Labour lawyers too have explored the meaning of the 'autonomy of labour law' and its interplay with other fields of law.[81] Against this background, it is important to appreciate that human rights, including labour rights, have acquired a special constitutional status in Europe. Labour rights, insofar as they are classified as human rights, can serve as standards against which state and employer action is assessed. When EU institutions engage in action that may violate workers' rights and other human rights, they must be prepared to be held accountable. This is crucial both symbolically, particularly at a time of crisis like the one that the EU is currently facing, and practically for individuals that allege that the EU violates their

[76] *Pringle*, cited above.
[77] Case C-434/11 Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor (MAI) and Others EU:C:2011:830; Case C-134/12 MAI v Corpul Na ţional al Poli ţi ştilor - Biroul Executiv Central EU:C:2012:288; C-264/12 Sindicato Nacional dos Profissionais de Seguros e Afins EU:C:2014:2036.
[78] C Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 EuConstLR 393.
[79] Opinion 2/13, cited above, paragraphs 186 and 223-225.
[80] Opinion 2/13, cited above, paragraphs 249-257.
[81] See McCrudden in this volume. See also Bogg, Costello, Davies and Prassl (eds), *The Autonomy of Labour Law*, Hart, 2015, and particularly the contributions by A Davies, 'Labour Law as Public Law', p and C Costello, 'Migrants and Forced Labour: A Labour Law Response', p 189.

rights and seek to hold it accountable.

That there will be an avenue for accountability in Strasbourg after accession does not mean that labour rights will be absolute. The protection of public interests, as we said earlier, can serve as a legitimate aim for restrictions of rights. In this context, it seems to us that the ECtHR is particularly well-placed to play the role of the final arbiter of human rights in Europe. The Strasbourg Court has long experience and has played a leading role in the judicial protection of labour rights at regional level, showing also an understanding for different social and political considerations that may affect 47 different member states. The involvement of the Strasbourg Court is particularly welcome because its judges 'do not operate in the splendid isolation of an ivory tower built with materials originating solely from the ECHR's interpretative inventions or those of the States party to the Convention'.[82] The adoption of the integrated approach that takes note of ILO materials in the interpretation of labour rights shows that the Court is well aware of the challenges in the interpretation of these rights, and hence pays attention to ILO expertise in the field.[83]

In addition, even though there certainly is hope that the Strasbourg Court will apply a stricter test in examining limitations of rights than that employed by the CJEU in *Viking* and *Laval*, there is no evidence that it will be too intrusive when assessing the compatibility of state or EU action with the ECHR. If the ECtHR found that there is a breach of article 11 in cases such as *Viking* and *Laval*, this might slow down European economic integration, but it would address concerns about the EU's social deficit. However, at the moment, the concern is probably the opposite: namely that the ECtHR may show too much deference on sensitive social and political issues of workers' rights when they conflict with the aim of European economic integration.[84] The tendency to recognize wide discretion to national authorities in labour rights recently emerged in a case on trade union action, *RMT v UK*,[85] which has been criticised by labour law scholars for recognizing an inappropriately wide margin of appreciation to restrictions of the right to strike by UK authorities.[86]

A further point that we wish to make in relation to this discussion is that accession may lead to further cross-fertilisation in the protection of human rights in Europe. It was earlier said that the EUCFR contains a long list of labour rights, contrary to the ECHR. It is our belief that accession can open the door for the ECtHR to take further note of the EUCFR, and use Charter rights in the interpretation of Convention provisions. Rights such as the protection from unfair dismissal[87] or fair and just working conditions,[88] for example, can be used by the Strasbourg court in the interpretation of the right to private life or the right to property in the ECHR. This further integration can enrich the content of civil and political rights and lead to accountability for alleged violations of labour rights in Europe.

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[82] C Rozakis, 'The European Judge as a Comparatist' (2005) 80 *Tulane Law Review* 257 at 278.

[83] On the importance of this, see Bogg, n 4 above.

[84] On the margin of appreciation, see D Spielmann, 'Whither the Margin of Appreciation?', (2014) 67 *Current Legal Problems* 249.

[85] *National Union of Rail, Maritime and Transport Workers v United Kingdom*, Application No 31045/10, Judgment of 8 April 2014.

[86] A Bogg and K Ewing, 'The Implications of the *RMT* Case', (2014) 43 *Industrial Law Journal* 221.

[87] Article 30 EUCFR.

[88] Article 31 EUCFR.

6. Conclusion

There are many sources of labour rights in Europe that have been developed by organisations with different rationales. These rationales are not static, though; they evolve. The EU as a supranational legal order the purpose of which has developed over the years must be willing to be subject to assessment of its compliance with the human rights that the ECHR protects. Accession of the EU to the ECHR is required by the Lisbon Treaty and is crucial because it signals that the EU today is a human rights actor both at regional and global level. There is no doubt that economic integration of the EU sets new challenges to the protection of labour rights. It is our belief, though, that the ECtHR appreciates and has the tools to address the challenges. It is very unfortunate that accession has been such a protracted process, which at times has seemed to involve more judicial politics than concerns for human rights and accountability. We hope that the obstacles that the CJEU set to the process will be overcome, and that the EU, like its Member States, will be willing to be held accountable for alleged labour and other human rights violations by the Strasbourg Court.