City Research Online

City, University of London Institutional Repository

Citation: Koutrakos, P. (2022). Confronting the Complexities of Mixed Agreements-Opinion 1/19 on the Istanbul Convention. European Law Review, 47(2), pp. 247-263.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/29035/

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

City Research Online: http://openaccess.city.ac.uk/ publications@city.ac.uk

Confronting the complexities of mixed agreements - *Opinion 1/19* on the Istanbul Convention

Panos Koutrakos*

City, University of London

Introduction

The significance of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) in policy terms for the European Union (EU) legal order is twofold. First, the Convention is only the second international human rights treaty that the Union has signed (the first was the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)).[1] Second, it is not only the first gender-focused and binding instrument on violence against women[2] but also 'the first European instrument to deal with violence against women and domestic violence in a comprehensive manner' and to link such crimes 'expressly to harmful gender stereotypes'.[3]

The Convention is also significant for the EU in constitutional terms. Its signature and conclusion as a mixed agreement has been marred by tension and discord, illustrated by inter-institutional conflict within the Union and wildly divergent approaches amongst the Member States. This state of affairs may be explained by timing, the current state of Union integration and the wide and diverse membership of the Union. The political discord in the Union is characterised by the emergence of a small but vocal number of Member States the prevailing

* Professor of EU Law and Jean Monnet Professor of EU Law. I am grateful to the organisers and participants of the workshop on 'Opinion 1/19, Istanbul Convention: Exploring legal themes and consequences' organized by the University of Groningen on 17 December 2021.

[1] Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35. On the process of negotiation, see G de Búrca, 'The European Union in the Negotiation of the UN Disability Convention', (2010) 35 ELRev 174. On its application, see D Ferri, 'The unorthodox relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and secondary rights in the Courts in the Court of Justice case law on disability discrimination', (2020) 16 *European Constitutional Law Review* 275.

[2] S Preschal, 'The European Union's Accession to the Instabul Convention' in K Lenaerts, J-C Bonichot, H Kanninen, C Naome P Pohjankoski (eds), *An Ever-Changing Union? Perspectives on the future of EU Law In Honour of Allan Rosas* (Hart Publishing, 2019) 279.

[3] Venice Commission Opinion 961/2019 "Opinion on the constitutional implications of the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (Armenia)", Council of Europe doc. CDLAD(2019)018 (14/10/2019). See also L Grans 'The Istanbul Convention and the Posivitive Obligation to Prevent Violence', [2018) 18 *Human Rights Law Review* 133. See also K Nousiainen and C Chinkin (eds), *Legal implications of EU accession to the Istanbul Convention* (European network of legal experts in gender equality and non-discrimination, 2015).

views of which about how to organise society differ considerably from the liberal mainstream EU norm. In such a climate, the aims and methods of the Convention have attracted greater attention and objections to them have found fertile ground.

The controversy about the EU's accession to the Convention has raised questions about competences, procedure, and political disagreement which are central to the role of the EU as an international actor, in general, and the functioning of the phenomenon of mixity, in particular. These questions have been addressed by the Grand Chamber of the European Court of Justice ('ECJ' or 'the Court') in Opinion 1/19.[4] Whilst complex and at times difficult to convey to an audience unfamiliar with the technicalities of external relations law, these questions are neither narrow in their scope nor limited in their implications. In the words of Advocate General Hogan regarding the unfolding episode of the signature and conclusion of the Istanbul Convention, 'the relationship between the Member States and the Union in respect of the conclusion of international agreements which bind both parties is apt to present some of the most difficult and complex questions of Union law'.[5]

The analysis in this article is structured as follows. First, it will offer an overview of the Convention and will highlight the state of discord that has characterised the process of its signature and conclusion. Second, it will set out the subject matter of the request for an Opinion.[6] Third, it will examine the part of Opinion 1/19 dealing with the substantive issue of the choice of legal basis. Fourth, it will focus on the procedural issue of how the Convention ought to be concluded on behalf of the Union and will analyse the combination of procedural propriety and political pragmatism that underpins the Opinion. Finally, it will reflect on the contribution of the Opinion to our understanding of how mixed agreements work in practice.

The Istanbul Convention: an overview and the state of discord that may affect the EU's accession

The text of the Istanbul Convention was negotiated by an expert group, the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence

[4] EU:C:2021:832
[5] AG Hogan Opinion in Opinion 1/19 EU:C:2021:198, para. 1.
[6] These two sections draw on the chapter by P Koutrakos and V Soneca, 'The Future of the Istanbul Convention before the CJEU' in N Levrat, Y Kaspiarovich, C Kaddous and R Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing, 2022) (forthcoming).

(CAHVIO). The European Commission participated, alongside the Member States, at the negotiations as an observer.[7]

The Convention entered into force on 1 August 2014. As set out in Article 1, its purposes are to:

a. protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
b. contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
c. design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
d. promote international co-operation with a view to eliminating violence against women and domestic violence;
e. provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

In order to achieve its purposes, the Istanbul Convention provides for a wide range of measures that straddle various fields, such as data protection, awareness-raising, education and training, protection and support, civil remedies and the criminalisation of various forms of violence. It includes a specific chapter on asylum and immigration (Chapter VII) and requires, amongst others, that the parties 'take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution' within the meaning of the Refugees Convention 'and as a form of serious harm giving rise to complementary/subsidiary protection'.[8] It establishes a monitoring mechanism operated through, on the one hand, an independent group of experts (GREVIO) and, on the other hand, the Committee of the Parties, composed of the representatives of the parties to the Convention and responsible for issuing recommendations to the individual parties.

[7] COM(2016) 109 final. *Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence*, p2. See also COM (2016) 111 final, *Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence*.
[8] Art 60(1) Istanbul Convention which refers to Art 1,A(2) of the 1951 Convention relating to the Status of Refugees.

While it rules out reservations in principle,[9] the Istanbul Convention provides that any party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, submit reservations for two specific purposes: not to apply or to apply only in specific cases or conditions certain provisions;[10] and to provide for non-criminal sanctions, instead of criminal sanctions, for psychological violence and stalking.[11] Such reservations are valid for a period of five years from the day of the entry into force in respect of the party concerned.

There are currently 34 signatories to the Istanbul Convention,[12] Turkey has denounced, it, and 22 parties have made reservations or declarations.[13] While the Union and its Member States are all signatories, there is considerable divergence in the approach of the latter. Six Member States have not yet ratified the Istanbul Convention (Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, and the Slovak Republic) while Poland has announced, controversially, its intention to withdraw from it.[14]

Most Member States have made reservations/declarations concerning part of the Istanbul Convention's provisions. Reservations are narrow in scope. For example, Latvia's reservation is about the right not to apply Article 55 (1) in respect of Article 35 regarding minor offences whereas Ireland has reserved the right not to apply the provisions of the Istanbul Convention laid down in Articles 30 (2) and 44 (3).There are also declarations of a broad nature: Latvia, Lithuania and Poland, for instance, have declared that they would apply the Istanbul Convention in conformity with the principles and provisions of their Constitution.

In addition to the above divergence of approaches, there have been express disagreements between Member States about their respective positions. A case in point is

[9] Art. 78(1) Istanbul Convention. On reservations, see Art. 2 (1)(d) of the Vienna Convention on the Law of Treaties.
[10] Art. 78(2)(1) refers to Article 30, paragraph 2; Article 44, paragraphs 1.e, 3 and 4; Article 55, paragraph 1 in respect of Article 35 regarding minor offences; Article 58 in respect of Articles 37, 38 and 39; Article 59.
[11] Art. 78(3) Istanbul Convention which refers to Articles 33 and 34 respectively.
[12] Albania, Andorra, Armenia, Austria, Belgium, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, the EU, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the UK. and Turkey.
[13] Serbia, Romania, Poland, North Macedonia, Monaco, Malta, Latvia, Ireland, Andorra Armenia, Sweden, Switzerland, Slovenia Finland, France, Georgia, Germany, Greece, Croatia, Cyprus, Czech Republic, Denmark.
[14] Poland Announces Withdrawal from "Harmful" Istanbul Convention. 28.07.2020. Available: https://exit.al/en/2020/07/28/poland-announces-withdrawal-from-harmful-istanbul-convention/. See also https://www.euronews.com/2020/07/27/istanbul-convention-poland-s-plan-to-quit-domestic-violence-treaty-causes-concern.

Austria's formal objection to the Polish Declaration mentioned above as being incompatible with the object and purpose of the Istanbul Convention: given its general and indeterminate scope, the Declaration is viewed as not clearly defining the extent to which Poland has accepted the obligations laid down in the Convention. Netherlands, Sweden and Finland have also objected to the Declaration made by Poland on similar grounds and suggest that it casts doubt as to the commitment of Poland to fulfil its obligations under the Convention. Finland in particular has also suggested that the Polish Declaration is incompatible with the general principle that a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations and, therefore, with Article 19 of the Vienna Convention on the Law of the Treaties.[15]

A clear sense of discord, therefore, emerges from the approach of the Member States to the conclusion of the Istanbul Convention. In stark contrast to the UNCRPD where no Union Member State had made a declaration or a reservation, this state of affairs has legal and policy implications: it complicates the process of the conclusion of the Convention by the Union and throws the effective application of its provision into doubt. It also reflects a widening gap between Union Member States in the context of human rights. This gap has emerged with striking force and has been developing with increasing intensity on the internal plane in relation to the organization of the judiciary: there is now a solid body of case-law against Poland[16] and voluminous literature on the rule of law issues that have arisen in that country and Hungary.[17] The unfolding episode of the conclusion of the Istanbul Convention provides another

[15]. On Art 19 VCLT, see O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary* (OUP, 2011), pp 443–445.

[16] See, for instance, Case 192/18 *Commission v Poland* EU:C:2019:924, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others* EU:C:2019:982, Joined Cases C-558/18, Case C-619/18 *Commission v Poland* EU:C:2019:531, C-563/18 Miasto Łowicz and Prokurator Generalny EU:C:2020:234, C-272/19, *Land Hessen* EU:C:2020:535, C-256/19, *Maler* EU:C:2020:523, and ongoing C-487/19 *W.Ż.* [AG Tanchev Opinion EU:C:2021:289) and C-518/19 *M.F. v J.M* **[**AG Tanchev Opinion EU:C:2021:290. See also, in the case of Romania, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19 Asociaţia *Forumul Judecătorilor Din România* et als EU:C:2021:393.

[17] See, for instance, P Bogdanowicz, I Canor, M Schmidt, M Taborowski, A von Bogdandy, 'Guest Editorial: A potential constitutional moment for the European rule of law – The importance of red lines', (2018) 55 CMLRev 983, L Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber"' (2021) 58 CMLRev 137, id and D Kelemen, 'The uses and abuses of constitutional pluralism: Undermining the rule of law in the name of constitutional identity in Hungary and Poland' (2019) 21 CYELS 59, S. Platon, 'Court of Justice, Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: *Miasto Lowicz*', (2020) 57 CMLRev 1843, A Ploszka, 'Shrinking Space for Civil Society: A Case Study of Poland', (2020) 26 EPL 941, K Scheppele and R Kelemen, 'Defending Democracy in EU Member States: Beyond Article 7 TEU' in F. Bignami (Ed.), *EU Law in Populist Times: Crises and Prospects* (2020, CUP) 413.

manifestation of the divergence of views on fundamental issues between Member States.[18] The spokesperson of the Council of Europe referred to the non-ratification of the Convention as 'an anti-European, and an anti-Union gesture' and the ensuing discord as involving 'traditionalists against progressives in Europe'.[19] What we see, therefore, is an external context within which internal divisions between between Member States manifest themselves. Viewed from this angle, this case is not just about the technicalities of a legal formula that has tested the ingenuity of Union policy-makers and has baffled external partners.[20] While it does throw the modalities of mixity into sharp relief, it also touches upon the underlying differences between Member States which the international context of this legal dispute amplifies further.

The request for and the subject-matter of Opinion 1/19

It is settled case law that "the rules regarding the manner in which the Union institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves".[21] The general procedure for negotiation, signature and ratification of international agreements is set out in Article 218 TFEU. The legal dispute in Opinion 1/19 is about the decision to sign and conclude the Istanbul Convention. In accordance with Articles 218(5) and (6) TFEU, it is for the Council, following a proposal by the Commission, to adopt the decisions authorizing the signing and concluding the Agreement respectively. The Council does so, in principle, by a qualified majority pursuant to Article 218 (8) TFEU subparagraph 1 TFEU.[22]

The Commission had not submitted a recommendation that the Council decide to open negotiations, nominate the Commission to negotiate on behalf of the Union and allow it to participate in the negotiations. On 4 March 2016, it adopted two proposals for Council

[18] That is not to say that the discord is confined to EU Member States: Turkey, for instance, annulled its ratification of the Convention in March 2021.
[19] Daniel Höltgen, quoted in M De Law Baume, 'How the Istanbul Convention became a symbol of Europe's cultural wars' [12 April 2021)(https://www.politico.eu/article/istanbul-convention-europe-violence-against-women/).
[20] See P Olson, 'Mixity from the Outside: the Perspectiove of a Treaty Partner' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing, 2010) 331.
[21] Case C-28/12 *Commission v Council*, EU:C:2015:282, paragraph 42 and case law cited.
[22] Under Art. 218(8) subparagraph 2 TFEU, unanimity is required for agreements covering a field for which unanimity is required for the adoption of a Union act, for association agreements, for the agreements referred to in Article 212 TFEU with the States which are candidates for accession, and for the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. For an analysis of these procedures, see A Dashwood in A Dashwood, M Dougan, B Rodger, E Spaventa and D Wyatt, *Wyatt and Dashwood's European Union Law* (6th ed., 2011) 936 et seq and P Koutrakos, *EU International Relations Law* (2nd ed, 2015) Ch. 4.

decisions on the signing[23] and conclusion[24] of the Istanbul Convention on behalf of the Union. The former cited Article 218(5) TFEU and the latter Article 218(6)(a) TFEU as the procedural legal basis. As for the substantive legal bases, the Commission relied upon the judicial cooperation in criminal matters Chapter of the TFEU (Title V, Chapter 4) and cited Articles 82 (2) and 84 TFEU. The former provision is about "facilitat[ing] the mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension", whereas the latter is about "establish[ing] measures to promote and support the action of the Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States".

The Council departed from the Commission's proposal in two respects. First, it adopted two, rather than one, separate decisions on the signing of the Convention on behalf of the Union.[25] Second, the legal basis of these measures differed from those proposed by the Commission: Decision 2017/856 is based on Articles 82(2) and 83(1) TFEU, the latter providing for "establish[ing] minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis"; Decision 2017/866 is based on Article 78(2) TFEU which provides for the adoption of measures for a common European asylum system.

The Istanbul Convention was signed on behalf of the Union on 13 June 2017 but has not yet been ratified. Following the adoption of the above measures by the Council, the Parliament submitted a request for an Opinion under Article 218(11) TFEU and raised two questions. The first was about the substantive legal basis: should the Union conclude the

[23] COM(2016) 111 final, n7 above. p. 9-10.
[24] COM(2016) 109 final, n7 above.
[25] Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, [2017] OJ L 131/11; Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement, [2017] OJ L 131/13. This practice has also been followed in relation to the UN Smuggling of Migrants Protocol: Council Decision 2006/616/ EC on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community [2006] OJ L 262/24 and 2006/617/EC: Council Decision 2006/617/EC on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community [2006] OJ L 2262/344.

Istanbul Convention under Articles 82(2) and 84 TFEU (as proposed by the Commission) or Articles 78(2), 82(2) and 83(1) TFEU (as decided by the Council)? The Parliament also asked whether it was necessary or possible to separate the decisions concerning the signature and the conclusion of the convention as a consequence of that choice of legal basis. The second question was about the adoption of the Council Decision to conclude the Istanbul Convention on behalf of the Union: was it compatible with Article 218(6), given the absence of mutual agreement between all the Member States regarding their consent to be bound by that Convention?

The significance of the issues raised before the Court was illustrated by the number of Member States (13) that submitted observations. It is also borne out by the structure of the Opinion itself: The longest part is about the views of the institutions and the intervening Member States while the ruling itself starts only in paragraph 192 (out of a total of 338 paragraphs).

In its Opinion, the Court started off by providing a detailed and, by and large, uncontroversial overview of the preventive function and broad scope of the procedure laid down in Article 218(11) TFEU. This will not be examined here, save for two points. First, whilst questions about the signature of an envisaged agreement by the EU may be raised, the Court pointed out that that was not the case where the EU has already signed the agreement in question. It was for this reason that it found the request inadmissible as far as it concerned the division of the Council act authorising the signature of the Convention into two decisions. Second, an issue worth elaborating on, namely the exclusion from the scope of the procedure of questions about compatibility of the envisaged agreement with public international law, will be examined below, in the context of the legality of the conclusion of the Convention by common accord.

The substantive dimension: the choice of legal basis

It is well-known that the choice of legal basis and the division of competence between the EU and the Member States are questions that are 'closely linked'[26] and that the latter is based on the principle of conferral (Article 5(2) TEU) and the assumption that competences not conferred upon the Union remain with the Member States (Articles 5 (2) and 4 (1) TEU). In the context of Opinion 1/19, the issue was not whether the Union had exclusive competence over the entirety of the Istanbul Convention. In fact, the Commission had acknowledged in its

[26] Opinion 1/08 [GATS) EU:C:2009:739, para. 111.

proposal that the Member States "remain competent for substantial parts of the Convention, and particularly for most of the provisions on substantive criminal law and other provisions in Chapter V to the extent that they are ancillary".[27] Instead, it was the implications of its position that was contentious, namely that the Union has competence "for a considerable part of the provisions of the Convention"[28] or, as it put it in the preamble to the Decision it proposed, for "most of the provisions of the Istanbul Convention".[29] A further complicating factor was about Ireland's participation in the light of Protocol (No 21) on the position of the United Kingom and Ireland in respect of the area fo freedom, security and justice. This will not be examined in this analysis which will focus on the broader issues of choice of legal basis.

The starting point for the Court's analysis was the oft-repeated premise that the choice of legal basis must be made on objective factors amenable to judicial review, including the aim and the content of the measure,[30] even though there was no reference to its constitutional significance.[31] The Opinion, then, set out what has become the standard test on this matter:

> "If the examination of an EU act reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main owner, whereas the other is merely incidental, the act must be founded on a single legal basis, namely, that required by the Marion or predominant aim or component. Exceptionally, if it is established, however, that the act simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, such that various provisions of the Treaties are applicable, such a measure will have to be founded on the various corresponding legal bases".[32]

What follows is a helpful overview of how to go about applying the above test. It is 'necessary … to verify whether the provisions of that agreement which pursue an objective or which constitute a component of that agreement are a necessary adjunct to ensure the effectiveness of the provisions of those agreements which pursue other purposes or which constitute other components or whether they are "extremely limited in scope", in which cases 'the existence of that objective or component does not justify it being specifically reflected in

[27] COM(2016) 111 final, n7 above, p. 7.
[28] Ibid.
[29] Ibid, p. 11-2, para. 5.
[30] Opinion 1/19, para. 284. See also Opinion 1/15 (*EU-Canada PNR Agreement*) EU:C:2017:592, para. 76, Case C-263/14 *European Parliament v Council (EU-Tanzania Transfer Agreement)*, EU:C:2016:43, para. 43 and Joined Cases C-626/15 and C-659/16 *Commission v Council* EU:C:2018:925, para. 76.
[31] See, for instance, Opinion 2/00 *(Cartagena Protocol on biodiversity)*, EU:C:2001:664, para. 5.
[32] Opinion 1/19, para. 285. See also Opinion 2/00, para. 44, Opinion 1/15, n30 above, para 77 and Case C-244/17 *Commission v Council (EU-Kazakhstan Agreement)* EU:C:2018, para. 37.

the substantive legal basis of the decision to sign or conclude that agreement on behalf of the European Union'.[33] The criteria for ascertaining whether a component of an agreement is incidental 'include the number of provisions devoted to it, in compassion with the act's provisions as a whole, and the nature and scope of those provisions'.[34]

Having set out the relevant test and applicable criteria, the Opinion proceeds to engage in a detailed examination of the provisions of the Convention. As far as its context is concerned, the Opinion refers to the 'comprehensive and multifaceted legal framework [aiming] to protect women against all forms of violence'[35] and points out the limited purpose of Decisions 2017/865 and 2017/866 concluding the Convention: they pertain to the cross-cutting objectives of the latter (equality between women and men in all areas and combating violence against women) only as regards the provisions of the Convention which both fall within the competences of the EU and relate to judicial cooperation in criminal matters, asylum and non-refoulement, or institutions and public administration of the EU (even though the latter not expressly mentioned in Art 1).

As far as the content of the Convention is concerned, the Opinion engages in a detailed reference to specific provisions of the Convention against the above three fields. This elaborate process leads to different conclusions. In relation to judicial cooperation in criminal matters, the Opinion identifies provisions that fall 'to a large extent within the competence of the European Union referred to in Article 82(2) TFEU' and, given 'their number and scope', they render the latter one of the legal bases on which the EU act concluding the Convention should be based.[36] This is in addition to Article 84(3) TFEU which confers on the EU competence to support Member State action in the area of crime prevention and which must be included in the light of Convention provisions that 'fall, to a large extent' within it ('their number and scope' and the fact that they impose independent obligations render crime prevention that suggest 'not purely incidental' and not 'extremely limited' in scope').[37] Finally, while Article 83(1) TFEU pertained to certain Convention, it should be be included as a legal basis as these provisions are 'narrow' and the obligations on the EU 'extremely limited' in scope.[38]

[33] Opinion 1/19, para. 286.
[34] Opinion 1/19, para. 287.
[35] Opinion 1/19, para. 289 referring to recital 3 to Decision 2017/865.
[36] Opinion 1/19, para. 296.
[37] Ibid, para. 298.
[38] Ibid, para. 301.

As far as asylum and non-refoulement is concerned, the Court identified only three provisions of the Convention (Articles 59-61) that fall within the scope of Article 78(2) TFEU. However, the latter provision should be included in the legal bases: the above Convention provisions 'form a separate chapter of that convention and lay down specific and substantive obligations requiring, where necessary, the amendment of the law of the parties to that convention on those maters', they 'cannot be regarded as being incidental or "'extremely limited' in scope, within the meaning of the case-law'.[39]

Finally, the Court held that the Convention included a considerable number of provisions that imposed significant obligations on the EU regarding its staff and the members of the public visiting its premises, hence rendering Article 336 TFEU another legal basis that should be included.

The combination of legal bases pursuant to which the EU would have to conclude the Convention did not pose a procedural problem under EU law, as they would also trigger the application of Article 218(6)(v) and 218(8) sub paragraph 1 TFEU.

While its conclusion on the question of the choice of legal basis is not controversial, Opinion 1/19 is noteworthy for two main reasons: it provides an overview of the applicable criteria that is of surprising concision and clarity and applies them in a reasonably straightforward manner. This latter aspect is all the more striking in the light of the positions that the Commission and the Council had taken on the matter.

Let us consider, first, the Commission's position. It was articulated in a manner that lacked both clarity and coherence. While its proposal had referred to a wide range of Treaty provisions that pertain to areas covered by the Istanbul Convention,[40] the main thrust of its approach was that the predominant purpose of the agreement "lies in the prevention of violent crimes against women, including domestic violence, and the protection of victims of such crimes,"[41] hence its reliance upon Article 84 TFEU as a legal basis. It is striking, for instance, that non-discrimination should not be considered a main component of the Istanbul Convention and that Article 19 TFEU is not relied upon.[42] This is all the more so, given the prominent place

[39] Ibid, para. 304.
[40] Arts 16, 19(1), 23, 18, 21, 46, 50, 78, 79, 81, 82, 83, 84, and 157 TFEU.
[41] Ibid, p. 9.
[42] See also Preschal, n2 above, at 283 and De Vido, 'The ratification of the Council of Europe Istanbul Convention: A step forward for the protection of women from violence in the European legal system', (2017) 9 *European Journal of Legal Studies* 69 at 85-6.

of non-discrimination in the Istanbul Convention itself.[43] In this vein, it is interesting that, back in 2015, the Commission itself would have stressed the contribution of the ratification of the Istanbul Convention to its commitment to gender equality and to the Union's commitments in the context of the UNCRPD,[44] the latter having also been concluded under Article 13 EC (now Article 19 TFEU).[45] Viewed from this angle, the Commission's proposal is somewhat sweeping in its assumption that the matters not covered by its proposed legal bases are ancillary in nature.

Whilst narrow in its choice of legal basis, the Commission's proposal is broad in terms of the scope of the Union's competence. In fact, its approach is based on the assumption that the Union may exercise its competences "over the entirety of the Convention and excluding elements over which it would have no competence".[46] However, its examination of the specific provisions of the Convention is lacking in detail. While it argued that there was "abundant legislation in most" of the areas of the Istanbul Convention covered by the Union competence[47] and that the latter was exclusive to the extent that the Istanbul Convention might affect those rules or alter their scope in the meaning of Article 3(2) TFEU, the 'comprehensive and detailed analysis of the relationship between the envisaged international agreement and the Union law in force' required under the Court's case-law in order to ascertain whether the Union's competence is exclusive[48] is strikingly absent. It is recalled that, according to settled case-law, such reasoning is not only necessary but "must [also] take into account the areas covered by the Union rules and the by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions in order to determine whether the agreement is capable of undermining the uniform and consistent application of the Union rules and the proper functioning of the system which they establish".[49]

[43] See, for instance, the prominent position in the preamble to the Convention of the '[r]ecogni[tion] that the realisation of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women'.
[44] EU Commission, Roadmap A (possible) EU accession to the CoE Convention on preventing and combating violence against women and domestic violence (October 2015, 2015/JUST/010 and EU Commission), p1.
[45] Along with Art. 95 EC (now Art. 114 TFEU): Council Decision 2010/48 [2010] OJ L 23/35.
[46] COM(2016) 111, n9 above, p. 9-10. The broad accession of the Union was also supported by the Parliament: European Parliament Resolution of 14 March 2017 on equality between women and men in the European Union in 2014-2015 (2016/2249(INI)), para. 33.
[47] Ibid, p. 7.
[48] Opinion 1/13 (*Hague Convention)* EU:C:2014:2303 at para. 74, as well as Opinion 1/03 (Lugano) EU:C:2006:81 at paras 126, 128 and 133, and Case C-114/12 *Commission v Council (neighbouring rights)*, EU:C:2014:2151 para. 74.
[49] Ibid.

The dispute about the choice of legal basis for the conclusion of the Istanbul Convention illustrates, yet again, that, the objective nature of the relevant test withstanding, neither the Union's institutions have found it easier to apply it, nor the volume of ensuing legal disputes has decreased over the years. The somewhat sweeping manner in which the Commission substantiated its proposal and the strong disagreement amongst Member states about different aspects of the Convention and its application added to the politically charged context within which this legal dispute unfolded. The latter has brought to the fore the question whether common accord was necessary for the conclusion of the Convention. This will be examined in the following section.

The procedural dimension: the issue of common accord

As illustrated above, the process of the accession of the Member States to the Convention has been far from smooth. There has been considerable divergence about the scope of the obligations the Member States are prepared to assume, legal objections to the practice of certain Member States, and even a Member State that has expressed its intention to withdraw. It was against this background that the question about the conclusion of the Convention by recourse to common accord was raised before the Court. This question is underpinned by a paradox. On the one hand, the voting procedure in the Council for the conclusion of the Convention laid down in Article 21§8(6) TFEU is qualified majority (it is recalled that, described as "the procedural code" of the Union's treaty-making,[50] Article 218 TFEU has been viewed by the Court, " as regards the conclusion of treaties, an autonomous general provision, in that it confers specific powers on the [Union] institutions … [w]ith a view to establishing a balance between those institutions …").[51] On the other hand, the absence of mutual agreement amongst Member States about their consent to be bound by the Istanbul Convention may cast doubt on the ability of the EU to conclude the Convention, hence raising the question whether the latter might come about by common accord after all.

Article 218(6) TFEU is silent on the timing of the Council's decision to conclude an international agreement. Drawing on this lacuna, Advocate General Hogan argued that not only does the Council enjoy considerable discretion as to when to conclude the Istanbul Convention but that there are also 'strong practical reasons' for the Council to wait until all Member States

[50] A Dashwood in A Dashwood, M Dougan, B Rodger, E Spaventa and D Wyatt, *Wyatt and Dashwood's European Union Law* (6th ed., 2011) at 936.
[51] Case C-327/91 *France v Commission*, EU:C:1994:305 para 28.

have concluded it.[52] The Court did not follow his advice. Four main themes emerge from its approach.

First theme: procedural integrity

The first theme is about procedural integrity. The Opinion stresses the pivotal role of the rules and procedures laid down in Article 218 TFEU and concludes that, to view common accord as a prerequisite for the conclusion of an international agreement is tantamount to adding yet another procedural requirement that is not provided for in primary law. As such, it may not be justified by the duty of cooperation, the constitutional significance of the latter notwithstanding.

This theme is underpinned by a heavy emphasis on the constitutional fundamentals of EU decision-making and the paramount significance of the primary rules that set out the applicable procedures. The all too familiar adage is repeated about the EU in general (it constitutes a new legal order of international law in the context of which relations between Member States, in so far as they fall within the scope of EU law, are governed exclusively by EU rules and procedures), as is the significance of institutional balance and the status of Article 218 TFEU as the source of a single procedure of general application that governs the negotiation and conclusion of international agreements. This procedure grants no role to the Member States for the adoption of such a decision.

This conclusion about the incompatibility of common accord with Article 218 TFEU is entirely consistent with prior case-law. It follows directly from the Court's approach to hybrid decisions, that is, decisions adopted both by the Council and the Representatives of the Governments of the Member States meeting within the Council dealing with issues of both Union and national competence. In Case C-28/12 *Commission v Council*, the Court had held that such measures may not be adopted for the signature and provisional application of mixed agreements as they violate Article 218(2), (5) and (8) TFEU (and, therefore, Article 13(2) TEU).[53] It was the conflation of different procedures and the ensuing deviation from that required under Article 218 TFEU that was found objectionable.[54] Whilst reliance upon

[52] AG Hogan, EU:C:2021:198, para. 218.
[53] Case C-28/12 *Commission v Council* EU:C:2015:282.
[54] See the analysis in Joni Heliskoski, The procedural law of international agreements: A thematic journey through Article 218 TFEU, (2020) 57 CMLRev, 113 at 90-4 and P Koutrakos, 'Institutional Balance and Sincere Cooperation in treaty-making under EU law', (2019) 68 ICLQ 1 at 13-16.

common accord for the conclusion of the Istanbul Convention 1/19 would not lead to two different acts, one pursuant to consensus of the Member States while the other adopted by the EU, brought together in a single hybrid decision, the Opinion was correct to hold that the principle still applied: to render mutual agreement between Member States about the consent to be bound by a mixed agreement a requirement for the conclusion of that agreement by the Union under Article 218(6) TFEU would be tantamount to altering the procedure for the conclusion of the latter.[55] In the light of the above, the reasoning in Opinion 1/19 is eminently convincing: to accept common accord in this case would, indeed, establish a hybrid decision-making procedure.[56]

The Court's approach is also consistent with the general tenor that characterises the case-law of the last few years on the procedure governing treaty-making. In addition to the judgment in Case C-28/12 *Commission v Council*, other instances include the judgments in Case C-660/13 *Council v Commission* (about the EU-Switzerland Memorandum of Understanding regarding financial contribution in exchange for access to the EU's single market) and the power of the Council to sign even non-binding agreements[57] or the robust construction of the right of the European Parliament to be informed in the process of the negotiation and conclusion of international agreements in Cases C-658/11 *Parliament v Council (EU-Mauritius Agreement)*[58] and Case C-263/14 *Parliament v Council (EU-Tanzania Agreement),*[59] or in Case C-687/15 *Commission v Council (International Telecommunications Union)* about the EU's position at a meeting without complying with the procedure laid down in Article 218(9) TFEU.[60] This author has written elsewhere about the theme of procedural integrity that emerges from the case-law on Article 218 TFEU.[61] All in all there is a clear message that that case law sends: procedures matter and institutional practice may not develop contrary to the rules laid down in primary law. Viewed from this angle, Opinion 1/19 is the most recent illustration of that that that has underpinned the case-law for some time and which aims to ensure that legal procedures would not be marginalised by practice.

[55] Opinion 1/19, para. 245.
[56] Ibid.
[57] EU:C:2016:616.
[58] EU:C:2014:2025.
[59] EU:C:2016:435.
[60] EU:C:2017:803.
[61] See P Koutrakos, 'Institutional Balance and Sincere Cooperation in treaty-making under EU law', (2019) 68 ICLQ 1.

The conclusion that common accord would not be permitted for the conclusion of an agreement by the EU also makes sense in practical terms. If the Court had concluded to the contrary, the Council would be held hostage to the will of some Member States and would be prevented from exercising the powers conferred upon it by the Treaties. This might even prevent the Union from exercising its exclusive competence. Such an outcome would be intolerable under the current constitutional arrangements.

Second theme: pragmatism

The Opinion does not only stress the significance of the procedure governing the conclusion of international agreements laid down in Article 218 TFEU. It also teases out the political discretion that the Council enjoys and that is central to reliance upon this procedure: 'both the decision whether or not to act on the proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time to adopt such a decision fall within the Council's political discretion'.[62] Not only is there a voting threshold that needs to be met for a decision to be adopted under qualified majority voting but there is also no time limit for the Council decision concluding the agreement to be adopted. The Court points out that there is nothing to prevent the Council from seeking to achieve the greatest possible majority so that practical problems that may arise because of the choice of women Member States not to conclude the Agreement would be avoided. The exercise of political discretion in the process of concluding a mixers agreement is linked to the duty of close cooperation, all the more so given that the provisions of the Istanbul Convention that fall within the EU's competence are 'inextricably linked' to those that fall within the Member States' competence.[63] Viewed from this angle, the process of conclusion of such an agreement must 'allow[…] account to be taken … , where necessary by means of an extended discussion, of institutional and political considerations liable to affect the perceived legitimacy and effectiveness of the European Union's external action'.[64]

This part of the Opinion may be viewed as somewhat negating the conclusion that common accord is incompatible with Article 218 TFEU. In other words, the Court. May appear to be

[62] Opinion 1/19, para. 252.
[63] Opinion 1/19, para. 254.
[64] Opinion 1/19. Para, 254.

uncompromising in principle but more than accommodating in practice. Such a view is misguided for two main reasons.

First, the point that the Opinion makes about political discretion is neither extraordinary nor all that controversial. After all, there is no obligation on the Council to act. In any case, it is a well-known feature of the decision-making culture in the Council that it is heavily tilted towards achieving the broader possible consensus while avoiding actual voting. If anything, the Opinion spells out what has traditionally been every practice.

Second, as the Opinion makes clear, political discretion is neither unfettered not uncontrolled. The Court refers to the effectiveness of the rules laid down in Article 218(2), (6) and (8) TFEU, the Council's Rules of Procedures, and the principle of transparency that governs decision-making under Article 15(3) TFEU. These constraints are not of rhetorical significance. For instance, Article 11(1) of the Council's Rules of Procedures provides that '[t]he President shall … be required to open a voting procedure on the initiative of a member of the Council or the Commission, provided that a majority of the Council's members so decides'.[65] As the Court put it in Opinion 1/19, 'any Member State and the Commission [have] the right to request the opening of a voting procedure' and 'a majority within the Council may, at any time, … require the closure of discussions and the adoption of the decision concluding the international agreement'.[66] Whilst hardly novel, the point borne out by the above reminds us of the outer limits of the political discretion that is inherent in decision-making.

Put differently, Opinion 1/19 stresses the significance of the procedural rules that govern treaty-making whilst reminding both the Member States and the EU institutions that such rules are not applied in a political vacuum.

Third theme: avoiding the big questions

A striking feature of the Opinion is the way in which the Court fends off questions about how to manage the implementation of the Istanbul Convention. It did so in response to the objection by five Member States and the Council that, in the absence of common accord, the EU would run the risk of being held liable under international law, as it would not be possible to guarantee that commitments related to the entire Convention would be fulfilled. The Court adopted a

[65] Council Decision 2009/937/EU adopting the Council's Rules of Procedure [2009] OJ L 325/35
[66] Opinion 1/19, para. 255.

positivist approach and relied on the wording of Article 218 (11) TFEU: it held that the procedure pursuant to which an Opinion is rendered is about compatibility with the EU Treaties, not with public international law, and that it does not concern the consequences that might arise from a future infringement of international law in the implementation of that agreement.

This approach may appear puzzling as a matter of principle. After all, not only is observance of international law an essential requirement for the EU's exercise of its power (a point acknowledged in the Opinion) but it is also part of the Union's own principles, as set out in Article 3(5) TEU in general and Article 21(1) TEU in particular. However, the point that made in Opinion 1/19 is somewhat different. Even if the practical problems of mixity are such as to give rise to a violation of the Convention by the EU, this would amount to a future, not present, violation that, in itself, would not render the Council decision concluding the Convention on behalf of the Union invalid.

Is this approach too formalistic? Would it not be to the benefit of both the EU and the other parties to the Convention for the future difficulties that might lead to violations of international law to be prevented at this early stage? And, for that reason, would it not be best to construe the scope of the Opinion procedure as broadly as possible? While there may be a whiff of formalism in the Court's approach, the latter is understandable for three main reasons.

First, the focus on the wording of Article 218(11) TFEU is consistent with the strict and textual interpretation of the rules and procedures laid down in Article 218(11) TFEU and follows from the Court's overall approach to Article 218 TFEU highlight above. Second, the Court's approach protects the economy of the procedure laid down in Article 218(11) TFEU which differs significantly from the other procedures on the basis of which what the EU does in the context of international agreements may be challenged. As the procedure pursuant to which an Opinion is handed down is part of the 'procedural code' of how the EU engages in treaty-making, it makes sense to confine it to issues that any render the EU measure concluding an international agreement invalid. Future and uncertain violations of international law are not, strictly speaking, such issues. Third, to rule otherwise is not only to predict how the relationship between the EU and the Member States would evolve in the context of a mixed agreement, it is also tantamount to expressing doubts as to the scope and impact of the duty of cooperation that binds the EU institutions and the Member States in, amongst others, the implementation of mixed agreements.

It is noteworthy that Opinion 1/19 seeks to further buttress the refusal to engage with the possibility of future violations of international law. The Court points out that it has not been established that the conclusion of the Istanbul Convention by then EU in the absence of a common accord of the Member States would amount to the EU taking on commitments beyond its own competences. This statement may appear to cast some doubt as to how strongly the Court felt about the narrower construction of the Article 218(11) TFEU procedure. Would things have been different, had the Court been prepared to assess compatibility with international law? The answer is negative: in a case where the EU assumes obligations that exceed the scope of its competences by concluding an international agreement, the very act of concluding the agreement would be contrary to the Treaties and, therefore, invalid. This would be precisely what the Opinion procedure would aim to prevent.

The approach examined in this section is further highlighted by how Opinion 1/19 dealt with the dispute settlement mechanism established under the Convention. It is recalled that a specific independent monitoring body (GREVIO) is tasked with ensuring effective implementation of the provisions of the Convention by the Contracting Parties. Detailed reports drawn up by the latter on their measures giving effect to the Convention would be evaluated by GREVIO which may also carry out country visits and draw up a report and conclusions. These may form the basis for the Committee of the Parties' recommendations to the Contracting Party, which may also be required to report back on implementation of the recommendations by a certain date. The GREVIO may also conduct urgent enquiries, the results of which would be submitted to the Contracting Party, to the Committee of the Parties and to the Committee of Ministers of the Council of Europe. The Union, as any other party to the Convention, would become subject to the above procedure upon accession and all its institutions, bodies, offices and agencies would be subject to this monitoring mechanism.[67] The Court resisted the invitation (including by the Council) to deal with the implications of this mechanism for the EU's autonomy by distinguishing it from the dispute settlement system established in the European Convention

[67] See recital 7 to the preambles to Council Decision (EU) 2017/865 and Council Decision (EU) 2017/866. This in itself is not controversial, as the EU submits to monitoring mechanisms established under agreeements to which it accedes. It also accepted, in principle, that a treaty setting up a judicial body with jurisdiction binding on the institutions of the parties, including the EU's judiciary, may be compatible with the EU's primary rules (Opinion 1/91 (EEA) EU:C:1991:490, paras 39-40). In practice, the Court has been far from enthusiastic about this prospect and its case-law (eg Case C-459/03 *Commission v. Ireland (re: Mox Plant)* EU:C:2006:345, *Opinion 1/09* EU:C:2011:123, *Opinion 2/13* EU:C:2014:2454) has given rise to an intense debate about and voluminous literature on the autonomy of EU legal order (for a snapshot, see, for instance, Jan Klabbers and Panos Koutrakos (eds), 'Special Issue: An Anatomy of Autonomy', (2019) 88 Nord. J. Int'l L. 1 et seq and K Lenaerts, Jos. A. Gutierrez-Fons, Stanislas Adam. 'Exploring the Autonomy of the European Union Legal Order', (2021) 81 Za.RV 47).

on Human Rights (ECHR): not only was the latter an international court whose decisions would have been final and binding on the EU and its Member States but its jurisdiction had also been held by the Court of Justice to be incompatible with EU law 'in the context of a detailed examination of the substantive compatibility of the envisaged agreement with the Treaties'.[68]

The Court's refusal to engage in such an examination of the Istanbul Convention (it 'is not covered by the present request for an Opinion and does not therefore fall within the scope of the present proceedings')[69] suggests a reluctance to deal with some of the big questions about the complications of mixed agreements in the absence of their conclusion by all Member States. It is interesting that the Commission's proposals should have also overlooked this aspect of accession, especially given that the question of the obligations that the Union would incur for its own institutions and its public administration had been raised in the context of the UNCRPD, that is the only other human rights convention to which the Union has acceded. The declaration of competence that was eventually made by the Union in regard to the UNCRPD explicitly mentions the matter of the Union's own obligations under that Convention for the Union's own institutions and its own public administration.[70]

Conclusion

In its 2015 Roadmap to the accession to the Istanbul Convention, the European Commission argued as follows: "[p]rovided that the Union would accede, alongside Member States, to the full extent of its competences, ratification of the Istanbul Convention would put the Union in a strong position as regards monitoring of enforcement of the Istanbul Convention also beyond the Union and would send a firm political message. At the same time, the Union would become internationally accountable for the implementation of those parts of the Istanbul Convention. Union accession would also answer the calls from the European Parliament and stakeholders for binding measures at Union level".[71]

The ambition underpinning this statement sits ill at ease with the picture that emerged from the request for *Opinion 1/19*, namely the discord between the institutions and the Member States about how to exercise the Union's competence in the context of the Convention and the

[68] Opinion 1/19, para. 268..
[69] Opinion 1/19, para. 269.
[70] Annex II to the Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, [2010] JO L 23/35.
[71] Roadmap to the accession to the Istanbul Convention. Available: https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-accession-to-the-istanbul-convention.

fundamental divergence of views between Member States about the ratification of the Convention as well as the effectiveness of its provisions within their legal order.

This analysis argued that, whilst the Opinion is striking for its focus on procedural propriety, it is also noteworthy for the fact that it elaborates on the political discretion underpinning the exercise of the powers conferred by Article 218 TFEU. In fact, what is noteworthy is not so much what the Court has said about political discretion but the fact that it should have chosen to say it.

In order to appreciate this argument, it is worth opening up the scope of our analysis. Mixity has emerged as a formula aiming to reconcile a number of different imperatives: the limited competence of the EU, the organisation of international relations on the basis of agreements the subject-matter of which does not reflect the division of powers between the EU and its Member States, the dynamic nature of the Union's competence which evolves in patterns not always predictable and which may not be easy to capture accurately and in a manner that would not change during the lifetime of a given agreement. Viewed from this angle, and given the various permutations of legal principles about competence, procedural rules and political contingencies, there is something deeply pragmatic about mixity. This is how it has also been construed both in practice and in the Court's case-law: its different guises have emerged gradually, its practical difficulties have been addressed a s matter of course from the bottom up, and the various legal problems have been addressed on an *ad hoc* basis.

What the episode of the conclusion of the Istanbul Convention does is to throw into high relief many of the fundamental challenges that mixity raises: a treaty whose provisions are inextricably linked to a striking degree, policy sensitivities of unusual intensity, considerable political divergences amongst Member States, and all that at a juncture where the Union appears to be fractured. Viewed from this angle, what lies at the core of the request for this Opinion is a set of questions about the fundamentals of mixity: in essence, what do we do when we cannot agree as to what to do? How far can the law take us? And how flexible is the EU framework governing mixity? In some ways, it is a testament to the resilience of EU law and the ingenuity of its practitioners and decision-makers that mixity should have served the Union well for so long without addressing these big questions. Of course, this is hardly novel in the

EU legal order in general and EU external relations in particular: a case in point is the development of the *AETR* principle the precise contours and implications of which have been puzzling us for many years after its introduction.

However, what Opinion 1/19 does is to bring the pragmatic underpinnings of mixity to the fore. Not only does it acknowledge the space that the institutions and the Member States have in order to agree as to how to proceed, but it highlights it. On the one hand, it is hardly surprising that the Court should avoid addressing questions that are neither necessary nor tangible enough in the context of the specific request for an Opinion. After all, this is this is a pattern which emerges from the case-law with striking regularity. On the other hand, by juxtaposing political discretion to the strict construction of procedural rules, the Opinion suggests two points. The first is about flexibility: whilst treaty-making by the EU is governed by rules and procedures that may not be instrumentalised in order to alter the balance of powers within the Union's institutional structure, these rules do not negate the political space that the EU institutions and the Member States have in order to reach agreement as to how to square the circle that mixity was designed to achieve. After all, the very practice of mixity has been an exercise in political ingenuity. The second point is about ambiguity: this is inherent in how mixity has evolved. Consider, for instance, the declarations of competence: the Court refers to the possibility of the EU submitting one so that the limits of the Union's competence would be specified,[72] and yet, such Declarations are infamous for their vague content and the limited assistance that they provide to the EU's treaty partners.[73]

[72] Opinion 1/19, para. 263.
[73] See the analysis in A Delgado Casteleiro, 'Eu declarations of competnece to mulitlateral agreements: a useful reference base?', (2012) 17 EFA Rev 491 and J Heliskoski, 'EU Declarations of Competence and Internatioanl Responsibility' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union – European and Interntational Perspectives* (Ocford: Hart Publishing, 2013)189.

One appreciates that what may appear pragmatic or ambiguous to one person may strike another as messy. To be sure, the practical implications of avoiding the big questions about mixity may be difficult to manage. In the light of the failure of certain Member States to ratify the Istanbul Convention, would they be bound by it as a matter of Union law in so far as the Convention covers areas of Union competence but not in so far as it covers areas of national powers?[74] If so, how would this work, given the interlinked nature of the Union and national competences pertaining to the Istanbul Convention and the wide-ranging scope of the provisions of the latter? If not, would the absence of mutual agreement not impede the fulfilment of the Union's obligations under the Istanbul Convention, in which case the further question of compatibility with Article 27 of the Vienna Convention on the Law of Treaties might be raised?[75] The dynamic nature of the Union's competence raises an inherent difficulty in approaching the question of the Union's ratification of an agreement in the absence of national ratification. As the division of competence under a mixed agreement is subject to constant redefinition, the ratification by the Union only may amount gradually to the imposition of duties on non-ratifying Member States which were not covered by the provisions ratified originally by the Union.

The implications of the joint participation of Member States and the failure of some to ratify the Convention may create a legal knot of considerable complexity. To what extent may the duty of cooperation help approach it?[76] It is settled case-law that, in the case of mixed

[74] See G Van der Loo and R Wessel, 'The non-ratification of mixed agreements: legal consequences and solutions', (2017) 54 CMLRev 735.
[75] This issue was raised, in a different context, in *LaCrand* (*Gernany v. United States of America)* I. C.J. Reports 2001, p. 466.
[76] From the voluminous literature on the duty of cooperation, see F Casolari, 'Like a bridge over troubled water: the 2/15 Opinion through the lens of EU loyalty' in I Bosse-Platière and C Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements – Constitutional Challenges* (Cheltenham: E Elgar Publishing, 2019) 85, M Clamert, *The Principle of Loyalty in EU Law* (Oxford: OUP, 2014), M Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing, 2008) 125, C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation' in Hillion and Koutrakos (eds), n27 above, 87, J Larik and A Delgado Casteleiro, 'The Duty to Remain Silent: Limitless Loyalty in Eu External Rleaitons', (2011) 36 ELRev 524, P Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in M Varju (ed.), *Between*

agreements, the Union institutions and the Member States are under a duty to ensure close cooperation in the process of negotiation, conclusion and application of these agreements.[77] Whilst malleable,[78] the Court only relied on it in Opinion 1/19 in the context of the political discretion in the Council and the ensuing role of extended discussions between the institutions and the Member States in order to take into account 'institutional and political considerations liable to affect the perceived legitimacy and effectiveness of the European Union's external action'.[79]

This strikingly broad formulation does not take us far in terms of how the duty of cooperation may assist when it comes to the ratification of international agreements. After all, Article 51 of the Vienna Convention on the Law of Treaties attaches great importance to the independent decision of Member States to ratify international agreements, and the Venice Commission points out that "the ratification of a treaty is a sovereign act of the State, which means that the State is entirely free in its choice of whether or not to ratify a treaty and, as a result, be bound by its obligations. It is also a sovereign act of the State to choose the type of relationship it would like to establish between its domestic and the international legal order i.e. what status a treaty will have within the domestic legal order, once it is ratified."[80] Viewed from this angle, would extending the scope of the duty of cooperation so that it covers the ratification of an international agreement not interfere with a fundamental right of Member States as sovereign subjects of international law in so far as this concerns provisions of the Convention that fall within their competences?[81]

Compliance and Particularism – Member State Interestes and European Union Law (Springer: 2019) 283, E Neframi, 'The Duty of Loyalty: Rethinking Its Scope through Its Application in the Field of EU External Relations', (2010) 47 CMLRev 323.

[77] Opinion 1/94, EU:C:1994:384, para 108, Opinion 2/00 (*Cartagena Protocol)*, n37 above, para 18, Case C-246/07 *Commission v Sweden*, EU:C:2010:203 para 73, Case C-28/12 *Commission v Council*, EU:C:2015:282, para 54.

[78] See, for instance, Case C-459/03 *Commission v Ireland (MOX Plant)* EU:C:2006:345 and Case C-246/07 *Commission v Sweden (PFOS)* EU:C:2010:203.

[79] Opinion 1/19, para. 254.

[80] Venice Commission Opinion 961/2019 "Opinion on the constitutional implications of the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (Armenia)", Council of Europe doc. CDLAD(2019)018, p3.

[81] See AG Hogan in his Opinion in Opinion 1/19, EU:C:2021:198, paras 203-4. See also N Levrat and Y Kaspiarovich, "Are EU member States still States under International Law?", *GSI Working Paper Prof. PhDc LAW 2019/02*.

In the light of the above, and given the peculiarities of the unfolding Istanbul Convention episode, the Opinion makes us think about the function of mixity more generally. As far as recourse to mixed agreements, is this as good as it gets? In other words, can we live with the inherent ambiguity and the pragmatism that the management of mixity entails? Or do we find this state of affairs so problematic for the EU legal order that we should have to think about our reliance on mixed agreements, not only from a normative but also an empirical perspective?