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Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky

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Abstract

This Essay joins the chorus of criticism, but also aims to deepen some of the analysis, as well as focusing it on wider questions of judicial dialogue and autonomy. Where relevant for the purpose of its critique, the Essay also refers to the View of Advocate General Kokott, which is generally much more positive in tone—even if it also finds fault with some of the provisions of the Accession Agreement. It starts with an attempt to give some basic meaning to the dialogue concept, on which it may be possible to find some agreement. The argument is that, at a minimum, the ECtHR should be able to exercise its core function of controlling compliance with the Convention norms, which are within their jurisdiction. It then examines the CJEU's approach towards the Accession Agreement, arguing that it fails to respect that core function. The Essay goes on to consider the case “for the defense,” and in favour of the current status quo, but finds that case to be unconvincing.

KEYWORDS: EU, EU Accession, ECHR, Judicial Dialogue, Autonomy, Human Rights, Kadi litigation, CJEU, Accession Agreement, Opinion 2/3

ARTICLE

OPINION 2/13 ON EU ACCESSION TO THE ECHR AND JUDICIAL DIALOGUE: AUTONOMY OR AUTARKY?

*Piet Eeckhout**

INTRODUCTION	955
I. DIALOGUE AND AUTONOMY	959
II. ANALYSIS OF THE COURT’S OBJECTIONS	963
A. The EU Charter’s Level of Protection	963
B. Autonomy and the EU Principle of Mutual Trust.....	968
C. Protocol 16.....	971
D. The Court’s Exclusive Jurisdiction.....	972
E. The Co–respondent Mechanism.....	979
F. The CJEU Prior Involvement Procedure.....	985
G. Judicial Review in CFSP Matters	987
III. THE CASE FOR THE DEFENCE?	989
CONCLUSION.....	992

INTRODUCTION

In a world of proliferating and expanding legal systems, and of increasing recourse to judicial–type dispute settlement, the concept of a “dialogue” between courts has long been central to debates about their interaction and interdependency. The concept has its origins in the very construction of the EU legal system, which required mechanisms for ensuring that Member State courts interacted with the EU Court of Justice (“CJEU”), and could be enlisted as agents for the enforcement of EU law.¹ One of those mechanisms is the preliminary

* Faculty of Laws, University College London. I am most grateful for comments by Eleni Frantziou, Alex Mills, Joanne Scott, and the participants at the UCL staff seminar and the EUI workshop at which I presented an earlier version of this Essay.

1. See, e.g., KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001).

rulings system, which instituted a formal dialogue between the CJEU and national courts. But, there has also been a dialogue outside the framework of that system; for example, between the German *Bundesverfassungsgericht* (“BVerfG”) and the CJEU.² It could even be argued that at the grand constitutional level, the non-formal dialogue has been more influential than the preliminary rulings mechanism. That is certainly the case regarding the EU system of fundamental rights protection, which is the product of the pressure exercised by the German and Italian constitutional courts.³ It is the BVerfG which has introduced the *Solange* criterion, a Janus-like concept which serves as a gatekeeper for ensuring that, where a legal system opens itself up to another system, its fundamental principles—in particular the protection of fundamental rights—are safeguarded.⁴ This is an idea which has caught on. The European Court of Human Rights (“ECtHR”) has employed it in its *Bosphorus* decision, which accepted the EU system of fundamental rights protection as equivalent to its own.⁵ The CJEU has referred to it in *Kadi I*, even if in the negative sense of not accepting the adequacy of fundamental rights protection by the UN Security Council when listing supporters of terrorism.⁶ It must be added that there is no agreement between commentators on whether *Kadi I* incorporates a true *Solange* principle: some have read the judgment as saying that the CJEU would never defer to a UN system of rights protection, even if it offered full protection.⁷

The *Kadi* litigation shows that there is also scope for dialogue between the CJEU and international courts and tribunals, even if no such court or tribunal was involved in that particular case. Indeed, the ECtHR is an international court, both from an external public

2. The first ever reference by the BVerfG is currently pending. See Case C-62/14, *Gauweiler and Others*, Opinion of Cruz Villalón AG, EU:C:2015:7.

3. Gráinne de Búrca, *The Evolution of EU Law*, in *THE EVOLUTION OF EU HUMAN RIGHTS LAW* 465 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011).

4. BVerfG, *Solange I* [1974] CMLR 540 and *Wünsche Handelsgesellschaft (Solange II)* [1987] CMLR 225.

5. *Bosphorus v. Ireland*, App No. 45036/98 (2006) 42 EHRR 1.

6. Joined Cases C-402 & 415/05 *Kadi v. Council and Commission* EU:C:2008:461, ¶¶ 319–25.

7. See JHH Weiler, *Editorial*, 19 EUR. J. INT’L L. 895 (2008); see also D. Halberstam & E. Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13, 59–61 (2009).

international law perspective, and in terms of its self-perception.⁸ It has for a long time entertained a dialogue with the CJEU,⁹ through case law as well as other forms of communication, which at one point even led to a joint press release.¹⁰ The CJEU has further been confronted with matters of WTO law, including WTO case law. Although the Court does not recognise the direct effect of WTO law,¹¹ or of WTO case law,¹² there have been veiled references to such case law, leading one commentator to coin the concept of a “muted dialogue.”¹³

It is clear that judicial dialogue is an essentially contested concept.¹⁴ Its scope and meaning are a function of how one theorises the relationships between different legal systems. The current predominant theory is legal or constitutional pluralism, but it is fair to say that there are many different pluralism versions,¹⁵ some of which may even be seen to be conflicting. Moreover, pluralism is itself contested, and I have argued in an earlier paper that, at least in the sphere of the relationship between the EU, ECHR, and national constitutional systems of human rights protection, the paradigm of legal integration is more appropriate than that of legal pluralism.¹⁶

That paper also looked at the EU’s accession to the ECHR, mandated by Article 6(2) of the Treaty of the European Union (“TEU”). The CJEU has now delivered a negative Opinion on the compatibility of the draft Accession Agreement with the EU

8. Regarding the latter, see Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 INT’L & COMP. L.Q. 217–31 (2007).

9. See, e.g., S. Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg, and the Growing European Human Rights Acquis*, 43 COMMON MKT. L. REV. 629 (2006).

10. See Joint Communication from Presidents Costa and Skouris, (Jan. 24, 2011), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

11. See Case C–149/96 *Portugal v. Council* EU:C:1999:574.

12. See Joined Cases C–120 and 121/06 P *FIAMM and Fedon* EU:C:2008:312.

13. See Marco Bronckers, *From ‘Direct Effect’ to ‘Muted Dialogue’ – Recent Developments in the European Courts’ Case Law on the WTO and Beyond*, 11 J. INT’L ECON. L. 885 (2008).

14. See, e.g., W.B. Gallie, *Essentially Contested Concepts*, in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, 167–98 (Vol. 56, 1956).

15. See, e.g., Neil Walker, *Constitutionalism and Pluralism in Global Context*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND, 17 (Matej Avbelj & Jan Komárek eds., 2012); see also Christiaan Timmermans, *The Magic World of European Constitutionalism* 10 EUR. CONS. L. REV. 349 (2014).

16. See, e.g., Piet Eeckhout, *Human Rights and the Autonomy of EU Law: Pluralism or Integration?*, 66 CLP 169 (2013).

Treaties—notwithstanding the imperative nature of accession.¹⁷ It is a hugely significant Opinion, not just in relation to the specific issues raised by the European Convention on Human Rights (“ECHR”) accession, but equally regarding the Court’s conception of the autonomy of EU law, which impacts the kind of relationship the Court is willing to entertain with other courts and tribunals. It follows in the footsteps of earlier rulings emphasising the need to safeguard the autonomy of EU law in relation to the possible roles played by such non–EU courts and tribunals in the interpretation and application of EU law.¹⁸ This application of the autonomy concept is linked to the *Solange* principle, and to the issue of judicial dialogue. The Court employs the concept to ensure that the “specific characteristics” of EU law (to use the terms of Protocol 8 on ECHR accession) are not undermined by the EU’s participation in international dispute settlement. The EU can only open itself up to international dispute settlement and to the creation of new courts or tribunals if the fundamental characteristics of EU law are preserved. The CJEU’s own jurisdiction is one of those characteristics.

Opinion 2/13 has so far not been well received—with a couple of exceptions.¹⁹ This Essay joins the chorus of criticism, but also aims

17. Opinion 2/13 re ECHR Accession EU:C:2014:2454 [hereinafter ECHR Accession].

18. Opinion 1/76 re Inland Waterways EU:C:1977:63; Opinion 1/91 re EEA Agreement EU:C:1991:490; Opinion 1/00 re European Common Aviation Area EU:C:2002:231; *Commission v. Ireland (MOX Plant)*, Case C–459/03, EU:C:2006:345; Opinion 1/09 re Unified Patent Litigation System EU:C:2011:123.

19. See e.g., Steve Peers, *The CJEU and the EU’s Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU L. ANALYSIS (Dec. 18, 2014), <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>; Leonard F.M. Besselink, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*, VERFASSUNGSBLOG (Dec. 23, 2014), <http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/>; Sionaidh Douglas-Scott, *Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice*, [UK Constitutional Law Association] (Dec. 24, 2014), <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/>; Pieter Jan Kuijper, *Reaction to Leonard Besselink’s ACELG Blog*, BLOGACTIV (Jan. 6, 2015), <http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselink-s-acelg-blog/>; Stian Øby Johansen, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and its Potential Consequences*, 16 GERMAN L. J. 169 (2015); Adam Lazowski & Ramses A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 GERMAN L. J. 179 (2015); Steve Peers, *The EU’s Accession to the ECHR: The Dream Becomes a Nightmare*, 16 GERMAN L. J. 213 (2015); *Editorial Comments: The EU’s Accession to the ECHR - A ‘NO’ from the ECJ!*, 52 COMMON MKT. L. REV. 1 (2015). But see Daniel Halberstam, *‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights*, 16 GERMAN L.

to deepen some of the analysis, as well as focusing it on wider questions of judicial dialogue and autonomy. Where relevant for the purpose of its critique, the Essay also refers to the View of Advocate General Kokott, which is generally much more positive in tone—even if it also finds fault with some of the provisions of the Accession Agreement.²⁰ It starts with an attempt to give some basic meaning to the dialogue concept, on which it may be possible to find some agreement. The argument is that, at a minimum, the ECtHR should be able to exercise its core function of controlling compliance with the Convention norms, which are within their jurisdiction. It then examines the CJEU’s approach towards the Accession Agreement, arguing that it fails to respect that core function. The Essay goes on to consider the case “for the defense,” and in favour of the current status quo, but finds that case to be unconvincing.

I. DIALOGUE AND AUTONOMY

It is not the purpose of this Essay to develop a full conceptualization of judicial dialogue and of the requisite autonomy of EU law. Regarding dialogue with international courts and tribunals—including the ECtHR—there are different views on how the EU and public international law legal systems interact, and on how they ought to interact. There is, to begin with, a fundamental discord between “EU lawyers” and “international lawyers,” well described by Bruno de Witte²¹: the former conceive of EU law as a *sui generis* constitutional-type system which has been severed from its international law origins; the latter argue that EU law is no more than a regional subsystem of international law. Within public international law itself there are divergent views on fragmentation, with arguments about whether there continues to be a unitary system, or whether at least some of its subsystems have gained independence by having become self-contained.²² Fragmentation gives rise to questions which are similar to those looked at by the pluralism

J. 105 (2015); C. Krenn, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13*, 16 GERMAN L. J. 147 (2015).

20. Opinion of Advocate General Kokott, Opinion 2/13 EC:C:2014:2475 [hereinafter Kokott Opinion].

21. Bruno de Witte, *European Union Law: How Autonomous is its Order?*, 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 141, 146 (2010).

22. Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EJIL 483 (2006).

literature.²³ Further, there is disagreement on the degree of openness of EU law towards international law, particularly, but by no means exclusively, as a result of the *Kadi* litigation.²⁴ In this respect the debate focuses on the rich case law of the CJEU on the direct and other effects of international agreements, and on whether international norms can be relied upon for purposes of EU judicial review—or indeed whether they may preclude such review (*Kadi I*).

So is it possible to say anything useful about the concept of dialogue between international courts and the CJEU, for the purpose of an analysis and critique of Opinion 2/13, without first resolving the above disagreements? An attempt at finding some agreed (in the sense of agreeable) meaning could run as follows.

In the relationship between the CJEU and the ECtHR no questions arise as to the degree of integration of ECHR norms into EU law. Indeed, the CJEU has for a long time used the Convention as one of the main sources for determining what fundamental rights form part of the general principles of EU law. Notwithstanding initial doubts expressed by some,²⁵ it has attempted to respect the Convention, as well as the ECtHR case law.²⁶ The EU Charter of Fundamental Rights (“EUCFR”) effectively incorporates the Convention norms into EU law, and contains strict instructions for EU law to respect the Convention.²⁷ So the Convention rights are already fully integrated in EU law, albeit not in a formal sense. However, as the CJEU points out and accepts in Opinion 2/13, accession would have the effect of formally incorporating the Convention into the EU legal order,²⁸ of making it an integral part of that legal order,²⁹ and of subjecting the EU institutions, including the Court, to the decisions and judgments of the ECtHR, which would be binding.³⁰ The CJEU does not go so far as saying that the Convention

23. Regarding the question of whether WTO panels should apply non-WTO international norms, see generally JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (Cambridge Univ. Press 2003).

24. See *supra* note 6. See generally *Commission and Others v. Kadi*, Case C–584/10 P, EU:C:2013:518.

25. Jason Coppel & Aidan O’Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 COMMON MKT. L. REV. 669, 689 (1992).

26. See *supra* note 9.

27. Charter of Fundamental Rights of the European Union art. 52(3) 2000 O.J. C 364/01.

28. See ECHR Accession, *supra* note 17, ¶ 179.

29. *Id.* ¶ 180.

30. *Id.* ¶¶ 181–82.

norms will have direct effect in EU law, but it is difficult to see on what basis such effect could be denied, given that the Convention is inherently about the rights and freedoms of private parties.³¹

In light of these elements, accession is about subjecting the EU and its institutions to external control by the ECtHR, as to respect for Convention rights. The CJEU accepts this in principle, but considers that the particular arrangements for accession, as contained in the Accession Agreement, undermine, in essence, the autonomy of EU law. Now it is clear that the ECtHR will not be able to exercise its control function without entering into some kind of judicial dialogue with the CJEU about possible violations of the Convention and ways to remedy them. From the perspective of ensuring that this control function can be performed, it is possible to give some basic meaning to the dialogue concept. A judicial dialogue which is part of a mechanism of ensuring that the institutions of a particular legal system—including its courts—respect external norms which are interpreted and applied by an external court must clearly include the ability for that external court to “look into” that legal system. The external court must be in a position to examine that legal system, for else it will be unable to exercise control. This means that the court must be able, in its judgments, to make statements on how it understands that legal system to operate, so as to rule on defects and compliance. Applied to the ECHR–EU relationship, the ECtHR must be able to look into EU law, and to make statements about how it understands that law to function, in order to exercise its control function.

This of course is but one part of the judicial dialogue, for else it would be a monologue. The courts of the legal system which has accepted external control must also be in a position to make statements about how that system conceives of the external norms with which it needs to comply, and what mechanisms for compliance their system makes use of. Again applied to the ECHR–EU relationship, the external control by the ECtHR will work better if the CJEU is in a position to construe the Convention, and analyse in its case law in what ways the EU ensures respect for the Convention. That part of the dialogue, however, is less relevant to this Essay’s analysis, for two reasons. First, the Accession Agreement introduces the (in)famous prior involvement mechanism, which is created so as

31. Cf. *Intertanko*, Case C–308/06, EU:C:2008:312, ¶ 59, 64.

to enable the CJEU to intervene in those cases pending before the ECtHR in which it has not yet had the opportunity to rule on the relevant EU law issues. It is the CJEU itself that has insisted on this mechanism. Second, it is accepted and acquired that the CJEU is generally capable of construing the Convention, as its norms form part of the EU Charter of Fundamental Rights. It would be in an even stronger position to do so after accession, because the ECHR provisions will then be an integral part of EU law.

The question which this Essay seeks to answer is whether, in the conditions for accession which it imposes, Opinion 2/13 allows for this basic concept of judicial dialogue. More specifically, would it still be possible for the ECtHR to perform its control function—or, put differently, to exercise the specific judicial function for which it was created, which is of course mainly to consider individual complaints about human rights violations and to ensure that the Convention is respected throughout Europe. This requires an analysis of whether the conditions for accession are so strict as to undermine the proper exercise of the ECtHR's jurisdiction and of its control function.

It also requires an analysis of whether the ECtHR would be given sufficient leeway to look into the EU legal system, for the purpose of determining when and how the Convention may be violated. No proper dialogue between the two courts on the EU's compliance with the Convention can take place if the ECtHR is precluded from considering all relevant matters of EU law, because of the conditions for accession which are imposed as a result of Opinion 2/13. There is, as we will see, an EU-specific dimension to that requirement for a proper judicial dialogue: it is the fact that EU law is as a rule implemented by the EU Member States, through their national laws, and that this requires decisions on the attribution of responsibility, to either the EU or the implementing Member State, or to both.

Next to these conditions for proper judicial dialogue, what could be a basic understanding of preserving the autonomy of EU law—a particular focus of Opinion 2/13? As will be seen, the CJEU is mostly concerned with safeguarding its own jurisdiction. That is not necessarily an invalid concern.³² As described above, the very phenomenon of judicial dialogue across European legal systems

32. See Halberstam, *supra* note 10.

started with the introduction of the *Solange* concept by the BVerfG. That concept demands that dialogue does not undermine the fundamental principles of the legal system which opens itself up, or which “integrates” the norms of another system. This means that it is part of a basic understanding of judicial dialogue for the CJEU to require respect for the fundamental characteristics of EU law—for its autonomy. It is definitely acceptable, as a matter of principle, for those characteristics to include the essential elements of the CJEU’s jurisdiction. Genuine judicial dialogue should not lead to subverting the function and jurisdiction of either of the judicial actors, which engage in it.³³ What will need to be examined, though, is whether the CJEU operates a proper understanding of what those fundamental characteristics are—including the question whether that understanding is not so restrictive as to preclude a genuine judicial dialogue.

It is also important to emphasise that the principles and conditions which the CJEU established or confirmed in Opinion 2/13 transcend the specific question of the EU’s accession to the Convention. In a world in which (a) the EU is becoming an ever more active international treaty-maker, and (b) international law is characterised by a growing judicialisation,³⁴ the Opinion will be a touchstone for many other instances of potential judicial dialogue between the CJEU and international courts.

In what follows, this Essay examines different aspects of Opinion 2/13, against the benchmark of the above basic ideas of what proper judicial dialogue and autonomy require.

II. ANALYSIS OF THE COURT’S OBJECTIONS

A. The EU Charter’s Level of Protection

In a first section the Court looks rather generally at what it calls “the specific characteristics and the autonomy of EU law.”³⁵ It starts by recalling the effects of accession, which are to make the ECtHR formally binding on the EU and its institutions. It also reiterates that

33. *Contra* R. Krämer & J. Märten, *Der Dialog der Gerichte – die Fortentwicklung des Persönlichkeitsschutzes im europäischen Mehrebenenrechtsverbund*, EUROPARECHT (forthcoming 2015).

34. *See generally* THE OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION (Karen Alter, Cesare Romano & Yuval Shany eds., 2014).

35. *See* ECHR Accession, *supra* note 17, at ¶¶ 179–200.

the EU must be able to conclude “an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice.”³⁶ However, the essential character of the Court’s own powers must be safeguarded, and the autonomy of the EU legal order must not be adversely affected. In particular, the Court adds, “any action by the bodies given decision-making powers by the ECHR . . . must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.”³⁷

These statements can be regarded as uncontroversial from the perspectives of dialogue and autonomy, except for the last one. Throughout the Opinion, the Court emphasises that accession will make the Convention an integral part of EU law. Moreover, the Convention norms form part of the EU Charter, which emphasises in Article 52(3) that the meaning and scope of the relevant Charter provisions must be the same as those of the Convention. So does the last statement mean that the Convention interpretations by the ECtHR are in no sense binding on the Court of Justice, which must for example be free to adopt its own interpretation of a Charter right that replicates a Convention right? If that were the case, it would not be conducive to a judicial dialogue that enables the ECtHR to exercise its control function. It would, moreover, be contradictory to the principle that it is possible for the EU to conclude an international agreement establishing a court whose decisions are binding on the Court of Justice. It is true that the above statement does not clarify whether it extends to the actual Convention rights, or is limited to EU law other than the Convention. The question is nevertheless anything but academic. There has been debate about the extent to which the EU should be able to develop its own conception of fundamental rights protection, now that it has its own Charter.³⁸ There are moreover signs in the case law of a tendency to conceive of international norms as in some sense “domesticated,” once incorporated in EU law.³⁹ Effectively this may mean that those norms need to be interpreted in

36. *Id.* ¶ 182.

37. *Id.* ¶ 184.

38. *See, e.g.*, Opinion of Advocate General Cruz Villalón, *Scarlet Extended v. SABAM*, Case C-70/10, EU:C:2011:255, ¶ 33.

39. M. Cremona, paper presented at ESIL in 2014.

accordance with the EU's objectives.⁴⁰ But if that were the case, also as regards the Convention, how could the EU ensure that it complies with the Convention, and respects the binding nature of the ECtHR's judgments?

However, the further analysis, which the Court of Justice then offers of the relationship between the Convention and the Charter, is more disturbing. The Court emphasises that “it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.”⁴¹ This is a reference to what I have called the “federal question” regarding the Charter: in which cases does it bind the Member States, because they are implementing EU law (Article 51(1) Charter)?⁴² It is a very sensitive question, which is difficult to answer, and the Court has arguably been struggling with it.⁴³ However, there is no indication at all in either the Convention or the Accession Agreement that the ECtHR could be called upon to answer this question. Nor does that seem to be the Court of Justice's main concern, as in the following paragraphs it turns to a different horizontal provision of the Charter: Article 53, which provides that nothing in the Charter is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and, *inter alia*, the Convention as well as Member States' constitutions. The Court then refers to its *Melloni* decision, in which it decided that Article 53 Charter does not allow the application of a higher standard of constitutional protection in cases involving uniform EU legislation, such as the European Arrest Warrant (“EAW”): “the application of national standards of protection of fundamental rights must not compromise the level of

40. See, e.g., Opinion of Advocate General Léger, *Ikea Wholesale*, Case C-351/04, EU:C:2007:236.

41. See ECHR Accession, *supra* note 17, at ¶ 186.

42. Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945 (2002).

43. Compare Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, in which the Court decided that a Swedish criminal tax fraud case was subject to the Charter because it partly involved VAT fraud, even if there was no further connection with EU law, with C-40/11 *Itida* EU:C:2012:691, in which the Court decided that the immigration status in Germany of a Japanese citizen, who is the father of an EU citizen who has moved to Austria, is not within the scope of EU law.

protection provided for by the Charter or the primacy, unity and effectiveness of EU law.”⁴⁴

It is time to pause here for a moment. Not all commentators may agree with *Melloni*, yet it is hard to see in what way the ECtHR could threaten this ruling. In *Melloni* the CJEU decided that the provisions of the EAW (on convictions *in absentia*, but with representation by counsel of choice) were in conformity with the Charter. In this regard, the ECtHR could do one of two things, if it was ever asked to look into this: it could decide that those EAW provisions comply with the Convention, or that they do not comply. In the latter case, the EU would be found to be in breach of the Convention, and would need to amend the EAW legislation. That, it would seem, is precisely the purpose of the external control by the ECtHR. Such a case would reveal disagreement between the ECtHR and the CJEU on how the Convention needs to be interpreted, and one can leave open the question of how such disagreement could be resolved. But surely the ECtHR could not determine that the abstract *Melloni* principle, which essentially concerns the primacy and uniform application of EU legislation, violates the Convention. In fact, Advocate General Kokott found that the Accession Agreement does not affect the direct effect and primacy of EU law, without even considering the specific *Melloni* issue.⁴⁵

So what does the Court have in mind? In the next paragraph it clarifies that it is concerned about the potential effect of another Article 53: that of the Convention itself. The Court points out that Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the Convention. The Court then reveals its main concern, and it is worth quoting it in full:

[Article 53 of the ECHR] should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited—with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR—to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.⁴⁶

44. ECHR Accession, *supra* note 17, ¶ 188.

45. See Kokott AG, *supra* note 20, §§ 197–207.

46. *Id.* § 189.

In other words, the Court appears to insist on the insertion, into the Accession Agreement, of a provision confirming that an EU Member State cannot impose a higher standard of protection in a *Melloni*-type situation, which concerns the primacy and uniformity of EU legislation. However, is there any real danger that the ECtHR would ever force an EU Member State to apply a national standard of human rights protection which is higher than the Convention standard, where that Member State is bound by the EU standard? The ECtHR enforces the Convention, it does not enforce higher national standards of protection. It does not act as a protector of the power granted to the Contracting Parties to apply higher standards. It seems self-evident that there is no basis in the Convention for what would effectively amount to a prohibition imposed on the ECHR Contracting Parties to bind themselves, by virtue of an international agreement (here the EU Treaties), to a standard of fundamental rights protection, which complies with, but does not exceed the standard of the Convention.⁴⁷

The CJEU implicitly adopts a wide notion of potential conflict between EU primary law and the Convention, in relation to the two Articles 53. It is true that, in theoretical terms, two legal provisions can be regarded as conflicting where one of them prohibits conduct which the other permits.⁴⁸ In that sense, the permissive effect of Article 53 of the ECHR, which allows Contracting Parties to arrange for higher standards of fundamental rights protection, could be seen to be undermined by the uniform standard of protection imposed by the EU Charter in combination with relevant EU legislation. However, such a wide notion of conflict cannot operate as a benchmark for reviewing whether an international agreement which the EU intends to conclude is compatible with the EU Treaties. It is simply too restrictive, in that it would make it virtually impossible for the EU to participate in international lawmaking: there will always be examples of wide conflicts. Nor has the wide notion been employed by the ECtHR as regards review of EU Member State action when implementing EU law. The *Bosphorus* presumption of equivalence, founded on the need to accept that ECHR Contracting Parties comply with other international obligations, seeks to accommodate the kind of

47. Cf. M. Claes & S. Imamovic, *National Courts in the New European Fundamental Rights Architecture*, in *THE EU ACCESSION TO THE ECHR 172* (V. Kosta, N. Skoutaris & V. Tzevelekos eds., 2015); Halberstam, *supra* note 19, at 125.

48. Cf. Pauwelyn, *supra* note 23, at 164–88.

tension there may be between different legal systems from the perspective of a wide notion of conflict.

Lastly, if one looks at this CJEU objection from the perspective of dialogue, it seems clear that a proper dialogue between the two courts is not facilitated by the proclamation of certain “no-go areas” by one of them. Nor does such a proclamation facilitate the ECtHR control function.

B. *Autonomy and the EU Principle of Mutual Trust*

In the next section of the Opinion the Court looks at the principle of mutual trust (or mutual recognition) between Member States, which is in particular a component of the EU’s Area of Freedom Security and Justice (“AFSJ”).⁴⁹ The principle means that, save in exceptional circumstances, an EU Member State may not be the judge, when implementing EU law, of whether another Member State complies with its fundamental rights obligations. Mutual trust is required in the context of the EAW, for example, and of the EU’s asylum legislation, which determines the Member State responsible for asylum applications. When implementing those pieces of EU legislation a Member State must surrender, and respectively return, persons to another Member State without verifying whether that Member State complies with human rights. This principle of mutual trust has already caused some friction with the Convention. In *M.S.S. v. Belgium and Greece* the ECtHR found that Belgium could not return asylum seekers to Greece because of violations of the Convention rights of these vulnerable people in Greece.⁵⁰ In *N.S.* the CJEU subsequently accepted that the systemic nature of these violations justified a kind of exception to the principle of mutual trust, and was able to construe the asylum regulation in such a way that the asylum seekers would not be returned to Greece.⁵¹ However, in its more recent case law the ECtHR does not confine its intervention to systemic violations, but finds that the Convention must be fully applied to individual cases.⁵² The UK Supreme Court has effectively

49. See S. Douglas-Scott, *The EU’s Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?*, 11 *CAMBRIDGE Y.B. OF EUROP. L. STUD.* 53 (2008–09).

50. *M.S.S. v. Belgium and Greece*, App. No. 30696/09, ECHR 2011.

51. Joined Cases C–411/10 and C–493/10, *N.S.*, EU:C:2011:865.

52. *Tarakhel v. Switzerland [GC]*, App. No. 29217/12, ECHR 2014.

sided with the ECtHR.⁵³ Opinion 2/13 now clarifies that the Court does not particularly appreciate this effect of the Convention.

The Court's reasoning is extraordinary, and was not preceded by any analysis in the View of Advocate General Kokott, who did not even mention the issue.⁵⁴ The Court blames the Accession Agreement for treating the EU as a State and giving it a role identical in every respect to that of any other Contracting Party. This approach:

[S]pecifically disregards the intrinsic nature of the EU and . . . fails to take into consideration the fact that the Member States have . . . 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.⁵⁵

If the ECtHR were to require that an EU Member State checks whether another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust, accession would be “liable to upset the underlying balance of the EU and undermine the autonomy of EU law.”⁵⁶ The message is therefore that EU law may rightly require the Member States not to check Convention violations by another Member State, and that this should not be undermined by accession.

Again the Court's approach seeks to cordon off parts of EU law that would need to be protected from control by the ECtHR. That is not a good starting point for a proper judicial dialogue. Nor is it consonant with the principle that the purpose of accession is to subject the EU to Strasbourg control. There may well be good reasons for defending the principle of mutual trust as being generally compatible with the Convention, save in specific cases of blatant or systemic violations. But it would surely be beneficial, from the perspective of fundamental rights protection, for the dialogue between the ECtHR and the CJEU about the limitations to the mutual-trust principle to continue. Instead, the CJEU requires that the Accession Agreement carves out that principle. This could lead to a situation in which, effectively, the ECtHR would no longer be able to deliver a ruling such as in the *M.S.S.* case. Accession would be leading to less control rather than more. Unfortunately there are more instances of

53. *EM (Eritrea) v. Sec. of State for the Home Dep't* [2014] UKSC 12.

54. See Kokott Opinion, *supra* note 20.

55. ECHR Accession, *supra* note 17, ¶ 193.

56. *Id.* ¶ 194.

such a reductionist effect in the further conditions, which the Court imposed in the Opinion.

Moreover, from the perspective of the autonomy of EU law, it is not clear at all that the principle of mutual trust, as a “specific characteristic” of EU law, trumps the protection of fundamental rights.⁵⁷ It is true that the principle is a cornerstone of the AFSJ, and that the relevant TFEU provisions make several references to mutual recognition. But the protection of fundamental rights is a foundational EU value,⁵⁸ and the TFEU’s opening provision on the AFSJ predicates the area on “respect for fundamental rights”⁵⁹—such respect is also a “specific characteristic” of EU law. Surely, that means that in the event of a conflict between mutual trust and human rights, the latter must prevail, as a matter of EU law?

It is difficult to see in what way the current (pre-accession) and potential future challenges (post-accession) to the principle of mutual trust are anything other than a manifestation of the very purpose of the incorporation of the Convention norms in the Charter, and of the full integration of the Convention coupled with Strasbourg control by virtue of the Treaty-mandated accession. There are other areas of EU law which may be candidates for future Strasbourg review, such as the standing requirements for private parties in actions for annulment,⁶⁰ the position of the Advocate General in CJEU proceedings, and the role of the Commission in competition investigations, to name but a few. It is difficult to see in what way mutual trust is more systemic, in EU law, than those examples. Must they also be excluded from ECtHR review in an accession agreement which respects the autonomy of EU law?

A further point in relation to mutual trust is that, from an EU perspective, the current interference by the ECtHR is worse than a post-accession review.⁶¹ As the *M.S.S.* and *Tarakhel* judgments show, mutual trust is currently not shielded from Strasbourg review, at least not where the Member States are able to exercise discretion, such as in asylum applications. The *Bosphorus* equivalence and deference

57. Peers, *supra* note 19, at 221.

58. See Consolidated Version of the Treaty of the European Union, art. 2, 2010 O.J. C 83/01 [hereinafter TEU].

59. See TFEU, *infra* note 84, art. 67(1).

60. See TFEU, *infra* note 84, art. 263.

61. See also Halberstam, *supra* note 19, at 126–37 (developing a very interesting argument in support of accession, on the basis that the current system threatens the EU’s federal stability).

principle does not apply. The effect of this is that, instead of the EU being able to defend itself in such cases, the Member States are in the dock. This is less likely to lead to a proper defense of the EU principle of mutual trust before the ECtHR, and to the determination of an acceptable balance with the protection of fundamental rights. It may also lead to Member States simply disregarding EU law, on the basis that they are required to comply with the Convention.

C. Protocol 16

In the third section of the Opinion focusing on the specific characteristics and autonomy of EU law, the Court looks at the newly minted Protocol 16 to the Convention, which will enable the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle. The Court contrasts this with the EU law obligation for such highest courts to refer cases on EU law to the Court of Justice under the preliminary rulings system. The Court recognises that the EU itself will not become a party to Protocol 16, and that it was signed after the Accession Agreement had been negotiated. Nevertheless, the Court goes on to explain, “since the ECHR would form an integral part of EU law, the mechanism established by that protocol could—notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECtHR—affect the autonomy and effectiveness of the preliminary rulings procedure.”⁶²

Reading up to that point, it is difficult to understand the Court’s concern. Why would a second European preliminary rulings system affect the autonomy and effectiveness of the EU one? Are preliminary rulings to be conceived of as some type of EU intellectual property, which may not be duplicated? Nor is it easy to see how this concern, even if it were justified, has anything to do with the Accession Agreement. Protocol 16 has been signed and will or will not enter into force, independently of EU accession to the Convention. If Member States’ highest courts were to make use of the Protocol in a way which violates their EU law obligations, such a violation would be distinct from the EU’s own accession. It could take place any way.⁶³

62. *Id.* at 197.

63. See Kokott AG, *supra* note 20, § 140. In fact it could well be argued that this issue, which is not a consequence of accession, was not within the CJEU’s jurisdiction in the framework of the request for an Opinion.

But the Court does not confine itself to the above general concern. It points out that, *post* accession, the use of Protocol 16 may trigger the procedure for prior involvement of the CJEU, which the Accession Agreement sets up. That procedure, which is further analysed below, has been inserted into the Accession Agreement upon the strong insistence of the Court itself. Yet the Court considers that, if a Protocol 16 request to the ECtHR for an advisory opinion were to trigger its own involvement, because the request raises questions of EU law compatibility with the Convention, this would amount to the circumvention of the EU preliminary rulings system.⁶⁴

There are lots of “ifs” here, and I confess that I fail to understand the issue. The main purpose of the obligation imposed on highest courts to refer EU law cases to the CJEU is to ensure that EU law is uniformly interpreted and applied in each Member State. To achieve that purpose the CJEU needs to be involved. So if a national court refers a case to the ECtHR, instead of to the CJEU, yet the CJEU is nevertheless involved through the prior involvement procedure, that purpose would seem to be achieved. It would of course be preferable for that complex game of ping pong between European courts not to take place. But the Court’s desire expressly to ban it in the Accession Agreement presupposes that Member States’ highest courts cannot be trusted to respect EU law. That is not a position, which is conducive to genuine judicial dialogue.

D. The Court’s Exclusive Jurisdiction

The potential effect of Protocol 16 on the preliminary rulings system is not the Court’s only concern about its own jurisdiction. In fact, most of the objections, which the Court sets out in the Opinion are linked to that jurisdiction, broadly conceived.⁶⁵ In itself there is nothing wrong with requiring that the fundamental characteristics of a supreme court’s jurisdiction are preserved, as part of the autonomy of a legal system and as a precondition for a proper judicial dialogue. It is however doubtful, to say the least, whether the CJEU’s concerns are truly fundamental.

In the next section of the Opinion the Court examines the effect of the Accession Agreement on its exclusive jurisdiction, as defined in Article 344 of the TFEU, according to which Member States

64. *Id.* § 198.

65. *See* Eeckhout, *supra* note 16.

undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. In previous case law, particularly *Commission v. Ireland (Mox Plant)*,⁶⁶ the Court has applied that principle to an UNCLOS dispute, started by Ireland against the UK, which related to UNCLOS provisions which are within EU competence and which therefore have to be regarded as being a part of UNCLOS concluded by the EU. Like the ECHR *post* accession, UNCLOS is a mixed agreement, which has both the EU and its Member States as Contracting Parties. Instead of going to an UNCLOS tribunal, Ireland should have brought its dispute before the CJEU, pursuant to the little-used procedure of Article 259 of the TFEU. In the Opinion the Court refers to that judgment, and adds that the Member States' duty to respect the Court's jurisdiction is a specific expression of their more general duty of loyalty.⁶⁷ The Court also draws attention to Article 3 of Protocol 8 EU, which expressly provides that the Accession Agreement must not affect Article 344 of the TFEU.⁶⁸

The Court then sets out its concerns. It considers that Article 33 of the ECHR, which provides for inter-State cases, and would extend to the EU after accession, conflicts with Article 344 of the TFEU. Because the ECHR will form an integral part of EU law, "where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR."⁶⁹ The negotiators of the Accession Agreement had sought to safeguard the Court's jurisdiction in Article 5, by providing that proceedings before the CJEU are not to be regarded as a means of dispute settlement, which the ECHR Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR. That provision concerns the exclusion of means of dispute settlement other than those in the Convention. The CJEU considers that Article 5 of the Accession Agreement:

. . . . merely reduces the scope of the obligation laid down by Art 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Art 33 of the ECHR, concerning an alleged violation thereof by a

66. *Comm'n v. Ireland (MOX Plant)*, *supra* note 18.

67. *See* TEU, *supra* note 58, art. 4(3).

68. ECHR Accession, *supra* note 17, ¶¶ 201–03.

69. *Id.* ¶ 204.

Member State or the EU, respectively, in conjunction with EU law.⁷⁰

The very existence of such a possibility undermines Article 344 of the TFEU, particularly since, if an intra-EU dispute were brought pursuant to Article 33 of the ECHR, the ECtHR would find itself seised of such a dispute. Article 344 of the TFEU precludes any prior or subsequent external control. The above possibility “goes against the very nature of EU law, which . . . requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.”⁷¹ The Court concludes that “only the express exclusion of the ECtHR’s jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU.”⁷² This is another instance of a wide notion of conflict: one in which a proscriptive norm of EU law (Member States are subject to the CJEU’s exclusive jurisdiction) conflicts with a permissive norm of ECHR law (the ECHR would still allow intra-EU conflicts to be brought before the ECtHR). Clearly, Advocate General Kokott did not adopt such a wide notion, and therefore did not find that this aspect of the Accession Agreement is incompatible with the Court’s exclusive jurisdiction.⁷³

The CJEU’s analysis calls for several comments.⁷⁴ It should be conceded that the Court’s initial starting-point is correct: once the ECHR forms an integral part of EU law, disputes between Member States, or Member States and the EU, for example on whether the EU complies with the Convention, are subject to the Court’s exclusive jurisdiction. Member States ought not to take these disputes to the ECtHR, and they are no doubt aware of that EU law obligation, after the *Mox Plant* judgment. However, there is one type of potential “intra-EU” dispute, which is not subject to the CJEU’s exclusive jurisdiction, because it is not within its jurisdiction at all. That is the case for a dispute in which a Member State considers that a provision of EU primary law violates the Convention. The CJEU’s jurisdiction

70. *Id.* ¶ 207.

71. *Id.* ¶ 212.

72. *Id.* ¶ 213.

73. Opinion of Advocate General Kokott, Opinion 2/13 [2014] E.C.R. I ___, ¶ 107–20 (delivered Jun. 13, 2014).

74. See Johansen, *supra* note 19.

does not of course extend to a review of primary law, *i.e.*, the Treaties and other instruments with equal status.

It is clearly open to debate whether it would be desirable for a Member State to involve the ECtHR in a review of whether EU primary law violates the Convention. The judicialisation, through the use of an external control organ such as the ECtHR, of what could be fundamental political or constitutional EU issues may not be appropriate except in very specific cases. Yet in effect the ECtHR has already assumed that role, in the *Matthews* case, in which it decided that the citizens of Gibraltar should be able to vote in European Parliament elections.⁷⁵ That ruling did not cause a major crisis, and the CJEU embraced it in *Spain v United Kingdom*, a judgment which is a good example of useful and proper judicial dialogue leading to a better protection of fundamental rights.⁷⁶ The *Matthews* litigation also shows that, even prior to accession, EU primary law can be reviewed in the context of individual applications. Nor can it be argued that EU accession is premised on the principle that EU primary law ought to be immune from Convention review. The negotiations on the co–respondent mechanism expressly took into account the possibility of such review.⁷⁷

It is true that ECtHR review of EU primary law could be employed as a form of external control of the CJEU case law. That is so because the line between a clear primary law violation, and one which is actually the result of the CJEU’s interpretation of such primary law, may be difficult to draw. It is easy to think of an example: the Court’s restrictive interpretation of the conditions under which private parties may bring an action for annulment, pursuant to Article 263 of the TFEU, has long been debated and criticised.⁷⁸ However, from the perspective of the ECtHR’s external control function, which is to ensure that the EU respects human rights, it is hard to see in what sense this kind of review would be more problematic than review of EU legislation, or of the CJEU’s rulings applying such legislation. Furthermore, the Opinion itself identifies a problematic principle of EU primary law: the exclusion of the CJEU’s

75. *Matthews v. United Kingdom*, pp. No. 24833/94, Eur. Ct. H.R. (1999), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910>.

76. *Spain v. United Kingdom*, Case C–145/04, [2006] E.C.R. I–7961.

77. See art. 3(3) Accession Agreement.

78. See PAUL CRAIG & GRAINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 502–10 (5th ed., 2011).

jurisdiction over Common Foreign and Security Policy (“CFSP”) matters.⁷⁹ It is not difficult to see how Strasbourg review of this exclusion, which may well be a breach of the right to an effective remedy,⁸⁰ could be in the CJEU’s interest. Such a review could create pressure to extend the CJEU’s jurisdiction, or could be used by the CJEU as a reason for an expansive interpretation of the exception to that exclusion, which concerns “restrictive measures against natural or legal persons.”⁸¹

How about Article 33 ECHR cases which do not involve EU primary law? The CJEU is right that EU Member States (or indeed the EU itself) could make use of Article 33 in such a way as to interfere with its exclusive jurisdiction. It is however questionable whether the Accession Agreement should seek to preclude the use of Article 33 altogether. First, there is the above point that the CJEU’s exclusive jurisdiction does not extend to the review of EU primary law. It is therefore difficult to see on what basis there should be a complete ban on “intra-EU” disputes. Second, a ban would presumably need to be limited to intra-EU disputes which concern EU law. Disputes between EU Member States which do *not* concern EU law should continue to be within the Article 33 remit. Otherwise, the principle that all ECHR Contracting Parties are equal would be breached in a way which cannot be justified on the ground of preserving the specificities of EU law. However, that distinction would mean that the ECtHR would need to decide, in the case of a ban, whether an Article 33 dispute between two EU Member States is concerned with EU law, or not. As will be discussed below, the CJEU considers that the ECtHR ought not to be able to look into EU law, in particular as regards the division of competences between the EU and its Member States, and as regards attribution of responsibility. But a review of whether an Article 33 case concerns EU law may require just such an examination of basic EU law principles. Third, the Court by speaking about “any prior or subsequent external control” is seeking a general ban, which also excludes a further ECtHR review once the CJEU has exercised its exclusive jurisdiction. From the perspective of the ECtHR’s control function, which is the central aim of the accession project, it is hard to see why an Article 33 “intra-

79. See *infra* Part II.G (discussing judicial review in CFSP matters).

80. See Opinion of Advocate General Kokott, Opinion 2/13 [2014] E.C.R. I ___, ¶ 82 (delivered June 13, 2014).

81. See TFEU, *infra* note 84, art. 275.

EU” case ought to be excluded, if the dispute has first been dealt with by the CJEU. At any rate, such a potential case, which may be presumed to be rare in practice, would raise questions about the compatibility of EU law with the Convention over which the ECtHR has jurisdiction any way, in the context of individual applications. Take the *Matthews* facts. With a view to implementing that judgment, the United Kingdom enabled the citizens of Gibraltar to vote in EP elections. Spain subsequently challenged that UK act as being contrary to EU law, but the CJEU rejected that challenge. Assume, for the sake of argument, that the Court had not done so, and had ruled that the United Kingdom had breached EU law, and that the new voting rights were unlawful. In a scenario *post* accession, under the arrangements of the current Accession Agreement which does not preclude an EU Member State from making use of Article 33 ECHR, the United Kingdom might consider bringing a case against the EU. However, even if it was precluded from doing so, the issue would most likely be brought before the ECtHR anyway, pursuant to a new individual complaint, brought by Ms. Matthews or by any other Gibraltar citizen. Lastly, even in the absence of EU accession to the Convention, EU Member States could make use of Article 33 ECHR in a case involving EU law, and there is currently no limitation to Article 55 of the ECHR: does that mean that their current membership of the ECHR is in breach of EU law?

At a more general level, the CJEU’s analysis of its exclusive jurisdiction appears to seek a carve-out of parts of EU law, which ought not to be subject to ECtHR control. Similarly to the CJEU’s emphasis on safeguarding the mutual trust principle, the Court’s reiteration of the idea that “relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law,” seems to reflect a conception of intra-EU relations, which has been employed in other contexts. For example, the EU often includes so-called disconnection clauses in the private international law conventions it concludes.⁸² Those clauses aim to ensure that in intra-EU relations EU law prevails, and not the provisions of the Convention. Such an approach may be acceptable in a specific policy or legislative context. However, it is not consistent with the concept of EU accession to the Convention. Article 6(2) of the TEU requires such accession, and its provisions, together with those of Protocol 8,

82. See M. Cremona, *Disconnection Clauses in EU Law and Practice*, in *MIXED AGREEMENTS REVISITED* 160 (Christophe Hillion & Panos Koutrakos eds., 2010).

merely provide that accession “shall not affect the Union's competences” and “shall make provision for preserving the specific characteristics of the Union and of Union law.” Those conditions do not justify a carve-out for intra-EU relations, in any shape or form.

Moreover, if one stands back a little and tries to look at the CJEU's exclusive jurisdiction in its broader context, exclusivity becomes relative, and the carve-out could never work. The Court itself famously established, in *Van Gend en Loos*, that the new EU legal order has not only the Member States as subjects, but also their nationals (EU citizens).⁸³ The Court's jurisdiction is by no means exclusive when it comes to EU law disputes involving individuals. National courts are fully involved, even if they are subject to the obligation to make a reference to the CJEU in certain cases.⁸⁴ The purpose of accession is to enable individuals to complain to the ECtHR about Convention violations by the EU. In fact, one would be forgiven to lose sight of that objective after reading Opinion 2/13, for the CJEU hardly even mentions that objective of strengthening the fundamental rights protection of real human beings. In light of this central purpose, which definitely precludes the conception that EU law applies to the exclusion of any other law (*i.e.*, the Convention), does it really matter that much that the Accession Agreement does not expressly prohibit the EU Member States from litigating against each other or against the EU before the ECtHR?

A last point in connection with the Court's analysis of its exclusive jurisdiction is that it reveals that the EU's membership of the WTO violates the EU Treaties. As pointed out by AG Kokott:

[I]f the aim in the present case is to lay down an express rule on the inadmissibility of inter-State cases before the ECtHR and on the precedence of Article 344 TFEU as a prerequisite for the compatibility of the proposed accession agreement with EU primary law, this would implicitly mean that numerous international agreements which the EU has signed in the past are vitiated by a defect, because no such clauses are included in them.⁸⁵

83. *Van Gend en Loos*, Case 26/62 [1963] E.C.R. 2.

84. See Consolidated Version of the Treaty on the Functioning of the European Union [hereinafter TFEU] art. 263, 2010 O.J. C. 83, at 162; *Foto-Frost v. Hauptzollamt Lübeck-Ost*, Case C-314/85 [1987] E.C.R. 4225 (national courts cannot declare EU acts invalid).

85. See Opinion of Advocate General Kokott, Opinion 2/13 [2014] E.C.R. I ___, ¶ 117 (delivered Jun. 13, 2014). A list of such agreements is found in Johansen, *supra* note 19, at 176.

The Advocate General did not refer to any particular agreements, but at least Article 23 of the WTO's Dispute Settlement Understanding is interpreted as establishing the WTO's exclusive jurisdiction to consider disputes about WTO law.⁸⁶ The EU Member States continue to be full members of the WTO, notwithstanding the EU's exclusive competence for nearly all WTO matters pursuant to Article 207 of the TFEU. Therefore, at least in theory, an intra-EU case could be brought before a WTO panel.⁸⁷ However, since the creation of the WTO in 1995, no intra-EU cases have been brought before a WTO Panel, nor to my knowledge has this possibility ever been seriously suggested by any Member State or academic commentator. This perhaps shows how unlikely it is for intra-EU disputes on EU law issues to be brought before the ECtHR, in breach of the CJEU's exclusive jurisdiction.

E. *The Co-respondent Mechanism*

The Accession Agreement sets up a complex co-respondent mechanism in Article 3. Such a mechanism is needed because, in specific ECtHR cases which involve an EU law element, it may not always be clear whether it is the EU which is responsible for the alleged human rights violation, or a particular Member State which is implementing EU law or taking a decision connected to EU law. For example, a Member State may be implementing an EU directive on fisheries in such a way that there is a human rights violation—which will raise the question whether the violation results from the directive itself, or from the way in which the Member State has implemented it.⁸⁸ Or, to give another example, a Member State may refuse authorisation for demonstrations and protests on a polluted Alpine motorway, with the argument that freedom of expression and freedom of assembly need to give way to the EU free movement of goods—which may raise the question whether EU law genuinely requires that restriction on these fundamental rights.⁸⁹

86. See e.g., Gabrielle Marceau, *WTO Dispute Settlement and Human Rights* 13, EJIL 753, 759–61 (2002).

87. See Halberstam, *supra* note 19, at 119.

88. Cf. Joined Cases C–20, Booker Aquaculture Ltd. v. Scottish Ministers, Case 64/00 [2003] E.C.R. I–1446. For background information, see Bruno de Witte, *Beyond the Accession Agreement: Five Items for the European Union's Human Rights Agenda*, in THE EU ACCESSION TO THE ECHR, *supra* note 47, at 349, 352–53.

89. Cf. Schmidberger v. Republik Österreich, Case C–112/00, [2003] E.C.R. I–5694.

There is no need to analyse the co-respondent mechanism in great detail. The CJEU objects to three features of that mechanism, two of which are examined here.⁹⁰ The first concerns the conditions under which a Member State, respectively the EU, may become co-respondent.⁹¹ One avenue is for the Member State or the EU to request co-respondent status in a pending case. The ECtHR must then seek the views of all parties, and must decide upon the request on the basis of an assessment of the reasons given by the requesting Contracting Party. That assessment must establish that the reasons given are “plausible,” regarding the conditions for becoming a co-respondent, set out in Article 3(2) and (3).

The CJEU objects to the fact that the ECtHR will need to examine this plausibility. Its premise is that “the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.” This is so because “those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR”⁹² Thus, the ECtHR, when deciding on plausibility, “would be required to assess the rules of EU law governing the division of powers . . . as well as the criteria for the attribution of their acts or omissions”⁹³ This review “would be liable to interfere with the division of powers between the EU and its Member States.”⁹⁴

The second feature of the co-respondent mechanism to which the Court objects concerns the consequences of the use of that mechanism. Article 3(7) of the Accession Agreement provides that the co-respondents shall be jointly responsible if the alleged violation of the Convention is established. However, the ECtHR may, “on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, [decide] that only one of them be held responsible.” That is again something which the CJEU finds unacceptable, because it would risk adversely affecting the division of powers between the EU and its Member States. In

90. The third one concerns the position of Member States who have made use of reservations pursuant to art. 57 ECHR.

91. See Accession Agreement, *supra* note 77, art. 3(5).

92. Opinion 2/13, ¶¶ 220–21.

93. *Id.* ¶ 224.

94. *Id.* ¶ 225.

response to the argument that the reasons given by the respondent and co-respondent (a Member State and the EU, or *vice versa*) will be the result of an agreement between them, the Court makes the following statements, which are worth quoting in full:

The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.⁹⁵

These CJEU concerns, strongly expressed, are again highly problematic from the perspective of allowing for a proper judicial dialogue, *post* accession, between the ECtHR and the CJEU. They are not conducive to guaranteeing that the ECtHR may properly exercise its external control function. They are based on a misunderstanding of what international responsibility involves. And there is a high risk that any arrangements which comply with the conditions which the CJEU imposes will affect the position of victims of human rights violations for which the EU and a Member State are jointly responsible.

The CJEU appears to reject that the ECtHR should be able to make any statements at all concerning the division of powers between the EU and its Member States. However, that division is a central feature of the EU law system, which can hardly be avoided in disputes, which raise questions as to the respective roles of the EU and of a Member State. For the ECtHR to be in a position to exercise its external control function, and to ensure that human rights violations are properly assessed and redressed, it will need to look into EU law, including the basic principles concerning the division of powers.⁹⁶ That does not mean that the ECtHR can determine that division. It will need to ensure that, like in past cases involving State Contracting Parties, it assesses EU law as objectively and faithfully as possible. If it gets EU law wrong, that is deplorable, but a ECtHR judgment will of course not be capable of modifying EU law. The

95. *Id.* ¶ 234.

96. Lazowski & Wessel, *supra* note 19, at 199.

ultimate authority for the interpretation of EU law rests with the CJEU, and the provisions of the Accession Agreement do not purport to undermine that authority, nor could they have that effect. However, if the ECtHR were too restricted in its power to look into EU law, as a result of modifications to the Accession Agreement required by the Opinion, the consequences are likely to be negative all round. In some cases it may become more difficult for a victim to obtain redress, because joint responsibility leaves undecided which Contracting Party needs to act. The actual assessment of whether there is a human rights violation may suffer from the fact that the ECtHR cannot look into EU law, which will be negative also for the EU and for EU law.

Moreover, the CJEU confuses attribution of international responsibility with the EU internal division of powers.⁹⁷ The former is built on the attribution of a breach⁹⁸—in the ECHR case to either the EU, a Member State, or both the EU and a Member State. That attribution focuses on acts or omissions, not on questions of competence. For purposes of international human rights protection, it does not matter whether a municipal authority was legally competent under its municipal law; what matters is how it has acted, and what effects these acts have had on the victim of a violation.

Take the example of the *M.S.S.* case regarding the return of the asylum seekers to Greece, pursuant to EU asylum legislation, and the ECtHR's ruling that this constituted a violation of the Convention, in light of the deficiencies in Greece's arrangements for the reception and treatment of asylum seekers.⁹⁹ If a similar case were to be brought before the ECtHR *post* accession, it would, of course, raise a question of responsibility: was Belgium required under EU law to return the asylum seekers, or did it have discretion, which it could exercise in a Convention-compatible way? The answer to that question does not require an analysis of the EU division of competences. It does, however, require an interpretation of relevant EU legislation. Obviously, it is in everyone's interest—the individual's, Belgium's, the EU's, and all other EU Member States' interests—that the ECtHR adopts the right interpretation, for the purpose of determining

97. Regarding this distinction in the context of WTO membership, see Piet Eeckhout, *The EU and its Member States in the WTO – Issues of Responsibility*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 449 (Lorand Bartels & Federico Ortino eds., 2006).

98. See the ILC Articles on the Responsibility of States, and of International Organizations.

99. See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Eur. Ct. H.R.(2011).

responsibility. All parties need to know where they now stand. It may be that the point has not yet been decided by the CJEU. However, the Accession Agreement contains a dedicated procedure of CJEU prior involvement, which is designed to enable the CJEU to decide these kinds of issues in ECtHR cases involving EU law.¹⁰⁰

The idea that the ECtHR would need to look into the division of competences between the EU and its Member States in a genuinely intrusive way is puzzling. Imagine that a Member State has acted in breach of EU exclusive competence, for example, in the field of fisheries. Imagine further that this action violates the right to property of fishermen. For the purpose of attributing responsibility under the Convention, the EU's exclusive competence would be immaterial. It is the Member State which has acted and which is responsible. The Member State must remove the act and remedy the violation. It is, in fact, also required to do so by virtue of EU law, as there is a breach of EU exclusive competence, but that would not be a relevant consideration in the ECtHR's assessment.

Or imagine that we are looking at an area of shared competence, such as an internal market, and a case involving a Member State adopting new plain packaging rules for tobacco, in the presence of an EU Directive which is rather unclear about whether EU law allows this or not.¹⁰¹ Imagine that the ECtHR needs to examine a complaint to the effect that these new rules constitute a violation of the freedom of expression, or of the right to property. The Strasbourg Court would not need to look into questions of competence here. At most, it would need to determine whether the Member State was compelled by EU law, by the Directive, to adopt these rules or not. If the Member State was acting within its discretion, pursuant to EU law, it will be responsible. If EU law forced it to adopt plain packaging, the EU will be responsible. The prior involvement procedure can be triggered to allow the CJEU to decide this point. Moreover, these kinds of questions are already within the ECtHR's jurisdiction, by virtue of the *Bosphorus* equivalence principle: the Court already decides whether a Member State has discretion under EU law or not.

100. See *infra* Part III (discussing the CJEU's prior involvement procedure).

101. This case is not hypothetical. The United Kingdom is currently in the process of adopting plain packaging rules, which are likely to be challenged as a violation of Directive 2014/40. See Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, 2014 OJ L 127/1.

In fact, it can be argued that the current Accession Agreement is too restrictive regarding the role that the ECtHR is able to play in determining responsibility in mixed cases where it is unclear whether it is the Member State or the EU which is responsible. No student of EU law will deny that the borders between EU and national law are often uncertain. That uncertainty should not however undermine the need to respect Convention rights and freedoms. Instead of precluding the ECtHR from entering those borderlands, the EU and the CJEU should encourage a proper dialogue with the ECtHR of precisely where the borders may lie in specific cases. The concept, also defended by Halberstam, that from an EU law perspective questions of responsibility for a breach of the ECHR are pure questions of EU law, and that the signature of the Accession Agreement would involve “signing away the CJEU’s power to determine what the law of the Union is,”¹⁰² is incompatible with the very purpose of accession and external control.

The succinctness with which the CJEU in this section of the Opinion conflates the international law of responsibility with EU law principles concerning the divisions of competences between the EU and its Member States is wholly inadequate. The reader is left with the impression that it is EU law that would determine whether the EU or a Member State is internationally responsible. That of course cannot be the case. There has been intense debate, at the occasion of the drafting of the Draft Articles on Responsibility of International Organisations (“DARIO”), about the extent to which EU law principles regarding the division of competences may play a role in the determination of international responsibility.¹⁰³ The EU Commission has been arguing for there to be such a role, particularly in fields where the EU has exclusive competence. The ILC has provided some room for this position by inserting Article 64 on *lex specialis*, which provides that responsibility may be governed by special rules, which “may be contained in the rules of the organisation applicable to the relations between an international organisation and its members.” The commentary to that provision refers to the

102. See Halberstam, *supra* note 19, at 117.

103. See, e.g., JEAN D’ASPREMONT, A EUROPEAN LAW OF INTERNATIONAL RESPONSIBILITY? THE ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS AND THE EU, IN THE EU ACCESSION TO THE ECHR 75 (Vasiliki Kosta ed., 2014); see also ARMAN SARVARIAN, THE EU ACCESSION TO THE ECHR AND THE LAW OF INTERNATIONAL RESPONSIBILITY, IN THE EU ACCESSION TO THE ECHR 87 (Vasiliki Kosta ed., 2014).

Commission's position, and to ECtHR case law such as *Bosphorus*.¹⁰⁴ This is a noncommittal acknowledgement, and the ILC Rapporteur, current Judge Gaja ("ICJ") has stated that questions of ECHR responsibility will only rarely require an analysis of EU competence: "The question is *not about who is competent, but whether the provision of EU law is actually at the origin of the breach.*"¹⁰⁵ For the CJEU to gloss over this debate and assume that responsibility and division of competences are one and the same is not an example of proper judicial reasoning.

F. The CJEU Prior Involvement Procedure

Article 3(6) of the Accession Agreement introduces a procedure of prior involvement of the CJEU in those cases which are brought before the ECtHR and which involve a provision of EU law that has not yet been assessed by the CJEU for its compatibility with the Convention. The procedure has been created at the CJEU's own insistence.¹⁰⁶ The CJEU was concerned that a case on EU law may arrive in Strasbourg, without national courts having made a reference to the CJEU. That this is not illusory is shown by the *M.S.S.* case.¹⁰⁷ That case concerned Belgium's action to return an asylum seeker to Greece, pursuant to the Dublin Regulation. Although the asylum seeker had brought legal proceedings in Belgium in order to resist the return, no Belgian court had made a reference to the CJEU in order to have the right interpretation of the Dublin Regulation established.

Not all observers are convinced that the prior involvement procedure is required.¹⁰⁸ Take again, the *M.S.S.* case. If it occurred *post* accession, the CJEU would have to determine whether the Dublin Regulation complies with the Convention, before the ECtHR would rule on the alleged human rights violations. It is definitely not

104. 2011 Draft Articles on the Responsibility of International Organisations, Int'l Law Comm'n, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

105. Giorgio Gaja, *The 'Co-respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR*, in *THE EU ACCESSION TO THE ECHR* (Vasiliki Kosta ed., 2014), at 346.

106. See Joint Communication, *supra* note 10; see also Jean Paul Jacqu e, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 COMMON MKT. L. REV. 995, 1017–19 (2011).

107. See *M.S.S. v. Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R.(2011).

108. See AIDA TORRES P EZ, *TOO MANY VOICES? THE PRIOR INVOLVEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION*, in *THE EU ACCESSION TO THE ECHR* (Vasiliki Kosta ed., 2014).

unimaginable, in light of the emphasis which the Court places in Opinion 2/13 on the principle of mutual trust, that it would decide that a Member State cannot verify whether the conditions of reception and treatment of asylum seekers in another Member State amount to systemic human rights violations. Assuming that the ECtHR would subsequently rule in accordance with its judgment in *M.S.S.*, the CJEU interpretation of the Dublin Regulation would constitute a violation of the Convention. What this shows is that there may be benefits for the CJEU in *not* having ruled on a point of EU law, before a case reaches Strasbourg, in particular as the lack of a relevant CJEU judgment is the responsibility of the Member State, whose courts have failed to refer the case to the CJEU.

Be that as it may, the negotiators have respected the CJEU's wishes, and have introduced a prior involvement procedure. It may be noted that that procedure was even informally agreed between the CJEU and the ECtHR, as it is mentioned in a joint press communication.¹⁰⁹ It is therefore astounding to see that the CJEU finds the procedure to be defective and insufficient for the purpose of guaranteeing its say in ECtHR cases involving EU law.

The Court's main concern is that, as formulated in the Accession Agreement, the prior involvement procedure appears to be limited to issues of compatibility of EU acts with the Convention, and not to extend to the interpretation of those acts.¹¹⁰ That concern is perplexing. It is, by definition, the compatibility of EU law with the Convention that may be at issue before the ECtHR. That Court cannot simply be asked to interpret EU law. Clearly, where a compatibility case is subject to the prior involvement procedure, the CJEU will first need to interpret the EU act, before ruling on its compatibility.¹¹¹ It may interpret the act in such a way as to be consistent with the Convention. The ECtHR may disagree subsequently with such compatibility. Or the CJEU may find that the EU act is incompatible. Precisely what then the effects of that ruling are on the Strasbourg proceedings, and on the victim's position, is unclear at this point. However, the CJEU is simply mistaken in distinguishing between interpretation and incompatibility.

109. See Joint Communication, *supra* note 10.

110. Opinion 2/13, EU:C:2014:2454, ¶¶ 242–247.

111. Opinion of Advocate General Kokott, Opinion 2/13, EC:C:2014:2475 (delivered Dec. 18, 2014) (considering that the notion of compatibility is “sufficiently broad to include questions of interpretation of EU law”).

G. Judicial Review in CFSP Matters

The jurisdiction of the EU Courts in Common Foreign and Security Policy matters is restricted to questions of competence in relation to other EU policies¹¹² and to actions for annulment of “restrictive measures” (sanctions) against natural or legal persons.¹¹³ This limited jurisdiction is a feature of the intergovernmental character of the CFSP. The Member States, or at least a number of them, continue to be keen to keep the EU Courts out of this area of policy-making, for fear of the Court’s integrationist tendencies. In the accession negotiations there was some debate on whether the jurisdiction of the ECtHR should likewise be restricted in CFSP matters, but in the end it was decided that there should be no carve-outs.

Before the CJEU, the Commission had made a strong argument to the effect that the limited jurisdiction of the Courts could nevertheless be widely construed in such a way that there would be effective internal EU review in all cases where this would be warranted from the perspective of the Convention. However, the Court refused to countenance such a wide interpretation. It simply found that “the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.”¹¹⁴ This, the Court considers, would effectively entrust judicial review of EU acts exclusively to a non-EU body, which is simply not permissible, even if it is a consequence of the way in which the CJEU’s powers are currently structured.¹¹⁵

This is again a finding that is not conducive to proper judicial dialogue, and it is too strict from the perspective of allowing the ECtHR to exercise its normal control function. That function does not presuppose that there is, at all times, an effective remedy under national law for human rights violations. Indeed, if that were the premise, there would be no need for the requirement of an effective remedy in Article 13 ECHR. It may be that the ECtHR could be confronted with CFSP measures that are not subject to the jurisdiction

112. See TEU, *supra* note 58, art. 40.

113. *Id.* art. 275.

114. *Id.* ¶ 254.

115. *Id.* ¶¶ 255–57. The Court also refers to Opinion 1/09, ¶¶ 78, 80 and 89.

of either national courts or the EU Courts. The ECtHR could then expose that gap in the system of protection, which the EU would need to remedy. From the perspective of expanding the CJEU's jurisdiction in CFSP matters, that could be a good thing. Moreover, as argued by Advocate General Kokott, in many cases national courts, which are also EU courts, will have jurisdiction over CFSP measures. They are able, and indeed required by Art 19(1) of the TEU, to offer judicial protection in the field of CFSP.¹¹⁶

Nor is it correct to hold, as the CJEU does, that the ECtHR would effectively be entrusted with judicial review of CFSP acts. The purpose of accession is not to make the ECtHR rule on the lawfulness of EU acts, but only to establish whether the EU respects or violates the Convention, and to give some form of redress to victims of such violations. It is not within the ECtHR's jurisdiction to carry out judicial review, nor is it to be feared that it would take on such a role.¹¹⁷ The argument that human-rights review is, effectively, judicial review can be contrasted with the CJEU's denial of its own authority, in *Kadi I*, that it was reviewing the lawfulness of the relevant UN Security Council resolution.¹¹⁸ In issuing the denial, the CJEU respected the limits on its own jurisdiction, which is confined to reviewing the lawfulness of EU acts under EU law and does not extend to reviewing UN resolutions under international law. There is no reason to expect the ECtHR not to recognize the limits on its jurisdiction, subsequent to EU accession.

Lastly, the Court's refusal to accept that the ECtHR be given jurisdiction to look at all EU acts, including those under the CFSP, for as long as the CJEU's jurisdiction in that sphere is limited, may well be completely ineffective. In *M.S.S.* the ECtHR took care to spell out that the *Bosphorus* equivalence presumption is limited to "[c]ommunity law in the strict sense—at the time the 'first pillar' of European Union law."¹¹⁹ On the ground, the CFSP is mostly implemented by the EU Member States, for example where the use of force is involved. The ECtHR may well consider that, if there was ever an allegation of breach of the Convention in the context of the

116. *Id.* ¶¶ 95–102.

117. *Id.* ¶ 122; see Christiaan Timmermans, *Some Personal Comments on the Accession of the EU to the ECHR*, in *THE EU ACCESSION TO THE ECHR* (Vasiliki Kosta ed., 2014).

118. *Kadi v. Council & Comm'n*, Joined Cases C-402/05 & C-415/05, [2008] E.C.R. 461.

119. See *M.S.S. v. Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R.(2011).

CFSP, the relevant Member States are fully responsible and cannot hide behind their EU law obligations. This scenario is worse for the EU than a review *post* accession, because the EU cannot participate in the ECtHR proceedings to defend itself.

III. THE CASE FOR THE DEFENCE?

It is clear that the conditions, which the CJEU imposes in Opinion 2/13 are difficult to meet, both in legal and political terms. The Opinion reveals a fundamental disagreement between the CJEU and the EU Member States as authors of the Lisbon Treaty, regarding the desirability of EU accession to the Convention. It is difficult to read the Opinion in any other way. Leaving aside the question of who the *Herren der Verträge* (Masters of the Treaties) really are, the present critique of the Opinion should also look, generally, at the case in defense of the Court's disagreement, which favours the status quo.

Opinion 2/13 confirms a pluralist conception of the relationship between EU law and the ECHR. On the pluralism spectrum it is a conception that is closer to radical pluralism than to the softer versions of constitutional pluralism. The Court emphasises its exclusive jurisdiction in EU law, and does not accept the kind of interference with EU law that the Accession Agreement would entail by allowing the ECtHR to look into matters of EU law. It emphasises the autonomy of EU law, confirming its own position as the ultimate and, at least formally, unfettered authority on all EU law matters. It insists on having the last word. The protection of fundamental rights is a central pillar of the EU law edifice, and the CJEU cannot accept that in such a core area of EU law it is formally and fully bound by ECtHR case law, and therefore subservient to a non-EU court.

To be fair, such a pluralist conception does not preclude judicial dialogue of a less formal kind. The CJEU and the ECtHR have for a long time communicated effectively. Nor does this conception preclude respect for the Convention. Its norms are part of the EU Charter, and there are no indications that the CJEU is aiming to construe the Charter in ways that fundamentally conflict with the Convention. Is a horizontal relationship between the two courts not to be preferred?

The Accession Agreement, its academic commentary,¹²⁰ and the complexities which Opinion 2/13 reveal, all show that EU accession

120. See, e.g., THE EU ACCESSION TO THE ECHR (Vasiliki Kosta ed., 2014).

is likely to have a dark side. The need to arrange for co-responsibility and for CJEU prior involvement give rise to complex legal questions, the resolution of which may be the playground of specialist judges, counsel, and academics, but which do not in the end contribute much to effective and better protection of human rights in the EU. However, this kind of case in defence of the status quo, quickly sketched, is unsustainable, for reasons connected with the relationship between the CJEU and the ECtHR, the role and function of the ECHR, with the nature of the European legal space.

After Opinion 2/13 the relationship between the CJEU and the ECtHR is unlikely to return to the past golden years of mutual respect and cooperation, let alone admiration. It will be difficult for Strasbourg not to look at the Opinion as a rejection of its core judicial function: to serve as an external control organ for human rights violations in Europe. It will also be difficult for the CJEU not to travel further along the path of developing its own, autonomous system of human rights protection, focused on the Charter rather than the Convention. Some commentators draw an analogy with how constitutional and supreme courts in some EU Member States deal with the effects of Strasbourg case law: as an obligation to do no more than to “take account” of that case law.¹²¹ The CJEU would continue to take the ECtHR judgments into account when interpreting corresponding Charter provisions, as indeed it did in judgments delivered on the same date as Opinion 2/13.¹²² However, even if that were the case, the general constellation is very different. The EU Member States are all formally bound by the Convention, and are therefore under an international law obligation to comply with the ECtHR’s rulings. Against such a background of international obligation, there may be good reasons for leaving some space for judicial debate by rejecting slavish incorporation of ECtHR case law—even if it involves threading a fine line between constructive dialogue and respect for the Convention. But the EU is not bound by the Convention, and the ECtHR cannot issue judgments against the EU. That is a fundamentally different stage on which the two courts interact. A mere “taking account” of ECtHR case law by the CJEU

121. See Eirik Bjorge, National Supreme Courts and the Developments of ECHR Rights, 9 *INT’L J. CON. LAW* 5 (2011).

122. See *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida*, Case C-542/13, [2014] E.C.L.I. I-2453, ¶ 47, and *Mohamed M’Bodj v. État belge*, Case C-562-13, E.C.L.I. I-2452, ¶ 39.

will effectively send the message that, in the sphere of human rights protection, the two courts are equal, and that the Convention and the Charter are equivalent documents. Coupled with the expansion of EU law, and with its claims to supremacy and direct effect, this equality message risks being read as undermining the ECtHR's core judicial function.

The geo-political context of an increasingly divided Europe must also be taken into account.¹²³ It would be unfortunate for the Opinion and the EU's non-accession to contribute to a general split in conceptions of human rights protection across the European continent.

The ECtHR may well react by reconsidering the *Bosphorus* equivalence presumption, at least in certain cases. The case law in the field of asylum discussed above, already demonstrates Strasbourg's ability to deliver rulings involving EU law. The Court is unlikely to stand back, after Opinion 2/13, particularly as regards sensitive AFSJ issues. It may find willing interlocutors in national supreme and constitutional courts, which are equally critical of some of the EU policy instruments in this field. The CJEU may be able to ignore conflicts with the ECtHR, but it cannot do so where there is a coalition with national courts, which may give precedence to the Convention over EU law.¹²⁴ Such a coalition would be an existential challenge for EU law.¹²⁵

From a theoretical perspective, the radical pluralism paradigm risks undermining the very authority of law in the European legal space. It is one thing to conceive of European legal orders or systems—national law, EU law, and Convention law—as having their own identity and autonomy. It is another to conceive of them as self-contained and unbridgeable. The territorial and personal space in which they operate is unitary. These legal systems may all claim authority over a single case: the case for example of the Afghan Mr. M.S.S. who resisted his return from Belgium to Greece for the purpose of examining his asylum application. If the answer to his claims depends on which set of norms is applied, and which court

123. See Robert Harmsen, *The (Geo-)Politics of the EU Accession to the ECHR: Democracy and Distrust in the Wider Europe*, in *THE EU ACCESSION TO THE ECHR* (Vasiliki Kosta, ed. 2014).

124. See *EM (Eritrea) v. Sec. of State of the Home Dep't*, [2014] 12 U.K.S.C. (appeal taken from E.W.).

125. Editorial Comments, 52 *COMMON MKT. L. REV.* 1, 14–15 (2015).

hears his case, the rule of law will become relative and contingent, and the very idea of inalienable human rights will suffer.

CONCLUSION

The CJEU's objections to the Accession Agreement do not persuade, and are not in accordance with, the limited conditions imposed by Article 6(2) of the TEU and by Protocol 8. The Accession Agreement does not affect the EU's competences, and takes care to preserve the specific characteristics of the EU and of EU law. The CJEU's wide notion of conflict is inappropriate as a benchmark for the kind of constitutionality review that the Court was asked to perform. The drafters of the Treaty of Lisbon made the fundamental decision that the EU's accession is required and is in the EU's interest. The wide notion of conflict, which the CJEU employs in the Opinion, leads to conditions for accession, which carve out certain areas and principles of EU law. That is not what the Treaty drafters intended. Nor is the CJEU right in insisting that the ECtHR should not be given the opportunity to look into matters of EU law—even matters of EU competence. The ECtHR cannot properly exercise its control function if it is unable to consider the relationship between EU law and national law, and it is as much in the EU's interest as in that of the ECtHR and of the victims of human rights violations, for Strasbourg to be able to do so. That is not equivalent to the ECtHR having the last word as regards the division of competences.

Opinion 2/13 is based on a concept of the autonomy of EU law that borders on autarky. The conditions the Opinion imposes on accession—which may not even be exhaustive—stand in the way of a future relationship between the CJEU and the ECtHR to open up space for a genuine dialogue. It is clear that the CJEU has not digested the idea of external control, and sees it as a threat rather than an opportunity. In theoretical terms, it has opted for a version of radical legal pluralism, which enables it to confirm its supreme authority, unhindered by the integration of the Convention system. Whilst there are clearly difficulties and disadvantages associated with a formalised relationship between the two European courts, the conversion of EU law into a Fortress Europe risks becoming self-destructive. There is, in this respect, not only the relationship with the ECtHR or other international courts and tribunals, but also, much more vitally, with national constitutional and supreme courts.