Special Section: *Opinion 2/13*

"It's the Autonomy, Stupid!" A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward

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A. Introduction

The Court of Justice of the European Union has arrived! Gone are the days of hagiography, when in the eyes of the academy and informed observers the Court could do no wrong. The pendulum has finally swung the other way. The judicial darling, if there is one today, is Strasbourg, not Luxembourg. Not hours had passed before the Court's 258-paragraph long *Opinion 2/13*[1] on the Draft Agreement on EU Accession to the European Convention on Human Rights was condemned as "exceptionally poor."[2] Critical voices have mounted steadily ever since, leading to nothing short of widespread "outrage."[3]

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[1] Opinion Pursuant to Article 218(11) TFEU, C-2/13 (Dec. 18, 2014), http://curia.europa.eu/ [hereinafter Opinion 2/13].

[2] See Steve Peers's statement via Twitter dated December 18, 2014, available at https://twitter.com/StevePeers/status/545523536551768064: "My summary of CJEU ruling on EU accession to ECHR. Blog post coming later. Preview: an exceptionally poor judgment "

[3] Walther Michl, *Thou Shalt Have No Other Courts Before Me*, VERFBLOG (Dec. 13, 2014), http://www.verfassungsblog.de/en/thou-shalt-no-courts/. For a sampling of the numerous critical comments, see, e.g., Leonard F.M. Besselink, *Acceding to the ECHR Notwithstanding the Court of Justice Opinion 2/13*, VERFBLOG (Dec. 23, 2014) available at http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/; Pieter Jan Kuijper, *Reaction to Leonard Besselink's ACELG Blog*, AMSTERDAM CENTRE FOR EUROPEAN LAW AND GOVERNANCE (Jan. 6, 2014), available at http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks's-acelg-blog/; Tobias Lock, *Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR*, VERFBLOG (Dec. 18, 2014), available at http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/; Aidan O'Neill, *Opinion 2/13 on EU Accession to the ECHR: the CJEU as Humpty Dumpty*, EUTOPIALAW (Dec. 18, 2014), available at http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/; Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EULAWANALYSIS, (Dec. 18, 2014), available at http://eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html; S. Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas Bombshell From the European Court of Justice*, U.K. CONST. L. BLOG (Dec. 24, 2014), available at http://ukconstitutionallaw.org; Mattias Wendel, *Mehr Offenheit wagen! Eine kritische Annäherung an das Gutachten des EuGH zum EMRK-Beitritt*, VERFBLOG, (Dec. 21, 2014), available at http://www.verfassungsblog.de/mehr-offenheit-wagen-eine-kritische-annaeherung-das-gutachten-des-eugh-zum-emrk-beitritt. For the very few more positive voices, see, C. Barnard, *Opinion 2/13 on EU Accession to the ECHR: Looking for the Silver Linings*, EULAWANALYSIS, (Dec. 16, 2015), available at http://eulawanalysis.blogspot.com/2015/02/opinion-213-on-eu-accession-to-echr.html; A. Duff, *The European*

The Court, for its part, has not made things easy. As with James Carville's famous slogan to which the title of this piece alludes,[4] an abrasive message may work better as an internal catchphrase among friends than as an external message to an audience that needs convincing. The tone of *Opinion 2/13*, and its many uncompromising interpretive moves along the way, sure make it seem as though Strasbourg is not welcome in Luxembourg. Wary of its younger and overburdened sibling, the CJEU seems intent on guarding its privileged judicial position in Europe. Especially when compared to Advocate General Kokott's rather softer views ending in "Yes, but only if . . . ," the Opinion's harsh "No, unless . . ." seems stark.[5] *Opinion 2/13* appears all the more abrupt given the judges' own involvement in the process leading up to the proposed agreement.[6]

I, too, disagree with a good deal in the Court's Opinion. And as a critic on record of the CJEU[7] as well as, in the pages of this Journal, the German Constitutional Court,[8] I have little patience for judicial hagiography. But a whiff of quite the opposite is in the air. These days it seems more tempting to follow the scent of weak prey, than to delve into the highly intricate legal issues and resist moving in for the kill.

Upon careful and moderately charitable inspection, however, I argue that *Opinion 2/13* warrants far more serious attention than its numerous critics suggest. As an initial matter,

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Union is in Deep Trouble with its Top Court, BLOGACTIV.EU, (Jan. 7, 2015), available at http://andrewduff.blogactiv.eu/2015/01/07/the-european-union-is-in-deep-trouble-with-its-top-court/; Jean Paul Jaqué, Non à l'adhésion à la Convention Européenne des Droits de l'homme?," DROIT UE, (Dec. 13, 2014), available at: http://www.droit-union-europeenne.be/412337458/2394230/posting/texte; Henri Labayle, *La guerre des juges n'aura pas lieu. Tant mieux? Libres propos sur l'avis 2/13 de la Cour de justice relatif à l'adhésion de l'Union à la CEDH*, GDR-ELSJ.EU, (Dec. 22, 2014), available at: http://www.gdr-elsj.eu. Martin Sheinin, in turn, steers clear of the substance, arguing in favor of three "mitigating circumstances" for the Court's Opinion "without any intention to defend the Opinion itself." M. Sheinin, *CJEU Opinion 2/13 – Three Mitigating Circumstances*, VERFBLOG, (Dec. 26, 2014), http://www.verfassungsblog.de/en/cjeu-opinion-213-three-mitigating-circumstances.

[4] James Carville, strategist to Bill Clinton in the 1992 election campaign, coined the campaign slogan: "It's the economy, stupid!" It started out even shorter: "The economy, stupid!" For obvious reasons, the phrase was originally intended only as internal slogan, not for public consumption.

[5] Compare View of Advocate General Kokott, Opinion Procedure 2/13, Case C-2/13 (June 13, 2014), http://curia.europa.eu/ with Opinion 2/13.

[6] CJEU Council Document 13714/10 (Sept. 17 2010).

[7] Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 CMLR 13 (2009).

[8] Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deuschland"*, 10 German L.J. 1241 (2009).

the opinion cannot simply be ignored.[9] It is binding on the Member States and the EU institutions, none of which can proceed with accession without in good faith changing either the Draft Agreement or the Treaty. It would also be a serious mistake for the Member States to follow the related suggestion to sign a protocol declaring that accession shall take place "notwithstanding Article 6(2) Treaty on European Union, Protocol No 8 relating to Article 6(2) of the Treaty on European Union and *Opinion 2/13* of the Court of Justice of 18 December 2014."[10]

Adopting such a protocol as part of the accession agreement would mean circumventing Article 48 of the Treaty on European Union ("TEU"), which lays down the exclusive way to amend the EU's treaties. At least since *Kadi*,[11] this is no longer a constitutional option. A protocol adopted as part of an international treaty would not qualify as a treaty revision to override the Court's opinion within the meaning of Article 218(11) of the Treaty on the Functioning of the European Union ("TFEU"). The adoption of any "Notwithstanding Protocol" would have to follow the full procedures of Article 48 TEU, including—unless the European Parliament agrees otherwise—a full Convention.

But even if properly crafted and properly adopted, a blanket dismissal of the Court's concerns would still be throwing out the baby with the bathwater. The bracing exchange of pluralism, of which I am a strong proponent, lacks value and values if constitutionalism is not part of the mix. The internal constitutional perspective of actors considering external legal claims does not undermine pluralism. To the contrary, constitutionalism provides a framework for legitimacy of the exercise of public power. As a result, constitutionalism supplies the terms on which the pluralist contestation takes place. As I have argued repeatedly elsewhere, constitutionalism supplies the "*grammar of legitimacy"* that governs the pluralist contest by insisting that power always vindicate a combination of "'*voice,' 'rights,' and 'expertise.'*"[12] We must, therefore, never forget the role that constitutionalism plays in a pluralist constellation.

But the current critics did just that: They rushed to embrace Strasbourg while forgetting about the constitutional dimension of EU governance along the way. This singular focus on international human rights regimes can be misleading. Participation in international human

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[9] Pieter Jan Kuijper, *Reaction to Leonard Besselink's ACELG Blog*, AMSTERDAM CENTRE FOR EUROPEAN LAW AND GOVERNANCE, (Jan. 6, 2014), available at http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks's-acelg-blog/.

[10] Besselink, *supra* note 3. In a carefully and interesting editorial forthcoming in the Common Market Law Review (privately shared with the author), Leonard Besselink has since clarified his position, discussing the notwithstanding protocol in terms of a proper amendment under TEU art. 48.

[11] Kadi and Al Barakaat Int'l Fndtn v Council and Comm'n, Case C-402/05 P and C-415/05 P, 2008 ECR 461.

[12] D. Halberstam, *Local, Global, and Plural Constitutionalism: Europe Meets the World*, *in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM 150, 170-171 (G. de Búrca & J. Weiler eds., Cambridge University Press, 2012).

rights regimes should be encouraged and, indeed, brought about. But signing on to a particular rights regime ought not to come at the expense of the constitutional nature of the EU's legal order, which is geared to vindicating all three constitutional values, including rights. The EU may therefore sign on to the ECHR as an extension, but not as a substitution, of its own project of constitutional governance.

In sum, the EU's constitutional engagement with the world leaves ample space for hard pluralist contestation. But we must first understand the constitutional element of the EU's side of the contest. It is in this *plural constitutionalist* spirit that I reconstruct the Court's objections to the Draft Agreement.

B. Advisory Opinions

We will get into the nitty-gritty of EU law very quickly. A comparativist at heart, however, I cannot help but begin by noting that this kind of opinion would have been impossible in the United States. U.S. federal courts, including the United States Supreme Court, do not opine on matters of constitutional law outside the context of what Americans call a "case or controversy."[13] When Secretary of State Thomas Jefferson asked the United States Supreme Court for constitutional advice on a delicate matter of treaty interpretation in the spring of 1793, the Justices brushed him off. This was not a judicial matter, they said, as it did not involve two adverse parties locked in a real case. As such, the Supreme Court did not have jurisdiction to opine on the matter. The Chief Justice wrote back to President Washington: "We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right."[14]

The European Union Treaties clearly take the opposite approach, allowing advisory opinions under Article 218(11) TFEU well in advance of any real case. And it seems that here, it's the opinion given, not the opinion refused, that is causing some rather serious embarrassment in Brussels. *Opinion 2/13* is binding, which means either the Draft Agreement must be changed or the EU Treaties must be amended. The CJEU quite likely regrets the embarrassment *Opinion 2/13* has caused. Indeed, in the light of the Court's answers, some members of the Commission might wish they'd never asked the Court in the first place. After all, no Treaty provision required them to do so.

[13] U.S. Const. Art. III, Sec. 2.

[14] Letter from John Jay to George Washington, *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Johnston ed., 1891).

C. How Did We Get Here?

Brussels seems shocked by *Opinion 2/13*. Some complain that when acting as observer in the drafting of the agreement,[15] the Court failed to indicate the concerns that now trip up the result of that process in the courtroom. Others lament that Luxembourg did not leak any part of its decision to those in power before dropping the Christmas bombshell. Putting aside whether the Court is estopped from complaining or should warn actors about impending rulings,[16] were there really no warning signs?

Just take Opinion 2/94,[17] which was the last time the Court was asked to opine on whether EU accession to the European Convention on Human Rights ("ECHR") was legal. EU accession had been bandied about since the late 1970s, but shortly after the Maastricht Treaty officially included respect for fundamental rights in the Treaty on European Union, things got more serious.

The Council wanted to know whether EU accession was compatible with the Treaties. Opinion 2/94 cleverly deflected that question, choosing to declare instead that the EU did not have the competence to join the ECHR. The Court opined that joining the ECHR would exceed the general rounding out competence of what was then Article 235 of the Treaty on European Community. And why was that? Opinion 2/94 points right back to what are best understood as serious concerns about the compatibility of accession:

> 34. Accession to the Convention would . . . entail a substantial change in the present Community System for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.
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> 35. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of

[15] *See supra* note 6.

[16] On the second complaint, recall that Justice Felix Frankfurter reportedly leaked the U.S. Supreme Court's impending *Ex Parte Endo* decision to the Roosevelt administration which, in turn, led the President to announce the closing of the U.S. detention camps before the ruling declared them unlawful. This allowed the Administration to save face. It is also likely why so few remember the Supreme Court's decision in *Ex Parte Endo* today. *See* Patrick O. Gurthridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

[17] Case C-2/94 (Mar. 28, 1996), http://curia.europa.eu/.

> constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by Treaty Amendment.[18]

What did the political branches do in response? Two things. First, they added a bare mandate to Article 6 TEU that "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Second, they added a series of what you might call stand-still provisions. One was in Article 6 TEU: "Such accession shall not affect the Union's competences as defined in the Treaties." The others were placed in Protocol 8 of the TEU and TFEU; demanding that accession shall (a) "preserv[e] the specific characteristics of the Union and Union law," (b) "not affect the competences of the Union or the powers of its institutions," (c) not "affec[t] the situation of Member States in relation to the European Convention," and (d) not "affect Article 344 of the Treaty on the Functioning of the European Union" (which provides that the Member States will resolve their Treaty-related disputes exclusively by the mechanisms provided for in the Treaties).[19]

Put another way, after Opinion 2/94 said that accession to the ECHR would entail changes of constitutional proportions in the European Union's legal order, the political actors turned around with a mandate to join the ECHR, demanding at the same time that there be no significant changes in the European Union's legal order. The amendment also made it a requirement that nothing change in the Member States' relationship to the ECHR.

Threading the needle of accession on these terms would be a very difficult task. To be sure, the Court might well have read the accession mandate somewhat more broadly. And as I argue below, there is indeed room for political actors to push back against the strictest reading of *Opinion 2/13*. But putting all this and the soundness of Opinion 2/94 itself aside, it cannot come as a complete shock to serious observers of the Court that, this time around, the CJEU balked, once again, at the question of compatibility.

There were other warnings, too. Add to *Opinion 2/13* the *Kadi* decision,[20] and the Court's Opinion 1/09 on the Unified Patent Court.[21] *Kadi* confirmed the Court's view that EU law is

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[18] *Id.* at paras. 34–35.

[19] Consolidated Version of the Treaty on the Functioning of the European Union art. 15, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[20] *Kadi*, Case C-402/05 P and C-415/05 P.

[21] CJEU Case C-1/09 (Mar. 8, 2011), http://curia.europa.eu/ [hereinafter Opinion 1/09].

autonomous not only vis-à-vis Member State law, but also vis-à-vis international law.[22] As a consequence, no international legal obligation can alter core principles of EU constitutional law. The Patent Court Opinion, in turn, held that the application of EU law must remain in the hands of the EU judiciary, which includes national courts but excludes courts in which Member States and non-Member States participate together.[23] Both were strong assertions of the autonomy of EU law and the necessity of maintaining the integrity of the EU's constitutional architecture.

No warning? I think not.[24] Rightly or wrongly, there were strong signals that the Court would not bend existing principles to accommodate accession. Nothing, in the Court's view—not even a Treaty Amendment that broadly commands accession to the ECHR—may compromise the autonomy of the European Union legal order.

D. The Court's Opinion in Brief

The Court's *Opinion 2/13* holds the Draft Agreement to be incompatible with the Treaties for five basic reasons, some with multiple subparts. The following is a quick and straightforward summary.

First, the Draft Agreement disregards the specific characteristics of EU Law in several ways. Article 53 ECHR reserves to the Contracting Parties the power to lay down higher standards, whether in their national laws or in international agreements. The CJEU, however, has already interpreted the similarly worded Article 53 of the EU Charter of Fundamental Rights ("CFR") as precluding higher Member State standards that undermine the primacy, unity, and effectiveness of EU Law.[25] *Opinion 2/13* now similarly objects to Article 53 ECHR, noting that this provision should be coordinated with Article 53 CFR, as interpreted by the Court of Justice, again to preserve the primacy, unity, and effectiveness of EU law.[26]

The Draft Agreement further runs afoul of the specific characteristics of EU law in that the ECHR obligation of Member States to check each other in their observation of fundamental rights is incompatible with the mutual trust that Member States must show one another,

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[22] *Cf.*, *e.g.,* Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 Harv. Int. L.J. 1 (2010); Halberstam and Stein, *supra* note 7.

[23] Opinion 1/09, at paras. 78, 80 and 89. *Cf., e.g.,* Roberto Baratta, *National Courts as 'Guardians' and 'Ordinary Courts' of EU Law: Opinion 1/09 of the ECJ*, 38:4 LEG. ISSUES OF ECON. INTEGRATION 297 (2011).

[24] I am unlikely alone in this assessment. For a good discussion prior to Opinion 2/13, see Gráinne de Búrca, *The Road Not Taken*, 105 AJIL 649 (2011).

[25] Judgment in Melloni, Case C-399/11 (Apr. 5, 2013), http://curia.europa.eu/.

[26] *See* Opinion 2/13 at paras. 187–190.

especially in the area of Freedom, Security, and Justice. Even if there are extraordinary circumstances in which such trust might no longer be applicable, the Court says EU law controls those situations, and may do so to the exclusion of any other law.[27]

Protocol 16 of the ECHR—to which the EU would not become a party—would also violate the specific characteristics of EU law. The Protocol allows Member State high courts to ask Strasbourg for an advisory opinion on a question of ECHR interpretation. After accession, this would potentially circumvent the EU's own preliminary reference system.[28]

Second, the Court holds that the Draft Agreement would violate Article 344 TFEU—which grants exclusive jurisdiction over disputes regarding EU law to the method of settlement provided for in EU law—by allowing Member States or the EU to initiate proceedings against one another under Article 33 ECHR.[29]

Third, the co-respondent mechanism runs afoul of EU Treaty requirements in several ways. Allowing the European Court of Human Rights ("ECtHR") to review the plausibility of a request from the Member States or the EU to become a co-respondent would improperly allow the ECtHR to decide on a question of EU law.[30] Allowing the ECtHR to hold co-respondents jointly liable may run contrary to the Member State's reservation regarding that particular obligation.[31] And it is also unacceptable to allow the ECtHR to decide, on the basis of the reasons given by the parties, to place responsibility on only one of the co-respondents, as this would infringe on the CJEU's exclusive jurisdiction to rule on the division of responsibilities among the EU and the Member States.[32]

Fourth, the prior involvement procedure fails to guarantee that the Court of Justice can decide all questions of EU law. The Court holds that the Draft Agreement must be changed to inform the EU, and to allow the appropriate EU institution to trigger the prior involvement of the CJEU in cases where it is doubtful whether the CJEU has already decided the question of EU law at issue in the case.[33] Furthermore, the prior involvement procedure must be available for the CJEU to examine not only the validity of provisions of

[27] *See id.* at paras. 191–195.

[28] *See id.* at paras. 196–199.

[29] *See id.* at paras. 201–214.

[30] *See id.* at paras. 222–225.

[31] *See id.* at paras. 226–228.

[32] *See id.* at paras. 229–234.

[33] *See id.* at paras. 238–241.

secondary EU Law and the interpretation of primary law, but also regarding the interpretation of provisions of secondary law.[34]

Finally, the Court declares the Draft Agreement incompatible with the specific characteristics of EU law insofar as it would entrust judicial review, including of fundamental rights and ECHR compliance, of some Common Foreign and Security Policy ("CFSP") matters exclusively to the ECtHR.[35]

E. Evaluating the Court's Objections: A Constitutional Approach

Let's get one thing out of the way. The President of the Court of Justice has been quoted as saying at the FIDE Conference in 2014: "The Court is not a human rights court. It is the Supreme Court of the European Union." Commentators quote this passage with the suggestion that it demonstrates the Court's failure to take human rights seriously.[36] The argument echoes a rather old debate,[37] recently renewed by suspicions about the Court's bona fides regarding labor rights after *Viking* and *Laval*[38] and asylum rights after *N.S.* and *Abdullahi*.[39]

Rights lapses at the Court and anywhere else must be condemned, but there is nevertheless a good deal of respectable truth to the President's statement. After significant prodding from Member State high courts, the Court has come a long way from its early days of dismissing such claims. Today, the Court sees fundamental rights as at the very heart of EU law, indeed as a precondition of the legality and legitimacy of the entire legal order.[40] The Union is broadly committed to protecting rights, even to joining international human rights agreements—as well it should. Nonetheless, solicitude for international human rights agreements comes with a caveat. The Court will show solicitude for international human rights agreements only insofar as these agreements and their

[34] *See id.* at paras. 242–247.

[35] *See id.* at paras. 249–257.

[36] *E.g.*, S. Douglas-Scott, *Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice*, U.K. CONST. L. BLOG, (Dec. 24 2014), available at http://ukconstitutionallaw.org.

[37] *See* J.H.H. Weiler & N.J.S. Lockhart, *'Taking Rights Seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence*, 32 C.M.L. Rev. Parts I & II (1995); J. Coppel & A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 C.M.L. Rev. 669 (1992).

[38] *See, e.g.*, VIKING, LAVAL, AND BEYOND (M. Freedland & J. Prassl eds., 2014).

[39] *See, e.g.*, Steve Peers, *Tarakhel v. Switzerland: Another Nail in the Coffin of the Dublin System?*, EU Law Analysis Blog, (Nov. 5, 2014), available at http://eulawanalysis.blogspot.com. Cf. *infra* notes 79–101 and accompanying text.

[40] *See, e.g., Kadi*, Case C-402/05 P and C-415/05 P at paras. 283, 284.

various institutional arrangements do not undermine the constitutional architecture of the European Union.

As the theory of constitutional pluralism holds, the constitutional architecture of the European Union need not displace all other claims of constitutional authority from within or even beyond the EU.[41] As far as the Member States are concerned, the Court has long participated in the give and take of constitutional pluralism, i.e., the multiplicity of claims to constitutional authority among the Member States and the European Union and their respective high courts. As far as potential claims of constitutional pluralism from actors beyond the EU are concerned, by contrast, the Court has still been rather more reluctant to play the same game.[42] But even if we push for a pluralist vision of the relationship among the CJEU, Member State high courts, and the ECtHR in Strasbourg,[43] we must nonetheless first understand the constitutional element of the EU's side of the bargain.

If constitutionalism is the overarching dimension along which the preservation of the specific characteristics of the European legal order must be judged, another involves the f-word. Put aside for the moment the endless disputes about defining federalism.[44] The web of mutual obligations among the European Union and its Member States goes well beyond that seen in any other international organization to date. Nonetheless, the EU and its Member States do not necessarily replicate the specific relationship between the central government and the component states of a traditional federal state. The same goes for the relationship among the Member States themselves, as compared to the signatory parties to any other international organization, on the one hand, and to the component states of a traditional federal state, on the other. To understand the Court's concerns, we will therefore carefully draw on the theory and practice of federalism without ignoring the special characteristics of the European Union.

Taken together, constitutionalism and federalism leave international law and the European Union in a quandary as they approach each other in Strasbourg. There is near universal agreement that the EU is not a state. But this negative conclusion does not tell us how, positively and systematically, to conceive of the relationship between the European Union and the Member States, and among the Member States themselves, especially as this constitutional bundle of joined legal systems approaches international law.

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[41] *See, e.g.,* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Mateij Avbelj & Jan Komarek, eds., 2012) (with pluralist contributions from Halberstam, Komarek, Kumm, Maduro, and Walker).

[42] Halberstam and Stein, *supra* note 7; De Burca, *supra* note 7.

[43] Andreas Vosskuhle, *Der europäische Verfassungsgerichtsverbund*, 106 Staatlicheit im Wandel, (Dec. 12, 2009), http://www.sfb597.uni-bremen.de/pages/pubApBeschreibung.php?SPRACHE=de&ID=146.

[44] S. Rufus Davis, THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING (1978).

We know from *Kadi* that the Court considers the European Union to be a constitutional entity. But this still leaves open how the EU's peculiar federal-type nature should generally affect its relationship with international law. This overarching question is related to, but different from, the very old but ever fresh subject of competences and mixed agreements.[45] It goes one step deeper. How does the deep federal-type structure of the EU's constitutional order affect even those agreements to which the EU is a full-fledged independent party? The terms of this aspect of the engagement are still being set.

Reading the Court's opinion in light of this overarching question, we see that the Court properly identifies some problems while suggesting sensible remedies. On other matters, the Court properly identifies certain problems, but nonetheless seems misguided on the remedy. Even on this approach, there is at least one element of the Opinion that seems misguided on the underlying substantive complaint. Finally, we shall see along the way that the Court's concerns can all be addressed while preserving space for a pluralist give and take between Luxembourg and Strasbourg.

I. The Co-Respondent Mechanism and the Prior Involvement of the Court

The Court's concerns about the co-respondent mechanism and about the prior involvement procedure contained in the Court's third and fourth main points above are both well founded. And both demand a remedy along the lines the Court suggests. These issues need not be discussed at great length here given that the Advocate General's opinion—which has been as universally cheered as the Court's has been condemned—fully agrees with the Court. The only difference between the Advocate General and the Court on these two points is rhetorical: the Advocate General concludes with "yes, but only if" whereas the Court says "no, unless". The different reception of the two opinions on these issues shows that a difference in tone goes a long way.

To state matters briefly, the Advocate General agrees that becoming a co-respondent cannot depend on a plausibility check on the part of the ECtHR.[46] The agreement must clarify that joint responsibility will not affect any reservations made by the Contracting Parties,[47] and that allocating responsibility to one or the other party, even according to the reasons given by the parties, is beyond the scope of the ECtHR's jurisdiction.[48] She concludes that the Draft Agreement and the accompanying explanations must be changed to preserve the autonomy of EU law.

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[45] *Cf.*, *e.g.*, MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD (Christoph Hillion & Panos Koutrakos, eds., 2010).

[46] View of Advocate General Kokott, *supra* note 5 at para. 229–235.

[47] *Id.* at para. 260–265.

[48] *Id.* at para. 175–179.

The Advocate General further agrees that the EU must be reliably informed so as to trigger a co-respondent application,[49] and that the prior involvement of the Court must also be engaged where there is any doubt on whether the CJEU has resolved the EU law question at issue in the case.[50] Finally, the AG agrees that the Draft Agreement must be clarified to establish that the subject matter of such prior involvement cannot be limited to the determination of compatibility, but must also encompass the interpretation of secondary law.[51]

Were the ECtHR to decide—however minimally—on whether to allow the EU or a Member State to become a co-respondent, Strasbourg would directly or indirectly be deciding on the distribution of competences among the EU and the Member States. From the perspective of international law, the question of state responsibility is surely considered to be distinct from the internal law of the state or international organization to be judged.[52] So Strasbourg can, indeed, lay claim to authority to decide which of two Contracting States bears responsibility for any given violation of the ECHR. But from the perspective of EU law, determining the responsibility for a violation and the competence to provide a remedy are nonetheless both strictly questions of EU law.[53]

The clash between these two perspectives is the stuff of pluralism, which need not (and perhaps should not) be destroyed. But there is a trick to this. Call it the art of ambiguity: pluralism could have been preserved by failing to specify who ultimately decides questions of responsibility. We know this all too well from our experience with constitutional pluralism elsewhere. By eliding the question of ultimate authority, the question of "who decides" can become a matter of mutual accommodation. We see this in the EU's "internal" constitutional pluralism, i.e., the EU's relationship with its Member States.[54] In the same way, determining the plausibility of whether the EU should be a co-respondent (as well as allocating final responsibility) could have been left to the mutual accommodation between Strasbourg and Luxembourg.

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[49] *Id.* at para. 222–228.

[50] *Id.* at para. 180–184.

[51] *Id.* at para. 130–135

[52] *See*, *e.g.*, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 2, ¶ 77, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2); *Draft Articles on the Responsibility of International Organizations, with Commentaries,* Rep. of the Int'l Law Comm'n, 63rd Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, ¶ 88, UN Doc. A/66/10.

[53] *E.g.*, View of Advocate General Kokott, *supra* note 5 at para. 232.

[54] I borrow the term "internal" constitutional pluralism from Miguel Maduro. *See* M. Poiares Maduro, *Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism*, 2 EUR. J. LEGAL STUD. 1 (2007).

Unfortunately, however, the Draft Agreement (plus explanations) chose a different path. In the matter of who decides on responsibility in the context of the joint respondent mechanism, the draft treaty sought, rather unhelpfully, to clears things up by brokering a compromise. It gave the EU the greater part of the power to determine responsibility, while allowing Strasbourg to check only the plausibility of the EU's claim and to allocate responsibility on the basis of the arguments put forward by the EU and whatever Member State found itself before the ECtHR.

The Draft Agreement's compromise is what caused the problem. From the perspective of EU law, the EU cannot sign a document that formally grants the ECtHR the power to decide these questions of EU law (even if only at the margins.) Signing such a document would be signing away the CJEU's power to determine what the law of the Union is. As a constitutional matter, this is not possible. Moreover, after accession, the ECHR would become binding EU law, and the ECtHR's decisions interpreting the ECHR (including joint responsibility questions, if that were allowed) would take on great significance within the EU's legal order.

The two other objections need no further elaboration. It seems evident that the CJEU must retain authority to interpret, not just to invalidate, EU law, and that it must retain this power in all cases in which there is any doubt on whether the CJEU has had the opportunity to do so. Let's please just not make the same mistake when fixing the Draft Agreement on this score. Do not specify that the ECtHR may decide whether such doubt exists.[55] That may create the same problem as assigning jurisdiction over the plausibility check to the ECtHR.

II. Article 344 and the Exclusivity of EU Adjudication of Member State Disputes

This issue, the Court's second main concern, is easy on substance, but far less so on remedy. Here, too, the Advocate General agrees with the Court on the substantive concern. Proceedings under Article 33 ECHR by one Member State against another, or between the EU and any one Member State, would violate the exclusivity provision of Article 344 TFEU.[56]

The AG and the Court differ somewhat, however, on the question of remedy. The AG submits that an express statement in the Draft Agreement is unnecessary. As the AG

[55] The revised accession agreement would best not specify who determines whether such "doubt" exists. Once the agreement specifies the institution that has ultimate authority over whether "doubt" exists, the Court will, once again, insist that this power be given to the CJEU.

[56] TFEU art. 344 provides: "Member States 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."

properly notes, some international agreements do contain an express statement regarding the priority of regional dispute settlement systems,[57] but such priority statements are not common in international law agreements (including several the EU has signed in the past). If the Court is really worried, the AG suggests it could make accession subject to a binding unilateral declaration on the part of the EU and the Member States that neither the EU nor the Member States would invoke the Article 33 ECHR interstate dispute provision when the subject matter of the dispute falls within the scope of EU law.[58]

Here, too, the difference between the celebrated views of the AG and the condemned Opinion of the Court is rather slim. The AG says no action is needed but does suggest a unilateral binding declaration on the part of the Member States rejecting ECtHR jurisdiction. The CJEU, by comparison, says "only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes 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."[59] To be sure, perhaps the most faithful reading of this passage in the Court's opinion is that a unilateral declaration does not suffice. And yet, a unilateral declaration submitted in the form of a reservation and accepted by the ECtHR might just count as such an express exclusion. Whether the Court would ultimately accept such a unilateral binding agreement may depend on how many of the Court's other complaints are properly heard by the political actors.

To understand what remedy might be needed, we must better understand why the Court thought there was a problem in the first place. After all, several commentators plausibly point out that the Article 33 ECHR issue looks much more like an EU problem than an ECHR problem. If Member States violate EU law by resorting to the ECHR's dispute resolution mechanism, why turn to the ECHR to save the Union from the illegal behavior of its own actors? Also, one might ask, even if this problem were real, does the problem not already exist in the absence of accession?

This is a powerful critique, but let me nonetheless try to rehabilitate the Court just a bit. As several commentators have pointed out, the Court remarks grandly that the Article 33 ECHR dispute resolution mechanism is problematic because "the very existence of such a possibility undermines the requirement set out in Article 344 TFEU."[60] But commentators have uniformly failed to notice the very next paragraph of *Opinion 2/13*, which adds: "This is particularly so since, if the EU or Member States did in fact have to bring a dispute

[57] *See* United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397, art. 282 (Dec. 10, 1982).

[58] View of Advocate General Kokott, *supra* note 5 at para. 120.

[59] Opinion 2/13 at para. 213.

[60] *Id.* at para. 208.

between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute."[61] What does this mean?

If one Member State were to take another Member State, or the EU, before the court in Strasbourg in violation of Article 344 TFEU,[62] the Strasbourg court's jurisdiction would not be optional. On its face, the ECHR would demand that the ECtHR entertain the suit. To be sure, one might plausibly argue that a Member State was thereby acting in violation of good faith or in *abus de droit*.[63] The AG puts the point this way: "An objection of inadmissibility could . . . be raised before the ECtHR in respect of any inter-State case that was nevertheless initiated."[64] But whether general principles of law or principles of general international law would allow the Strasbourg court to reject the dispute because of a violation of a treaty other than the ECHR is not clear. If the EU were to violate its own constitutional treaty by bringing a suit in the ECtHR that does not belong there, it would seem rather simple to argue that the suit does not belong there. But if a Member State, which is party to the TEU and TFEU on the one hand, and to the ECHR on the other hand, brings a suit in one forum in violation of the other forum's exclusivity rules, the case for dismissal will likely be a much closer call.

Even if Member States currently can misuse Strasbourg in just this way, accession would worsen the problem in two ways. First, the EU currently cannot be party to such abusive suits, whether in bringing suits or being sued, simply because the ECtHR lacks jurisdiction over the EU. After accession, however, an abusive suit could also be brought by and against the EU itself. Second, by acceding to the ECHR in a way that potentially allows for such suits, the EU is becoming party to the agreement that serves as the basis for such abusive suits.

The fact that other, existing international treaties the EU has signed, such as the WTO, for instance, may potentially create similar problems is somewhat beside the point. For example, a suit by one Member State against another or against the EU within the scope of EU law may well be far less sustainable as a good faith use of the WTO's dispute resolution mechanism than a suit among Member States or by a Member State against the EU under the ECHR. But even if agreements the EU has already signed create this problem as well, that should not estop the CJEU from objecting to this one. After all, nobody has argued

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[61] *Id.* at para. 209.

[62] This is no far-fetched hypothetical, as the Mox Plant litigation illustrates. *See* Judgment in Commission v. Ireland ('Mox Plant'), CJEU Case C-459/03, EU:C:2006:345 (May 30, 2006).

[63] *See*, *e.g.*, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998).

[64] View of Advocate General Kokott, *supra* note 5 at para. 115.

that the CJEU has ever considered this problem in the past, or specifically approved of this aspect of a prior treaty.

In summary, if the ECtHR were indeed required to hear the dispute under the circumstances just described, then the CJEU's concern may seem rather more plausible. It is one thing not to require Strasbourg to help keep rogue EU Member States in check. It is quite another to ask the Luxembourg to approve of an agreement extending the reach of a provision that, under certain factual circumstances, mandates a violation of EU law.

This reconstruction, in my view, renders the CJEU's substantive concern far more plausible than might appear at first blush. I might nonetheless have encouraged the Court to show somewhat greater tolerance and to entertain this risk. But from the internal, constitutional perspective of the CJEU, these are not implausible concerns.

So what about the remedy?

A binding declaration of the Member States along the lines suggested by the AG would seem sufficient to solve this problem. Such a binding declaration would almost certainly allow the ECtHR to dismiss any action brought under Article 33 ECHR in contravention of Article 344 TFEU as a violation of good faith. With the existence of such a declaration, the Member States would be acting against the intent they themselves publicly expressed as part of the EU's accession. This places the commitment not to sue one another in Strasbourg in violation of Article 344 TFEU into a domain clearly cognizable by the ECtHR. Again, such a declaration is probably not what the Court had in mind, but the Court might be convinced to accept it depending on how the Court's other concerns are addressed.

Notice that this binding declaration vindicates the Court's constitutional premise, but ultimately preserves an important element of pluralism in the arrangement with Strasbourg. Such a declaration would allow the dismissal of routinely abusive suits and thereby address the Court's legitimate concerns. At the same time, however, in an extreme case, a litigant might argue that the EU's system of remedies had failed completely, and that the situation was therefore no longer covered by the declaration. The binding declaration would thus eliminate the core problem while still leaving room for a pluralist system of global checks and balances.

III. Protocol 16 on the Optional Advisory Opinion Procedure

Let us take the Advocate General as our point of departure again. This time, though, the Advocate General differs from the Court both in the perception of the problem and in the proposed solution. As we shall see, the Court may have the better of the argument on substance, even if not on remedy.

On the substance, the Advocate General says the threat of Protocol 16 to the preliminary reference procedure would exist with or without EU accession to the ECHR. The AG, along with some commentators, suggests that accession cannot be unlawful as a result of Protocol 16. After all, so this claim goes, even absent accession, Member States may turn to the ECtHR with questions about fundamental rights, notably with questions about ECHR provisions that could have been framed as questions about the EU Charter of Fundamental Rights. The problem, then, is not one created by the Draft Agreement.[65]

This rejection of concerns about Protocol 16 is, once again, too quick. Keeping the constitutional autonomy of the EU's legal order in mind, the problem of Protocol 16 is a real problem, and a distinct problem after accession. Here's why.

Before accession, an ECHR question is mostly that: a question about the interpretation of the ECHR. Article 52(3) FRC refers to the ECHR for content, but that provision does not incorporate the ECHR into EU law as a legally operative norm. After accession, by contrast, an ECHR question indeed becomes a question of EU law, at least insofar as the question implicates the EU's own ECHR obligations. This means that the advisory opinion process creates a real risk of undermining the EU's preliminary reference procedure after accession, and far more so than before.

We must, once again, move away from an exclusively human rights focused interpretive approach and towards constitutional analysis in order to see the significance of the problem more clearly. Without EU accession, if a Member State court asks the ECtHR instead of the ECJ, it might well be asking the wrong question. That is, the Member State court should have asked Luxembourg about the Charter instead of asking Strasbourg about the Convention. From the perspective of the CJEU, this is bad, of course. But at least the Member State court is not thereby mixing up the two courts and the legal systems over which the two courts have jurisdiction.

After accession, by contrast, the mistaken Member State court would be asking Strasbourg about the Convention, when it should be asking Luxembourg about the Convention. Recall that accession turns the Convention into an integral part of EU law, binding on all actors and institutions of the Union.[66] This means that after accession, the CJEU must be considered the authoritative interpreter of the ECHR-as-EU-law for all matters that fall within the scope of EU law. After accession, therefore, the mistaken Member State court that rings up Strasbourg instead of Luxembourg would be asking a non-EU court a question of EU law.

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[65] View of Advocate General Kokott, *supra* note 5 at para. 140.

[66] Haegeman v. Belgian State, Case 181/73, EU:C:1974:41, para. 5.

To be sure, the mistaken Member State could be thought of as asking Strasbourg the Convention question purely as a matter of Convention law (*conventionality*), not as a matter of EU law (*legality*). But it is not clear this distinction matters much. First, after accession the Member States should be taking their lead from the CJEU not the ECtHR even on matters of conventionality, as long as they fall within the scope of EU law. Second, accession may turn the distinction between conventionality and legality into an almost metaphysical one insofar as the EU's status as a Contracting Party bears internally on judging the legality of EU (secondary) law. Because the Convention will have become internally binding EU law—even if the advisory opinion itself would apply a margin of discretion and not be binding[67]—the difference between legality and conventionality (in judging secondary EU law) may become rather slight in the eyes of Member State courts adjudicating fundamental/human rights challenges.

For related reasons, accession may spur Member State courts to make more such "mistaken" requests for advisory opinions from Strasbourg than before. Once the ECHR binds the EU, a Member State court might see the advisory opinion as a shield against (secondary) EU law the Member State court does not like. Prior to accession, the Member State court would have to invoke that Member State's full sovereignty and independent obligations under the Convention to resist the commands of an "offending" EU law. After accession, by contrast, the Member State court might be encouraged just to play off its own less-favored EU obligation (a secondary provision of EU law the Member Court dislikes) against the higher ranking EU obligation (compliance with the ECHR) after a conversation with Strasbourg. The fact that Strasbourg might involve Luxembourg in answering this question via the prior involvement procedure adds insult to injury from the CJEU's perspective because the entire proceeding should be in Luxembourg, subject to the jurisdiction of the CJEU.

Once again, considering the question from a constitutional perspective makes the Court's concerns quite a bit more plausible. But, do we need to change the agreements as a result?

The AG says that any threat is alleviated by the obligation of Member State courts of last resort under Article 267 TFEU to refer open questions of EU law to Luxembourg.[68] Given the pervasive possibility of Member State court "confusion" spelled out above, however, this may not suffice. In addition, it may be useful to distinguish between the mere possibility of a violation of EU law and signing an agreement that requires or virtually ensures the ECtHR's participation in the violation of EU law. Here, the apparent obligation on the part of the Strasbourg court to hear such advisory opinions is indeed less

[67] *See* Protocol No. 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Feb. 2013, C.E.T.S. No. 214, art. 5.

[68] View of Advocate General Kokott, *supra* note 5 at para. 141.

pronounced than in the case of Article 33 ECHR. Strasbourg can reject such requests but must "give reasons" for doing so.[69] But nothing would currently tell Strasbourg to refuse a request for an advisory opinion on an open ECHR question that falls within the scope of EU law. A binding unilateral declaration would provide guidance and provide a solid legal basis for the ECtHR to refuse jurisdiction when a Member State wrongly requests an advisory opinion where the question falls within the competence of the CJEU.

As in the case of Article 344 TFEU, this solution of a binding unilateral declaration to the Protocol 16 problem gives due consideration to the Court's constitutional premise without sacrificing pluralism along the way. A declaration would expressly commit the Member States vis-à-vis the ECHR to using the EU's procedures for questions concerning EU law. It would thereby eliminate the potential legal requirement on the ECtHR to hear mistaken questions that should be brought within the EU's own legal system. And yet, unlike the more explicit express exclusion possibly suggested by the Court, this would leave the door open just a crack: In an extraordinary case where the EU's own legal system had massively failed in a structural sense, a Member State might argue before the ECtHR that there was no EU legal process available, and hence the declaration inapplicable.

IV. The Puzzling Nature of both Article 53s and the Problem of "Higher Standards"

We are beginning to get into more difficult terrain. There has always been something counterproductive and downright misleading about Article 53, whether in the ECHR or in the Charter. Both provisions purport to ensure that nothing in the Charter or the Convention, as the case may be, shall derogate from existing rights in the laws—or constitutions—of the signatory or Member States and their international agreements. These claims are deeply problematic.

On its face, the Article 53 claim that the Convention, or the Charter as the case may be, does not override rights found elsewhere runs up against any minimally sophisticated understanding of rights.[70] As soon as parties claim rights on both sides of an issue, no law or legal institution can possibly protect one of these rights while completely deferring to a

[69] Protocol No. 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Feb. 2013, C.E.T.S. No. 214, art. 2.

[70] Compare European Convention on Human Rights art. 53, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005 [hereinafter ECHR] ("Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.") with Charter of Fundamental Rights of the European Union art. 53, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter CFR] ("Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.").

different law or legal institution on the definition and assessment of the other right involved. Where rights claims are made on both sides, holding for one side inevitably means rejecting, or balancing away, the other side's claim. If a court sets limits on positive gender-based action as a way of vindicating one person's right to equal treatment, for instance, it cannot remain infinitely open to a more broadly conceived right to gender-based preferences. To take a concrete example from the case law, a Member State cannot grant female job applicants a constitutional right to absolute and unconditional priority over men whenever the woman has the same formal educational degree as the man against whom she is competing. This kind of absolute and unconditional priority would almost certainly violate what the CJEU has determined to be the man's right to equality.[71] Similarly, a court cannot declare that you have, say, a right to free expression in a particular case without also ruling on the right of competing claims to free expression or dignity when such a competing right is in play.[72] So, for the Convention (or the Charter, as case may be) to guarantee one right while claiming completely to preserve all others, regardless of how they may be defined by the states, makes rather little sense. One might have objected to Article 53—whether in the Charter or the Convention—on that ground alone.

As far as Article 53 of the EU's Charter of Fundamental Rights was concerned, it should have been clear that the generic reservation of more expansive rights at the Member State level was dead on arrival. Since the earliest days of the Community, and confirmed repeatedly even after the Union expressed its concern for human rights, a Member State was not allowed to object to EU law simply on the grounds that the EU measure violated an idiosyncratic human right found in that Member State's constitution.[73] The rights reservation in Article 53 CFR could not possibly resurrect those claims. To be sure, there can be—and there is—a certain give and take between the Member State high courts and the CJEU on defining the extent of rights protection with the Union. Indeed, the EU has long derived its own set of fundamental rights in one way or another from the Member

[71] *See, e.g.,* Eckhard Kalanke v Freie Hansestadt Bremen, Case C-450/93, [1995] ECR I-03051; Hellmut Marschall v Land Nordrhein-Westfalen, Case C-409/95, [1997] ECR I-06363; Georg Badeck and Others, Case C-158/97, [2000] ECR I-01875; Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, Case C-407/98, [2000] ECR I-05539; H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij, Case C-476/99, [2002] I-02891; Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice, Case C-319/03, [2004]ECR I-8807; Judgment in Commission of the European Communities v Hellenic Republic, Case C-559/07, ECLI:EU:C:2009:198, 26 March 2009.

[72] For a German example, see the landmark judgment in Lüth, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1BvR 400/51, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 198 (Jan. 15, 1958) (striking down defamation charge against applicant as violating his free speech rights). For a prominent U.S. example, compare Catharine MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.Y.U. Law Rev. 793 (1991) with American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) (striking down local anti-pornography statute as violating free speech).

[73] *See, e.g.,* Mannesmannröhren-Werke, Case T-112/98, [2001] E.C.R. II-729, para. 84.

States' constitutional and international law practice. But from the internal perspective of the CJEU, the formal reservation of the unilateral power of the Member State to create any additional fundamental/human rights they please was always ruled out. And so, sure enough, the Court recently confirmed in *Melloni* that a Member State's idiosyncratic fundamental rights catalogue cannot undermine the primacy, unity, and effectiveness of EU law.[74]

Opinion 2/13 expresses the worry that the Member States might now use Article 53 of the Convention to resurrect fundamental rights standards in defiance of *Melloni*. As a factual matter, this is not an implausible concern. After all, *Melloni*, too, was a real case, not an imagined one. There, too, one Member State sought to resist the application of EU law by invoking an idiosyncratic constitutional right in conjunction with Article 53 FRC. Such a case, then, might well arise under the Convention as well.

Regardless whether such a case might arise, however, the claim is legally unfounded for one simple reason: *the reservation in the Convention cannot create a power that did not previously exist*. Article 53 ECHR says that "[n]othing in this Convention shall be construed as limiting or derogating from any of the . . . rights . . . which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."[75] This is not a power provision. It is a rule of construction that purports to limit the effect of the remaining provisions of the Convention. It does not grant the Contracting Parties any right they did not already have prior to signing on to the Convention. Therefore, Article 53 ECHR also cannot resurrect a power EU law has already denied the Member States. If Member States today are denied the power to maintain "higher"[76] standards that violate the primacy, unity, and effectiveness of EU law, then Article 53 of the Convention does not and cannot give them that power in the future. If a Member State seeks to use the Convention to impose a higher standard of rights, that "higher" standard of rights can and will be reviewed under the *Melloni* doctrine just as it was before.

If the Court's objection to Article 53 ECHR is unfounded, what about the Court's proposed remedy? Fortunately, the Court did not specifically demand one. The Court demands only that "[i]n so far as Article 53 ECHR essentially reserves the power of the Contracting Parties to lay down higher standards" that provision "should be coordinated with Article 53 of the

[74] *Melloni*, Case C-399/11.

[75] ECHR art. 53

[76] I am generally puzzled by the phrase "higher" in this context, as it suggests some kind of linear metric of rights. But that seems to be the way the concern is usually formulated. A better phrase would be to speak about "additional" rights (i.e., rights not recognized as part of the Charter by the CJEU or as part of the Convention by the ECtHR) insofar as they do not conflict with the rights guaranteed in Charter (or the Convention). Whether those additional rights are "higher" in any meaningful sense of that term will likely depend on your point of view.

Charter" to protect the "primacy, unity and effectiveness of EU law."[77] The next paragraph simply notes "there is no provision in the agreement envisaged to ensure . . . coordination."[78]

It could be possible not to change anything and to argue, along the lines just discussed, that there is no real problem with Article 53 ECHR. One could respond to the Court, then, by explaining that the predicate ("in so far as") to the Court's demand of a remedy has been rebutted. Alternatively, the Member States could, once again, go on record saying that Article 53 ECHR does not reserve any additional rights to the Member States that the Member States do not enjoy under the Charter. That seems like a simple fix and, again, one that does not involve any negotiation beyond the Member States of the Union.

V. The Problem of Mutual Trust and the Ticking Bomb of Non-Accession

This leads us to one of the Court's biggest concerns: mutual trust. Oddly, this concern does not figure into the Advocate General's opinion at all. At the root of this problem is a very practical tension between the case law of the EHCR and the CJEU, especially in matters of asylum and family law. It also reflects a profound clash between the Court's constitutional and the ECHR's intergovernmental vision of the Union. As we shall see, there is a great deal to this problem, but not necessarily in the way the CJEU sees it.

1. A Concrete Clash of Standards in Asylum Law

One pressing practical problem of mutual trust is the tension between the CJEU and the ECtHR's jurisprudence regarding the Dublin system on the interstate transfer of asylum seekers to the Member State of first entry.[79] As the CJEU reiterates in *Opinion 2/13*, it has

[77] Opinion 2/13 at para. 189. A good argument can be made that this entire paragraph is incoherent, but there is no need to get into that here.

[78] *Id.* at para. 190.

[79] This system originated in the Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C 254) 1 (Aug. 19, 1997), which was replaced by Council Regulation No. 343/2003 of 18 Feb. 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third Country National, 2003 O.J. (L 50) ("Dublin II"), and ultimately replaced by Council and Parliament Regulation No. 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodge in one of the Member States by a Third-Country national or a Stateless Person (recast) (*applicable from* 1 January 2014). The asylum process relies on a set of complementary directives: European Council Directive 2003/9/EC of 27 Jan. 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31); European Council Directive 2004/83/EC of 29 Apr. 2004 on Minimum Standards for the Qualifications and Status of Third Country Nationals or Stateless Persons as Refugees or as Person who Otherwise Need International Protection and the Content of the Protection and the Content of the Protection Granted, 2004 O.J. (L 304) and corrigendum, 2005 O.J. (L204); European Council Directive 2005/85/EC of 1 Dec. 2005 on Minimum Standards and Procedures in Member States Granting and Withdrawing Refugee Status, 2006 O.J. (L 236), and corrigendum 2006 OJ (L 236).

held that, in the Area of Freedom, Security, and Justice, Member States must trust each other's procedures for the protection of fundamental rights. In *N.S.*, for instance, the Court explained that an individual only has a legal claim to resist transfer to the Member State of first entry if the sending state has evidence of "systemic deficiencies" in the receiving state that "amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment" in the receiving state.[80] The Court warned, however, that not "any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No. 343/2003."[81] At stake, the Court added, was "the raison d'être of the European Union . . . ."[82] The Court reiterated this view in *Abdullahi*.[83] The CJEU steadfastly maintained that the "only way" in which an applicant can challenge his transfer is by pleading "systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."[84] This same standard of mutual trust and the presumption of compliance presumably applies throughout the EU's Area of Freedom, Security, and Justice, from European arrest warrants to interstate transfers of child custody.[85]

The ECtHR's case law, by contrast, has been rather more solicitous of asylum seekers' fundamental rights. In *M.S.S. v. Belgium and Greece*,[86] for instance, which predates the CJEU's *N.S.* decision by a few months, the ECtHR found Belgium liable under the Convention for having transferred an asylum seeker back to Greece (which the ECtHR had separately found to have violated Article 3 ECHR's prohibition on inhuman or degrading treatment).[87] The ECtHR also held that Belgium violated Article 13 ECHR, which guarantees the right to an effective remedy, by failing to provide for a proper review of such claims.[88]

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[80] N.S. v. Sec'y of State for the Home Dep't, Case C-411/10, EU:C:2011:865, para. 94.

[81] *Id.* at para. 82.

[82] *Id.* at para. 83.

[83] Abdullahi v. Bundesasylamt, Case C-394/12, EU:C:2013:813.

[84] *Id.* at para. 62.

[85] For an insightful general treatment, see Koen Lenaerts, The Principle of Mutual Recognition in the Area of Freedom, Security and Justice, The Fourth Annual Sir Jeremy Lever Lecture, All Souls College Oxford (Jan. 30, 2015).

[86] ECHR App. No. 30696/09 (Jan. 21, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{"itemid":["001-103050"]}.

[87] *Id.* at para. 264.

[88] *Id.* at para. 396.

Even though the factual situation in Greece in that case clearly amounted to widespread failures throughout the system, nothing in the ECtHR's judgment suggests that Belgium's responsibility depends on the *systemic* shortcomings in Greece. The way the ECtHR put it, Article 13 ECHR demanded "independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [ECHR]."[89]

National courts have begun to pick up on the subtle but real differences that potentially exist between the CJEU and the ECtHR standards. The U.K. Supreme Court in *E.M. v. Secretary of State for the Home Department*, [90] for instance, criticized the CJEU's standard for ignoring the real risk that an individual's transfer will violate the Convention in cases where that risk does not result from a "systemic failure" of the receiving system.[91] The U.K. court complained:

> [A]n exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice. There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental rights is more grievous or more deserving of protection. And, as a matter of practical experience, gross violations of article 3 rights can occur without there being any systemic failure whatsoever.[92]

The U.K. Supreme Court said the rule that "only systemic deficiencies" can constitute a basis to resist transfer to the listed country "cannot be upheld."[93] The only correct approach, that Court held, was the one employed by the ECtHR, i.e. that "removal of a person from a Member State of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to article 3 of ECHR."[94]

Shortly after the CJEU's *Abdullahi* judgment and after the U.K. Supreme Court's intervention, the ECtHR returned to this question and the potential difference in standards. In *Tarakhel* v. *Switzerland*, the ECtHR considered the claim by a family of asylum

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[89] *Id.* at para. 293; *cf. id.* at paras. 359, 365.

[90] R (E.M.(Eritrea)) v. Sec. of State for the Home Dep't, [2014] UKSC 12 (Feb. 19, 2014).

[91] *Id.* at para. 42.

[92] *Id.* at para. 48.

[93] *Id.* at para. 58.

[94] *Id.*

seekers living in Switzerland that transferring them to Italy would violate their Convention rights.[95] Switzerland, to which the Dublin II & III Regulations have been extended,[96] had ordered the family's return to Italy as the first country of entry within the Dublin system.[97] The Strasbourg Court recounts the CJEU's case law on the Dublin system, including the exception of "systemic risk." It notes that the applicants themselves formulated their claim in those terms. And yet, the ECtHR reiterates its own standard from *M.S.S.*[98] The Strasbourg Court then rather ingeniously concludes:

> In the case of 'Dublin' returns, the presumption that a Contracting State which is also the 'receiving' country will comply with Article 3 of the Convention can *therefore* validly be rebutted where 'substantial grounds have been shown for believing' that the person whose return is being ordered faces a 'real risk' of being subjected to treatment contrary to that provision in the receiving country.[99]

Whether the word "therefore" in this statement means that the Luxembourg and Strasbourg standards are the same or that Strasbourg's standard trumps Luxembourg's standard for purposes of the Convention is anyone's guess. Either way, it is a strong warning signal to Luxembourg that the CJEU's standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention.

To drive the point home, the ECtHR points out that it agrees with the U.K. Supreme Court that the "source" of the risk is immaterial and "does not exempt that State from carrying out a thorough and individualized examination of the situation of the person concerned."[100] The question, then, for the ECtHR is to "ascertain whether, in view of the overall situation with regard to the reception arrangements for asylum seekers in Italy and

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[95] ECHR App. No. 29217/12 (Nov. 4, 2014), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148070#{"itemid":["001-148070"]}.

[96] Switzerland is bound by the Dublin System by virtue of the association agreement of 26 October 2004 between the Swiss Confederation and the European Community regarding criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (O.J. (L 53) Feb. 27, 2008). The Dublin III Regulation was passed into law by the Swiss Federal Council on 7 March 2014.

[97] *Tarakhel*, ECHR App. No. 29217/12 at paras. 9–19.

[98] *Id.* at paras. 100–103.

[99] *Id.* at para. 104 (emphasis added).

[100] *Id.* (citing the U.K. Supreme Court's judgment in *E.M.*).

the applicants' specific situation, substantial grounds have been shown for believing that the applicants would be at risk of treatment contrary to Article 3 if they were returned to Italy."[101] This sets up a clash between Strasbourg and Luxembourg on questions of mutual trust in the Area of Freedom, Security, and Justice.

2. Brief Interlude: Three Conditions of Mutual Trust

The CJEU seems to be concerned that, once the ECHR becomes binding on the EU itself, Member States will increasingly invoke the ECHR to disregard their EU obligations of interstate cooperation on account of individual—as opposed to systemic—rights violations. After all, once the ECHR binds the EU, the CJEU's "systemic failure" standard will not only clash with the Member States' own "real risk" obligations under the Convention, but with the EU's legal obligations under the Convention as well.[102]

Many might well see this as an outrageous worry.[103] How could the CJEU object to a Member State's refusal to send an individual into another Member State in which that individual's fundamental rights are at real risk of being violated? I, too, am sympathetic to the sentiment. Indeed, it was a related outrage—though at a far higher level of moral transgression—that tore the American Union apart in the middle of the 19th Century. Abolitionist States were obligated by the Fugitive Slave Clause to deliver escaped slaves to their "home" slave States.[104] This was a grave moral transgression. And we all know how that ended for the American Union.

A federalism perspective illuminates how this problem that contributed to the U.S. Civil War was similar to the mutual trust problem that troubles the European Union today. From a federalism perspective, the deep problem of stability in both cases is a serious mismatch between obligations of mutual trust and social reality.

I suggest that the survival of any Union that demands every component state trust and give effect to the legal process of every other component state, depends on three

[101] *Id.* at para. 105.

[102] To be sure, some might argue that this is already the case since Article 53 CFR refers to the Convention. Therefore, some might say that the Charter of Fundamental Rights already today requires application of the "real risk" standard. Currently, however, the CJEU is ultimately in charge of interpreting the Charter, including the extent to which the Charter imports the ECHR's standards. The clash today, then, is legally a rather indirect tension between the two standards. After accession, any difference would transform into a clear violation of the EU's legal obligations under the Charter.

[103] *Cf.*, *e.g.*, Peers, *supra* note 3 (describing the CJEU's resistance to Member States' imposition of higher fundamental rights standards as "shocking" from a human rights perspective, and especially in the light of the Court's ruling on mutual trust).

[104] *See* Prigg v. Pennsylvania, 41 U.S. 539 (1842).

interrelated conditions. First, a reasonably common set of values and similar level of fundamental rights protection throughout the Union. Second, the Union's ability to remedy rights violations in component states effectively whenever they occur. And third, a safety valve (either in primary or secondary law) for a component state to invoke overriding policy justifications where compliance with mutual trust would otherwise rip the Union apart.

Furthermore, there is, in my view, a hydraulic connection between these three conditions of mutual trust: where one or more of these elements is weak, the remaining element(s) must be correspondingly strong. For example, if there are serious divergences in fundamental rights protections, and the Union does not have the power to step in protect individuals, it must relax the obligations of mutual trust. At bottom, for a federal union to survive, any legal obligation of mutual trust must be grounded in social reality, not judicial fiat.

3. Beyond Asylum Law: The Ticking Bomb of Non-Accession

The CJEU's demand that accession provide an exemption for Convention violations caused by a Member State's EU-related mutual trust obligations is rather short sighted. An exemption would alleviate the tension between Strasbourg, Luxembourg, and Member States in asylum law without relieving the corresponding (and far greater) tension among these three actors that pervades fundamental/human rights in the European Union more generally. To be sure, accession under the conditions the CJEU's demands may help the CJEU in its most immediate troubles regarding the concrete clash on asylum standards. But, as I shall explain, accession on those conditions does not address the far bigger problem that affects all of EU law.

The CJEU seems to overlook this larger problem and its relation to accession completely. The Court also misses the fact that accession *without* a mutual trust exemption will help address the larger problem. Conversely, with regard to the larger problem, the Court has much to lose. Here, non-accession is the outcome the Court should fear. To see why, we need to back up and briefly examine the state of fundamental/human rights protection in the European Union.

3.1 The Wholesale/Retail Problem

Currently—in the absence of accession—the ECtHR has decided the EU cannot be sued in Strasbourg.[105] EU actions are reviewable in Strasbourg only indirectly by holding Member States liable either for bringing about an offensive EU measure by unanimous vote, or for

[105] *Cf.* Bosphorus v. Ireland, ECHR App. No. 45036/98, para. 152 (June 30, 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564#{"itemid":["001-69564"]}.

implementing an EU measure.[106] Currently, the ECtHR considers such challenges with considerable deference. Member State actions are presumed to be lawful under the Convention as long as the action is subject to a roughly equivalent standard of fundamental rights protection within the EU.[107]

As the ECtHR announced in its seminal *Bosphorus* judgment, however, this presumption can be rebutted if "in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient."[108] The ECtHR will thus still hear challenges to a Member State's implementation of EU law either where the EU has failed to provide an equivalent standard of protection or where the Member State exercised discretion in the matter, and the violation could have been avoided without disregarding Union law.[109]

The *Bosphorus* standard is often likened to the German Constitutional Court's *Solange* doctrine,[110] but there is an important difference between the two. Under the well-known *Solange* compromise, the Member State high court will not review individual complaints that EU actions violate fundamental rights, as long as the EU generally provides an equivalent standard of fundamental rights protection.[111]

The *Solange* compromise has two components. The first is rather similar to the ECtHR's margin of appreciation, but which we shall here simply call *rough equivalence*.[112] It suggests that the standards employed by the CJEU and the ECtHR need not be identical, but only comparable—i.e., roughly the same. The second element is what I have long liked

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[106] See generally, *id.* See also Matthews v. the United Kingdom, ECHR App. No. 24833/94 (Feb. 18, 1999); SEGI and others v. 15 Member States (SEGI and Gestoras Pro-Amnistia v. Germany and others), ECHR App. No. 6422/02, decision of inadmissibility of May 23, 2002.

[107] *See, e.g., Bosphorus*, ECHR App. No. 45036/98 at para. 155.

[108] *Id.* at para. 156.

[109] This is, indeed, the posture of many of the recent asylum cases in Strasbourg. States in those cases could, legally under EU law, have invoked the so-called "sovereignty" clause and chosen to keep the asylum seeker. The decision to send the asylum seeker back to the state of first entry was, therefore, fully attributable to that Member State.

[110] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 197/83, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 339, 374, 387 (Oct. 22, 1986); *cf.* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvL 1/97, 102 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 147, 164 (June 7, 2000).

[111] BVerfG, Case No. 2 BvR 197/83 at para. 132.

[112] For a comprehensive discussion of the margin of appreciation, *see, e.g.*, Yutaka Arai-Takahashi, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2001).

to call a *wholesale/retail* distinction.[113] A Member State court following the *Solange* doctrine will not examine at the *retail* level—meaning with regard to an individual case—whether the EU violated fundamental rights in that case. Such a court will consider only claims that there has been a *wholesale* disregard for fundamental rights at the EU level—meaning that Member States will consider fundamental rights violations of the EU only where they exist in bulk across a range of cases. The retail business of fundamental rights protection with regard to EU measures is the EU's business, not that of the Member States. As far as EU law is concerned, a Member State high court's business under the *Solange* compromise is strictly wholesale. Following this idea, for example, the German Constitutional Court in the *Solange* decision itself held inadmissible a fundamental rights claim by a mushroom exporter against Germany's implementation of an EU export restriction on the grounds that the EU "generally" provided fundamental rights protection that was "essentially equivalent" to that envisaged by the German *Grundgesetz* (constitution).[114]

The *Bosphorus* standard that Strasbourg applies to a Member State's nondiscretionary implementation of EU actions, and the *Solange* standard are currently in serious tension with one another. To be sure, Strasbourg's standard of "equivalence" is likely to match what we have loosely called the *rough equivalence* prong of the *Solange* compromise.[115] But the two standards differ radically on what we've termed the *wholesale/retail* distinction.

As far as adjudicating Convention rights are concerned, the ECtHR is still firmly established in the *retail business*.[116] The *Bosphorus* presumption can be rebutted on a case-by-case basis.[117] But a Member State following the *Solange* compromise, as we have just seen, is not. Accordingly, the German high court might well reject an individual's fundamental rights challenge even though the CJEU made a grave error in that individual case as long as

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[113] Much like a wholesaler, who does not deal with individual customers but sells goods only in bulk (or *en gros)*, so, too, the German high court refuses to deal with individuals' case-by-case fundamental rights complaints, considering only a claim that the EU has *generally* violated fundamental rights.

[114] BVerfG, Case No. 2 BvR 197/83 at para. 132.

[115] *Cf.* generally Arai-Takahashi, *supra* note 112; Howard Charles Yourow, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); Steven Greer, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS (2000); J.G. Merrills, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (1993). For a recent critical assessment, see Federico Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, *in* A FUTURE FOR THE MARGIN OF APPRECIATION? (Mads Andenas, Eirik Bjorge & Giuseppe Bianco, eds., forthcoming, 2015), available on SSRN at http://ssrn.com/abstract=2552542.

[116] *Bosphorus*, ECHR App. No. 45036/98.

[117] *Cf., e.g.,* Michaud v. France, ECHR. App. No. 12323/11 (Dec. 6, 2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115377#{"itemid":["001-115377"]}.

the CJEU has not failed to protect fundamental rights more generally. That same individual can now go to the Strasbourg court, which will condemn Germany for implementing EU law in that particular case because the action in that individual case manifestly disregarded that particular applicant's fundamental rights. Should this happen, Germany will surely rethink the *Solange* compromise.

The consequences could not be more dramatic. The current tension between Strasbourg's *retail* standard and *Solange*'s *wholesale* standard threatens to unravel the entire compromise—a core principle of judicial cooperation in the Union for the past thirty years.[118] Even Member States who have their own version of such a compromise that does not strictly follow the *Solange* model will surely take note if Germany backs away from this foundational model and begins to review all of EU law for fundamental rights violations on a case-by-case basis.

3.2 Why Accession Helps Solve This Problem

The Court seems to miss the fact that accession does not exacerbate the wholesale/retail problem in asylum law or elsewhere. To the contrary, accession defuses the explosive tension in the triangle between Luxembourg, Strasbourg, and the Member State high courts on the wholesale/retail problem of mutual trust in asylum policy and beyond.

Once the EU accedes to the ECHR, the EU will itself be under the normal legal obligation to protect rights according to ECHR standards.[119] According to the Draft Agreement, if a Member State that follows the *Solange* compromise or the "mutual trust" obligation is sued in Strasbourg after accession, the EU can become a co-respondent and effectively take over the litigation. The EU can step in and take joint or, where appropriate, even full responsibility for the violation.

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[118] To be sure, even Germany has since developed additional retail checks on EU law, such as *ultra vires* and *identity* actions. *See, e.g.,* Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 German L.J. 111 (2014); Jürgen Bast, *Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, 15 German L.J. 168 (2014); Mattias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It*, 15 German Law Journal 204 (2014); Armin von Bogdandy and Stephan Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 Comm. Mkt. L. Rev. 1417 (2011); Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Supremacy Before and After the Constitutional Treaty*, 11 Eur. L. J. 262, 302–03 (2005). But the scope of these threats would likely pale in comparison to what would be unleashed if the German Constitutional Court would step back into the retail business of fundamental rights adjudication.

[119] As Olivier de Schutter further points out, the ECtHR would have little reason to grant the EU special *Bosphorus*-type deference after accession. *See* Olivier de Schutter, *Bosphorus Post-Accession: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention*, *in* THE EU ACCESSION TO THE ECHR 177 (Vasiliki Kosta, Nikos Skoutaris & Vassilis P. Tzevelekos eds., 2014).

I am tempted to abuse an idiom and say this would be a "win-win-win" situation. By taking responsibility for the violation, the EU will shield the Member State in question. Thus, the EU will be responsible for fixing the human rights problem; Member State high courts can cheerfully continue to defer to the CJEU under the *Solange* compromise; and mutual trust will be preserved as well. To put the point somewhat colorfully: Karlsruhe can defer to Luxembourg, and if Luxembourg fails, Brussels will step in as joint respondent and take over full responsibility should Berlin get sued in Strasbourg.

Plain accession, then, solves the mutual trust problem the Court seems so concerned about in the Area of Freedom, Security, and Justice, including the asylum context. There is no need for an exemption in the Convention for Member States who follow their obligations of mutual trust. If a Member State transfers an individual to another Member State in compliance with mutual trust but in violation of the Convention, that Member State can be sued in Strasbourg. The EU can then join that Member State and take full responsibility for that action before the Strasbourg court.

Some might object that the EU might not have the power or resources to remedy the violation in such a case. But that is the point of the hydraulic connection between what I earlier spelled out as the "*three conditions of mutual trust*." Where the EU has the power to intervene and remedy the rights violation,[120] it will be bound by the Convention to do so. Where the EU lacks the power or the resources, it will be forced by the Convention to open what we have termed the necessary "*safety valve*" in the principle of mutual trust. In those cases, the EU, whether by CJEU order or legislation, will need to allow the Member States to check one another. This reserves to the EU, as opposed to Strasbourg, the calibration of the three elements. Luxembourg, not Strasbourg, determines the nature and depth of mutual trust. And yet Strasbourg can make sure that rights don't get dismissed along the way.

With respect to the Dublin System, this is quite easily done. Under the so-called "sovereignty" clause, Member States may already choose to allow an asylum seeker to remain within their territory and process the application without sending the individual back to the Member State of first entry.[121] The EU could rather simply give in and adopt

[120] For arguments in favor of expansive EU powers on this score, *see*, *e.g.*, K.L. Scheppele, *EU Commission v. Hungary: The Case for the "Systemic Infringement Action"*, VERFBLOG, (Nov. 22, 2013), http://www.verfassungsblog.de/en/eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/ (suggesting EU systemic infringement action against Member States). Compare further Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 326, 351–353 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (suggesting reverse-*Solange* review to protect citizens' fundamental rights), with Armin von Bogdandy et al, *Reverse Solange–Protecting the essence of fundamental rights against EU Member States,* 49 Comm. Mkt. L. Rev. 489 (2012) (fleshing out same).

[121] Regulation No. 343/2003, art. 3(2). Indeed, this is the posture of the current cases in Strasbourg. In the cases discussed earlier in the text, Strasbourg held that Member States bore full responsibility for the transfer because

the ECtHR's standard, allowing individuals to claim a "real risk" of inhuman and degrading treatment in the receiving state, regardless of any "systemic" dimension of the problem.[122] The EU legislature could adopt that provision as law, or the CJEU (upon accession) could interpret the Regulation's sovereignty clause in conformity with the EU's legal obligations under the EHCR.

However the balance is achieved, the result will be that the EU's legal control of the degree of mutual trust its Member States must show each other and the EU will be preserved. Human rights under the Convention will be preserved. And the *Solange* compromise that forms an important element of constitutional pluralism in the EU will be preserved as well.

4. How Do We Get There From Here?

The CJEU, then, has identified a substantive problem that seems to be far greater than even the Court itself may have realized. As a result, the Court's proposed remedy asks for both too much and too little.

Opinion 2/13 seems to be pushing the analogy to a traditional federal state too hard. By asking for an express exemption for Member States' Convention violations caused by EU law's mutual confidence obligations, the CJEU is trying to mimic the existence of a federal state in international law. After all, where component units of a federal state implement federal law in violation of a treaty the federation itself has signed, international law holds the center—not the component units of government—responsible.[123] But simply transferring this rule to the EU for cases involving the Area of Freedom, Security, and Justice does both too much and too little. First, it fails to account for the many ways in which the EU is not an integrated state, especially in that its Member States are generally and broadly full-fledged international states. Second, the proposed remedy seems principally focused on the Area of Freedom, Security, and Justice and on the relations among the Member States themselves, ignoring the larger threat to vertical judicial cooperation under the *Solange* compromise.

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they could have allowed the individual applicant to remain in their territory pursuant to the "sovereignty" clause. The Strasbourg court then held that the Member State has an obligation under the Convention to exercise this option as a way to protect the individual's rights under the Convention. *See, e.g.*, *Tarakhel*, ECHR App. No. 29217/12.

[122] M.S.S. v. Belgium and Greece, ECHR App. No. 30696/09 (Jan. 21, 2011), para. 293, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{"itemid":["001-103050"]}; *cf. Tarakhel*, ECHR App. No. 29217/12 at paras. 359, 365.

[123] *See*, *e.g.*, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 2, ¶ 77, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

Fortunately, the solution to this conundrum may already be contained in changes to the Draft Agreement discussed earlier: (1) eliminating the power of the ECtHR to second guess the EU's bid to become a co-respondent, and (2) eliminating the ECtHR's power to second guess the EU's view on joint versus sole responsibility. As long as those two changes are made (along the lines discussed earlier), the Commission can present to the Court that it has heard the Court's concerns, that changes have been made, and that Member States' obligations of mutual trust will be shielded from ECtHR interference through the co-respondent mechanism.

VI. CFSP Jurisdiction and the "Consolidating Function" of the Court

The final part of *Opinion 2/13* has been criticized as "mind-boggling," as "politics of the playground," and as giving rise to "a moral duty to reject the EU's accession to the ECHR."[124] The Advocate General, too, finds no fault in granting jurisdiction over CFSP-related human rights claims to Strasbourg even in cases where the CJEU has no jurisdiction over the matter. If there is no supranational governance in CFEU matters, as the AG says, is there any privileged CJEU role to protect? And isn't some review better than no review at all? The Court's decision seems like a naked power grab.

Not so fast. You do not have to be naïve about judicial motivation to see that there is more to the Court's opinion than playground politics. Once again, if one is exclusively focused on international human rights regimes, it may indeed be difficult to fathom what objection one could possibly have to bringing another actor under the umbrella of the ECtHR. The goal of rights protection, after all, is laudable and righteous.

But the human rights perspective does not negate the fact that, from a constitutional perspective of the Union, there may nonetheless be legitimate concerns about the Draft Agreement in the area of CFSP. This will take a few moments to explain. But in a nutshell, the Court's constitutional concern can be summarized as this: The CJEU must be allowed to play a "*consolidating function*" if domestically justiciable claims that European Union law violates fundamental/human rights are brought before an international court.

1. The Court's Constitutional Claim

Let's start with the Court's concerns. A deceptively simple constitutional idea lies at the beginning of this argument: *there is only one European Union*. To be sure, shadows of the Maastricht Treaty's pillar system remain even after passage of the Lisbon Treaty. For example, CFSP matters often function according to special rules, including unanimity voting

[124] Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU LAW ANALYSIS BLOG (Dec. 18, 2014), http://eulawanalysis.blogspot.it/2014/12/the-cjeu-and-eus-accession-to-echr.html?utm_source=Weekly+Legal+Update&utm_campaign=b9719ea1b3-WLU_19_12_2014&utm_medium=email&utm_term=0_7176f0fc3d-b9719ea1b3-422285509.

rules,[125] lack of legislative power,[126] and—most important for present purposes—the lack of CJEU jurisdiction over certain matters in this domain.[127] CFSP actions therefore sure look like they still fall into a rather distinct category from the rest of Union activity. But still, regardless of voting rules and judicial review, there is only one European legal order.

Even when we had the Community on the one hand, and the Union on the other, the Court pushed for a reading that integrated important background principles among the two. Read only *Pupino*,[128] where the Court roundly rejected Member States' arguments that Justice and Home Affairs ("JHA") "framework decisions and Community directives are completely different and separate sources of law," and that Member State courts did not have a duty to interpret national law in conformity with framework decisions because of the "inter-governmental nature of cooperation between Member States in the context of Title VI of the Treaty on European Union."[129] Despite unanimity rules and the lack of direct effect under then-Article 24 TEU, and the optional nature of JHA reference actions under then-Article 35 TEU, the Court held that the usual Community obligations of loyalty and conforming interpretation applied to the Union's JHA measures as well. To be sure, that was JHA, and this is CFSP where the Court may be said to have even less involvement.[130] Nonetheless, with the formal merger of the Community and the Union after Lisbon, there is only one EU legal order.

That is the big constitutional claim. Although specific elements of the legal order might be adjusted in different areas of functioning, the strong presumption is that the great background principles of the European Union's legal order should remain the same.[131] As a matter of interpretation, then, in an area such as CFSP, we begin with constitutional principles and ask how these might be minimally altered by express exceptions of the Treaty. We no longer think of CFSP as a separate legal order broadly governed by its own general intergovernmental principles; nor do we take the thin governance provisions of CFSP as suggesting a more intergovernmental vision of the Union as a whole. This is the

[125] *See*, *e.g.*, TEU arts. 22, 24, 31(1).

[126] *See, e.g.,* TEU arts. 24(1), 31(1).

[127] TEU art. 24(1), TFEU art. 275.

[128] Judgment Criminal Proceedings Against Maria Pupino, Case C-105/03, EU:C:2005:386.

[129] *Id.* at paras. 25–26

[130] *Cf.* Christophe Hillion & Ramses Wessel, *Restraining External Competences of EU Member States under CFSP*, *in* EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS 79 (Marise Cremona & Bruno de Witte eds., 2008).

[131] *Cf.* Christophe Hillion, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, *in* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW: CONSTITUTIONAL CHALLENGES 47, 49–51 (Marise Cremona & Anne Thies, eds., 2014).

constitutional approach that serves as the basis for the complaint about the Draft Agreement.

2. The Accession Picture: Before and After

Currently, the CJEU lacks jurisdiction over certain CFSP measures.[132] To the extent jurisdiction over CFSP matters has not been delegated to the CJEU, Member States and their courts retain jurisdiction.[133] As a result, Member State courts currently have the final say on some matters of EU law (even where the EU is a party to the dispute).[134] Accordingly, until the CJEU clarifies the full extent of its jurisdiction under Article 275 TFEU (which it notably refused to do in *Opinion 2/13*), Member State high courts have the final say on the interpretation of Charter rights at least in some CFSP matters.

Currently, then, in the absence of CJEU jurisdiction, there is no single EU institution to harmonize potentially conflicting interpretations of EU law in this area. This is more than just "regrettable."[135] From a constitutional perspective, it is deeply problematic, especially in an area presumably vital to the international security of the Union. Recall Justice Holmes' famous dictum: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."[136] Fully decentralized rights adjudication can create similar challenges as unreviewable component state legislation.[137] One can well affirm the value of preserving Member State courts' *competing* power to interpret the rules of the system in a constellation of pluralism, and still see that denying the CJEU *all* power to adjudicate the law of the Union is in serious tension with the constitutional idea of a Union. If component state courts retain exclusive authority to determine the legality of Union law, the Union may well be in peril.

Nonetheless, the current situation does not violate the EU's constitutional order, or render it a sham. First, the Treaty expressly limits the CJEU's jurisdiction over CFSP measures along

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[132] *See* TEU art. 24 (1); TFEU art. 275.

[133] See generally Opinion of Advocate General Mengozzi, Gestoras Pro Amnistía and Others v. Council, C‑354/04 P and C‑355/04 P, EU:C:2006:667 (Oct. 26, 2006) (albeit predating the Treaty of Lisbon).

[134] TFEU art. 274.

[135] Opinion 2/13 at para. 101.

[136] Oliver Wendell Holmes, COLLECTED LEGAL PAPERS, 295–296 (1921).

[137] The 19th Century U.S. episodes of nullification and interposition were in part based not on unreviewable component state laws, but on component states' assertion of their authority to interpret the national constitution. *See* H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 Yale L.J. 1285, 1292 (1985).

the lines just discussed.[138] Second, as the Treaty fairly suggests in Article 19(1) TEU, Member State courts are, after all, courts of the Union.[139] Accordingly, when Member State courts interpret EU law in the course of adjudicating CFSP matters, they have an obligation to view themselves as engaged in a common enterprise of collective governance with all the obligations of mutual fidelity that their own constitutions, as well as EU primary law and general legal principles, demand.

Today, judging by Strasbourg's UN-related case law, the ECtHR can adjudicate CFSP-related action only indirectly, i.e., only insofar as the action is at least partly attributable to a Member State. If a Member State is partly responsible, the ECtHR will charge that Member State with liability under the Convention for the Member State's own EU-related CFSP activity.[140] Conversely, following the current line of jurisprudence, once the action is exclusively attributable to the EU, the Strasbourg court would not have jurisdiction because the EU is not a Contracting Party to the ECHR.[141] To be sure, this potentially creates a troublesome accountability gap (albeit not one of the CJEU's making) regarding the administration of the ECHR's human rights regime. Focusing on the Court's constitutional concerns about the EU's legal order, however, we observe that, today, Strasbourg reviews only the conventionality of Member State actions. The legality of CFSP actions under EU law, by contrast, is currently determined exclusively by courts of the Union, i.e., Member State courts.

Once the EU becomes a Contracting Party of the Convention, Strasbourg will gain authority to adjudicate the ECHR compatibility of the EU's CFSP measure itself. Some might believe this ought not to be problematic, even from the perspective of EU law. After all, one might say, Strasbourg would be adjudicating only the "conventionality" of the CFSP measure, and Strasbourg's judgments do not have immediate legal effect in Contracting States' legal systems. And so, then as now, Strasbourg would not be adjudicating EU law as such.

This final line of argument may be technically accurate, but it risks ignoring the substantial practical effect that accession on the DA's terms may have on the constitutional system of the Union.

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[138] TFEU art. 275.

[139] TEU art. 19(1).

[140] *See, e.g.,* Al Jedda v. United Kingdom, ECHR App. No. 27021/08 (July 7, 2011). *Cf.* Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L L. 121 (2012).

[141] Behrami and Behrami v. France and Saramati v. France, Germany and Norway, ECHR App. Nos. 71412/01, 78166/01 (May 2, 2007).

3. The Practical Fusion of Legality and Conventionality

Accession on terms of the Draft Agreement would have effectively turned the Strasbourg Court into the constitutional court of the Union—at least for certain matters. Recall that the ECHR is integrated into EU law as a binding international agreement; that the EU will be deemed to have implemented the ECHR by virtue of Article 52(3) FRC; and that the ECHR will therefore become fully binding on EU institutions and the Member States with priority over secondary EU law.[142] After accession on the Draft Agreement's terms, Member States (and their courts) would likely have taken the Strasbourg court as the authoritative guide on the fundamental rights compatibility of the CFSP measures Member States implement, at least whenever the CJEU could not say otherwise. As a practical matter, Member State courts would likely have taken the ECtHR as their guide on the legality of CFSP matters under EU law despite the fact that this authority formally was beyond the ECtHR's jurisdiction.

Protocol 16 would have made this outcome more likely, as it inserts the Strasbourg court institutionally into those signatory states' process of adjudication. This allows Member State high courts to be in direct communication with Strasbourg on matters of EU law without the buffer of the CJEU as a consolidating authority. From the perspective of the Union as a whole, this risks institutionally disaggregating the Union, much as Article 177 EEC (now 267 TFEU) so brilliantly did with the Treaty of Rome.

In some respects, the disaggregating effect of Protocol 16 would likely have been even more extreme than it was in the case of Article 177 EEC. The EU's preliminary reference action has always operated alongside, and in competition with, existing Member State high courts. That, once again, was and is the stuff of constitutional pluralism. As envisioned under the Draft Agreement's accession conditions, by contrast, Protocol 16 would have operated an advisory opinion system in certain CFSP matters without the EU's own high court anywhere in sight.

To be sure, Strasbourg judgments do not claim supremacy or direct applicability; and Strasbourg would formally adjudicate only the compatibility of CFSP measures with the ECHR as a matter of ECHR Treaty law. Nonetheless, because the ECHR itself would be binding on the EU with all the resulting legal effects within the EU's legal order, Member State high courts might well have taken Strasbourg's word on compatibility with the Convention as seriously as they take any CJEU judgment on the legality of a CFSP measure under EU law. In practical terms, then, with regard to fundamental/human rights, Strasbourg's conventionality review might well have operated as the EU's legality review.

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[142] *See* Judgment in *Haegeman*, Case 181/73 at para. 5. For brief reflections, 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 349 (Vasiliki Kosta, Nikos Skoutaris & Vassilis P. Tzevelokos eds., 2014).

Member State courts could surely still have insisted on their own internal reading of the Charter (or *in extremis* perhaps even of the Convention), by stepping into the shoes of an absent CJEU. But likely they wouldn't have done so. Given the multiplicity of Member State high courts, accession on terms of the Draft Agreement would have placed Strasbourg into the position of a singular, uniquely situated, and legally privileged harmonizing voice adjudicating a binding fundamental rights regime that is an integral part of EU law.

Add to this that Member State systems are increasingly treating obedience to EU law and ECHR law similarly, often by virtue of domestic constitutional command.[143] Accession on the Draft Agreement's terms, again, would have meant that EU law itself commands adherence to the ECHR with regard to all secondary EU law obligations (and possibly more).[144] One must remember that, despite Article 19(1) TFEU, Member State judges are principally trained at home and steeped in their domestic judicial bureaucracy. It might well have been hard for them not to look to the ECtHR for complete and final resolution of any conflict between EU law and the ECHR. Without the CJEU in sight, Member State court judges may well have conceived of EU law and ECHR law as fused and fungible. After all, for Member State courts both sets of norms are constitutionally imported from Europe beyond the nation state.

In summary, Member State courts might well have taken Strasbourg's decisions on the conventionality of CFSP mandates beyond the purview of the CJEU as a final decision on the legality of the action under EU law.

If this is right, accession on Draft Agreement terms would have meant that in CFSP matters beyond Luxembourg's jurisdiction, Strasbourg would effectively have become the European Union's constitutional court. To be sure, this assessment includes a good deal of (contestable) predictions about judicial behavior. But the CJEU gets only one shot at identifying and preventing the potential problem now. Once the Court gives the Draft Agreement a pass, by contrast, accession is for the ages.

4. The Consolidating Function of the Court

The absence of CJEU jurisdiction in the face of EU accession would have denied the Court all authority to help "consolidate" domestic jurisprudence on matters that result in the

[143] *Cf.* Giuseppe Martinico, *Two Worlds (Still) Apart? ECHR and EU Law before National Judges*, *in* THE EU ACCESSION TO THE ECHR 141 (Vasiliki Kosta, Nikos Skoutaris & Vassilis P. Tzevelokos eds., 2014).

[144] Given the ECHR's substance as a fundamental rights catalogue and its deep structural incorporation by reference and, after accession, as binding international agreement into the core of fundamental rights protection in the EU, the ECHR will, after accession, undoubtedly have quite more than the usual legal effect of an ordinary international agreement to which the EU is a party.

international liability of the Union as a whole. Given the lack of CJEU jurisdiction over certain CFSP matters, accession on these terms places the EU on quite a different—and rather disfavored—footing, as compared to all other Contracting Parties. All the other Contracting Parties to the Convention have the benefit of a consolidating domestic judiciary to harmonize interpretation and judicial review of domestic law before a case against them proceeds to Strasbourg. The EU does not. This is more than playground politics.

As already discussed, this lack of a domestic consolidating jurisdiction may contribute to the fusion of conventionality and legality review as Member State courts deal severally with Strasbourg. But there are two additional concrete consequences of denying Luxembourg the authority to consolidate domestic jurisprudence after accession.

First, given the multiplicity of Member State court voices and the absence of the CJEU, the ECtHR will likely wind up as a kind of *soft interpreter* of the underlying CFSP law as well. In light of the absence of any harmonizing voice at the EU level, if different Member States find themselves before the ECtHR with conflicting views of what an underlying CFSP measure demands, the Strasbourg court will have great leeway in basing its decision on what it takes to be the most plausible of the various interpretations of EU law. Given Strasbourg's privileged position in this arrangement and the absence of the CJEU, Strasbourg's version of EU law is likely to seep back into the jurisprudence of Member State courts. The consolidating function of EU law in the area of CFSP will have been farmed out to Strasbourg.

Second, the EU as a whole may incur international legal responsibility as a result of a violation that could have been avoided if only the CJEU would have had jurisdiction. What is more, the entire EU may be held in violation of the Convention in Strasbourg on account of the decision of a single Member State high court, even if all other Member State high courts (and the CJEU) would have decided the matter differently and kept the Union (or placed the Union) in compliance with the Convention.

It is one thing expressly to preclude CJEU consolidation of the law in certain CFSP issues, as is the case today. After all, the effects of a Member State high court decision on CFSP issues could be (and likely should be) limited to the territorial jurisdiction of that particular high court. After accession, however, the decisions of any given high court would have entailed direct international responsibility of the Union as a whole without the possibility of any recourse to a consolidating court within the Union. That would have been an entirely new and problematic consequence for the Union as the result of accession on the Draft Agreement's terms.

Third, the importance of the consolidating function of a domestic high court is corroborated by the double standard that would have implicitly been built into Protocol 16 vis-à-vis the European Union after accession under the Draft Agreement. Notice that the

Member States only allow designated "highest" courts to ask Strasbourg for advisory opinions.[145] Under Protocol 16 Member States would not allow their regional high courts, for instance, to contact Strasbourg directly. As far as each Member State is concerned, then, with or without Protocol 16, the domestic consolidation of jurisprudence is fully preserved in interacting with Strasbourg. In the case of the EU, by contrast, accession according to the Draft Agreement would have meant that all Member State high courts could ring up Strasbourg while Luxembourg is shut out of the conversation.

5. Now What?

Let us return for a moment to the current "human rights gap" in CFSP matters. Commentators have condemned *Opinion 2/13* by saying that accession on the terms of the CJEU's opinion is not worth pursuing.[146] But, the human rights gap and the Court's concerns could both be accommodated rather comfortably by granting the CJEU jurisdiction over all matters that could, upon accession, come before the Strasbourg court. Everyone would win as a result.

This change would not require any involvement of non-EU members of the Council of Europe, which means, most concretely, that it would not involve reopening negotiations with Russia. From the perspective of human rights, moreover, nothing is gained by allowing the ECtHR to adjudicate Convention violations of CFSP measures while withholding from the CJEU jurisdiction to review those actions for their compatibility with the Charter and, as a matter of EU law, the Convention. And if the only explanation for this particular outcome is realpolitik, then that is a rather weak justification for a constitutional court such as the CJEU to accept.

F. Conclusion

It is tempting to speculate about the motives of the various actors involved in this intricate problem. I sometimes like to think of it as administering a kind of "Rorschach test," the test that asks what people see in an inkblot. When human rights champions see the CJEU, they see an economically minded court that puts fundamental rights second. When human rights champions see Strasbourg, by contrast, they see a court single-mindedly devoted to their cause. When Member State governments see the CJEU, they see an institution that takes a mile when you give it an inch. When Member States see the Strasbourg court, by contrast, they see a far more respectful court, a court that is more tethered to its signatories, and (as far as adjudicating military interventions is concerned) they see the

[145] *See* Protocol No. 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Feb. 2013, C.E.T.S. No. 214, arts. 1, 10.

[146] *See, e.g.*, Douglas-Scott, *supra* note 3 ("in the light of the ECJ Opinion, those who value human rights no longer have any reason to pursue EU accession to the ECHR.").

devil they know. As for what the CJEU and the ECtHR see when they look at each other, the negative images of that sibling rivalry need not be spelled out here. On the positive side, however, they see each other as partners in keeping their signatories honest and wedded to principle, not politics.

A cynical view sees all these actors as interested only in their own self-aggrandizement. That is always a quick and very easy judgment to make, including when it comes to the Court of Justice of the European Union. But, as I have tried to argue, that judgment in this case is too quick, and far too easy. If we diligently reconstruct the Court's various concerns with a modicum of charity, we see that the Court has a number of valid objections about the EU's accession to the ECHR on the terms of the Draft Agreement.

To understand the substance of these concerns, however, we need to take the Court's perspective as the supreme and constitutional court of a federal-type Union (even as the Court stands in a productive pluralist rivalry to other high courts in and of the Union). *Opinion 2/13* is, moreover, an attempt to flesh out the Union's multi-level nature in the world of international law. To be sure, discussions about mixed agreements and vertical arrangements in European foreign affairs have been around for as long as the *ERTA*[147] case. But once *Kadi* took the position that the EU is an autonomous constitutional order, vindicating the constitutional principles of the Union's federal-type structure in the international arena took on added importance.[148] We are still feeling our way about in what continues to be an ever-fresh frontier: the intersection of the Union's multi-level system of *plural constitutionalism* and the world of international law.

One must further bear in mind that this particular international agreement is like no other. Due to the EU's special embrace of fundamental rights, of international law generally, and of the ECHR (via Article 53 of the Charter) in particular, the agreement goes to the very core of the Union's legality and legitimacy. In many ways, it is the EU's very *openness* to fundamental/human rights in and through international law that lies at the root of the problems surrounding accession. As a matter of substance, the EU's legal order is already joined at the hip with the content of the Convention. With the proposed accession, the Union will become both normatively and institutionally fused with the Convention as well.

This Article comprehensively analyzed each of the Court's many concerns, and reconstructed all but one—the concern about Article 53 of the Convention. As we have seen, one of the largest concerns of the Court, that of preserving Member States' obligations of good faith toward one another, turns out to be even larger than the Court

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[147] Comm'n of the European Cmtys. v. Council of the European Cmty., Case C-22/70 (21 Mar. 1971). For an early seminal discussion, see Joseph Weiler, *The External Relations of Non-Unitary Actors: Mixity and the Federal Principle*, *in* MIXED AGREEMENTS (David O'Keefe & Henry G. Schermers eds., 1983).

[148] *Kadi*, Case C-402/05 P, C-415/05 P.

imagined. Indeed, the discussion revealed that *non-accession* to the Convention presents a ticking bomb for the Union's legal order as a whole. The Court's other large concern, that about accession in light of the CJEU's lack of jurisdiction over certain CFSP matters, required a good deal of unpacking. But even here we have seen that a reasonably charitable look at the Court's opinion reveals real concerns about important constitutional principles. Only after these principles are protected, can we turn to the pluralist engagement with Strasbourg.

All of the Court's concerns, as I have attempted to show, are solvable either unilaterally or by a minimum of changes affecting other parties. But this does not mean accommodating every one of the Court's imagined concerns or proposed remedies just the way the Court may have hoped. And it does not preclude a vigorous relationship of cooperation and challenge between Luxembourg and Strasbourg when we are done. Revisions can be made to accommodate the valid concerns in good faith while still doing justice to the Convention and to the idea of pluralist contestation. The EU's political institutions and the Member States can and should push back where the Court's concern is misguided or the Court's seemingly preferred remedy goes too far. Most wisely, of course, they would nonetheless take the position that they are addressing all of the Court's concerns either explicitly or implicitly in the various changes to accession they make.

Once the EU's political institutions and the Member States accommodate the Court in good faith along the lines outlined here, even if not necessarily following the most restrictive interpretation of *Opinion 2/13* possible, they will have done their part. It would then be wise to take the revisions back to the Court for approval before signing the agreement. But they could, of course, always decide that, this time around, they will do what President Washington was required to do in 1793, and forge ahead on their own advice.