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European Exceptionalism and the EU's Accession to the ECHR

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Abstract

In its December 2014 opinion, the Court of Justice of the European Union (CJEU) rejected the draft accession agreement that would have enabled the European Union (EU) to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms on the grounds of its incompatibility with the EU's constitutional structure. The opinion was widely and immediately criticized as evidence of the CJEU's unwillingness to be bridled by another international court and its anxiety over losing its primacy within Europe's juridical space. This article argues that the Luxembourg court's reasoning exemplifies a problematic attitude of 'European exceptionalism' that has deep roots within the philosophy of the European integration project. According to this narrative, the enlightened character of supranational institutions ought to exempt them from the constraints designed to check more imperfect forms of political organization such as nation states. The article argues that this conviction is not only ill-founded but also provides another reason why the EU, just like the sovereign states it has been set up to constrain, needs external human rights scrutiny.

> [W]hile man may try as he will, it is hard to see how he can obtain for public justice a supreme authority which would itself be just, whether he seeks this authority in a single person or in a group of many persons selected for this purpose. For each of them will always misuse his freedom if he does not have anyone above him to apply force to him as the laws should require it … This is therefore the most difficult of all tasks, and a perfect solution is impossible.
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> – Immanuel Kant

Can a constitution command the impossible? In view of the recent opinion rendered by the Court of Justice of the European Union (CJEU) on the European Union's (EU) accession to the Convention for the Protection of Human Rights and Fundamental

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Freedoms (ECHR), this is what the Treaty on European Union (TEU) comes close to doing.[1] As amended by the Lisbon Treaty, Article 6(2) of the TEU proclaims that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.[2] Protocol No. 8 to the Lisbon Treaty, however, insists that the EU's accession to the ECHR must preserve 'the specific characteristics of the Union and Union law', the competences of the Union and the relationship between EU member states and the ECHR. Taken together, these conditions leave the EU with a very narrow path to accession, particularly considering the extent to which Convention membership has modified the constitutional orders of many signatory states.[3]

The draft agreement on the EU's accession to the ECHR, painstakingly negotiated over three years between the Commission and the ECHR's Steering Committee on Human Rights, attempted to tread this narrow path. However, in an adverse opinion (Opinion 2/13) delivered in December 2014, the CJEU has found several aspects of the agreement to be incompatible with the Protocol No. 8 requirements.[4] In doing so, it has reinvigorated scholars and practitioners who have long criticized the Court's aggressive defence of its own jurisdictional domain. To these observers, the Court stands guard at the gates of the EU legal order, Cerberus-like, one head fending off national constitutional courts, the other keeping international organizations such as the United Nations (UN) and the World Trade Organization at bay and now a third glowering at the European Court of Human Rights (ECtHR).

This article identifies a potentially more pernicious attitude behind the CJEU's unforgiving treatment of the accession agreement, namely an overconfident belief that the EU, under the Court's own stewardship, has risen above the political and institutional defects that typically generate human rights infringements. This posture, which I will term 'European exceptionalism', has deep roots within the philosophy of European integration.[5]

1 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222; Treaty on European Union, OJ 2010 C 83/13.

2 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C 306.

3 For a state-by-state compendium of these adjustments, see A. Stone Sweet and H. Keller (eds), *Assessing the Impact of the ECHR on National Legal Systems* (2008).

4 Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU – Draft International Agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties*, judgment of 18 December 2014, not yet reported (ECLI:EU:C:2014:2454).

5 The term 'European exceptionalism' has been used in recent scholarship in a variety of senses, descriptive and critical/normative. At the most basic level, European exceptionalism can refer to the extent to which the EU's special constitutional characteristics shape its aims, needs, and behavior on the international stage. For a descriptive account of the accommodations the EU and its member states have sought and received under international law owing to the EU's distinctive features as a non-sovereign regional entity, see Ličková, 'European Exceptionalism in International Law', 19 *European Journal of International Law* (2008) 463. For a critical assessment of these accommodations, see Safrin, 'The Un-Exceptionalism of US Exceptionalism', 41 *Vanderbilt Journal of Transnational Law* (2008) 1307. Others emphasize the generally negative normative connotation of the term, contending that the EU's 'special character' alone cannot justify the charge of exceptionalism unless one can also show a claim on the part of EU institutions or member states that the EU as an international actor is 'free from certain obligations, or occupies a special position with respect to obligations which arose from general international law or from a generally applicable treaty regime'. Nolte and Aust, 'European Exceptionalism?', 2 *Global Constitutionalism* (2013) 407, 416. This article refers to European exceptionalism to denote a self-understanding on the part of EU institutions according to which their purported fidelity to principles of human rights, democracy, and the rule of law justifies exempting them from certain international standards tailored to states.

Accordingly, a commitment to reason, universalism, and respect for law are held to be immanent within the structure of supranational governance and to constitute a sufficient safeguard against fundamental rights violations. Since supranational institutions are designed to hold in check the parochial and exclusionary tendencies of nation states, they are said to have no need of similar checks on their power. I will argue that this conviction is ill-founded and provides another reason why the EU, just like the sovereign states it has been set up to constrain, needs an external source of human rights supervision.

1 In Fair Luxembourg Where We Lay Our Scene

The constitutional issues at stake in the controversy over the EU's accession to the ECHR are complex, and legal scholars have exhaustively mapped out the concerns raised by the CJEU regarding the compatibility of the procedures proposed in the draft accession agreement with various elements of the EU's legal order.[6] While it is possible to explain the substance of the opinion in purely doctrinal terms, this article will argue instead that we can gain deeper insight into the Court's reasoning by situating it within the narrative arc of the European integration project, particularly given that the Court has been an active participant in defining the EU's 'ethos and telos'.[7]

The ECHR accession controversy is an emblematic moment in the evolution of 'International Law 2.0', which has been ongoing since at least the end of the Second World War. Under International Law 2.0, not only states but also international institutions and regional organizations like the EU, public bodies, individuals and corporate entities claim various forms of legal subjectivity, normative power and political agency.[8] Public authority is no longer concentrated in discrete units but, rather, shared and contested along functional, territorial and temporal dimensions. As a consequence, international organizations, which come in myriad forms, have acquired various rights and duties in relation to each other as well as to their members, citizens and other public and private agents. However, Opinion 2/13 brings to the fore some of the difficulties associated with establishing and regulating relationships among interlocking legal orders in a pluralistic legal

[6] See, among others, the contributions by Halberstam, Krenn, Johansen, Łazowski and Wessel in a special section of vol. 16 (2015) of the *German Law Journal*. See also Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?', 38 *Fordham International Law Journal* (2015) 1.

[7] 'What Europe needs … is not a constitution but an ethos and telos to justify, if they can, the constitutionalism it has already embraced.' Weiler, 'Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision', 1 *European Law Journal* (1995) 219, at 220.

[8] The dawning of this new order was heralded by Hersch Lauterpacht in his 1950 book, *International Law and Human Rights* (1950), although a contemporaneous reviewer of the book already concluded that 'the position of public international bodies and … the growing participation of private international organizations in important power decisions' was 'today hardly controvertible'. McDougal, 'Review of Lauterpacht, *International Law and Human Rights*', 60 *Yale Law Journal* (1951) 1051, at 1051.

landscape.[9] It also casts doubt on the idea that the EU in general, and its judiciary in particular, are better equipped than sovereign states to fulfil the international responsibilities that accompany their ever-expanding claims to authority.

Observers of a cosmopolitan persuasion tend to single out the sovereign state as the primary threat to individual liberty and security within the global order and, accordingly, to celebrate International Law 2.0 and the burgeoning of alternative forms of political organization. Inescapably, however, non-state institutions that exercise public power are, like states, capable of abusing it and must be held to similarly demanding standards of legitimacy. Although some of these standards need to be adapted to take account of new institutional forms,[10] most observers agree that they must include respect for human rights norms.

At any rate, this was a primary justification for setting the EU on the formal path to ECHR accession.[11] Although the original treaties establishing the European Communities lacked a bill of rights to constrain the institutions they called into

[9] On the contemporary phenomenon of global legal and/or constitutional pluralism, see Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002) 317; Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', 6 *International Journal of Constitutional Law* (2008) 373; Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009) 356; Isiksel, 'Global Legal Pluralism as Fact and Norm', 2 *Global Constitutionalism* (2013) 160; Wiener *et al.*, 'Global Constitutionalism: Human Rights, Democracy, and the Rule of Law', 1 *Global Constitutionalism* (2012) 1; Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 261; Avbelj and Komárek, 'Four Visions of Constitutional Pluralism', 2 *European Journal of Legal Studies* (2008); P. Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (2014). For specific applications of this idea to the European Union's (EU) legal order, see MacCormick, 'Risking Constitutional Collision in Europe?', 18 *Oxford Journal of Legal Studies* (1998) 517; Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (2003) 524.

[10] As Grant and Keohane argue with regard to the standards of democratic legitimacy, 'There is no simple analogy that can be made between domestic democratic politics and global politics,' which is why '[e]ffective accountability at the global level will require new, pragmatic approaches: approaches that do not depend on the existence of a clearly defined global public'. Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005) 29, at 34. See also Walker, 'Postnational Constitutionalism and the Problem of Translation', in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (2003) 27.

[11] In 1979, the Commission adopted a memorandum recommending the accession of the European Communities to the ECHR as well as the adoption of a catalogue of fundamental rights 'specially adapted' to the EC's powers. Ironically, the Commission estimated that the latter development did not appear possible in the short term and considered accession to the ECHR to be the best way to 'reinforce the legal protection of the citizens of the Community immediately and in the most efficient manner possible'. 'Accession of the European Communities to the European Convention on Human Rights', *Bulletin of the European Communities*, Commission Memorandum Supp. 2/79, 4 April 1979, at 5. See also A. Rosas, Is the EU a Human Rights Organization?, Center for the Law of EU External Relations Working Paper 2011/1 (2011), at 8: 'When the question of EU accession to the European Convention on Human Rights became a subject of discussion … it was held that whatever the precise legal and constitutional status of the EU, the Union had obtained "real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community" to such an extent that non-accession to the European Convention raised the question of a gap in the Convention system and this gap tended to become wider and wider as the integration process moved forward' (internal citation omitted).

being,[12] the European Court of Justice began an active campaign in the 1970s to fill this gap, declaring a wide range of fundamental rights enumerated in domestic constitutions to be an 'integral part' of the 'general principles of law' on which the European legal order is founded.[13] As the EU's functions have sprawled into such areas of policy as asylum and immigration, border control, criminal justice, counter-terrorism, data gathering and intelligence sharing, they have come to implicate the exercise of core individual rights. Moreover, EU member states have found themselves having to defend measures taken in pursuance of their EU obligations before the ECtHR with increasing frequency. Therefore, the EU's accession to the Convention offers a way not only to consolidate the EU's own human rights standards but also to ensure that responsibility for any infringements is fairly apportioned between the EU and its member states.

Although the European Court of Justice (ECJ) has made use of the Convention in adjudicating fundamental rights matters since the 1970s,[14] the EU's lack of membership has insulated the Court from the risk of being formally called to account for its interpretations of the ECHR or its applications of Strasbourg jurisprudence to questions of EU law.[15] By contrast, after formal accession to the ECHR, 'the EU and its institutions, including the Court of Justice, would be subject to the external control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR'.[16] The Luxembourg court has long conceded the possibility, in principle, of subjecting the EU to the scrutiny of an international judicial body.[17] However, Opinion 2/13 forcefully reiterates its stance that assuming obligations under the ECHR must not jeopardize 'the intrinsic nature of the EU' as set out in the treaties and as interpreted by the CJEU itself.[18] In this connection, the Court denounces a number of aspects of the proposed accession agreement for, *inter*

[12] There are two dominant explanations as to why. On the conventional account, the EEC Treaty left out any mention of basic rights since rights protection was understood to fall within the domain of member state competence and the remit of the ECHR. On de Búrca's account, however, the omission was merely temporary. It was a strategic move in line with the gradual method of integration favoured by Jean Monnet and Paul-Henri Spaak in contrast to earlier, more ambitious schemes of integration sought by Altiero Spinelli and the framers of the failed European Defence Community and the European Political Community. The EC was eventually meant to acquire a human rights function as a result of the expanding process of integration. See de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor', 105 *American Journal of International Law* (2011) 649.

[13] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.

[14] The European Court of Justice (ECJ) first cited the ECHR in Case 36/75, *Rutili v. Ministre de l'intérieur*, [1975] ECR 1219, para. 32. In other cases, it has made reference to international human rights instruments drafted or signed by member states. See Case 4/73, *Nold*, [1974] ECR 491, para. 13; Case 44/79, *Hauer*, [1979] ECR 3727, paras 17–18; Case 136/79, *Panasonic*, [1980] ECR 2033. For a compendium of important references by the ECJ to the ECtHR's case law through 2006, see Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*', 43 *Common Market Law Review* (2006) 629, at 644–650.

[15] Douglas-Scott, *supra* note 14.

[16] Opinion 2/13, *supra* note 4, para. 181.

[17] Opinion 1/91, *Opinion Delivered pursuant to the Second Subparagraph of Article 228 (1) of the Treaty – Draft Agreement between the Community, on the one hand, and the Countries of the European Free Trade Association, on the other, Relating to the Creation of the European Economic Area*, [1991] ECR I-6084, para. 40.

[18] Opinion 2/13, *supra* note 4, para. 193.

alia, endangering the principle of mutual trust between member states;[19] giving the ECtHR the authority to interpret the allocation of competences and responsibilities between the EU and its member states;[20] allowing the CJEU insufficient room to assess EU law in light of its compatibility with the Convention (the so-called prior involvement procedure)[21] and failing to respect the specific characteristics of judicial review in the area of common foreign and security policy.[22] Although observers disagree about whether the prospects of accession have been merely dented or totalled as a consequence of these holdings, most have interpreted the Opinion as an outright finding of incompatibility between the EU's constitutional structure and the proposed agreement.[23]

In my analysis, I will home in on the Court's claim that 'the approach adopted in the agreement envisaged' is to 'treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party'.[24] This is an important claim because it stems from a real difficulty, one that is symptomatic of and likely to recur in the context of International Law 2.0. It is also a claim that the CJEU troublingly leverages to excuse the EU from external fundamental rights scrutiny. I will argue that such a move is highly problematic but, nevertheless, indicative of the self-understanding of EU institutions, not least the Court itself. According to this self-understanding, which I will call 'European exceptionalism', the enlightened character of supranational institutions exempts them from the normative constraints designed to check more imperfect forms of political organization such as nation states.[25] This overly flattering estimation of the EU's constitutional virtues implies that the uncertainties and challenges that ECHR membership is likely to generate for the EU are too high a price to pay for too little return. I will conclude the article by arguing that far from being justified, the Court's overconfidence in the EU's constitutional and human rights credentials illustrates the EU's need for an external mechanism of human rights scrutiny.

19 *Ibid.*, paras 191–195.

20 *Ibid.*, paras 224–225, 228, 230–231.

21 *Ibid.*, paras 246–248.

22 *Ibid.*, paras 256–257.

23 For an influential analysis, see Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice', *Verfassungsblog*, 24 December 2014, available at http://www.verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.VXhff2Sqqko (last visited 10 June 2015).

24 Opinion 2/13, *supra* note 4, para. 193.

25 Bradford and Posner distinguish between exceptionalism and exemptionalism, whereby the former refers 'to the view that the values of one particular country should be reflected in the norms of international law', while the latter denotes 'the claim that the rules of international law, or of certain international treaties, should apply to all states except for one particular state'. Bradford and Posner, 'Universal Exceptionalism in International Law', 52 *Harvard International Law Journal* (2011) 1, at 7. While this is at first glance a plausible conceptual distinction, it is difficult to see why seeking the recognition of one's values or interests in international law should in and of itself be labelled exceptionalist, unless it is invoked to plead for exceptional treatment. As Safrin points out, a political actor who adopts an exceptionalist posture 'seeks to apply a legal rule for itself that differs from an existing or emerging international norm as reflected in a multilateral treaty'. Safrin, *supra* note 5, at 1308.

2 'A New Legal Order': The ECJ's Shibboleth

Like many other international regimes, the ECHR is tailored to sovereign states. Excluding the protocols, the Convention mentions the noun 'state' 20 times. Many of these references are couched in the semantic context of sovereign power and take aim at the unlimited claim of authority associated with it. The ECHR defines the limits of sovereign power in accordance with fundamental individual rights, just as the EU defines the contours of member state authority *vis-à-vis* the internal market and related objectives. Unlike other ECHR signatories to date, however, the EU lacks the attribute of sovereignty and the claims that typically accompany it, not least those of comprehensive authority, exclusive territorial jurisdiction and a monopoly on the legitimate use of coercion. This makes the EU an awkward entity to shoehorn into the Convention regime, and the process of accession and acclimatization could certainly affect the multi-level configuration of its authority. For instance, the CJEU rightly notes the danger that the ECtHR might 'require the EU to perform an act or adopt a measure for which it has no competence under EU law'.[26] To prevent the unfair application of procedures, norms and expectations tailored to sovereign states to the EU, the Court argues, the accession agreement must recognize '[t]he fact that the EU has *a new kind of legal order*, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation'.[27]

The debate over whether the EU is a state, federation, international organization or flying saucer is as old as European integration itself.[28] This ambivalence has always made it tempting to describe the EU as a *sui generis* entity or, to use the Court's parlance, a 'new legal order'.[29] Whatever the terminology used to denote the EU's special nature, however, the Court is nevertheless right to point out that it warrants tweaking the standards and procedures of the Convention, the tough task with which the negotiators of the accession agreement were charged.

Even if we go along with the Court's own characterization of the EU's legal structure, however, Opinion 2/13 still leaves us with a puzzle. Since its earliest days, the Luxembourg court has characterized the European legal order as a web of commitments by means of which member states have 'limited their sovereign rights, albeit within limited fields', whose 'subjects … comprise not only Member States but also their nationals'.[30] In other words, these commitments are not only valid between member states but also constitute promises made to their own and one another's citizens. To persuade one another of their fidelity to their commitments, and to uphold them in

[26] Opinion 2/13, *supra* note 4, para. 53.

[27] *Ibid.*, para. 158 (emphasis added).

[28] J. Delors, *Intervention de 9 Septembre 1985, Luxembourg: Bulletin des Communautés européennes*, No. 9 (1985), available at http://www.cvce.eu/content/publication/2001/10/19/423d6913-b4e2-4395-9157-fe70b3ca8521/publishable_fr.pdf (last visited 10 June 2015).

[29] Opinion 2/13, *supra* note 4, para. 158. The formulation echoes, in slightly altered form, the Court's celebrated *Van Gend en Loos* judgment of 1963. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

[30] *Ibid.*

the face of temptations to cheat, member states have commissioned supranational institutions with upholding, monitoring and implementing them.[31] The resultant web of commitments is highly reflexive in two senses. First, member states have at their disposal legislative and constitutional mechanisms by which they can adjust, expand and adapt it in the face of changing circumstances. Second, the EU itself can enter into commitments of its own by assuming legal obligations, acceding to other international organizations and conducting diplomatic relations with third countries. These commitments bind the EU's organs as well as its member states and create tangled questions of responsibility that energize scholars of constitutional and international law.

Reiterating this long-standing conception, Opinion 2/13 describes the EU's legal order as 'a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other' in the service of 'creating an ever closer union among the peoples of Europe'.[32] In addition, the CJEU states:

> This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded … That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and, therefore, that the law of the EU that implements them will be respected.[33]

Finally, the Court emphasizes that fundamental rights are an integral part of this 'structured network of principles, rules and mutually interdependent legal relations'.[34]

How do we square the CJEU's vision of the European legal order as a dense web of commitments that encompasses principles of reciprocity, mutual obligation and the values enshrined in Article 2 of the TEU with its resistance to subjecting the EU to a similar system of commitment embodying similar values, namely, the ECHR? The predominant trend among critics has so far been to chalk up this stance to institutional self-assertion by the Court or to anxiety over its primacy within Europe's juridical space. In one of the most charitable and meticulous interpretations of Opinion 2/13 to date, Daniel Halberstam rejects these explanations and defends some of the Court's conclusions as necessary and justified in light of the autonomy of EU law. He argues that 'signing onto 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 [the] constitutional values' of 'voice, rights, and expertise'.[35]

Halberstam is surely right that there is more to the CJEU's stance on the accession agreement than a disingenuous attempt to protect its own position within Europe's constitutional architecture. While I do not disagree that concern over the EU's constitutional autonomy guides Opinion 2/13, however, I view the Court's

[31] A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998), at 73, 153.

[32] Opinion 2/13, *supra* note 4, para. 167.

[33] *Ibid.*, para. 168.

[34] *Ibid.*, para. 167.

[35] Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward', 16 *German Law Journal* (2015) 105, at 107.

unsparing demolition of the accession agreement as evidence of its underestimation of the value of the EU's accession to the ECHR. Behind the Court's breathless flurry of objections to the accession agreement, I detect an overconfident belief that the EU, under the Court's own stewardship, has transcended the political and institutional flaws that typically generate human rights infringements. In other words, it is because the CJEU views itself as a fail-safe guardian of human rights that it treats membership of the Convention as a luxury the Union can ill afford, one that would be purchased at the price of the EU's carefully calibrated constitutional equilibria.

As a range of international relations scholars have argued, some international institutions are commitments undertaken by states at least partially in order to safeguard or 'lock in' their firmly held values and principles.[36] These institutions can be understood as enabling commitments – the constraints they establish on state behaviour are intended to allow states to achieve valued ends that might otherwise elude them, including the stability of democratic institutions, the protection of individual rights and respect for minorities.[37] From this perspective, the EU is not *sui generis*; to the contrary, it exemplifies the post-war strategy of bolstering the structure of domestic constitutional democracy by surrounding it with a robust exoskeleton of legal and political safeguards at the international level. Its task is to extend the purchase of constitutional principles beyond the domestic context.[38] Incidentally, this conception is not too far off from the CJEU's own characterization of the nature of the EU in Opinion 2/13 as a 'structured network of principles, rules and mutually interdependent legal relations'.[39]

As such, one might expect the EU's character as a 'new legal order' to facilitate, rather than obstruct, relationships with other international institutions that instantiate International Law 2.0. However, past decisions of the CJEU addressing the tangled problems of autonomy, jurisdiction and obligation that result from Europe's multi-levelled constitutional configuration show this expectation to be misplaced.[40] In fact, confronting complex, overlapping and mediated instances of international legal obligation tends to expose the insecurities that the Luxembourg

[36] J.W. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (2011), at 148–149; Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *International Organization* (2000) 217; Keohane, Macedo, and Moravcsik, 'Democracy-Enhancing Multilateralism', 63 *International Organization* (2009) 1.

[37] On the theory of enabling commitments in the domestic context, see S. Holmes, *Passions and Constraint* (1995); North and Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England', 49 *Journal of Economic History* (1989) 803; Root, 'Tying the King's Hands', 1 *Rationality and Society* (1989) 240; North, 'Institutions and Credible Commitment', 149 *Journal of Institutional and Theoretical Economics* (1993) 11; Sejersted, 'Democracy and the Rule of Law: Some Historical Experiences of Contradictions in the Striving for Good Government', in J. Elster and R. Slagstad (eds), *Constitutionalism and Democracy* (1988) 131.

[38] Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in Dunoff and Trachtman, *supra* note 9, 258.

[39] Opinion 2/13, *supra* note 4, para. 167.

[40] Pernice, Multilevel Constitutionalism in the European Union, WHI Paper 5/02 (2001), available at http://whi-berlin.de/documents/whi-paper0502.pdf (last visited 11 June 2015).

court harbours on behalf of the EU legal order and on account of its own role within it. To take an early example, the Court in Opinion 1/76 rejected plans by several member states to establish an international agreement to govern navigation of the Rhine on the grounds that such an agreement would entail 'a surrender of the independence of action of the Community in its external relations and a change in the internal constitution of the Community by the alteration of essential elements of the Community structure', and that the jurisdiction of the special tribunal tasked with adjudicating disputes arising under the agreement would parallel its own, thereby raising the danger that the two courts would 'arrive at divergent interpretations with consequential effect on legal certainty'.[41] In its 1991 opinion concerning the draft agreement on the European Economic Area (EEA), the Court similarly warned that endowing a separate EEA court with the competence to interpret the EEA treaty was likely to 'adversely ... affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice'.[42] More recently, in its opinion concerning the draft agreement to create a European and Community Patents Court that would unify the system of patent litigation in Europe, the CJEU held that the proposed system would jeopardize the autonomy of the EU legal order and compromise its judicial structure.[43] Opinion 2/13 recalls and expands these prior reservations.

Since the requirement to preserve the special nature of the EU legal order has been decisive in each of these cases, the Court's demanding construal of this requirement deserves closer scrutiny. Although the Court had already stated in its 1996 advisory opinion on the accession of the European Community (EC) to the ECHR that accession would have 'constitutional implications' for the Community and, as such, would require amending the treaty structure, it cleverly reserved for itself the discretion to adjudicate what kinds of alterations would be permissible.[44] Delivered almost two decades later, Opinion 2/13 takes a very restrictive view of that issue. Although the Court concedes that acceding to an international court whose 'decisions are binding' on the EU and the ECJ 'is not, in principle, incompatible with EU law',[45] it qualifies this concession by holding that:

> an international agreement may affect [the Court's] own powers *only if* the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order.[46]

41 Opinion 1/76, *European Laying-up Fund for Inland Waterway Vessels*, [1977] ECR 741, paras 12, 20, respectively.

42 Opinion 1/91, *supra* note 17, para. 2. Agreement on the European Economic Area, OJ 1994 L 1.

43 Opinion 1/09, *Opinion Delivered on the Draft Agreement Creating a Unified Patent Litigation System*, [2011] ECR I-01137, paras 78–89. For a detailed commentary, see Lock, 'Taking National Courts More Seriously? Comment on Opinion 1/09', 36 *European Law Review* (2011) 576.

44 Opinion 2/94, *Opinion Delivered on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-01759, paras 32–34.

45 Opinion 2/13, *supra* note 4, para. 182.

46 *Ibid.*, para. 183.

In particular, submitting to the interpretive authority of the ECtHR 'must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law'.[47] Of central concern to the CJEU in this regard is the possibility that the ECtHR might gain the authority to review the constitutional allocation of competences and responsibilities between the EU and its member states.[48] As Jean Paul Jacqué sums it up, accession to the Convention must leave intact two key characteristics of the EU legal order: '[T]he distribution of responsibilities between the Union and its Member States may only be assessed by the Court of Justice, and the Court of Justice has exclusive jurisdiction regarding the application and interpretation of Union law.'[49]

Although the CJEU concedes that it is 'inherent in the very concept of external control that' the ECtHR's interpretation of the ECHR 'would, under international law, be binding on the EU and its institutions, including the Court of Justice', it reasserts its own exclusive authority over matters of EU law, 'including the Charter [of Fundamental Rights]', whose substantive provisions in many instances mirror those of the Convention and must be interpreted in conformity with it.[50] Importantly, it is not part of the ECtHR's task to interpret the requirements of domestic law, which the Strasbourg court must take as the facts of the case.[51] Nonetheless, the ECtHR's task of giving an authoritative interpretation of the Convention can shade, sometimes unavoidably, into the interpretation of national norms and measures whose compatibility with the Convention it is asked to examine. In this respect, 'binding the EU and its institutions in the exercise of their internal powers'[52] and curtailing the autonomy of the EU legal order is precisely the point of submitting to the jurisdiction of an external human rights regime.[53] Signatories to the ECHR renounce the autonomy to act in ways that infringe on the standards of treatment owed under the Convention to the persons under their jurisdiction. Sometimes, ferreting out these infringements can require delving into the meaning of the acts that prompted them. As such, accession to the ECHR implies nothing if not a partial renunciation of autonomy on the part of

47 *Ibid.*, para. 184.

48 Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', 76 *Modern Law Review* (2013) 254, at 265–266 (anticipating this concern before the publication of Opinion 2/13); Halberstam, *supra* note 35, at 13.

49 Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* (2011) 995, at 1012.

50 Opinion 2/13, *supra* note 4, para. 186. Charter of Fundamental Rights of the European Union, Doc. 2012/C 326/02, 26 October 2012, Art. 52(3) states: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

51 Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order', 48 *Common Market Law Review* (2011) 1025, at 1034.

52 Opinion 2/13, *supra* note 4, para. 184.

53 As noted by Advocate General Kokott. Opinion 2/13, *supra* note 4, Opinion of Advocate General Kokott (EC:C:2014:2475) para. 41. See also Lock, *supra* note 51, at 1033; Eeckhout, *supra* note 6, at 7, 27–28.

the signatories, the EU not excepted.[54] More broadly, it is among the central aims of international human rights law to aid in drawing the legitimate bounds of the exercise of public power. This aim is founded on the assumption that the holders of public power are bad judges of the scope of their own authority. The Strasbourg court is, in effect, charged with second-guessing actions that signatories believe to fall within the legitimate scope of their authority but which adversely affect the rights and liberties of those subject to their power.

Having reference to the Luxembourg court's well-known reservations, however, negotiators of the draft treaty were reportedly very solicitous of preserving the autonomy of the EU legal order and the Court's status as the authoritative interpreter of EU law.[55] Their attempt to tiptoe around these concerns is evident in the final product. As Christina Eckes notes, the draft accession agreement seeks to assuage the CJEU's fears with accommodations not afforded to member state parties.[56] For instance, '[n]o national constitutional court is given the privilege to rule on the compliance of national law with the Convention before the Strasbourg Court gives its judgment', while the CJEU would be afforded precisely such a mechanism.[57] Similarly, the Strasbourg court's presumption that the EU provides a level of fundamental rights protection comparable to that required by the ECHR, and its concomitant pledge to refrain from reviewing Member State acts mandated under EU law for their conformity with the Convention is a remarkable indulgence accorded to no state party.[58]

Although the draft accession agreement endeavours to respect the CJEU's longstanding reservations, it is instructive to shift the burden of justifying those reservations back onto the Luxembourg court. Why should the EU's autonomy be a more sensitive condition than state sovereignty, with which the ECHR has successfully reached a rigorous, if contested and flexible, accommodation? Why should the EU's limited autonomy command so much more respect than state sovereignty, particularly if the latter can be assumed to represent the democratic autonomy of citizens?[59] As I acknowledged earlier, the EU's hybrid constitutional structure undoubtedly introduces additional complications regarding the membership of international organizations that any accession agreement must carefully address, but is the CJEU justified in attempting to parlay these complications into a greater measure of deference and special dispensations for the EU as compared to state parties?

[54] According to a Kantian conception of autonomy, this would not count as a curtailment at all, since the autonomy of a moral agent is delimited by what the moral law permits. Applied to a constitutional system, this conception implies that restricting a public agent's ability to infringe on human rights does not amount to a restriction of the agent's autonomy, since any such infringement would be an act that the agent did not have the authority to undertake in the first place.

[55] Eckes, *supra* note 48, at 265.

[56] *Ibid.*

[57] This refers to the 'prior involvement procedure' enumerated in Art. 3(6) of the draft accession agreement. See also *ibid.* 268–269.

[58] This is the '*Bosphorus* presumption,' announced in ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005, paras 155–156.

[59] Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13', 16 *German Law Journal* (2015) 147, at 163.

Far from vindicating the CJEU's reservations, these questions throw into high relief why characterizing the EU as a *sui generis* entity is, in addition to being analytically unsatisfactory, politically and normatively problematic. In comparison to generic categories used in constitutional law or comparative social science, the nebulous concept of a 'new legal order' has allowed the Court to assume a gatekeeper role over defining the EU's core constitutional structure and the acceptable parameters of change. By designating the EU as an exceptional entity, the Court keeps other institutional actors involved in European integration – including the member states – guessing as to what may or may not be compatible with its basic structure, while reserving for itself the authority to pronounce on the necessary contours of this new legal order. Opinion 2/13 is perhaps most notable for exposing this dynamic. By construing the Protocol No. 8 requirement that the EU's accession to the ECHR must preserve 'the specific characteristics of the Union and Union law' in an exceedingly restrictive manner, the ECJ has rendered the EU's accession to the ECHR, mandated by Article 6(2) of the TEU, nugatory in practice, if not in law. In so doing, it has implicitly also curtailed the ability of the member states, in their capacity as masters of the treaties, to shape and modify the EU's constitutional structure, a move that the Court has no *de jure* authority to perform.

3 Free Market, Mercantilist Judiciary

The fact that Opinion 2/13 rejects the conciliatory tone proffered by its advocate-general and proceeds to demolish an agreement carefully negotiated to realize a treaty-mandated objective suggests that the CJEU's concerns are not limited to preserving the legal coherence of the EU.[60] The Court's at best indifferent attitude towards accession to the ECHR indicates a certain overconfidence that the EU's supranational structure already embodies the requisite commitments to human rights. In fact, this posture recalls the ideal espoused by post-war framers of the integration project, according to which supranational institutions would help to surmount the nation state's tendencies to chauvinism, belligerence and moral exclusion through a commitment to reasoned dialogue, universal principles, and impartiality. On this view, nation states are prone to wielding public power in the service of a highly dangerous dream of ethnic unity and grandeur and, therefore, require the external discipline of laws and institutions. By contrast, supranational institutions are intended to decouple public power from identity or 'eros' and must be, for this reason, immune to the irrational impulses of states.[61] Furthermore, being insulated from democratic control, they can resist the siren song of populism and demagoguery; their judgment is unclouded by majoritarian pressure. The identification of supranational institutions with enlightened universalism implies that these institutions can themselves be exempted from the need

[60] Opinion 2/13, *supra* note 4, Opinion of Advocate General Kokott (EC:C:2014:2475).

[61] Weiler, 'To Be a European Citizen: *Eros* and Civilization', 4 *Journal of European Public Policy* (1997) 495, at 511.

for external oversight, having internalized all of the external checks that matter. At the apex of this progressive edifice stands the CJEU, carefully curating the 'general principles of law' that must be respected within the legal universe called into being by the treaties.

In describing this posture as exceptionalist, I do not mean to suggest that there is anything extraordinary about the CJEU's attempt to evade the prospect of external judicial scrutiny. The entire field of judicial politics is devoted to understanding and documenting the behaviour of courts as political actors that seek power, independence and recognition.[62] Far from being exceptional, nothing is more banal than a political institution trying to exempt itself from the very checks that it insists on applying to rival institutions. My claim is rather that the CJEU's aversion to assuming formal responsibility under the Convention goes beyond the standard unwillingness of an aggressive 'junk yard dog' in charge of monitoring compliance to be chained up by compliance mechanisms.[63] The Court's attitude is nourished, at least in part, from deep sources within the founding philosophy of European integration, according to which supranational institutions are possessed of political judgment that, while not necessarily inerrant, is capable of rising above the distortions of moral particularism and *raison d'état* that ensnare nation states.

To be sure, this attitude is at best implicit within the CJEU's judicial philosophy, and exposing it requires attending carefully to a string of opinions and judgments rendered over the past several decades in which the Court has addressed the EC/EU's relationship to international law. A good case in point is the much lauded, but nonetheless jarringly reasoned, *Kadi* judgment of 2008, which cited fundamental rights norms to invalidate EU secondary legislation implementing the UN Security Council's mandate to freeze the financial assets of individuals and entities suspected of financing terrorism.[64] As Gráinne de Búrca has argued in an influential commentary, the ECJ opted for an 'internally-oriented approach and a form of legal reasoning which emphasized the particular requirements of the EU's general principles of law and the importance of the autonomous authority of the EC legal order'.[65] In other words, its logic seemed 'deliberately calculated' 'as an opportunity … to emphasize the autonomy, authority and separateness of the European Community from the international legal order'.[66]

[62] This area of inquiry was pioneered most notably by M.M. Shapiro, *Courts. A Comparative and Political Analysis* (1986).

[63] Shapiro, 'The European Court of Justice: Of Institutions and Democracy', 32 *Israel Law Review* (1998) 3, at 7.

[64] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-06351.

[65] de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', 51 *Harvard International Law Journal* (2010) 1, at 44.

[66] *Ibid.*, at 44. Cf. Nolte and Aust, who contend that the *Kadi* decision did not imply that the EU is 'free from certain obligations, or occupies a special position with respect to obligations which arose from general international law or from a generally applicable treaty regime' but, instead, conveyed that the EU 'accepts, in principle, that the international rules and decisions are binding' on it. Nolte and Aust, *supra* note 5, at 416.

The *Kadi* decision, according to de Búrca, was at least as much an exercise in external delineation as internal quality control. This is not to understate the complex constitutional stakes of the *Kadi* ruling, in which the Court addressed a serious alleged breach of fundamental rights standards by the EU's organs. In fact, I have elsewhere argued that this ruling should be welcomed insofar as it effected an 'institutional prioritization of rights protection within the EU's array of functions'.[67] Still, as de Búrca rightly notes, the Court could have arrived at the same salutary rights-protecting outcome via means less dismissive of international law, but pointedly chose the unilateral path instead.[68] To adapt a famous line from Edmund Burke, it chose to represent the rights at stake as European rights rather than 'rights of man', as internal norms of the European Union rather than universal guarantees.[69] Nonetheless, in *Kadi*, the outcome that reinforced supranational constitutional autonomy was also, happily, the one that was most conducive to the protection of fundamental rights. By contrast, Opinion 2/13 puts these two cardinal aims on a collision course.

In hindsight, the CJEU has for some time subtly but surely indicated that it considers the EU's accession to the ECHR to be superfluous. For instance, its 1996 advisory opinion on accession exhaustively listed the many ways in which the EC ensures respect for human rights, with the implication that the EC's built-in procedures are quite adequate to the task.[70] Furthermore, its habitual invocations of Convention standards and ECHR case law over several decades (though rarely with substantive impact on the outcomes) can be seen as a strategy of co-opting ECHR standards into Community law and preempting the demand for accession. Finally, a recent study by de Búrca indicates that since the entry into force of the EU Charter of Fundamental Rights, the CJEU has made 'very occasional and increasingly selective use of the case law of the European Court of Human Rights',[71] which suggests a deliberate move on the part of the Luxembourg court to develop an autonomous jurisprudence of human rights. A human rights document that is indigenous to the EU leaves the Court with greater interpretive discretion and frees it from having to rely on a jurisprudence it cannot control.

67 Isiksel, 'Fundamental Rights in the EU after *Kadi and Al Barakaat*' 15 *European Law Journal* (2010) 551, 571.

68 Expressing a similar critique, Halberstam and Stein write: 'As the highest tribunal of a legal system with deep historical and structural commitments to the international legal order, the European Court of Justice might have been expected to demonstrate greater concern for the development and maintenance of international law … It should have reached for a *Solange* type dialogue and grounded this exchange not in Europe's domestic bill of rights alone, but in a broader discussion about international human rights as well.' Halberstam and Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *Common Market Law Review* (2009) 13, at 68.

69 E. Burke, *Reflections on the Revolution in France*, edited by L.G. Mitchell (2009 [1790]), at 32–33.

70 Opinion 2/94, *supra* note 44, paras 32–34.

71 de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20 *Maastricht Journal of European and Comparative Law* (2013) 168, at 173–174. De Búrca reports that between 2009 and the end of 2012, 'out of 122 cases involving the Charter, the CJEU referred to the ECHR in just 18, with only 10 of these involving some mention or discussion of ECtHR case law, the other 8 making mention only of the Convention provision'. *Ibid.*, at 175. Charter of Fundamental Rights, *supra* note 50.

In fact, the Luxembourg court's turn towards the Charter and away from the ECHR in recent rulings extends what is one of the longest threads in its jurisprudence, reaching back to the 1959 *Stork* judgment rendered under the European Coal and Steel Community (ECSC).[72] Although the ECJ framed this judgment in terms of its own lack of authority to assess the conformity of acts by the ECSC's High Authority with the German Grundgesetz, it implied, more importantly, that Community law possessed an autonomous source of validity and could not be interpreted in light of national law.[73] In 2014, as in 1959, the CJEU continues to insist that the supranational legal order is a closed shop, not so much because 'neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty' but, more importantly, because EU institutions are only bound by EU law.[74] Indeed, where the treaties manifestly lacked necessary legal remedies and procedures (such as a catalogue of basic rights or a procedure for bringing an annulment action against the European Parliament), the Court has made a point of fashioning them, precisely to avoid the injection of domestic courts and their standards into the EC/EU's circulation system. This mercantilist manoeuvre is particularly ironic in the context of an organization designed to promote free movement and exchange.

Having so far insinuated that ECHR accession would be redundant at best, in Opinion 2/13, the CJEU shifts into alarmist mode, warning that ECHR accession could throw the EU's constitutional balances out of whack. Most of the objections the Court raises against the accession agreement have to do with the potential exposure of the EU and its member states to various jurisdictional and substantive challenges before the ECtHR in ways that could jeopardize the integrity of EU law.[75] Exemplifying its long-standing reliance on teleological argumentation from the 'primacy, unity, and effectiveness' of the supranational legal order,[76] the Court warns that the accession agreement is inattentive to the need to preserve 'the principle of mutual trust between the Member States' on which the EU rests.[77] As framed by the agreement, Convention accession would 'require a Member State to check that another Member State has observed fundamental rights' and, thereby, 'upset the underlying balance of the EU and undermine the autonomy of EU law'.[78]

Here as elsewhere, the CJEU seems to be resisting not merely a corrigible flaw in the accession agreement but also the very maxim that defines an international human rights regime

[72] Case 1/58, *Friedrich Stork and Cie v. High Authority of the ECSC*, [1959] ECR 17.

[73] *Ibid.* Specifically, the Court held: 'Under Article 8 of the Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law' (para. 3).

[74] *Internationale Handelsgesellschaft*, *supra* note 13; Case 294/83, *Partie Ecologiste 'Les Verts' v. Parliament*, [1986] ECR 1339.

[75] For a detailed account and assessment of these objections, see Halberstam, *supra* note 35.

[76] M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (2004), ch. 4. See also Opinion 2/13, *supra* note 4, paras 188, 189, 197, 199.

[77] Opinion 2/13, *supra* note 4, para. 191.

[78] *Ibid.*, para. 194.

such as the ECHR, namely that any institution entrusted with exercising public power must be subject to human rights compliance mechanisms.[79] These mechanisms can be internal or external – that is to say, they may be built into the political system whose power they are designed to check or they may be exercised by other duly commissioned agents. Domestic judicial review, the separation of powers, rules of administrative procedure and representative democratic institutions are examples of internal mechanisms designed to keep the exercise of state power in conformity with basic individual rights. However, international human rights instruments are premised on the assumption that internal mechanisms are prone to error and manipulation and that they may be biased in favour of the institutions that they are supposed to police. On this view, however stringently the Luxembourg court might review EU law for conformity with human rights, it can only count as an internal mechanism of commitment as far as the EU legal order is concerned. However, the strict demands expressed in Opinion 2/13 militate against the very idea that EU institutions, like the domestic institutions of states, might benefit from external mechanisms of oversight.

This is not to say that the guarantees afforded by international human rights law against what James Madison called 'the encroaching spirit of power' are always effective.[80] On the contrary, they are tenuous, spasmodic, and post hoc at the best of times. Compared with a well-ordered domestic system of constitutional, administrative and democratic safeguards, international human rights law is weak, even ornamental. Thus, the role of the ECJ (as with any domestic judiciary) in upholding human rights standards *vis-à-vis* EU acts is indispensable. However, international human rights instruments are meant to complement, rather than replace or substitute for, domestic mechanisms, not least by establishing, formalizing and publicizing the obligations of states to respect the basic rights and liberties of individuals. As extensive social science research has shown, the effectiveness of external human rights mechanisms depends critically on their synergies with domestic mechanisms.[81] International human rights law should therefore be understood as one component of a complex system of commitments whose ability to curtail the arbitrary exercise of public power relies on the availability of external as well as internal mechanisms of oversight.

4 Ever Closed Union?

The benefits and burdens of the EU's accession to the ECHR have been discussed in too much detail for too long to warrant another exhaustive accounting here.

[79] As Advocate General Kokott notes, this is a demand consistently applied to candidate countries wishing to accede to the EU. Opinion 2/13, *supra* note 4, Opinion of Advocate General Kokott (EC:C:2014:2475), para. 1.

[80] Madison, 'Federalist No. 48 [1788]', in A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, edited by I. Shapiro (2009) 251, at 252.

[81] M. Goodale and S.E. Merry (eds), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (2007); R. Goodman and T. Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2011); B.A. Simmons, *Mobilizing for Human Rights: International Law and Domestic Politics* (2009), especially 125–147; M.E. Keck and K. Sikkink, *Activists beyond Borders* (1998); S. Benhabib, *Another Cosmopolitanism* (2006).

Furthermore, much of this debate has been rendered moot thanks to the establishment of ECHR membership as an obligation for the EU under Article 6(2).[82] Well rehearsed as they may be, however, the reasons in favour of complementing the CJEU's status as an internal human rights monitor with external human rights supervision should be tallied against the qualms the CJEU has expressed in Opinion 2/13 in order to exempt itself from such supervision as far as possible. First, the EU's obligations under this complex system of commitments would give the Luxembourg court an incentive to be more diligent in its application of the relevant human rights law, if only in an effort to avoid being overruled by its counterpart in Strasbourg. At present, the CJEU has a sparse jurisprudence of fundamental rights relative to domestic courts of last instance (that is, excluding the 'fundamental freedoms' of movement whose claim to moral equivalence with the rights enshrined in the Convention is shaky at best).[83] To date, the CJEU's reasoning in decisions touching on fundamental human rights issues has been curt, stipulative and tacit. While some of this has been attributed to the parsimonious rhetorical style of the civil law tradition, the expansion of the Court's interpretive authority to ever more contested areas of policy, including basic rights, creates the need for a more serious engagement with the rich normative issues at stake.[84] Convention membership is likely to draw the CJEU out of its reticence and into a substantive judicial dialogue about these issues. This would also mark a welcome departure from the discretionary, not to say instrumental, manner in which the Luxembourg court has so far made use of the ECtHR's case law. In short, ECHR membership might catalyse the development of a more deliberate and deliberative fundamental rights jurisprudence in EU law.

Just as the nation states that compose the EU have proven themselves prone to forms of ethnic exclusion and nationalist aggression, the EU has endemic moral limitations that stand in need of correction, not least a single-minded adherence to the *telos* of market liberalization at the expense of other, equally important public ends. The EU's formal accession to the ECHR would encourage the Luxembourg court to be more judicious in assigning relative weight to the market objectives of the EU *vis-à-vis* other important ends, values, rights and freedoms, such as the freedoms of association and collective action.[85] Such a moderating effect may be particularly welcome given that the CJEU has come under fire in recent years for privileging market freedoms at the

[82] 'Since the entry into force of the Treaty of Lisbon, it has been clear from Article 6(2) TEU that not only does the EU have the power to accede to the ECHR, but it has been placed under an obligation by the Member States to follow that path.' Opinion 2/13, *supra* note 4, Opinion of Advocate General Kokott (EC:C:2014:2475), para. 3. Łazowski and Wessel note, however, that this is an imperfect obligation, since its realization is conditional on the approval of non-EU members to the ECHR. Łazowski and Wessel, 'When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR', 16 *German Law Journal* (2015) 179, at 183.

[83] See especially Coppel and O'Neill, 'The European Court of Justice: Taking Rights Seriously?', 12 *Legal Studies* (1992) 227.

[84] Perju, 'Reason and Authority in the European Court of Justice', 49 *Virginia Journal of International Law* (2009) 308; de Búrca, *supra* note 71, at 176–177.

[85] Koskenniemi, 'The Effect of Rights on Political Culture', in P. Alston (ed.), *The EU and Human Rights* (1999) 99.

expense of other important individual rights and social objectives. Recent decisions, including *Laval*[86] and *Viking*,[87] have favoured supranational guarantees of commercial mobility at the cost of undermining long-standing forms of corporatist social consensus venerated in member states such as Sweden, Germany and Finland.[88] To be sure, if these decisions had been subjected to the scrutiny of the Strasbourg court, the latter may well have found the balance struck by the CJEU to fall within the EU's margin of appreciation and to be in conformity with convention standards. Without formal accession, however, there will be no way of ascertaining whether this is indeed the case. More importantly, decisions such as *Viking* and *Laval* show the extent to which the EU's universe of values is still firmly anchored within the market-building project and suggest that its institutions occasionally have trouble giving due recognition to the moral urgency of other, non-market-related rights. More generally, the CJEU has a notably thin record of finding rights violations by EU institutions or in EU law (which may or may not be because such violations do not transpire in practice).[89]

Furthermore, even if the CJEU is motivated to develop an autochthonous jurisprudence of fundamental rights, its ability to do so is circumscribed by Article 52(3) of the EU Charter of Fundamental Rights, which explicitly pegs many of the EU's rights standards to the Strasbourg court's jurisprudence.[90] Any lag or misalignment between Convention standards and the CJEU's relevant case law is worrying from a constitutional perspective – not necessarily because the substantive standards applied by the CJEU are likely to be lower but, more importantly, because the determination of the necessary standard would be unilateral. In this regard, accession would institutionalize dialogue in order to ensure consonance between the two legal orders as well as the predictability and uniform application of basic rights standards.[91] In other

[86] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779.

[87] C-314/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767.

[88] Hinarejos, '*Laval* and *Viking*: The Right to Collective Action versus EU Fundamental Freedoms', 8 *Human Rights Law Review* (2008) 714; Joerges and Rödl, 'Informal Politics and Formalised Law: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', 15 *European Law Journal* (2009) 1.

[89] Although the ECJ incorporated human rights norms into its interpretive repertoire in 1970, its first-ever judgment finding an EU act in violation of these norms was not until 1998. See Case C-185/95, *Baustahlgewebe v. Commission*, [1998] ECR I-8417. A notable (and recent) standout in the CJEU's thin record of human rights scrutiny *vis-à-vis* EU acts is the decision invalidating the EC Council Directive 95/46, OJ 1995 L 281. Joined Cases C-293 and 594/12, *Digital Rights Ireland Ltd and Seitlinger and Others*, judgment of 8 April 2014, not yet published (ECLI:EU:C:2014:238). For an excellent commentary, see Lynskey, 'The Data Retention Directive is Incompatible with the Rights to Privacy and Data Protection and is Invalid in Its Entirety: *Digital Rights Ireland*', 51 *Common Market Law Review* (2014) 1789.

Other cases in which the ECJ has found EU acts to be incompatible with basic rights norms include Case C-236/09, *Test-Achats*, [2011] ECR I-773, which invalidated the part of EC Council Directive 2004/113 on the principle of equal treatment between the sexes, OJ 2004 L 373, Art. 5(2) that allowed for gender-based discrimination in the pricing of insurance policies; and Cases C-92 and 93/09, *Volker und Markus Schecke and Hartmut Eifert*, [2010] ECR I-11063, in which the Court declared Art. 44a of Regulations 1290/2005 and 259/2008 requiring the publication of the names of recipients of agricultural aid as incompatible with the right to private life and data protection guarantees of the Charter of Fundamental Rights.

[90] Charter of Fundamental Rights, *supra* note 50.

[91] Eeckhout, *supra* note 6

words, some of the very real constitutional snags identified by Opinion 2/13 can only be smoothed over by institutionalizing the relationship between the two legal orders, already assumed by the EU's own Charter, by means of the EU's formal accession to the Convention.

For its part, the ECtHR has so far been forced to paper over the fraught and uncertain triadic relationships between the Convention, the EU and its member states by relying on generalized and formalistic presumptions in lieu of actual scrutiny. According to the '*Bosphorus* presumption', the Strasbourg court refrains from reviewing EU member state acts mandated by EU law for their conformity with the ECHR as long as the EU upholds general standards of protection comparable to that afforded by the Convention.[92] However, this is an uncomfortable position for a human rights court to occupy. Addressing a specific infringement claim with reference to the respondent's overall compliance with human rights norms is at odds with the very idea of human rights, whose distinct merit is to recognize each individual violation as a free-standing moral wrong irrespective of systemic considerations. As Jeremy Waldron stresses, '[t]he great advantage of rights-talk has always been the way it forces us to focus on individual wrongs, wrongs done to individual persons, rather than evaluating societies on the basis of the way they treat their members in aggregate terms'.[93] The general effectiveness of the Luxembourg court in ensuring the EU's compliance with fundamental rights norms does not make violations that escape its scrutiny, however occasional, any less contrary to human rights. Put differently, the ECtHR's inability to move beyond a generalized presumption about the adequacy of the EU's human rights protections deprives individuals subject to its jurisdiction of the opportunity for targeted scrutiny and institutional accountability.

The same objection applies with equal force to the CJEU's own doctrine of mutual trust, according to which the smooth functioning of the EU's area of freedom, security, and justice hinges on member states trusting one another's standards of fundamental rights protection.[94] The Luxembourg court holds that:

[92] *Bosphorus*, *supra* note 58, paras 155–156. The precursor to the *Bosphorus* presumption is found in *M & Co v. Germany*, a 1990 decision in which Commission of Human Rights held that 'the transfer of powers to an international organization is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection'. *M & Co. v. Federal Republic of Germany*, Appl. no. 13258/87, Judgment of 9 February 1990. See Douglas-Scott, *supra* note 14 at 636–638.

[93] Waldron, 'Human Rights: A Critique of the Raz/Rawls Approach', New York University School of Law Public Law and Legal Theory Research Paper Series No. 13–32 (2013), at 12.

[94] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013, not yet reported (ECLI:EU:C:2013:107). In the context of asylum, the CJEU has held that 'the Common European Asylum System was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard'. Case C-394/12, *Shamso Abdullahi v. Bundesasylamt*, judgment of 10 December 2013, not yet reported (ECLI:EU:C:2013:813), para. 52; Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [2011] ECR I-13905, para. 78.

> the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.[95]

In recent years, the presumption of mutual trust has created considerable legal friction (and moral consternation) with regard to the mandated transfer of asylum seekers from one member state to another under the 'Dublin rules' for allocating responsibility over processing asylum applications.[96] According to the CJEU, Article 3(1) of the Dublin Regulation requires that 'an application for asylum is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III of the Regulation indicate is responsible'.[97] However, Article 3(2) of the Regulation provides that member states may refrain from transferring an asylum seeker to the state responsible for the processing of his/her claim if (and, according to the CJEU, only if) there are 'systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State'.[98]

In its *N.S. and Others* decision, the Luxembourg court interpreted this provision as meaning that not '*any* infringement of a fundamental right by the Member State responsible' will provide a sufficient reason for suspending the transfer of an asylum seeker to that state.[99] Instead, there must be 'systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State'.[100] According to the CJEU:

> [a]t issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.[101]

If member states were to look too closely at one another's human rights records before deciding whether to transfer asylum seekers or execute a European arrest warrant, the CJEU reasons, the mutual confidence and reciprocal respect on which their cooperative endeavour depends would be undercut. Consequently, if a member state's human rights infringements do not add up to 'systemic deficiencies' in protection, the imperative of uniform and effective implementation of EU law must take precedence.

The CJEU is right that mutual trust in one another's standards of basic rights is, if not the *raison d'être* of the EU, then its *conditio sine qua non*. After all, without assuming that they share fundamental values, member states cannot engage in the kind of extensive and thorough-going co-legislation to which the treaties commit them.

95 Opinion 2/13, *supra* note 4, para. 192.

96 Council Regulation 604/2013 (Dublin III Regulation), OJ 2013 L 180/31.

97 Case C-4/11, *Germany v. Kaveh Puid*, judgment of 14 November 2013, not yet reported (ECLI:EU:C:2013:740), para. 27.

98 Dublin III Regulation, *supra* note 96, Art. 3(2).

99 *N.S. and Others*, *supra* note 94, para. 82 (emphasis added).

100 *Ibid.*, paras 86, 94.

101 *Ibid.*, para. 83.

Nonetheless, the CJEU's logic is troubling because it effectively justifies the risk of one-off human rights violations with reference to the overall coherence of EU law. In other words, obliging member states to process 'Dublin returns' so long as there are no systemic deficiencies in the receiving state's treatment of asylum seekers risks abetting grievous human rights violations that are no less grievous because they do not form part of a sustained pattern of abuse.[102] This is a point that the ECtHR soberly noted in its own landmark decision concerning the transfer of asylum seekers under the EU's Dublin rules:

> [I]n view of … the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy … imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response; it also requires that the person concerned should have access to a remedy with automatic suspensive effect.[103]

In the conflict between the tempest-tost refugee's need for safe haven and the EU's need to have its laws obeyed, the ECtHR clearly sides with the former, as a human rights court should. This discrepancy between the Luxembourg court's emphasis on the integrity of the EU's legal order and the Strasbourg court's concern with the vulnerability of human beings (not least before the EU's elaborate mechanisms of bureaucratic buck-passing) illustrates the EU's need for a human rights court's touch.

Particularly in view of such discrepancies, the diminishing prospect of accession is likely to erode the remarkable restraint that the Strasbourg court has shown in the face of human rights complaints implicating EU primary and secondary law. There is little evidence that the *Bosphorus* accommodation was meant as a permanent solution rather than as a stopgap measure pending the EU's formal accession to the ECHR, and I have already argued that it is at odds with the Strasbourg court's core mission. According to several Strasbourg judges interviewed for this article, as the EU's prospects of membership recede for the near term, the future of the *Bosphorus* presumption looks uncertain.[104] Moreover, as the Luxembourg court shifts the basis of its fundamental rights jurisprudence to the EU Charter and away from the Convention, the

[102] The UK Supreme Court has made a similar point in openly defying the 'systematic deficiency' standard set out by the CJEU in *ibid*. See *R. (on the Application of E.M. (Eritrea)) v. Secretary of State for the Home Department*, UKSC 12 (19 February 2014), paras 58, 63

[103] ECtHR, *M.S.S. v. Belgium and Greece,* Appl. no. 30696/09, Judgment of 21 January 2011, para. 293 (internal references omitted). See also ECtHR, *Tarakhel v. Switzerland*, Appl. no. 29217/12, Judgment of 4 November 2014. For analyses of the continuities and discontinuities between the two courts on the Dublin rules, see Halberstam, *supra* note 35, at 23–27; Gragl, 'The Shortcomings of Dublin II: Strasbourg's *M.S.S.* Judgment and Its Implications for the European Legal Order', in W. Benedek *et al.* (eds), *European Yearbook on Human Rights* (2012) 123; Mouzourakis, '"We Need to Talk about Dublin": Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union', University of Oxford Refugee Studies Centre Working Paper Series No. 105 (2014); Lenart, '"Fortress Europe": Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms', 28 *Merkourios: Utrecht Journal of International and European Law* (2012) 4.

[104] Semi-structured interviews were conducted with sitting judges of the ECtHR on 8 June 2015 in Strasbourg, France. The anonymity of the interviewees has been preserved as per the agreement between the interviewees and the author (interview notes on file with the author).

ECtHR may be justified in taking a harder look at the correspondence between the EU's rights protection standards and its own.[105] While the CJEU frets over the uncertain effects of Convention membership on the EU legal order, therefore, the consequences of non-accession are difficult to foresee and may be far more compromising.[106]

Although the CJEU is understandably wary towards the potential destabilizing effects of Convention membership, the history of the EU's own fundamental rights regime suggests that competition and overlap among judiciaries can generate a higher standard of human rights protection overall, particularly where each is anxious to prove to the others the stringency of its own standards.[107] Furthermore, as national constitutional courts within the EU have long understood, accepting the jurisdiction of an international court such as the CJEU or ECtHR need not be conceived as a categorical relationship of hierarchy.[108] In fact, it is more in keeping with Europe's pluralist constitutional landscape to construe external human rights review as a sustained dialogue among peer or constituent legal orders, including member state constitutional courts and the ECtHR.[109]

Although the CJEU contests the proposition that member state high courts are empowered to exercise external oversight over EU law (for conformity with human rights or any other norm), in practice, it has for decades been engaged in collective constitutional *bricolage* with domestic courts.[110] The move by the German and Italian Constitutional Courts in the 1970s to make compliance with fundamental rights a precondition for giving effect to the doctrine of the supremacy of EC law was what prompted the ECJ to take up the cause of human rights in the first place.[111] Regrettably, however, the Court of Justice seems assured that when it comes to providing the highest standard of rights protection possible within the scope of EU law, it is best to go it alone.

Far from being exclusive to the CJEU, this confidence has its origins in the foundations of the European integration project and emerges most clearly in comparisons with the failures of the nation state. Writing in exile in 1943, Jean Monnet argued:

[105] de Búrca, *supra* note 71.

[106] Halberstam, *supra* note 35, at 28–31.

[107] For a sanguine analysis of the potential benefits of a well-managed system of constitutional pluralism, see especially Krisch, 'The Open Architecture of European Human Rights Law', 71 *Modern Law Review* (2008) 183.

[108] *Ibid.*

[109] '[T]he constitutional discourse in Europe must be conceived of as a conversation of many actors in a constitutional interpretive community rather than a hierarchical structure with the ECJ at the top … A feature of neo-constitutionalism in this case would be that the jurisdictional line (or lines) should be a matter of constitutional conversation, not a constitutional *diktat*.' Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order', 44 *Political Studies* (1996) 517, at 532. In the field of human rights, Eeckhout argues that the relationship among Europe's supreme adjudicators should be structured as a deliberate sharing of jurisdiction. Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 *Current Legal Problems* 169. See also Eeckhout, *supra* note 6.

[110] Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in Weiler and Wind, *supra* note 10, 7.

[111] For an overview of this process, see Isiksel, *supra* note 67.

> There will be no peace in Europe if states rebuild themselves on the basis of national sovereignty, which brings with it the politics of prestige and economic protectionism. If the countries of Europe protect themselves against one another again, the constitution of vast armies will again be necessary … European states are too constrained [*étroits*] to guarantee their peoples the prosperity that modern conditions make possible and consequently necessary.[112]

According to Monnet, mutual suspicions, shifting alliances and arms races had been 'made unavoidable due to the configuration of states in the model of national sovereignty and protectionism as we have seen prior to 1939'.[113] 'Unless European states form a federation or a "European entity"', Monnet predicted, 'the inevitable consequence will be the establishment of arbitrary authority in Europe and the reconstitution of sovereign and protectionist states'.[114] In a similar vein, Altiero Spinelli and Ernesto Rossi argued in their wartime Ventotene manifesto that the nation state was no longer the 'guardian of civil liberty' or 'the most efficacious form of organizing collective life within the framework of the entire human society' but, instead, had become a 'divine entity', 'the master of vassals bound into servitude'.[115] Accordingly, they proclaimed, 'the absolute sovereignty of national states has given each the desire to dominate' and has created a slippery slope towards totalitarianism. 'A free and united Europe', Spinelli and Rossi concluded, 'is the necessary premise to the strengthening of modern civilization.'[116]

These passages were written by courageous anti-fascists peering out from within the moral and humanitarian abyss of World War II. They are as utopian as the reality they confronted was dystopian. Although the integration project envisaged by the founding generation has succeeded in leaving behind the catastrophic world out of which it arose, the task of critique remains as important as ever. To be sure, critique need not take the form of a fatalistic 'narrative of decline', nor should it be dismissed as the 'intellectual glamour of pessimism'.[117] To the contrary, it constitutes a necessary form of civic engagement through which citizens, scholars and practitioners can help the EU confront evolving challenges. Even if supranationalism is appraised a necessary corrective to the nation state, such an appraisal must not lull EU institutions into a hubristic sense of their own infallibility. Sadly, as far as the protection of human rights is concerned, this is precisely what seems to have happened to the CJEU, which sometimes treats the EU as the enlightened guardian that

[112] J. Monnet, Note de Réflexion de 5 août 1943, available at http://www.cvce.eu/obj/note_de_reflexion_de_jean_monnet_alger_5_aout_1943-fr-b61a8924-57bf-4890-9e4b-73bf4d882549.html (last visited 10 June 2015) (author's translation).

[113] *Ibid.*

[114] *Ibid.*

[115] A. Spinelli and E. Rossi, *The Manifesto of Ventotene for a Free and United Europe* (1941), available at http://www.ena.lu/manifesto-ventotene-1941-020000007.html (last visited 10 June 2015).

[116] *Ibid.*

[117] Both phrases are borrowed from J.M.D. Barroso, 'The State of the European Union' (public address delivered at Princeton University Woodrow Wilson School of Public and International Affairs, 8 April 2015) (text on file with the author).

does not need a guardian. Is it really possible that the EU has squared Rousseau's circle[118] – *pace* Kant – that it has wrought something straight out of the crooked timber of humanity?[119]

Exposing the fallacies of the narrative of European exceptionalism requires little more than simply recounting it. We need not catalogue the EU's many and varied shortcomings, including its failure to stand up for the human rights of members of ethnic and religious minorities in many member states,[120] its callous criminalization of asylum seekers and desperate migrants[121] and its chronic attenuation from popular participation and democratic control to burst the self-congratulatory bubble. While the EU's shortfalls in the area of human rights protection indicate that its accession to the ECHR would be far from superfluous, my primary contention is neither that the EU has a particularly poor record of protecting fundamental rights nor that its judiciary is ill-equipped to conduct human rights scrutiny. (After all, the ECHR's signatories include some of the most meticulously law-abiding states in the world, which nevertheless submit to the scrutiny of the Strasbourg court.)

My point is rather that however exotic its internal constitutional structure, the very reasons why the EU was created apply equally to the EU itself. Powerful public institutions are more likely to miss, cover up or explain away their normative shortcomings when they are not subjected to the scrutiny of other institutions. Conversely, they have reasons to wield public power with greater care and deliberation when they are so accountable. While we can and should aspire to build better, more humane political institutions, we cannot realistically aspire to build infallible ones. Our best hope therefore lies with a compound system of external and internal checks, imperfect as each of these will be by itself. If the 20th century established conclusively that the nation state is a flawed mode of political organization, then perhaps circumspection about the virtues of supranational governance is a more reasonable lesson to draw for the 21st century than dogged confidence in its superiority.

[118] Rousseau writes: 'To put law over man is a problem in politics which I compare to that of squaring the circle in geometry.' J.J. Rousseau, *The Plan for Perpetual Peace: On the Government of Poland, and Other Writings on History and Politics*, translated by C. Kelly and J. Bush, edited by C. Kelly (2005), at 170.

[119] Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in I. Kant, *Political Writings*, with an introduction by H. Reiss, translated by H.B. Nisbet (2nd edn, 1997), at 46.

[120] On the endemic mistreatment, racism, and exclusion faced by Roma citizens in numerous member states, see Amnesty International, Left Out: Violations of the Rights of Roma in Europe (2010), available at https://www.amnesty.org/download/Documents/36000/eur010212010en.pdf (last visited 5 October 2015).

[121] See especially European Council on Refugees and Exiles, Dublin II Regulation: Lives on Hold (February 2013), available at http://www.ecre.org/component/downloads/downloads/701.html (last visited 6 November 2015); UN Human Rights Council, Regional Study: Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, Doc. A/HCR/23/46 (2013), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf (last visited 6 November 2015).