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The EU's accession to the ECHR and the Dublin Regulation: is accession still desirable?

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ABSTRACT: This paper addresses whether the European Union's accession to the European Convention on Human Rights (ECHR) is still possible and desirable considering Opinion 2/13, as well as the caselaw of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) on the application of the Dublin Regulation. It argues that accession is still possible, though negotiations of an accession agreement compliant with the conditions imposed by Opinion 2/13 may prove particularly difficult in practice. Additionally, it argues that accession is desirable if the principle of mutual trust is not upheld over human rights, since accession in these conditions would enhance human rights protection in the context of the application of the Dublin Regulation.

KEYWORDS: Accession EU to ECHR – Opinion 2/13 CJEU – Dublin Regulation – European Convention on Human Rights.

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1. Introduction

More than forty years have passed since the Commission first proposed the accession of the Community to the European Convention on Human Rights.[1/2] Meanwhile, the Lisbon Treaty conferred on the European Union[3] the competence to accede to the ECHR[4] and a draft agreement on accession was reached[5] and subsequently rendered incompatible with the EU Treaties by Opinion 2/13.[6] Concurrently, the system of EU human rights protection evolved significantly, culminating in the attribution of binding force[7] to the Charter of Fundamental Rights,[8] which is enforced by national courts and the Court of Justice of the EU.[9] Nonetheless, some deficiencies in the EU system of human rights protection can be identified.

Since the EU has not yet acceded to the ECHR, EU acts cannot be directly scrutinised by the European Court of Human Rights.[1011] Direct scrutiny over EU acts is only exercised by the CJEU,[12] which can be insufficient considering that the CJEU has repeatedly applied lower human rights standards than the ECtHR jurisprudence on asylum. An analysis of the CJEU's case law on the application of the Dublin system shows that the CJEU repeatedly upheld the principle of mutual trust over compliance with fundamental rights.

This paper examines the above developments and attempts to answer the following research questions: (1) can the EU still accede to the ECHR and (2) should the EU accede considering the Dublin Regulation?

In Section 2, we analyse the developments leading up to the Lisbon Treaty (Section 2.1), the 2013 draft agreement on accession and Opinion 2/13 (Section 2.2). We demonstrate that accession is still possible though negotiations of an accession agreement compliant with the conditions imposed by Opinion 2/13 may prove particularly difficult in practice. In Section 3, we provide an overview of the EU system of human rights protection and the jurisdiction of the ECtHR prior to accession (Section 3.1). We exemplify some of the deficiencies of the EU system of human rights protection with reference to the case law of the CJEU and the ECtHR on the application of the Dublin Regulation (Section 3.2). We then analyse

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Hereinafter referred to as: "the ECHR".

[2] Commission of the European Communities, Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM(79)210 Final, 1979, 1.

[3] Hereinafter referred to as: "the EU".

[4] Article 6(2) Treaty on the European Union (hereinafter referred to as: "TEU").

[5] European Commission, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights. Final Report to the CDDH, 2013.

[6] Opinion 2/13, No. ECLI:EU:C:2014:2454 (Court of Justice of the European Union December 18, 2014).

[7] Article 6(1) TEU (Treaty of Lisbon).

[8] Hereinafter referred to as: "the CFR".

[9] Hereinafter referred to as: "the CJEU".

[10] Hereinafter referred to as: "the ECtHR".

[11] Judgment ECtHR *Matthews v United Kingdom*, 18 February 1999*,, Application no. 24833/94; Judgement ECtHR Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, Application no. 45036/98.

[12] Article 263 TFEU (hereinafter referred to as: "TFEU").

whether those deficiencies would be improved by the EU acceding to the ECHR pursuant to the conditions specified in Opinion 2/13 (Section 3.3). We propose that accession is desirable if the principle of mutual trust is not upheld over human rights compliance, since accession in these conditions would enhance human rights protection in the context of the application of the Dublin Regulation. Finally, in Section 4, we present our concluding remarks.

2. Can the EU still accede to the ECHR?

2.1. From Paris to Lisbon

The development of the Council of Europe[13] and the European Communities[14] occurred in parallel. This impacted how human rights protection was (not) incorporated in the original treaties of the European Communities.[15] Indeed, in the early 1950s, human rights protection was considered an exclusive domain of the Council of Europe; since the European Communities operated mainly in the economic field, it was considered that they could not affect human rights.[16] For this reason, the original treaties of the European Communities did not include any provision on human rights,[17] and the Court of Justice of the European Communities initially refused to exercise judicial review over human rights.[18] However, from the end of the 1960s, the Court recognised that human rights – as derived from the national traditions of the Members States and from international human rights treaties, especially the ECHR, – are general principles of Community law, which cannot be breached by the Community.[19]

Despite these developments, in 1974, the German Constitutional Court handed its famous *Solange I* judgment, stating that it would control the compliance

[13] The Council of Europe was founded by the 1949 Treaty of London.

[14] The European Communities consisted in the European Coal and Steel Community (established by the 1951 Treaty of Paris), the European Atomic Energy Community and the European Economic Community (both established by the 1957 Treaties of Rome).

[15] Silvia Maria Tabusca, "The Evolution of Human Rights Principle within the EU Legal System", *EIRP Proceedings,* 7 (2012): 320; Lammy Betten and Nicholas Grief, "Human Rights Protection in the European Union", in *EU Law and Human Rights* (Longman, 1998), 53.

[16] Tabusca, "The Evolution of Human Rights Principle within the EU Legal System", 320; Betten and Grief, "Human Rights Protection in the European Union", 53.

[17] Tabusca, "The Evolution of Human Rights Principle within the EU Legal System," 320; Betten and Grief, "Human Rights Protection in the European Union", 53.

[18] Judgment Court of Justice of the European Communities *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, 4 February 1959, Case 1/58; Judgment Court of Justice of the European Communities *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*, 15 July 1960, Joined cases 36, 37, 38-59 and 40/59; Judgment Court of Justice of the European Communities *Marcello Sgarlata and Others v Commission of the EEC*, 1 April 1965, Case 40/64; Paul Craig and Gráinne De Búrca, "The Evolution of EU Human Rights Law," in *The Evolution of EU Law* (OUP Oxford, 2011), 477–78; Betten and Grief, "Human Rights Protection in the European Union," 54–56.

[19] Judgment Court of Justice of the European Communities *Erich Stauder v City of Ulm – Sozialamt*, 12 November 1969, Case 29-69; Judgment Court of Justice of the European Communities *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970, Case 11-70; Judgment Court of Justice of the European Communities *J. Nold, Kohlen und Baustoffgroßhandlung v Commission of the European Communities*, 14 May 1974, Case 4-73; Judgment Court of Justice of the European Communities *Hoechst AG v Commission of the European Communities*, 21 September 1989, Joined cases 46/87 and 227/88; Craig and De Búrca, "The Evolution of EU Human Rights Law," 477–78; Betten and Grief, "Human Rights Protection in the European Union," 56–62.

of Community law with (national) fundamental rights as long as the Community lacked fundamental rights protection, including a bill of fundamental rights.[20] This judgment undermined the supremacy of Community law proclaimed in *Costa v. ENEL*[21] and prompted the institutions to discuss enhancing human rights protection in the Community legal order.[22] Although it initially defended that accession was unnecessary,[23] the Commission adopted a memorandum in May 1979 in which it considered that "*the best way of replying to the need to reinforce the protection of fundamental rights at Community level, at the present stage, consists in the Community formally adhering to the [ECHR]*".[24] The memorandum was endorsed by the Economic and Social Committee and the Parliament, but accession was only discussed in the Council in April 1986.[25] These discussions were unfruitful, leading the Commission in November 1990 to again propose the Community's accession to the ECHR.[26] The Council's response came in April 1994, when it requested an opinion from the Court on whether accession to the ECHR was compatible with the Treaty establishing the European Community.[27] Considering the reluctance of some Member States towards accession, the Council's request for an opinion could be interpreted as an attempt to have the Court declare the accession incompatible with the Treaty, thereby removing the issue from the political agenda of the Community.[28] "*This would have saved those Member States who are reluctant or hostile towards accession from appearing to be against furthering the protection of human rights within the Community*".[29]

In Opinion 2/94, the Court ruled that "*as Community law now stands, the Community has no competence to accede to the [ECHR]*".[30] The Court considered that the Treaty did not confer on the Community the competence to "*enact rules on human rights or to conclude international conventions in this field*".[31] Subject to the principle of conferral, the Community could only accede to the ECHR if the Treaty was amended to grant it such a competence.[32]

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[20] *Internationale Handelsgesellchaft mbH v Einfuhr- & Vorratsstelle fur Getreide & Futtermittel* (German Federal Constitutional Court 1974); Betten and Grief, "Human Rights Protection in the European Union," 64–65.

[21] Judgment Court of Justice of the European Communities *Costa vs ENEL*., 1964, Case 6/64.

[22] Betten and Grief, "Human Rights Protection in the European Union," 65–66.

[23] Commission of the European Communities, "Report of the Commission of 4 February 1976", n.d.; Betten and Grief, "Human Rights Protection in the European Union," 68.

[24] Commission of the European Communities, Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1.

[25] Commission of the European Communities, Commission Communication on Community Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Some of Its Protocols, SEC(90) 2087 final, 1990, 2.

[26] Commission of the European Communities, 5.

[27] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Court of Justice of the European Union March 28, 1996).

[28] Giorgio Gaja, "Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, given on 28 March 1996, Not yet Reported.," *Common Market Law Review* 33, no. 5 (1996): 974.

[29] Gaja, 974.

[30] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 36.

[31] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 27.

[32] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 35.

Although Opinion 2/94 was delivered in March 1996, neither the Treaty of Amsterdam[33] nor the Treaty of Nice[34] included an amendment providing for the EU's accession to the ECHR. Such an amendment was only introduced by the Lisbon Treaty – more than 10 years after Opinion 2/94 was delivered.[35] After Lisbon, Article 6(2) TEU reads: "*[t]he Union shall accede to the [ECHR]*". Interestingly, Article 6(2) TEU not only grants the EU competence to accede to the ECHR but the English and Spanish versions of the Treaty point to the establishment of a legal obligation to do so ("*[t]he Union shall accede*"; "*La Unión se adherirá*"). Contrastingly, other versions of the TEU, namely the Portuguese, Italian and French versions, do not textually indicate the establishment of a legal obligation ("*A União adere*"; "*L'Unione aderisce*"; "*L'Union adhère*").

With the Lisbon Treaty explicitly granting the EU competence to accede to the ECHR, another difficulty remained; this time from the side of the Council of Europe. Since the original text of the ECHR – more precisely Article 59(1) – stated that only members of the Council of Europe could accede to the ECHR[36] and such membership is limited to "*European State[s]*",[37] the EU as an international organisation could not accede to the ECHR without it being amended beforehand. This was accomplished by Protocol 14 to the ECHR.[38]

2.2. The draft agreement on accession and Opinion 2/13

With all obstacles to accession seemingly resolved,[39] in June 2010 the Council authorised the opening of negotiations on the accession agreement.[40] In April 2013, the European Commission and the Steering Committee for Human Rights settled upon a draft agreement.[41] Pursuant to the Lisbon Treaty, the decision to conclude the accession agreement is to be taken by the Council acting unanimously[42] after obtaining the consent of the European Parliament[43] and only enters into force after it is approved by the Member States in accordance with their respective constitutional requirements.[44] However, the procedure did not reach those phases. In July 2013, the Commission requested an opinion from the CJEU[45] on whether

[33] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, OJ C 340, 1997.
[34] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, OJ C 80, 2001.
[35] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ C 306, 2007.
[36] Article 59(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.
[37] Article 4 of the Statute of the Council of Europe, ETS 1, 1949.
[38] Article 17 of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention, ETS 194, 2004.
[39] The Lisbon Treaty entered into force in December 2009 and Protocol 14 to the ECHR entered into force in June 2010.
[40] Council of the European Union, Council Decision Authorising the Commission to Negotiate the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2010.
[41] European Commission, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights. Final Report to the CDDH.
[42] Article 218(8) TFEU.
[43] Article 218(6)(a)(ii) TFEU.
[44] Article 218(8) TFEU.
[45] Pursuant to Article 218(11) TFEU.

the draft agreement was compatible with the Treaties.[46] In December 2014, the CJEU would deliver Opinion 2/13, thereby declaring the draft agreement incompatible with Article 6(2) TEU and Protocol No. 8.[47]

The Lisbon Treaty specifies three conditions which the accession agreement must comply with. Such an agreement must ensure that:

(1) the competences of the Union and the powers of its institutions are not affected by the accession,[48]

(2) the specific characteristics of the Union and Union law are preserved,[49] and

(3) disputes concerning the interpretation or application of the EU Treaties are not submitted to external methods of dispute settlement.[50]

In Opinion 2/13, the CJEU analysed whether the draft agreement complied with these conditions and concluded negatively.[51] Most importantly, the CJEU ruled that the draft agreement did not account for the specific characteristics of EU law because it "*...did not provide for the application of the rule of 'mutual trust' in Justice and Home Affairs matters, which means that Member States must presume that all other Member States are 'complying with EU law and particularly with the fundamental rights recognised by EU law', other than in 'exceptional circumstances'*"[52]

An agreement which the CJEU has declared incompatible with the Treaty may only enter into force if it is amended or the Treaties are revised.[53] Thus, the draft agreement had to be abandoned. Does this mean that the accession of the EU to the ECHR is no longer possible? Strictly speaking, the CJEU only declared that the specific agreement reached in 2013 was incompatible with the EU Treaties: the CJEU did not declare that all accession agreements would be incompatible with the Treaties. Accordingly, Opinion 2/13 can be read as the CJEU specifying the conditions which a new agreement to be reached by the European Commission and the Steering Committee must respect in order to be compatible with the EU Treaties (a sort of "*checklist of amendments [to be made] to the accession agreement*").[54]

The list of issues which the amendment must address is neither short nor uncomplicated, including: "*(a) ensuring Article 53 ECHR does not give authorisation for Member States to have higher human rights standards than the EU Charter, where the EU has fully harmonised the law; (b) specifying that accession cannot impact upon the rule of mutual trust in JHA matters; (c) ensuring that any use of Protocol 16 ECHR by national courts cannot undermine the EU preliminary ruling system, presumably by ruling out the use of Protocol 16 where EU law issues are involved; (d) specifying expressly that Member States cannot bring disputes connected with EU law before the ECtHR; (e) ensuring that in the co-respondent system, the ECtHR's assessment of admissibility does not extend to the power to interpret EU law; (f) guaranteeing that the joint*

[46] Opinion 2/13.
[47] Opinion 2/13 paragraph 258.
[48] Article 6(2) TEU and Article 2 of Protocol No 8.
[49] Article 1 of Protocol No 8 and Declaration on Article 6(2) of the Treaty on European Union.
[50] Article 3 of Protocol No 8 and Article 344 of the TFEU.
[51] Opinion 2/13 paragraph 258.
[52] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," *EU Law Analysis Blog* (blog), December 18, 2014, sec. Summary, http://eulawanalysis.blogspot.be/2014/12/the-cjeu-and-eus-accession-to-echr.html.
[53] Article 218(11) TFEU.
[54] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," sec. Consequences; Catherine Barnard, "Opinion 2/13 on EU Accession to the ECHR: Looking for the Silver Lining," *EU Law Analysis* (blog), February 16, 2015, http://eulawanalysis.blogspot.com/2015/02/opinion-213-on-eu-accession-to-echr.html.

responsibility of the EU and its Member States for ECHR breaches cannot impinge upon Member State reservations to the Convention; (g) preventing the ECtHR from allocating responsibility for ECHR breaches as between the EU and its Member States; (h) ensuring that only the EU institutions can rule on whether the CJEU has already dealt with an issue; (i) providing that the CJEU should be allowed to rule on the interpretation, not just the validity, of EU law, during the 'prior involvement' procedure; and (j) curtailing the role of the ECtHR to rule on EU foreign policy matters ".[55]

Consequently, some commentators have questioned whether the CJEU's conditions for the accession agreement are not so demanding as to render reaching such an agreement rather difficult in practice.[56] Indeed, the Council of Europe and its non-EU Member States are not under any legal obligation to agree to accession or even to continue negotiations.[57] Thus, it may prove particularly difficult in practice to reach an agreement with the Council of Europe and its non-EU Member States on amendments insisting on the primacy of EU law and the CJEU over the ECHR and the ECtHR.[58] Nonetheless, negotiations on accession resumed in June 2020.[59]

If we disregard that reaching an agreement compliant with the CJEU's conditions may be extremely difficult in practice, another question remains: was the CJEU right in imposing such conditions? The judgment has received extensive criticism. Steve Peers questions whether the conditions imposed do not run counter to the very purpose and nature of the system of supervision of human rights compliance provided by the ECHR and the ECtHR.[60] According to the same commentator, accession pursuant to the conditions imposed by the CJEU is not desirable from the perspective of enhancing human rights protection.[61]

In short, the EU can still accede to the ECHR, but the accession agreement must comply with the extensive conditions specified in Opinion 2/13. Negotiating and reaching such an agreement may prove extremely difficult in practice. However, even if such an agreement is reached, there is no guarantee that the

[55] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," sec. Consequences; "Editorial Comments: The EU's Accession to the ECHR – a 'NO' from the ECJ!," *Common Market Law Review* 52, no. 1 (2015): 13–15.

[56] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," sec. Consequences; "Editorial Comments: The EU's Accession to the ECHR – a 'NO' from the ECJ!," 13–15.

[57] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," sec. Consequences.

[58] Steve Peers, sec. Consequences; Sionaidh Douglas-Scott, "Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice," *UK Constitutional Law Association* (blog), December 24, 2014, sec. Reflections on the Opinion, https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/; "Editorial Comments: The EU's Accession to the ECHR – a 'NO' from the ECJ!," 13–15.

[59] "The EU's Accession to the European Convention on Human Rights: Joint Statement on Behalf of the Council of Europe and the European Commission," September 29, 2020, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1748; "Virtual Informal Meeting of the CDDH Ad Hoc Negotiation Group ('47+1') on the Accession of the European Union to the European Convention on Human Rights. Meeting Report," June 22, 2020, https://rm.coe.int/cddh-47-1-2020-rinf-en/16809efeda; Anita Kovacs and Stian Øby Johansen, "Negotiations for EU Accession to the ECHR Relaunched - Overview and Analysis," *EU Law Analysis* (blog), January 30, 2021, http://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html.

[60] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," sec. Consequences.

[61] Steve Peers, sec. Comments.

conditions imposed by the CJEU will result in a better agreement – compared to the 2013 agreement. One may wonder if the new agreement will score higher than its predecessor in terms of enhancing human rights protection. In these circumstances, it is pertinent to ask: what is the added value of the EU acceding to ECHR pursuant to the conditions imposed by the CJEU? Section 3 will address this question with reference to the Dublin Regulation.

3. Should the EU accede to the ECHR considering the Dublin Regulation?

3.1. EU human rights protection and the jurisdiction of the ECtHR

More than forty years have passed since the Commission first proposed the accession of the Community to the ECHR.[62] Meanwhile, EU human rights protection evolved significantly. The Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty included provisions on human rights and the Charter of Fundamental Rights (CFR) was proclaimed in 2000.[63] Notably, the CFR was heavily inspired by the ECHR and the caselaw of the ECtHR;[64] it is even considered an updated reformulation of the ECHR.[65] This evolution culminated in the Lisbon Treaty prescribing that fundamental rights are general principles of EU law[66] and providing binding force to the CFR.[67] Since Lisbon, the EU has its own bill of fundamental rights and its own system of judicial review over those rights. Nonetheless, the Lisbon drafters clearly felt that this was not enough and granted the EU the competence to accede to the ECHR.[68] Considering the conditions for accession specified in Opinion 2/13, it is worth questioning what would be the added value of the EU acceding to the ECHR. It can certainly not be said that the EU does not have a system of human rights protection: it has legally binding human rights standards (the CFR) and venues enforcing those standards (national courts and the CJEU). However, some deficiencies in the EU system of human rights protection can be identified. This will be exemplified in Section 3.2 with reference to the case law of the CJEU and the ECtHR on the application of the Dublin Regulation. First, it is important to examine the jurisdiction of the ECtHR prior to accession.

Currently, all EU Member States are parties to the ECHR.[69] This means that the ECtHR has jurisdiction to review acts of the EU Member States,[70] including

[62] Commission of the European Communities, Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1.
[63] Craig and De Búrca, "The Evolution of EU Human Rights Law," 480.
[64] Ottavio Marzocchi, "The Protection of Fundamental Rights in the EU," Fact Sheets on the European Union. European Parliament, December 2020, https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu.
[65] Giorgio Sacerdoti, "The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizen's Europe," *Colum. J. Eur. L.* 8 (2002): 45–46.
[66] Article 6(3) TEU.
[67] Article 6(1) TEU.
[68] Article 6(2) TEU.
[69] "Chart of Signatures and Ratifications of Treaty 005. Convention for the Protection of Human Rights and Fundamental Freedoms," Treaty Office of the Council of Europe, May 1, 2021, https://www.coe.int/en/web/conventions/full-list.
[70] Articles 1, 19 and 32 ECHR.

acts implementing EU law.[71] However, the ECtHR does not have jurisdiction to review EU acts precisely because the EU is not a party to the ECHR.[72] Only the CJEU can review EU acts for their compliance with fundamental rights (prescribed in the CFR).[73]

Despite the EU not being a party to the ECHR, the ECtHR is able to exercise indirect scrutiny over EU acts. Since EU Member States are parties to the ECHR, they cannot evade their obligations of compliance with the ECHR through the establishment of an international organisation.[74] *"The [ECtHR] reiterated in [the Bosphorus judgment] that the [ECHR] did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity […]. The States nevertheless remain responsible under the [ECHR] for all actions and omissions of their bodies under their domestic law or under their international legal obligations"*.[75] Thus, even if we put aside the multiple references to the ECHR in the TEU,[76] in the CFR[77] and in the case law of the CJEU,[78] the EU is to some extent indirectly bound by the ECHR due to the fact that all of its Member States are directly bound by it.

This is implicit in the case law of the ECtHR, regarding the implementation of EU law by Member States. When an EU Member State implements EU law and has discretion in said implementation, the ECtHR scrutinises that act of implementation just like it would scrutinise a national act not related to the EU.[79] However, when an EU Member State implements EU law without discretion, the *Bosphorus* presumption is applied.[80] This means that for as long as the EU is considered to provide equivalent human rights protection to the ECHR,[81] an EU Member State implementing EU law without discretion is presumed to be complying with the ECHR.[82] This presumption can only be rebutted if the human rights protection provided by the EU in a particular case is considered manifestly deficient.[83] Thus, under the *Bosphorus* presumption, scrutiny by the ECtHR of acts

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[71] Judgment ECtHR *M.S.S. v. Belgium and Greece*, 21 January 2011, Application No. 30696/09; Judgment ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, para. 153.

[72] Judgment ECtHR *Matthews v United Kingdom*, para. 32; Judgment ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* para. 152.

[73] Article 263 TFEU.

[74] Judgment ECtHR *Matthews v United Kingdom*, para. 32; Judgment ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* paras. 152–154.

[75] Judgment ECtHR *M.S.S. v. Belgium and Greece,* para. 338.

[76] Articles 6(2) and 6(3) TEU.

[77] Preamble and Articles 52(3) and 53 CFR.

[78] Judgment Court of Justice of the European Communities *Hoechst AG v Commission of the European Communities,* Joined cases 46/87 and 227/88, para. 13.

[79] Judgment ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* para. 157.

[80] Judgment ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* paras. 155–156; Lize R. Glas and Jasper Krommendijk, "From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts," *Human Rights Law Review* 17, no. 3 (2017): 570–71.

[81] In terms of substantive guarantees and control mechanisms.

[82] Judgment ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* paras. 155–156; Glas and Krommendijk, "From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts," 570–71.

[83] Judgment ECtHR *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* para. 156; Tobias Lock, "The ECJ and the ECtHR: The Future Relationship between the Two European Courts," *The Law & Practice of International Courts and Tribunals* 8, no. 3 (2009): 378.

of EU Member States implementing EU law without discretion is exceptional.[84] Only if it is considered that the human rights protection provided by the EU was manifestly deficient – a high bar to reach –, will the ECtHR scrutinise these acts.[85]

The ECtHR later clarified that the *Bosphorus* presumption only applies if the EU control mechanism was fully brought into play, namely through the submission of a preliminary reference to the CJEU.[86] This requirement was softened in *Avotiņš v. Latvia*.[87] In this judgment, the ECtHR held that for the *Bosphorus* presumption to apply the CJEU must have jurisdiction, though it is not necessary for the CJEU to have exercised it.[88] The fact that a national court did not submit a preliminary reference to the CJEU does not necessary preclude the application of the *Bosphorus* presumption, especially when the preliminary reference would serve no purpose such as in "*cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights*".[89]

Overall, "*lacking accession:*

- *the jurisdiction of the ECtHR is limited to those cases where the claimant can rebut the presumption of equivalent protection; this means that overall it is more difficult for individuals to seize the ECtHR in cases relating to EU law than it is in domestic cases;*
- *the EU is not party to the proceedings so that it is the Member States collectively that incur responsibility, and the EU is not bound, as a matter of [ECHR] law, by the ECtHR ruling*".[90]

As we will exemplify in the context of the application of the Dublin system, the fact that direct scrutiny over EU acts is only exercised by the CJEU is problematic since the CJEU seems to apply lower human rights standards than the ECtHR when it comes to asylum.

3.2. The Dublin system and the diverging case law of the CJEU and the ECtHR

Though migration control is "*an emblem of national sovereignty*",[91] in 1985 and 1990 the Member States of the European Communities signed the Schengen Convention[92]

[84] Glas and Krommendijk, "From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts," 570–71.
[85] Eleanor Spaventa, "Fundamental Rights in the European Union," in *European Union Law*, ed. Catherine Barnard and Steve Peers, Third Edition (Oxford University Press, 2020), 274.
[86] Judgment ECtHR *Michaud v. France*, 6 December 2012, Application No. 12323/11.
[87] Judgment ECtHR *Avotiņš v. Latvia*, 23 May 2016, Application No. 17502/07 ; Glas and Krommendijk, "From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts," 581–82.
[88] Judgment ECtHR *Avotiņš v. Latvia,* paras. 109–111; Eleanor Spaventa, "Fundamental Rights in the European Union," 275.
[89] Judgment ECtHR *Avotiņš v. Latvia,* paras. 109–111.
[90] Eleanor Spaventa, "Fundamental Rights in the European Union," 276.
[91] Virginie Guiraudon, "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping," *JCMS: Journal of Common Market Studies* 38, no. 2 (2000): 251.
[92] Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 1985.

and the Dublin Convention.[93/94] The move to regulate such a core issue of national sovereignty at European level can be explained by the theory of venue shopping: national policy makers choose to regulate migration control at European level in order to avoid national constraints such as judicial and parliamentary scrutiny, compliance with fundamental rights and the presence of migration associations at national level; by doing so, more restrictive rules could be created.[95]

With the aim of combatting "asylum shopping",[96] the Dublin Convention established the principle that a single Member State is responsible for examining an asylum application lodged in one or more Member States by a third-country national.[97] The Dublin Convention also specified the criteria for determining which Member State is responsible.[98] In this order, the responsibility shall lay with the Member State of residence of close family members,[99] the Member State of issuance of a valid residence permit,[100] the first Member State of entrance into the European Communities,[101] or the first Member with which an asylum application is lodged.[102] Given that most asylum seekers lack family ties and residence permits in Europe, the Member State responsible is usually the Member State of entrance into the territory. If a Member State with which an asylum application has been lodged considers that another Member State is responsible for examining the application, it may transfer the asylum seeker to that other Member State[103] or examine the application itself.[104]

Following the entry into force of the Treaty of Amsterdam, the Tampere European Council of October 1999 decided upon the establishment of a Common European Asylum System.[105] Between 2003 and 2005 legislation was adopted for this purpose, including the Dublin II Regulation,[106] which replaced the Dublin Convention.[107] The Dublin II Regulation essentially reaffirmed/clarified the Dublin Convention's criteria for determining the responsibility for an asylum application, and brought the Dublin system into the EU framework.[108]

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[93] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1990.

[94] Among other issues, these Conventions regulated asylum procedures in the European Communities, thereby elaborating on the rules provided by the 1951 UN Convention on the Status of Refuges (amended by the 1967 Protocol).

[95] Guiraudon, "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping," 257–67.

[96] Joanna Lenart, "Fortress Europe: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms," *Merkourios-Utrecht J. Int'l & Eur. L.* 28 (2012): 18.

[97] Article 3(2) Dublin Convention.

[98] Article 3(2) Dublin Convention.

[99] Article 4 Dublin Convention.

[100] Article 5 Dublin Convention.

[101] Article 6 Dublin Convention.

[102] Article 8 Dublin Convention.

[103] Article 11 Dublin Convention.

[104] Article 9 Dublin Convention.

[105] Steve Peers, "Immigration and Asylum," in *European Union Law*, ed. Catherine Barnard and Steve Peers, Third Edition (Oxford University Press, 2020), 843.

[106] Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003.

[107] Steve Peers, "Immigration and Asylum," 843.

[108] Susan Fratzke, "Not Adding Up," *The Fading Promise of Europe's Dublin System*, 2015, 3.

"*It is important to note that the Dublin system is underpinned by the fundamental idea of equivalence of Member States' asylum systems, presuming, therefore, that asylum-seekers would not benefit from any advantage by having their application examined in a specific country*".[109] However, "*[t]he automaticity of the transfer of asylum-seekers between Member States […] quickly appeared problematic in terms of protection of asylum-seekers' fundamental rights. Notably due to their geographic situation, some Member States were faced with a high number of arrivals that put their asylum-seekers' reception infrastructures under pressure, and resulted in degradation of their national asylum systems*".[110]

This issue was addressed by the ECtHR in *M.S.S. v. Belgium and Greece*.[111] The Court ruled that Belgium had violated Article 3 ECHR when it transferred an asylum seeker to Greece – the country responsible for examining the asylum application under the Dublin II Regulation – thereby exposing him to detention and living conditions that amounted to degrading treatment.[112] Despite the fact that the degrading detention and living conditions in Greece "*were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources*", the Belgian authorities did not take them into account in the decision to transfer the applicant.[113] Indeed, the Court noted that the Belgian Authorities "*systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception*".[114]

Shortly after, the CJEU gave its *N.S.* judgement, which illustrates the tension between the principle of mutual trust on which the Dublin system is based and fundamental rights.[115] The Dublin II Regulation establishes a system based on the presumption that the Member State responsible for analysing the asylum application complies with fundamental rights.[116] However, the CJEU deemed the presumption rebuttable.[117] The Court stressed that minor violations of fundamental rights are not sufficient to rebut the presumption and introduced a high threshold for this.[118] Indeed, the CJEU held that Article 4 CFR (only) precludes a Member State from transferring an asylum seeker to the Member State responsible for the examination of the asylum application "*where [it] cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment*" (our underlining).[119] Past this high threshold, the Member State in

[109] Cecilia Rizcallah, "The Dublin System: The ECJ Squares the Circle Between Mutual Trust and Human Rights Protection," *EU Law Analysis* (blog), February 20, 2017, http://eulawanalysis.blogspot.com/2017/02/the-dublin-system-ecj-squares-circle.html.
[110] Cecilia Rizcallah.
[111] Judgment ECtHR *M.S.S. v. Belgium and Greece*.
[112] Judgment ECtHR *M.S.S. v. Belgium and Greece*, paras. 367–368.
[113] Judgment ECtHR *M.S.S. v. Belgium and Greece*, para. 366.
[114] Judgment ECtHR *M.S.S. v. Belgium and Greece*, para. 352.
[115] Judgment CJEU *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*, 21 December 2011, Joined Cases C-411/10 and C-493/10.
[116] Judgment CJEU *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,* paras. 79-83.
[117] Judgment CJEU *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,* para. 104.
[118] Judgment CJEU *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,* paras. 82–86.
[119] Judgment CJEU *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,* para. 106.

which the asylum seeker is present must identify if in accordance with the criteria established in the Dublin II Regulation another Member State can be deemed responsible.[120] Failing this, the Member State in which the asylum seeker is present must examine the asylum application itself.[121]

The CJEU reiterated this high threshold in *Puid*[122] and in *Abdullahi,*[123] and – when the Dublin Regulation was revised is 2013 – it was codified into Article 3(2) of the Dublin III Regulation[124].[125] One year later, the ECtHR held in *Tarakhel v. Switzerland* that the threshold was too high, since states must conduct "*a thorough and individualised examination of the situation of the person concerned and [suspend] enforcement of the removal order should the risk of inhuman or degrading treatment be established*" (our underlining).[126] Thus, the CJEU's approach in *N.S.* was deemed incompatible with the ECHR, because it did not account for individual circumstances of the asylum seeker which may render him vulnerable to human rights violations.[127]

Interestingly, in the 2017 *C.K.* ruling[128] and in the 2019 *Jawo* ruling,[129] the CJEU reconciled the systemic approach of *N.S.* with the individualised approach of the ECtHR.[130] In *Jawo*, the CJEU ruled that Article 4 CFR precludes the transfer of an applicant for international protection if "*the court hearing an action challenging the transfer decision finds, on the basis of information that is objective, reliable, specific and properly updated […], that that risk is real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty.*"[131] The court hearing an action challenging the transfer decision must assess "*whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people*",[132] but also whether there are exceptional circumstances unique to the asylum seeker making him particularly vulnerable.[133]

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[120] Judgment CJEU *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,* para. 107.
[121] Judgment CJEU *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,* para. 108.
[122] Judgment CJEU *Bundesrepublik Deutschland v Kaveh Puid,* 14 November 2013, Case C-4/11.
[123] Judgment CJEU Shamso Abdullahi v Bundesasylamt, 10 December 2013, Case C-394/12.
[124] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), n.d.
[125] Article 3(2) of the Dublin III Regulation reads: "*Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 [CFR], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.*"
[126] Judgment ECtHR *Tarakhel v. Switzerland*, 4 November 2014, Application No. 29217/12 .
[127] Steve Peers, "EU Law Analysis: Tarakhel v Switzerland: Another Nail in the Coffin of the Dublin System?," *EU Law Analysis* (blog), November 5, 2014, sec. Introduction, http://eulawanalysis.blogspot.com/2014/11/tarakhel-v-switzerland-another-nail-in.html.
[128] Judgment CJEU *C. K., H. F., A. S. v Republika Slovenija*, 16 February 2017, Case C-578/16 PPU.
[129] Judgment CJEU *Abubacarr Jawo v Bundesrepublik Deutschland*, 19 March 2019, Case C-163/17.
[130] Georgios Anagnostaras, "The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection," *German Law Journal* 21, no. 6 (2020): 1183–88.
[131] Judgment CJEU *Abubacarr Jawo v Bundesrepublik Deutschland,* para. 98.
[132] Judgment CJEU *Abubacarr Jawo v Bundesrepublik Deutschland,* para. 90.
[133] Judgment CJEU *Abubacarr Jawo v Bundesrepublik Deutschland,* para. 95.

3.3. Mutual trust and accession to the ECHR

Though *C.K.* and *Jawo* approximate the standards applied by the ECtHR and the CJEU concerning the application of the Dublin Regulation,[134] the CJEU's prior case law demonstrates that it has been keen to apply lower human rights standards than the ECtHR when it comes to asylum, since it repeatedly upheld the principle of mutual trust over ensuring compliance with fundamental rights.[135] Arguably the CJEU only changed its approach[136] due to the influence of the ECtHR.[137]

Given that fundamental rights under the CFR must have the same scope as under the ECHR[138] and that EU Member States are bound by the ECHR, it is unproductive for the CJEU to apply lower human rights standards than the ECtHR when ruling on the application of the Dublin Regulation. The reason why Member States chose to regulate migration control at European level in the first place was to avoid national constraints such as judicial scrutiny.[139] It is true that the EU evolved, progressively incorporating constraints similar to those present at national level, which renders the theory of venue shopping arguably less suitable to describe the current state of affairs.[140] Indeed, most EU acts, including the Dublin Regulation, are subject to the judicial scrutiny of the CJEU.[141] However, the fact that the EU has not acceded to the ECHR and that the CJEU is keen to apply lower human rights standards than the ECtHR when it comes to asylum[142] allows the Dublin Regulation, to some extent, to escape being subject to the higher standards enforced by the ECtHR.

The Dublin Regulation is (as all EU acts are) only subject to the indirect judicial scrutiny of the ECtHR, since only implementing acts of Member States can be reviewed by the ECtHR – and non-discretionary implementing acts even escape, to a great extent, the ECtHR's judicial scrutiny due to the *Bosphorus* presumption. In this way, the Dublin Regulation (like all other EU acts) largely escapes the scrutiny of the ECtHR. If the EU were to accede to the ECHR, the ECtHR would be able to exercise direct judicial scrutiny over EU acts. The EU would be obliged to comply with the same human rights standards as its Member States and the ECtHR would directly control compliance, thereby precluding Member States from using the EU to avoid judicial scrutiny and human rights compliance when it comes to asylum. Thus, from the perspective of enhancing human rights protection, the EU should accede to the ECHR and be subject to the scrutiny of the ECtHR if that means higher human rights standards will be enforced and the principle of mutual trust will not be upheld over human rights compliance.

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[134] Georgios Anagnostaras, "The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection," 1183-88.

[135] Judgment CJEU *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*; Judgment CJEU *Bundesrepublik Deutschland v Kaveh Puid*; Judgment CJEU Shamso Abdullahi v Bundesasylamt.

[136] Judgment CJEU *C. K., H. F., A. S. v Republika Slovenija*; Judgment CJEU *Abubacarr Jawo v Bundesrepublik Deutschland.*

[137] Judgment ECtHR *Tarakhel v Switzerland,* 4 November 2014, Application No. 29217/12. Case of.

[138] Article 52(3) CFR.

[139] Guiraudon, "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping," 257-67.

[140] Christian Kaunert and Sarah Léonard, "The Development of the EU Asylum Policy: Venue-Shopping in Perspective," *Journal of European Public Policy* 19, no. 9 (2012): 1403-10.

[141] Article 263 TFEU.

[142] Even though fundamental rights under the CFR must have the same scope as under the ECHR (Article 52(3) CFR).

However, the benefits of the EU acceding to the ECHR have been significantly diminished by the conditions imposed by Opinion 2/13.[143] In particular, the CJEU ruled that accession must not affect the principle of mutual trust, pursuant to which EU Member States must consider all other EU Members to be complying with fundamental rights, save in exceptional circumstances.[144] The CJEU did not explicitly state what those exceptional circumstances are but referred to the *N.S.* ruling,[145] thereby possibly implying that in the context of the application of the Dublin Regulation, the presumption of compliance with fundamental rights is to be rebutted only if there are "*systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers.*"[146] Hence, the CJEU arguably stated that – in the context of the application of the Dublin Regulation – accession cannot "*require a Member State to check that another Member State has observed fundamental rights*"[147] except if there are "*systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers*".[148]

Upholding the principle of mutual trust over human rights is problematic, considering that asylum seekers are particularly vulnerable to human rights violations – precisely because they are third country nationals that do not benefit from citizenship rights in the country that they seek asylum in.[149] Additionally, there are extensive documented accounts of human rights violations by EU Member States,[150] especially during the 2015/2016 migration crisis.[151] The danger that (near absolute) mutual trust poses for human rights clearly preoccupies the ECtHR since, in *Avotiņš v. Latvia,* it criticised Opinion 2/13 for limiting the waiver of mutual trust to exceptional cases and affirmed that manifest deficiencies in the area of mutual trust could rebut the *Bosphorus* presumption.[152] The ECtHR stressed that the principle of mutual recognition cannot be applied automatically and mechanically to the detriment of fundamental rights.[153]

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[143] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," sec. Comments; Sionaidh Douglas-Scott, "Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice," sec. Reflections on the Opinion; Tobias Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and Is It Still Desirable," *EuConst* 11 (2015): 270–71.

[144] Opinion 2/13 paragraph 191.

[145] Opinion 2/13 paragraph 191.

[146] Judgment CJEU *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,* para. 106.

[147] Opinion 2/13 paragraphs 191–194.

[148] Judgment CJEU *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,* para. 106.

[149] Cathryn Costello, *The Human Rights of Migrants in European Law* (Oxford University Press, 2016), 9; United Nations Human Rights Office of the High Commissioner, "Fact Sheet No. 20. Human Rights and Refugees," accessed May 3, 2021, https://www.ohchr.org/Documents/Publications/FactSheet20en.pdf.

[150] Steve Peers, "EU Law Analysis"; Judgment ECtHR *M.S.S. v. Belgium and Greece,* paras. 226–234.

[151] Arne Niemann and Natascha Zaun, "EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives," *JCMS: Journal of Common Market Studies* 56, no. 1 (2018): 3–5.

[152] Judgment ECtHR *Avotiņš v. Latvia,* paras. 114-116; Glas and Krommendijk, "From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts," 584; Paul Gragl, "An Olive Branch from Strasbourg: Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotins Case: ECtHR 23 May 2016, Case No. 17502/07, Avotins v. Latvia," *EuConst* 13 (2017): 566–67.

[153] Judgment ECtHR *Avotiņš v. Latvia,* para. 116.

Perhaps, the 2017 *C.K.* ruling and the 2019 *Jawo* ruling mean that the CJEU will no longer impose this (near absolute) mutual trust condition on accession.[154] If we consider that these judgments partially overturn Opinion 2/13,[155] accession would arguably only have to respect that – in the context of the application of the Dublin Regulation – Member States must presume that another Member State complies with fundamental rights except if there are systemic deficiencies or individual circumstances that render the asylum seeker in a real risk of suffering fundamental rights violations if he were to be transferred to the Member State responsible for examining his asylum application. This condition of accession would comply with the case law of the ECtHR and would render the EU's accession to ECHR more favourable to enhancing human rights protection.

In short, accession to the ECHR is desirable; shifting from indirect to direct scrutiny of EU acts by the ECtHR would improve human rights protection, since the ECtHR enforces higher human rights standards than the CJEU when it comes to asylum. Additionally, accession would allow the ECtHR to retire the *Bosphorus* presumption, thereby removing the privilege that currently shields non-discretionary implementing acts from being subject to the same scrutiny as national acts not related to the EU.[156] If accession is executed in accordance with Opinion 2/13, read together with the *C.K.* and *Jawo* rulings, accession would certainly enhance human rights protection in the EU, since the principle of mutual trust would no longer be upheld over human rights. On the contrary, if the CJEU were to subject accession to the respect of the (near absolute) mutual trust condition of Opinion 2/13, read together with the *N.S.* ruling, accession would be rendered useless in enhancing human rights protection in the context of the application of the Dublin Regulation (as well as contrary to the case law of the ECtHR).[157]

4. *Conclusion*

The analysis of the developments leading up to the Lisbon Treaty, the 2013 draft agreement on accession and Opinion 2/13 revealed that the EU's accession to the ECHR is still possible, though negotiations of an accession agreement compliant with the conditions imposed by Opinion 2/13 may prove particularly difficult in practice.

The overview of the EU system of human rights protection and of the ECtHR's jurisdiction prior to accession demonstrated that the EU has its own system of human rights protection and that the ECtHR only exercises limited indirect scrutiny over EU acts. However, some deficiencies in the EU system of human rights protection can be identified, as was exemplified with reference to the case law of the CJEU and the ECtHR on the application of the Dublin Regulation. This

[154] Cecilia Rizcallah, "EU Law Analysis."

[155] Cecilia Rizcallah; Eduardo Gill-Pedro and Xavier Groussot, "The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?," *Nordic Journal of Human Rights* 35, no. 3 (2017): 271–72.

[156] Lock, "The ECJ and the ECtHR: The Future Relationship between the Two European Courts," 395–96.

[157] Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection," sec. Comments; Sionaidh Douglas-Scott, "Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice," sec. Reflections on the Opinion; Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and Is It Still Desirable," 270–71.

case law showed that the CJEU repeatedly applied lower human rights standards than the ECtHR when it comes to asylum, due to its over reliance on the principle of mutual trust.

Depending on the concrete terms of the EU's accession to the ECHR, accession may be effective or useless in resolving the deficiencies identified and enhancing human rights protection. We proposed that accession is desirable if the principle of mutual trust is not upheld over human rights compliance, since only accession in these conditions would actually enhance human rights protection in the context of the application of the Dublin Regulation.

Only time will tell if the EU accedes to the ECHR under the concrete terms of that accession. For the sake of human rights protection, we hope mutual trust does not undermine the ECtHR's jurisdiction over the EU.