THE FUTURE OF EU HUMAN RIGHTS LAW: IS ACCESSION TO THE ECHR STILL DESIRABLE?

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Abstract: This article focuses on an almost perennial question: what should the relationship between European Union (EU) law and the European Convention on Human Rights (ECHR) become, in particular whether EU accession remains desirable. In light of the condition formulated by the European Court of Justice (ECJ) in Opinion 2/13 that EU accession can only happen if the doctrine of mutual recognition is protected from human rights review by the European Court of Human Rights (ECtHR). The article argues that the consequence would be a lowering of the fundamental rights protection enjoyed by individuals in the EU in the Area of Freedom, Security and Justice (AFSJ). It concludes that in light of this negative effect on human rights protection, the *status quo* of indirect review is preferable and that accession should not take place. This conclusion is reached in five overall steps: first, the article briefly describes the current EU-ECHR relationship and presents three key arguments in favour of EU accession to the ECHR; second, it introduces the AFSJ as a (potential) site of contention between the ECJ and the ECtHR; third, the article recounts the ECJ's requirements that a reworked accession agreement would need to fulfil; fourth, it shows how fundamental rights protection in the AFSJ has developed in light of ECHR requirements and asks how this might continue in the absence of accession; and fifth, it discusses the counterfactual situation of the EU acceding to the ECHR in compliance with the stipulations of the ECJ.

Keywords: *EU accession to the ECHR; European Court of Justice; European Court of Human Rights; Area of Freedom, Security and Justice; cross-fertilisation; Charter of Fundamental Rights*

I. Introduction

Since the Charter of Fundamental Rights became binding on 1 December 2009, European Union (EU) fundamental rights law has developed into a fast-evolving area of EU law. Numerous important questions — eg on the application of the

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Charter in the Member States[1] or its relationship with domestic fundamental rights[2] — have become clearer; others remain open. Examples of issues that need to be determined still are the extent of horizontal effects of Charter rights; their relationship with fundamental freedoms; and the difference between rights and principles. Apart from these bigger structural questions, there are many rights whose scope remains relatively ill-defined.[3] There are thus plenty of future challenges for EU fundamental rights law that deserve attention.[4]

This article will focus on an almost perennial question: what should the relationship between EU law and the European Convention on Human Rights (ECHR) become? Despite repeated attempts, the EU still has not acceded to the ECHR, chiefly because the European Court of Justice (ECJ) held in Opinion 2/13 that the draft agreement on the EU's accession to the ECHR was incompatible with the Treaties.[5] For a second time — after Opinion 2/94[6] — the ECJ had thus put a spanner in the works of the EU's endeavour to become a party to the Convention.

Opinion 2/13 does not appear to have permanently dented the EU's and the Council of Europe's enthusiasm for accession. Accession negotiations were meant to recommence in March 2020, but had to be postponed due to the COVID-19 pandemic. In light of the overall negative reception of Opinion 2/13 in academic writings,[7] however, it is worth asking whether EU accession remains desirable in light of the conditions formulated in Opinion 2/13.

The ECJ put forward various reasons why the draft accession agreement was incompatible with the Treaties. While some of these were of a technical nature and could easily be addressed, others would have further-reaching implications: for instance, the ECJ's demand that the European Court of Human Rights (ECtHR) should not be given jurisdiction over Common Foreign and Security Policy (CFSP)

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1 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105.

2 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

3 Eg the right to human dignity (art.1 of the Code of Federal Regulations (CFR)); the right to security if indeed it exists (art.6 of the CFR); freedom of the arts and sciences (art.13 of the CFR); freedom to conduct a business (art.16 of the CFR); children's rights (art.24 of the CFR).

4 Eg the field of data privacy law (see the contribution by Maria Tzanou in this Special Issue, "The Future of EU Data Privacy Law: Towards a More Egalitarian Data Privacy") or in EU citizenship law (see Adrienne Yong's contribution in this Special Issue, "The Future of EU Citizenship during the Crisis: Is There a Role for Fundamental Rights Protection?").

5 Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.

6 Opinion 2/94 *Accession to the ECHR* ECLI:EU:C:1996:140.

7 See eg Stian Øby Johansen, "The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences" (2015) 16 *German Law Journal* 169; Ramses A Wessel and Adam Łazowski, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR" (2015) 16 *German Law Journal* 179; Eleanor Spaventa, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13" (2015) 22 *Maastricht Journal of European and Comparative Law* 35; 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?" (2015) 11 *European Constitutional Law Review* 239; Steve Peers, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare" (2015) 16 *German Law Journal* 213.

measures in the absence of mirroring ECJ jurisdiction can only be fulfilled via Treaty change.[8]

This article's focus is on the ECJ's demand for the preservation of the doctrine of mutual trust — considered to be of "fundamental importance in EU law"[9] — in the Area of Freedom, Security and Justice (AFSJ), which is an area that is not only growing in importance in EU law more generally, but which is also particularly fundamental rights-sensitive. It closes a gap in the existing literature on accession by asking whether, *in light of the conditions formulated by the ECJ*, accession would result in better fundamental rights protection for individuals in Europe than in its absence. The article further complements the existing literature on the ECtHR's and ECJ's case law in mutual recognition cases[10] by exploring the dynamic between the two courts, which has led to improved fundamental rights protection in the EU.

The argument proffered here is that accession to the ECHR would bring with it a risk of lowering the fundamental rights protection enjoyed by individuals in the EU as far as the AFSJ is concerned. The analysis is conducted by way of a counterfactual: based on a demonstration of how the ECtHR's case law has prompted the ECJ to accept the ingression of fundamental rights into the previously almost hermetically sealed doctrine of mutual trust, the article then argues that this dynamic would not have occurred, had the EU already been a party to the ECHR under the conditions formulated in Opinion 2/13.[11] In methodological terms this case law analysis is complemented by references to legislation, institutional policy documents and secondary literature on the interaction between regional human rights systems.

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8 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?" (n.7) 263–267.

9 Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454 [191].

10 Eg most recently: Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice* (Hart Publishing, 2020); Francesco Maiani and Sara Migliorini, "One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice" (2020) 57 *Common Market Law Review* 7; Valsamis Mitsilegas, "Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice" (2020) 57 *Common Market Law Review* 45; Mattias Wendel, "Mutual Trust, Essence and Federalism — between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*" (2019) 15 *European Constitutional Law Review* 17; Auke Willems, "The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal" (2019) 20 *German Law Journal* 468; 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" (2017) 13 *European Criminal Law Review* 551; Madeline Garlick, "Protecting Rights and Courting Controversy: Leading Jurisprudence of the European Courts on the EU Dublin Regulation" (2015) 29 *Journal of Immigration Asylum and Nationality Law* 192; Marie-Luce Paris, "Paving the Way: Adjustments of Systems and Mutual Influences between the European Court of Human Rights and European Union Law before Accession" (2014) *Irish Jurist* 59.

11 In common with other contributions to this Special Issue, the article looks to the past to learn lessons for the future; on this theme, Elaine Fahey, Introduction to the Special Issue "Future-Mapping the Directions of European Union (EU) Law: How Do We Predict the Future of EU Law?"

While this article should not be understood as a wholesale endorsement of pluralism in international law, it nonetheless concludes that accession should only happen if it serves the overall purpose of the European human rights regime embodied by the ECHR: to further the protection of individual rights, and not to curtail them.[12] It is thus argued here that the current pluralistic relationship between the EU and the ECHR serves these ends better than accession under the conditions formulated by the ECJ in Opinion 2/13 would. Hence on balance EU accession to the ECHR is not desirable so long as the ECJ does not change its stance on the issue of mutual trust.

The article reaches the further conclusion that accession under the conditions formulated by the ECJ may not even be successful in reducing the risks of fragmentation but rather create new gaps between the two systems and thus additionally threaten the legitimacy of the ECHR system as whole. Hence, the current pluralistic relationship between the EU and the ECHR is capable of yielding more positive results for human rights protection Europe than accession to the ECHR.

The argument develops in five steps: first, it briefly describes the current EU-ECHR relationship and presents three key arguments in favour of EU accession to the ECHR; second, it introduces the AFSJ as a (potential) site of contention between the ECJ and the ECtHR; third, the article recounts the ECJ's requirements that a reworked accession agreement would need to fulfil; fourth, it shows how fundamental rights protection in the AFSJ has developed in light of ECHR requirements and asks how this might continue in the absence of accession; and fifth, it discusses the counterfactual situation of the EU acceding to the ECHR in compliance with the stipulations of the ECJ.

II. The Current EU-ECHR Relationship

The current relationship between the EU and the ECHR is largely uncoordinated and pluralistic. It is characterised by a latent potential for contradiction and thus fragmentation as well as by accountability gaps. This relationship is well documented in the literature,[13] so that the following discussion can be kept fairly brief.

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12 Note that pluralism historically often precedes constitutionalisation, see Colin RG Murray and Aoife O'Donoghue, "A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order" (2017) 13 *International Journal of Law in Context* 225.

13 Eg by Rick Lawson, "Confusion or Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in Rick Lawson and Matthijs de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry G Schermers* (Martinus Nijhoff Publishers, Vol III, 1994) p.219; Dean Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities" in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press, 1999) p.757; Nina Philippi, "Divergenzen im Grundrechtsschutz zwischen EuGH und EGMR" (2000) *Zeitschrift für Europarechtliche Studien* 97; Sebastian Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen*

A. Contradiction and fragmentation

Both European courts have a long tradition of seeking inspiration from each other: the ECtHR increasingly looks to the ECJ for guidance;[14] and in the pre-Charter era, the ECJ over time adopted the fundamental rights standards established by the ECHR[15] and the ECtHR.[16] With the advent of the Charter this practice of looking to Strasbourg for guidance received formalisation: Article 52(3) of the EU Charter of Fundamental Rights requires that Charter rights be given the same meaning and scope as corresponding ECHR rights, so that contradictions between the case law of the two courts are rare, but not unheard of. While in the pre-Charter era commentators mainly pointed to three contradictory strands of case law — whether business premises were protected as a "home" under art.8 of the ECHR; whether companies benefitted from the right against self-incrimination; and whether art.6 of the ECHR gave parties to proceedings before the ECJ a right to respond to Advocate General's opinions[17] — the post-Charter era has produced one such conflict, which the following paragraph will briefly describe.

In *Menci* the ECJ was confronted with the question whether art.50 of the CFR — which contains the *ne bis in idem* principle — prevented a Member State from criminally prosecuting a person for VAT fraud where it had already imposed an administrative penalty. In this case the ECJ had strongly suggested that the administrative penalty was so severe as to be criminal in nature.[18] One would have expected the ECJ to find a criminal prosecution following the imposition of the

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Menschenrechtskonvention (Baden-Baden: Nomos, 2000); Johan Callewaert, "Les rapports entre la Charte et la Convention européenne des droits de l'homme" in Wolfgang Heusel (ed), *Grundrechtecharta und Verfassungsentwicklung in der EU* (Köln: Bundesanzeiger-Verlag, 2002) p.129; Dean Spielmann, "Un autre regard: la Cour de Strasbourg et le droit de la Communauté européenne" in *Libertés, Justice, Tolerance — Mélanges en hommage au Doyen Gérard Cohen-Jonathan* (Bruylant, Vol II, 2004) p.1447; Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis" (2006) 43 *Common Market Law Review* 629; Johan Callewaert, "The European Convention on Human Rights and European Union Law: A Long Way to Harmony" (2009) *European Human Rights Law Review* 768; Jan Hendrik Wiethoff, *Das konzeptionelle Verhältnis von EuGH und EGMR* (Nomos, 2007); Bruno de Witte, "The Use of the ECHR and Convention Case Law by the European Court of Justice" in Patricia Popelier, Catherine van de Heyning and Piet van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and National Courts* (Intersentia, 2011) p.17; Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing, 2013); Tobias Lock, *The European Court of Justice and International Courts* (Oxford University Press, 2015) pp.167–218.

14 Tobias Lock, "The Influence of EU Law on Strasbourg Doctrines" (2016) 41 *European Law Review* 804.

15 Since Case 4/73 *Nold* ECLI:EU:C:1974:51.

16 Since Case C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170.

17 See eg Lawson, "Confusion or Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" (n.13) p.219; Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities" (n.13) p.758; Philippi, "Divergenzen im Grundrechtsschutz zwischen EuGH und EGMR" (n.13); these conflicts were eventually resolved by either the European Court of Justice (ECJ) or the European Court of Human Rights (ECtHR) adapting and clarifying their case law, see Lock, *The European Court of Justice and International Courts* (n.13) pp.172–178.

18 Case C524/15 *Luca Menci* ECLI:EU:C:2018:197 [26]–[33].

administrative (criminal) penalty to be contrary to art.50 of the CFR, which says that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". As art.50 of the CFR corresponds to art.4 of Protocol No 7 to the Convention,[19] according to art.52(3) of the CFR it must be given the same meaning and scope as the latter. Article 4 of Protocol No 7 of the ECHR is an absolute right, ie double punishment for the same crime can never be justified, not even in cases of emergency.[20] Despite that, the ECJ considered whether in *Menci* a criminal prosecution following the imposition of an administrative penalty that is criminal in nature could be justified applying art.52(1) of the CFR. While the outcome of *Menci* — which strongly suggested to the national court finds no violation of art.50 of the CFR — might not necessarily constitute an infringement of art.4 of Protocol No 7 of the ECHR given that the ECtHR allows the imposition of two criminal sanctions for the same conduct where "the dual proceedings in question have been 'sufficiently closely connected in substance and in time'",[21] the ECJ nonetheless opened up a dangerous precedent and potential route for divergence by downgrading the protection offered by art.50 of the CFR to that of a relative right.

The *Menci* decision is one piece in the bigger mosaic of what one can term an "autonomous turn" in the ECJ's fundamental rights case law. In a study covering the first three years since the Charter's entry into force, de Búrca noted that the "the frequency of citations of the European Court to the European Convention on Human Rights has declined, and that whereas the Court used to cite the ECHR significantly more often than the Charter in cases involving human rights claims, the reverse is now the case".[22] This trend has since continued.[23] This suggests a heightened potential for contradictions between the ECJ and the ECtHR and would at first glance support an argument in favour of EU accession. Yet as this article argues, accession *under the conditions formulated by the ECJ* would lead to less protection of fundamental rights for individuals in the particularly human-rights sensitive AFSJ.

B. Accountability gaps

Apart from creating opportunities for contradiction and resulting fragmentation of human rights protection in Europe, the *status quo* also results in accountability gaps. This is because first, the European Union as such cannot be held responsible

19 See art.52, Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

20 See art.4(3) of Protocol No 7 of the ECHR.

21 *A and B v Norway* ECHR 2016, [130].

22 Grainne de Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator" (2013) 20 *Maastricht Journal of European and Comparative Law* 168, 175; see also Jasper Krommendijk, "The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders" (2015) 22 *Maastricht Journal of European and Comparative Law* 812.

23 This author ran a comparable search on the ECJ's data base (limited to judgments of the Court of Justice handed down between 1 January 2013 and 31 December 2019). This search revealed 530 judgments referencing the Charter; 233 judgments referencing the ECHR (search term: "European Convention for the Protection of Human Rights and Fundamental Freedoms"); and 177 referencing both together.

for human rights violations before the ECtHR;[24] second, the ECtHR's case law on Member State responsibility in lieu of the EU[25] does not fully manage to close this gap as it contains two important exceptions: the *Bosphorus* doctrine and the gap confirmed in *Connolly*. The literature has documented this case law very well,[26] so that it suffices to present it in broad brush strokes here. According to the ECtHR's decision in *Matthews*, the Convention does not prevent EU Member States from transferring powers onto the EU, "provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer".[27] The EU Member States thus are accountable for breaches of the Convention brought about by EU law.

In *Bosphorus*, the ECtHR introduced the first exception to this rule. Where the organisation — *viz* the EU — protects "fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides" there is a presumption "that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation".[28] Based on the ECtHR's finding that the EU does provide equivalent protection this means that where an EU Member State has no discretion in the implementation of its EU law obligations, it is presumed to have complied with the Convention. This presumption can only be rebutted if the protection of ECHR rights was manifestly deficient in the

24 The inadmissibility decision in *Confédération française du travail v European Communities* (1978) 13 DR 236 still holds.

25 Starting with *Matthews v United Kingdom* ECHR 1999-I.

26 See eg Henry G Schermers, "Case Note on Matthews" (1999) 36 *Common Market Law Review* 673; Carl-Otto Lenz, "Matthews v United Kingdom" (1999) *Europäische Zeitschrift für Wirtschaftsrecht* 311; Jean-Paul Jacqué, "Droit Communautaire et Convention Européenne des droits de l'homme, l'arrêt Bosphorus, une jurisprudence 'Solange II' de la Cour des droits de l´homme?" (2005) 41 *Revue Trimestrielle de Droit Européen* 749; Gerrit Schohe, "Das Urteil Bosphorus: zum Unbehagen gegenüber dem Grundrechtsschutz durch die Gemeinschaft" (2006) *Europäische Zeitschrift für Wirtschaftsrecht* 33; Steve Peers, "Bosphorus — European Court of Human Rights" (2006) 2 *European Constitutional Law Review* 443; Cathryn Costello, "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" (2006) 6 *Human Rights Law Review* 87; Sionaidh Douglas-Scott, "Bosphorus v Ireland" (2006) 43 *Common Market Law Review* 243; Alicia Hinarejos Parga, "Bosphorus v Ireland and the Protection of Fundamental Rights in Europe" (2006) 31 *European Law Review* 251; Christine Heer-Reißmann, "Straßburg oder Luxemburg — Der EGMR zum Grundrechtsschutz bei Verordnungen der EG in der Rechtssache Bosphorus" (2006) *Neue Juristische Wochenschrift* 192; Sebastian Winkler, "Die Vermutung äquivalenten Grundrechtsschutzes im Gemeinschaftsrecht nach dem Bosphorus-Urteil des EGMR" (2007) *Europäische Grundrechtezeitschrift* 641; Leonard FM Besselink, "The European Union and the European Convention on Human Rights: From Sovereign Immunity in Bosphorus to Full Scrutiny Under the Reform Treaty?" in Ineke Boerefijn and Jenny E Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights, Essays in Honour of Cees Flinterman* (Antwerp: Intersentia, 2008) p.295; Tobias Lock, "Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights" (2010) 10 *Human Rights Law Review*.

27 *Matthews v United Kingdom* ECHR 1999-I, [32].

28 *Bosphorus v Ireland* ECHR 2005-VI, [155]–[156].

concrete case.[29] Thus far, the ECtHR has never found the *Bosphorus* presumption to be rebutted. This means that in practice no one can be held accountable before the ECtHR where EU Member States have no discretion, even if there are good reasons to assume that the underlying EU legislation is contrary to the Convention.

The second exception to the *Matthews* rule — and thus the second accountability gap — is a category of EU-related cases in which no Member State authority was involved. In *Connolly* — a staff dispute between the Commission and one of its employees[30] — the ECtHR held that the alleged violation of the Convention had not occurred within the jurisdiction of any of the Member States as required by art.1 of the ECHR. In this case only acts of EU institutions — here the Court of Justice which did not allow the applicant to respond to the opinion of the Advocate General in his case against the Commission — had occurred and no Member State had been involved at any point. Again, no one can be held accountable before the ECtHR in such cases even if an ECHR violation has taken place.

These potential inconsistencies and consequent fragmentation, the existing accountability gaps and the protection of fundamental rights protection in Europe as such are the reasons why a number of academic writers are arguing that the EU should make another attempt at acceding to the ECHR. After all, the *status quo* would not be sustainable in the long term. This is neatly summarised by Callewaert:

> Firstly, as regards the procedure before the European Court of Human Rights ("ECtHR"), the current picture is still a distorted one, not reflecting the proper structure of the EU, with Member States having to face alone the implications of EU law under the Convention. Secondly, in terms of the substance of fundamental rights, the status quo does not seem capable of ensuring a stable level of protection and legal certainty in the long term. Last but not least, removing the legal obligation on the EU to accede to the ECHR would undermine the very idea of a collective understanding and enforcement of fundamental rights. This, in turn, could initiate a process leading to the current European architecture of fundamental rights protection being unravelled altogether.[31]

These are valid concerns and in the absence of the ECJ's strict conditions for accession as formulated in Opinion 2/13, there would be few reasons to disagree with this analysis. However, the following sections will demonstrate that — at

29 *Ibid.*, [157].

30 *Connolly v 15 Member States of the EU* App no 73274/01 (ECtHR, 9 December 2009).

31 Johan Callewaert, "Do We Still Need Article 6(2) TEU? Considerations on the Absence of EU Accession to the ECHR and Its Consequences" (2018) 55 *Common Market Law Review* 1685, 1688; a similar argument is made by Martin Kuijer, "The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession" (2018) *The International Journal of Human Rights*, DOI: 101080/1364298720181535433.

least with regard to the AFSJ — there are good reasons to question whether EU accession to the ECHR would lead to an improvement of the *status quo*. Indeed, it will be argued that the price of accession may be too high.

III. The AFSJ as a Contentious Site

The AFSJ constitutes a particular challenge when it comes to EU accession. Many AFSJ measures rely on the principle of mutual trust, which according to the ECJ has constitutional significance.[32]

This constitutional significance results from the specific characteristics of the EU legal order, which "have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other".[33] These unique relations between the Member States require a degree of mutual trust between the Member States.

Mutual trust can be conceived of as an obligation on part of the Member States, which entails a presumption of compliance with each other's standards resulting in their mutual recognition. That principle requires the Member States "to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law"[34]. It results in Member States being required by EU law to presume that fundamental rights have been and are being complied with in the other Member States so that Member States are generally not in a position to refuse compliance with an AFSJ instrument on the basis that there are deficits in procedural or fundamental rights terms in another Member State.

The Framework Decision on the European Arrest Warrant provides a paradigmatic example.[35] A Member State must execute a European Arrest Warrant — provided it has been issued in a procedurally correct manner — unless one of the grounds for non-execution, which are exhaustively listed in the Framework Decision, applies. Other grounds — such as doubts over compliance with the right to a fair trial or doubts over inhumane prison conditions — are generally not permissible.[36] In cases where human rights grounds are invoked against the surrender of a requested person to another Member State, the default situation is that any challenges must be brought before the courts of the requesting Member State, but that they cannot result in the non-execution of the European Arrest Warrant. This type of reasoning

32 Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:24, [191].

33 Case C-621/18 *Wightman* ECLI:EU:C:2018:999, [45].

34 Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:24, [191].

35 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States [2002] OJ L 190/1.

36 See the foundational cases of Case C-396/11 *Ciprian Vasile Radu* ECLI:EU:C:2013:39 and *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

is based on the fiction that the human rights protection in all EU Member States — both in substantive and enforcement terms — complies with the requirements of the EU Charter of Fundamental Rights;[37] which then allows for the fiction of mutual trust of Member States in each other's systems for the protection of fundamental rights, which in turn allows for mutual recognition to take place.[38]

Up until the softening of the duty of mutual trust explored in Section V, "Accession Conditionality as Found in Opinion 2/13", that duty had the consequence that — except in cases provided for by EU law — a Member State may not review the human rights compliance of another Member State. This became obvious in the *Melloni* case where the fundamental rights found in the Spanish constitution would have made it impossible for the Spanish authorities to surrender Mr Melloni due to the fact that the arrest warrant had been issued to enforce a criminal sentence handed down following a trial in absentia. The ECJ however held that even a provision of the national constitution cannot undermine the "primacy, unity and effectiveness" of EU law.[39] This meant that the Spanish courts were limited to reviewing whether the trial in absentia had complied with the requirements set out in art.5 of the Framework Decision, failing which the Spanish courts could have refused execution of the European Arrest Warrant. Otherwise the efficacy of the Framework Decision — and by extension that of mutual trust — would have been compromised.[40]

From this the ECJ concluded in Opinion 2/13 that if the accession agreement afforded the ECtHR jurisdiction to question the application of the principle of mutual trust on fundamental rights grounds, this would be incompatible with the autonomy of EU law. This presents a serious challenge to accession given the great practical relevance of the AFSJ under EU law. There has been sharp increase in the number of cases heard by the ECJ in recent years: with 106 new cases in 2019 the AFSJ is now the busiest area of ECJ activity.[41] The vast majority (eighty) of these new AFSJ cases are preliminary rulings. This suggests that the cases reaching the ECJ are only the tip of a much larger iceberg of national proceedings dealing with AFSJ matters. The consequence is that any exclusion of mutual trust cases from the jurisdiction of the ECtHR would not only remove the most human rights-sensitive area of EU activity from external scrutiny, but also an area of the

37 And thus with ECHR requirements so far as a "corresponding right" is concerned, see art.52(3) of the CFR.

38 For a more comprehensive explanation of the principle of mutual trust and an analysis of the recent case law of the ECJ, see Ermioni Xanthopoulou, "Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust" (2018) 55 *Common Market Law Review* 489.

39 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107, [60].

40 *Ibid.*, [63]; there has been some weakening of this strict stance in recent years (see the following discussion as well as newer legislative measures, such as art.14(2) of the Directive 2014/41/EU on the European Investigation Order [2014] OJ L 130/1.

41 The number of new cases in the area of freedom, security and justice (AFSJ) has gone up sharply. In 2014 and 2015, there had only been 53 new cases, respectively. 2016 saw an increase to 76; 2017 to 98 and 2018 saw 82 new cases, see Court of Justice, Annual Report (Judicial Activity) 2019.

law that produces a large number of cases, which implies that there is a real need for external supervision.[42]

The obligation to trust can therefore come into conflict with the ECtHR's long-standing case law on extradition and expulsion. According to that case law, high contracting parties to the ECHR must in particular not expel individuals to countries where there is a real risk that they would face inhuman and degrading treatment and punishment contrary to art.3 of the ECHR.[43]

IV. Accession Conditionality as Found in Opinion 2/13

In Opinion 2/13 the ECJ recognised this potential conflict between Member States' obligations under EU law and under the ECHR. Instead of accepting that even fundamental constitutional principles are subject to questioning where a state or an organisation signs up to external human rights supervision, the ECJ held that in "so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law".[44]

This statement is curious for a number of reasons: first, the Court had never before made the express connection between mutual trust and the autonomy of the EU legal order, which meant that the drafters of the accession agreement could not anticipate that mutual trust would present a problem.[45] Consequently, not only the draft accession agreement but also the Advocate General's opinion in this case does not mention it at all. Second, the statement ignores entirely the responsibility of EU Member States under the Convention in the absence of accession. As will be shown in more detail, they must under certain circumstances carry out precisely the type of review the ECJ considers to be contrary to the autonomy of the EU legal order. Yet the ECJ asks for this possibility to be removed once EU accession to the ECHR has taken place. Third, instead of subjecting the EU's entire legal order to external human rights supervision, the ECJ wishes to seal off certain particularly human

42 Note that not all AFSJ cases before the ECJ concern mutual trust.

43 See eg the cases of *Soering v United Kingdom* (1989) Series A no 161 and *Chahal v United Kingdom* ECHR 1996-V; this case law was extended to deportations which would result in the violation of an individual's fair trial rights, see *Othman (Abu Qatada) v United Kingdom* ECHR 2012.

44 Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:24, [194].

45 Admittedly, the Court considered it the *raison d'être* of the EU and of the AFSJ in Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* ECLI:EU:C:2011:865, [83], but this statement was not clear as to the question whether an external supervision by an international court would be permissible under the Treaties.

rights sensitive aspects of it and carve out a special kind of treatment for the EU that no other high contracting party to the ECHR enjoys.

In Opinion 2/13 the ECJ was clear that in order to be compatible with the EU Treaties, the accession agreement would need to contain a provision that would prevent the situation identified by the Court, ie, that Member States would be considered contracting parties in their relations with each other. Drafting such a provision would not be straightforward due to limitations on the ECtHR's jurisdiction necessitated by the autonomy of the EU legal order. According to the autonomy principle — on which much of the Court's reasoning in Opinion 2/13 was based — no other court but the ECJ may interpret EU law in a manner that is binding on the EU or its Member States. Hence any provision in a revised accession agreement would need to ensure that the ECtHR is not given jurisdiction to interpret EU law and in this particular case the question whether there is an obligation under EU law of mutual trust. This means that a broad exclusion of any right of Member States to review another Member State's compliance with the ECHR would be the safest option which would ensure that the accession agreement does not violate the autonomy of the EU legal order. A possible formulation would be this: "Member States of the EU cannot be held responsible under the Convention for failing to carry out a review of another Member State's compliance with Convention rights."[46]

V. Pluralism at Work in the Absence of Accession

The present relationship between the legal orders of the EU and of the ECHR is pluralistic: in the absence of accession there is no mutually agreed coordination mechanism. As shown above, the ECtHR exercises indirect control of EU measures by holding the Member States responsible. The following section will show that this indirect control has left its mark on the AFSJ, in that it has prompted the ECJ to concede that there can be exceptions to mutual trust based on human rights grounds even where these are not expressly stipulated in legislation.

This pluralism at work can be demonstrated by way of two case studies from the AFSJ: EU asylum law and in the law of the European Arrest Warrant. It is argued here that the ECJ's acceptance of exceptions to a strict duty of mutual trust in both instances goes back to pressure exerted by the ECtHR in its case law.

A. Asylum and refugee law

In *MSS v Belgium and Greece* the applicant was an Afghan national who had first entered the territory of the European Union by crossing the border to Greece.[47] Under the Dublin II Regulation this meant that the Member State responsible for

46 See 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?" (n.7) 261.

47 *MSS v Belgium and Greece* ECHR 2011.

processing the applicant's asylum application was Greece.[48] The applicant made his way to Belgium and the Belgian authorities proceeded to return him to Greece on the basis that under EU law Greece should examine whether he should be granted refugee status or not. The applicant was unsuccessful in having the decision to return him to Greece judicially reviewed. A central tenet of the judgments of the Belgian courts was the principle of mutual trust: it had to be presumed that Greece was compliant with its obligations under EU law (including fundamental rights) and that presumption could only be reversed if there was concrete evidence of a real risk that the applicant would be subjected to treatment contrary to art.3 of the ECHR. Mere general reports of problems with the reception of asylum seekers in Greece were not sufficient.[49]

The ECtHR, however, established that the reception conditions for the applicant in Greece had been so dire that they amounted to violations of arts.3 and 13 of the ECHR.

The ECtHR then turned to the question whether Belgium would still be able to return the applicant to Greece. It very briefly came to the conclusion that if this happened, the applicant would face a real risk of being subjected to treatment contrary to art.3 of the ECHR. It was clear from the judgment that this was because there had been a systemic deficiency in reception conditions in Greece so that anyone being returned there would be facing a real risk of art.3 of the ECHR violations.

The judgment thus called into question the principle of mutual trust in EU law. The ECtHR made it clear that it could not result in "blind trust"[50] at least where absolute rights protected by the Convention were at risk.

Not long after the judgment in *MSS* the ECJ was faced with a nearly identical scenario in *NS*.[51] The ECJ's judgment was based on the ECtHR's reasoning and the ECJ consequently held that Member States "may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they 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 within the meaning of Article 4 of the Charter".[52] It followed that in "those circumstances, the presumption underlying the [Dublin Regulation] that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable".[53]

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48 See art.3(1) of Council Regulation (EC) No 343/2003 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] OJ L50/1.

49 Quote at *MSS v Belgium and Greece* ECHR 2011, [150].

50 The term is borrowed from Xanthopoulou, "Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust" (n.38).

51 Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* ECLI:EU:C:2011:865.

52 *Ibid.*, [94].

53 *Ibid.*, [104].

The ECJ's decision in *NS* demonstrates that the ECJ is prepared to depart from fundamental principles of EU law — such as mutual trust and resulting mutual recognition — in exceptional circumstances where fundamental rights are at stake. The ECJ's strong reliance on the *MSS* case however suggests that this only happened because otherwise a central pillar of the Common European Asylum System would have been found in violation of the ECHR by the ECtHR. On the face of it *NS* appears to follow the ECtHR's reasoning, yet a closer look reveals that the ECJ interpreted it rather narrowly: it confined the rebuttal of the presumption of fundamental rights compliance to cases where there were "systemic deficiencies", which is a term not used by the ECtHR in *MSS*.[54] Nonetheless, the revised Dublin III Regulation codifies the decision in *NS* in its art.3(2) where it says that:

> 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 of the Charter of Fundamental Rights of the European Union, 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.[55]

This strict reading of *MSS* reflected in *NS* and in the Dublin III Regulation did not find favour with the ECtHR in the subsequent case of *Tarakhel v Switzerland*, however. Despite not being an EU Member State, Switzerland partakes in the Common European Asylum System and thus applies the Dublin Regulation. In *Tarakhel* the question of a return to Italy was at issue. The ECtHR found that the situation in Italy could "in no way be compared to the situation in Greece at the time of the M.S.S. judgment",[56] ie there were no systemic deficits so that there could be no overall bar to returning asylum seekers to Italy. Nonetheless, there existed serious doubts as to the capacity of the Italian reception system, so that an individual assessment of the risk whether the asylum seeker concerned would face a real risk of being subjected to treatment contrary to art.3 of the ECHR would still need to be carried out. The ECtHR therefore adopted a case-by-case approach instead of the systemic deficiencies test advocated by the ECJ. This meant in the concrete case that the applicants and their children could not be returned to Italy unless

54 Admittedly, some of the partly concurring and partly dissenting opinion of Judge Sajó in *MSS* uses this narrow reading of the *MSS* decision.

55 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) [2013] OJ L180/31.

56 *Tarakhel v Switzerland* ECHR 2014, [114].

Switzerland obtained individual guarantees that they would be accommodated in a way compatible with art.3 of the ECHR.[57]

The decision in *Tarakhel* showed that the ECJ's interpretation of *MSS* — and consequently its codification in the Dublin III Regulation — was too narrow. It is hardly surprising that that issue came before the ECJ not long after Tarakhel was handed down. The asylum seeker in *CK* was supposed to be returned from Slovenia to Croatia, where no systemic deficiencies existed. Nonetheless, the ECJ held that such a return would not be compatible with art.4 of the CFR if there was "a real and proven risk of the person concerned suffering inhuman or degrading treatment".[58] This was the case here as the asylum seeker was suffering from a serious illness, which she argued would deteriorate if she were returned.

Again one can see an alignment of the ECJ's case law with that of the ECtHR. Interestingly, in *CK* the Advocate General had argued against this citing the wording of art.3(2) of the Dublin III Regulation and the fact that the ECJ is not legally bound to follow the ECtHR's case law. The ECJ by contrast expressly based its reasoning on the Member States' duty to comply with the ECtHR's case law as mentioned in the recitals of the Dublin III Regulation.[59] The ECJ then made reference to that case law and although it did not mention *Tarakhel* directly, its reliance on the ECtHR's decision in *Paposhvili v Belgium*[60] — itself based on *Tarakhel* — shows that the decision in *CK*, which did away with the systemic deficiencies requirement was prompted by the ECtHR.

In the area of asylum and refugee law one can thus clearly see how the ECtHR's decisions have led to a gradual softening of the mutual trust doctrine and a move away from "blind trust", all of which was achieved in the absence of formal ECHR membership. The heavy reliance by the ECJ on ECtHR case law leaves little room for doubt that these decisions were important factors in this. The consequences of not following the ECtHR on these questions would have been grave from the ECJ's perspective: there is little doubt that sooner or later one of the ECJ's own decisions would have been challenged before the ECtHR and the risk of a finding of a violation of the Convention would have been very high in light of the clear line of case law.

B. European arrest warrant

The second line of case law on mutual trust is less straightforwardly connected to ECtHR precedent; nonetheless, it is suggested here that in light of parallel developments in the field of asylum and refugee law as well as in private international law, one can strongly presume that there has been a spill-over effect.[61]

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57 *Ibid.*, [116]–[122]; individual guarantees were eg obtained by Denmark in *NA v Denmark (app no 15636/16)* which resulted in the application being declared manifestly ill-founded.

58 Case C-578/16 PPU *CK v Slovenia* ECLI:EU:C:2017:127.

59 *Ibid.*, [63].

60 *Paposhvili v Belgium* ECHR 2016.

61 The parallels between mutual recognition in EU asylum law and EU criminal law are *inter alia* noted by Fenella Billing, "The Parallel between Non-removal of Asylum Seekers and Non-execution of a

The leading case in this area is *Aranyosi and Căldăraru* where the ECJ held that a Member State must refuse the execution of a European Arrest Warrant where the detention conditions in the requesting Member State are such that the requested person would face a real risk of inhuman or degrading treatment.[62] Under European Arrest Warrants issued by Hungary and Romania, respectively, Germany was requested to surrender Mr Aranyosi and Mr Căldăraru. The ECtHR had found violations of art.3 of the ECHR in respect of the overcrowding of prisons in both requesting Member States.[63]

It is remarkable that the ECJ neither quoted its own nor the ECtHR's case law on the return of asylum seekers discussed above even though both sets of cases are underpinned by the doctrine of mutual trust. In this connection it is interesting to note that Advocate General Bot had argued against drawing an analogy between Dublin Regulation cases and European Arrest Warrant cases even though this had been advocated by a number of intervening Member States. Advocate General Bot's opinion is revealing in that it relies *inter alia* on a consequentialist argument:

> In view of the number of Member States faced with a malfunctioning prison system, and in particular a problem of generalised prison overcrowding, that interpretation would have the effect, as we have seen, of introducing a systematic exception to the execution of European arrest warrants issued by those States, which would lead to the paralysis of the European arrest warrant mechanism.[64]

That such an argument is not acceptable from a human rights point of view — ie in particular if this or a similar case found its way to the ECtHR — hardly needs explaining. Violations of (absolute) fundamental rights — such as the right not to be subjected to inhuman and degrading treatment — cannot be justified by wider utilitarian considerations. Their absolute character means that an interference with them is never justifiable, so that proportionality considerations do not arise. Somewhat confusingly the Advocate General then performed a volte face and stated that nonetheless the decision on whether to surrender the requested person should be based on a proportionality assessment, which can only be described as a category error. The ECJ evidently did not follow this argument and instead made compliance with art.4 of the CFR the determining factor.

While the influence of the ECHR on this line of case law is not obvious, there is some authority to suggest that the ECJ did not accept the alleged differences between the asylum cases and the European Arrest Warrant cases.

European Arrest Warrant on Human Rights Grounds: The CJEU Case of *N.S. v. Secretary of State for the Home Department*" (2012) 2 *European Criminal Law Review* 77.

62 Case C-404/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198.

63 Cases cited *ibid.*, [43] and [60].

64 Case C-404/15 *Aranyosi and Căldăraru* Opinion of AG Bot ECLI:EU:C:2016:140, [123].

A key difference to the area of asylum and refugee law is that under the European Arrest Warrant Framework Decision Member States do not have a discretion as to whether they wish to surrender an individual to another Member State.[65] The instances of non-execution are exhaustively listed in the Framework Decision, the only exception recognised in case law being compliance with (some) fundamental rights.[66] This means that — in contrast to cases dealing with the Dublin Regulation — the presumption of equivalent protection as formulated in *Bosphorus v Ireland* applies.[67] As explained above, this means that a case brought before the ECtHR against a Member State is usually considered "manifestly ill-founded" and inadmissible, unless the applicant can show that the human rights protection in the concrete case has been "manifestly deficient".

Up until the case of *Avotiņš v Latvia* — concerned with mutual trust under the Brussels I Regulation[68] — the ECtHR never seriously engaged with the "manifest deficit" exception. By contrast in *Avotiņš* — having confirmed the applicability of the *Bosphorus* presumption in principle — the ECtHR nonetheless proceeded to investigate whether the presumption of equivalent protection had been rebutted due to a manifest deficit in the human rights protection in the concrete case. In that context it seized the opportunity to call into question the ECJ's statement in Opinion 2/13 that the power of Member States to review the observance of fundamental rights by another Member State should be limited to exceptional cases only and concluded that there was thus in such cases a potential that the protection of the rights concerned was manifestly deficient.[69] It noted that "if a serious and substantiated complaint is raised before [Member State courts] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law".[70]

It then engaged in a lengthy scrutiny exercise as to whether such a manifest deficit existed in the concrete case before concluding that it did not. This must be considered an unusually robust engagement with the level of protection offered

65 This is perhaps also one of the reasons why there have been very few cases before the ECtHR concerning the European Arrest Warrant; additionally, of course, the jurisdiction of the ECJ concerning the AFSJ (then Title VI of the TEU) was limited until the entry into force of the Lisbon Treaty.

66 See the discussion of *Aranyosi* and *LM* below; the Framework Decision itself recognises respect for fundamental rights by confidently stating in its preamble and in art.1(3) that it does not modify the obligation to respect them under art.6 of the TEU.

67 See *Bosphorus v Ireland* ECHR 2005-VI; the ECtHR made it clear in *MSS* that the presumption did not apply given that Member States were able to exercise discretion to assess the asylum application themselves, *MSS v Belgium and Greece* ECHR 2011 [340].

68 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L 12/1; since replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351/1.

69 *Avotiņš v Latvia* ECHR 2016, [116].

70 *Ibid.*

by the EU legal order. In most cases applying the *Bosphorus* presumption so far, the manifest deficit rebuttal did not play much of a role. In *Avotiņš* it clearly did and this must thus be understood as a strong signal from the ECtHR that it would be willing to interfere in mutual trust cases unless the Court of Justice protected fundamental rights adequately.

There are good reasons to believe that the threat of a "manifest deficit" finding as hinted at in *Avotiņš* influenced the outcome in *Aranyosi*.

First, from a human rights perspective the difference between the European Arrest Warrant and the Common European Asylum System is irrelevant: what counts is whether by being surrendered to another Member State the individual is facing a real risk of being subjected to art.3 violation.

Second, there is long line of case law by the ECtHR finding prison conditions in breach of art.3 of the ECHR with four pilot judgments[71] and countless other judgments finding violations as evidence of systemic problems in many European countries, including EU Member States. This will not have escaped the ECJ so that there was a real risk of a manifest deficit finding by the ECtHR, unless the ECJ carved out an exception to mutual trust.

Finally, AG Tanchev in *Donnellan* — dealing with mutual trust under Directive 2010/24 concerning the recovery by Irish authorities of a fine issued by the Greek authorities — broadly referred to exceptions to the principle of mutual trust on fundamental rights grounds citing both *Aranyosi* and *NS* in the same footnote.[72] This suggests an awareness of the importance of both cases for the principle of mutual trust more generally.

The same dynamic can also be seen in *LM*, which dealt with the question whether a Member State may refuse execution of a European Arrest Warrant if the requested person is at a real risk of suffering a flagrant denial of justice on account of the lack of independence of the judiciary in the requesting Member State.[73] The reference arose in the context of the rule of law crisis in Poland.[74] The ECJ held that where there were substantial grounds for believing that that person will run a real risk of breach of their fundamental right to a fair trial if surrendered to the requesting Member State they could not be surrendered.

While the ECJ itself did not mention the pertinent case law of the ECtHR on the extradition and expulsion of persons who would face an unfair trial in another state,[75] Advocate General Tanchev discussed it — as well as the *Aranyosi*

71 *Ananyev v Russia* App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012); *Torreggiani v Italy* App nos 43517/09; 46882/09; 55400/09; 57875/09; 61535/09; 35315/10; 37818/10 (ECtHR, 8 January 2013); *Varga v Hungary* App nos 14097/12; 45135/12; 73712/12; 34001/13; 44055/13 and 64586/13 (ECtHR, 10 March 2015); *Rezmiveş v Romania* App nos 61467/12; 39516/13; 48231/13 and 68191/13 (ECtHR, 25 April 2017).

72 Case C-34/17 *Donnelly* Opinion of AG Tanchev ECLI:EU:C:2018:174, [49].

73 Case C-216/18 PPU *LM* ECLI:EU:C:2018:586.

74 On the situation in Poland more generally, see eg Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

75 In particular: *Othman (Abu Qatada) v United Kingdom* ECHR 2012.

case — extensively in his opinion.[76] Hence the ECJ was clearly aware of the ECtHR's stance on the matter and the parallels with the *Aranyosi* case.

The preceding discussion suggests that the pluralism currently underpinning the legal relations between EU and the ECHR (as well as between the ECJ and the ECtHR) has led to an improvement in the human rights protection for individuals subject to AFSJ measures based on mutual trust. Contrary to what critics of pluralism often claim, pluralism has not led to contradictions and fragmentation, but to a degree of harmony.[77] It is suggested here that the softening of the mutual trust doctrine on part of the ECJ is chiefly due to the latent threat posed by the ECtHR's external review and a finding that EU law is not compliant with the ECHR.

VI. Counterfactual: What If the EU Were a Party to the ECHR under Opinion 2/13?

These positive developments resulting from the current pluralistic set-up have their downsides, of course, in that they result in the accountability gaps described in SectionII, "The Current EU-ECHR Relationship". These allow the EU institutions to "hide" behind the Member States and their mutual trust obligation in order to evade responsibility under the ECHR. The following counterfactual hypothesises what the outcome of the mutual trust cases discussed above would have been if the EU had already been a party to the ECHR *under the conditions formulated by the ECJ in Opinion 2/13*. It supports this article's overall argument that under those conditions the EU's accession to the ECHR may do more harm than good to human rights protection in Europe.

As previously discussed, mutual trust is particularly relevant in the AFSJ, which in turn can be considered the most human rights sensitive area of EU activity. Not only does it facilitate the arrest, detention, and prosecution of individuals, but it also contributes to determining the fate of refugees. Furthermore, the civil procedural aspects of the AFSJ — in particular in the field of child abduction and other family law issues — gives rise to interferences with fundamental rights.

It is recalled that in Opinion 2/13 the ECJ held that for a revised accession agreement to be compatible with the Treaties it would need to contain a clause that would make it clear that a Member State is not required to check that another Member State has observed fundamental rights.[78] As shown above, a legally sound solution would be to exclude any review by a Member State of the ECHR compliance of another Member State in all cases.

It is worth going through the cases discussed above and assess how they would have been decided had a clause excluding Member State review of human rights compliance by another Member State.

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76 Case C-216/18 PPU *LM* Opinion of AG Tanchev ECLI:EU:C:2018:517.

77 On this phenomenon see Nico Krisch, *Beyond Constitutionalism* (Oxford University Press, 2010) p.152.

78 Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:24, [194].

In *MSS* the applicant successfully argued that Belgium would violate its obligations under art.3 of the ECHR if it returned the applicant to Greece. The reason was that the reception conditions for asylum seekers were so bad that the applicant would face a real risk of being subjected to inhuman and degrading treatment upon his return. Hence Belgium was held responsible for not assessing the human rights situation in Greece accurately and for not drawing the correct conclusion, ie that there would be a real risk that the applicant's right under art.3 of the ECHR would be violated. After accession this case would no longer be within the jurisdiction of the ECtHR and would have to be declared inadmissible.

The same goes for any hypothetical case challenging the execution of a European Arrest Warrant: assuming that a case like *Aranyosi* came before the ECtHR, after accession the ECtHR would equally not be in a position to review the Member State's failure to take into account the human rights situation in the requesting Member State.

Equally, if a case like *Avotiņš* came before the ECtHR after accession, the ECtHR would have to declare it inadmissible.

According to the ECJ's logic, the solution in all of these cases would have to be that the applicant either receives adequate protection under EU law – as e.g. did *Aranyosi* – or failing that, the applicant lodges a complaint against the Member State the applicant's rights are under threat; yet this would most likely only be possible after the applicant finds themselves in that state and thus after their rights have been violated.

Accession would therefore result in a reduced degree of human rights protection in mutual trust cases. This would likely manifest itself in two ways: first, by excluding external supervision by the ECtHR. And second, by removing the hitherto successful co-existence between the ECJ and ECtHR, which — as demonstrated in the previous section — has resulted in the ECJ increasing its human rights protection internally. It is of course not possible to provide conclusive evidence in this regard, but there are good reasons to suggest that in the absence of the *MSS* judgment the ECJ would not have accepted exceptions to the principle of mutual trust in *NS* or *Aranyosi*.

There is a further aspect to be considered, however, which is exemplified by the *Tarakhel* case. *Tarakhel* is as much a mutual trust case as the others, the only difference being that the respondent was not an EU Member State, but Switzerland. As Switzerland is bound by the Dublin Regulation through an association agreement with the EU,[79] it must respect the principle of mutual trust in the same way as an EU Member State. After accession, however, Switzerland[80] would be remain responsible to check ECHR compliance of Schengen states to which it seeks to

79 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis [2008] OJ L 53/52.

80 And also the EEA states Norway, Liechtenstein and Iceland.

return an asylum seeker, whereas an EU Member State in the same position would not. Conversely, EU Member States would remain responsible to check whether Switzerland complied with the ECHR in mutual trust cases.

Accession under the conditions formulated by the ECJ would thus create two classes of high contracting parties to the ECHR: those with privileges concerning their responsibilities (viz the 27 EU Member States) and those without such privileges. Given that the ECHR — like all international law — is underpinned the principle of sovereign equality of states, this is highly problematic.

VII. Conclusion

This article has tried to show that the future of EU human rights law might better be served in a pluralistic relationship with the European Convention on Human Rights compared with formal accession to it. While accession would have the advantage of more appropriate accountability and a clearer hierarchy of norms, it is argued here that the price to be paid for accession might simply be too high. To comply with the ECJ's accession demands as formulated in Opinion 2/13, the ECtHR would have to be deprived of jurisdiction over mutual trust cases in the AFSJ. This would have two detrimental consequences: first, it would lead to a complete lack of external accountability in this ever-growing and highly rights-sensitive field of law; and second, it would divide the state parties to the ECHR into two categories: EU Member States, who enjoy carve-outs of their responsibility and non-EU Member States that do not.

Somewhat ironically and contrary to what the advocates of continued accession argue,[81] the attempt at consolidating and constitutionalising human rights protection in Europe would therefore not result in stability and a better collective understanding of fundamental rights, but lead to fragmentation within the ECHR system, which could undermine its credibility and legitimacy as a whole as it would question whether all members to the Convention are truly equal.

81 See eg the quote by Callewaert at the end of Section II, "The Current EU-ECHR Relationship".