

Julia Rackow

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Strasbourg and Luxembourg: A Dialogue between Law and Politics

by

Julia Rackow*

Abstract

(French version below)

This article examines the evolution of the dialogue between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) in its political context focussing on the current conflict raised by Opinion 2/13, as well as the case law concerning the Dublin system. A substantive divergence between both courts occurred in the cases concerning the transfer of asylum seekers under the Dublin Regulations. In Tarakhel, the ECtHR opposed the outcomes in the cases N.S. and M.E. where the CJEU had held that the principle of mutual trust between EU Member States only required them to assess whether the entire asylum system of the receiving state was deficient. The courts entered into a judicial dialogue that also affects national courts as they are confronted with diverging standards. The CJEU's ruling in Opinion 2/13, where it declared the Accession Agreement incompatible with EU law, overshadows this dialogue. One of the CJEU's principal concerns with the Accession Agreement was that the mutual trust between EU Member States and the autonomy of EU law might cause conflicts with Strasbourg's jurisdiction. These developments are related to the political environment in which both courts have to maintain their legitimacy in their respective Member States. The dialogue between judges is an important tool in the current conflict, and on a more general level it strengthens the European human rights protection system, as well as both courts' legitimacy vis-à-vis their Member States.

Keywords: Tarakhel, M.S.S., N.S. and M.E., Melloni, Opinion 2/13, Dublin, Autonomy, Mutual trust, Judicial dialogue, Accession

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Résumé

L'article examine l'évolution du dialogue entre la CJUE et la CEDH dans le contexte politique en focalisant sur le conflit apparu récemment dans l'avis 2/13 et la jurisprudence sur le système de Dublin. Une divergence matérielle s'est produite dans les cas concernant le transfert des demandeurs d'asile selon les règlements Dublin. Dans l'affaire Tarakhel, la CEDH a rejeté la solution choisie par la CJUE dans l'affaire N.S. and M.E. Ainsi, cette dernière avait décidé que la confiance mutuelle entre les États membres requerrait seulement l'examen si le système d'asile entier de l'Etat accueillant manifestait des défauts systémiques. De cette manière, les cours ont ouvert un dialogue qui affecte aussi les tribunaux nationaux dans la mesure où ils doivent appliquer des critères contradictoires. L'avis 2/13, dans lequel la CJUE a rejeté l'adhésion de l'UE à la CEDH, assombrit ce dialogue. Parmi les principales objections contre l'accord d'adhésion se trouvent également le fait que la confiance mutuelle entre les États membres de l'UE et l'autonomie du droit de l'Union pourraient causer des conflits avec la juridiction de Strasbourg. Ces développements se présentent dans le cadre de l'environnement politique dans lequel les deux cours doivent maintenir leur légitimité vers les États membres. Le dialogue des juges joue un rôle important dans le conflit actuel et renforce en général le système européen de protection des droits fondamentaux et la légitimité des deux cours envers leurs États membres.

Mots-clés : Tarakhel, M.S.S., N.S. et M.E., Melloni, Avis 2/13, Dublin, Autonomie, Confiance mutuelle, Dialogue des juges, Adhésion

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I. Introduction

The relationship between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has been described as a “relationship in motion”.¹ Originally the two European courts worked in separate fields, but soon started citing each other’s case law. Since the Charter of Fundamental Rights of the European Union (Charter) came into force, an increasing potential for conflict between the two overlapping legal orders and the two courts can be observed. The current situation could be described as a pluralist landscape of these overlapping human rights instruments.² Their coordination was to be formalised by the accession of the EU to the ECHR. The CJEU, however, barred the accession in Opinion 2/13 declaring the draft revised Agreement on the Accession of the European Union (EU) to the ECHR (Accession Agreement) incompatible with Article 6(2) TEU and with Protocol (No 8) relating to Article 6(2) of the Treaty on the European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.³ Some of the main issues raised by the CJEU in Opinion 2/13 are related to the judicial dialogue that has recently taken place between the courts on the Dublin system. This struggle on questions of power and supremacy could even pose a danger to the European integration project, considering the context of the current – no less troubled – relationship between the two courts and certain Member States. After all, the acceptance of both courts’ judgments is essential to their legitimacy. Judicial dialogue has been identified as an important tool to enhance supranational courts’ legitimacy.⁴ Opinion 2/13 however is a clear statement against a more enhanced dialogue, and in favour of a strictly pluralist European fundamental rights system.⁵ Some authors have compared the

¹ VOßKUHL Andreas, “Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts“, Dialogue between judges 2014, available at: http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf, pp. 36-40, p. 38.

² HALBERSTAM Daniel, “It’s the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward“, German Law Journal 2015, pp. 105-146, p. 114; VOßKUHL Andreas, “Der europäische Verfassungsgerichtsverbund“, NVwZ 2010, pp. 1-8, p. 3.

³ Opinion 2/13, EU:C:2014:2454, 18 December 2014, para. 258.

⁴ SLAUGHTER, Anne-Marie, “A Typology of Transjudicial Communication“, University of Richmond Law Review 1994, pp. 99-134, p.119.

⁵ EECKHOUT Piet, “Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?“, Jean Monnet Working Paper 1/2015, available at: <http://jeanmonnetprogram.org/paper/opinion-213-on-eu-accession-to-the-echr-and-judicial-dialogue-autonomy-or-autarky/>, p. 36.

conflict between Strasbourg and Luxembourg raised by Opinion 2/13 to the UK government's sovereignty claim when trying to renegotiate the terms of its membership in the ECHR.⁶ The UK government has not only announced a referendum on Britain's membership in the EU but has also threatened to leave the ECHR. The objective of this paper is to show what role the dialogue between courts can play in the coordination of the European human rights instruments and an effective European human rights protection in adverse political circumstances.

Dialogue has become an increasingly important tool in the relationship between the ECtHR and its Member States. The Brighton Declaration - as a result of the High Level Conference meeting in Brighton on 19th and 20th April 2012, at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe - mentions the importance of dialogue in the protection of human rights:

"[It] (w)elcomes and encourages open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and (t)he highest courts of the States Parties; (...)."⁷

The development of the relationship between the ECtHR and the CJEU equally shows the importance of dialogue with regard to many legal aspects including the delimitation of competences between both courts.

This paper will highlight the relationship between the CJEU and the ECtHR against the background of the recent "No" to accession and the different forms of dialogue. The analysis will focus in particular on the recent decisions of both courts regarding the transfer of asylum applicants under the Dublin rules. These judgments are closely related to one of the main objections the CJEU raised in Opinion 2/13 against the Accession Agreement, namely the concept of mutual trust between Member States. Many scholars voiced strong criticism of Opinion 2/13, and on Luxembourg's approach to the Dublin system, while speculating on the future of the relationship between CJEU and ECtHR.⁸ In the light of its ruling in *Melloni*, however, the CJEU might have proposed a useful concept for the coordination of the European fundamental rights instruments in *N.S. and M.E.*

⁶ DOUGLAS-SCOTT Sionaidh, "Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice", VerfBlog, 2014/12/24, <http://www.verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/>; also in this sense: PEERS, Steve, "The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection", EU Law Analysis, 18.12.2014, available at: <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>.

⁷ High Level Conference on the Future of the European Court of Human Rights. The Brighton Declaration, 20 April 2012, § 12; available at <https://wcd.coe.int/ViewDoc.jsp?Ref=BrightonDeclaration&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁸ TOMUSCHAT Christian, "Der Streit um die Auslegungshoheit: Die Autonomie der EU als Heiliger Gral", EuGRZ 2015, pp. 133-139; BREUER, Marten, "Wasch mir den Pelz, aber mach mich nicht nass! Das zweite Gutachten des EuGH zum EMRK-Beitritt der Europäischen Union", EuR 2015, pp. 330-351; DOUGLAS-SCOTT, note 6.

II. Judicial dialogue as a legal and a political instrument

The observation that “courts are talking to each other all over the world” is not new.⁹ The communication between courts has been subject to legal research for some time, yet it has grown more important in the relationship between the ECtHR and the CJEU. When the term “judicial dialogue” is used, it is not always precisely referring to “two-way traffic”. While some authors use a broader concept of dialogue that also includes actual monologues¹⁰, others use the word dialogue in a narrower sense.¹¹ This article will refer to dialogue as communication in a broader sense. The objective is to describe the shift in their evolving relationship as envisaged by the accession project. Judicial dialogue will be presented as the central part of their communication when negotiating the terms of their co-operation. The judges of the courts adopt different tools or “channels” of dialogue which are used in the discussions related to the Dublin system and Opinion 2/13. The analysis will also assess the functions of dialogue, which the ECtHR and the CJEU use in order to relate to the political background of the current controversy.

A. Categories of dialogues between courts from “may” to “must”

Between different types of courts, different categories of judicial dialogue can, on an abstract level, be distinguished from a vertical to a horizontal relationship.¹² The dialogue between Strasbourg and Luxembourg has implications also for their Member States. When describing the conversation between these courts, and the tools they use to coordinate their legal orders, various dimensions must be taken into account.

In this multidimensional system of courts, a strictly vertical relation would be the one between national courts and their respective supreme courts or constitutional courts.¹³ The relation between the CJEU and national courts has also been qualified as vertical.¹⁴ However, elsewhere this has been distinguished from the strictly vertical situation between national courts and their supreme courts. It is a different type of vertical communication in the sense that the CJEU’s mandate is limited to the binding interpretation of EU law, whereby it cannot declare national decisions null and void.¹⁵

In these categories the relationship between the ECtHR and its Member States could be described as vertical, however not strictly vertical. Strasbourg’s judgments are binding for

⁹ SLAUGHTER Anne-Marie, note 4, p. 99.

¹⁰ ROSAS Allan, “The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue”, EJLS 2007, available at: www.ejls.eu, pp. 1-16, pp. 5.

¹¹ See for example: CLAES Monica and DE VISSER Maartje, “Are You Networked Yet? On Dialogues in judicial networks”, ULR 2012, pp. 100-114, p. 106. In this paper the term “network” is used to describe the broader map of judicial communication. The authors consider the official channels of communication as monologues while the informal communication is qualified as actual dialogue.

¹² See the categories described by ROSAS, note 10, p. 6.

¹³ ROSAS, note 10, p. 6.

¹⁴ SLAUGHTER, note 4, pp. 106.

¹⁵ ROSAS, note 10, p. 7.

the Member State in cases to which they are parties according to Art. 46 ECHR. However, there is no hierarchical situation in the sense of primacy in EU law. National courts generally take account of the ECtHR's case law in other cases in which they are not involved as parties. Nevertheless, "taking into account" does not mean strictly binding in the view of certain national courts. The UK courts developed the "mirror principle"¹⁶ with regard to Art. 2 (1) of the British Human Rights Act of 1998 and the German Federal Constitutional Court has the concepts of "faktische Präcedenzwirkung"¹⁷ and "Berücksichtigungspflicht"¹⁸ in order to make room for national adaptations of the ECtHR's case law.¹⁹

Two national courts of different countries might enter into a horizontal dialogue. There are examples of national courts citing other national courts' case law as a source of inspiration without being bound to follow or take account of each other's case law.²⁰ When two States Parties of the ECHR communicate through ECtHR case law, it has been described as "mixed vertical-horizontal communication".²¹

The relationship between the ECtHR and the CJEU is formally horizontal. It has sometimes been described as 'semi-vertical', because in practice it developed into neither a vertical nor a horizontal constellation.²² In other words, it is a "should" situation, while in a horizontal relation it would be a "may" and in a strictly vertical situation a "must".²³ Both courts feel like they should take each other's case law into account, although they are not formally bound. The accession was to turn this somewhat ambiguous situation into a vertical or a "must" situation, where the CJEU is bound by the ECtHR's decisions, a step the CJEU rejected in Opinion 2/13.

In the current situation, the communication between CJEU and ECtHR could also be defined as an intermediate dialogue.²⁴ Although each court adjudicates on its own legal basis, both courts share the ECHR, which was incorporated into the EU's human rights instruments. Therefore, they pay close attention to each other's case law. In earlier years it used to be horizontal communication where both courts sought inspiration from each other, while the other court was not necessarily aware of it. In this case, a two-way monologue is the more accurate concept.²⁵ A direct dialogue takes place only between courts in a vertical relationship such as between the CJEU and national courts in the preliminary-ruling procedure.²⁶ However, in the recent case law on the transfer of asylum seekers, Strasbourg and

¹⁶ R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323 at para 20.

¹⁷ "factual precedent".

¹⁸ "obligation to take into account".

¹⁹ BVerfGE 128, 326 (press release in English available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-031en.html) - *preventive detention*; BVerfGE 111, 307 (official English translation available at www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html) - *Görgülü*.

²⁰ ROSAS, note 10, p. 13.

²¹ SLAUGHTER, note 4, p. 111.

²² ROSAS, note 10, p. 8.

²³ ROSAS, note 10, p. 15.

²⁴ SLAUGHTER, note 4, p. 113.

²⁵ SLAUGHTER, note 4, p. 113.

²⁶ SLAUGHTER, note 4, pp. 112.

Luxembourg entered into a dialogue that will be described as diagonal. It is diagonal in the sense that it has implications not only for the relationship between Strasbourg and Luxembourg but, most immediately, for the relationship with and between Member States which have to apply the standards developed by both European courts.

B. “Channels” of dialogue between the ECtHR and the CJEU

Within the relationship between the ECtHR and the CJEU, three forms of dialogues can be distinguished: the informal, the institutionalised and the judicial.²⁷ The informal dialogue consists of frequent meetings of judges from both courts as well as judges from the UK Supreme Court, the German Constitutional Court and the French Conseil d’Etat.²⁸

The institutionalised dialogue was envisaged in the shape of the “co-respondent” or “co-defendant” mechanism, and prior involvement proceedings in the Accession Agreement.²⁹ The CJEU however, considered this to be incompatible with the EU Treaties, as the ECtHR would acquire jurisdiction on EU law.³⁰

The judicial dialogue in a narrower sense concerns the references each court makes to the other court’s case law as an interpretative tool or source of inspiration.³¹ Only after accession would the case law of the ECtHR become binding on the CJEU when interpreting the ECHR. Judicial dialogue is considered important by the judges of both courts in order to ensure coherence and avoid divergent decisions.³² Regarding the future – especially after accession to the ECHR – the judges see a need for stronger cooperation, however not within a hierarchical relationship.³³

The analysis of the Dublin case law and Opinion 2/13 will focus on the judicial dialogue that takes place in case law. Judicial dialogue in a narrower sense is proposed as the essence

²⁷ MORANO-FOADI Sonia/ ANDREADAKIS Stelios, A Report on the Protection of Fundamental Rights in Europe: A reflection on the relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon, Strasbourg 2014, available at: <https://dm.coe.int/CED20140017597>, p. 42.

²⁸ MORANO-FOADI/ ANDREADAKIS, note 27, p. 43.

²⁹ Art. 3(7) of the Accession Agreement.

³⁰ Opinion 2/13, paras. 226-234.

³¹ While the CJEU frequently referred to the case law of the ECtHR since *Rutili* in 1975 when it started using the ECHR as a source, the ECtHR hardly took notice of the CJEU until the 1990s. Since then it has made references on different occasions, however in a rather one-sided manner. In *Marckx v Belgium* the ECtHR made its first (still exceptional) reference to the CJEU’s *Defrenne* case where it used the so-called concept of prospective overruling. The ECtHR used the CJEU’s case law on transsexual rights in *P v S* in order to motivate its decision in *Goodwin v UK*. The decision in *Pellegrin v France* was based on the CJEU’s definition of “public service” in *Commission v Belgium* when interpreting the concept of a “civil right” in the sense of Article 6 (1) ECHR. In earlier cases the ECtHR had also rejected claims of a right to a preliminary reference to the CJEU according to Article 267. In *Dhabbi v Italy*, however, it found a violation of Article 6 (1) ECHR for the national court’s failure to give reasons for its refusal to refer the question to the CJEU in a decision that could not be appealed under national law. This case was distinguished from *Vergauwen and Others v Belgium* where no violation was found since - unlike in this case - a judicial remedy under national law was still available.

³² MORANO-FOADI/ ANDREADAKIS, note 27, p. 44.

³³ MORANO-FOADI/ ANDREADAKIS, note 27, p. 45.

of the communication between the CJEU and the ECtHR. While other forms of communications complement judicial dialogue, the judicial dialogue in its narrower sense is where conflicts emerge - but also where they can best be solved.

C. Functions of dialogue between courts

Trans-judicial communication fulfils different functions beyond a cross-fertilisation of legal systems.³⁴ Borrowing concepts as a source of inspiration for the solution of a specific legal problem extends these concepts across judicial borders. Dialogues between courts also enhance the effectiveness of supranational courts, thus promoting international law.³⁵ It has been demonstrated that judicial communication supports a careful approach in gaining national courts' confidence and cooperation.³⁶ The troubled relationship between the ECtHR and the UK illustrates this mechanism.³⁷ The aforementioned Brighton Declaration is one result of this conflict. Judicial dialogue provides a forum for a "collective deliberation" on the delimitation of competences between national and supranational courts.³⁸ It appears that a similar mechanism has been deemed important by the judges of the CJEU and the ECtHR although they are not yet formally related within the system of the ECHR.³⁹ References to other courts ultimately enhance the persuasiveness, and consequently the authority and legitimacy of judicial decisions.⁴⁰ The CJEU and the ECtHR derive their legitimacy from their Member States and to a great extent from Member States' courts.⁴¹ Judges of supranational courts are especially aware that this function of trans-judicial communication is essential, because the legitimacy of their decisions is connected to the legitimacy of the institution as a whole. In times of political conflict judicial dialogue could thus be a means of consolidating their positions.

III. The dialogue on the Dublin system

In general the judicial dialogue between Strasbourg and Luxembourg has been cooperative and productive in the development of the common European human rights *aquis*. Before turning to the controversial issue of asylum law, the ECtHR's approach towards the review of Member States' applications of EU law, in its landmark decisions in *M & Co*, *Matthews* and *Bosphorus*, will be recalled for the purpose of the analysis. These cases provide the framework of the current delimitation of competences. Recently, in several rulings regarding the

³⁴ SLAUGHTER, note 4, p. 117.

³⁵ SLAUGHTER, note 4, pp. 114.

³⁶ SLAUGHTER, note 4, pp. 114.

³⁷ For an overview : HALE Brenda, "Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?", *Human Rights Law Review* 2012, pp. 65-78.

³⁸ SLAUGHTER, note 4, pp. 120.

³⁹ The interviews cited in the report by MORANO-FOADI/ ANDREADAKIS, note 27, show this clearly.

⁴⁰ SLAUGHTER, note 4, p. 119.

⁴¹ FRANZIUS Claudio, "Grundrechtsschutz in Europa - Zwischen Selbstbehauptungen und Selbstbeschränkungen der Rechtsordnungen und ihrer Gerichte", *ZaöRV* 2015, pp. 383-412, pp. 410; KRISCH Nico, "The Open Architecture of European Human Rights Law", *The Modern Law Review* 2008, pp. 183-216, p. 202.

Dublin Regulations, the courts entered into a genuine dialogue on substantive questions that evolved into a conflict on competences. The idea of a relationship in motion, mentioned at the beginning of this paper, can be observed following the ECtHR's well known case law reflecting its attitude towards the review of acts of EU law applied by the Member States.

A. Background

Both European courts work within their respective legal orders. The dialogue to be analysed concerns situations where both legal orders overlap.

1. The legal framework

The background is well known: While the ECtHR supervises compliance with the ECHR, three human rights instruments constitute the legal framework the CJEU works with: The ECHR, the Charter and the general principles of the Union's law.

The Treaty of Lisbon clarified the status of the ECHR in EU law. According to Article 6 (3) of the Treaty on the European Union (TEU) fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. As long as the EU does not accede to the ECHR, the CJEU is not bound by Strasbourg's case law. However, the CJEU's established practice to take the ECtHR's case law into account is reflected by Article 6 (3) TEU. The EU thus committed to compliance with the ECHR.

Currently there is no overall hierarchy between the three overlapping human rights instruments. As sources of law, however, the judges of the two courts use them in distinct ways. The ECtHR refrains from interpreting the Charter as it considers itself competent only with regard to the ECHR. The CJEU on the other hand applies the Charter offering the highest protection, but also refers to the ECHR, especially where it contains identical rights or where the Charter expressly makes reference to it.⁴²

2. The Bosphorus principle

In *M & Co v Germany* the (then still existing) European Commission on Human Rights (EComHR)⁴³ established the "equivalent protection principle".⁴⁴ The applicant invoked a violation of Articles 1 and 6 (2) and (3) (c) of the ECHR against the execution of a judgment

⁴² MORANO-FOADI/ ANDREADAKIS, note 27, p. 26.

⁴³ The EcomHR was abolished in 1998 when Protocol 11 came into force and individual applications were allowed directly to the ECtHR.

⁴⁴ EComHR, App. No. 13258/87, *M & Co. v The Federal Republic of Germany* [1990], Decisions and Reports No. 64, 138.

of the CJEU in a competition law case. The EComHR did not deem itself “competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities, the latter not being a Party to the European Convention on Human Rights”. By contrast it found the Member States “responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations”. The ECHR therefore allowed Member States to transfer powers to an international organisation “provided that within that organisation fundamental rights will receive an equivalent protection”. Commentators referred to this decision as the EtHR’s first acknowledgement of an EU human rights law and related it to the “*Solange*” case law of the German Federal Constitutional Court.⁴⁵

The case of *Matthews v The United Kingdom*⁴⁶ is generally considered the first fundamental decision for the emerging relationship between the CJEU and the ECtHR. The applicant, a resident of Gibraltar, claimed that the 1976 Community Act, which has the status of an EC Treaty, violated the right to free elections under Article 3 Protocol 1 ECHR. According to the 1976 Community Act, Gibraltar was not represented in the European Parliament. Consequently, Ms Matthews was denied the possibility to vote for the European Parliament. The ECtHR held the UK responsible for the breach of Article 3 Protocol 1 ECHR on the grounds that

“legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly. To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to “secure” the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be “secured” in respect of purely domestic legislation”.⁴⁷

It follows that the ECtHR found a violation in an act of a Member State based on EU primary law without mentioning the “equivalent protection principle”.

The *Bosphorus*⁴⁸ judgment became and still is the leading case on the question of the EtHR’s competence to review EU law. The applicant claimed a violation of his property rights by an EC Regulation implementing a UN Security Council resolution. The ECtHR reaffirmed the “equivalent protection principle” from *M & Co*⁴⁹ and established a rebuttable presumption “that a State has not departed from the requirements of the Convention when it does

⁴⁵ DOUGLAS-SCOTT Sionaidh, “A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Rights Acquis”, CML Rev 2006, pp. 629-665, pp. 636 ; MORANO-FOADI/ ANDREADAKIS, note 27, p. 51.

⁴⁶ ECtHR, App. No. 24833/94, *Matthews v United Kingdom* [1999] Reports of Judgments and Decisions 1999-I, ECLI:CE:ECHR:1999:0218JUD002483394.

⁴⁷ *Matthews v The United Kingdom*, para. 34.

⁴⁸ ECtHR, App. No. 45036/98, *Bosphorus Hava Yollari Turizm v Ireland* [2005], Reports of Judgments and Decisions 2005-VI, ECLI:CE:ECHR:2005:0630JUD004503698.

⁴⁹ *Bosphorus*, para. 155.

no more than implement legal obligations flowing from its membership of (an international) organisation”.⁵⁰ The presumption can be rebutted if “it is considered that the protection of Convention rights was manifestly deficient”.⁵¹ This decision has been denominated the ECtHR’s “*Solange II*” despite some differences.⁵² In any case, most scholars affirm that the Bosphorus case law would be redundant and should be abandoned after accession.⁵³ As the Dublin cases show, the Bosphorus presumption does not apply where Member States have discretion in applying EU law.

B. Substantive divergences in asylum law and their further implications

In the area of asylum law some divergences have occurred, which are reflected in a genuine dialogue between Strasbourg and Luxembourg as well as in one of the CJEU’s major points against the Accession Agreement in Opinion 2/13. The conversation between the courts illustrates the connection between diverging case law, the conflict on competences and the solution judicial dialogue can provide: The conflict arose in connection with the Dublin Regulations, which were originally part of the Schengen Convention. In 1990 the Dublin Convention was established and was later replaced when the Dublin II Regulation (2003) was adopted. This was then replaced by the Dublin III Regulation (2013)⁵⁴ applicable since 2014, and has been extended to the non-EU Schengen countries. Measures under the Dublin Regulations must of course be compatible with the prohibition of torture and inhumane or degrading treatment, which are established in Article 4 of the Charter and in Article 3 ECHR. In principle the Charter offers higher protection compared to Article 3 ECHR. By contrast, it has been observed that the ECtHR’s interpretation of Article 3 ECHR, applying its living instrument doctrine, has evolved.⁵⁵ When the ECtHR and the CJEU both had to decide on parallel cases of transfers of asylum seekers to the Member State of first entry under the Dublin II Regulation in 2011, the CJEU established a presumption of compliance with fundamental rights for EU Member States that actually resulted in lower protection. In a 2013 decision the ECtHR maintained its position that a “real risk” of treatment contrary to Article 3 ECHR suffices to rebut the presumption. A judgment of the UK Supreme Court that expressly rejected the CJEU’s approach supported Strasbourg’s reasoning.

⁵⁰ *Bosphorus*, para. 156.

⁵¹ *Bosphorus*, para. 156.

⁵² LOCK Tobias, “The ECJ and the ECtHR : The Future Relationship between the Two European Courts “, *The Law and Practice of International Courts and Tribunals* 2009, pp. 375-398, p. 379.

⁵³ BREUER, note 8, p. 335.

⁵⁴ Regulation no. 604/2013 of the European Parliament and of the Council of 26 June 2013 (“the Dublin III Regulation”).

⁵⁵ MORANO-FOADI/ ANDREADAKIS, note 27, p. 39.

1. M.S.S. v Belgium and Greece

The ECtHR first delivered its judgment in *M.S.S. v Belgium and Greece*⁵⁶, a case concerning an asylum seeker who was transferred from Belgium back to Greece, the Member State of first entry, under the EU Dublin II Regulation. It held that Greece had violated the prohibition of inhuman and degrading treatment of Article 3 ECHR due to the detention of the applicant in a holding centre and the conditions of detention.⁵⁷ Belgium was equally found responsible for a violation of Article 3 and additionally of Article 13 ECHR, the right to an effective remedy, for transferring the asylum seeker back to Greece, while the systematic practice of detaining asylum-seekers in Greece, as well as the conditions of detention, were well known and freely ascertainable from a wide number of sources.⁵⁸ The ECtHR mentioned the equivalent protection presumption, but did not apply it because it considered that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's legal obligations as Belgium could have refrained from transferring the applicant under EU law.⁵⁹

2. N.S. and M.E. and Abdullahi

Shortly after this decision the CJEU responded in *N.S. and M.E.*⁶⁰ with what has been called an “alignment of the two case laws”⁶¹ but later developed into a serious clash between Strasbourg and Luxembourg.⁶² The different approaches of the two courts also turned out to be a reason for one of the major concerns of the CJEU in Opinion 2/13.

In *N.S. and M.E.* the CJEU took account of the ECtHR's judgment in *M.S.S. v Belgium and Greece* and confirmed the decision in principle as well as in the particular case.⁶³ By contrast, within the scope of Article 4 of the Charter it modified the ECtHR's case law stating that EU law established a presumption that all states applying the Dublin rules act in accordance with human rights.⁶⁴ That presumption was required to protect the mutual confidence between Member States.⁶⁵ However, “systemic deficiencies” in the Member States' asylum procedures could rebut the presumption.⁶⁶ Furthermore, in the case of *Abdullahi* the CJEU specified its approach stating that the “only way” to rebut the presumption of the prerogative of the Member States “is by pleading systemic deficiencies in the asylum procedure

⁵⁶ ECtHR, App. No. 30696/09, *M.S.S. v Belgium and Greece* [2011] 53 E.H.R.R. 2, ECLI:CE:ECHR:2011:0121JUD003069609.

⁵⁷ *M.S.S. v Belgium and Greece*, paras. 226, 232-233.

⁵⁸ *M.S.S. v Belgium and Greece*, paras. 161-164, 366.

⁵⁹ *M.S.S. v Belgium and Greece*, para. 340.

⁶⁰ CJEU, Joined cases C-411/10, *N.S. v. Secretary of State for the Home Department*, and C-493/10, *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2012], ECLI:EU:C:2011:865.

⁶¹ MORANO-FOADI/ ANDREADAKIS, note 27, p. 55.

⁶² HALBERSTAM, note 2, p. 130.

⁶³ *N.S. and M.E.*, para. 88-89.

⁶⁴ *N.S. and M.E.*, para. 99.

⁶⁵ *N.S. and M.E.*, para. 78-80.

⁶⁶ *N.S. and M.E.*, para. 106.

and in the conditions for the reception of applicants for asylum in that Member State”.⁶⁷ The CJEU did not define the criteria of systemic deficiencies as opposed to minor deficiencies, a question that is still to be answered because of the discrepancy with the subsequent ruling from Strasbourg and in order to provide criteria for national courts.⁶⁸

This differed from the ECtHR’s approach which clearly stated that the transfer of asylum applicants from one state of the Dublin system to another violates Article 3 when the requirements of inhuman or degrading treatment were fulfilled without mentioning any presumption regarding legal acts of the EU. Moreover, the ECtHR had established that

“the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a “real risk” of treatment contrary to Article 3, as well as a particularly prompt response.”⁶⁹

3. Tarakhel v Switzerland

In *Tarakhel v Switzerland*⁷⁰ the ECtHR answered back and, included the UK Supreme Court in the conversation, which had invited itself previously in *E.M. v. Secretary of State for the Home Department*⁷¹. The applicants in *Tarakhel v Switzerland* claimed that their transfer to Italy under the Dublin II and III Regulations violated Article 3 ECHR. The ECtHR reaffirmed its case law in *M.S.S.* and cited the CJEU’s judgment in *N.S. and M.E.* where it established the presumption that could be rebutted when a systemic flaw in the asylum procedure was demonstrated.⁷² By contrast, the ECtHR did not mention *Abdullahi* where the CJEU had decided that the “only way” to rebut the presumption was pleading systemic deficiencies.⁷³ Also by then, the Dublin III Regulation had entered into force with a codification of the presumption in Article 3 (2) which provides that Member States have to examine whether 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 ECtHR went on to conclude that

“[t]he presumption that a Contracting State which is also the “receiving” country will comply with Article 3 of the Convention can therefore validly be rebutted where “substantial grounds have been shown for believing” that the person whose return is being ordered faces a “real risk” of being subjected to treatment contrary to that provision in the receiving country.”⁷⁴

⁶⁷ CJEU, Case C-394/12 *Abdullahi v Bundesasylamt* [2013], ECLI:EU:C:2013:813, para. 60.

⁶⁸ VON BOGDANDY Armin and IOANNIDIS Michael, “Das systemische Defizit - Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens“, *ZaöRV* 2014, pp. 283 - 328, p. 321.

⁶⁹ *M.S.S. v Belgium and Greece*, para. 293.

⁷⁰ ECtHR, App. No. 29217/12 *Tarakhel v Switzerland* [2014], ECLI:CE:ECHR:2014:1104JUD002921712.

⁷¹ R (E.M. v. Sec. of State for the Home Dep’t), [2014] UKSC (Feb. 19, 2014).

⁷² *Tarakhel v Switzerland*, para. 101-103.

⁷³ CJEU, Case C-394/12 *Abdullahi v Bundesasylamt* [2013], ECLI:EU:C:2013:813, para. 60.

⁷⁴ *Tarakhel v Switzerland*, para. 104.

This paragraph of the judgement allows for different interpretations: It could mean that systemic deficiencies are not the only example of the rebuttal of the presumption.⁷⁵ The ECtHR clearly refers to a “real risk” instead of systemic deficiencies. In this sense it has also been argued that the CJEU establishes two categories of prohibitions: The general prohibition in the case of systemic deficiencies and a case-by-case prohibition based on the individual situation, such as the transfer of children who are especially vulnerable.⁷⁶ The other possible interpretation could be that the concept of systemic deficiency has a broader meaning that includes more cases than the collapse of an entire asylum system, as was the case in Greece in *M.S.S. and N.S. and M.E.*⁷⁷ After modifying the CJEU’s presumption the ECtHR stated its approval of the UK Supreme Court’s approach in *E.M. v. Secretary of State for the Home Department*.⁷⁸ The UK Supreme Court, however, had apparently rejected the CJEU’s approach in *N.S. and M.E.* when it held that

“[a]n exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice. There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental rights is more grievous or more deserving of protection. And, as a matter of practical experience, gross violations of article 3 rights can occur without there being any systemic failure whatsoever.”⁷⁹

This can be interpreted as a clear sign of tension between Strasbourg and Luxembourg.⁸⁰ However, despite the divergence, the judgments show that both courts, even all courts taking into account the Member States’ courts represented by the UK Supreme Court in this case, consider the other court’s approach. While they defend their point of view, they nevertheless leave room for the other court to converge on their view. Thus the CJEU could answer to the *Tarakhel* ruling by explaining the concept of systemic deficiencies.⁸¹ The reasoning in *N.S. and M.E.* might not be as detrimental to human rights as it was perceived by the ECtHR, which will be argued below. The *Melloni* judgment could present the CJEU’s reasoning in a different light. In any case, there remains room for a sequel of this judicial dialogue. The ECtHR has also been criticised precisely for failing to provide a clear definition and thus creating a lack of legal certainty.⁸² This however might be a necessary part of the process of judicial dialogue, especially when the political situation becomes as difficult as after Opinion 2/13.

IV. Opinion 2/13 and the conflict on competences

The divergence in the asylum law cases is related to the conflict at the level of competences. The CJEU’s emphasis on the importance of the presumption of mutual trust between

⁷⁵ PEERS Steve, “*Tarakhel v Switzerland*: Another nail in the coffin of the Dublin system?”, EU Law Analysis, 05.11.0214, available at: <http://eulawanalysis.blogspot.co.uk/2014/11/tarakhel-v-switzerland-another-nail-in.html>.

⁷⁶ WENDEL Matthias, “Menschenrechtliche Überstellungsverbote: Völkerrechtliche Grundlagen und verwaltungsrechtliche Konkretisierung“, DVBI 2015, pp. 731-741, pp. 733, pp. 735.

⁷⁷ PEERS, note 75.

⁷⁸ *Tarakhel v Switzerland*, paras. 104, 52.

⁷⁹ R (E.M. v. Sec. of State for the Home Dep’t), [2014] UKSC (Feb. 19, 2014), para. 48.

⁸⁰ HALBERSTAM, note 2, p. 130.

⁸¹ PEERS, note 75.

⁸² WENDEL, note 76, p. 738.

Member States in *N.S. and M.E.* is also reflected in Opinion 2/13. The subsequent paragraphs will deal with the principle of mutual trust and the autonomy of EU law as invoked in Opinion 2/13, which is representative of the CJEU's general attitude in this judgment. Arguably, this judgment exposes a conflict on competences covering the substantive issues that could be resolved through judicial discourse.

A. The principle of mutual trust between Member States and the autonomy of the EU

The Accession Agreement would have also conceded the last word on violations of the ECHR through acts of EU law to the ECtHR. The CJEU explained its fundamental concerns with this result in Opinion 2/13.

1. Opinion 2/13 – The CJEU's “No” to dialogue ?

Will the judicial dialogue as analysed with regard to the Dublin system continue after Luxembourg's rejection of the Accession Agreement? The CJEU objections go beyond technical questions and they are detrimental to the idea of judicial dialogue.

In Opinion 2/13 the CJEU highlighted the importance of mutual trust between EU Member States as one of the most important objections against the Accession Agreement and expressly referred to *N.S. and M.E.* in this paragraph of the judgment.⁸³ According to this ruling, the principle of mutual trust may require Member States to presume that other Member States comply with fundamental rights when implementing EU law.⁸⁴ This was the situation in the application of the Dublin Regulations in the aforementioned decisions. In these cases the CJEU wants to protect its Member States from any other legal obligations that could contradict the principle of mutual trust, when it declares that

“(i)n so far as the ECHR would (...) 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.”⁸⁵

The Accession Agreement, the CJEU argues, does not provide a provision to prevent this.⁸⁶ The CJEU does not want a direct institutionalised dialogue where the ECtHR has the last word. What the CJEU is demanding instead in Opinion 2/13 is an exemption for acts of EU law from Strasbourg's review, or at least non-application of the ECHR between EU Member States regarding EU law.⁸⁷ In other words, the CJEU wants EU law to prevail over

⁸³ Opinion 2/13, para. 191.

⁸⁴ Opinion 2/13, para. 192.

⁸⁵ Opinion 2/13, para. 194.

⁸⁶ Opinion 2/13, para. 195.

⁸⁷ LAZOWSKI Adam and WESSEL Ramses A, “When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR”, German Law Journal 2015, pp. 179-212, p. 192.

the ECHR and prevent the victim of a violation of ECHR rights from going to Strasbourg when the autonomy of EU law is at stake.⁸⁸

Opinion 2/13 has been criticised for several human rights and international law issues: Although the tension between the functioning of the EU system of mutual trust and the protection of individual rights has been identified as a problematic issue before⁸⁹, the CJEU's attitude almost unanimously received strong criticism, especially from human rights lawyers.⁹⁰ Even those who defended the CJEU position pointed out that the CJEU appeared to imitate the role of a state defending its sovereignty.⁹¹ What the CJEU is suggesting is considered contradictory: It wants to defend the higher human rights standard of the Charter, but at the same time it wants to prevent the ECtHR from imposing possibly higher standards on the EU.⁹² From the point of view of public international law it is doubtful whether accession under the CJEU's conditions could ever take place. An exemption for the EU from certain obligations would be incompatible with the principle of equality in the treaty system, according to which the States Parties are generally subject to the same rights and obligations.⁹³ It could only be introduced by reservation or consent of the States Parties. It is however unlikely, that such a consent could be reached, at least without conceding similar privileges to the other (States) Parties. An exemption from the ECtHR's competence to protect the autonomy of EU law as envisaged by the CJEU would amount to a general reservation, which is not permitted according to Article 57 (1) ECHR.⁹⁴

The practical implications for the current interaction between both European courts and national courts have received less attention. In the current situation no mechanism such as the prior involvement procedure is available in order to protect mutual trust between Member States. Consequently the Member States have to either violate the ECHR or the principle of mutual trust according to the Dublin III Regulation in situations as in *M.S.S.* and *Tarakhel*. A judicial discourse on the Dublin system between both European courts and national courts is no longer possible without reacting to the CJEU's objections against Strasbourg's external review from Opinion 2/13.⁹⁵

The CJEU's conditions are impossible to fulfil without compromising the ECtHR's core function. An exemption provision as the CJEU requires would only solve the conflict on competences between Strasbourg and Luxembourg, while the incoherence in fundamental

⁸⁸ TOMUSCHAT, note 8, p. 137.

⁸⁹ CALLEWAERT Johan, "To accede or not to accede: European protection of fundamental rights at the crossroads", *Journal européen des droits de l'homme* 2014, pp. 496- 513, p. 509.

⁹⁰ BREUER, note 8, p. 336 ; DOUGLAS-SCOTT, note 6; PEERS, note 6; DOUGLAS-SCOTT Sionaidh, "Opinion 2/13 and the 'elephant in the room': A response to Daniel Halberstam", *VerfBlog*, 2015/3/13, available at : <http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam>.

⁹¹ HALBERSTAM, note 2, p. 136; TOMUSCHAT, note 8, p. 139.

⁹² TOMUSCHAT, note 8, p. 139.

⁹³ TOMUSCHAT, note 8, pp. 134.

⁹⁴ TOMUSCHAT, note 8, pp. 136-137.

⁹⁵ EECKHOUT, note 5, p. 37.

rights protection in asylum law for instance would remain unresolved.⁹⁶ Such an exemption might protect the principle of mutual trust, but at the same time it would undermine the ECtHR's task of performing an external review.⁹⁷ Since the ECtHR's cannot be prevented from accepting individual applications, the CJEU's approach leads to more pluralism. Thus human rights protection in a particular case could differ depending on which court is deciding. This situation is questionable with regard to the rule of law.⁹⁸

The CJEU's concerns with mutual trust can be reduced to a substantive legal question in the Dublin system case law. An undefined concept such as "systemic deficiencies" in the ECtHR's reasoning in *Tarakhel* causes practical problems also in view of national courts. A disagreement on substantive legal questions can arguably be better resolved through case law, than through a regulation in the Accession Agreement.⁹⁹ Similarly, the British proposal to include a definition of the margin of appreciation into the ECHR in order to limit the ECtHR's external review at the Brighton Conference in 2012 was rejected. Such a definition would not only have been incompatible with the independence of the court, but it would also continue to leave the task of defining the content of the margin of appreciation in every particular case to the ECtHR.¹⁰⁰ If the CJEU had the Dublin transfer cases in mind, when it demanded an exemption provision to protect the mutual trust between Member States, it overlooked that the question of systemic deficiencies could be settled in particular cases.

2. Article 53 Charter vs. Article 53 ECHR and Melloni

Another of the CJEU's principal concerns with the Accession Agreement is the interference between Article 53 of the Charter and Article 53 ECHR.¹⁰¹ Article 53 of the Charter and Article 53 ECHR concern the relationship between the courts and their respective Member States. While the CJEU stated in *Melloni* that Article 53 of the Charter prohibits higher national standards, where this could undermine the primacy, unity and effectiveness of EU law, Article 53 ECHR does not impose an obligation on Member States. Even though the ECtHR does not enforce national human rights standards, this seems to be Luxembourg's concern.¹⁰² If the application of Article 53 of the Charter leads to a violation of the ECHR, the ECtHR is competent to review such legal acts. The CJEU cannot object to the ECtHR's competence to perform external human rights review without undermining its function.

⁹⁶ HALBERSTAM, note 2, p. 131.

⁹⁷ EECKHOUT, note 5, p. 8.

⁹⁸ EECKHOUT, note 5, p. 38.

⁹⁹ WENDEL Mattias, "Mehr Offenheit wagen! Eine kritische Annäherung an das Gutachten des EuGH zum EMRK-Beitritt", VerfBlog, 2014/12/21, available at : <http://www.verfassungsblog.de/mehr-offenheit-wagen-eine-kritische-annaeherung-das-gutachten-des-eugh-zum-emrk-beitritt>.

¹⁰⁰ BRATZA Nicholas, President of the European Court of Human Rights, High level Conference, Brighton 18-20 April 2012, Draft speaking notes, available at: <http://hub.coe.int/20120419-nicolas-bratza>.

¹⁰¹ Opinion 2/13, para. 189.

¹⁰² EECKHOUT, note 5, p. 13.

This section of Opinion 2/13 therefore underlines the CJEU's hostile approach to the dialogue with the ECtHR.¹⁰³ In the light of the *Melloni* judgment however, the cases on the Dublin system can provide a more constructive solution for future interference between national fundamental rights standards, the Charter and the ECHR.

The CJEU had adopted a narrow interpretation of Article 53 of the Charter in *Melloni*.¹⁰⁴ In Opinion 2/13, and in its previous *Melloni* judgment on the compatibility of the European arrest warrant with the EU's fundamental rights standards, the CJEU held that Article 53 of the Charter did not allow higher national fundamental rights standards where this could undermine the primacy, unity and effectiveness of EU law.¹⁰⁵ In *Melloni* this led to the conclusion that Article 53 of the Charter did not allow Spain to review the surrender of a person convicted in absentia in order to ensure the right to a fair trial and the rights of the defence guaranteed by its constitution.¹⁰⁶ According to the CJEU, this could interfere with Article 53 ECHR which reserves the right of the Member States to provide higher fundamental rights standards than the minimum standard protected by the ECHR, thus undermining the primacy, unity and effectiveness of EU law.¹⁰⁷ Accordingly the CJEU rejected the Spanish Constitutional Court's interpretation of Article 53 of the Charter, but supported the view of the Spanish government.¹⁰⁸

It is important to consider that the preliminary ruling in *Melloni* concerned the EU arrest warrant, which is fully harmonised EU legislation.¹⁰⁹ In the light of *Melloni* the CJEU's reasoning in *N.S. and M.E.* appears quite different than it was perceived by the ECtHR: In *N.S. and M.E.* the CJEU conceded room for the application of national standards - including the ECHR - because the Dublin system leaves a margin of appreciation to the Member States. Their application is limited to the examination of systemic deficiencies, but within these limits the CJEU asked the Member States not to apply EU secondary law when the receiving state disrespects fundamental rights in a systemic way. The presumption of mutual trust thus includes an element of mutual control. The concept of systemic deficiencies must be developed further between the CJEU, the ECtHR and national courts. However, it appears as a possible solution for situations of overlapping fundamental rights regimes.¹¹⁰ The ECtHR itself has used this concept in cases concerning the execution of judgments.¹¹¹ The idea proposed by several authors is to apply a "horizontal *Solange*-test" between Member States, following the reasoning from *N.S. and M.E.*¹¹² In this sense the CJEU could develop

¹⁰³ EECKHOUT, note 5, p. 14.

¹⁰⁴ CJEU, case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], ECLI:EU:C:2013:107 ; Opinion 2/13, para. 188.

¹⁰⁵ *Melloni*, paras. 58-60; Opinion 2/13, paras. 187-190.

¹⁰⁶ *Melloni*, para. 64.

¹⁰⁷ Opinion 2/13, paras. 187-189.

¹⁰⁸ FRANZIUS Claudio, "Strategien der Grundrechtsoptimierung in Europa", EuGRZ 2015, pp. 139-153, p. 143.

¹⁰⁹ FRANZIUS, note 41, p. 399.

¹¹⁰ FRANZIUS, note 41, pp. 406; VON BOGDANDY/IOANNIDIS, note 68, pp. 319.

¹¹¹ *Burdov v Russia* (No 2), app. No. 33509/04, judgement of 15.01.2009, ECLI:CE:ECHR:2009:0115JUD003350904.

¹¹² FRANZIUS, note 108, pp. 407; CANOR Iris, "My Brothers's Keeper? Horizontal *Solange*. An Ever Closer Distrust among the Peoples of Europe", CML Rev. 2013, pp. 383-421.

its own *Bosphorus* or *Solange* principle.¹¹³ While accession is off the table, this could be a pluralist solution. The further development of this test also requires some deference of the CJEU towards the ECtHR in forthcoming decisions. Nevertheless, the idea that plural fundamental rights instruments can operate in one situation without strictly differentiating between the legal spheres – as has been the German Federal Constitutional Court’s point of view – is clearly presented in *N.S. and M.E* in contrast to *Melloni*. Systemic violations of fundamental rights in another Member State must lead to non-application of EU law. The concept of systemic deficiencies thus could be developed as a collision rule for Member States’ applications of EU secondary law while the CJEU made it clear in *Melloni* that the primacy and autonomy of EU law must prevail where there is harmonised EU law. In their margin of appreciation the Member States can and must consider the standard defined by the ECHR and the case law of the ECtHR.¹¹⁴ In terms of horizontal and vertical dialogues between courts this represents a shift to an additional category: There is a vertical dialogue between the CJEU and the Member States and a horizontal dialogue between the Member States. The ECtHR influences all of these dialogues in what could be described as a ‘diagonal dialogue’.

B. The future of human rights protection between Europe’s constitutional courts after Opinion 2/13

Opinions on the future of the accession project differ. Many commentators stress the importance of accession¹¹⁵ while others regard renegotiations as highly unlikely after Opinion 2/13 – especially with regard to declarations of non-EU Member States of the ECHR.¹¹⁶ Some have argued that it is no longer worth pursuing accession, especially on the CJEU’s terms, because the human rights protection gap regarding acts of the EU, which the accession was intended to close, would remain.¹¹⁷ However, the importance of accession to enhance the legitimacy and to ensure the effectiveness and coherence of the human rights protection system in Europe has been stressed before and after Opinion 2/13.¹¹⁸ Other commentators proposed an accession in spite of the CJEU’s judgement through treaty amendments.¹¹⁹ It is, however, considered unlikely in the current political environment that all Member States would agree to such an amendment.¹²⁰

¹¹³ CANOR, note 112, pp. 406 f.

¹¹⁴ FRANZIUS, note 41, p. 409.

¹¹⁵ LOCK Tobias, “Oops! We did it again – das Gutachten des EuGH zum EMRK-Beitritt der EU“, *VerfBlog*, 2014/12/18, available at : <http://www.verfassungsblog.de/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/>; POLAKIEWICZ Jörg and BRIESKOVA Lucia, “It’s about Human Rights, Stupid!“, *VerfBlog*, 2015/3/12, available at : <http://www.verfassungsblog.de/its-about-human-rights-stupid/>.

¹¹⁶ TOMUSCHAT, note 8, p. 139, BREUER, note 8, p. 349 ; LAZOWSKI and WESSEL, note 87, pp. 206, 210.

¹¹⁷ DOUGLAS-SCOTT, note 6.

¹¹⁸ VOBKUHLE, note 1, p. 40 ; POLAKIEWICZ and BRIESKOVA note 115.

¹¹⁹ BESSELINK Leonard, “Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13“, in: *VerfBlog*, 2014/12/23, <http://www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213>.

¹²⁰ DOUGLAS-SCOTT, note 6; LAZOWSKI and WESSEL, note 87, p. 206.

As the analysis shows, dialogue and judicial concepts play a crucial part with or without accession. Therefore the CJEU's "No" to accession does not cause a crisis, although accession would have been desirable to facilitate the process of coordinating the different spheres of fundamental rights protection. This can still be achieved, but it will be a more arduous process. There are a few signs on further possible developments:

1. Strasbourg's answer to Opinion 2/13

Strasbourg gave its direct answer to Opinion 2/13 in its Annual Report where it expressed its "great disappointment" regarding the CJEU's ruling.¹²¹ The ECtHR also stated

"that the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each Member State. More than ever, therefore, the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation."¹²²

This could be an occasion to speculate on the ECtHR's possible intention to modify or even give up the *Bosphorus* principle in order to protect the "victims of Opinion 2/13".¹²³ It will be interesting to observe if the ECtHR's forthcoming judgments on issues related to EU law will be activist in this sense. To defy the CJEU on the next occasion seems risky, especially if the CJEU's intention is to develop its own case law on the rights protected by the Charter in order to become more independent from Strasbourg.¹²⁴ It has also been observed that the CJEU's references to the ECtHR's case law have decreased since the entry into force of the Charter.¹²⁵ All of this could lead to further divergences and thus more protection gaps for individuals. Furthermore, many scholars have doubted the CJEU's intention to protect fundamental rights effectively since the *Melloni* judgment¹²⁶, and even more since Opinion 2/13.¹²⁷ In the interest of individual rights a cooperative approach would be desirable. The approach adopted in *N.S. and M.E.* on the other hand could help to develop a doctrine of both: mutual trust and mutual control.

2. The role of the margin of appreciation

In any case the CJEU and the ECtHR have already developed mechanisms in order to solve conflicts with other legal orders. The ECtHR uses the *Bosphorus* principle in order to take Member State's international obligations into account. Although the CJEU's situation is

¹²¹ ECtHR, Annual Report 2014, p. 6, available at : http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf.

¹²² ECtHR, Annual Report 2014, note 114, p. 6.

¹²³ LOCK Tobias, "Schlägt das Imperium zurück? Die Straßburger Reaktion auf das EuGH-Gutachten zum EMRK-Beitritt", VerfBlog, 2015/1/30, available at : <http://www.verfassungsblog.de/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/>.

¹²⁴ This has been suggested by LAZOWSKI and WESSEL, note 87, pp. 180, 204, 209.

¹²⁵ DE BÚRCA Gráinne, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", Maastricht Journal of European and Comparative Law 2013, pp. 168-184, pp. 174-176.

¹²⁶ CJEU, case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], ECLI:EU:C:2013:107.

¹²⁷ PEERS, note 96.

different with regard to primacy and direct effect, an analogy of the *Bosphorus* principle or a horizontal *Solange* test could be useful.

In the relationship between the ECtHR and its Member States the balance between national legislative decisions and obligations under the ECHR is achieved through the margin of appreciation doctrine. The margin of appreciation is the doctrinal instrument to balance national public interest and external human rights review.¹²⁸ The margin of appreciation is also the doctrinal counterpart to institutional subsidiarity. This principle should be remembered when the CJEU fears the ECtHR's judicial activism in matters of EU law especially after the *Tarakhel* judgment. The CJEU's autonomy argument is similar to the sovereignty argument the UK government used against certain judgments from Strasbourg that were perceived as activist.¹²⁹ On the other hand, in the conflict with the UK the ECtHR has demonstrated its willingness to practice self-restraint.¹³⁰ Recently, subsidiarity has repeatedly been declared the ECtHR's motto.¹³¹ In the context of conflicts on certain decisions with the UK and other Member States the ECtHR now appears to be reformulating these concepts in a more restrictive manner.¹³² In analogy to the ECtHR's margin of appreciation doctrine the instrument of deference has also been suggested as a tool for the CJEU's judicial review.¹³³

Returning to the different categories of dialogue, the dialogue between the ECtHR and the CJEU and their Member States is to a great extent determined by the diagonal dialogue between the European Courts. Therefore the analogy of concepts such as the margin of appreciation or *Solange* in situations as *N.S. and M.E.* and *Tarakhel* can provide a solution as long as the institutional question cannot be resolved. In this sense, the reasoning of the CJEU in Opinion 2/13 should be reconsidered in the spirit of *N.S. and M.E.*: There should be no predetermined exemption from Strasbourg's review, but a horizontal *Solange* or *Bosphorus* principle could apply between Member States. The ECtHR in return, when reviewing EU law related issues, should leave a margin of appreciation for EU law and the CJEU's interpretation.

¹²⁸ On the mechanism and the current development in general: KRIEGER Heike, "Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?", *ZaöRV* 2014, pp. 187-213, pp. 202; pointing this out with regard to Opinion 2/13: BREUER Marten, "It's not about pluralism. It's about power politics!", in: *VerfBlog*, 2015/3/16, available at: <http://www.verfassungsblog.de/its-not-about-pluralism-its-about-power-politics>.

¹²⁹ The highly contested prisoners voting rights cases troubled the relationship between the UK and the ECtHR: App. no. 74025/01, *Hirst v. The UK* (No. 2) [2005] ; App. nos. 60041/08 and 60054/08, *Greens and M.T. v. The UK* [2011].

¹³⁰ See for instance the dialogue in ECtHR, App. No. 3455/05, *A and others v. the United Kingdom* [2009].

¹³¹ SPANO Robert, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", *Human Rights Law Review* 2014, pp. 1-16.

¹³² SPANO, note 132, pp. 6 and 12.

¹³³ GERARDS Janneke, "Pluralism, Deference and the Margin of Appreciation Doctrine", *ELJ* 2011, pp. 80-120.

3. Contradictory standards for national courts

National courts currently have to deal with the consequences of the conflict between Strasbourg and Luxembourg: A divergence between the two European courts directly affects national courts, as they have to apply contradictory standards.¹³⁴ The following overview of national court's interpretations of both European courts' standards also demonstrates the limits of judicial dialogue. In any case national courts always have to translate supranational standards into the respective national legal order.

The UK courts have recently dealt with the interpretation of the *Tarakhel* decision.¹³⁵ This has also occurred in the German administrative courts' decisions on Dublin transfers. Some considered that the asylum system in Italy was not deficient¹³⁶, others held that transfers to Italy were prohibited because of systemic deficiencies.¹³⁷ Before the *Tarakhel* decision, the Federal Administrative Court found that systemic deficiencies were the only exemption from a transfer to an EU Member State following the CJEU's *N.S. and M.E.* judgement.¹³⁸ After *Tarakhel* the administrative courts were left with the uncertainty of whether the authorities have to consider only the general situation of the asylum system in the state of first entry or if they have to examine the particular situation to which the applicant would be exposed. Some administrative courts follow the ECtHR and assess the individual situation of the asylum applicant¹³⁹, while others continue to assess only whether the receiving state's asylum system is deficient.¹⁴⁰ The latter also diverged in their conclusions: The administrative court of *Würzburg* held that the asylum system in Hungary was not deficient, whereas the administrative court of *Berlin* found that it was.¹⁴¹ The problem of contradictory standards shows the practical importance of another clarifying CJEU decision on this matter. However, the concept of systemic deficiencies or a test of mutual trust and mutual control provides at least a provisional solution.

V. Conclusion: the conflict in its broader context

It is not entirely coincidental that the current most controversial issue of European politics has also become the most controversial legal issue between Europe's courts. The case law on the Dublin system illustrates the limits of the interaction between Strasbourg and Luxembourg. While the conflict directly affects national courts when applying EU law and European human rights standards, Strasbourg and Luxembourg on the other hand are not

¹³⁴ FRANZIUS, note 108, p. 148.

¹³⁵ R (on the application of Weldegeber) v Secretary of State for the Home Department (Dublin Returns - Italy) (IJR) [2015] UKUT 70.

¹³⁶ VG Würzburg, B. v. 07.03. 2014 – W 6 S 14.30255 –, juris, paras. 13.

¹³⁷ VG Frankfurt, U. v. 09.07.2013 – 7 K 560/11 – juris, para. 20.

¹³⁸ BVerwG, B. v. 06.06.2014 – 10 B 35/14 – juris, para. 6.

¹³⁹ VG Düsseldorf, B. v. 28. 05. 2015 – 15 L 1602/15.A –, juris, para. 34.

¹⁴⁰ VG Würzburg, B. v. 02.01.2015 - W 1 S 14.50120 – juris; VG Berlin, B. v. 15.01.2015 – 23 L 899.14 A –, juris.

¹⁴¹ *Ibid.*

immune from the political developments in their Member States. The UK government might have welcomed Opinion 2/13 because accession would have made its plans to leave the ECHR and replace the Human Rights Act with a British Bill of Rights more complicated.¹⁴² The ECHR debate in the UK on the ECtHR's alleged claims to be a supreme court and on the protection of its own sovereignty do not only share a similar reasoning. Both debates are also based on the same misleading approach that a potential danger of activism or forum shopping on part of the ECtHR must be excluded through mechanisms in the treaties weakening the position of the ECtHR. If a new Accession Agreement followed the CJEU's conditions, this could set a bad example for non-EU Member States. They could feel encouraged to obtain similar privileges vis-à-vis the ECHR.¹⁴³

It has also been suggested that recent attempts by certain Member States under the leadership of the UK to weaken the ECtHR, within the system of the ECHR, might have been a motive for the CJEU to refused to participate in the "process of downgrading the ECHR", thus making a "wise political move" in times of a general European crisis and increasing Euroscepticism.¹⁴⁴ In any case the role of the Member States in the complicated relationships of the European constitutional order is not limited to the reception of Strasbourg's and Luxembourg's standards and bears its own conflicts. In the current political situation achieving balance between all of these actors seems more important than judicial activism.¹⁴⁵

Regarding these political circumstances the legitimising function of judicial dialogue must be remembered: Both courts have struggled in consolidating their legitimacy. In order to strengthen their authority they have to make concessions on their autonomy.¹⁴⁶ Whether the dialogue between Strasbourg and Luxembourg will fulfil this function, essentially depends on their ability to reconcile their substantive points of view and resolve the issues raised by Opinion 2/13. After making impossible demands in Opinion 2/13, the CJEU will now have to enter into dialogue with the ECtHR again in order to preserve both its autonomy and its authority.

The Dublin system case law represents the core of the matter. These cases show the possibility of divergences due to the plural legal instruments and different approaches of the two courts, but also the effort to achieve convergence in substantive questions as well as the development of concepts to achieve a balance on the level of competences.¹⁴⁷ The balance in substantive matters and the balance of competences are closely connected. In the current

¹⁴² LAZOWSKI and WESSEL, note 89, p. 207.

¹⁴³ MICHL Walther, "Thou shalt have no other courts before me", VerfBlog, 2014/12/23, available at : <http://www.verfassungsblog.de/thou-shalt-no-courts/>.

¹⁴⁴ SCHEININ Martin, "CJEU Opinion 2/13 – Three Mitigating Circumstances", VerfBlog, 2014/12/26, available at : <http://www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances>.

¹⁴⁵ NOLTE Georg, "Grenzen der Politik – am Beispiel der Menschenrechte", in Franzius Claudio /Mayer Franz C /Neyer Jürgen (eds), *Grenzen der europäischen Integration: Herausforderungen an Recht und Politik*, Baden-Baden, Nomos, 2014, pp. 145-148.

¹⁴⁶ KRISCH, note 41, p. 202.

¹⁴⁷ This is the conclusion of MORANO-FOADI / ANDREADAKIS, note 23, pp. 39, 41.

situation it seems that conflicts on the coordination of competences as well as substantial issues cannot be solved at the political level. The accession of the EU seems adjourned indefinitely after Opinion 2/13. The dialogue between the courts, however, is a powerful tool to resolve these issues. It is not isolated from communication with other actors. In fact it takes place through the dialogue with Member States. Divergences between Strasbourg (in *M.S.S.* and *Tarakhel*) and Luxembourg (*N.S. and M.E.* and *Abdullahi*) have therefore caused contradictory standards for national courts. A closer look at the CJEU's reasoning however reveals its proposal to coordinate the different layers of fundamental rights in a system of mutual trust and mutual control.

* * *

List of abbreviations

CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EU	European Union
Charter	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights and Fundamental Freedoms
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
para(s)	paragraph(s)

Bibliography

BESSELINK Leonard, *The Parameters of Constitutional Conflict after Melloni*, European Law Review 2014, pp. 531-552.

BESSELINK Leonard, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*, VerfBlog, 2014/12/23, <http://www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213>.

BREUER Marten, *‘Wasch mir den Pelz, aber mach mich nicht nass!’ Das zweite Gutachten des EuGH zum EMRK-Beitritt der Europäischen Union*, EuR 2015, pp. 330-351.

BREUER Marten, *It’s not about pluralism. It’s about power politics!*, VerfBlog, 2015/3/16, available at: <http://www.verfassungsblog.de/its-not-about-pluralism-its-about-power-politics>.

CALLEWAERT Johan, *To accede or not to accede: European protection of fundamental rights at the crossroads*, Journal européen des droits de l’homme 2014, pp. 496- 513.

CANOR Iris, *My Brothers’s Keeper? Horizontal Solange: An Ever Closer Distrust among the Peoples of Europe*, CML Rev. 2013, pp. 383-421.

CLAES Monica and DE VISSER Maartje, *Are You Networked Yet? On Dialogues in judicial networks*, ULR 2012, pp. 100-114.

DE BÚRCA Gráinne, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, Maastricht Journal of European and Comparative Law 2013, pp. 168-184.

DOUGLAS-SCOTT Sionaidh, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Rights Acquis*, CML Rev 2006, pp. 629-665.

DOUGLAS-SCOTT Sionaidh, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, VerfBlog, 2014/12/24, <http://www.verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/>.

DOUGLAS-SCOTT Sionaidh, *Opinion 2/13 and the ‘elephant in the room’: A response to Daniel Halberstam*, VerfBlog, 2015/3/13, available at : <http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam>.

EECKHOUT Piet, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?*, Jean Monnet Working Paper 1/2015, available at: <http://jeanmonnetprogram.org/paper/opinion-213-on-eu-accession-to-the-echr-and-judicial-dialogue-autonomy-or-autarky/>.

FRANZIUS Claudio, *Strategien der Grundrechtsoptimierung in Europa*, EuGRZ 2015, pp. 139-153.

FRANZIUS Claudio, *Grundrechtsschutz in Europa - Zwischen Selbstbehauptungen und Selbstbeschränkungen der Rechtsordnungen und ihrer Gerichte*, ZaöRV 2015, pp. 383-412.

GERARDS Janneke, *Pluralism, Deference and the Margin of Appreciation Doctrine*, ELJ 2011, pp. 80-120.

HALBERSTAM Daniel, *'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, German Law Journal 2015, pp. 105-146.

HALE Brenda, *Argentoratium Locutum: Is Strasbourg or the Supreme Court Supreme?*, Human Rights Law Review 2012, pp. 65-78.

KRIEGER Heike, *Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?*, ZaöRV 2014, pp. 187-213.

KRISCH Nico, *The Open Architecture of European Human Rights Law*, The Modern Law Review 2008, pp. 183-216.

LAZOWSKI Adam and WESSEL Ramses A, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, German Law Journal 2015, pp. 179-212.

LOCK Tobias, *The ECJ and the EctHR: The Future Relationship between the Two European Courts*, The Law and Practice of International Courts and Tribunals 2009, pp. 375-398.

LOCK Tobias, *Oops! We did it again – das Gutachten des EuGH zum EMRK-Beitritt der EU*, VerfBlog, 2014/12/18, available at : <http://www.verfassungsblog.de/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/>.

LOCK Tobias, *Schlägt das Imperium zurück? Die Straßburger Reaktion auf das EuGH-Gutachten zum EMRK-Beitritt*, VerfBlog, 2015/1/30, available at : <http://www.verfassungsblog.de/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/>.

MICHL Walther, *Thou shalt have no other courts before me*, VerfBlog, 2014/12/23, available at : <http://www.verfassungsblog.de/thou-shalt-no-courts/>.

MORANO-FOADI Sonia and ANDREADAKIS Stelios, *A Report on the Protection of Fundamental Rights in Europe: A reflection on the relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon*, Strasbourg 2014, available at : <https://dm.coe.int/CED20140017597>.

NOLTE Georg, *Grenzen der Politik – am Beispiel der Menschenrechte*, in Franzius Claudio /Mayer Franz C /Neyer Jürgen (eds), “Grenzen der europäischen Integration: Herausforderungen an Recht und Politik”, Baden-Baden, Nomos, 2014, pp. 145-148.

PEERS Steve, *Tarakhel v Switzerland: Another nail in the coffin of the Dublin system?*, EU Law Analysis, 05.11.2014, available at: <http://eulawanalysis.blogspot.co.uk/2014/11/tarakhel-v-switzerland-another-nail-in.html>.

PEERS Steve, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, EU Law Analysis, 18.12.2014, available at: <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>.

POLAKIEWICZ Jörg and BRIESKOVA Lucia, *It's about Human Rights, Stupid!*, VerfBlog, 2015/3/12, available at : <http://www.verfassungsblog.de/its-about-human-rights-stupid/>.

ROSAS Allan, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, EJLS 2007, available at: www.ejls.eu, pp. 1-16.

SCHEININ Martin, *CJEU Opinion 2/13 – Three Mitigating Circumstances*, VerfBlog, 2014/12/26, available at : <http://www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances/>.

SLAUGHTER Anne-Marie, *A Typology of Transjudicial Communication*, University of Richmond Law Review 1994, pp. 99-134.

SPANO Robert, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, Human Rights Law Review 2014, pp. 1-16.

TOMUSCHAT Christian, *Der Streit um die Auslegungshoheit: Die Autonomie der EU als Heiliger Gral*, EuGRZ 2015, pp. 133-139.

VON BOGDANDY Armin and IOANNIDIS Michael, *Das systemische Defizit - Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeits-aufsichtsverfahrens*, ZaöRV 2014, pp. 283 – 328.

VOBKUHLE Andreas, *Der europäische Verfassungsgerichtsverbund*, NVwZ 2010, pp. 1-8.

VOBKUHLE Andreas, *Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts*, Dialogue between judges 2014, available at: http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf, pp. 36-40.

WENDEL Mattias, *Menschenrechtliche Überstellungsverbote: Völkerrechtliche Grundlagen und verwaltungsrechtliche Konkretisierung*, DVBl 2015, pp. 731-741.

WENDEL Mattias, *Mehr Offenheit wagen! Eine kritische Annäherung an das Gutachten des EuGH zum EMRK-Beitritt*, VerfBlog, 2014/12/21, available at : <http://www.verfassungsblog.de/mehr-offenheit-wagen-eine-kritische-annaecherung-das-gutachten-des-eugh-zum-emrk-beitritt>.

Table of cases

CJEU

Case C-11/70, *Internationale Handelsgesellschaft* [1970], ECR I-1125.

Case C-36/75, *Rutili* [1975], ECR I-1219.

Case C-149-77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976], ECR I-455.

Case C-149/79, *Commission v Belgium* [1980], ECR I-3881.

Case C-13/94, *P v S* [1996], ECR I-2143.

Joined cases C-411/10, *N.S. v. Secretary of State for the Home Department*, and C-493/10, *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2012], ECLI:EU:C:2011:865.

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

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

Opinion 2/13, EU:C:2014:2454, 18 December 2014.

ECtHR

App. No. 6833/74, *Marckx v Belgium* [1979], A31, ECLI:CE:ECHR:1979:0613JUD000683374.

App. No. 13258/87, *M & Co. v The Federal Republic of Germany* [1990], Decisions and Reports No. 64, 138.

App. No. 24833/94, *Matthews v United Kingdom* [1999] Reports of Judgments and Decisions 1999-I, ECLI:CE:ECHR:1999:0218JUD002483394.

App. No. 28541/95, *Pellegrin v France* [2001], Reports of Judgments and Decisions 1999-VIII, ECLI:CE:ECHR:1999:1208JUD002854195.

App. No. 28957/95, *Goodwin v UK* [2002], ECLI:CE:ECHR:2002:0711JUD002895795.

App. No. 45036/98, *Bosphorus Hava Yollari Turizm v Ireland* [2005], Reports of Judgments and Decisions 2005-VI, ECLI:CE:ECHR:2005:0630JUD004503698.

App. No. 74025/01, *Hirst v. The UK (No. 2)* [2005], ECLI:CE:ECHR:2005:1006JUD007402501.

App. No. 3455/05, *A and others v. the United Kingdom* [2009], ECLI:CE:ECHR:2009:0219JUD000345505.

App. Nos. 60041/08 and 60054/08, *Greens and M.T. v. The UK* [2011]. ECLI:CE:ECHR:2010:1123JUD006004108.

App. No. 17120/90, *Dhabbi v Italy* [2014], ECLI:CE:ECHR:2014:0408JUD001712009.

App. No. 29217/12 *Tarakbel v Switzerland* [2014], ECLI:CE:ECHR:2014:1104JUD002921712.

UK Courts

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

R (on the application of Weldegaber) v Secretary of State for the Home Department (Dublin Returns - Italy) (IJR) [2015] UKUT 70.

German courts

BVerwG, B. v. 06.06.2014 – 10 B 35/14 – juris.

VG Frankfurt, U. v. 09.07.2013 – 7 K 560/11 – juris.

VG Würzburg, B. v. 07.03. 2014 – W 6 S 14.30255 –, juris.

VG Würzburg, B. v. 02.01.2015 - W 1 S 14.50120 – juris.

VG Berlin, B. v. 15.01.2015 – 23 L 899.14 A –.

VG Düsseldorf, B. v. 28. 05. 2015 – 15 L 1602/15.A –, juris.

Other documents

High Level Conference on the Future of the European Court of Human Rights. The Brighton Declaration, 20 April 2012 ; available at <https://wcd.coe.int/View-Doc.jsp?Ref=BrightonDeclaration&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

BRATZA Nicholas, President of the European Court of Human Rights, High level Conference, Brighton 18-20 April 2012, Draft speaking notes, available at: <http://hub.coe.int/20120419-nicolas-bratza>.



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