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The relationship between the ECHR and the EU

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Introduction

On 18 December 2014, the Court of Justice of the European Union ('CJEU') delivered Opinion 2/13. It found that the draft agreement on the accession of the European Union ('EU') to the European Convention on Human Rights ('ECHR') – the product of protracted and (sometimes) bitter negotiations between the Council of Europe and the EU – was incompatible with the treaties and could not proceed to the next stage.[i] This was not the first time the CJEU had vetoed the establishment of another court with parallel and complementary jurisdiction to that of the CJEU - perhaps even perceived as competing with it!)

With hindsight these earlier opinions should have indicated which way the CJEU would go in Opinion 2/13. Nevertheless, for many people it still came as a shock.

Brief – and simplified – overview of the background

The EU (and before it the European Community) had a somewhat chequered relationship with fundamental rights. Two matters were key: the absence from the original European Treaties of any catalogue of fundamental rights and the ECJ's insistence on the supremacy of EU (as it now is) law. In the landmark case of *Internationale Handelsgesellschaft mbH*, the ECJ held:

"The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of the national constitutional structure."[ii]

In *Nold*, the ECJ stated:

"International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."[iii]

Twenty years later in *Kremzow,Case C- 299/95* {1997] it went on to hold that the ECHR has "special significance" and that measures are not acceptable in the Community which are incompatible with the observance of human rights recognised and guaranteed by the ECHR.

These dicta have a somewhat hollow resonance in the light of Opinion 2/13 discussed below

By 1994, the suggestion had been made that the EU should accede to the ECHR. Opinion 2/94 of the ECJ, as it then was, now the CJEU, concerning the accession by the EU to the ECHR was sought as to the legality of such a proposal.[iv] The negative answer of the Court was generally – although as it turns out erroneously - perceived to rest on the fact that such an accession *"could be brought about only by way of Treaty amendment".*[v]

With hindsight, the other aspects of the brief Opinion 2/94 should have been noted more diligently, in particular:

"where it is a matter of ruling on the compatibility of provisions of an envisaged agreement with the rules of the Treaty, it is necessary for the Court to have sufficient information about the actual terms of the agreement …..in particular as to the solutions envisaged to give effect in practice to submission by the Community to the present and future judicial control machinery established by the Convention

The text of Opinion 2/94 nevertheless lulled many into thinking that, once the Union had collectively decided to amend the treaties to open the door for accession, a carefully negotiated accession agreement would go forward. This was, of course, as we now know, not to be the case.

In 2000, the Charter of Fundamental Rights of the European Union ('CFR') was "solemnly proclaimed" in Nice. The Charter brought together the rights recognised in the ECHR and the rights of the European Social Charter and introduced some new rights such as the right to asylum (Art 18) and the right to good administration (Art 41). But the solemnity of its proclamation did not make it legally binding or justiciable. Fast-forward to the Lisbon Treaty which made the Charter a part of EU law and accorded it equal status with the treaties themselves. The Treaty amendment which was designed to meet the concerns voiced by the ECJ in Opinion 2/94 was duly adopted.

Article 6(2) of the Treaty on European Union ('TEU') now provides that:
The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

The treaty amendment went further than necessary. The text of 6(2) TEU says that the Union ***shall*** accede and not that the Union ***may*** accede, in contrast to the facilitating language of the corresponding provision of the ECHR.[vi] This mandatory language has placed the Union in a very difficult position as it would appear to be under a treaty obligation to negotiate an accession solution which is acceptable both to the Member States of the Council of Europe and to the CJEU.

Protocol 8 to the Lisbon Treaty states that: The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "European Convention") provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2
The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect

the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

Article 3
Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

So Protocol 8 was intended to ensure the preservation of the specific characteristics of EU law in the context of accession.

The Council of Europe comprises 47 States, 28 of which are also EU Member States, 19 are not. To facilitate accession, treaty amendments from the Council of Europe side were also necessary and the possibility for the EU (not a state) to accede to the ECHR was amongst the many reforms included in Protocol 14 to the ECHR. The Convention now simply states (in Article 59(2)) that: "The European Union ***may*** accede to this Convention".

Only the accession of the EU was contemplated, not the accession of EFTA (the organisation in a parallel agreement between Iceland Liechtenstein Norway and Switzerland, of which the UK was a member prior to joining the European Community). The laws implemented through EFTA are largely those taken over from the EU, but the EFTA Surveillance Authority (the EFTA equivalent of the EU Commission) was not included in the accession negotiations and does not appear even to have been consulted (though this was raised with the Commission on a number of occasions during the negotiations). This was an all the more bizarre omission since EFTA forms a bridge between the EU and several of the non-EU Member States of the Council of Europe and EFTA already has free trade arrangements with Albania Bosnia and Herzegovina, Macedonia, Montenegro Serbia Turkey and Ukraine. It is an omission which may assume a greater importance if BREXIT were to go ahead. Paradoxically there are many provisions of EU law in which the UK – even now as a notionally "full" member of the Union - does not participate, but which EFTA has adopted. It is difficult to see how a meaningful relationship between the UK and the current EFTA states could come into existence which would permit the UK to retain it's opt outs from many of the provisions of EU law which have been adopted by EFTA.

EFTA has its own Court which – broadly – fulfils the same role vis a vis EFTA as the CJEU does vis a vis the EU. Like the CJEU it sits in Luxembourg. It has delivered some significant judgments on free movement of persons on the right of establishment and on non-discrimination (see e.g. Clauder case E-04/11 on the right of residence for family members of persons with permanent residence and Wahl E-15/12. And Kottke E -05/10)

EFTA also has its own Parliament.

All the EFTA countries are members of Schengen, but EFTA does not participate in EU Freedom Justice and Security measures such as the Common European Asylum System although all the EFTA countries have (by bilateral agreements) joined the Dublin Regulation scheme (cf ECtHR Tarakhel v Switzerland). They are not however bound by the other measures of the asylum *acquis*

In another parallel to EFTA is the EEA agreement. The EEA states are the EU and the EFTA states minus Switzerland. It is an agreement but not an organisation or association like EFTA. It might – theoretically - be possible for the UK to join the EEA without becoming an EFTA member, but it is difficult to see how this would work in practice.

Opinion 2/13 – Accession of the EU to the ECHR

On 18 December 2014, in what has been described as the Christmas bombshell, Opinion 2/13 was delivered. The CJEU found:

"the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms."[vii]

It also said:

"If, in the opinion of the Court of Justice, any agreement relating to the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms authorises Member States to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than its final resolution by the Court of Justice, then this does not provide a lawful basis for the EU to accede to the ECHR."

The Opinion appeared to have lost sight of the object and purpose of accession, as mandated by the Lisbon Treaty, which was precisely to bring the acts and omissions of the Union under the ***judicial*** scrutiny of the ECtHR and thereby fill the gap in judicial accountability that exists within the EU legal order. This gap is an irony, given that effective judicial protection is a fundamental tenet of EU law and reflected in Article 47 of the CFR. The existence of this gap (as will be discussed below) has only recently been confirmed and buttressed by the CJEU itself in its decisions in e.g. *Inuit* and *AMS*.[viii]

Effectively what we have in Opinion 2/13 is a claim by the Court of Justice that it is 'Master of the Treaties' and a declaration that it will refuse to recognise the lawfulness of any agreement among the Member States which might threaten to displace the Court of Justice as the apex Court for the European Union.[ix]

At an earlier stage on the negotiations with the Council of Europe, it had originally been proposed that the CJEU would participate in the work of the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons, acting as a preparatory body of the Council, ('FREMP') on accession

"On 7 January 2010, the Permanent Representatives Committee, approved the participation, as an observer, of a delegate from the Court of Justice of the European Union in the meetings of the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons, throughout the duration of the discussions on the draft recommendation for the opening of the negotiations for the accession of the European Union to the European Convention on Human Rights, on the basis of document 17807/09 JAI 948 INST 255.

Bearing in mind that the Council Decision authorising the Commission to negotiate the Accession agreement and the relevant negotiating directives have been adopted by the JHA Council on 4 June 2010, ***the participation as an observer of a delegate from the Court of Justice for the duration of the negotiation process for the Accession agreement, is not anymore possible****".*[x] *(emphasis added)*

Although it was the Commission that was given the mandate to negotiate the agreement with the Council of Europe the EU Council did however foresee the possibility that a delegate of the CJEU should nevertheless be permitted to participate at FREMP meetings "to the extent that his expertise would be required".

In May 2010, the Court of Justice issued a discussion document.[xi] The presidents of the two courts subsequently issued a joint communication in January 2011.[xii] Both of these documents, and the CJEU's participation (albeit limited) in the Council discussions in FREMP would have appeared to clear the path for the – tortuously negotiated – accession agreement to be given the green light by the Court.

Few were thus prepared (even after the acrimonious hearing in Luxembourg) for the outright rejection of the draft agreement by the Court and even less prepared for the terms of that rejection to be such that – absent some kind of improbable *volte face* by the Court – the prospect of any renegotiated agreement being reached are now slim. This is firstly because the non-EU Member States of the Council of Europe had bent over backwards to accommodate the EU's concerns in the negotiation process and, with great difficulty, reached the compromise draft eventually concluded and secondly because what appetite there was in Strasbourg for the accession of the EU has now largely gone. Those entrusted with the negotiation process are justifiably unlikely to spend months on a renegotiation only to have the fruits of their labours rejected again.

Professor Daniel Halberstam of the University of Michigan Law School is one of the few academic authors to attempt to justify the Court's approach. In his scholarly and reasonable paper he says:

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

Following its decision in *Melloni*,[xiv] Opinion 2/13 now overtly objects in principle to Article 53 ECHR which ensures that nothing in the ECHR shall be construed as limiting or derogating from any of the rights ensured under the laws of any party or under any other agreement to which it is a party. The Court suggests that this important provision of the ECHR must – in respect of the EU – defer to the primacy, unity, and effectiveness of EU law.

The EU from the perspective of the ECtHR

The key decision in ECHR law on the question of the relationship between EU law and the Convention remains *Bosphorus Airways*.[xv] The relevant findings in that case may be summarised as follows: the Court confirmed that Contracting Parties to the ECHR remain fully responsible for their acts which fall within the remit of their international obligations;[xvi] absolving Contracting States completely from their Convention responsibility in the areas covered by a transfer of sovereignty to an international organisation would be incompatible with the object and purpose of the Convention.[xvii] Action taken in compliance with legal obligations derived from membership of such an organisation is justified as long as the organisation is considered to protect fundamental rights in a manner, which can be considered at least equivalent to that for which the Convention provides.[xviii] In such circumstances the presumption will be 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.[xix] Where it retains discretion, it will remain responsible for the exercise of that discretion and must exercise it in accordance with the ordinary requirements of the Convention.

Long before the Court's famous judgment in *Bosphorus*, the European Commission of Human Rights held that "if a State contracts a treaty obligation and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty."[xx] In *Austria v Italy*, the Commission held that was particularly so where the obligations in question had been assumed under the ECHR whose guarantees affect "the public order of Europe."[xxi]

The European Court of Human Rights ('ECtHR') does not determine the content of national law, but the Court will question the interpretation of domestic law by the national courts in the event of "evident arbitrariness" or "when it observes that the domestic courts have applied law in a particular case manifestly erroneously", or so as to reach arbitrary conclusions and/or a denial of justice.[xxii]

Although the ECtHR similarly does not determine the content of EU law, it will – if necessary for its consideration of whether there has been a violation of the Convention – also consider whether the national authorities failed to comply with, or "manifestly erroneously" applied any applicable EU law.[xxiii]

Determining the *content* of EU law is the prerogative of the CJEU. The CJEU has the opportunity to do so by way of preliminary references made by the national courts under Article 267 of the TFEU. Such references are obligatory if there is any uncertainty as to the content of EU law and the national court is a court of final instance. The Strasbourg Court has recently held in *Dhahbi*[xxiv] and *Schipani*[xxv] that where a national court decides not to make a reference in such circumstances it must give reasons for that decision in order comply with Article 6 of the ECHR.

The CJEU has since held itself in *Ferreira da Silva e Brita*:

"It follows that, in circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level [regarding the concept of a 'transfer of a business' within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law."[xxvi]

The ECtHR is regularly and increasingly required to consider whether the action taken by Member States in matters regulated by EU law is compatible with the State's obligations under the Convention. The European Commission is of course at liberty – were it to choose to do so – to ask to intervene, or to respond positively to an invitation by the Strasbourg Court to intervene, as a third party in any case involving EU law that comes before the ECtHR.[xxvii]

Since *Bosphorus* it has only very rarely done so: in *Artemi and Gregory*[xxviii] and, most recently, in *Avotins.*[xxix] Interestingly, the EU Commission's request to intervene in *Avotins* was submitted on the same day – 18 December 2014 – as the CJEU delivered its negative Opinion 2/13 on EU accession.[xxx] Coincidence?

The Strasbourg Court can be called upon to consider the interface between EU law and the ECHR in a number of situations. Sometimes EU law requires a State to act (or refrain from acting) in a way, which strengthens and reinforces Convention rights. It is the EU measures either directly (Regulations) – or as transposed into national law (Directives) – which will dictate whether or not an act or omission is "in accordance with the law" where that is a requirement of ECHR compliance (e.g. the issue of residence permits, the compliance with the various measures of the EU asylum acquis, and the return of "abducted" children under the Brussels II Bis Regulation).

Opinion 2/13 was drafted after a two-day hearing in Luxembourg, in which the Commission, the Council, the Parliament and 24 Member States participated.[xxxi] Some of them expressed some concerns, but all in the end recommended that the agreement should go through. The Advocate General's very detailed and thorough "View" was delivered shortly after the hearing but only published together with the Opinion itself.[xxxii] After an extensive analysis of some difficulties that would have to be overcome, she too recommended acceptance of the agreement. The Opinion analysed the elements of the draft Agreement in detail including in particular those parts that had been subject to the most intensive submissions by the EU delegate to the negotiations – such as the co-respondent mechanism and the procedure for prior referrals to the CJEU.

For Strasbourg lawyers, the most contentious part of the Opinion is found in paragraphs 191-194 relating to "mutual trust". The Strasbourg Court has always been very respectful of international comity[xxxiii] and in particular the principle of mutual trust running through much of

EU law. But the Court has also held that this respect for mutual trust cannot be blind. As President Spielmann noted in his formal address at the opening of the judicial year in 2015:

"The important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution. Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations."[xxxiv]

The enforcement of foreign judgments is one aspect of this. The ECtHR unanimously held in *Pellegrini* that the guarantees of Article 6 were violated by the failure of the Italian courts, before enforcing the Roman Rota's judgment annulling a marriage, to satisfy themselves that the relevant proceedings in the Roman Rota were Article 6 compliant.[xxxv] This approach sits uncomfortably with the provision of the Brussels I Regulation,[xxxvi] which requires near automatic execution of the judgments of other Member States.

In *X v Latvia*, the Grand Chamber found that before returning a child under the 1980 Hague Convention on the Civil Aspects of international Child Abduction the returning State was under a duty to ensure that the necessary investigations had been carried out to guarantee the well being of the child being returned.[xxxvii] The Brussels II bis (Regulation 2201/2003) is the intra EU version of the Hague Convention. It seems inconceivable that the Strasbourg Court would not feel constrained to show the same diligence in relation to safeguarding a child's welfare in a Brussels II bis return.

An example at national level is found in an Irish case in which the High Court refused execution of a European Arrest Warrant from Romania on account of having substantial grounds for believing the trial at which she had been convicted 16 years ago amounted to a flagrant denial of justice.[xxxviii] The Court held there was a wide practice of discrimination against Roma in Romania; there were reasonable grounds for believing that the respondent, who was Roma and illiterate, had suffered discrimination such that her surrender and imprisonment would mean that she is being treated less favourably than a person who is not of her ethnic origin.

The Strasbourg Court's approach to the *Bosphorus* principle set out above has needed some modification in the light of some recent decisions by the CJEU. A few examples will suffice.

The *Melloni* case concerned the surrender under a European Arrest Warrant of an individual from Spain to Italy to serve a sentence imposed on him after trial in absentia.[xxxix] The CJEU held that the provision of the Spanish Constitution, which prohibited this, had to be disapplied. The substantive human rights at issue were not the problem – the ECHR permitted such returns – the problem was the approach of the CJEU. In stark contrast to the provisions of Article 53 ECHR, the CJEU found categorically that States were not permitted to offer more generous human rights protection than EU law provided.

In *AMS v Union Locale des syndicats CGT and others*, the CJEU chose to miss an opportunity to strengthen the role of the EU Charter of Fundamental Rights. Although the Directive in question (Directive 2002/14) had been adopted with a view to giving effect in secondary EU law to Article 27 of the CFR, it rejected the carefully reasoned opinion of Advocate General Villalón, and found that the human rights protection of the provisions of the Charter were inapplicable to disputes between private parties under that Directive.[xl]

In *Inuit Tapariit Kanatami*, the CJEU re-affirmed the lack of standing of legal persons to challenge a decision depriving them of their livelihood, and found that Article 47 of the CFR (right to an effective remedy) did not require there to be any means of challenging such a decision before the EU courts.[xli]

In the CJEU Opinion 2/13 on the Draft Accession Agreement, the Court stated:

191. ….it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in N. S. and Others, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and Melloni, EU:C:2013:107, paragraphs 37 and 63).

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

193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

194. 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.

Experience shows it is far from only being in "exceptional circumstances"[xlii] that Member States fail to comply with EU law.[xliii] It is also far from exceptional that they fail to comply with fundamental rights.[xliv] In 2014 alone, in cases brought against Member States of the EU, the ECtHR found a total of 111 violations of Article 3, (the absolute prohibition of torture and inhuman and degrading treatment), 73 violations of Article 5 (the right to liberty and security) and 183 violations of Article 6 (the right to a fair trial).[xlv] Some problems are chronic and systemic.[xlvi] National courts have no difficulty in recognising that such violations are either systemic or systematic, or that, absent *ad hominem* guarantees, respect for ECHR rights is at best a lottery.[xlvii]

The statement of the position in EU law contained in paragraph 192 of Opinion 2/13 is inherently at odds with the protection of human rights guaranteed by the ECHR. The Strasbourg Court considers that where evidence is adduced indicating the existence of a failure to comply with both EU law and the Convention, the national authorities are required to verify the actual situation.[xlviii] Where the return of an individual to a situation with an arguably real risk of a violation of convention rights – in particular Articles 2, 3, 5, 6, and 8 – the sending State is not only permitted but **required** to satisfy itself that the individual will not be exposed to such a risk and/or to take the necessary steps to prevent it.[xlix] The reverse is also true. Where there is a real risk that a judicial decision in one Member State is unsafe because the safeguards of Article 6 ECHR are not (or are plausibly alleged not to have been) respected, the Contracting Party to the ECHR is required to verify the allegation. The Court made this clear in *Pellegrini*.[l]

This approach has recently been re-visited in the case of *Avotins*, judgment in which was delivered in May 2016. The Court considered the *Bosphorus* principle in the light of the dicta quoted above in paras 191 to 194 of Opinion 2/13 an din particular the words in para 192 that are in bold. The ECtHR considered that limiting to exceptional cases the power of the state in which recognition is sought to review the compliance with human rights by the state of origin could run counter to the Convention. The national court must at least be empowered to conduct a review which is commensurate with the gravity of the violation of human rights in the state of origin which has been alleged. The mutual recognition mechanism must not leave any gap which would render the protection of Convention rights manifestly deficient and that deficiency cannot be remedied by EU law. It is the ECtHR's duty to verify that the principle of mutual recognition is not applied automatically or mechanically to the detriment of fundamental rights.

Another recent opinion of the Court of Justice is also instructive.[li] It concerns the accession to the Hague Convention on the Civil Aspects of International Child Abduction. The Convention has 68 parties worldwide and is the prime instrument globally for effecting the return of children who have been unlawfully removed or retained in another jurisdiction to their original jurisdiction. The parallel internal EU measure Regulation 2201/2003 ("Brussels II bis") applies only to the return of children **between two EU Member States**.[lii] The accession of the new parties to the Hague Convention would enable children who had been wrongfully removed or retained to return to the appropriate jurisdiction. Shortly before its ruling in Opinion 2/13 on EU accession to the ECHR, the CJEU also ruled that the acceptance of a third State as a party to the Hague Convention (by any of the Member States of the EU) was a matter of "exclusive EU competence". The Court concluded that the accession of new States to the Hague Convention (not to the EU measure, which is not possible) was a matter of exclusive EU competence as it might "affect common rules or alter their scope." At the hearing, the Belgian, Czech, German, Estonian, Irish, Greek, Spanish, French, Cypriot, Latvian, Lithuanian, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish, and United Kingdom Governments (19 States) and the Council maintained that the EU did not have exclusive external competence in this matter. Additionally, the Greek, French, and Polish Governments maintained that the EU had no competence at all in this matter. The only State, which considered that the matter fell exclusively within EU competence, was Italy (8 States expressed no view).

As a consequence of this Opinion, Member States of the EU are now bound to accept the EU's decision about which third States accede to the Hague Convention – with the attendant consequences for cases before ECtHR in relation to abducted children. In the event of BREXIT this obligation will continue to bind the other 27 MS of the EU with the knock on effect on the UK.

Some final thoughts

Measures adopted at EU level, which to a greater or lesser degree and in one version or another, already bind the UK include for example the EU asylum acquis, the provisions on freedom of movement, the cross border criminal justice acquis, all the many other mutual recognition measures such as Brussels 1[liii], and Brussels II, and the data protection directives. The ECtHR already takes them into account when deciding whether the acts and omissions of EU states are compatible with their obligations under the ECHR. Sometimes non-EU MS will have opted in to EU measures [liv] Sometimes it takes into account measures which have been widely adopted across Europe (but not by the specific state in question) to inform its jurisprudence on particular provisions of the ECHR[lv] irrespective of whether the state is an EU member state or not . Many Council of Europe countries which are candidates for accession to the EU are in the process of expressly harmonising their national laws with EU law so that the reach of EU law is now goes far beyond the confines of EU membership. It will be decades before the UK can disentangle measures derived from EU law from non-EU derived national law if BREXIT occurs. The aborted accession of the EU to the ECHR would have enabled individuals who were victims of violations of the ECHR occasioned by the acts and omissions

of the EU to seek the redress from Strasbourg they cannot obtain in Luxembourg (see para 46 above) Now they must rely on Strasbourg alone to provide remedies for EU law inspired acts and omissions of national authorities. One of the many as yet unanswered post BREXIT, questions .(and not answered by the recent judgment in *Avotins*) – is whether absent EU accession to the ECHR , the *Bosphorus* defence can still hold good in cases which might be brought against two European states , in relation to the same provisions of national law - one of which remains bound by EU law and one of which does not.

References

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[ii] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Corratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 3.
[iii] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft* [1974] ECR 00491, para 13.
[iv] Opinion 2/94 of the Court of 28 March 1996 EU:C:1996:140, [1996] ECR I-01759.
[v] ibid para 35.
[vi] See below.
[vii] Opinion 2/13, para 258.
[viii] Case C-176 *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)* [2014] ECR I-00000; Case 583/11 *Inuit Tapariit Kanatami and Others v Parliament and Council* [2013] ECR I-nyr.

[ix] Aidan O'Neill, 'Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty' (Eutopia Law, 18 December 2014) <http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/> accessed 1 December 2015.

[x] Council of the European Union, 'Request for the participation of a delegate of the Court of Justice of the European Union as an observer, at the next consultations with the Member States, pertaining to the accession of the European Union to the European Convention on Human Rights (ECHR)' [2010] 13714/10 JAI 747 INST 333, p 1.

[xi] CJEU, 'Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (5 May 2010) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf> accessed 1 December 2015.

[xii] *Joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, further to the meeting between the two courts in January 2011* (24 January 2011) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 1 December 2015.

[xiii] Daniel Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 of EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105; U of Michigan Public Law Research Paper No. 439, p.8.
[xiv] See below.
[xv] Case 45036/98 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] 42 EHRR 1.
[xvi] ibid para 153.
[xvii] ibid para 154.
[xviii] ibid para 155.
[xix] ibid para 156.
[xx] Case 235/56 *X v Germany* [1958] ECHR, Series A, p. 256.

[xxi] Case 788/60 *Austria v Italy* [1961] ECHR 4 YB, p. 20 (A).
[xxii] *Anđelković v Serbia* App no 1401/08 (ECtHR, 9 April 2013).
[xxiii] See, e.g., Case 30696/09 *M.S.S. v Belgium and Greece* [2011] ECHR 108.

[xxiv] *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014).
[xxv] *Schipani and Others v Italy* App no 38369/09 (ECtHR, 21 July 2015).
[xxvi] Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015] ECR I-nyr, para 44.
[xxvii] ECHR, art 36.

[xxviii] *Artemi and Gregory v Cyprus, Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Sweden* App no 35524/06 (ECtHR, 30 September 2010).
[xxix] *Avotiņš v Latvia* App no 17502/02 (ECtHR, 25 February 2014) (Grand Chamber pending- judgment expected summer 2016).
[xxx] The AIRE Centre has submitted a third party intervention in *Avotins*
[xxxi] The Member States who did not participate did not voice any objection to the agreement.

[xxxii] Opinion 2/13 of the Court of 18 December 2014 EU:C:2014:2454, [2014] ECR I-nyr, View of AG Kokott.
[xxxiii] See, e.g., Case 14038/88 *Soering v UK* [1989] 11 EHRR 439.
[xxxiv] Dean Spielmann, "Solemn hearing for the opening of the judicial year of the European Court of Human Rights," ECHR (30 January 2015).
[xxxv] Case 30882/96 *Pellegrini v Italy* [2001] ECHR Rep VIII 369.

[xxxvi] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1; 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 (recast) [2012] OJ L351/1.
[xxxvii] Case 27853/09 *X v Latvia* [2012] ECHR 1 FLR 860.

[xxxviii] *The Minister for Justice and Equality v Magdalena Rostas* [2014] IEHC 391.
[xxxix] Case 399/11 *Melloni v Ministerio Fiscal* [2013] ECR I-00000.
[xl] Case C-176 *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)* [2014] ECR I-00000.
[xli] In Case 583/11 *Inuit Tapariit Kanatami and Others v Parliament and Council* [2013] ECR I-nyr.
[xlii] Opinion 2/13, para 191.
[xliii] See, e.g., 31st Annual Report on Monitoring The Application of EU Law (noting that in 2013 the European Commission launched 761 infringement proceedings against Member States).
[xliv] Opinion 2/13, para 192.
[xlv] ECHR Statistics 2014.
[xlvi] See, e.g., Case 43517/09 *Torreggiani and Others v Italy* [2013] ECHR 007 (in relation to prison conditions in Italy which violate Article 3), and most recently Varga and Others v. Hungary, ECHR 077 (10/3/2015), and Halil Adem Hasan v. Bulgaria, ECHR 074 (10/3/15).

[xlvii] See, e.g., Case 29217/12 *Tarakhel v Switzerland* [2014] ECHR 1185.

[xlviii] Case 30696/09 *M.S.S. v Belgium and Greece* [2011] ECHR 108, para 359.
[xlix] See, e.g., Case 30696/09 *M.S.S. v Belgium and Greece* [2011] ECHR 108; Case 29217/12 *Tarakhel v Switzerland* [2014] ECHR 1185; Case 27853/09 *X v Latvia* [2012] ECHR 1 FLR 860.

[l] Case T-375/07 *Rosario Maria Pellegrini v Commission of the European Communities* [2008] ECR II-00001.
[li] Opinion 1/13 of the Court of 14 October 2014 EU:C:2014:2303, [2014] ECR I-nyr.
[lii] Council Regulation (EC) No 2201/203 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1.
[liii] See fn 36 above
[liv] see e.g Tarakhel v Switzerland
[lv] see e.g. Demir and Baykara v Turkey