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When a Fence Becomes a Cage: The Principle of  
Autonomy in EU External Relations Law

Jed Odermatt



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## **Abstract**

In *Opinion 2/13* the Court of Justice of the European Union found that the draft agreement on the EU's accession to the European Convention on Human Rights was "liable adversely to affect the specific characteristics of EU law and its autonomy." The Court in recent years has applied the principle of autonomy – a concept first developed regarding the relationship between the EU and its Member States – to the EU's relationship with third states and international organizations. The EU's increased interaction with external actors raises questions regarding the effects this might have on the integrity and unity of EU law and the EU legal order. What exactly does the principle of autonomy entail in EU external relations law? This Working Paper examines the case-law in which the Court has applied the principle of autonomy and argues that the principle is a more broad and all-compassing structural principle than is often presented. The Court's focus is almost entirely on what might be called the negative dimension of autonomy; it is about ensuring that the EU legal order is protected from external threats. It is less concerned, however, with the positive dimension of autonomy, which entails providing the EU with the ability to act effectively as a distinct actor on the international stage.

## **Keywords**

Principle of Autonomy, Court of Justice of the European Union, European Union, External Relations Law, Opinion 2/13

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## Introduction

Autonomy means self-rule. An entity that possesses autonomy has the ability to choose a path for itself, without the influence, direction and control of others. Autonomy, however, is not absolute. It does not so much describe an absolute quality of an entity, but the relationship of that entity with others, and in particular the ability of that entity to define this relationship.<sup>1</sup> A legal body, such as the European Union, is “autonomous” in relation to other actors or another legal order. In the context of the EU, the concept of autonomy is closely tied to the notion of the EU as a “new legal order”,<sup>2</sup> one of the foundational myths that were used to develop the building blocks of the Union legal order, such as direct effect and primacy. From its early days, this concept of internal autonomy—the idea that the EU is not only a new legal order, but also one that is distinct from its Member States – was instrumental in developing this EU legal order. As the EU developed greater external competences, and increased its interaction with external actors, questions arose regarding the EU’s relationship with third states and other organizations and the effects that this might have on EU law. It was in this context that the Court of Justice of the European Union (CJEU) turned towards external autonomy, that is, the idea that the integrity of EU law and the EU legal order should not be undermined by the international action of the Union or the Member States. While the internal and external elements of autonomy are closely entwined, this working paper focuses on the external element, an issue that is now an important one in the law of EU external relations.

The EU Treaties do not refer explicitly to the principle of autonomy, and it has mostly been developed through the jurisprudence of the CJEU. Although the term has only been employed in more recent case law, the principle has a longer history. Early discussions about the principle of autonomy focused on this internal threat, that is, the EU’s autonomy vis-à-vis its Member States. One can see how it would be difficult to develop an EU legal order if the Member States were able to dismiss EU law because it conflicts with their own legal systems or national legislation. The concept of autonomy was therefore important in developing the principles of direct effect and primacy, which are based on the idea that the EU represents a new legal order, one that differs from the system of public international law. Barents argues, for instance, that “[a]lthough the EC is based on a document which bears the name “treaty”, this has but a formal meaning. In a material sense the EC Treaty has the character of an autonomous constitution and, as a result, it constitutes the exclusive source of Community law.”<sup>3</sup> In *Costa*, the Court refers to EU law as “an independent source of law”<sup>4</sup> and makes a strong link between this idea of the EU as a “new legal order” and the concept of autonomy. The fact that the Union had legal personality and powers, exercised independently of the EU Member States, was not always self-evident, and had to be developed over time. The idea of the EU legal order as autonomous and independent played a significant role in this development.

The focus on internal autonomy gave way to a protection of the external dimension of autonomy. The EU further developed its relations with external actors and has participated in its own right at the international level; it seeks to influence, and is influenced by, its complex interactions with

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<sup>1</sup> B. de Witte, ‘European Union Law: How Autonomous is its Legal Order?’ 65 *Zeitschrift für öffentliches Recht* (2010) 141, 142: “the autonomy of EU law is not absolute but relative; it does not mean that EU law has ceased to depend, for its validity and effective application, on the national law of its member states, nor that it has ceased to belong to international law.” In this discussion on autonomy, ‘self-rule’ does not refer to the issue of kompetenz-kompetenz whereby a Court has the competence to decide upon the extent of its jurisdiction.

<sup>2</sup> Judgment in *Van Gend en Loos v Administratie der Belastingen*, C-26/62, EU:C:1963:1: “the Community constitutes a new legal order of international law” Judgment in *Costa v E.N.E.L.*, 6/64, EU:C:1964:66 : “By contrast with ordinary international treaties, the EEC Treaty has created its own legal system...” See J.H.H. Weiler, ‘The Transformation of Europe’, 100 *The Yale Law Journal* 8 (1991) 2403; J.H.H. Weiler and U.R. Haltern, ‘The Autonomy of the Community Legal Order – Through the Looking Glass’ 37 *Harvard International Law Journal* (1996) 411.

<sup>3</sup> R. Barents, *The Autonomy of Community Law* (The Hague, Kluwer Law International, 2004) 112.

<sup>4</sup> Judgment in *Costa v E.N.E.L.*, 6/64, EU:C:1964:66.

other entities. As these interactions have become more common and more complex, a new “threat”<sup>5</sup> emerged; the idea that EU law could be undermined, not only by conflicting national legislation, but by international law. This not only means that international law and EU law may come into direct conflict. It also means that international law may not always recognise the separate actorness of the EU, in the sense that it may view the Union, not as a distinct legal entity on the international plane, but as merely a reflection of the collective will of the EU Member States, or may treat EU law as simply an international law regime, with all that means in terms of hierarchy of norms and rules of treaty conflict. The concept of autonomy, first developed with regard to the relationship between the Union and the Member States, became a concept that would help navigate the EU’s relationship with the wider international legal order.

This paper discusses how the concept of autonomy has developed into a principle in EU external relations law and how it relates to other systemic principles such as effectiveness and coherence. It discusses how the CJEU has developed a relatively narrow principle into a more broad and overarching concept, one that determines how the EU should interact with other entities and the wider international legal order. Part 2 discusses the concept of autonomy in international law and international organizations. The principle of autonomy is not unique to the EU legal order, but is touched upon in discussions about international organizations generally. The paper then turns to the question of how autonomy has developed as a self-standing principle in EU law. It focuses on how the principle of autonomy has been given effect in two key fields of EU external relations. Part 3 discusses the principle of autonomy in relation to the EU’s participation in forms of dispute settlement outside those established by the Treaties. Part 4 then turns to the question of how the Court deals with norms that originate outside the EU legal order, in particular its relationship with international law. These are only two manifestations of the principle of autonomy, which has developed into a more all-encompassing constitutional principle. This was revealed in *Opinion 2/13*, in which the Court ruled that that the agreement designed to allow the EU to become a contracting party to the European Convention on Human Rights was rejected because it “is liable adversely to affect the specific characteristics of EU law and its autonomy.”<sup>6</sup> While the Court’s reasoning is open to criticism, its conclusions are perhaps less surprising when viewed as the latest judgment in a line of case law in which the principle of autonomy has developed into a broad and far-reaching principle. In contrast to some of the other principles of EU law and EU external relations law, such as the principle of conferral or subsidiarity, the precise meaning of autonomy, and the limits of the concept, are still being developed. The final part discusses how the Court’s application of autonomy can have negative effects. It discusses how, by seeking to protect the EU legal order, the application of this principle may also impede the effectiveness of the EU’s external action and compromises its ability to act on the international plane. The Court’s focus is almost entirely on what might be called the negative dimension of autonomy; it is about ensuring that the EU legal order is protected from external threats. It is less concerned, however, with the positive dimension of autonomy, which entails providing the EU with the ability to act effectively as a distinct actor on the international stage.

Autonomy has been described as a “concept”<sup>7</sup> or as an “idea”<sup>8</sup> but should it be regarded as a legal principle in the same way as we discuss other principles of EU law? Principles, unlike rules, are norms of a fundamental character, and rules must conform to these underlying principles. Autonomy may appear quite different from other structural principles, such as the duty of sincere cooperation, or

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<sup>5</sup> M. Parish, ‘International Courts and the European Legal Order’ 23 *European Journal of International Law* (2012) 141, 142: “A new threat has recently emerged to the consistent application of EU law, namely interpretation of EU law by the ever growing range of international tribunals that sit outside the domestic legal order of any particular state.”

<sup>6</sup> *Opinion 2/13*, EU:C:2014:2454.

<sup>7</sup> N. Tsagourias, ‘Conceptualizing the Autonomy of the European Union’, in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 339: “The concept of autonomy has been embedded in the legal and political culture of the European Union and has been the harbinger of important legal and political developments.”

<sup>8</sup> R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011).

the principle of transparency. Indeed, autonomy is often presented as a more foundational concept, one that differs from other principles, such as direct effect and primacy.<sup>9</sup>

The concept of autonomy was instrumental in developing these foundations of the EU legal order, but it was not until later that the concept of autonomy developed into a more concrete principle in EU external relations law. Principles are of a general character, but may be translated into more specific rules. In the cases discussed in this paper, we see how the Court translates the principle of autonomy into more specific rules. These are *manifestations* of the autonomy principle, not elements of the principle itself. For instance, the obligation under Article 344 TFEU, whereby EU Member States agree not to submit disputes on EU law to any method of dispute settlement other than those provided in the EU Treaties, is one such manifestation of the principle. The rule is designed to protect and preserve the integrity and unity of EU law. Yet one should equate these particular manifestations – such as the protection of the Court’s judicial monopoly – with the principle itself. Further, even in instances where the Court does not explicitly invoke autonomy, the underlying principle may still be the motivating force behind the Court’s reasoning. As shown in section 4, the principle of autonomy can help explain the Court’s approach to the reception of international law in the EU legal order, even if the term “autonomy” is seldom invoked explicitly.

### **Autonomy in International Law**

The debate about autonomy arises not only in relation to the European Union; it is also a phenomenon that is discussed more widely in public international law. In particular, “autonomy” is debated in international law and international relations literature, when it concerns the degree to which international organizations exercise independent powers. This stems from a foundational issue at the heart of all international organizations. On the one hand, international organizations are composed of states, and their founding instruments are normally international legal instruments, often a treaty, entered into by those states. The organization remains dependent upon its members, both in terms of its legal existence, but also in terms of its day-to-day functioning. Decision making, funding, and the actions of an international organization often require the input of the member states. On the other hand, when an international organization with legal personality is created, a new legal subject is established, one that may possess a certain level of autonomy from its membership. This reflects the underlying paradox of international organizations: they are at the same time made up of states and constrained by their founding instruments, but have also been tasked with the powers and institutional structures to act with a certain level of independence *from* those states. As the International Court of Justice stated in *Legality of Nuclear Weapons* case, one of the intentions of treaties establishing international organizations “is to create new subjects of law endowed with a certain autonomy”.<sup>10</sup> The level of autonomy enjoyed by a given organization differs from organization to organization.

The autonomy of international organizations is often presented as a positive development in international law.<sup>11</sup> The international legal order is still one dominated by states. When an international organization is capable of developing a certain degree of autonomy from its members, this can be seen as strengthening international law, since an international organization may be more likely to achieve its foundational objectives without being hindered by the political interests of states. In this way the development of greater institutional autonomy addresses a certain flaw in the

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<sup>9</sup> J-W van Rossem, ‘The Autonomy of EU Law: More is Less?’ in R.A. Wessel, S. Blockmans, *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (T.M.C. Asser Press/Springer Verlag, 2013) 13, 18: “In any event, the bottom line of this argument is that autonomy is not exactly in the same league as, say, primacy, fundamental rights protection or judicial review, but forms the premise upon which such fundamental principles of EU law are built.”

<sup>10</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 75.

<sup>11</sup> “For some time, in fact, the assumption amongst many international lawyers seems to have been that whatever independence and influence an organization gained at the expense of its member states was necessarily good for the functioning of the organization and, in turn, whatever was good for the functioning of the organizations was necessarily beneficial for the advancement of international law.” R. Collins and N.D. White, ‘Introduction and Overview’ in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 2.

international legal order, that is, the fact that state interests and geopolitics can prevent an international organization from fully exercising its functions and realising its objectives.<sup>12</sup> This development of an autonomous legal order is thus often viewed as a form of institutional maturity. In an international legal order which is characterised as decentralised, state-centric and lacking enforcement mechanisms, the development of international institutions possessing a greater degree of autonomy can be viewed as a positive development, one that strengthens the effectiveness of international law.<sup>13</sup>

This phenomenon can be described as the “internal” dimension of autonomy. It refers to the relationship between an international organization and its members and the degree to which an organization exercises independent powers. While the autonomy of international organizations can have certain positive elements, states are wary of allowing an organization to develop too much, lest it become a Frankenstein’s monster, a body that is able to act without the necessary level of control by its members.<sup>14</sup>

Autonomy can also describe the relationship from the other angle, that is, the relationship between the organization and public international law more generally.<sup>15</sup> In this case, autonomy refers firstly to the extent to which the organization has become an independent actor in its own right on the international plane. It also describes the extent to which the legal order has developed to become somewhat “impermeable” to external influences.<sup>16</sup> This argument can be found, for example, in the discussion of self-contained regimes in international law. A self-contained regime is a “sub-system” of international law; not only does it regulate a certain sphere of activity, it also contains its own secondary rules, largely (or completely) replacing general international law.<sup>17</sup> The International Law Commission’s study on the fragmentation of international law recognizes that a system may develop into a self-contained regime over time.<sup>18</sup> The EU legal order has for a long time been described as a self-contained regime in international law,<sup>19</sup> although whether the EU should be considered as a fully

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<sup>12</sup> “[T]he lack of institutional autonomy in international law is seen as the fundamental stumbling block in the way of realizing an international rule of law” R. Collins and N.D. White, ‘Introduction and Overview’ in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 23.

<sup>13</sup> “[I]t cannot be excluded that autonomy has been seized upon by international legal scholars as a political banner under which one could demonstrate support for the role of international institutions – seen as a necessarily positive development – as opposed to the sovereign prerogatives of states, seen as harmful to the general interest.” J. D’Aspremont, ‘The Multifaceted Concept of Autonomy of International Organizations: A Challenge to International Relations Theory?’ in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 77.

<sup>14</sup> See A. Guzman, ‘International Organizations and the Frankenstein Problem’, 24 *European Journal of International Law* (2013), 999.

<sup>15</sup> F. Dopagne, ‘Sanctions and Countermeasures by International Organizations: Diverging Lessons for the Idea of Autonomy’ in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 187: “The autonomy of the international organization can indeed refer either to the relationship between the latter and its member states or to the link between the legal system of the organization and general international law.”

<sup>16</sup> “Autonomy as institutional independence is also what gives the organization the possibility of acting as an independent member of the international community.” J. D’Aspremont, ‘The Multifaceted Concept of Autonomy of International Organizations: A Challenge to International Relations Theory?’ in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 70.

<sup>17</sup> E. Klein, ‘Self-Contained Regime’, Max Planck Encyclopedia of Public International Law  
< [opil.ouplaw.com/home/EPIL](http://opil.ouplaw.com/home/EPIL) >.

<sup>18</sup> ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 p. 1-256 and 18 July 2006, UN Doc. A/CN.4/L.702, para. 157.

<sup>19</sup> J.H.H. Weiler, ‘The Transformation of Europe’, 100 *The Yale Law Journal* 8 (1991) 2403, 2422. “The Community legal order ... is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood.”

self-contained regime remains disputed.<sup>20</sup> International lawyers are beginning to recognise that international organizations can also possess this type of “external” autonomy.

The two elements of autonomy are closely entwined. Internal autonomy can be seen as beneficial to the international legal order, as it allows the organization to contribute to the international community by taking decisions independently of states. At the same time, as the organization develops greater internal autonomy, it may seek to act in a “state-like” manner by seeking to protect and preserve its institutional autonomy from *external* influences. In this way, the organization, like a state, begins to give normative priority to its internal legal order over obligations stemming from international law. The principle of autonomy, therefore, is not only relevant in relation to the EU legal order, but is a concept discussed regarding international organizations generally.

While autonomy exists as a concept in public international law, it has developed into a self-standing principle with a more precise legal meaning in EU law. In the context of the EU’s external relations, autonomy may be termed a structural principle in that it plays an important role in establishing the EU as an international actor with the ability to determine its interaction with other international legal regimes. The way in which this principle has been developed and applied in practice is discussed in the next sections.

### **Autonomy and Judicial Competition**

One of the main ways in which the principle of autonomy manifests itself in the external relations case law is when the Court seeks to preserve its exclusive jurisdiction to interpret and apply EU law. These cases all relate to the EU and the Member States participation in forms of judicial dispute settlement outside the context of those set out in the Treaties. The Court has held that in principle, the EU and its Member States are open to use other such modes of settlement, and may join a treaty that employs binding methods of dispute settlement. However, the Court has set out certain conditions, the most important of which is that such participation must not violate the autonomy of the EU legal order.<sup>21</sup> The Court’s aim is to ensure that no body other than the CJEU is capable of interpreting and applying EU law, even indirectly. It has been argued that this stems from the “selfishness” of the Court.<sup>22</sup> De Witte, for instance, argues that the autonomy of the EU legal order “is put forward as a rhetorical shield to help to protect the Court’s own exclusive jurisdiction” in a way that is “rather unfriendly towards the “rest” of international law.”<sup>23</sup> The principle of autonomy is not designed only for the benefit of the Court, however; it is also for the benefit of the EU legal order. The Court’s desire to ensure uniform and consistent interpretation of EU law stands as a valid reason for asserting autonomy. Seen in this way, the Court’s protection of its judicial monopoly is a means by which to preserve this autonomy, and is not only motivated by a need to preserve its own prerogatives and powers. One can understand how rival courts and tribunals interpreting EU law in a way that diverges from that of the CJEU may have the effect of undermining the unity and consistent application of EU law. The problem, however, is that the preservation of this goal can often come at the expense of another important goal, namely the EU’s effective participation in the international legal order.

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<sup>20</sup> See B. Simma and D. Pulkowski ‘Of Planets and the Universe: Self-contained Regimes in International Law’ 17 *European Journal of International Law* 3 (2006) 483, 518.

<sup>21</sup> See *Opinion 1/91* (EEA Agreement) EU:C:1991:490, para. 40: “An international agreement providing for such a system of courts is in principle compatible with Community law. The Community’s competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.”

<sup>22</sup> B. de Witte, ‘A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union’ in M. Cremona and A. Thies, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, Hart Publishing, 2014).

<sup>23</sup> B. de Witte, ‘European Union Law: How Autonomous is its Legal Order?’ 65 *Zeitschrift für öffentliches Recht* (2010) 141, 150.

The Court's judicial monopoly is safeguarded by Article 344 TFEU:

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

It is not self-evident that this provision is intended to apply to the participation of the EU Member States in international dispute settlement mechanisms. Since *MOX Plant*<sup>24</sup> this provision has been applied to the participation of the EU and the Member States within international dispute settlement mechanisms. Article 344 TFEU raises a number of questions. What should be considered another “method of settlement”, especially when there is a vast array of dispute settlement mechanisms? Does this apply only to judicial bodies, or also to non-judicial dispute resolution procedures? When does a dispute concern the “interpretation or application of the Treaties”? Is this the case, for example, when the rival court or tribunal is called upon to interpret EU law only indirectly, such as provisions of an agreement that closely resemble EU law? Moreover, does it apply to interpretations of EU law that are merely incidental or procedural, such as in identifying the appropriate party in a case? Or, more radically, does it mean that the EU is prevented from joining a dispute settlement body simply because there is a *possibility* that Member States *might* bring claims against one another concerning EU law? Is it concerned only with inter-Member State disputes or is it an expression of a more general principle of exclusivity of jurisdiction? In answering these questions, the Court has had to strike a balance between preserving its judicial monopoly on the one hand and allowing the EU to participate in international dispute settlement on the other.

The Court addressed many of these questions in *MOX Plant*,<sup>25</sup> a case that arose from a dispute between the UK and Ireland regarding a nuclear facility situated on a site at Sellafield, UK, on the coast of the Irish Sea. Ireland instituted arbitral proceedings against the UK at the international level, pursuant to the dispute settlement provisions in UNCLOS.<sup>26</sup> The European Commission regarded Ireland's use of arbitral proceedings as a violation of EU law and brought proceedings against Ireland for *inter alia* failing to fulfil its obligations under Article 292 TEC (now Article 344 TFEU). While the arbitral tribunal considered that it had *prima facie* jurisdiction, it noted that the dispute between Ireland and the United Kingdom before the CJEU would be binding under EU law, and might therefore lead to conflicting decisions. The Tribunal decided to suspend the proceedings.<sup>27</sup>

The Commission argued that the dispute between Ireland and the UK was essentially a dispute concerning the interpretation of EU law, and that the CJEU therefore had exclusive jurisdiction to hear the dispute. The Court found that Ireland, by submitting the dispute to arbitral tribunal, had breached its obligation under Art 292 TEC (now Art 344 TFEU). The judgment drew a certain amount of criticism, from academics in both EU law and international law.<sup>28</sup> Klabbers, for instance, argued that “the Court's attitude is worrisome: it does aspire to build a fence around EU law, thus running the risk of placing the EU outside international law.”<sup>29</sup> Prost argued that the judgment “artificially ‘Communitarises’ whole portions of the law of the sea and asserts, in absolute terms, the autonomy and superiority of the Community system over the universal regime of the UN.”<sup>30</sup> Much of the

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<sup>24</sup> Judgment in *Commission v. Ireland*, C-459/03, EU:C:2006:345 (‘MOX Plant’).

<sup>25</sup> Judgment in *Commission v. Ireland*, C-459/03, EU:C:2006:345 (‘MOX Plant’).

<sup>26</sup> Art. 287 United Nations Convention on the Law of the Sea (UNCLOS) and Article 1, Annex VII, UNCLOS.

<sup>27</sup> See President's Statement of June 13, 2003, *Ireland v. United Kingdom* (“MOX Plant Case”) <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1148](http://www.pca-cpa.org/showpage.asp?pag_id=1148)>, para. 11. “The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.”

<sup>28</sup> “For an international lawyer, this is a stunning case.” M. Koskenniemi, ‘International Law: Constitutionalism, Managerialism and the Ethos of Legal Education’ *European Journal of Legal Studies* 1 (2007).

<sup>29</sup> J. Klabbers, *Treaty Conflict and the European Union* (Cambridge, Cambridge University Press, 2009) 148.

<sup>30</sup> M. Prost, *The Concept of Unity in Public International Law*, (Oxford, Hart Publishing, 2012), 42-43.

criticism stemmed from the fact that the Court examined the issues solely through the lens of EU law, without acknowledging that the wider dispute concerned issues of international law and dispute settlement.<sup>31</sup> The judgment is also important in that the Court invoked the principle of autonomy in order to determine the relationship between EU law and the international legal order more generally. It held that an international agreement could not “affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system.”<sup>32</sup> Autonomy is not used here just to preserve the role of the Court, but as a way to protect the allocation of responsibilities in the EU legal order.

In *Mox Plant*, Article 292 TEC (now Article 344 TFEU) was used as a means to prevent Member States from bringing disputes against one another involving EU law. It allowed the Commission to initiate proceedings on the basis of Article 344 in cases where a Member State has made use of international dispute settlement processes against another EU Member State. But could the very *possibility* of the Member States bringing these proceedings in the first place violate Article 344? This question was addressed in *Opinion 2/13*. Article 33 of the European Convention on Human Rights (ECHR) allows Contracting Parties to bring inter-state disputes. The Court found that the “very existence of such a possibility” of the EU or Member States utilizing Article 33 ECHR with respect to a dispute involving EU law would violate Article 344 TFEU.<sup>33</sup> The Court stresses that the ability to bring such a dispute to the ECtHR “goes against the very nature of EU law.”<sup>34</sup> It does not seek to prevent, as in *Mox Plant*, Member States from initiating proceedings against one another, it prevents them from entering into an agreement that allows for such a possibility.

The issue of inter-state disputes does raise concerns about autonomy. This is because the ECHR Accession Agreement would have allowed EU Member States to bring proceedings before Strasbourg that deal with issues of EU law, without the CJEU having been able to address those issues. The issue of inter-state proceedings was also addressed in the *View*<sup>35</sup> of Advocate General Kokott. However, as she rightly points out such an issue can be fully addressed using the EU’s own institutional framework, such as the Commission initiating proceedings against the Member State, as was the case in *Mox Plant*. Kokott also stresses that numerous international agreements to which the EU and the Member States are party already allow for inter-state proceedings. If it were the case that a proposed agreement must *expressly* forbid inter-state cases in order to be valid under EU law, then “this would implicitly mean that numerous international agreements which the EU has signed in the past are vitiated by a defect, because no such clauses are included in them.”<sup>36</sup>

The Court is requiring a principle of EU law, one that is already adequately safeguarded using the EU’s own constitutional controls, to be addressed through a clause in an international agreement. By requiring “the express exclusion of the ECtHR’s jurisdiction”<sup>37</sup> over these inter-state disputes, the Court significantly expands the requirements under Article 344. It does not merely require Member States to refrain from a certain action; it obliges them to include in an international agreement a provision that excludes the dispute settlement body’s jurisdiction over certain cases. No such clause can be found in the WTO Agreement or UNCLOS, and the Court does not explain clearly why the

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<sup>31</sup> “[T]he Court analysed matters primarily, if not solely, through the prism of Community law.” S. Boelaert-Suominen, ‘The European Community, the European Court of Justice and the Law of the Sea’, 23 *The International Journal of Marine and Coastal Law* 4 (2008) 643–713.

<sup>32</sup> *MOX Plant*, *supra* note 25, para. 123.

<sup>33</sup> *Opinion 2/13*, *supra* note 6, para 208.

<sup>34</sup> *Opinion 2/13*, *supra* note 6, para 212.

<sup>35</sup> *Opinion 2/13*, *View* of AG Kokott, EU:C:2014:247, para. 118: “In my view, the possibility of conducting infringement proceedings (Articles 258 TFEU to 260 TFEU) against Member States that bring their disputes concerning EU law before international courts other than the Court of Justice of the EU, with the added possibility that interim measures may be prescribed within those proceedings if necessary (Article 279 TFEU), is sufficient to safeguard the practical effectiveness of Article 344 TFEU.”

<sup>36</sup> *View* of AG Kokott, *supra* note 35, para. 117.

<sup>37</sup> *Opinion 2/13*, *supra* note 6, para. 213.

ECHR situation differs from these other forms of dispute settlement. The Court's rationale, that "if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute"<sup>38</sup> applies equally to these other forms of settlement. This is an example of how the Court's approach to the principle of autonomy emphasises the negative dimension, that is, the desire to protect the EU legal order *from* international law. Yet this requirement, by stipulating that the Union can only take part in dispute settlement procedures when such a clause exists, undermines the EU's positive autonomy. Such an interpretation of Article 344 jeopardises the EU's ability to participate effectively in the wider international legal order. By requiring that internal issues be taken into account at the international level, the Court may have made it more difficult in practice for the Union to take part in these agreements.<sup>39</sup>

The Court also employed the principle of autonomy in its reasoning in *Opinion 1/91*, in which it was asked to decide on the compatibility of the EEA Agreement with the Treaties. In contrast with *Mox Plant*, this and similar cases relate to proposed agreements that include forms of dispute settlement. The Court has held consistently that such a dispute settlement body should only have jurisdiction to interpret and apply the international agreement at issue, and should not be capable of interpreting EU law. While this may seem a rather straightforward requirement, this can be quite complex in practice, particularly in the cases of a mixed agreement, where the EU and Member States are both parties. One of the questions that arose in relation to the EEA Agreement was whether the Court of the European Economic Area, established by the agreement, would be interpreting and applying EU law. In particular, since the EU and the Member States were parties alongside one another, the EEA Court would have had the power to determine who would be the correct party in a given case, either the Member State(s) or the Community. According to the Court, this conferral of jurisdiction would allow the EEA Court to rule upon the allocation of competences of the Community and the Member States, and therefore, would "likely adversely [to] affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order..."<sup>40</sup> Like in *Mox Plant*, the Court is essentially safeguarding its judicial prerogative, but it is doing so in order to protect the allocation of responsibilities in the EU legal order.

We see similar issues being played out, for instance, when the EU seeks to participate in agreements covering investor-State dispute settlement mechanisms, especially now that the Union has competence in the field of foreign direct investment.<sup>41</sup> The text of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) for instance includes a "domestic law clause" (Article 8.31(2) "Applicable law and interpretation") under which the Tribunal "shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party." The inclusion of such a clause can be seen as being motivated largely in order to preserve the judicial monopoly of the CJEU to interpret EU law. Whether this would be enough to satisfy the Court, especially in light of *Opinion 2/13*, remains debatable, since it may still allow an incidental review of EU law.<sup>42</sup>

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<sup>38</sup> Opinion 2/13, *supra* note 6, para. 209.

<sup>39</sup> T. Locke, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: is it Still Possible and is it Still Desirable?' 11 *European Constitutional Law Review* 2 (2015) 239, 255: "This stance again reveals the Court of Justice's lack of trust in the EU's own legal order. The consequence of this is that the EU is becoming an even more awkward partner on the international plane. Requiring the protection of the autonomy of EU law in a watertight manner requires an externalisation of internally resolvable issues, which is new and worrying because it makes the EU a difficult partner to deal with."

<sup>40</sup> Opinion 1/91, *supra* note 21. 6.

<sup>41</sup> See H. Lenk, 'Investor-state Arbitration Under TTIP: Resolving Investment Disputes in an (Autonomous) EU legal order' Swedish Institute for European Policy Studies (SIEPS) 2015:2. Articles 206 and 207 TFEU explicitly mention "foreign direct investment" as part of the EU common commercial policy.

<sup>42</sup> Article 8.31(2) of CETA states that "the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts

In *Opinion 2/13* the Court discussed a different institutional innovation designed to protect EU autonomy: the co-respondent mechanism. This was procedure was designed to allow both the EU and a Member State to become parties to ECtHR proceedings and was introduced primarily in order to *prevent* the Strasbourg Court from making rulings on who is the correct party to a case involving the EU and/or its Member States, and thereby indirectly ruling on issues of competence.<sup>43</sup> The CJEU found that the design of the co-respondent procedure still violated the autonomy of the EU legal order. In certain circumstances the ECtHR would have been asked to determine whether it was plausible that the conditions of co-respondency were fulfilled, thereby asking the ECtHR to make an indirect assessment of competence. According to the CJEU, interpreting EU law in such an indirect and incidental way still gives rise to concerns over autonomy.

The Court summarised its position on what the principle of autonomy requires in *Opinion 1/00*<sup>44</sup> on the establishment of a European Common Aviation Area. In a passage that has been referred to a number of times since, the Court states that the preservation of autonomy of the Union legal order requires two main features:

[...] first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered. ... Second, it requires that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement<sup>45</sup>

Here the Court sets out two key conditions. The first relates to the preservation of the “essential character” of the powers of the Union and its institutions. The second seeks to ensure that an outside dispute settlement body would not have the power to interpret EU law if it is to have binding effect on the Union. This presents what was understood as a narrow understanding of autonomy. This narrow conception is focused primarily on preserving the exclusive powers of the Court to interpret the Treaties and EU law.<sup>46</sup> De Witte, for instance, summarising the Court’s position in these cases, states that “the theme of the autonomy of the Community legal order is mentioned recurrently, and relates essentially to the preservation of the Court’s own exclusive power to interpret Community law.”<sup>47</sup> However, what we see in these cases is not the preservation of the Court’s powers for its own sake; in each instance a more fundamental issue is at stake.

This broader conception of the principle of autonomy can be seen in *Opinion 1/09*. Here the Court was called upon to decide whether a proposed European and Community Patents Court (ECPC), which would have jurisdiction to hear actions related to European and Community patents, was compatible with the EU Treaties. One of the controversial aspects of the agreement establishing the ECPC was that it allowed the Patent Court to refer a question to the CJEU relating to questions concerning EU law. This was designed to be a way of safeguarding autonomy, by ensuring that the CJEU still has the final say on the interpretation of EU law. The Court stressed that an “international agreement concluded with third countries may confer new judicial powers on the Court provided that

(Contd.) \_\_\_\_\_

or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.”

<sup>43</sup> Opinion 2/13, *supra* note 6, paras 215-235.

<sup>44</sup> Opinion 1/00, EU:C:2002:231

<sup>45</sup> Opinion 1/00, EU:C:2002:231, para. 12.

<sup>46</sup> T. Locke, ‘The Future of the European Union’s Accession to the European Convention on Human Rights after Opinion 2/13: is it Still Possible and is it Still Desirable?’ 11 *European Constitutional Law Review* 2 (2015) 239, 243: “A narrow conception of autonomy, such as this, is appropriate as it serves the legitimate purpose of protecting the integrity of the EU law while retaining the EU’s capacity as an external actor.”

<sup>47</sup> B. de Witte, ‘European Union Law: How Autonomous is its Legal Order?’ 65 *Zeitschrift für öffentliches Recht* (2010) 141, 150.

in so doing it does not change the *essential character of the function of the Court* as conceived in the EU and FEU Treaties.”<sup>48</sup>

What is an “essential” character or function of the Court? The CJEU found that one of these essential elements is the ability of the Courts of the EU Member States to refer questions to the CJEU. The preliminary ruling mechanism in the draft agreement would essentially deprive the national courts of this function in this field of law.<sup>49</sup> This role of the national courts, the Court asserts, is “indispensable to the preservation of the very nature of the law established by the Treaties.”<sup>50</sup> The judgment holds that the Member State courts have an essential role in the interpretation and application of EU law, and that this function cannot be delegated to the international level.<sup>51</sup> Here we see that the principle of autonomy is not simply concerned with the judicial monopoly of the Court; rather, the Court links the concept of autonomy to the broader notion of safeguarding the “essential characteristics of the European Union legal order”.<sup>52</sup> The Court is nevertheless still safeguarding its own authority, since the national courts are under the authority of the CJEU in a way that an international court is not.<sup>53</sup> What constitutes the “essential characteristics” remains an open and debated question. *Opinion 1/09* illustrates the broadening of the principle of autonomy, and can be seen as laying the groundwork for the rationale used in *Opinion 2/13*, discussed below.<sup>54</sup>

### ***Autonomy and International Courts***

The EU seeks to play a more active role in shaping, developing and strengthening international law. The support of international dispute settlement mechanisms should be a large part of this. International dispute settlement can help to bolster international law and the rule of law by establishing some of the features often missing in the international legal order, such as judicial review and enforcement. Participation in international dispute settlement by the EU is also a way to ensure that the Union observes its own international obligations. This would be especially important in the ECHR context, since there is currently no external mechanism to monitor the EU’s compliance with human rights norms. The Court has been reluctant to accept the role of other Courts, however. Parish argues that

The Court of Justice should learn to be more relaxed about other international tribunals adjudicating on EU law. International courts are a growth industry, and it is inevitable that investment treaty law, international trade law, and a host of other areas of international law that international courts have mandates to apply overlap with the ever-expanding ambit of EU law.<sup>55</sup>

The increasing number and density of international courts and tribunals of course gives rise to a number of challenges to supranational courts such as the CJEU. How, then, should the principle of autonomy be interpreted? The Court has interpreted it in a way that establishes a high threshold for the Union to participate in international dispute settlement procedures. Yet, as discussed in the next

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<sup>48</sup> *Opinion 1/09*, EU:C:2011:123, para. 75. Emphasis added.

<sup>49</sup> *Opinion 1/09*, EU:C:2011:123, para 81: “The draft agreement provides for a preliminary ruling mechanism which reserves, within the scope of that agreement, the power to refer questions for a preliminary ruling to the PC while removing that power from the national courts.”

<sup>50</sup> *Opinion 1/09*, EU:C:2011:123, para 85.

<sup>51</sup> See R. Barratta, ‘National Courts as ‘Guardians’ and ‘Ordinary Courts’ of EU Law: Opinion 1/09 of the ECJ’ 38 *Legal Issues of Economic Integration* 4 (2011) 297.

<sup>52</sup> *Opinion 1/09*, EU:C:2011:123, para 65.

<sup>53</sup> *Opinion 1/09*, EU:C:2011:123, paras 86-88.

<sup>54</sup> On *Opinion 1/09* as a ‘warning sign’ see D. Halberstam, “‘It’s the Autonomy, Stupid!’ A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward,” 16 *German Law Journal* 1 (2015) 105, 111. “The Patent Court *Opinion*, in turn, held that the application of EU law must remain in the hands of the EU judiciary, which includes national courts but excludes courts in which Member States and non-Member States participate together. Both were strong assertions of the autonomy of EU law and the necessity of maintaining the integrity of the EU’s constitutional architecture.”

<sup>55</sup> M. Parish, ‘International Courts and the European Legal Order’ 23 *European Journal of International Law* (2012) 141.

section, the principle of autonomy has also been used in order to determine the conditions under which international law – including the decision of international courts – can be given effect in the EU legal order. Since the Court is capable of playing this gatekeeper role, it should not be so reluctant to allow EU participation in international dispute settlement. The CJEU can and does give priority to its own rules and constitutional legal order. Yet in doing so, the Court should be mindful of the fact that there are many benefits associated with the EU and its Member States participating in this wider legal order. The Union’s ability to act independently on the international stage is an expression of the Union’s autonomy.

### **Autonomy and Norms Originating outside the EU**

The previous section discussed briefly how the principle of autonomy has been used in the context of dispute settlement procedures, which is the main context in which the principle has been applied in practice. Yet the principle is employed in other aspects of EU external relations law, even if the language of autonomy is not used explicitly. The best example of this is instances where the Court is called upon to deal with the effects of international law within the EU legal order. As the EU enters into a greater number of international agreements and takes part in international organizations and other international bodies, international norms are increasingly invoked before the Court. This can range from provisions of treaty law, both binding and non-binding on the Union, customary international law, general principles of law, as well as a growing number of rules that might be categorised as “soft law”, which are not strictly binding but may nevertheless be influential. In recent years the Court has had to determine how to give effect to these norms, and under what conditions. In developing these rules, the principle of autonomy has played an important role.

Some have argued that the principle of autonomy, as applied in the external dimension, means that the Court has become rather “unfriendly” towards international law.<sup>56</sup> What this really means is that the relationship between the EU and international legal orders is to be determined solely by the rules in the EU legal order itself. It is not saying that the EU is no longer a part of the international legal order, nor that international law cannot have an effect within the EU legal order, but that this relationship can only be determined by reference to internal rules, and, more concretely, that the essential characteristics of EU law, especially the primary role of the Court in interpreting EU law, cannot be prejudiced by international law.

The complex issue of the Court’s approach to international law has been discussed extensively in academic literature.<sup>57</sup> In recent years the Court’s approach to international law has been described as being more “closed” or “unfriendly” towards public international law, often in contrast with its more open earlier case law, which was seen as being more receptive to international norms. The literature tends to contrast the CJEU’s recent emphasis on the autonomy of the EU legal order with its earlier “friendliness” towards public international law. Asserting the EU’s autonomy is therefore viewed as the CJEU further isolating itself from public international law.<sup>58</sup> Respect for international

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<sup>56</sup> “[T]he EU has a much less friendly disposition towards international law than is commonly assumed.” J. Klabbers, ‘The Validity of EU Norms Conflicting with International Obligations’ in E. Cannizzaro, P. Palchetti, R.A. Wessel (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2012) 112.

<sup>57</sup> F. Martines, ‘Direct Effect of International Agreements of the European Union’ 25 *European Journal of International Law* 1 (2014) 129; C. Kaddous, ‘Effects of International Agreements in the EU Legal Order’ in M. Cremona, B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford, Hart Publishing, 2008), 291–311; J. Klabbers, *The European Union in International Law* (Paris, Pedone, 2012); J. Wouters, A. Nollkaemper and E. de Wet (eds), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States* (The Hague, TMC Asser Press, 2008); M. Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford, Oxford University Press, 2013); K. Lenaerts, ‘Direct Applicability and Direct Effect of International Law in the EU Legal Order’ in I. Govaere, E. Lannon, P. van Elsuwege, S. Adam (eds) *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden, Martinus Nijhoff Publishers, 2014) 45.

<sup>58</sup> F. Hoffmeister, ‘The Contribution of EU Practice under International Law’, in M. Cremona (ed.) *Developments in EU External Relations Law* (Oxford, Oxford University Press, 2008) 56: “In other words, as the EC Treaty was not subject to ordinary international treaty rules, but rather interpreted from a constitutional perspective, the Community isolated itself from public international law to a certain degree in its ‘early strive for autonomy’.”

law and the preservation of the autonomy of the EU legal order are sometimes presented as mutually irreconcilable goals; the Court being presented as “oscillating between what may be called deference to international law and insistence on the autonomy of the EU legal order.”<sup>59</sup>

The Court of Justice famously applied the principle of autonomy to explain the relationship between the EU legal order and public international law in *Kadi I*.<sup>60</sup> The Court explicitly invoked the autonomy of the Union legal order in its reasoning, stating that “an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system.”<sup>61</sup> *Kadi I* is also important since it further underlines the fact that the principle of autonomy is not simply about preserving the role of the Court, but is a much broader constitutional principle.<sup>62</sup> Autonomy is concerned with preserving the “fundamental characteristics” of the EU legal order. These include, according to the Court, the protection of fundamental rights, respect for the rule of law, and the judicial review of EU acts, all of which cannot be prejudiced by an international agreement. What constitutes the essential characteristics of the EU legal order is open to debate. In *Opinion 2/13*, the Court found that the principle of mutual trust was one of these essential characteristics.<sup>63</sup>

The principle of autonomy also plays a role in cases where the Court is asked to determine which legal effect, if any, is to be given to agreements to which the EU is not a party, but all its Member States are. This question arose, for instance, in *Intertanko*, with respect to Marpol 73/78,<sup>64</sup> and *Air Transport Association of America*, with respect to the Chicago Convention on International Civil Aviation.<sup>65</sup> The Court held that the obligations under these agreements would only be binding upon the Union in cases where there had been a full transfer of the powers under the agreement to the Union.<sup>66</sup> The Court has set a very high threshold for the theory of functional succession to apply, and

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<sup>59</sup> H.G. Krenzler and O. Landwehr, ‘A New Legal Order of International Law’: On the relationship between Public International Law and European Law After *Kadi*, in U. Fastenrath, R. Geiger, D. Khan, A. Paulus, S. von Schorlemer, C. Vedder (eds) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011) 1004.

<sup>60</sup> “The Court’s judgment in *Kadi I* is a further landmark in the process of defining the autonomy of EU law from international law.” P. Eeckhout, ‘Human Rights and the Autonomy of EU Law: Pluralism or Integration?’ *Current Legal Problems* (2013) 1, 27. Judgment in *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, EU:C:2008:461.

<sup>61</sup> Judgment in *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, EU:C:2008:461, para. 282.

<sup>62</sup> J-W van Rossem, ‘The Autonomy of EU Law’ *supra* note 9, 17: “what spurred the ECJ’s appeal to the autonomy of the EU legal order was not so much a somewhat narrow concern for its exclusive jurisdiction, as a more general and more profound concern for the constitutional integrity of this legal order.”

<sup>63</sup> *Opinion 2/13*, para168: “This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.”

<sup>64</sup> Judgment in *Intertanko and Others*, C-308/06, EU:C:2008:312. <sup>64</sup> See J-W. van Rossem, ‘Interaction between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community’ 40 *Netherlands Yearbook of International Law* (2009) 183–227.

<sup>65</sup> Judgment in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864. See G. De Baere and C. Ryngaert, ‘The ECJ’s Judgment in *Air Transport Association of America* and the International Legal Context of the EU’s Climate Change Policy’ 18 *European Foreign Affairs Review* (2013) 389.

<sup>66</sup> For a discussion on the Court’s use of the theory of ‘functional succession’ see J. Wouters, J. Odermatt, T. Ramopoulos, ‘Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law’, in M. Cremona & A. Thies (eds) *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, Oxford University Press, 2014) 249.

this has only occurred in rare instances.<sup>67</sup> From the viewpoint of preserving the autonomy of the EU legal order, one can see why the Court would pursue this approach. Allowing international agreements to which only the Member States have entered into, but which the Union has not, to bind the Union would go against the idea of the Union as a separate and distinct entity. To do so otherwise might threaten the unity of EU legal order.<sup>68</sup>

The principle of autonomy also plays a role in cases where the Court has been called upon to determine the legal effect of agreements entered into by the EU Member States before their entry into the Union. This issue is governed by Article 351 TFEU, which states that while international agreements entered into by the Member States before they joined the Union will continue to apply, the Member States are also under an obligation to eliminate incompatibilities between EU law and those earlier international agreements. This article has two elements; the first is about preserving the prior Member States agreements, while the obligation to eliminate incompatibilities is motivated by the need to preserve the integrity of EU law. In case law applying Article 351 TFEU the Court has emphasised the latter goal.<sup>69</sup> This again can be seen as being motivated by the broader principle of autonomy.<sup>70</sup> The prior agreements of the Member States must be respected, according to the Court, but this cannot undermine the unity and integrity of the EU legal order. Autonomy is put forward as a shield to protect this integrity and unity of the legal order.<sup>71</sup>

In these instances, the Court is applying the principle of autonomy, a concept originally developed to assert the primacy of EU law over national law, to the EU's wider relationship with international law. In both instances the underlying rationale is the same: since the EU is a distinct and autonomous legal order, it cannot be undermined by the invocation of norms that originate outside that legal order, whether they derive from the Member States' legal systems or from international law.<sup>72</sup> At its heart, this means that the relationship between EU law and international law is to be determined by the CJEU itself, according to its own constitutional principles. As Advocate General Maduro boldly stated in his Opinion in *Kadi I* "in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law."<sup>73</sup> *Kadi I* and other cases stressing the autonomous nature of the EU legal order have

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<sup>67</sup> The most notable case being Judgment in *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, Joined Cases 21 to 25/72, EU:C:1972:115, para. 18. See also Case 38/75 *NV Nederlandse Spoorwegen*, EU:C:1975:154, para. 21.

<sup>68</sup> J-W van Rossem, 'The Autonomy of EU Law' *supra* note 9, 36: "In *Intertanko* and *Air Transport Association of America*, the Court's decision not to incorporate an international agreement to which the Union is not formally bound, primarily seems to have stemmed from a desire to defend the unity of the Union legal order."

<sup>69</sup> See Judgment in *Commission v Austria*, C-205/06, EU:C:2009:118; Judgment in *Commission v Sweden*, C-249/06, EU:C:2009:119; Judgment in *Commission v Finland*, C-118/07, EU:C:2009:715; Judgment in *Kadi I*, *supra* note 61 para 304. Judgment in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864, para 61: "Although the first paragraph of Article 351 TFEU implies a duty on the part of the institutions of the European Union not to impede the performance of the obligations of Member States which stem from an agreement prior to 1 January 1958 [...] that duty of the institutions is designed to permit the Member States concerned to perform their obligations under a prior agreement and does not bind the European Union as regards the third States party to that agreement."

<sup>70</sup> Klabbers, for instance, argues that "while ostensibly safeguarding anterior member state agreements, [Art. 351] has always been more about achieving a balance between the protection of those earlier treaties and the protection of the autonomy of the EC's legal order – and that is a charitable reading." J. Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provision' in E. Cannizzaro (ed), *The Law of Treaties Beyond the Geneva Convention* (Oxford, Oxford University Press, 2011) 203.

<sup>71</sup> See N Lavranos, 'Protecting European Law from International Law' 15 *European Foreign Affairs Review* (2010) 265–82.

<sup>72</sup> "The reference to the autonomy of the Community system in its relation to *international law* echoes much older references in the European Court's case law to the autonomous nature of Community law in relation to the law of its *member states*." B. de Witte, 'European Union Law: How Autonomous is its Legal Order?' 65 *Zeitschrift für öffentliches Recht* (2010) 141, 142.

<sup>73</sup> Opinion in *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, EU:C:2008:11 para. 23.

been criticised for essentially isolating the Union from international law. De Búrca, for instance, criticises the Court for following an “internally-oriented approach and a form of legal reasoning which emphasized the particular requirements of the EU’s general principles of law and the importance of the autonomous authority of the EC legal order.”<sup>74</sup> Autonomy is presented as a rather blunt instrument to detach the EU from international law. However, the reality is more nuanced, and is more concerned with the Court’s ability to determine the ways in which international law is given effect in the EU legal order. The next section discusses how the EU’s application of this principle can lead to some negative consequences; while there is a need for the Court to preserve the autonomy of the EU legal order, this can and should be balanced against other goals and principles, including the EU’s goal of respecting international law.<sup>75</sup>

### **Autonomy as a Structural Principle in *Opinion 2/13***

The EU Member States included an obligation in the Lisbon Treaty, that “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”<sup>76</sup> It should be borne in mind that accession was one of a number of approaches the EU could have taken to address the fact that the Union was not a Contracting Party to the European Convention on Human Rights. The Union could have sought simply to strengthen its own internal human rights mechanisms. In fact, this is what it sought to do through the EU Charter of Fundamental Rights and Freedoms. Alternatively, the Court could also have found the EU to be subject to the obligations under the Convention via the theory of “functional succession” discussed above.<sup>77</sup> This would have meant that the EU would be subject to the obligations in the ECHR under EU law through implied succession, rather than the EU being formally bound as a matter of international law. It would also have meant that the EU would not have been able to participate in the institutional mechanisms related to the ECHR, most importantly the Strasbourg Court. Both of these approaches were perceived as inadequate and would have failed to address the gap in human rights protection stemming from the EU not being a party to the ECHR.

It was decided that this gap in human rights protection should be addressed by the EU joining the ECHR as a full party. The legal significance of such a step should not be underestimated, both from an EU law and public international law perspective.<sup>78</sup> From the perspective of EU law, it would be the first time the EU had opened up its legal order for external scrutiny in the field of human rights, with judicial supervision backed up by binding commitments under international law. From an international law perspective, this would be the first time that an international organization had submitted itself to a form of binding judicial review in the human rights sphere. It would also mean that the ECHR system would have to be modified to allow participation by a contracting party that is not a state. Accession, therefore, was not merely a cosmetic procedure; it would have had important consequences for both the international and EU legal orders.

EU accession was to be a long process. An important step in the journey was the negotiations for a draft Accession Agreement, setting out the conditions under which the EU would accede, and outlining the changes that would be made to the ECHR to allow EU participation. In negotiating the

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<sup>74</sup> G. de Búrca, ‘The European Court of Justice and the International Legal Order After Kadi’, 51 *Harvard International Law Journal* 1 (2010) 1, 44.

<sup>75</sup> This duty stems from Article 3(5) TEU, which sets out that the EU “shall contribute [...] to the strict observance and the development of international law” and Article 21(1) TEU providing that the EU’s “action on the international scene” should be guided by “respect for the principles of the United Nations and international law”. See J. Wouters, J. Odermatt, T. Ramopoulos, *supra* note 66.

<sup>76</sup> Art. 6(2) TEU.

<sup>77</sup> T. Ahmed and I. de Jesús Butler, ‘The European Union and Human Rights: An International Law Perspective’, 17 *European Journal of International Law* (2006) 771, 788 “it is possible to argue that, although the EU has not become party to a human rights treaty itself, the obligations incurred by its Member States by virtue of their membership of such treaties might impose obligations on the EU per se.”

<sup>78</sup> J. Odermatt, ‘The EU’s Accession to the European Convention on Human Rights: An International Law Perspective’ 47 *New York University Journal of International Law and Politics* 1 (2014).

Agreement, the drafters, composed of the EU and the forty-seven Council of Europe members, had to balance two competing objectives. On the one hand, they sought to ensure that the EU would accede, as far as possible, on the same footing as other contracting parties. Not only would this ensure that the EU was not given special treatment, it would also help guarantee that the rights in the convention would be protected in a similar manner, irrespective of whether the violation stemmed from a Member State or from the EU. On the other hand, since the EU is not a state, and therefore differs in many respects from other state contracting parties, certain arrangements needed to be made to take into account this difference. The drafters had to strike a balance between treating the EU as a normal contracting party, while at the same time acknowledging the unique nature of the EU and its legal order. Importantly, the drafters had to ensure that any agreement respected the principle of autonomy.

In addition to the principle of autonomy found in EU law, the drafters of the Lisbon Treaty also included further constitutional safeguards, set out in Article 6(2) TEU and Protocol 8.<sup>79</sup> Article 6(2) highlights that "...accession shall not affect the Union's competences as defined in the Treaties" whereas Protocol 8 states that any draft agreement must also "ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions." The text of the draft Accession Agreement and its negotiating history has been discussed in detail elsewhere<sup>80</sup> The Accession Agreement introduced a number of institutional innovations to the ECtHR system, such as the co-respondent mechanism and prior involvement procedure. These were designed particularly to ensure that the autonomy of the EU would be preserved.

In accordance with the procedure in Article 218(11) TFEU, the CJEU was asked to deliver its opinion on whether the draft Accession Agreement was compatible with the EU Treaties and EU law. In *Opinion 2/13*, the Court found that it was not. The Court based its negative opinion mostly on the argument that the modalities of accession enshrined in the Accession Agreement would violate the autonomy of the EU legal order. *Opinion 2/13* is the most important judicial pronouncement on the principle of autonomy to date. Most importantly, it established the principle of autonomy as a broader and more all-encompassing doctrine than previously thought, and will have important ramifications on the EU's future external relations.

This working paper does not seek to explore further the Court's reasoning in full.<sup>81</sup> Rather, it seeks to understand a puzzling question. Why did *Opinion 2/13* come as such a surprise? The Court did not have minor qualms over the Accession Agreement, issues that might have been remedied by amendments to the agreement or declarations made at the time of accession. This was essentially the approach taken by the Advocate General, who, although finding similar faults in the Accession Agreement as the Court, still gave her approval. Rather, the Court came at the Accession Agreement with a sledgehammer.

The reaction to *Opinion 2/13* was generally one of surprise and shock.<sup>82</sup> Academic discussion prior to the Opinion did not see serious concerns with the Agreement. All EU Member States that

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<sup>79</sup> Protocol (No. 8) Relating to Article 6(2) 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.

<sup>80</sup> See X. Groussot, T. Lock and L. Pech, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011' 218 *European Issues* (2011) 3; P. Gragl, 'A Giant Leap European Human Rights? The Final Agreement on The European Union's Accession to the European Convention on Human Rights', 51 *Common Market Law Review* (2014) 13; J-P Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* 99 (2011) 1006.

<sup>81</sup> For an overview of the Opinion see B. de Witte, Š. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' 40 *European Law Review* 5 (2015) 68; J. Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' 47 *New York University Journal of International Law & Politics* 4 (2015) 783.

<sup>82</sup> Some of the early reactions include: W. Michl, 'Thou shalt have no other courts before me' *Verfassungsblog*, 23 December 2014, <http://www.verfassungsblog.de/en/thou-shalt-no-courts/>; A. Buyse, 'CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law', *ECHR Blog*, 20 December 2014, <http://echrblog.blogspot.co.uk/2014/12/cjeu-rules-draft-agreement-on-eu.html>; A. Duff, 'The European Union is in Deep Trouble with its Top Court', 7 January 2015, <http://andrewduff.blogactiv.eu/2015/01/07/the-european-union-is-in-deep-trouble-with-its-top-court/>; S. Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to

submitted observations to the Court agreed that the draft Accession Agreement was compatible with EU law and the agreement had the support of the European Commission, the Parliament, the Council as well as the Advocate General. Perhaps what made the Opinion all the more surprising was the fact that the Court itself played an indirect role in the drafting process. In particular, the drafters sought to address the concerns included in a Joint Communication of the Presidents of the CJEU and ECHR, which set out some of the essential conditions of any accession agreement.<sup>83</sup> Some of the institutional innovations found in the accession agreement, such as the procedure to allow prior involvement of the CJEU, can be traced back to this document, which clearly states that such prior involvement would be a necessary condition. Given all of these factors, in addition to the clear legal requirement for the EU to accede to the Convention established by Article 6(2) TEU, one can see why *Opinion 2/13* caused such surprise. In fact, it is not so much the outcome of the Opinion that is shocking as much as the language and legal reasoning used to support it. In contrast with the more conciliatory approach of the Advocate General, *Opinion 2/13* adopts a more abrasive and assertive tone.

What can explain this puzzle, and what does it tell us about the principle of autonomy? One possible explanation is that the Court was acting out of self-interest. According to this argument, the Court was simply against EU accession to the ECHR and sought to do all it could to kill off or delay this process. The idea is that the Luxembourg Court feared could not accept any judicial rival that would potentially rule on the legality of EU law. While this concern may have played some role in the Opinion, it is unhelpful to think of *Opinion 2/13* as purely political. It is unhelpful because it obfuscates the fact that the Opinion was based on existing case law and legal reasoning. Until this point, however, this reasoning had not led to such a drastic outcome as in *Opinion 2/13*.

The Court's Opinion may seem less surprising when one examines the line of case law on the autonomy of the EU. In particular, the Court's emphasis on autonomy is foreshadowed in *Opinion 2/94*, the first time it was asked to decide on the EU's accession to the ECHR. Referring to possible accession, the Court held that

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.<sup>84</sup>

*Opinion 2/94* is often presented as being based on the *lack of competence* for the EU to accede. The drafters of the Lisbon Treaty addressed this lack of competence by providing a duty to accede in Article 6(2) TEU. Although this addressed the competence issue, it did nothing to address the more fundamental questions raised by EU accession, the conclusion that such a step "would be of constitutional significance". This underscores the paramount importance given to the principle of autonomy. Article 1(a) of Protocol 8 requires that the "specific characteristics of the Union and Union law" be taken into account in the accession agreement and so this was included as an essential condition for accession. Yet the Court refers to the "specific characteristics *and the autonomy* of EU law" treating the two as separate but related elements.<sup>85</sup> Despite there being a clear legal obligation for the EU to accede enshrined in the TEU, the Court emphasises that this still must be done in a way that does not prejudice the autonomy of the EU legal order.

As discussed above, one can think of narrow and broad conceptions of autonomy. The narrow version tends to link autonomy to the powers and role of the Court. One of the recurrent criticisms of

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human rights protection' 18 December 2014, *EU Law Analysis* <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>; A. 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/>.

<sup>83</sup> Joint Communication from Presidents Costa and Skouris, CCBE (Jan. 24, 2011) [http://www.ccbe.eu/fileadmin/user\\_upload/document/Roundtable\\_2011\\_Luxembourg/Joint\\_communication\\_from\\_Presidents\\_Costa\\_and\\_Skouris\\_EN.pdf](http://www.ccbe.eu/fileadmin/user_upload/document/Roundtable_2011_Luxembourg/Joint_communication_from_Presidents_Costa_and_Skouris_EN.pdf).

<sup>84</sup> *Opinion 2/94*, EU:C:1996:140, para. 35. Emphasis added.

<sup>85</sup> *Opinion 2/13*, *supra* note 6, para. 258. Emphasis added.

*Opinion 2/13* is that the Court appears to have applied a much broader version of autonomy than it had in its previous case law. Locke argues, for instance, that in *Opinion 2/13* “the Court of Justice moved the goalposts and, without expressly admitting it, extended the meaning of the autonomy of EU law”.<sup>86</sup> The argument is that the drafters sought to safeguard autonomy according to the narrow conception of autonomy, whereas the benchmark used by the Court employs a much broader conception of the principle.

The drafters of the Accession Agreement seem to have approached the question based on the narrow conception of autonomy, that is, that respect for the principle of autonomy essentially required safeguarding mechanisms designed to preserve the role of the CJEU. The Court is extremely critical of this approach:

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.<sup>87</sup>

At first, this reasoning seems difficult to support. The accession agreement makes very clear that the EU is not a state; the Preamble even emphasises this: “[H]aving regard to the specific legal order of the European Union, which is not a State, its accession requires certain adjustments to the Convention system to be made by common agreement.”<sup>88</sup> The fact that a complex accession agreement was needed at all is based on the idea that the EU requires certain treatment for it to accede to the ECHR.

The Court’s criticism, however, was of the approach taken by the drafters. That is, they sought to treat the EU as a state in all respects, but would include “certain adjustments” where necessary. The drafters started from the principle that each Contracting Party should be treated in the same manner, unless special circumstances required different treatment. For the Court, it was the other way around; the unique nature of the EU legal order should have been the starting point. These two starting points were so different that the Accession Agreement was possibly doomed to fail. The Court did not have problems with the technical design of the building, but with the very foundations on which it was built. This can only be rectified, not with modifications, but by re-building from the ground up. One could argue that such an approach goes against the clear will of the Member States, who included ECHR accession as a constitutional obligation. Unlike other international agreements to which the EU seeks to accede, the EU Treaties *require* the Union to join the ECHR. Yet the fact that the Court would adopt such an approach, in the face of such strong support, serves to emphasise just how important the constitutional principle of autonomy has become.

The passage quoted above also shows that the external dimension of autonomy is concerned not only with the action of the EU, but also with the Member States, who have accepted that their mutual relations “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*”. The role and status of the EU Member States as parties to the ECHR, which would be transformed into a mixed agreement upon EU accession, would also be affected by the EU’s accession to the ECHR. This is quite different from the internal dimension of autonomy, where the Court emphasises the distinct nature of the EU legal order vis-à-vis the EU Member States. The external dimension of autonomy as a structural principle requires one to imagine the Member States as an important element of this structure. The effect of EU accession on the role and status of the EU Member States as parties to the ECHR is something that was arguably overlooked by the drafters and perhaps another reason why the Court’s Opinion came as a surprise.

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<sup>86</sup> T. Locke, ‘The Future of the European Union’s Accession to the European Convention on Human Rights after Opinion 2/13: is it Still Possible and is it Still Desirable?’ 11 *European Constitutional Law Review* 2 (2015) 239, 243.

<sup>87</sup> *Opinion 2/13*, *supra* note 6, para. 193. Emphasis added.

<sup>88</sup> Draft Accession Agreement, *supra* note, preamble.

## Conclusion: The Evolution of Autonomy

Autonomy is a somewhat paradoxical concept. In the context of international organizations, it relates to the idea that as a legal person the organization is both independent from, but at the same time dependent upon, its Member States. Similarly, the EU is the international organization that exercises the most independence from its Member States, and the Court has long emphasised the separate legal nature of the EU. Yet at the same time the Union is highly dependent upon the Member States in order to carry out its functions<sup>89</sup> and they remain an essential element in the EU constitutional structure.

This paradox also applies to the external dimension of autonomy. The EU has become a global actor in its own right and, especially since the Lisbon Treaty, it has espoused the principles of multilateralism and international cooperation. At the same time, its case recent case law has stressed the autonomy of the EU legal order, in a way that emphasises the Court as the gatekeeper able to decide the conditions under which international law can take effect within the EU. The way in which the Court has sought to preserve this autonomy has meant that it has appeared rather hostile to international law and towards international dispute settlement mechanisms. This approach to autonomy can in turn undermine another goal, the EU's ability to become a strong and effective global actor. The EU is a part of, and seeks to participate in the international legal order, but at the same time seeks to preserve its autonomy vis-à-vis that legal order: "On the one hand, the EU's autonomy is a product of international law; on the other, it must distance itself from the international legal order to cement and strengthen its autonomy."<sup>90</sup> Cannizzaro, Palchetti and Wessel point out this apparent contradiction: "The ambiguity lies in its claim to be an open society, which aims to play an increasingly active role in the global legal order, while simultaneously presenting itself as an isolated monad, safeguarding the autonomy of its domestic system of values."<sup>91</sup> Others have pointed out that, if the EU seeks to portray itself as a body committed to respecting international law, we should expect its Court to show a more open or integrationist attitude towards international law.<sup>92</sup> It seems, however, that the opposite is the case in practice.<sup>93</sup> The more the EU seeks to present itself as an actor in its own right at the international level, to participate in the development of international law, the more the Court seeks to stress the autonomy of the EU legal order.

This may not be as contradictory as it first appears. Perhaps we should expect that an entity so tightly woven into the fabric – both of the international legal order and that of its Member States – would need to assert its autonomy even more strongly. Eckes argues, for instance, that because of the

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<sup>89</sup> P.-J. Kuijper, E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013) 41-42: "The EU ... is the victim of a paradox in international relations. It seeks to act as a strong and unified actor towards the outside world in international relations and that is what it is supposed to do according to its latest charter, the Treaty of Lisbon. However, because of its basic structure, it is highly dependent on its Member States for carrying out its policies and implementing its laws, including in the field of international relations."

<sup>90</sup> R. Collins and N.D. White, 'Introduction and Overview' in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 14.

<sup>91</sup> E. Cannizzaro, P. Palchetti and R.A. Wessel, 'Introduction: International Law as Law of the European Union' in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds) *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2012) 1.

<sup>92</sup> G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' 20 *Maastricht Journal of European and Comparative Law* (2013) 168, 183. "If the EU perceives of itself as a uniquely internationally engaged entity, and as a political system founded on the idea of transnational legal and political cooperation, we would be inclined to expect that its Court of Justice would reflect something of this internationalist orientation too."

<sup>93</sup> T. Locke, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: is it Still Possible and is it Still Desirable?' 11 *European Constitutional Law Review* 2 (2015) 239, 244: "While this would suggest that in contrast to some states, which robustly defend the idea of their own sovereignty, the Union would be more open to integration into an international human rights mechanism, the Court has used this argument to achieve the exact opposite."

nature of the EU legal order, it needs more protection than that of a well-established State.<sup>94</sup> According to this argument, we should expect the CJEU, as the guardian of the EU legal order, to be more assertive in protecting what might be viewed as threats to autonomy, both external and internal. The assertion of autonomy can be seen as a necessary reaction to greater interaction with other actors and legal orders.<sup>95</sup> Autonomy in this respect is viewed as being closely interlinked with the EU's constitutional maturity.<sup>96</sup> However, the need to assert its autonomy in this way, especially the need to include specific clauses in agreements to protect EU autonomy, can also mean that the EU is not yet mature.

There comes a point, moreover, when the assertion of the EU's autonomy by the Court undermines the EU's ability to participate effectively at the international level. This working paper has argued that the concept of autonomy is a broad one, and as *Opinion 2/13* demonstrates, can sometimes lead to rather unexpected outcomes. It is not simply about safeguarding the role of the Court, but ensuring that the "essential characteristics" of the EU legal order are preserved. Such an abstract concept can have problems, particularly when the EU seeks to enter into international agreements and take part in dispute resolution mechanisms. Without clear guidance on the limits of the principle of autonomy, negotiators on behalf of the EU cannot be confident that certain clauses will not give rise to concerns. The Court in *Opinion 2/13* essentially required that every possible legal issue, even if slight or hypothetical, be resolved in the accession agreement. Rather than showing faith in the robustness, flexibility and maturity of the EU legal order, the Court requires that safeguards be put in place at the international level.

The principle of autonomy has also been used by the Court to develop the EU's relationship with international law more generally. Without defined boundaries, it can be used to justify a more restrictive attitude towards international law.<sup>97</sup> There are good reasons for seeking to preserve the integrity of Union law from being undermined by international law, yet autonomy should not be the only guiding principle in developing the EU's relationship with international law. Autonomy should also take into account other principles, including the Union's respect for international law. The EU exists in a larger world of other states and international organizations and benefits from participation and interaction in the international legal order; international law is in turn also strengthened by the participation of the Union in international agreements and dispute settlement mechanisms. Autonomy is currently defined primarily in terms of exclusion, even isolation, and not in terms of engagement and integration. Such an approach to the principle of autonomy can diminish the EU's ability to participate in this system, and undermines many of the principles it seeks to protect.

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<sup>94</sup> "Also, the Court of Justice did not have an alternative. It took the perspective of European law. This is the only possible option. After all, the European legal order, despite its ongoing constitutionalisation, remains an international organization that needs to defend its autonomy more firmly than a well-established state, both towards the inside and towards the outside." C. Eckes, 'Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?' 18 *European Law Journal* (2012) 230, 250.

<sup>95</sup> "[A]utonomy is relational. Autonomous orders interact with other orders and this inevitably leads to the normative and legal interpenetration. The question then is how a particular order can preserve its autonomy under conditions of intense interaction with other orders. It is submitted that the autonomy of otherwise juxtaposed orders is preserved only if such normative or legal penetration occurs according to the rules of the receiving order." N. Tsagourias, 'Conceptualizing the Autonomy of the European Union', in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 339, 345.

<sup>96</sup> J-W van Rossem, 'The Autonomy of EU Law' *supra* note X, 28: "one could argue, the more constitutionally mature the EU becomes, the more protective the shield of the concept of autonomy in the face of the international legal order."

<sup>97</sup> K. Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' University of Leicester School of Law Research Paper No. 15-25 (2015), 43. "The shift to an abstract 'principle' of autonomy is a dangerous precedent likely to be used to justify whatever restrictive approach to international law is considered appropriate."



