EU Autonomy and Decisions of (Quasi-)Judicial Bodies

How Much Differentness is Needed?

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Abstract:

Over many years the European Union (EU) has developed its own state-like foreign policy – newly labelled ‘external action’. One important dimension of this external action is participation in international legal regimes (membership in international organizations and signing of multilateral conventions). Because of the EU’s internal complexity participation in international legal regimes raises many issues of a constitutional nature. The Court of Justice has repeatedly been asked to scrutinize whether a particular case of participation is in compliance with EU law. In this regard, it is fair to say that the Court of Justice’s greatest concern has been the preservation of the EU’s autonomy vis-à-vis international (quasi-) judicial bodies. Indeed, it has not so far accepted to be submitted to the authority of any external (quasi-) judicial structure. The two most prominent examples of international (quasi-) judicial bodies that have had and will continue to have a normative impact on the EU are the dispute settlement mechanism of the World Trade Organization (WTO) and the European Court of Human Rights (ECtHR). As is well-known the EU is a member of the WTO, while negotiations for accession to the European Convention on Human Rights (ECHR) are on-going. Some of the questions addressed in this paper are: How does, will and should the Court of Justice deal with the decisions of these two (quasi-) judicial bodies? Why does the Court of Justice show so much concern for the autonomy of the European legal order? Indeed, should it be more concerned about the autonomy of the EU than constitutional courts are concerned about national autonomy?

Introduction

The European Union (EU) is unique; it is neither a state nor an international organization. Over many years, the EU has incrementally developed its own state-like foreign policy, which since the entering into force of the Lisbon Treaty is labelled ‘external action’. One important dimension of the EU’s state-like international appearance is participation in international legal regimes. The Court of Justice’s concern for the autonomy of the EU legal order has in the past been one of the greatest internal obstacles to EU participation. Particular concerns have been raised by membership in international organizations and signing of multilateral
conventions where these international regimes set up (quasi-) judicial bodies, which were feared to threaten the exclusive jurisdiction of the Court of Justice over the EU legal order.

Any participation in international legal regimes leads to the surrender of some autonomy. When a state or the EU becomes a member of an international organization, it has signed up under international law to respect the rules of that organization. This usually means that it is bound by: 1) the founding treaties (primary law), 2) the decisions of the political organs (secondary law), and 3) the decisions of any (quasi-) judicial organs (quasi-judicial decisions). This third category of (quasi-) judicial decisions is the focus of this paper because in the past they have been seen as the greatest threat to the autonomy of the EU legal order. The two most problematic and well-known examples are decisions of the World Trade Organization (WTO) dispute settlement mechanism and rulings of the European Court of Human Rights (ECtHR).

In principle, when joining an international organization or signing a convention the EU is in the same position as any other member or signatory party. Yet as we will see, the Court of Justice has been particularly cautious about accepting the ‘normative impact’ of (quasi-) judicial decisions. Normative impact refers here to the legally binding force and status of these decisions within the EU legal order. This entails that the focus is on decisions that are legally binding on the EU under international law. The effects of not legally binding instruments are by no means denied but they are not central to the present discussion.

This paper focuses on the Court of Justice’s concern that the decisions of (quasi-) judicial bodies of international organizations threaten the autonomy of the EU legal order. It addresses the following questions: How does, will and should the Court of Justice deal with the decisions of these two (quasi-) judicial bodies? What could be the reasons for the Court of Justice’s concern about the autonomy of the EU legal order? Indeed, should it be more concerned about the autonomy of the EU than constitutional courts are concerned about national autonomy? Section One gives an overview of the Court of Justice’s long-standing concern for the autonomy of the EU legal order, in particular with regard to international judicial bodies. It then discusses why the decisions of (quasi-) judicial bodies should be analyzed separately from the founding treaties or conventions (primary law). Section Two turns to the EU’s membership in the WTO and the Court of Justice’s approach to WTO dispute
decisions. Section Three addresses the negotiations on the EU’s accession to the European Convention on Human Rights (ECHR) and the decisions of the ECtHR. Even though the two legal regimes serve very different purposes and are structurally difficult to compare, both regimes are more ‘constitutionalized’ than other specialized international legal regimes. This is largely due to their developed enforcement mechanisms and the constitutional discourse resulting from that. Also, it was argued that at present (before EU accession to the ECHR) the Court of Justice treats ‘the “Geneva system” in many ways like the “Strasbourg system”.’¹ Both legal regimes are rule-based and benefit from predictability and effectiveness. Other examples of international (quasi-)judicial bodies do not lend themselves for comparison because they either do not exercise a form of jurisdiction that is likely to create a threat to the EU’s autonomy,² or demonstrate great deference to the Court of Justice.³ Section Four addresses the core questions that underlie this paper: Why does the Court of Justice fear that international law threatens the EU’s autonomy? In what way does the EU’s position differ from States that participate in international organizations? In the final section, tentative conclusions are drawn.

EU Autonomy

Participation in international organizations is a simple fact of life for States. For an international actor with certain state-like functions as the EU, participation in international organizations has become a necessity for effective policy-making and to fulfil the tasks conferred to it by the EU Treaties.

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² The EFTA court for instance that has taken the place of the proposed EEA court (see discussion of Opinion 1/91 below) does not settle disputes between the contracting parties of the EEA agreement.
³ The Arbitral Tribunal under the UN Convention on the Law of the Sea (UNCLOS), to which the EU is also a party, suspended the Mox Plant case pending the Court of Justice’s decision (see: Case C-459/03, Commission v Ireland (Mox Plant) [2006] ECR I-4635).
The Case Law

One specific problem flowing from the participation of the EU in international organizations is what is usually called the protection or preservation of the ‘autonomy’ of the EU legal order. Concern for the EU’s autonomy has guided the Court of Justice’s case law internally, but also externally in its opinions on the compatibility of international agreements with the Treaties. Internally and hence towards the Member States, the focus has been the primacy of EU law over national law. Ultimately, this includes the monopoly of review by the Court of Justice, but not a monopoly of interpretation of EU law. To the contrary, Member States’ courts must interpret and give effect to EU law as part of a hierarchal structure with the Court of Justice on the apex. Their autonomy as ‘EU courts’ must be protected from international bodies. Externally, the Court of Justice’s particular concern has been its own autonomy vis-à-vis other (quasi-) judicial bodies. This started with Opinion 1/76 on the European Laying-up Fund for Inland Waterway Vessels, and the Court of Justice has returned to the autonomy of the EU judiciary several times: in Opinion 1/91 on the European Economic Area (EEA), in Opinion 2/94 on the accession of the Community to the ECHR, and in Opinion 1/00 on the European Common Aviation Area, as well as in the case of Mox Plant. These cases have been examined in much detail in the literature. It might be worth adding a few remarks about a recent case though. In Opinion 1/09, on the creation of a unified patent litigation system, the autonomy of the EU legal order, and in particular of the EU judiciary, was the decisive argument to declare the draft agreement in question...

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4 See on this issue and on the case law discussed in this section: Jan Willem van Rossem, The Autonomy of EU Law: More is Less?, Section 2.
6 Article 218(11) TFEU.
9 Opinion 1/76 re draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels [1977] ECR 741. In this case, the CoJ rejected the establishment of a fund tribunal consisting of six of its own judges. It expressed concern about the possibility of conflict of jurisdiction in the event of two parallel preliminary ruling procedures on the interpretation of the agreement (one before the fund tribunal and one before the CoJ) and on the impartiality of those judges that sit on both judicial bodies.
13 Case C-459/03, Commission v Ireland (Mox Plant) [2006] ECR I-4635.
14 Opinion 1/09, re Unified Patent Litigation System, of 8 March 2011, see in particular paras 73-89.
incompatible with EU law. The Court of Justice’s main concern in this case was that the newly established European and Community Patents Court would take over powers of the Member States, including making references to the Court of Justice under Article 267 TFEU in disputes concerning European and Community patents.\textsuperscript{15} Hence, the autonomy concern is ongoing and extends not only to the substantive interpretation of EU law but also to the EU law functions of the courts of the Member States.

However, the Court confirmed as a matter of principle in the EEA Opinion that the EU can be a party to an international agreement that sets up a judicial body to solve disputes between the contracting parties and that the Court of Justice would be bound by that judicial body’s interpretation of the international agreement.\textsuperscript{16} The greatest obstacle in the past appears to have been the fear that another judicial body might give binding rulings on issues of EU law.\textsuperscript{17}

It is fair to say that the autonomy of the EU legal order is an old but ongoing concern of the Court of Justice, which is not likely to go away any time soon. On the contrary, with the increasing quantity and quality (impact) of cross-border activities in a globalized world the autonomy of domestic structures will come further under pressure.

\textit{The Greatest Threat to Autonomy: (Quasi-) Judicial Decisions?}

This section explains why (quasi-) judicial decisions of international organizations should be discussed separately from the founding treaties or convention (‘primary law’) and the ‘secondary law’ adopted by political bodies of these international organizations. In the case of the WTO, these are the decisions of the Appellate Body and in the case of the ECHR these are rulings by the Strasbourg Court.

\textsuperscript{15} \textit{Ibid}, para 80-81.
\textsuperscript{16} Opinion 1/91, re EEA, paras 39-40: The EU’s ‘capacity to conclude international agreements necessarily entail 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’.
\textsuperscript{17} \textit{Ibid}, para 33-36.
It makes sense to look at (quasi-) judicial decisions separately; not only because the Court of Justice’s concern with the autonomy of the EU legal order is particularly directed towards (quasi-) judicial decisions that might contain interpretations of EU law, but also because of their nature. (Quasi-) judicial decisions are a specific and binding interpretation of general rules.

(Primary) WTO law for instance leaves WTO members considerable room for manoeuvre, while WTO dispute decisions are very specific and ‘shall be […] unconditionally accepted by the parties to the dispute’. The WTO Appellate Body is called ‘body’ rather than court or tribunal and its decisions are called ‘reports’ and need to be formally approved by the WTO’s highest political organ, the Dispute Settlement Body (DSB). However, they are confirmed pursuant to negative consent where a decision is adopted by the DSB except when all WTO members oppose it (including the winning party to the dispute). This vests them in practice with all the binding force of a judicial decision. The case law of the ECtHR offers the interpretation of what is meant with human rights provisions that are phrased as open-ended and incomplete as Article 5(1): ‘Everyone has the right to liberty and security of person.’ The ECtHR’s decisions are binding on the parties of the case. In neither case is there any room for manoeuvre or negotiation.

Another question could be whether it should make a difference whether or not a State or the EU is party to the proceedings and hence directly obliged under international law to give effect to the ruling. In this sense, (quasi-) judicial decisions could be seen as limited in scope. However, both the case law of the ECtHR and the decisions of the WTO dispute settlement mechanism function through the building of a precedent-based system that leads to an autonomous interpretation of the Convention and WTO law respectively, to which later decisions refer. Therefore, for the present discussion on the normative impact of these decisions in the domestic legal order, the difference between the proceedings to which a State or the EU is a

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18 See for an argument in favour of direct effect of WTO dispute decisions but against direct effect of WTO law more broadly: Eeckhout, 2011, pp. 375 et seq.
19 See Article 17(14) Dispute Settlement Understanding.
20 Ibid.
21 Article 53 ECHR: The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties. Article 54 ECHR: The judgement of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
22 Greer, 2003 goes as far as arguing that the ECtHR’s primary function is ‘constitutional justice’ rather than ‘individual justice’. This is of course subject to societal change, see: ECtHR, Cossey v. UK (application no. 10843/84), Judgment (Plenary), 27 September 1990, Series A, Vol. 184, para 35.
party and those where this is not the case is limited. The main difference remains that, for example in the case of the ECtHR, it appears easier for a State and its national courts to distinguish decisions that concerned other States on the facts: they concerned after all a different domestic legal system and hence a different situation.

The Present: the EU in the WTO

In any international organization or convention regime, there is a positive correlation between the level of constitutionalization and the normative impact of that regime. Normative impact is often used as an argument for the need for greater constitutional constraints. At the same time, as can be best demonstrated with the example of the EU\(^{23}\), this results in a circular development between factors that reinforce each other: a greater normative impact requires a higher level of constitutionalization and a higher level of constitutionalization entails greater effectiveness, enforceability and/or legitimacy, all of which cumulate in a greater normative impact. This is also true for the development from the GATT to the WTO.

EU accession to the ECHR is and will be different from EU accession to the WTO. International trade is as a subject matter very different from human rights, both in terms of political loading and in terms of EU competence. Further, the two are structurally different. The WTO is based on negotiation. The ECHR simply requires compliance. EU accession to the ECHR raises different and complex questions of EU constitutional law, including in the long term and after all the technicalities have been agreed. However, at this point the WTO can serve as a point of comparison, mainly because the WTO and the ECHR are both fairly well-developed, i.e. constitutionalized, specialized international legal regimes. Both have been subject in the constitutional discourse that is grounded in a not state-bound

\(^{23}\) The effectiveness of EU law is the result of the interplay between the Member States’ acceptance of supremacy and direct effect (normative impact) on the one hand and a strong court and respect for the rule of law and human rights (constitutionalization) on the other.
understanding of what is constitutional. The ECtHR has repeatedly referred to the ECHR as ‘constitutional instrument of European public order’.

To better understand what is meant by ‘constitutional’ in the context of a non-state structure, it is helpful to look at the criteria Neil Walker has developed in this context. He mentions: (1) development of an explicit constitutional discourse; (2) claim to foundational legal authority; (3) development of jurisdictional scope/sphere of competences; (4) claim to interpretative autonomy; (5) institutional structure governing the polity; (6) criteria, rights and obligations of citizenship; and (7) representation of membership. Both for the WTO and of the ECHR, the judicialization of the regime is the most important constitutionalizing factor. Judicialization has established and defended the ‘jurisdictional scope’, a certain ‘interpretative autonomy’, with subscription to ‘rule of law values such as certainty, predictability and consistent and coherent reasoning’. This has led to a constitutional discourse. Hence, while neither the WTO nor the ECHR can compare with the EU in terms of constitutionalization, they both have entered some form of constitutional discourse and this is predominantly the case because of their powerful (quasi-) judicial bodies, which have also determined the normative impact of these legal regimes.

**Participation**

The WTO is the most powerful international organization that the EU has joined as a full member. It is probably also the most successful example of EU participation in any international organization. The Agreement Establishing the WTO is a mixed agreement, which means that both the Union and, in the case of the WTO, all Member States are parties. The legal reason for this construction is that

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26 Ibid, p. 35.
27 Ibid, pp. 50-51. For the ECHR compare Alec Stone Sweet’s analysis (supra note 24).
28 Eckhout, 2011.
the Union and its Member States both have competences in the areas covered by the
WTO Agreement. Even after the entering into force of the Lisbon Treaty, some of
these competences remain both with the Union and its Member States.

In practice, mixity has been replaced by a dominance of the Union within the
WTO. This is particularly visible in the dispute settlement procedure. While in the
earlier days EU Member States still acted as litigants in the WTO dispute settlement
mechanism, the Commission now represents as a single actor the Union and the
Member States in all WTO litigation. In actions against individual Member States,

29 See originally Opinion 1/94, re WTO Agreement, [1994] ECR I-5267. The division of
competences has changed with subsequent Treaty amendments, e.g. the Treaty of Nice has
given the EU exclusive competence for trade related intellectual property rights (ex-Article
133(5) EC).
30 E.g.: the competence to conclude agreements covering transport services.
31 See e.g.: Antoniadis, 2004, p. 327.
32 DS86 Sweden — Measures Affecting the Enforcement of Intellectual Property Rights
(Complainant: United States) 28 May 1997; DS83 Denmark — Measures Affecting the
Enforcement of Intellectual Property Rights (Complainant: United States) 14 May 1997; DS82
Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights
(Complainant: United States) 14 May 1997; DS80 Belgium — Measures Affecting Commercial
Telephone Directory Services (Complainant: United States) 2 May 1997; DS68 Ireland —
Customs Classification of Certain Computer Equipment (Complainant: United States) 14
February 1997; DS131 France — Certain Income Tax Measures Constituting Subsidies
(Complainant: United States) 5 May 1998; DS130 Ireland — Certain Income Tax Measures
Constituting Subsidies (Complainant: United States) 5 May 1998; DS129 Greece — Certain
Income Tax Measures Constituting Subsidies (Complainant: United States) 5 May 1998;
DS128 Netherlands — Certain Income Tax Measures Constituting Subsidies (Complainant:
United States) 5 May 1998; DS127 Belgium — Certain Income Tax Measures Constituting
Subsidies (Complainant: United States) 5 May 1998.
33 In the list of disputes on the WTO website, no Member State has brought a complaint. Cases
brought by or against the Union since 1 January 2009: DS425 China — Definitive Anti-
Dumping Duties on X-Ray Security Inspection Equipment from the European Union
(Complainant: European Union) 25 July 2011; DS424 United States — Anti-Dumping
Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy (Complainant:
European Union) 1 April 2011; DS409 European Union and a Member State — Seizure of
Generic Drugs in Transit (Complainant: Brazil) 12 May 2010; DS408 European Union and a
Member State — Seizure of Generic Drugs in Transit (Complainant: India) 11 May 2010;
DS407 China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from
the European Union (Complainant: European Union) 7 May 2010; DS405 European Union —
Anti-Dumping Measures on Certain Footwear from China (Complainant: China) 4 February
2010; DS401 European Communities — Measures Prohibiting the Importation and Marketing
of Seal Products (Complainant: Norway) 5 November 2009; DS400 European Communities —
Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Canada)
2 November 2009; DS397 European Communities — Definitive Anti-Dumping Measures on
Certain Iron or Steel Fasteners from China (Complainant: China) 31 July 2009; DS396
Philippines — Taxes on Distilled Spirits (Complainant: European Communities) 29 July 2009;
DS395 China — Measures Related to the Exportation of Various Raw Materials (Complainant:
European Communities) 23 June 2009; DS389 European Communities — Certain Measures
Affecting Poultry Meat and Poultry Meat Products from the United States (Complainant:
United States) 16 January 2009.
the Commission conducts the consultations and takes up defence in the panel. However, it should not be forgotten that the EU and the GATT did not fall in love at first sight. Indeed, the GATT’s most important principle of non-discrimination, the most-favoured-nation rule, and European integration stand in open conflict with each other – at least in principle. At the beginning, there was also resistance from GATT signatories, who ultimately accepted the status quo. Today, this is of course history. The EU’s role in the WTO is largely uncontested. It has virtually replaced the Member States.

**Decisions of the WTO Appellate Body**

While the WTO could be largely seen as lacking the capacity to produce secondary law, it has an exceptionally well-developed dispute settlement mechanism and produces hence quasi-judicial decisions that do not require consent and that are subject to an enforcement mechanism (trade sanctions). As is well-known and possibly discussed too often, the Court of Justice does not give direct effect to decisions of the WTO dispute mechanism. This means that these decisions cannot directly be used as yardstick against which acts of the EU institutions can be reviewed. On appeal in the case of Biret, the Court of Justice indicated in passing that the question of whether WTO dispute decisions enjoyed direct effect could be

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34 This was the case in the last complaint that was brought against an individual Member State: DS210 Belgium — Administration of Measures Establishing Customs Duties for Rice (Complainant: United States) 12 October 2000. In DS173 France — Measures Relating to the Development of a Flight Management System (Complainant: United States) 21 May 1999 and DS125 Greece — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Complainant: United States) 4 May 1998 an identical request for consultations was addressed to the Union, see: DS172 European Communities — Measures Relating to the Development of a Flight Management System (Complainant: United States) 21 May 1999; DS124 European Communities — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Complainant: United States) 30 April 1998.

35 See e.g.: DS67 United Kingdom — Customs Classification of Certain Computer Equipment (Complainant: United States); DS68 Ireland — Customs Classification of Certain Computer Equipment (Complainant: United States).

36 As a matter of principle this has not changed even though Article XXIV GATT has solved the legal problem.


38 Paasivirta and Kuijper, 2005 emphasise that WTO law and decisions of the dispute settlement bodies are the exception that confirm the rule that international agreements do form part of the EU legal order and can have direct effect. More recently also decisions of the UNCLOS Tribunal, see C-308/06 Intertanko [2008] ECR I-4057.

examined separately from general WTO law. This gave rise to speculation of whether WTO dispute decision could enjoy direct effect. However, in the case of Van Parys, the Court closed this avenue and made clear that the nature of the dispute settlement mechanism did not justify conferring direct effect on WTO dispute decisions. It later confirmed this line in the case of Fiamm.

The Court’s rejection of direct effect of decisions of the WTO dispute settlement mechanism is based on several strands of argument. The first focuses on the nature of the WTO dispute settlement mechanism. Both in Van Parys and in Fiamm the Court emphasized the fact that WTO dispute resolution relied on negotiation between the parties. It focussed on the temporary measures of compensation and suspension of concessions. The second strand traces the effect of WTO dispute decision back to the effect of WTO law as such. In Fiamm, the Court further explained that WTO dispute decisions do not have direct effect because they apply WTO law which does not have direct effect either. It should be added that this is not to say that WTO law does not play a role in disputes before the Court of Justice. The Court routinely interprets secondary EU law consistently with WTO law.

The issue of the exclusive jurisdiction of the Court of Justice for the interpretation of EU law has not been a central issue in the discussion of the (potential) effects of decisions of the WTO dispute settlement bodies. However, decisions exist in which the panel or Appellate Body took a position on the allocation of responsibility on the basis of the division of competences or tasks between the EU and its Member States under EU law. The situation is comparable to the discussion on future scenarios in which the ECtHR might give binding rulings in which it touches upon questions of internal EU law. In cases that could have been

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40 Case C-377/02, Van Parys, [2005] ECR I-1465. See on the same issue and with the same outcome in more detail: Advocate General Léger, C-351/04, IKEA Wholesale, paras 77 et seq.
42 Ibid.
44 This is very different for the ECtHR: see infra.
46 See above.
problematic, the Appellate Body has displayed considerable deference towards the EU. In the case of Selected Customs Matters, for instance, the Appellate Body was essentially invited to declare that the entire EU customs system was not sufficiently coherent. However, it chose not to enter into this argument.

The Future: the EU in the European Convention on Human Rights

Accession Negotiations

The most topical example of the EU becoming a contracting party to an international convention is its accession to the ECHR. The accession discussion has been going on since the 1970s and culminated in 1994 with the Court of Justice terminating all accession attempts under the old Treaty framework. The situation changed on 1 December 2009 with the entering into force of the Lisbon Treaty. The EU’s accession to the ECHR has now become an obligation under EU law.

Jean Paul Jacqué predicted that accession of the EU to the ECHR will ‘deprive academics and lawyers involved in the European legal discourse of one of their favourite topics of discussion’, namely what the relationship between the two courts should be and how to deal with conflicting substantive decisions. Yet as Jacqué’s further analysis demonstrates, not all issues have been finally resolved and also actual accession might still be a long way ahead. One remaining (technical)
issue is for instance that the EU may make reservations, declarations and derogations under the Convention when it accedes to the ECHR. The Convention is not one comprehensive list of human rights. It consists of multiple protocols that need to be separately ratified and contracting parties to the ECHR, including EU Member States, have chosen not to be bound by particular provisions (reservation). An example is the UK’s reservation to Article 2 of the First Protocol, the right to education, in which the UK states that it will respect parents’ religious and philosophical convictions to the extent that this is compatible with providing efficient instruction and training and avoids unreasonable public expenditure. The EU’s reservation will determine the scope of protection under the Convention for the whole realm of EU law, including for the Member States when acting within that realm, be it by implementing EU law or even by derogating from EU law.

The EU’s concern with autonomy was one of the dominant points of discussion in the negotiation of the terms of the EU’s accession to the ECHR. On the side of the ECHR, further technical and legal modifications, such as the establishment of the co-respondent mechanism, are required to ensure the EU’s autonomy. The co-respondent mechanism is aimed to address the difficulty of apportioning responsibility. Apportioning responsibility is not the same as

Convention on Human Rights (CDDH-UE) with the European Commission, Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16) on 14 October 2011 to the Committee of Ministers of the Council of Europe (see Paragraph 15 of Document CDDH(2011)009). The Parliamentary Assembly of the Council of Europe as well as both Courts will give their opinion on the agreement. It will then need to be adopted by the Committee of Ministers. The EU will finally accede to the ECHR after the accession agreement has entered into force, which will be the case after it is ratified by all states parties to the ECHR as well as the EU itself.

54 Document CDDH-UE(2011)16, ibid, para 27.
55 On 1 October 2011, fifteen protocols are open for signature. Protocol 1 (property; education; elections); Protocol 4 (civil imprisonment, free movement, expulsion); Protocol 6 (restriction of death penalty); Protocol 7 (crime and family); Protocol 12 (discrimination); Protocol 13 (complete abolition of death penalty) and of course on procedural issues Protocol 14 (entered into force on 1 November 1998).
58 Article 3 of CDDH-UE (2011) 16fin; see also paragraph 54 of the Explanatory report to the agreement.
attribution, but it cannot be completely disjoint either. Attribution to the EU or its Member States however cannot ignore the power division between the EU and its Member States under internal EU law. This is where the ECtHR could give rulings that threaten the judicial monopoly of the Court of Justice to give an autonomous and binding interpretation of EU law. The situation appears comparable to the situation under consideration in Opinion 1/91. In this case, the Court found the system of judicial supervision under the EEA incompatible with EU law because the EEA Court would have had to ‘rule on the respective competences of the Community and the Member States’ in order to decide who would have been the correct party to the dispute under the mixed agreement in each case. Division of competences was a problem under the EEA Agreement but not under the ECAA Agreement because the former was a mixed agreement while the latter was an agreement between the Community and third States (the EU Member States were not parties) at the time it was submitted to the Court of Justice for an opinion on its compatibility with EU law.

The final draft accession agreement introduces a co-respondent mechanism, with joint responsibility of the respondent and co-respondent the common case, to disburden the Strasbourg Court from the task of assessing the distribution of competences between the EU and its Member States. Further, if the Court of Justice was not involved in the case and the EU becomes a co-respondent it is possible to stay the proceedings before the ECtHR and give the Court of Justice the opportunity to scrutinise compliance with Convention. This is similar to the arrangements made under the second EEA Agreement and under the ECAA Agreement. Both place the Court of Justice the privileged position that it can be asked for an interpretation before the ruling is given. Both substantive parts of the EEA and the ECAA Agreement are tailored on the model of EU law. The ECHR, by contrast, does not replicate EU law. Yet, many rights under the Charter of Fundamental Rights are largely identical to the ECHR. Hence, even though it is rather the Charter that is

60 See the discussions on attribution in ECtHR, Behrami, Saramati supra note 25. See also Articles 3 and 4 of the draft articles on the responsibility of international organisations, 2011.
61 Opinion 1/91, para 34.
62 The ECAA Agreement had been substantially amended and become a mixed agreement by the time it was signed in 2006. See: Marco Bronckers, ‘The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful, or Submissive?’, Common Market Law Review 44 (2007), pp. 601-627, at 609.
63 Accepted by the Court of Justice in Opinion 1/92, re EEA II, [1992] ECR I-2821.
64 Opinion 1/00 re ECAA.
drawn up with an eye on the Convention than the other way around, the substantive overlap is comparable.

Finally, the Court of Justice might be asked to give an opinion on the compatibility of the (future) ECHR accession agreement with EU law. Yet, it is hard to imagine that the Court will block the way to accession. This was similar when the Court was asked to give an Opinion on the WTO Agreement. Here too, it would have been a disaster if internal quarrels had hindered the EU to accede to the WTO. The EU had already taken over large part of the Member States’ activities in the WTO.

**Comparing to the Status Quo**

The question is whether at present (before EU accession to the ECHR) the ECtHR could not be seen as facing the exact same questions of allocating (rather than apportioning) responsibility between the EU and its Member States. The EU cannot – until accession – be held responsible before the Strasbourg Court. This does not exclude holding the Member States responsible under the ECHR even if they merely execute or implement EU law. Yet, their responsibility does not cover the actions of the EU that cannot be attributed to them. In the case of *Connolly* for instance, the ECtHR rejected the admissibility of an application of an employee of the European Commission challenging on several accounts a disciplinary procedure that had resulted in the suspension of the applicant from work. The decision of whether the Member States can be held responsible for actions of the EU or whether the actions exclusively fall within the independent internal EU sphere also require an interpretation of the internal workings of the EU. The difference after accession will be that the EU itself is bound under international law to accept the ECtHR’s rulings and give effect to them. This will place the Court of Justice in the position to have to determine their binding force and status within the EU legal order.

It might seem exaggerated to consider *Connolly* as an example of a type of ruling that could threaten the autonomy of the EU. However, this case turns on the question of whether the contested act was an act of the EU or whether it was an act of

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65 Opinion 1/94, re WTO Agreement  
67 ECtHR, *Connolly vs Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and UK*, Application no. 73274/01 (available in French only).
the Member States. This evaluation requires a closer look at the internal workings of the EU. Similarly, in the well-known case of Matthews concerning the right of the citizens of Gibraltar to vote for the European Parliament (EP), the ECtHR examined whether the EP had the ‘characteristics of a “legislature” in Gibraltar’, which can only be decided in view of the function of the EP under EU law. Further in the case of Bosphorus, concerning the impoundment of an aircraft in Ireland intended to give effect to a sanctions regime adopted by the UN and implemented by an EU regulation, the ECtHR examined the legal nature and force of Ireland’s obligation under the relevant regulation. The Court specifically discussed that an EU regulation is “binding in its entirety” and “directly applicable” in all member States [which] means that it takes effect in the internal legal orders of member States without the need for domestic implementation’. The nature of regulations was and still is straightforwardly determined by the European Treaties. Examining the nature and extent of Member States’ obligations under EU law however can also be more difficult and controversial. This would be the case for instance, if the ECtHR was to examine one of the EU law concepts based on case law, such as the direct effect of directives or the obligation of consistent interpretation – or primacy for that matter.

A particular problem could arise from the lack of jurisdiction under the Common Foreign and Security Policy (CFSP). CFSP is a policy area in which, even after Lisbon, the Court of Justice does not have the power to give preliminary rulings and can receive direct actions for review of legality (not interpretation) only as far as they are directed against a very specific measure, namely CFSP decisions providing for restrictive measures against natural or legal persons within the meaning of Article 215(2) TFEU. This could potentially raise problems. First, the EU is carrying out multiple peace keeping missions under the CFSP that could lead to potential complaints before the ECtHR. Second, CFSP decisions providing for restrictive measures against individuals could give rise to questions of interpretation relating to an alleged breach of human rights that the Court of Justice cannot receive. One could think of a case relating to the interpretation of ‘the funds and other financial assets or

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68 ECtHR, Matthews v UK, application no. 24833/94, judgment of 18 February 1999, paras 45 et seq.
69 ECtHR, Bosphorus, supra note 25, para 145.
70 Article 288(1) TFEU.
71 See Article 275 TFEU.
72 The best example for this is a Behrami-type situation. See: ECtHR, Behrami, supra note 25.
economic resources’ or whether these funds actually belong to the listed person, similar to the case of M. Third, as to date, sanctions adopted under Article 215(2) TFEU are still based on a pre-Lisbon common position that is governed by pre-Lisbon rules and remains consequently outside of the Court’s reach. Fourth, if counter-terrorist sanctions against individuals have taught us anything it is that the EU institutions are willing to interpret their Treaty powers creatively to adopt whatever measure they deem necessary. Hence, CFSP measures of the future could impact on the rights of individuals in ways that we cannot predict today. However particularly in the area of CFSP, EU accession to the ECHR could, from the perspective of the individual, make all the difference between having access to justice or not, since actions of the EU will no longer fall outside the personal scope of the Strasbourg Court’s jurisdiction.

Decisions of the ECtHR under Domestic Law

Rather than making the EU more of a ‘human rights organization’ comparable to the ECHR, accession will place the EU in a position more similar to its Member States. However, the fact that the EU will be in a state-like position as regards its obligations under the ECHR means that it is bound under international law as all other Contracting Parties. It does not immediately answer the question of what the normative impact of ECtHR decisions will be in the EU legal order. As with other international law, the reception in the domestic legal order is determined by domestic law.

States receive decisions of the ECtHR in very different ways. The German Federal Constitutional Court (GFCC) for example explicitly ruled that the Convention, as any other binding international law in Germany, has the same status as ordinary laws (Gesetzesrang) and takes effect within the framework of the German Constitution. This means that it ranks below the German Constitution, with the

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73 See Article 2 of Common Position 2001/931/CFSP.
74 C-340/08, M and Others, ECR [2010] I-3913. This is a case concerning the question of whether the subsistence allowance of a spouse of the listed person was covered.
75 See: ECtHR, Behrami, supra note 25.
76 Rosas, 2011.
consequence that ordinary courts must observe and apply the Convention, while before the GFCC the ECHR (only) serves as ‘interpretation aid’ in determining the contents and scope of fundamental rights and fundamental principles protected under the German Constitution. 79 Most recently, the GFCC accepted that ‘…decisions of the […] ECtHR, which contain new aspects for the interpretation of the Basic Law, are equivalent to legally relevant changes, which may lead to the final and binding effect of a Federal Constitutional Court decision being transcended.’ 80 The GFCC accepts the ECHR as binding at the level of ordinary laws but uses it as an interpretation aid only for constitutional matters. Indeed, even in cases to which Germany has been a party and where it is consequently legally bound to give effect to under international law,81 the GFCC only ‘takes account of the valuations made by the ECtHR’.82

Indeed, the GFCC’s approach to the ECHR and the case law of the ECtHR can – as regards the outcome, not the argument – be compared to the current (pre-accession) approach of the Court of Justice. The Court of Justice has given the ECHR special significance in the EU legal order and taken much inspiration from it, including long before a reference to the ECHR was incorporated into the Treaties. 83 More recently the Court has even dropped its traditional ‘general principles’ or ‘source of inspiration’ approach and has started referring directly to the rights guaranteed in the ECHR.84 However, the ECHR and the case law of the ECtHR are

78 See explicitly: GFCC, Decision of 4 May 2011 (Preventive Detention), ibid, second headnote (Leitsatz): ‘Die Europäische Menschenrechtskonvention steht zwar innerstaatlich im Rang unter dem Grundgesetz.’; see also: para 94 ‘…Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte auf der Ebene des einfachen Rechts…’.
79 GFCC, Decision of 4 May 2011 (Preventive Detention), supra note 77, para 86: ‘Auslegungshilfe’.
80 Press release no. 31/3011 of 4 May 2011. See also the first headnote (Leitsatz) of the decision of 4 May 2011 (Preventive Detention), supra note 77: ‘Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, die neue Aspekte für die Auslegung des Grundgesetzes enthalten, stehen rechterheblichen Änderungen gleich, die zu einer Überwindung der Rechtskraft einer Entscheidung des Bundesverfassungsgerichts führen können.’
81 ECtHR, M. v. Germany, Application no. 19359/04, Decision of 17 December 2009 (on preventive detention).
82 Press release no. 31/3011 of 4 May 2011. See also: second headnote (Leitsatz) of decision of 4 May 2011 (Preventive Detention), supra note 77: ‘Der Konventionstext und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte dienen auf der Ebene des Verfassungsrechts als Auslegungshilfen für die Bestimmung von Inhalt und Reichweite von Grundrechten und rechtsstaatlichen Grundsätzen des Grundgesetzes’.
84 Case C-413/99, Baumlaut [2002] ECR I-7091, para 72; Case C-60/00, Carpenter [2002] ECR I-6279, paras 41–2; Case C-200/02, Kungqian Catherine Zhu Chen [2004] ECR I-9925, para 16.
not directly binding sources of law in the EU legal order, they remain highly relevant aids of interpretation before the Luxembourg courts.

In the UK, the European Convention is not itself part of UK law and the decisions of the ECtHR are not directly legally binding under UK law. The ECHR is given effect by the Human Rights Act 1998. However, the Human Rights Act does not require Parliament to legislate compatibly with the Convention nor does it oblige courts to disregard national laws that are incompatible with the Convention. The UK Supreme Court decided most recently in the case of McCaughey\(^{85}\) that the principle that the Human Rights Act should mirror the ambit of the European Convention must be balanced against the (national legal) principle that the Human Rights Act cannot operate retrospectively. The case concerned the obligation to conduct investigation into controversial deaths. The UK excluded obligations under national law arising from an event that had occurred before the Human Rights Act had entered into force (the death of the person in question), irrespective of whether the case at hand would have good chances to succeed before the Strasbourg Court. The ECtHR had imposed obligations flowing from an event that had occurred before the State had become a contracting party to the ECHR. Hence, as a basic position the Human Rights Act mirrors the rights under the Convention, but not under all circumstances. Precedence is given to national understanding of the ECHR, not the interpretation of the ECtHR. Again this does not amount to full incorporation but keeps the ECHR at a distance. In this sense, it allows UK courts to do the same as the Court of Justice at present (pre-accession): to give the Convention and its interpretation by the Strasbourg Court a domestic reading.

The Netherlands, with a (moderate\(^{86}\)) monist tradition, takes a different approach: it places binding obligations of international law above the national constitution.\(^{87}\) Decisions of the ECtHR can be directly invoked before national courts. In this reading, the ECHR offers more protection under Dutch law than currently (pre-accession) under EU law. After accession the precise effects of rulings of the ECtHR under EU law remain to be determined. This explains why from the particular Dutch perspective, EU accession might potentially appear to reduce the

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\(^{86}\) It is considered moderate because international customary law does have internal effect but does not take precedence over a conflicting rule of Dutch law (HR 6 March 1959; NS 1962,2 (Nyugat)).

\(^{87}\) Article 94 of the Dutch Constitution. Except for provisions of international agreements that are not binding on everyone (‘een ieder verbindend’).
rights of the applicant in cases where previously the Netherlands was found by the ECtHR to be the relevant actor. After accession, the EU is asked to determine the internal question of whether a/the Member State(s) and/or the EU is responsible. If this determination results in responsibility of the EU and if the Court of Justice continues to keep the ECHR and the case law of the ECtHR at arm’s length, e.g. by not giving it (at least) the same status as the EU Treaties, the protection of individuals might, from a Dutch perspective, suffer. At the same time, after accession the Court of Justice might be willing to give broader effect to decisions of the ECHR than Germany and the UK. Hence, it would not be justified to lament a general reduction of protection. The enforcement mechanisms within the EU legal order are strong.88 Indeed, they are much stronger than the enforcement mechanisms under the ECHR.89 Further, EU accession generally will fill the gaps revealed by cases such as Connolly90 and resulting from the fact that at present the rulings of the Court of Justice are not subject to review by the ECtHR.

The status and effects of the ECHR and the case law of the ECtHR might still have to be determined by the Court of Justice. Yet, the ECHR enjoys a special constitutional force and can be said to fulfill in the field of human rights a constitutional function within Europe. It is difficult to see in practice how in a ‘Union of law’91 the Court of Justice could follow an argument or give a ruling that openly clashes with a decision of the ECtHR. In any event, the Rechtfertigungsdefizit92 is much lower if the Court does not accept the ECtHR’s position on competence matters of internal EU law than on a matter of substantive interpretation of human rights. On a substantive level the two Courts have so far shown great respect for each other’s decisions.93 The ECtHR has so far had regard to “specific characteristics of the Union and the Union law”.94 In the case of Bosphorus, the ECtHR went as far as establishing

88 Article 260 TFEU. For case law on the strict interpretation of the old Article 228 EC see in particular:
89 Article 46 ECHR and Protocol 14. Implementation of rulings is monitored by the Committee of Ministers.
90 See also: ECtHR, Behrami, Saramati supra note 25.
92 ‘Justification deficit’ - this term is borrowed from: Habermas, 1973.
93 One case stands out in which, it could be argued, the Court of Justice departed from the position of the ECtHR: Case C-17/98, Emesa Sugar, [2000] ECR I-665.
94 Article 1 of Protocol No. 8 relating to Article 6 (2) TEU dealing with the accession of the Union to the ECHR.
the presumption that the protection under the EU law is equivalent to the protection under the Convention if no manifest deficiency is shown in the individual case. This presumption applies to the situation where the ECtHR has jurisdiction because there is a national measures implementing EU law but the Member State did not have any discretion. The draft agreement also recognises the ‘specific legal order’ of the EU. Indeed, while the rules on the side of the ECtHR appear to be fairly detailed there are no guidelines for the Court of Justice how to deal with decisions of the ECtHR. Protocol 8 annexed to the Lisbon Treaty only stipulates that accession may affect neither the competence division between the Union and its Member States (Article 2) nor the exclusive jurisdiction of the Court of Justice (Article 3). Any rules on how the Court of Justice would have to treat decisions of the ECtHR however would have to be rooted in the European Treaties to be binding on the Court of Justice and as the Lisbon Treaty has abundantly demonstrated Treaty amendments are cumbersome and take long. The most practical solution will be to continue to rely on judicial dialogue in different degrees and shades, which would allow being bound in practice with (hypothetical) reservations toward decisions on internal matters of EU law. After accession the ECtHR’s decisions will be formally binding on the Union as a matter of international law. This could in an extreme case result in a finding of non-compliance if the Court of Justice rejects an interpretation of the ECtHR of internal matters of EU law. However, it seems that in most cases it will be possible to reconcile an interpretative difference in a way that does not result in non-compliance.

Finally, the logic behind the ECHR is different from the WTO Agreement. While it is doubtful whether WTO dispute decisions leave room for negotiation, as the Court assumes, the WTO Agreement is a framework in which members negotiate with each other on a formally equal footing. In the ECHR, the core objective is to protect citizens from their States. This is not even formally based on the assumption of equality, or reciprocity for that matter. Finally, while there might be political or economic considerations to delay compliance with a WTO dispute decision, it is more difficult to see why the EU should not immediately give effect to a decision of the ECtHR, e.g. legislative reform to prevent similar violations or individual measures to erase the consequences, such as compensation. It seems more difficult to see an overriding domestic policy consideration that would justify delay in the latter case.

95 Final paragraph of the preamble of the draft agreement.
Autonomy and Sovereignty in a Globalized World

The increased intensity of interaction between international and domestic law has become a platitude. Generally speaking, States have started giving greater consideration to these growing sovereignty constraints resulting from international law. Their concerns usually focus on the protection of individuals and of national power structures from uncontrollable effects flowing from international law. 96

The EU’s relationship with international law is complex and it would be an over-simplification to say that the EU is more concerned about its autonomy than ‘States’. Also, as we have seen with regard to the ECHR, there is not one approach of States to international law. They have very different attitudes.

Under international law, each State is considered sovereign and equal. 97 This presumption lies at the core of international law. Even if international law is evolving and increasingly recognising individuals 98 and non-state entities 99 as actors, international law is and remains state-centric. The basic assumption is that sovereignty is enjoyed by States and by States only. This also explains why States remain the only accepted litigants before many international courts 100 and why membership in most international organizations is limited to States and only few have recognised the EU as a member. 101 International law still functions according to the conceptions of the Peace of Westphalia of 1648: self-determination of people and sovereignty exist in form of States and States only. This leads to a binary understanding: so long as the EU is not a State (which it is not and for all its difference in territorial and hierarchical organisation never will be) it must still be an international organization. The EU’s ‘difference’ (neither State nor international organization) is not recognized by international law that treats it, by want of an adequate frame of reference, as an international organization. A telling example is the responsibility of States versus the responsibility of international organizations. In

96 This is probably best illustrated by the discussions around counter-terrorist sanctions against individuals: Eckes, 2009.
100 International Court of Justice (ICJ), Article 34 (1) of the statute of the ICJ; International Tribunal for the Law of the Sea (ITLoS), Article 20(1) of the statute of ITLoS.
101 WTO, FAO and European Bank for Reconstruction and Development (EBRD).
October 2011, the International Law Commission (ILC) adopted a set of draft articles, together with commentaries thereto, on the responsibility of international organizations. The ILC recommended to the General Assembly to take note of the draft articles in a resolution and to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles. The draft articles set out a general framework and have the advantage of organising the field in a ‘one-size fits all’ way that avoids being lost in exceptions and specificities. At the same time, they do not take account of the diversity of international organisation, the ‘specific nature’ of the EU, and the EU’s ‘real powers stemming from a limitation of sovereignty or transfer of powers from the [Member] States to the [EU]’. The ILC has also been critical at other occasions about legal constructions that result from the EU’s differentness. While States are considered as solid-blocks, i.e. as one entity whose internal structure is irrelevant to the responsibility it owes to third parties, the situation is more complicated for international organizations. The EU for instance often relies on its Member States for implementation of its policies (vertical executive federalism). Further, it regularly concludes ‘mixed agreements’ together with its Member States which do not specify the delineation of their respective responsibilities vis-à-vis third parties. This leads to complex questions concerning the apportionment of responsibility and the attributability of conduct, which cannot be decided without taking account of the internal rules of EU law. This particularity of the EU however is not reflected in the draft articles of 2011.

One could argue that international law’s assumption that only States are

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102 See for a summary of the eleven year process that has led to the adoption of the draft articles: [http://untreaty.un.org/ilc/summaries/9_11.htm](http://untreaty.un.org/ilc/summaries/9_11.htm).
104 The expression is used in this context by: Paasivierta and Kuijper, 2005.
107 The term is taken from: Dann, 2006.
109 See for a convincing argument and suggestions how the draft articles should consider the particular nature of 'Regional Economic Integration Organizations (REIOs) such as the European Community ': Paasivierta and Kuijper, 2005, in particular Section 5. See also the above discussion on the ECHR.
sovereign depends on the underlying understanding of sovereignty. In classical philosophy, sovereignty was understood in absolute terms.\(^{110}\) Under international law and even more in the international relations reality of today, an absolute understanding of sovereignty appears out of place. An absolute understanding focusses on the extreme case or ‘the last word’. However, in determining who has the power to take binding decisions and determine the legal situation the extreme case appears unhelpful. For Hart, a state’s ‘sovereignty is that area of conduct in which it is autonomous’.\(^{111}\) This does not necessarily imply that sovereignty can be divided but in Hart’s understanding, sovereignty appears to be able to be limited to certain areas. Others have identified different elements or properties for sovereignty to be present.\(^{112}\) Ulrich Beck further suggests measuring sovereignty as ‘political clout’ or the ability to have an impact on the world stage and to further the wellbeing of its citizens.\(^{113}\) One difference appears to lie in whether the focus is the hypothetical ‘last word’ in any conflict or whether the focus is the actual practice of who takes or determines the decision.

So far the basic understanding of sovereignty under general international law remains that it is indivisible. It has not adapted to the complex co-existence of the EU\(^ {114}\) and its Member States. This understanding of sovereignty might explain why States do not generally have the same fear of ‘implosion’ that the EU has. Their sovereignty or existence is not questioned as such by international law. States, including EU Member States, remain ‘powerful if not predominant’ players even in the globalized world,\(^ {115}\) even if their power might at times be ‘eroded or even reconfigured’ by normative cross-border activities.\(^ {116}\) It is true that State sovereignty stands in tension with the increasing rule of law pretensions of international law.\(^ {117}\) International human rights regimes are seen as a particular threat to State

\(^{110}\) See e.g. Hobbes, 1651, p. 155.
\(^{111}\) Hart, 1961, 217.
\(^{112}\) Hathaway, 2008, pp. 120 et seq: (1) authority to govern, (2) supremacy, (3) independence and (4) a territory over which this authority is exercised. See also: Balke, 2009, who analyses the limits of democratically legitimated sovereignty.
\(^{114}\) Changes of the concept of state responsibility: from a territorial to a personal link understanding...
\(^{115}\) Snyder, 2010, p. 12. See also: Hollis, 2005, pp. 137 et seq.
\(^{116}\) E.g. when they delegate powers to external bodies (Art 24(1) of the German Constitution: ‘Der Bund kann durch Gesetz Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen.’).
\(^{117}\) Hathaway, 2008, pp. 115 et seq, who ultimately sees international delegation as an exercise of state sovereign authority and not a diminution of it.
sovereignty. However, nobody denies the sovereignty of a State as such because of its entanglement with international relations that limits its freedom of choice because of direct constraints and, more indirectly, because it has to cooperate with other international players to achieve its objectives in a globalized world. Under international law, EU Member States remain sovereign entities, including in areas of EU competence. The same is true for federal States where sovereignty can be divided between the federal and the federate parts and where sub-entities may provoke international responsibility. At the same time, the federal level of any State is usually competent to conduct the entities foreign relations. Also, its very existence as a sovereign entity is uncontested. The EU, by contrast, is ultimately created by international agreements that are concluded by the Member States. This places it in a position different from the position of States. While general international law does not accept domestic law as a reason not to honour international obligations, it does not prescribe the reception of these obligations under domestic law either. This allows States to keep international law at arm’s length by not receiving it as part of the domestic legal system or by not conferring it a hierarchically superior status (the result of dualism).

Hence, while States are always considered sovereign actors, non-state entities, such as the EU, have to prove and defend their sovereignty and even their ability to take legally relevant action. The EU has come a long way – particularly internally. Yet, it has faced and still faces an uphill struggle to establish itself as a polity in its own right that enjoys a degree of sovereignty separate from its Member States. The EU law is of a highly integrated nature; it develops under the dicta of the Court of Justice, which has much helped to establish its differentness. Even if under international law actors are held to act in good faith there is no equivalent to the

118 Wotopka and Tsutsui, 2008, pp. 724 et seq.
119 See for the distinction between negative liberty (free of constraints) and positive liberty (the possibility to achieve certain objectives): Berlin, 1969, p. 180. Many constraints but certainly the growing interdependence lie outside of the influence of states and are hence not subject to their consent.
120 The most well-known example here is the discussion surrounding the Member States’ potential international responsibility if the EU fails to give effect to UN Security Council resolutions imposing counter-terrorist sanctions against individuals.
121 See e.g.: Articles 25 and 32(1) of the German Constitution or Article VI of the US Constitution.
122 This requires of course that the entity qualifies as state in the first place.
123 Good faith is seen as ‘perhaps the most important general principle, underpinning many international legal rules’ (Shaw, 2003, p. 97).
principle of sincere cooperation within the meaning of Article 4(3) TEU and Article 351(2) TFEU. The latter is seen as transforming ‘the status of sovereign States into that of Member States of the European Union.’ Further, new legal constructions such as the directly elected European Parliament and perhaps even more importantly EU citizenship have been created under the EU Treaties by the Member States. Further even though EU does not have Kompetenz-Kompetenz both the political bodies and the Court of Justice have achieved a considerable freedom to establish EU competence by means of creative treaty interpretation. This has attracted much critique from scholars, but has not in practice led to a boycott of the Member States. The dilemma of the EU’s differentness has only been unsatisfactorily solved by the sui generis thesis, which acknowledges the inaccuracy of the binary understanding but that does not offer a better theoretical foundation for how international law should see the EU. Yet, it is true that (at least at present) the transfer of public powers from the Member States to the EU does not have parallels and that this particular situation has found recognition not only by the EU Member States that treat EU law different from international law, but also by third parties that enter into mixed agreements with both the EU and its Member States as contracting parties and agree to ‘disconnection clauses’ that allow Member States to remain for their mutual relations within the scope of EU law ‘disconnected’ from the general regime of the international agreement. One could almost go as far as stating that ‘[a] generalized understanding has emerged that whenever an EU Member State comes to the international negotiation table, the European-law implications will be part of the agenda.’ Some international organizations even allow the EU to participate on a par with States. This level of recognition was

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125 Ibid, p. 323.
126 For an argument on the importance of the latter see: Hoeksma, 2011.
128 For a good overview see: Hlavac, 2010.
129 Many national Constitutions confer a particular status on EU law, different from international law: Article 23 of the German Constitution; The Dutch Raad van State no longer refers to Article 94 of the Dutch Constitution (effect of binding obligations of international law in the national legal order) but accepts primacy as flowing directly from EU law (e.g.: ABRvS, Metten, 7 July 1995, AB 1997, 117); Section 2(1) of the UK European Communities Act of 1972 that ‘is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the Treaty are to be given legal effect in England without more ado (Bulmer v Bollinger [1974] Ch 401, 419, per Lord Denning.).
130 The majority of international agreements concluded by the EU are mixed agreements (see e.g.: Hillion and Koutrakos (eds), 2010.
admittedly not present from the very beginning. However, the same is true for the internal recognition and it could also be argued that the EU has still some work to do until the citizens of the Member States also identify with their role as EU citizens.\textsuperscript{132} Externally, this struggle raises the question of whether the EU aspires to be recognised as a sovereign actor and whether it should do so.

The autonomy of the EU is understood as largely meaning that the EU has its own separate legal and political existence that cannot be linked back to the sovereignty of the Member States and that is not in practice controlled by them. Yet, this autonomy is an autonomy of practice which makes a claim to (limited) sovereignty that by definition cannot based on the classical understanding of (undivided) sovereignty. It could be argued that any decision of the Court of Justice against EU accession to the ECHR and aiming to protect the EU’s autonomy will in actual fact cut both ways. First, a negative decision would mean that the EU cannot become a Contracting Party of the ECHR with all the same rights and obligations as a State. Such full membership implies recognition of a state-like capacity under this particular specialised regime of international law (ECHR). Numerous UN Conventions\textsuperscript{133} and Council of Europe conventions,\textsuperscript{134} as well as the WTO, or for the UN Convention on the Law of the Sea for that matter,\textsuperscript{135} recognise the European Union as capable to participate in specialised international legal regimes on (near) equal footing with States. This ‘third party’ recognition of the EU’s special features creates a significant legal fact for international law.\textsuperscript{136} Perhaps general international law should either simply follow suit or move away from sovereignty and instead recognise autonomous rights including of non-state entities? Second, a negative decision based on the fear that the EU might lose its autonomy when treated on

\textsuperscript{132} The Lisbon Treaty makes some attempt to bring the EU closer to its citizens, see e.g. references to openness and democracy but also more specifically the citizens’ initiative in Article 11(4) TEU and Article 24(1) TFEU.
\textsuperscript{133} E.g. most recently: UN Convention on the Rights of Persons with Disabilities: \url{http://www.un.org/disabilities}.
\textsuperscript{134} The Complete list of the Council of Europe's treaties gives an overview of all Council of Europe conventions open to the EU (available at: \url{http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG}; indicated in the column ‘U’). Notice also the tremendous increase in recent years: 17 of 135 conventions or additional protocols signed between 1949 and 1989 are opened to the EU. 34 of 76 conventions or additional protocols signed between 1990 and 2011 are opened to the EU.
\textsuperscript{135} See: Article IX and XI of the WTO Agreement of 1994 and Article 305(1)(f) UNCLOS in combination with Annex IX.
\textsuperscript{136} Paasivirta and Kuiper, 2005, 210 discussing the particular nature of ‘Regional Economic Integration Organizations (REIOs) such as the European Community’.
equal footing with States highlights – to say the least – the EU’s weaknesses on this point.

By way of conclusion, the EU has evolved into a new type of actor within international law without international law being able to fully recognise this fact. This contradiction explains to some extent the EU’s concern about its own autonomy. It is under particular pressure because international law does not recognise the existence of EU sovereignty separate from its Member States.

Conclusions: If the EU can have its cake and eat it, it should also do so!

Interpreting case law and identifying legal rules and principles are the tasks of legal scholars. These are daunting tasks in face of the Delphic case law of the Court of Justice in the area of external relations. Caution is advised to draw too far-reaching general conclusions from individual cases that might be limited to their particular circumstances.\(^{137}\) However, it appears fair to say that the Court of Justice has a longstanding and ongoing concern for autonomy of the EU legal order. Further, in a world where the autonomy of international players is exposed to more and more external constraints this concern is unlikely to go away. At the same time, the EU’s accession to the ECHR might lead the Court to accept for the first time the binding force and direct effect of another court’s decisions on a subject matter (human rights) that places great constraints on autonomy.

The negotiations surrounding accession of the EU to the ECHR, as the probably most influential human rights regime, is the most recent example where the EU’s autonomy concern has posed and will continue to pose many questions. It will be interesting to see the Court of Justice’s understanding of the precise status and effects of decisions of the ECHR within the EU legal order. Generally speaking, while the Court of Justice has taken a balanced intermediate approach to international law and its effects within the EU legal order,\(^ {138}\) it has been cautious with the effects of decisions of (quasi-) judicial bodies. Indeed, so far it has not

\(^{137}\) Several scholars have convincingly argued this with regard to the investment treaty cases: Case C-266/03 Commission v Luxembourg [2005] ECR I-4805; Case C-433/03 Commission v Germany [2005], ECR I-6985; and Case C-246/07 Commission v Sweden [2010] ECR I-0000. see e.g.: de Baere G (2011), International negotiations post Lisbon: a case study of the Union’s external environmental policy. In Koutrakos (eds), 2011, 111.

\(^{138}\) Eckes, 2010.
accepted to be bound by the decisions of any external (quasi-)judicial body. Yet, both EU law (Article 6(3) TEU) and the status of the ECHR (‘constitutional instrument of European public order’) can be cited in support of the argument that decisions of the ECtHR require and deserve a greater force than decisions of other external (quasi-)judicial bodies, including the WTO dispute settlement bodies. However, the choice is not black and white. The Court of Justice could generally accept the binding force and direct effect of decisions of the ECtHR but express reservations if and when the ECtHR goes too far in interpreting EU law. On the substantive level, the ECHR lays down a minimum standard only and the ECtHR has been firm in its rulings but cautious to establish a margin of appreciation for the Contracting Parties. With particular regard to the Court of Justice it has even gone one step further by establishing a presumption of equivalent protection. Deference appears to be the soft approach by international courts that have no interest to accept a complete EU shield that would turn the EU into a federation and would no longer allow the court to directly hold Member States responsible.

One conclusion could be that the danger for the autonomy of the EU legal order has taken too central of a place in the discussion surrounding EU accession to the ECHR. We have seen that the current situation (the EU is not a Contracting Party) does not exclude pronouncements on aspects of internal EU law either when the ECtHR determines whether Member States can be held responsible or whether the particular act in question falls exclusively within the realm of influence of the EU institutions.

At the same time, the EU is a very complex legal construction with many actors that claim their position on the international plane and do not stand in a clear hierarchical relationship to each other, but also the foundations, separateness and differentness of the EU are to a large extent based on case-law. The argument put forward in this chapter is that the importance that the Court of Justice attaches to the external autonomy of the EU legal order vis-à-vis international law can partially be explained by the outdated concept of sovereignty under general international law. Under general international law, the EU is confronted with a binary choice between ‘state’ or ‘international organization’ that does not correspond to its reality. Over

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139 Article 53 ECHR.
140 ECtHR, Bosphorus, supra note 25. It remains of course uncertain what will happen with the presumption after EU accession to the ECHR.
time, the EU has asserted a position of relative sovereignty that is different from States but also different from international organizations.

Even though national constitutional courts interpret open-ended national constitutions and shape the principles and values on which a State is based, the very existence of state sovereignty is not based on case-law. Interpretations of the ECtHR could seriously constitute a threat to the complex EU construction, both in terms of internal power division and in terms of trust of EU citizens in the EU endeavour. The EU has chosen to shield its Member States in the WTO. Will it do the same in the field of human rights? From the perspective of legitimacy and trust of its citizens the stakes for taking on responsibility for the sake of establishing competence appear to be higher in the field of human rights. This also raises questions for the ECtHR. Should the EU’s aim be to be treated on equal footing with the other Contracting Parties under the ECHR? Would an extension of the Bosphorus line to all EU law strengthen the EU’s autonomy? Extending the Bosphorus approach to all EU law would first of all allow the EU to escape full external control and undermine to some extent the objective of accession. At the same time, the EU construction is so complex that it might require special protection from the influences of international law. So far, both the ECtHR and the Court of Justice have taken a nuanced approach to the matter, shown deference to each other and understanding of differentness of the EU. If EU can have its cake and eat it – specialized international legal regimes show additional deference and understanding for its differentness, while giving it the rights of states – it should also do so!
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