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Abstract

Some recent decisions of the highest court in the European Union (EU) verge on the hypocritical: on the one hand, the Court of Justice of the EU (CJEU) criticises the United Nations Security Council on the grounds of insufficient human rights protection, while, on the other hand, the Court rejects oversight of its own human rights standards by a specialised human rights court, the European Court of Human Rights. The construal of the Court of Justice's approach to external judicial review – in one case of its own legal order, in another of the international – requires to carefully balance multiple considerations. As such, the Court's judgments in *Opinion 2/13* and *Kadi* offer significant insights into the character of the institution. What they reveal is a court caught between competing legal principles in an international environment of contested legal authority. This paper contrasts the case law of the Court of Justice on the EU's accession to the European Convention on Human Rights and Fundamental Freedoms with the *Kadi* saga in order to tease out new details about the three-fold relationship between fundamental rights, international law and the autonomy of EU law. More precisely, it enquires to what extent the Court's approach to fundamental rights is consistent in the two cases. The paper argues that the CJEU has in its pursuit of autonomy created an inconsistency in its case law to the detriment of fundamental rights.

Introduction

Opinion 2/13 on accession of the European Union (EU) to the European Convention on Human Rights (ECHR) was one of the exceptional moments in the history of EU law, where the Full Court laid down an authoritative statement on a tripartite of interlinked legal issues with particular constitutional significance to the Court and the EU:¹ the protection of fundamental rights in the EU, including its legal sources; the observance and development of international law; and the autonomy of the EU legal system, including the CJEU's role within it.

Almost six years prior to *Opinion 2/13*, however, the Court established a different landmark precedent that combined similar legal ingredients but generated a somewhat contrasting result. In *Kadi*, the Court of Justice of the European Union (CJEU) motivated its excursion to the UN Security Council by pointing to the need to ensure that all EU acts comply with fundamental rights;² if that objective requires the indirect review of a higher rule of law – a UN Security Council Resolution –, then so be it, seemed to be the underlying message of the Court at the time.

The emphatic language and conclusion of *Opinion 2/13* is an excellent opportunity to revisit *Kadi* and its no less interesting successor, *Kadi II*.³ In a bid to examine the CJEU's credentials as a human rights or constitutional court, these two 'sagas' will represent two focus points around which the narrative of a court caught between legal principles will be examined. The analysis will be guided by a research problem arising from the juxtaposition of *Opinion 2/13* and *Kadi*: to what extent is the CJEU's approach to fundamental rights in the two cases consistent? More specifically, the research will investigate the divergence in the conduct of judicial review based on fundamental rights and how this paradox can be explained. Issues related to the core research problem, such as legal theory and the relationship of the Court to the ECHR and international law, will be addressed as well where relevant. The paper argues that the CJEU has in its pursuit of autonomy – its 'place in the sun' – created an inconsistency in the case law that has an adverse effect on fundamental rights and international law.

¹ Court of Justice of the European Union, Opinion of the Court (Full Court) of 18 December 2014 (*Opinion 2/13*), 2014, ECLI:EU:C:2014:2454.

² Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, 2008, ECLI:EU:C:2008:461.

³ Case C-584/10 P, *Commission and Others v Kadi*, 2013, ECLI:EU:C:2013:518.

Opinion 2/13

Few judgments of the CJEU have sparked such negative outpouring from the expert community, as has *Opinion 2/13*.⁴ The few defenders of the Court put forward 'modest' cases in support of the Opinion and even those were made with reservations.⁵ The Advocate General had advised the Court to give a conditional 'yes' to the draft accession agreement and the Court gave a resounding 'no'.⁶

The decision is complex, with various intricacies identified by the Court in assessing the compatibility of the draft accession agreement with EU law. One way of attaining a global view of the Opinion is to look at the intention to accede to the ECHR enshrined in the Treaties by the legislators. It is difficult to dispute that the phrase "the Union shall accede" in Article 6(2) TEU represents an obligation on the part of the EU to make accession happen. At the same time, the subsequent sentence of the Article (emphasised in Protocol No. 8) makes clear that an eventual accession "shall not affect the Union's competences". As a result, although the latter is not framed explicitly as a condition of the obligation to accede, the Treaty-makers have placed certain limits on the terms of accession. These limits, however, also serve as obstacles to accession, thus creating a tension with the obligation to accede. It fell to the Court to determine the balance between the two and the critics could argue that the Court has focused all its attention on the constraints (why accession is not possible), while it has somewhat forgotten about the obligation.⁷

The View of the Advocate General

The picture that the CJEU arrived at after reviewing the draft agreement against EU law will be considerably onerous to overcome both legally and politically. The Court has rejected the proposed agreement after taking issue with seven distinguishable

⁴ See for notable examples Peers, Steve, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare", *German Law Journal*, vol. 16, no. 1, 2015, pp. 213-222; Douglas-Scott, Sionaidh, "Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice", *Verfassungsblog*, 24 December 2014; Odermatt, Jed, "Giant Step Backwards - Opinion 2/13 on the EU's Accession to the European Convention on Human Rights", *New York University Journal of International Law and Politics*, vol. 47, no. 4, 2014-15, pp. 783-797.

⁵ See mainly Halberstam, Daniel, "'It's the Autonomy, Stupid!' A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward", *German Law Journal*, vol. 16, no. 1, 2015, pp. 105-146.

⁶ Court of Justice of the European Union, Opinion of the Court (Full Court) of 18 December 2014 (*Opinion 2/13*), 2014, ECLI:EU:C:2014:2475, View of AG Kokott of 13 June 2014.

⁷ Indeed, the wording of the obligation is only mentioned by the Court when listing applicable legal provisions.

points in the draft text – the first three having been grouped under one heading in the Opinion – which have, according to the Court, in various ways precluded the compatibility of the draft agreement with EU law:

1. Reconciling Article 53 of the Charter with Article 53 ECHR
2. Issue of mutual trust and recognition
3. Protocol No 16 to the ECHR and Article 267 TFEU
4. Violation of Article 344 TFEU
5. The co-respondent mechanism
6. The prior involvement procedure
7. Judicial review of Common Foreign and Security Policy (CFSP) matters

The view of Advocate General Kokott provides the most comprehensive resource for the question what an alternative to the Court's ruling could have looked like. On the whole, the advice of the Advocate General is to declare the draft agreement compatible with the Treaties provided that certain modifications are made.⁸ Of the seven issue areas highlighted by the Court, the Advocate General found only three problematic to the point where action by the negotiators was required: a potential violation of Article 344 TFEU on the jurisdictional monopoly of the EU Courts in EU matters (4.); the co-respondent mechanism (5.); and the prior involvement procedure (6.). First, as regards preserving the CJEU monopoly on dispute settlement under Article 344 TFEU, Advocate General Kokott suggested that existing measures at the disposal of the EU, such as infringement proceedings, should be sufficient to ensure the practical effectiveness of this provision; nevertheless, in case the Court wished to strengthen the safeguards, it could demand a declaration from the Member States not to submit disputes against each other to the European Court of Human Rights (ECtHR) pursuant to Article 33 ECHR where those would concern EU law.⁹

Second, and more importantly, the Advocate General is on common ground with the Court that a number of issues plague the proposed co-respondent mechanism whereby the EU and the Member States could be deemed jointly responsible for violating the ECHR. According to the Advocate General, the draft agreement should be amended to reflect that: the EU and its Member States will be systematically informed about pending applications where becoming a co-respondent could be

⁸ Court of Justice of the European Union, *Opinion 2/13*, View of AG Kokott, *op. cit.*, para 279.

⁹ *Ibid.*, paras 117-120.

of relevance to them; requests for leave for becoming a co-respondent are not subject to assessment by the ECtHR; no derogation from the principle of joint responsibility is possible; and, in line with Article 2 of Protocol No. 8 to the Treaties, that the draft agreement does not prejudice the reservations made to the ECHR by the Member States.¹⁰

Finally, the Advocate General pointed out that the compatibility of the draft agreement with EU law requires that the prior involvement procedure can be bypassed only when it is clear that the CJEU has already addressed the issue of EU law raised in proceedings before the ECtHR.¹¹ The proposal should also clarify that the prior involvement of the Court would encompass all legal issues, regardless of whether they concern primary or secondary EU law.¹²

The sophisticated view of the Advocate General makes apparent that, while the Court might have strictly treated every potential complication as an insurmountable obstacle, the draft agreement has truly contained provisions that need attending to from the perspective of EU law. At the same time, Advocate General Kokott has also shown that the outcome of the Opinion might have turned on the willingness to constructively engage with the negotiators, which the Court has manifestly failed to do. This, however, brings up possibly the most important dimension of the ruling: normative and theoretical considerations are absolutely essential in a hard constitutional case like *Opinion 2/13*. What is more important than the stated technical objections of the Court to the draft agreement are the implicit assumptions about the nature of the international legal space and the Union's place in it, and the normative choices regarding which considerations should principally guide the development of the EU legal order.

Reception of the Opinion

Understandably, the commentaries of the legal community have on the whole better reflected the importance of legal theory compared to the views of the Advocate General and the Court. This is a natural consequence of the CJEU's institutional identity – sometimes referred to as 'corporatist' – which does not permit separate (dissenting or concurrent) opinions. As the Court pronounces its judgments 'with one voice', the exposure of the role played by individual judges is suppressed in

¹⁰ *Ibid.*, paras 196, 265, 280.

¹¹ *Ibid.*, paras 184, 280.

¹² *Ibid.*, para 135.

a bid to increase the authority of the decisions.¹³ However, by adopting a unitary line that is presented as the 'right' solution to a dispute, it is not possible for the Court to openly concede that its decisions are theoretically informed (and how), since that would lead to an erosion of the corporatist legal fiction; rather, the principles and beliefs that guide the Court's decision-making can only be extrapolated from its case law by implication.

Even among the scholars of EU law, discussions of underlying assumptions and theory are the exception to the rule of doctrinal analysis that does not fundamentally problematise the internal point of view of the legal system. Luckily, in the case of *Opinion 2/13*, a number of academics do explicitly engage with theoretical considerations, which makes it possible to create a picture that transcends the potentially inconclusive debates on technical points of the EU's accession to the ECHR. The most theoretically informed study of *Opinion 2/13* has been carried out by Daniel Halberstam, who has scrutinised the decision from the perspective of constitutional pluralism.¹⁴ Halberstam is among the minority of legal researchers that have attempted to take the Court's reservations seriously and defend the Court's judgment. In so doing, however, Halberstam explicitly adopts the lenses of constitutionalism and quasi-federalism in evaluating the Opinion.

Constitutional pluralism implies the primacy of preserving the legal order's own constitutional design over other considerations, irrespectively of whether these have a desirable normative character, as in the case of increased fundamental rights protection. In a broader sense, pluralist contestation among constitutional orders with overlapping jurisdictions is challenging for international law more generally, and it outright contradicts monist conceptions of the relationship between national (EU) and international law.¹⁵

Following the constitutional premise, Halberstam's analysis leads him to the conclusion that most of the Court's grounds for rejecting accession are legitimate,

¹³ Iyiola, Solanke, "The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy", *Cambridge Yearbook of European Legal Studies*, vol. 14, 2011-2012, p. 705; de Búrca, Gráinne, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", *Maastricht Journal of European and Comparative Law*, vol. 20, no. 2, 2013, p. 176.

¹⁴ Halberstam, "It's the Autonomy, Stupid!", *op. cit.*

¹⁵ Somek, Alexander, "Monism: A Tale of the Undead", in Matej Avbelj & Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond*, Oxford, Hart Publishing, 2012, pp. 343-380.

even though the Court may have proposed some wrong remedies.¹⁶ To take the most controversial example from Halberstam's account, he argues that a constitutional/federalist perspective can justify even the CJEU's uneasiness about the ECtHR gaining jurisdiction in CFSP matters, where the Court's own involvement is ruled out by the Treaty (with the exception of measures pursuant to Article 275 TFEU).¹⁷ This assertion relies on the assumption that since after Lisbon there is only one EU legal order (formally no pillars anymore), the constitutional principles underlying EU law must in one way or another also apply to the CFSP, despite the explicit lack of CJEU jurisdiction (and EU legislative powers).¹⁸ Contrary to the verdict of the Advocate General, Halberstam thus in effect dismisses the overt decision of the Treaty-makers which upheld the essentially intergovernmental nature of the CFSP.¹⁹ Instead of acknowledging that the intergovernmentalism of the CFSP, too, is a specific feature of the EU which points to the imperfection of the constitutionalist/federalist narrative, Halberstam – and in a sense also the Court – puts forward an interpretation that conforms to his theory.²⁰

Although considerably more could be said about the constitutionalist angle, the preceding paragraphs should capture the crux of the argument. On the opposite end of the spectrum voices that accuse the CJEU of engaging in 'radical pluralism', which impedes a basic judicial dialogue with the ECtHR, can be found and also the majority who are concerned by the manifest disconnect between the "defensive and territorial attitude" of the CJEU and the purported – but seemingly forgotten –

¹⁶ Halberstam, "It's the Autonomy, Stupid!", *op. cit.*, p. 115. However, see the diverging view of Spaventa, Eleanor, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13", *Maastricht Journal of European and Comparative Law*, vol. 22, no. 1, 2015, pp. 35-56.

¹⁷ Article 24 TEU; Halberstam, "It's the Autonomy, Stupid!", *op. cit.*, p. 138; "The EU's Accession to the ECHR – a 'NO' from the ECJ!", Editorial Comments, *Common Market Law Review*, vol. 52, no. 1, 2015, p. 12; Krenn, Christoph, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13", *German Law Journal*, vol. 16, no. 1, 2015, p. 160.

¹⁸ Halberstam, "It's the Autonomy, Stupid!", *op. cit.*, p. 138.

¹⁹ Court of Justice of the European Union, *Opinion 2/13*, View of AG Kokott, *op. cit.*, para 101.

²⁰ de Witte, Bruno & Šejla Imamović, "Opinion 2/13 on the Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court", *European Law Review*, vol. 40, no. 5, 2015, p. 703. Compare with Court of Justice of the European Union, *Opinion 2/13*, *op. cit.*, para 257.

objective of the whole exercise to bring the EU into the ECHR regime: improving fundamental rights protection in Europe.²¹

From the standpoint of fundamental rights, the list of sticks to beat the CJEU with is considerable, but a number of central objections stand out. First, it has not escaped the attention of the human rights lawyers that the Court practically avoided discussing the aforementioned obligation to accede to the ECHR pursuant to Article 6(2) TEU.²² The balance of the decision is thus significantly tilted towards enumerating reasons why accession is not possible, as opposed to finding ways of fulfilling the Treaty obligation.

A similar disequilibrium can be found in the Court's choice of legal principles. As most observers agree, the central theme of *Opinion 2/13* is autonomy. But why not rule of law or, rather obviously, fundamental rights?²³ Plainly, a "community based on the rule of law" – codified as one of the values in Article 2 TEU – should have an interest in judicial review by a specialised human rights court which forms an established feature of the Member States' legal systems.²⁴ When it comes to the protection of fundamental rights, the Treaties make unambiguously clear that this is an area of strong EU concern, in addition to the Court's own relationship with fundamental rights and particularly the ECHR.²⁵

The issue of overlooked principles becomes even more palpable in some specific examples, such as the explicit requirement of "respect for fundamental rights" in the area of freedom, security and justice (AFSJ) in Article 67(1) TFEU. According to Steve Peers, the Treaties therefore do not prioritise mutual trust among Member States over fundamental rights, but rather the opposite holds true.²⁶ The Court was, nevertheless, exclusively concerned by the potential effect of the accession on mutual trust,

²¹ See, for example, de Witte & Imamović, *op. cit.*, pp. 683-705; Eeckhout, Piet, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?", *Fordham International Law Journal*, vol. 38, no. 4, 2015, pp. 955-992; Peers, *op. cit.*, pp. 213-222; Douglas-Scott, *op. cit.*

²² "The EU's Accession to the ECHR – a 'NO' from the ECJ!", Editorial Comments, *op. cit.*, p. 13.

²³ Peers, *op. cit.*, p. 221.

²⁴ Case 294/83, *Parti Ecologiste Les Verts v European Parliament*, 1986, ECLI:EU:C:1986:166, para 23.

²⁵ Peers, *op. cit.*, p. 221.

²⁶ *Ibid.*

despite the fact that the AFSJ is at the forefront of the “enormous lacuna” in EU fundamental rights protection.²⁷

To come back to the example of the CFSP, a rights-minded approach points to at least two arguments against the Court’s Opinion: first, the Treaty-makers have consciously decided in the Treaty of Lisbon to both restrict the CJEU’s jurisdiction in CFSP matters (Article 24(1) TEU) and impose an obligation on the EU to accede to the ECHR (Article 6(2) TEU). The Court, however, completely disregarded the possible connection between the two provisions that would indicate that the *Herren der Verträge* have foreseen CFSP matters being eventually reviewed by the ECtHR, thus filling another part of the EU human rights lacuna.²⁸ Second, an *a contrario* reading of Article 344 TFEU, which states that Member States may not submit a dispute to “any method of settlement other than those provided for [in the Treaties]”, would imply that where the Treaties expressly deny jurisdiction of the CJEU, the Member States may submit the dispute to a different court.²⁹ In fact, the position of the Court in *Opinion 2/13* that the EU cannot submit itself through an international agreement to the jurisdiction of an international court where the CJEU itself lacks powers is a particularly troubling one from the perspective of international law, and it more than symbolically marks another low in the ‘tormented relationship’ between Union and international law.³⁰

Looking more generally at the CJEU’s objection with regard to the possible violation of Article 344 TFEU, the Court appears to have interpreted this article so strictly as to endanger the mixed agreements signed by the EU in the past.³¹ The reason is that the Court established that the mere possibility that the Member States could submit a dispute to the ECtHR, pursuant to Article 33 ECHR, is sufficient to “undermine the requirement set out in Article 344 TFEU”.³² However, not only has the Advocate General found that such an interpretation runs contrary to a number of existing

²⁷ Gragl, Paul, “A Giant Leap for European Human Rights? The Final Agreement on the European Union’s Accession to the European Convention on Human Rights”, *Common Market Law Review*, vol. 51, no. 1, 2014, p. 45.

²⁸ “The EU’s Accession to the ECHR – a ‘NO’ from the ECJ!”, Editorial Comments, *op. cit.*, p. 13.

²⁹ Peers, *op. cit.*, p. 221; Johansen, Stian Øby, “The Reinterpretation of TFEU Article 344 in *Opinion 2/13* and Its Potential Consequences”, *German Law Journal*, vol. 16, no. 1, 2015, p. 176.

³⁰ Wouters, Jan, “The Tormented Relationship between International Law and EU Law”, in Pieter Dekker, Rudolf Dolzer & Michael Waibel (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, Cambridge, Cambridge University Press, 2010, pp. 198-221.

³¹ Johansen, *op. cit.*, p. 176.

³² Court of Justice of the European Union, *Opinion 2/13*, *op. cit.*, para 208.

agreements, it has also been argued that the CJEU has challenged its previous case law under which an international agreement was compatible with Article 344 TFEU, as long as it afforded the Member States the opportunity to act in accordance with the Treaties.³³ It is difficult to see in light of these issues – and the omitted obligation to accede of Article 6(2) TEU – what would justify imposing a stricter standard, other than the Court's determination to preserve its autonomy by rejecting accession to the ECHR.

What should have become clear from the preceding paragraphs is that *Opinion 2/13* could have been a very different judgment had the Court chosen a less formalistic approach.³⁴ Of the seven concerns raised by the Court (listed above), only the two procedural points (5. and 6.) have received more than a modicum of sympathy from most legal commentators, including the Advocate General. The rest of the judgment has been subjected to a scathing critique of a rarely seen magnitude.

A good part of why the CJEU was criticised so strongly is that the constitutional nature of the case gave the Court a wide interpretative margin. The Court has adopted a defensive attitude which emphasised the autonomy of EU law and the CJEU's prerogatives in that regard, but from the perspective of fundamental rights protection this has been far from obvious or inevitable. Having said that, *Opinion 2/13* does seem to lend support to Daniel Halberstam's theoretical argument that the constitutional element – at least in so far as it is perceived by the interpreting international court – is essential in a legal pluralist constellation. Unfortunately, the intensity and breadth of criticism show that the theoretical premise can yield normatively sub-optimal results which resemble legal autarky more than legal pluralism.³⁵ Indeed, to the extent that fundamental rights should be at the core of the EU's constitutional identity, it is difficult to see how *Opinion 2/13* caters to the integrity of the constitutional order by demoting fundamental rights protection in the EU.

³³ Court of Justice of the European Union, *Opinion 2/13*, View of AG Kokott, *op. cit.*, para 117; Johansen, *op. cit.*, p. 172; Eeckhout, *op. cit.*, pp. 978-981.

³⁴ "The EU's Accession to the ECHR – a 'NO' from the ECJ!", Editorial Comments, *op. cit.*, p. 1.

³⁵ Eeckhout, *op. cit.*, p. 992.

Autonomy and the ECHR in Recent Case Law

Autonomy has been given a crucial role by the CJEU in *Opinion 2/13*, but were there prior indications that the Court was becoming increasingly stingy about its prerogatives and the position of the EU legal order *vis-à-vis* other legal systems?³⁶

Daniel Halberstam reasons that the Court has on numerous important occasions signalled its position, albeit in a less theatrical fashion compared to *Opinion 2/13*.³⁷ The CJEU already put a break on accession in *Opinion 2/94* by requiring a Treaty amendment.³⁸ More recently, the Court has been eager to stress the autonomy of EU law not only *vis-à-vis* Member State law – a recurrent source of concern – but also with respect to international law. While in *Opinion 1/09* the Court ‘merely’ found the setting up of the European Patent Court incompatible with the Treaties, the accentuation of autonomy has taken the most dramatic form in the *Kadi* judgment, where the CJEU indirectly challenged the primacy of a UN Security Council Resolution by reviewing EU implementing regulations.³⁹

Although such constitutional decisions test the attitude of the CJEU at critical junctures, a more systematic analysis of the Court’s case law is necessary to establish the existence of a trend in favour of a more autonomous court. As regards the ECHR, the frequency with which the CJEU refers to it provides a measure of the level of autonomy the Court wishes to exercise towards the foremost human rights regime in Europe. Laurent Scheeck has argued that the relationship between the two Courts cannot be only competitive or only cooperative but will carry aspects of both.⁴⁰ In the form of the EU Charter of Fundamental Rights, the Court appears to have in any case obtained a licence to become more self-reliant or isolated from the ECHR.⁴¹

Empirical studies of references to the ECHR in the CJEU’s case law confirm the evolving nature of the relationship. From 1974 until 1998, the ECHR has been

³⁶ Ziegler, Katja, “Autonomy: From Myth to Reality – Or Hubris on a Tightrope? EU Law, Human Rights and International Law”, in Sionaidh Douglas-Scott & Nicholas Hatzis (eds.), *Research Handbook on EU Human Rights Law*, Cheltenham, Edward Elgar, 2016, forthcoming.

³⁷ Halberstam, “It’s the Autonomy, Stupid!”, *op. cit.*, p. 109.

³⁸ Court of Justice of the European Union, Opinion of the Court of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (*Opinion 2/94*), 1996, ECLI:EU:C:1996:140.

³⁹ *Ibid.*; de Búrca, Gráinne, “The Road Not Taken: The EU as a Global Human Rights Actor”, *American Journal of International Law*, vol. 105, no. 4, 2011, pp. 649-93. How *Kadi* relates to *Opinion 2/13* is covered in detail in the next section.

⁴⁰ Scheeck, Laurent, “Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks”, *GARNET Working Paper*, no. 23/07, August 2007, p. 4.

⁴¹ de Búrca, “After the EU Charter”, *op. cit.*, pp. 175-176.

mentioned by the Court a little more than 70 times.⁴² As the references kept growing, that number was surpassed in only eight subsequent years; between 1998 and 2005, the CJEU referred to the ECHR 7,5 times more often than to all other human rights instruments combined, confirming the 'special significance' of the ECHR for EU law.⁴³ However, the picture changed after 2009 when the EU Charter became legally binding. Between 2009 and 2012, the CJEU cited the ECHR only 18 times in the 122 judgments (less than 15%) that referred to the Charter. The Charter has thus unmistakably become the instrument of choice for the Court, in a number of cases demonstrably at the expense of the ECHR.⁴⁴

Building on de Búrca's analysis, the present paper surveyed 173 judgments, orders and opinions of the CJEU tagged as concerning fundamental rights in the systematic classification scheme reveals that from 2013 until the end of 2015, the Court has referred to the Charter 163 times and to the ECHR (and/or the ECtHR) on 74 occasions. Disregarding two cases in which the Court cited the Convention without referring to the Charter, the ECHR has been mentioned in 44% of the cases that also mention the Charter, which represents a marked increase compared to the four-year period analysed by de Búrca.⁴⁵ Having said that, the Charter is used much more by the Court, and in the vast majority of cases where both instruments are mentioned references to the Charter far outnumber those to the ECHR, which is often cited by the parties but then not picked up by the CJEU. This is related to a methodological caveat, namely that the comparability of the data with previous research is partly in question due to the lack of clarity regarding how references were counted in de Búrca's work.⁴⁶

Before jumping to conclusions – and bearing in mind the methodological caveats – it should be noted that the increase in the number of references to the ECHR can be a natural consequence of the growing fundamental rights litigation before the CJEU. As the Charter is used more than previously and new rights are invoked before the

⁴² Guild, Elspeth & Guillaume Lesieur, *The European Court of Justice on the European Convention on Human Rights: Who Said What, When?*, London, Kluwer Law International, 1998.

⁴³ Scheeck, *op. cit.*, p. 12.

⁴⁴ Arnaiz, Alejandro & Aida Torres Pérez, "Main Trends in the Recent Case Law of the EU Court of Justice and the European Court of Human Rights in the Field of Fundamental Rights", *European Parliament Study*, PE462.446, Brussels, 2012, p. 98.

⁴⁵ The two outstanding cases are C-171/14 P, *Calvi v European Court of Human Rights*, 2014, ECLI:EU:C:2014:2281, and C-216/14, *Covaci*, 2015, ECLI:EU:C:2015:686.

⁴⁶ The approach taken here was to search every judgment classified as concerning fundamental rights for separate references to the Charter and the Convention and count any mention by any party or the Court as a reference for the purpose of the research.

Court, the experience of the Convention regime is perhaps required more than before.

Nonetheless, it is undeniable that the data seem to somewhat disrupt a linear narrative of a reinforced autonomy of EU law and the CJEU's jurisdiction. The numbers show that the binding nature of the Charter may not have been the terminal blow to the role of the Convention in EU law that could have been anticipated shortly after 2009. Contrasting the recent data with the vigour of autonomy in *Opinion 2/13*, it could be argued that rather than a blanket rejection of external legal regimes ('autarky'), the CJEU is interested in being in charge of when, where (AFSJ?) and how (judicial review by the ECtHR?) these other regimes can enter the Union legal order ('autonomy'). For as long as the latter competence of the CJEU is not threatened – as was the case in *Opinion 2/13* – the Court might find most of the time referencing the ECHR and the Strasbourg case law (as follows from Article 52(3) of the Charter) unproblematic, even though it will still prioritise the Charter in order to develop it and thus augment its independence from external sources of fundamental rights.

The fact that the Court wishes to engage with international law, including the ECHR, on its own terms and selectively should not surprise.⁴⁷ In a recent preliminary ruling, however, the CJEU has taken a sharper stance on the obligation of a conforming interpretation of the Charter with the ECHR (Article 52(3) of the Charter). For the first time it referred to a passage on autonomy in the legally significant explanations to the Charter:

[T]he explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union'.⁴⁸

⁴⁷ See for example Wouters, Jan, Jed Odermatt & Thomas Ramopoulos, "Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law", in Marise Cremona & Anne Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Oxford, Hart Publishing, 2014, pp. 249-279.

⁴⁸ Case C-601/15 PPU, *J.N.*, 2016, ECLI:EU:C:2016:84, para 47.

The Court's reference to this part of the explanations is slightly peculiar, given that the explanations actually address the legislator, something omitted by the Court in its citation.⁴⁹ The spirit of *Opinion 2/13* lingers over this judgment.

The Court's engagement with the ECHR demonstrates a markedly pluralist approach to fundamental rights protection. *Opinion 2/13* highlighted that constitutional considerations push the Court to the edge of the pluralist scale, but also that the Court struggles to reconcile the purported centrality of fundamental rights protection in the EU legal order with its actual improvement. In a moment of truth, the CJEU chose to interpret accession to the Convention in light of fears about the erosion of its competences instead of boosting fundamental rights. The refusal to intricate itself into the web of international legal regimes is familiar from a previous judicial saga which, however, showed an almost unrecognisable concern for fundamental rights, even to the point where external judicial review was deemed acceptable, contrastingly to *Opinion 2/13*.

⁴⁹ European Union, "Explanations Relating to the Charter of Fundamental Rights", *Official Journal of the European Union*, C303, 14 December 2007, p. 33.

Kadi and External Judicial Review

The other line of case law that has profoundly shaken the European – and indeed international – legal community is the CJEU's judgment in *Kadi* and to a lesser extent the follow-up in *Kadi II*.⁵⁰ Lauded by some as an ambitious fundamental rights endeavour of the Court that transcends the confines of the European polity, it is difficult to resist having a fresh look at the *Kadi* saga in light of the Court's *Opinion 2/13*, as it appears that the Court itself has not followed what it preached in *Kadi*.⁵¹

The Kadi Saga

Kadi belongs to the rare class of judgments of the Court that has invited a seemingly endless amount of attention. Rightly so, as the decision has been one of the most important constitutional statements of the Court since the inception of the Union legal order and which has given rise to legal controversies far outside the EU. It is beyond the scope of this paper to review all of the criticisms; therefore, the focus is on issues connected to external judicial review on the basis of fundamental rights. Advancing in a chronological order, the CJEU's reasoning in support of its divisive encroachment on international law in *Kadi I* is analysed first before turning the attention to the appeal decision in *Kadi II* which supplies further detail as to the Court's view of the triangle of fundamental rights, international law and autonomy.

Kadi I

The *Kadi* saga began when Mr Yassin Abdullah Kadi was blacklisted by the UN Security Council in 2001 for being suspected to have financed international terrorism, as a result of which his financial assets have been frozen. The EU has quickly implemented the UN Security Council Resolution through an amending Commission Regulation.⁵² The first judgment in the saga was handed down by the General Court

⁵⁰ Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, 2008, ECLI:EU:C:2008:461; Case C-584/10 P, *Commission and Others v Kadi*, 2013, ECLI:EU:C:2013:518.

⁵¹ Kokott, Juliane & Christoph Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?", *European Journal of International Law*, vol. 23, no. 4, 2012, pp. 1015-1024; Ziegler, Katja, "Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights", *Human Rights Law Review*, vol. 9, no. 2, 2009, pp. 288-305.

⁵² European Commission, "Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and

in 2005, which established that Security Council resolutions cannot be reviewed against EU law, invoking the peremptory norms of *jus cogens* in the process.⁵³

On appeal, the CJEU reached a vastly different conclusion with the autonomy of Union law and of the EU judicature assuming a central role:

It follows [...] that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.⁵⁴

The CJEU has therefore not only overturned the General Court's decision, but also completely changed the underlying interpretation; the internationalist deference to the supremacy of UN Security Council resolutions (or 'a strictly monist view') was superseded by a challenge to public international law emanating from an autonomous, almost hermetically sealed, regional regime (a dualist or pluralist approach).⁵⁵ In an echo of the rule of law principle established in *Les Verts*, the Court has reiterated that no EU acts can escape fundamental rights review ("in principle full review") by the Union judicature, regardless of whether these merely implement Security Council measures.⁵⁶ The fact that in the process the Court referred to the UN Charter – the constitutional document of modern public international law – as "an international agreement" underlined the haughty tone of the judgment in the eyes of international lawyers.⁵⁷

To make judicial review in *Kadi* possible in the first place, seemingly without disposing of the supremacy of international law, the CJEU's reasoning dissociated the EU implementing regulation from its source, the UN Security Council Resolution.⁵⁸ According to the Court, this judicial move would "not entail any challenge to the

repealing Regulation (EC) No 337/2000", *Official Journal of the European Union*, L 277, 20 October 2001, pp. 25-26.

⁵³ Case T-315/01, *Kadi v Council and Commission*, 2005, ECLI:EU:T:2005:332, para 225.

⁵⁴ Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 2008, *op. cit.*, para 285.

⁵⁵ Wouters, "Tormented Relationship", *op. cit.*, p. 212; de Búrca, Gráinne, "The European Court of Justice and the International Legal Order After *Kadi*", *Harvard International Law Journal*, vol. 51, no. 1, 2010, p. 2.

⁵⁶ Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 2008, *op. cit.*, para 326.

⁵⁷ Wouters, "Tormented Relationship", *op. cit.*, p. 216.

⁵⁸ Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 2008, *op. cit.*, para 286.

primacy of that resolution in international law".⁵⁹ The feeling that the Court's commitment to the latter was merely rhetorical is difficult to shake off.

Antonios Tzanakopoulos elaborates on the separation of the EU act from international law by underlining the formalism of the Court's reasoning: of course the CJEU does not challenge the primacy of the Security Council measure *senso strictu*, given that the Court does not have the legal competence to produce binding interpretations of such measures (not even the International Court of Justice does).⁶⁰ Beyond the formalism, however, is the CJEU's curious assertion that the UN Charter does not in essence exclude "review of internal lawfulness" of an implementing measure.⁶¹ Tzanakopoulos calls this a case of accommodation rather than dualism, since the Court identifies the freedom to conduct the judicial review in international law itself.⁶² Nevertheless, he finds this reasoning unconvincing, as the CJEU disregards the distinction between international obligations that allow for some discretion and those that do not. The obligation under Security Council Resolution 1267 at stake in the case was of the second kind, thereby leaving no meaningful margin of discretion for the EU institutions to exercise and for the CJEU to review.⁶³

The reactions to the appeal judgment were mixed and reflected the tensions among the various principles at play in the decision itself, reminding of the debate from the previous section on the importance of principles in constitutional cases. Katja Ziegler pointed to the positive contribution made by the Court to human rights and the international rule of law, while at the same time admitting that the judgment further worsens the fragmentation of international law.⁶⁴ Others have highlighted that with the *Solange* doctrine in place, the CJEU had no other option but to review the dubious UN sanctions system with respect to fundamental rights, as failing to do so would have undermined the presumption on which the autonomy of the EU legal

⁵⁹ *Ibid.*, para 288.

⁶⁰ Tzanakopoulos, Antonios, "The Solange Argument as a Justification for Disobeying the Security Council in the *Kadi* Judgments", in Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, p. 122.

⁶¹ Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 2008, *op. cit.*, para 299.

⁶² Tzanakopoulos, *op. cit.*, p. 123.

⁶³ *Ibid.*, p. 124.

⁶⁴ Ziegler, "Strengthening the Rule of Law", *op. cit.*, pp. 288-305.

order from the Member State rests.⁶⁵ Others still have welcomed that the Court was careful to preserve the autonomy of EU law in the face of an external challenge.⁶⁶

Perhaps more importantly, some scholars identified that *Kadi* presented an opportunity to strike a better balance between EU law autonomy, deference to international law and the protection of fundamental rights than the one established by either of the EU courts in their judgments. Daniel Halberstam and Eric Stein opined in the wake of the appeal judgment that until the UN creates safeguard procedures that would guarantee an acceptable level of human rights protection – essentially one that would permit municipal courts to adopt a *Solange (II)* type of presumption – national and regional courts should be able to indirectly review Security Council resolutions not only against *jus cogens* norms, but also customary international human rights law.⁶⁷

Kadi II

In *Kadi II*, the General Court appeared to be at pains to overcome its distaste towards the appeal judgment of the CJEU in *Kadi I*. There, the Court of Justice held that although the considerable measure of freezing funds cannot be in principle regarded as disproportionate in light of the general object of maintaining international peace and security, in the particular circumstances of the case, the measures were unjustified due to the lack of effective judicial protection for Mr Kadi.⁶⁸ The same has been repeated reluctantly, if almost *verbatim*, by the General Court in *Kadi II*, leading the former Court of First Instance to agree with Mr Kadi that the principle of proportionality had been breached.⁶⁹

While in the appeal the CJEU upheld the operative conclusion of the General Court, it disagreed with some of the underlying reasoning. The Court found it necessary to examine in detail the summary made known by the Sanctions Committee in an effort to balance the rights of the applicant on the one hand, and the effectuation of

⁶⁵ Kokott & Sobota, *op. cit.*, p. 1019.

⁶⁶ Kunoy, Bjorn & Anthony Dawes, "Plate Tectonics in Luxembourg: The Ménage a Trois Between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases", *Common Market Law Review*, vol. 46, no. 1, 2009, pp. 73-104.

⁶⁷ Halberstam, Daniel & Eric Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", *Common Market Law Review*, vol. 46, no. 1, 2009, p. 71. Taking an international law perspective of *Kadi*, Jan Wouters concurs with this approach; see Wouters, "Tormented Relationship", *op. cit.*, p. 218.

⁶⁸ Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 2008, *op. cit.*, paras 363, 351, 369.

⁶⁹ Case T-85/09, *Kadi v Commission*, 2010, ECLI:EU:T:2010:418, para 194.

Security Council sanctions (implemented through EU regulations) on the other.⁷⁰ Contrary to the General Court, the CJEU stated that where the competent European authority is not in the possession of the evidence in question, this does not automatically lead to an infringement of fundamental rights, even though the authority in question is still obliged to seek cooperation with the UN.⁷¹ Instead, in such a situation, the CJEU established that the EU courts shall examine the “indications in the narrative summary of reasons”.⁷²

Equally, where evidence cannot be made readily disclosed to the EU courts and the defence, a careful balance must be struck between legitimate security concerns and the rights of the defence.⁷³ Depending on the assessment of the legitimacy of the non-disclosure, the competent court must ascertain the effects on the rights of the defence. At any rate, the CJEU has held that only one substantiated and legitimate reason for instituting the preventive measure is sufficient for the CJEU to uphold the measure as a whole; if none are found satisfactory, the measure will be struck down, as was duly the case with Mr Kadi also the second time around.⁷⁴

The standard of review is relatively exacting.⁷⁵ Both matters of procedure and substance are covered and the Court goes into quite some detail in its assessment, showing the breadth and depth of what a ‘full review’ in light of fundamental rights shall entail.⁷⁶ The CJEU considered the extent of the review “all the more essential” due to the perceived failure of the UN system to introduce sufficient human rights safeguards, despite certain improvements following the first *Kadi* judgment.⁷⁷

After the Court originally criticised the lack of effective judicial protection – calling the sanctions procedures essentially “diplomatic and intergovernmental” – the UN has introduced an *ex officio* periodic re-examination of the sanctions list and the

⁷⁰ Case C-584/10 P, *Commission and Others v Kadi*, 2013, *op. cit.*, para 130.

⁷¹ *Ibid.*, paras 139, 114.

⁷² *Ibid.*, para 123.

⁷³ *Ibid.*, paras 126, 131.

⁷⁴ *Ibid.*, para 130.

⁷⁵ Fontanelli, Filippo, “Kadiou: Connecting the Dots – from Resolution 1267 to Judgment C-584/10 P: The Coming of Age of Judicial Review”, in Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, p. 20; Sarvarian, Arman, “The *Kadi II* Judgment of the Court of Justice of the European Union: Implications for Judicial Review of UN Security Council Resolutions”, in Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, p. 100.

⁷⁶ Case C-584/10 P, *Commission and Others v Kadi*, 2013, *op. cit.*, para 40.

⁷⁷ *Ibid.*, para 133.

Office of the Ombudsperson.⁷⁸ When the issue arose again in *Kadi II*, the Court was, however, not convinced of the effectiveness of the new safeguards – similarly, albeit in a different way, to the ECtHR – while at the same time leaving the door open for a possible future application of conditional deference of the *Solange* type.⁷⁹

Ultimately, the Court rejected the quasi-judicial format of review developed at the UN Security Council and instead required that a “declaration from a court” be available to persons affected by a contested measure.⁸⁰ If the CJEU’s insistence on this requirement continues, it is questionable whether establishing the abovementioned *Solange II* presumption could ever become a reality. Barring an extremely unlikely transformation of the International Court of Justice’s rules of jurisdiction, it would be a no less challenging task for the Security Council to reform its sanctions procedures in a way that would comply with the CJEU’s ruling in *Kadi II*. In fact, the reaction of the Security Council was to make sanctions less targeted and as a consequence more difficult to be brought before a court – arguably a net loss for fundamental rights in practice.⁸¹

The Double Standard(s) of Kadi and Opinion 2/13

It is perhaps easy to lose sight due to the copious legal issues of a basic point about the *Kadi* saga, which is that the CJEU carried out judicial review – with some detail in *Kadi II* – based on fundamental rights of acts emanating from a different legal order. Moreover, the Court has set a high standard for the review (‘full review’), which included examining the procedures and underlying reasoning employed by not just any international organisation, but the UN Security Council. While the CJEU set the standard of ‘full review’ already in *Kadi I*, the full proportionality test balancing fundamental rights against security concerns has really been applied in *Kadi II*.⁸² *Kadi II* is thus more than just a confirmation of *Kadi I* – it fleshes out in practice the requirements of judicial review as applied by the Court with respect to international norms and, crucially, the Court shows that reconciling competing interests (principles) in the international legal order is done according to an “EU-preferred

⁷⁸ Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, 2008, *op. cit.*, para 323.

⁷⁹ Case C-584/10 P, *Commission and Others v Kadi*, 2013, *op. cit.*, para 133; de Wet, Erika, “From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions”, *Chinese Journal of International Law*, vol. 12, no. 4, 2013, pp. 787-808.

⁸⁰ Case C-584/10 P, *Commission and Others v Kadi*, 2013, *op. cit.*, para 134.

⁸¹ Tzanakopoulos, *op. cit.*, p. 134.

⁸² Fontanelli, “Kadiou”, *op. cit.*, pp. 18, 20.

balance”, which happens to be, at least in *Kadi*, also heavily influenced by the ECHR.⁸³

The conduct of judicial review in *Kadi* could hardly be more puzzling in light of the hindsight afforded by the analysis of *Opinion 2/13*. One of the basic aspects to take away from the Opinion is the Court’s rejection of an external judicial review based on fundamental rights. Yet, the Court does precisely that in relation to the UN Security Council in the *Kadi* cases, with its balancing approach even likened to the ECtHR’s way of working.⁸⁴ The discrepancy between *Opinion 2/13* and *Kadi* is compounded by the existence of the *Bosphorus* presumption⁸⁵ – noticeably not implemented in the *Kadi* saga – in the relationship between the CJEU and the ECtHR which lowers the standard of review, and would not necessarily go away with the EU’s accession.⁸⁶ What could explain the apparent double standard(s) – hypocrisy, some may even say – and what could possibly justify it, if anything?

As a preliminary matter, the meaning of ‘external’ needs elucidation. By external review, it is understood here that the judicial body carrying out the review, which may also be indirect, does not, in a conventional sense, form part of the same legal system as the bodies responsible for the act or omission under examination. This definition of external judicial review is somewhat clumsy in order to address at least three pitfalls: first, as the CJEU so skilfully demonstrated in *Kadi I*, it is possible to create the illusion of non-review by simply stating so and then reviewing a measure intended to give effect to the original act, even when the implementation of the act was non-discretionary and under a strict obligation. Second, for the judicial review to be ‘external’, the court executing it should stand apart from the legal system that produced the case. *Prima facie*, it is obvious that the CJEU is not part of the UN-instituted international judicature or that the ECtHR is not an EU court. However, from an international perspective, municipal courts are expected to consider and enforce international law in the exercise of their competences. Contrary to this decentralised

⁸³ *Ibid.*, pp. 20-21.

⁸⁴ Sarvarian, *op. cit.*, p. 102.

⁸⁵ In the *Bosphorus* case, the ECtHR established a presumption of ‘comparable’ protection of rights enshrined in the ECHR by the EU in spite of it not being a party to the Convention. Through the *Bosphorus* presumption, the ECtHR in principle agreed to refrain from reviewing EU acts, as long as the EU maintains its standard of fundamental rights protection. No such presumption was established by the CJEU with regards to the UN system.

⁸⁶ Bilková, Veronika, “The Standard of Equivalent Protection as a Standard of Review”, in Lukasz Gruszczynski & Wouter Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford, Oxford University Press, 2014, pp. 272-288.

understanding of judicial effectuation of international law, the phrase 'in a conventional sense' serves to indicate that some minimal delimitations of different legal orders exist that make a designation of judicial review as 'external' possible. Finally, the definition takes a broad view of judicial review in order to accommodate the fundamental rights approach of the ECtHR and the CJEU in *Kadi*.

For the explanation of the double standard, it is necessary to recall the role of autonomy in both cases. In *Kadi*, preserving the autonomy of EU law and the Court's ability to review acts thereof had a two-fold consequence: the Court boosted the importance of fundamental rights in the EU and triggered some institutional changes to that end also in the Security Council, but this occurred notably at the expense of the authority and effectiveness of international law. *Opinion 2/13* emphasised autonomy to an even greater extent – as the perceived 'danger' to the legal order was higher – but in contrast to *Kadi*, the result is not increased fundamental rights protection anywhere. Nevertheless, both judgments show that the outward effect of the autonomous legal order doctrine is that the CJEU is not overly preoccupied by the 'strict observance' of international law, never mind its development in the sense of Article 3(5) TEU.

Similar to the approach of the CJEU to the ECHR, its relationship to international law more generally had been marked by ups and downs.⁸⁷ Throughout the development of EU law, the nexus with international law has represented the other strand of demarcation of the boundaries of Union law as an autonomous system of law, next to the CJEU's 'turf war' against the Member States. The double standard in external judicial review is one of the most recent manifestations of the Court's insistence on outward autonomy, arguably reaching new heights. While international law is not necessarily the 'target' of the Court, it appears to be caught in the 'cross-fire' of its claims to autonomy which entrench fragmentation and pluralism in the international legal landscape. The CJEU is sometimes willing to display an open mind towards international law, as cases such as *Racke* exhibit,⁸⁸ but the incoherence of external judicial review points towards a constitutional tendency at the Court that triggers a territorial attitude when push comes to shove.

Despite the fundamental rights parlance of the Court in *Kadi*, it is clear from *Opinion 2/13* that the truly central element in the constitutional mosaic of EU law is autonomy.

⁸⁷ See for example Wouters, "Tormented Relationship", *op. cit.*, pp. 198-221.

⁸⁸ Case C-162/96, *Racke*, 1999, ECLI:EU:C:1998:293. In *Racke*, the CJEU reviewed in an unprecedented move an EU measure on the basis of customary international law.

Granted, the CJEU likes to repeat that fundamental rights form ‘an integral part’ of EU law but if that is the case, a high degree of autonomy of the Union legal order appears even more integral. In *Kadi*, the objective of strengthening autonomy coincided with greater emphasis on fundamental rights protection, not the other way around, and it has been even suggested that already *Kadi II* served the interests of the Court more than the individual, despite the use of fundamental rights.⁸⁹ *Opinion 2/13* brought out the real motivation, as preserving a high-degree of autonomy no longer aligned with increased fundamental rights protection. It should not be so surprising: human rights have been consciously omitted from the core of the Community at its beginning, only to be eventually brought in by the Court as a practical necessity stemming from the cohabitation with Member States’ judicial ordinances.⁹⁰ Nor has the CJEU been a model participant in a system of ‘multi-level judicial protection’, having been accused of a ‘selfish attitude’, whereby its unwillingness to cooperate with other international dispute settlement systems has hindered individual access to justice.⁹¹

Conclusion

It would be a mistake to dismiss the double standards of external judicial review as being of relevance merely to legal scholars. Even if not immediately quantifiable, the CJEU’s two-facedness chips away from the credibility and legitimacy of the EU’s ability to act or simply ‘be’ on the international scene.⁹² The resolution of seemingly internal judicial disputes by the CJEU affects the character of the EU, which has external implications.

This paper sought to investigate to what extent the Court’s approach to fundamental rights is consistent in *Kadi* and *Opinion 2/13*. The analysis revealed that the result of the Court’s decision-making is highly complex: the preservation of

⁸⁹ Yang, Nele, “Constitutional Dimensions of Administrative Cooperation: Potentials for Reorientation in *Kadi II*”, in Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, p. 184.

⁹⁰ de Búrca, “Road Not Taken”, *op. cit.*, pp. 649-693.

⁹¹ de Witte, Bruno, “A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union”, in Marise Cremona & Anne Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Oxford, Hart Publishing, 2014, pp. 33-46; Petersmann, Ernst-Ulrich, “Multilevel Judicial Protection of ‘Access to Justice’ and the EU’s Duty to Contribute ‘to the Strict Observance and Development of International Law’”, in Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, pp. 187-217.

⁹² Bretherton, Charlotte & John Vogler, *The European Union as a Global Actor*, London, Routledge, 2006, 2nd edn., pp. 2, 27.

autonomy triggers a robustly pluralist approach to the international legal order that side-lines international law, deepens the divide between internal and external EU fundamental rights policy and ultimately erodes the image of the EU as a 'virtuous international actor' wishing to credibly exude normative power as a result of undercutting EU external coherence.⁹³ On a more practical level, the Court's rejection of accession to the ECHR has added uncertainty to the EU's rules transfers to third countries which take place mainly as part of pre-accession conditionality or the European Neighbourhood Policy. What happens when the rules transferred – often filled with normative content – are subject to divergent interpretations of the Luxembourg and Strasbourg courts is unclear.

The issues put in front of the Court of Justice in *Opinion 2/13* and *Kadi* were by no means straightforward. Balancing so many considerations – fundamental rights, relationship to international law, autonomy of EU law and others – in individual judgments is almost always bound to disappoint some observers. There are no perfect solutions in such hard constitutional cases as the ones analysed in this study.

Nevertheless, it has been demonstrated that the Court's interpretation and balancing of legal principles in the cases – more visibly in *Opinion 2/13* but also in *Kadi* – has tended disproportionately more towards the autonomy of the EU legal order at the expense of fundamental rights and international law. Following this narrative, the limited strengthening of international human rights protection in *Kadi* has been a positive externality of the CJEU's preoccupation with autonomy, not the reverse. When the tables turned in *Opinion 2/13*, the Court's true colours shone through.

When it comes to international law, it has featured even more conspicuously lower down the Court's priorities. Despite the ECHR's specific place in both EU and international human rights law, the Court's decision in *Opinion 2/13* has done little to allay the fears of gradual disengagement from the international order evoked by *Kadi*. Although a quantitative analysis of the Court's case law has shown few signs of a further decline in references to the ECHR, the polarising jargon of autonomy has seeped into the most recent case law of the Court. The question of what the broader legacy of *Opinion 2/13* will be requires more time to answer but that should not divert attention from its most obvious and pressing consequence: the EU remaining outside of the ECHR regime. Should the resuscitation of the EU's accession not be successful,

⁹³ de Búrca, "The European Court of Justice after *Kadi*", *op. cit.*, p. 3.

the one-word epitaph summarising the whole endeavour would probably be 'autonomy'.

While concerns about autonomy of EU law are in principle legitimate, the foregoing analyses of *Kadi* and *Opinion 2/13* show that the Court construes them disproportionately in cases that define its attitude to fundamental rights and external judicial review. The juxtaposition of the two lines of case law reveals the existence of a double standard, whereby, in essence, the level of fundamental rights protection varies as a by-product of the prevailing considerations regarding the autonomy of EU law and of the CJEU. This is the message of hypocrisy that transcends the incoherence towards external judicial review as 'developed' by the Court – *Opinion 2/13* has shattered the narrative from the *Kadi* saga of a virtuous Court intervening into the international system for the sake of individuals without access to justice.⁹⁴ On the contrary, it has laid bare the supremacy of autonomy and unmasked a two-faced Court more concerned by its metaphorical 'place in the sun' than strengthening the fundamental rights protection under its own auspices.

⁹⁴ Martinico, Giuseppe, "The Autonomy of EU Law: A Joint Celebration of *Kadi II* and *Van Gend en Loos*", in Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment*, London, Routledge, 2014, p. 162.

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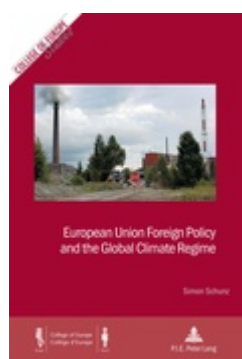
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