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THE OPPOSITION OF THE CJEU TO THE ECHR AS A MECHANISM OF INTERNATIONAL HUMAN RIGHTS LAW

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Abstract: The Court of Justice of the European Union (CJEU) has the competence to adjudicate on matters of human rights within the European Union (EU). It does so on the basis of a number of internal sources, such as the EU Charter on Fundamental Rights or EU general principles of law. EU law also requires that these sources are inspired by the rights found within the European Convention on Human Rights (ECHR), although this obligation does not place the EU under the direct supervision of the ECHR system. This article examines the approach of the CJEU to human rights protection and in particular seeks to analyse what this tells us about the Court's views about the role and purpose of the ECHR mechanism. The CJEU has rejected human rights monitoring of EU law by the European Court of Human Rights (ECtHR), an external body acting according to an external standard (the ECHR), despite the fact that case-by-case external review is a fundamental aspect of the modern international human rights law system. At the apex of recent retreat from the ECHR is the CJEU's *Opinion 2/13*, which suggests that any judicial scrutiny of EU law by the ECtHR (under a future EU accession to the ECHR) could only take place under strict constraints. This article suggests that the CJEU is unwilling to support the very purpose of the ECHR as an international human rights law mechanism.

Keywords: *EU; ECHR; human rights; external monitoring; individual petition; autonomy*

I. Introduction

It is common practice in international human rights law for governing authorities to be reviewed by international bodies in accordance with international standards of human rights.[1] This *external monitoring*, which constitutes an intrusion into state

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1 For instance, the International Covenant on Civil and Political Rights (supervised by the Human Rights Committee); the International Covenant on Economic, Social and Cultural Rights (supervised by the Committee on Economic, Social and Cultural Rights); the International Convention on the Elimination of Racial Discrimination (supervised by the Committee on Racial Discrimination); and the American Convention on Human Rights (supervised by the American Court of Human Rights).

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sovereignty, is an essential feature of the institution of international human rights; it ensures that states live up to generally accepted human rights standards:

> "from an original position of state-centric legal system, international law seeks to create a position in which the fundamental rights of the individual are a matter of international law, with international remedies available if these standards are not respected".[2]

Protection of human rights is commonly through a mechanism of petitions by aggrieved parties, which allows *case-specific review* of an alleged breach of human rights. This is an enforcement approach which has been prominent since the Versailles minority protection system post-World War I.[3] While as a matter of technicality human rights monitoring in the European Union (EU) is an internal affair, there has been an added element of reference to external standards and external monitoring. The Court of Justice of the EU (CJEU) monitors EU human rights protection in line with general principles of EU law[4] and the EU's own Charter of Fundamental Rights (EUCFR). This means that human rights in the EU are monitored by reference to an internal standard and by an internal body. As the EU is not a signatory of international human rights instruments — with the exception of only one instrument[5] — external bodies, such as the Council of Europe's European Court of Human Rights (ECtHR), which adjudicates on the European Convention on Human Right (ECHR), have no formal monitoring role. However, there has been some recognition in EU law of the importance of the ECHR for human rights standards in the EU. As we will see in Section IV, this arises through the historical case law of the CJEU and also art.6 of the Treaty on European Union (TEU). While not giving the ECHR legally binding authority over EU law, these sources serve to acknowledge the importance of the ECHR as a reference point for human rights in the EU.

The Council of Europe and the EU institutions have collaborated, for a number of years, towards greater integration of the ECHR into EU law. In 2013, they agreed to a draft proposal governing the conditions under which the EU should accede to the ECHR. This would require the EU to be a signatory of the ECHR. In 2014, in *Opinion 2/13*, the CJEU rejected the proposal, which would have placed the EU under the ECtHR's direct external monitoring.[6] The reasons behind this rejection,

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2 J Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights* (Manchester: Manchester University Press, 4th ed., 1996) p.2.

3 A Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016) p.26. It is well to note that the individual was in fact at the heart of international law, tracing back to the sixteenth century: p.11.

4 See further, Section IV(A).

5 The EU's adoption of the UN Convention on the Rights of Persons with Disabilities in 2010 was the first time in history that the EU has become a party to an international human rights instrument (which entered into force in the EU on 22 January 2011). See further, European Commission, "United Nations Convention on the Rights of Persons with Disabilities", available at http://ec.europa.eu/social/main.jsp?catId=1138 (visited 6 September 2017).

6 *Opinion 2/13* of 18 December 2014 ECLI:EU:C:2014:2454.

as explained in more in detail in Section IV(C), focused, *inter alia*, on the CJEU retaining autonomy over pronouncements on EU law in such a manner as to leave little scope for the ECHR to effectively conduct its external review functions. The CJEU was only willing to accept the ECHR as an international human rights law mechanism so long as such mechanism could operate without intruding upon the sovereignty or "autonomy" of EU law, suggesting that the CJEU's current human rights monitoring system is efficient and adequate. The rejection by the CJEU of an effective external monitoring role for the ECHR was not entirely unexpected: it was made in a context where it was already developing a protectionist attitude towards internal monitoring of EU human rights vis-à-vis the ECHR. While there is a whole host of criticism relevant to this approach of the CJEU towards the ECHR,[7] this article seeks to add to the existing scholarship analysis of how this may undermine the very purpose of the ECHR as an institution of international human rights law. The CJEU has in effect rejected the ECtHR as an external monitor and places formidable constraints on the ECtHR in offering case-specific review.

To demonstrate the claims of this article, Section II of this article examines how external monitoring and case-specific review have become essential characteristics of international human rights law. Section III outlines the alternative focus of the autonomy paradigm. Section IV examines the ways in which EU law has addressed human rights protection in relation to cases where EU law affects ECHR rights (the ECHR–EU intersection[8]), probing whether this has furthered the autonomy of the

7 See, for example, *Opinion 2/13* and the approach of the Court more generally; S Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection" *EU Law Analysis* (18 December 2014), available at http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html (visited 6 September 2017); L Storgaard, "EU Law Autonomy Versus European Fundamental Rights Protection — On Opinion 2/13 on EU Accession to the ECHR" (2015) 15 HRLR 485–521; S Lambrecht, "The Sting Is in the Tail: CJEU Opinion 2/13 Objects to Draft Agreement on Accession of the EU to the European Convention on Human Rights" (2015) EHRLR 186; L Besselink, M Claes and J Reesman, "A Constitutional Moment: Acceding to the ECHR or Not" (2015) 11(1) European Constitutional Law Review 2; B de Witte and S Imamovic, "Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court" (2015) 40(1) ELRev 683; S Peers, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare" (2015) 16 German Law Journal 213; A Lazowski and R Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR" (2015) 16 German Law Journal 179; P Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue; Autonomy or Autarky?" (2015) 38 Fordham International Law Journal 955–992; BH Pirker and S Reitmeyer, "Between Discursive and Exclusive Autonomy — Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law" (2015) 17(1) Cambridge Yearbook of European Legal Studies 168–188; E Guild and G Lesieur, *The European Court of Justice on the European Convention on Human Rights. Who Said What, When?* (London, The Hague, Boston: Kluwer Law International, 1998); J Callewaert, "'Unionisation' and 'Conventionalisation' of Fundamental Rights in Europe" in J Wouters, A Nolkaemper and E De Wet (eds), *The Europeanization of Public International Law: The Status of Public International Law in the EU and Its Member States* (The Hague: TMC Asser Press, 2008); S Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis" (2006) 43 CMLRev 629; S Douglas-Scott, "The Court of Justice of the European Union and the European Court of Human Rights after Lisbon" in S de Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford: Hart, 2013) pp.153–179.

8 This intersection has had a significant place in EU-ECHR debates, given the absence of a legally binding solution to the overlapping jurisdiction of both organisations.

EU or the institution of international human rights law. The Conclusion (Section V) critically evaluates the nature of the CJEU's understanding of international human rights protection systems.

II. The Intrinsic Characteristics of International Human Rights and the ECHR

The Council of Europe adopted the ECHR in 1950, which is open to signature for all European states, including (and exceeding) all of the EU member states. With 47 state signatories, it serves as a European minimum standard of human rights protection for Europe. The aim of the ECHR is simple: states sign the Convention, promising to uphold human rights standards in line with arts.2–18 of the ECHR.[9] If a state falls short of this standard, aggrieved individuals must first resort to domestic remedies, enabling the state to take corrective or preventive action to ensure that it complies with its Convention obligations. Where a complainant remains unsatisfied after exhausting domestic remedies, they are then entitled, under the ECHR rules, to bring a complaint before the ECtHR.[10] The ECHR provides a judicial mechanism for individuals to challenge states' failures to respect ECHR standards, and that mechanism is external to the state. This "external" standard and monitoring function[11] which enables the Convention to "defend individuals *against* member States … "[12] represents the very purpose of the ECHR, because "national mechanisms … are often ineffective …"[13] in protecting human rights and because "it is from his own government that an individual often most needs protection".[14] The ECHR's

9 ECHR, art.1.

10 *Ibid*., art.35.

11 Or "European supervisory function". HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Boston, London: Kluwer Law International, 1996) p.10.

12 L Bojin, "Challenges Facing the European Court of Human Rights: Fragmentation of the International Order; Division in Europe and the Right to Individual Petition" in S Flogaitis, T Zwart and J Fraser (eds), *The European Court of Human Rights and Its Discontents, Turning Criticism into Strength* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2013) pp.54–64, 61–62.

13 A Bradley, "Introduction: The Need for Both International and National Protection of Human Rights — the European Challenge" in S Flogaitis, T Zwart and J Fraser (eds), *The European Court of Human Rights and its Discontents, Turning Criticism into Strength* (Cheltenham, UK, Northampton, MA: Edward Elgar, 2013) pp.1–8, 2–3; J Gerards, "The Prism of Fundamental Rights" (2012) 8 ECLR 173–202, 184–185: calls this "back up" role one of the most important tasks of the Court.

14 Rosalyn Higgins, *Problems and Process, International Law and How We Use It* (Oxford: Oxford University Press, 1994) pp.95–96, 95. This logic underlies the development of the post-war European democratic order:

> "It was not enough for the legal and political orders to proclaim themselves committed to the values of human rights protection in their own constitutional documents. … . It required an 'external', legally-binding commitment towards all like-minded political orders in Europe to submit to the ECHR and its institutions … ."

approach to human rights protection in this manner is a direct reflection of the intrinsic characteristics of human rights as an international legal phenomenon: human rights presents an external standard for states, which is to be monitored through an institution external to the state.[15] Thus, inherent in the birth of international human rights law was a recognition of its necessary infringement of state sovereignty.

An integral aspect of international human rights law is a case-specific review of individual cases. The international human rights law system does not regard its role fulfilled through abstract review of states' human rights protection, but seeks to offer case-specific justice. The ECHR's system with its case-specific individual review[16] is known to be one of the most successful globally.[17] The ECtHR has hailed individual petition as "one of the keystones" in its machinery.[18] Through this mechanism, the ECHR reviews not "abstract problems", but specific facts of each case.[19] Referring to international human rights law treaty obligations, Rehman comments that "these obligations have been undertaken by states themselves to allow the individuals locus standi to make claims before international bodies".[20] While these mechanisms existed from early 1900s,[21] it was in the contemporary human rights field that case-specific reviews proliferated. Commencing with the post-World War I Versailles system of bilateral minority rights agreements, which embodied mechanisms for individual petition, to the institution of the post-World War II system of international human rights, case-specific review of individuals' allegations of human rights has become an essential feature of international protection of human rights. The universal Bill of Rights was quickly followed up with the growing case review capabilities of the two international committees, and at the regional level, all of the major human rights treaties are accompanied by such individual review mechanisms.[22]

L Besselink, M Claes and JH Reestman, "Editorial: A Constitutional Moment: Acceding to the ECHR (or Not)" (2015) 11 European Constitutional Law Review 2–12, 10.

15 See the text given in Note 1.

16 With the European Commission in 1955 and then the establishment of the ECtHR in 1959. See art.34 of the ECHR and Protocol 11 which permitted direct access to the Court.

17 AA Cancado Trinidade, *The Access of Individuals to International Justice* (Oxford: Oxford University Press, 2011), see discussion at p.36; Bradley, "Introduction: The Need for Both International and National Protection of Human Rights" (n.13) p.2.

18 *Mamatkulov and Askarov v Turkey* (2005) 41 EHHR 25, [122]; Council of Europe, *Effects of the Various International Human Rights Instruments Providing a Mechanism for Individual Communications on the Machinery of Protection Established under the European Convention on Human Rights*, Secretariat Memorandum prepared by the Directorate of Human Rights (Strasbourg, 1 February 1985) H (85) 3.

19 Yourow, *The Margin of Appreciation Doctrine* (n.11) p.10.

20 J Rehman, *International Human Rights Law* (Harlow, England: Pearson, 2010) p.17.

21 Peters, *Beyond Human Rights* (n.3) p.25.

22 See the text given in Note 1.

III. The Autonomy of EU Law

There is no formal hierarchy between the EU and the Council of Europe or its ECHR. The CJEU is bound by EU internal law and on matters of human rights applies the EUCFR. However, as detailed in Section IV, the CJEU is also committed to the standards set by the ECHR, and this has an early historical basis, and one which the EU and the Council of Europe sought to build upon through a proposed agreement for the EU to accede to the ECHR. Part of the context in understanding the developments in the relationship between the two jurisdictions is the notion of autonomy.

Autonomy is seen as essential to the definition of an international organisation[23] and can be equated with its sovereignty:[24] a sovereignty that encompasses its relations with international organisations, so that it is not subservient to other international organisations.[25] Autonomy is measured by, "the ability of the organization to behave as an independent member of the international community … without being subject to broader constraints imposed by the international community".[26] An organisation is autonomous when it "has its own foundational and validation points and is self-produced, self-organized and self-maintained"[27] and has its own dispute settlement mechanisms, both to settle disputes and to ensure uniform interpretation and application of its laws.[28] The CJEU has specified that for the EU, autonomy means:

> "… first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered. … Second, it requires that the procedures for ensuring uniform interpretation of the rules … and for resolving disputes will not have the effect of binding the

23 C Brolmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford: Hart, 2007) p.17; see also H Schermers and N Blokker, *International Institutional Law* (Nijhoff: Brill, 1995) pp.29–47; Bowett, *Textbook on the Law of International Institutions* (London: Sweet & Maxwell, 5th ed., 2001) p.16.

24 A Peters, "Membership in the Global Constitutional Community" in J Klabbers, A Peters and G Ulfstein (eds) *The Constitutionalisation of International Law* (Oxford: Oxford University Press, 2009) pp.153–262, 210.

25 But also from its member states.

26 J D'Aspremont, "The Multifaceted Concept of the Autonomy of International Organizations and International Legal Discourse" in R Collins and ND White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Abingdon: Routledge, 2011) pp.63–86, 63–64.

27 N Tsagourias, "Conceptualising the Autonomy of the European Union" in R Collins and ND White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Abingdon: Routledge, 2011) pp.339–352, 339.

28 *Ibid.*, p.343; JW Rossem, "The Autonomy of the EU: More is Less?" in R Wessels and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague, The Netherlands: TMC Asser Press, 2013) pp.13–146, 13.

> Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law …".[29]

Such articulations of autonomy raise issues for the ECtHR's role as an external monitor of EU human rights. They suggest that, in the ECHR–EU intersection, the autonomy debate concerns (1) the extent to which the EU is free from the broader constraints imposed by the ECHR; (2) whether the EU has its own (and not external) foundational and validation points; (3) whether the EU has its own dispute settlement mechanisms; (4) whether the EU's powers remain unaltered by the ECHR; and (5) that the ECHR does not interpret EU law. ECHR external monitoring would intrude on some of these features of EU autonomy, as it would constrain EU action as against an external validation point, through an external arbitrator. However, autonomy is a flexible concept: subjection to an external source would be permitted, so long as the ECHR enters EU law on the *EU's own terms*,[30] determined by its "own rules".[31] As such it would be a "self-determined choice to be compliant or cooperative with others".[32] This demonstrates that autonomy need not be inherently opposed to the institution of international human rights: international human rights invites authorities to willingly curtail their autonomy (or sovereignty) to enable external monitoring of their human rights performance. The following section of this article seeks to analyse how this has played out in EU law.

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29 *Opinion 1/00* ECLI:EU:C:2002:231, paras.12–13. For further analysis of autonomy in the context of the EU, see T Lock, "Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order" (2011) 48(4) CMLRev 1025–1054; C Eckes, "EU Accession to the ECHR: Between Autonomy and Adaptation" (2013) 76(2) MLR 254–285; Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue; Autonomy or Autarky?" (n.7); Pirker and Reitmeyer, "Between Discursive and Exclusive Autonomy — Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law" (n.7); C Eckes, "The European Court of Justice and (Quasi-)Judicial Bodies of International Organisations" in R Wessels and S Blockmans (eds) *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague, The Netherlands: TMC Asser Press, 2013) pp.85–109; E Cornu, "The Impact of Council of Europe Standards on the European Union" in R Wessels and S Blockmans (eds) *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (The Hague, The Netherlands: TMC Asser Press, 2013) pp.113–129; P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford: Hart, 2013); P Eeckhout, "Human Rights and the Autonomy of EU Law: Pluralism or Integration?" (2013) Current Legal Problems 1–34; P Gragl, "Accession Revisited: Will Fundamental Rights Protection Trump the European Union's Legal Autonomy?", *European Yearbook on Human Rights* (2011) pp.159–172; Rossem, "The Autonomy of the EU: More is Less?" (n.28) pp.13–46.

30 Tsagourias, "Conceptualising the Autonomy of the European Union" (n.27) p.346.

31 *Ibid.*, p.349.

32 G Brown, "The Idea of Autonomy: Accountability, Self-determinism and What Normative Claims about Institutional Autonomy in Global Governance Should Mean" in R Collins and ND White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Abingdon: Routledge, 2011) pp.104–119, 112.

IV. The EU's Engagement with the ECHR

This section offers an analysis of how the EU — primarily the CJEU — has engaged with the ECHR, as a system of human rights external to the EU, and ultimately whether this shows support for the rationale of the role of the ECHR as an international human rights system.

A. 1970s and 1980s: a (limited) jurisprudential breakthrough

When the EU came into being in 1950s, it did not have a human rights document[33] and did not impose human rights obligations on its institutions or its member states. For almost two decades, case law equally neglected human rights.[34] In 1969, the CJEU announced that it would respect human rights, which it observed were general principles of EU law, being those which the EU must respect in its acts.[35] The general principles of law are inspired by sources external to the EU. However, once such principles are accepted by the EU, and they become EU internal law principles. The CJEU has held that the contents of human rights as general principles of EU law are to be inspired by, *inter alia*, the ECHR.[36] However, despite this breakthrough in the recognition of the ECHR as an external human rights instrument with relevance to the EU, there were significant limitations with the CJEU's engagement with the ECHR:

(1) There was no supporting Treaty legal provision on respect for human rights either generally or for the ECHR specifically. In a limited fashion, the preamble of the Single European Act 1986[37] referred to promoting human rights and the ECHR, as did the Declaration by EU institutions in 1977.[38] The CJEU case law therefore developed without a formal legal basis.
(2) Only a few of the early cases mentioned the ECHR or the ECtHR specifically as a benchmark[39] (even when the applicant, the Advocate

33 See further, G de Búrca, "The Evolution of EU Human Rights Law" in P Craig and G de Búrca (eds), *The Evolution of EU Law* (New York: Oxford University Press, 2011) pp.465–497.

34 C-1/58 *Stork* ECLI:EU:C:1959:4; C-36-38, 40/59 *Geitling v High Authority* ECLI:EU:C:1960:36; C-40/64 *Sgarlata* ECLI:EU:C:1965:36.

35 C-29/69 *Stauder v City of Ulm* ECLI:EU:C:1969:57, [7]; C-11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, [4]; C-4/73 *Nold v Commission* ECLI:EU:C:1974:51, [13].

36 C-36/75 *Rutili v Minister for the Interior* ECLI:EU:C:1975:137, [32]. Subsequently, art.6 of TEU placed on legislative footing the place of the ECHR as an inspiration for EU general principles of law.

37 Preamble Single European Act:

> "determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the member states, the European Convention for the Protection of Human Rights and the European Social Charter …"

38 Joint Declaration by the European Parliament, the Council and the Commission [1977] OJ C103/1.

39 Examples referring to the ECHR are as follows: C-98/79 *Pecastaing* ECLI:EU:C:1980:69; C-136/79 *National Panasonic v Commission* ECLI:EU:C:1980:169; C-222/84 *Johnston* ECLI:EU:C:1986:206; C-46/87 and 227/88 *Hoechst* ECLI:EU:C:1989:337; C-63/83 *R v Kent Kirk* ECLI:EU:C:1984:255.

General or the European Commission, cited the ECHR).[40] The CJEU did not consider itself as so much bound by the ECHR, as merely inspired by it.[41]

(3) In many instances, the CJEU paid only lip service to upholding ECHR standards.

Thus, in the very early years, despite being the initiator of the integration of the ECHR into EU law, the CJEU did not assess itself rigorously against the standards set by this external framework and did not offer adequate case-specific review of ECHR rights to individuals affected by EU law.

B. 1990s to early 2000s: greater respect for the ECHR

The 1990s and early 2000s saw a marked change regarding the place of the ECHR in EU law. Despite an explicit rejection by the CJEU in *Opinion 2/94* of the possibility of accession of the EU to the ECHR (cited as due to the absence of legal competence within EU law),[42] there is nonetheless progressive recognition of the importance of the ECHR to the EU. In EU case law, the ECHR is frequently cited as having "special significance" in the EU.[43] Although this term is not formally defined, it implies that the ECHR has an important place in inspiring the content of the development of EU human rights law. In EU case law, there is regular acknowledgement of the relevance of the ECHR in human rights-related cases.[44]

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40 C-48/75 *Royer* ECLI:EU:C:1976:57; C-118/75 *Watson and Belman* ECLI:EU:C:1976:106, 1194. Other such cases include C-7/76 *IRCA* ECLI:EU:C:1976:108; C-30/77 *R v Bouchereau* ECLI:EU:C:1977:172; C-149/77 *Defrenne* (No.3) ECLI:EU:C:1978:130; C-85/76 *Hoffman–La Roche* ECLI:E:C:1979:36; C-34/79 *Henn and Darby* ECLI:EU:C:1979:295; C-41/79, 121/79 and 796/79 *Testa* ECLI:EU:C:1980:163; C-138/79 *Roquette Freres* ECLI:EU:C:1980:249; C-165/82 *Commission v UK* ECLI:EU:C:1983:311; C-246/83 *Binon v AMP* ECLI:EU:C:1985:165; C-5/88 *Wachauf v Germany* ECLI:EU:C:1989:321; C-100/88 *Oyowe and Traore v Commission* ECLI:EU:C:1989:638; C-154/205/206-78, 226-228, 263 and 264 and 39, 31, 83 and 85/79 *Valsabbia* ECLI:EU:C:1980:81; C-165/82 *Commission v UK* ECLI:EU:C:1983:311; C-267/83 *Diatta* ECLI:EU:C:1985:67; C-249/83 *Hoeckx* 1 ECLI:EU:C:1985:139; C-5/88 *Wachauf v Germany* ECLI:EU:C:1989:321 (13 July 1989) C-130/75 *Prais* ECLI:EU:C:1976:142; C-60 and 61/84 *Cinetheque* ECLI:EU:C:1985:329; C-12/86 *Demirel* ECLI:EU:C:1987:400.

41 And often only to "allow for the triumph of community will", J Coppel and A O'Neill, "The European Court of Justice: Taking Rights Seriously?" (1992) 29 CMLRev 669–692, 683.

42 *Opinion 2/94* Accession by the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:1996:140.

43 Eg, C-219/91 *Ter Voort* ECLI:EU:C:1992:414, [34].

44 See, eg, C-540/03 *Parliament v Council* ECLI:EU:C:2006:429; C-71/02 *Karner v Troostwijk* ECLI:EU:C:2004:181; C-36/02 *Omega v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614, [33.C] 249/86; C-331/88; C-121/89; C-76/93 *Scaramuzza* ECLI:EU:C:1994:371; C-415/93 Bosman ECLI:EU:C:1995:463; C-235/99 *Kondova* (2011) ECLI:EU:C:2001:490; C T-377/00 *Philip Morris International v Commission* ECLI:EU:T:2003:6; C-238/00P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P, *Limburgse Vinyl Maatschappij (LVM) v Commission* ECLI:EU:C:2002:582; C-117/01, *KB v The National Health Service and the Secretary of State for Health* ECLI:EU:C:2004:7.

In addition, an obligation was imposed on the EU member states wishing to derogate from their EU law obligations to justify their actions in line with the ECHR.[45]

In 1990s and early 2000s, we see, for the first time, the CJEU referring to the jurisprudence of the ECtHR, and this trend has continued through a long list of cases.[46] For instance, in *Höechst AG v Commission*,[47] the CJEU held that art.8 of the ECHR protecting privacy did not apply to companies, but the ECtHR went on to hold in *Niemietz v Germany*[48] that art.8 did apply to companies. The CJEU subsequently reversed *Höechst AG v Commission*[49] to bring EU law in line with *Niemietz v Germany*. Across CJEU case law in this period, there is both an acknowledgement of the ECtHR as an external standard and the value of an in depth, case-specific analysis of human rights complaints by individuals.

Throughout 1990s and 2000s then, the CJEU built up a strong commitment to ECHR standards of human rights protection,[50] filling the gap left by the lack of Treaty competence to formally sign the ECHR.[51] Commentators have observed that the CJEU treated the ECHR at this time as if it was binding upon the EU[52] and was "tending to 'follow' rather than merely refer to" the case law[53] of the ECtHR as persuasive authority.[54]

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45 C-260/89 *ERT* [1991] ECLI:EU:C:1991:254. Thus, should a member state wish not to apply a specific element of EU law, they could only do this in a form which would not entail a breach of the ECHR.

46 Eg, C-235/92 *Montecatini* ECLI:EU:C:1999:362; C-199/92 *Huls* ECLI:EU:C:1999:358; C-74/95 and C-129/95 *Criminal Proceedings against X* ECLI:EU:C:1996:491; C-13/94 *P v S* ECLI:EU:C:1996:170; C-368/95 *Familiapress* ECLI:EU:C:1997:325; C-249/96 *Grant v South West Trains Ltd* ECLI:EU:C:1998:63; C-189/95 *Baustahlgewebe GmbH v Commission of the European Communities* ECLI:EU:C:1997:504; C-7/98 *Krombach and Bamberski* ECLI:EU:C:2000:164; C T-112/98 *Mannesmannrohen-Werke AG v Commission of the European Communities* ECLI:EU:T:2001:61; C-274/99 *P Connolly v Commission of the European Communities* ECLI:EU:C:2001:127; C-60/00 *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434; C-276/01 *Joachim Steffensen* ECLI:EU:C:2003:228; C-465/00, C 138/01 and C-139/01 *Rechunhshof* ECLI:EU:C:2003:294; C-112/00 *Schimdberger* ECLI:EU:C:2003:333; C T-224/00 *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities* ECLI:EU:T:2003:195; C-109/01 *Akrich* ECLI:EU:C:2003:491; C 117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health* ECLI:EU:C:2004:7; C 71/02 *Herbert Karner* ECLI:EU:C:2004:181; C 482/01 and 493/01 *Orfanopoulos and Oliveri v Land Baden-Wurttemberg* ECLI:EU:C:2004:262; Case T-67/00, 68/00, 71/00 and 78/00 *JFE Engineering Corp, Nippon Steel Corp, JFE Steel Corp and Sumitomo Metal Industries Ltd v Commission of the European Communities* ECLI:EU:T:2004:221; C-145/04 *Spain v United Kingdom* ECLI:EU:C:2006:543; C-438/05 *The International Transport Workers' Federation and the Finnish Seamen's Union (Viking)* ECLI:EU:C:2007:772; C-60/00 *Carpenter* ECLI:EU:C:2002:434; C-7/98 *Krombach and Bamberski* ECLI:EU:C:2000:164.

47 Case C-46/87 and 227/88 *Höechst AG v Commission* [1989] ECLI:EU:C:1989:337.

48 (1992) 16 EHRR 97.

49 See, eg, Case C-94/00 *Roquettes Frères SA v Commission* ECLI:EU:C:2002:603.

50 Douglas-Scott, "A Tale of Two Courts" (n.7).

51 *Opinion 2/94* ECLI:EU:C:1996:140.

52 F Jacobs, *The Sovereignty of Law: The European Way* (Cambridge: Cambridge University Press, 2007) pp.54–55.

53 Douglas-Scott, "A Tale of Two Courts" (n.7) p.650.

54 There have been some notable exceptions to the general willingness of the CJEU to assess EU law against the ECHR as an external standard of human rights protection. The CJEU did not follow the ECHR Emesa Sugar case, in its own cases of Case C-17/98, *Emesa Sugar* ECLI:EU:C:2000:70 and

While this does not, of course, amount to external supervision by the ECtHR, the development is significant because the CJEU (voluntarily) constrains itself by reference to the ECHR, in the absence of a legal requirement to do so. It afforded individuals the opportunity for fairly advanced case-specific review of breaches of ECHR standards of human rights protection. Indeed, it is arguable that the CJEU case law in this period required, and implemented, better protection of ECHR standards than was required and implemented by the ECtHR itself.[55] The CJEU commitment to the ECHR persisted in this period, despite the introduction of the EU Charter on Fundamental Rights in 2000.[56] This moment could have triggered less reliance on the ECHR in EU case law, because the EUCFR constituted the EU's first enumeration of human rights and was a source of human rights which was internal to the EU (even though in 2000, it was a non-binding instrument of EU law). Moreover, while the Charter replicates all of the ECHR rights, it also contains a wider range of rights.[57] However, the Charter integrates respect for the ECHR into its human rights protection.[58]

Article 52(3) of the EUCFR requires that where a right in the EUCFR corresponds to that in the ECHR, the meaning and scope of those rights shall be the same as laid down by the ECHR. Article 53 requires that the Charter is not interpreted as restricting or adversely affecting, *inter alia,* the ECHR. The Charter is also reinforced by an explanatory document.[59] This is also supportive of the ECHR, indicating that the Charter must comply with the standards of the ECHR, including its case law, aiming to maintain the level of protection afforded within the ECHR.[60] This indicates that the ECHR is a minimum level of human rights

C-466/00 *Kaba II* ECLI:EU:C:2003:127. The CJEU ruled in C-46/87 and 227/88 *Hoechst and Orkem* ECLI:EU:C:1989:337, that there was no right against self-incrimination for businesses and the ECtHR's subsequent judgments again held the opposite (*Funke v France* [1993] 16 EHRR 297; *Saunders v UK* [1996] 23 EHRR 313). The CJEU has not changed its judgments to ensure closer consistency with the ECHR. See also C T-34/93, *Société Générale v Commission* ECLI:EU:T:1995:46; joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij v Commission* ECLI:EU:T:1999:80 and on appeal joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P *Limburgse Vinyl Maatschappij v Commission* ECLI:EU:C:2002:582; C-301/04 P *Commission v SGL Carbon* AG ECLI:EU:C:2006:432. Other still did not refer to the ECHR at all: C-62/90 *Commmision v Germany* ECLI:EU:C:1992:169; C T-77/92 *Parker Pen* ECLI:EU:T:1994:85; C-84/95 *Bosphorus* ECLI:EU:C:1996:312; C-274/96 *Bickel and Franz* ECLI:EU:C:1998:563; C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639; C-459/03 *Commission v Ireland (MoxPlant)* ECLI:EU:C:2006:345; C-341/05 *Laval* ECLI:EU:C:2007:809.

55 *M and Co v Germany* [1990] ECHR Series A 138; *Bosphorus Airways v Ireland* (2006) 42 EHRR 1. In both of these cases, the ECtHR is content to not hold EU member states responsible for breaches of the Convention arising from EU law, so long as the EU is deemed to provide equivalent protection, and has adequate internal mechanisms for reviewing human rights.

56 2000/C 364/01.

57 Among several are: art.1 (human dignity), art.18 (right to asylum), art.22 (cultural, religious and linguistic diversity), art.35 (right to healthcare) and art.38 (consumer protection).

58 See further, S Peers and S Prechal, "Article 52" in T Hervey, J Kenner, S Peers and A Ward (eds), *The Charter of Fundamental Rights, A Commentary* (Oxford: Hart, 2014) pp.1455–1521.

59 OJ C 303, 14.12.2007.

60 Explanatory notes to arts.52 and 53 of the EUCFR.

protection for the EU.[61] Thus, the Charter strengthens the position of the ECHR in EU law, because the ECHR has been given explicit mention as an external source of law relevant to the interpretation of the EUCFR.

Ironically, the CJEU's fairly advanced engagement with the ECHR might be attributable to the lack of a legal obligation to so engage[62] and also to the use of EU general principles of law to convert external ECHR rights into sources of EU internal law. As such, in effect, the CJEU was complying with EU internal law, as interpreted in the light of ECHR. These factors enabled the CJEU to commit to the ECHR "on its own terms", according to its internal EU validation point, the point being that the CJEU indicates that EU autonomy is not affected by non-binding recourse to external sources.

C. Post-2006 CJEU retreat from respect for the ECHR

In Section IV(C), we saw how the CJEU made significant advances in its respect for ECHR standards of human rights protection. Post-2006, on the one hand, it continued to reiterate that the ECHR was of special significance,[63] and in a string of cases, it made extensive reference to the ECHR and its case law.[64] However, there were instances where EU case law expressed reservations about the relevance of the ECHR and its jurisprudence. This included cases indicating that close adherence to the ECHR was no longer necessary. Advocate General Geelhoed in *European Commission v SGL Carbon* stated that: "[i]t is not possible simply to transpose the findings of the European Court of Human Rights, without more, to undertakings".[65]

This idea was again taken up by Advocate General Trstenjak in the *NS* case, in which he claimed that:

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61 B de Witte, "Article 53" in T Hervey, J Kenner, S Peers and A Ward (eds), *The Charter of Fundamental Rights, A Commentary* (Oxford: Hart, 2014) pp.1523–1538.

62 To summarise: at this point in time, the ECHR is not binding on the EU, and the EUCFR and its explanations (which require commitment to the ECHR) also have no legally binding force.

63 Case C-540/03 *Parliament v Council* (n.44), [35].

64 Paras.54ff; C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* ECLI:EU:C:2010:811; C-92/09 and C-93/09 *Volker and Markus Schecke GbR, Harmut Eifert v Land Hessen* ECLI:EU:C:2010:662; C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, C-127/08 *Metock v Minister for Justice, Equality and Law Reform* ECLI:EU:C:2008:449; C-34/09 *Gerardo Ruiz Zambrano v Office de Nationale d'Emploi* ECLI:EU:C:2011:124; C-404/15 and C-659/15 *Aranyosi Caldararu* ECLI:EU:C:2016:198; C-182/15 *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra* ECLI:EU:C:2016:630; C-205/15 *Direcţia Generală Regională a Finanţelor Publice Braşov (DGRFP) v Vasile Toma and Biroul Executorului Judecătoresc Horaţiu-Vasile Cruduleci* ECLI:EU:C:2016:499; C-294/16 *JZ v Prokuratura Rejonowa Łódź — Śródmieście* ECLI:EU:C:2016:610; C-601/15 *JN* ECLI:EU:C:2016:84; C-391/09 *Vardyn* ECLI:EU:C:2011:291; C-301/06 *Ireland v European Parliament and Council of the European Union* ECLI:EU:C:2009:68; C-334/12 *Orlando Arango Jaramillo* ECLI:EU:C:2013:134.

65 C-301/04 P *European Commission v SLG Carbon AG* [2006] ECLI:EU:C:2006:53. By "more", the AG indicates that ECtHR case law cannot simply be applied without considering the nuances of the scenario before the Court and the context of the EU.

> "the judgments of the European Court of Human Rights essentially always constitute case-specific judicial decisions and not the rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter". [66]

While the Court itself did not explicitly confirm the views of the AG in these cases, later case law[67] does indicate the CJEU's withdrawal from its pre-2006 reliance on the ECHR.

In this period, the CJEU sometimes failed or refused to consider the ECHR at all,[68] and overall, it was "… referring distinctively less to the ECHR and the case law of the ECtHR today compared with before the Lisbon Treaty".[69] This retreat from the ECHR ignores the fact that the ECHR had for decades been treated as relevant by EU law and the CJEU. EU case law is instead referring more to the EU's internal human rights document, the EUCFR. This may be explained by the fact that the EUCFR achieved heightened status in EU law, when in 2009, it was finally given legally binding form by the Lisbon Treaty. It has since then gathered increasing importance within EU case law.

2009 arguably marked a turning point in the approach of EU jurisprudence to the relevance of the ECHR in EU law. Henceforth, the EUCFR, and not the ECHR, emerges as the guiding light. CJEU President Skouris indicated that the EUCFR is "the reference text and the starting point for the CJEU's assessment of fundamental rights".[70] De Burca notes that there were 122 cases between December 2009 and December 2012 which referred to the EUCFR and only 18 referred to the ECHR.[71]

This shift in attitude in EU jurisprudence from one offering significant engagement with the ECHR to one exercising discernible retreat is thus seen to correlate, in part, with the time from which the EUCFR was given legally binding status. The binding nature of the EUCFR perhaps provoked a sentiment in the

66 C-411/10 and C 493/10 *NS v Secretary of State for the Home Department* ECLI:EU:C:2011:865, [146].

67 See discussion on *Opinion 2/13* below.

68 S Sanchez, "The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights" (2012) 49 CMLRev 1565. For instance, in C-40/11 *Lida* ECLI:EU:C:2012:691, the referring court asked questions which included whether the EUCFR and the ECHR were breached. In deciding that the case fell outside of the scope of EU law, therefore, the Court held that the EUCFR could not be raised. It did not mention the ECHR in its judgment. Likewise in C-271/08 *Commission v Germany* ECLI:EU:C:2010:426, the ECJ did not refer to the ECHR in deciding a case on collective agreements and pension contracts. In C-115/15 *Secretary of State for the Home Department v NA* ECLI:EU:C:2016:487, there was no reference to the ECHR, even though it was raised by the referring court. The *Dano* case equally does not refer to the ECHR: C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358.

69 Storgaard, "EU Law Autonomy versus European Fundamental Rights Protection" (n.7) p. 513.

70 "Joint Communication of Presidents Costa and Skouris" (24 January 2011), available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf (visited 21 April 2017).

71 G De Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" (2013) 13 Maastricht Journal of European and Comparative Law 168–184.

CJEU that the EUCFR now fulfils the EU human rights accountability gap that the Court sought to fill by reference to the ECHR, making the latter now redundant.

From the perspective of EU autonomy, this may work (ensuring that the CJEU references its own human rights documents as validation points for EU acts). But from the perspective of an international human rights approach, it does not — it displaces the use of the ECHR and its case law as an external standard for EU human rights protection. Moreover, regressive reference to the ECHR sits uneasily within the context of the EUCFR, because, as seen earlier, the EUCFR in fact requires the EU to interpret Charter rights in line with the ECHR (where those rights correspond to the rights in the Charter). Thus, the jurisprudential retreat from the ECHR is perplexing. It has nonetheless continued in stronger form in recent years, and it is in the context of the EU's accession to the ECHR that the fact of EU autonomy as the underlying motivation of this development becomes clear.

It is evident that recent legislation has thrown ambiguity towards the question of the EU's commitment to the ECHR (despite art.6 of the TEU requiring, since 2009, that the EU must accede to the ECHR). For instance, the explanations to the EUCFR stress that, although it requires consistency between the EU and the ECHR, this must not adversely affect the autonomy of EU law and the CJEU,[72] implying that consistency with the ECHR may be in opposition to the protection of the EU's autonomy. Furthermore, Protocol 8 to the Treaty of Lisbon guards against the EU's complete submission to the ECHR upon accession. It declares that "[s]uch accession shall not affect the Union's competences as defined in the Treaties". Declaration 2 to the Treaty of Lisbon 2009 also holds that accession to the ECHR "should be arranged in such a way as to preserve the specific features of Union law".

The European Parliament has also expressly maintained that the CJEU will not become subordinate to the ECtHR.[73] These pronouncements contradict long-held views on the EU's commitment to the ECHR. For instance, Wessel and Blockmans observed that in certain areas, the EU does not seem to be in a position to ignore international norms, citing the Council of Europe as a classic example of such an institution.[74] However, the judicial and legislative pronouncements indicated above lay the ground to make it possible for the ECHR to play a less prominent role in the EU.

As already mentioned, since 2009, art.6 of the TEU requires the EU to accede to the ECHR. However, with both legislative commitment to, and retreat from,

72 Explanations relating to the Charter of Fundamental Rights, 2007 OJ C303/02, explanation on art.52.

73 Draft Report of the Committee on Constitutional Affairs of the European Parliament on "Institutional Aspects of Accession of the EU to the European Convention on Human Rights", 2009/2241(INI), cited in G de Búrca, "The Evolution of EU Human Rights Law" (n.33) fn.85.

74 RA Wessel and S Blockmans, "Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations — An Introduction" in R Wessels and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (The Hague, The Netherlands: TMC Asser Press, 2013) pp.1–9, 5.

the ECHR being simultaneously indicated, negotiations for the EU's accession to the ECHR had to perform an important balancing act. 2013 saw the Council of Europe and EU institutions issue a draft accession agreement (DAA),[75] which was subsequently put before the CJEU for an Opinion on its conformity with EU law. The agreement, outlining the rules for accession, would enable the EU to accede to the ECHR, making the EU a signatory of the ECHR. Therefore, it would permit direct human rights litigation by individuals against the EU, before the ECtHR acting as the external monitor of EU human rights. The CJEU, in *Opinion 2/13*, rejected the agreement, listing a number of ways in which it breached EU law.[76] The CJEU stated that the EU's subjection to an international court is not necessarily a breach of EU law only if the "essential character" of the powers of the EU is safeguarded and "consequently, there is no adverse effect on the autonomy of the EU legal order".[77] Particularly noteworthy for this article is that autonomy is cited as a part of the EU's special characteristics[78] and a predominant ground for the rejection of the DAA.[79] Accordingly, autonomy received the status of an internal validation point for the DAA in EU law. The Court reached its judgment despite a number of provisions in the agreement aimed at safeguarding the powers of the EU.[80]

Opinion 2/13[81] ultimately rejects the ECHR as an external monitoring standard for EU human rights protection. It instead argues that the EUCFR (and not the ECHR) should be the highest standard of human rights in the EU.[82] However, from the perspective of international human rights law, while the EU may have its own internal mechanism for human rights protection, there should also be an independent external monitor. This was the very premise for European states establishing and signing the ECHR. The ECHR mechanism was not established because founding states had no internal mechanisms to address human rights. It was established *in addition* to those internal mechanisms. States committed to the ECHR because they recognised that their internal mechanisms do not make the ECHR redundant.

75 Council of Europe, Fifth Negotiating Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, 5 April 2013, Annex 1'Draft revised agreement (DAA) on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms', available at Council of Europe, Doc 47þ1(2013)2008rev2.

76 Paras.144–258.

77 Paras.182–183.

78 For example, supremacy, direct effect, mutual trust and respect for the EUCFR.

79 Para.258.

80 For instance, the CJEU's capacity to continue to oversee rulings on EU law was guaranteed by the proposal for the EU to be co-respondent in a case against an EU member state where EU law is in issue (art.3), or by the proposal that the CJEU could rule on EU-related cases first (before the ECtHR delivers a judgment) if it had not already done so, art.4.

81 For critical commentary on *Opinion 2/13*, see works referred to in note 7.

82 Its validation point for EU human rights: paras.186–190. It argued that the DAA failed to specify that the EUCFR is the highest standard of human rights in EU law.

By rejecting the DAA, the CJEU overturns this premise and "seeks to position EU law as the superior fundamental rights regime".[83]

The CJEU's protectionist stance towards internal review of EU human rights is reinforced across other parts of *Opinion 2/13*. The CJEU denies the ECtHR the role of external monitor of EU human rights specifically where this entails case-specific (and not mere abstract) reviews of EU-related cases. It observes repeatedly that the EU's autonomy is irreconcilable with case-specific review of ECHR rights. For instance, it argued that the draft agreement impinges on the principle of mutual trust among the member states under which member states may not demand higher levels of human rights protection from other member states than that available under EU law, and nor may "they check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".[84] EU accession to the ECHR jeopardises this because it would permit adjudicatory challenges to this EU principle, on the grounds that member states actions in a particular scenario did not meet ECHR standards. The CJEU regards this potential role of the ECtHR as "liable to upset the underlying balance of the EU and undermine the autonomy of EU Law".[85]

The CJEU also objected to the ECtHR's competence — as set out in the DAA — to review EU Common Foreign and Security Policy measures. The reasoning provided was that the CJEU itself does not currently possess competence itself to review such measures.[86] Thus, it appears that any case-specific review of EU law by the ECtHR is rejected, because any case-specific review necessarily would breach the principle of EU autonomy. Worryingly, however, this conflicts with the *raison d'etre* of human rights protection: that is, that human rights exist to protect individuals. As Stogaard comments, "…the true victims of *Opinion 2/13* are the individual right holders".[87]

In terms of autonomy, what *Opinion 2/13* shows is that when the ECHR is put forward as a legally binding instrument, and its court a legally binding adjudicator of EU human rights, the CJEU sees this as a threat to its autonomy. The court perceives the binding status of the ECHR as a threat, even though accession of the EU to the ECHR would be on the "EU's own terms", which would ensure that EU autonomy is not breached. Nonetheless, the CJEU indicates that its definition of

83 Storgaard, "EU Law Autonomy versus European Fundamental Rights Protection" (n.7) p.485.

84 Para.192.

85 Para.194.

86 Paras.249ff.

87 Storgaard, "EU Law Autonomy versus European Fundamental Rights Protection" (n.7) p.521. As further commented by Sharpston and Sarmiento: "in the balance between individual rights and primacy, the Court in Opinion 2/13 has fairly clearly sided within the latter". E Sharpston and D Sarmiento, "European Citizenship and Its New Union: Time to Move On?" in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2016) cited in D Kochenov, "EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?" (2015) 34(1) Yearbook of European Law 74–96, 94.

autonomy is more rigid. This reveals two points about the CJEU's approach to the ECHR as an external source of law:

(1) It sheds light on the nature of the Court's early references to, and engagement with, the ECHR: the Court was not wedded to the idea that EU human rights would progressively prioritise the ECHR, and indeed, a legally binding ECHR and its monitoring mechanism have been ultimately rejected by the EU. The Court's previous case law committing to the external standards of the ECHR was neither simply a step stone to (inevitable) full submission of the EU to the ECHR nor was it merely a device the CJEU used while waiting for the introduction of the relevant competence to accede to the ECHR (which it did not have at the time of *Opinion 2/94*).[88]

(2) The CJEU alters its understanding of EU autonomy for self-serving purposes. The CJEU has previously indicated that international law can enter the EU on its own terms.[89] As Advocate General Maduro said in *Kadi*:

> "the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community".[90]

This is also consistent with the theoretical understanding of autonomy as it relates to the EU.[91] For instance, Czuczai argues that the EU can restrict its own autonomy, so long as the decision to do so comes from the EU itself.[92] This suggests that autonomy is flexible enough for the EU to embrace international law, on its own terms. It would be logical to assume that direct instructions to accede to the ECHR in art.6 of the TEU and the input of the EU institutions into the DAA would be sufficient to fulfil the "own terms" criteria. However, contrary to its previous position and also the views of the Commission and Advocate General in *Opinion 2/13*,[93] the CJEU's view leaves little scope to subject the EU to the ECHR, without jeopardising the essential function of the ECHR as an external monitor of human rights. It does not accept EU autonomy as a more flexible notion.

88 See n.42.

89 *Opinion 1/92* ECLI:EU:C:1992:189 outlined that autonomy does not necessarily preclude the subjection of the EU to an external judicial body.

90 C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, [24].

91 *Ibid.*, s.3.

92 J Czuczai, "The Autonomy of the EU Legal Order and the Law-making Activities of International Organizations — Some Examples Regarding the Council's Most Recent Practice" (2012) Yearbook of European Law 452–472, 459.

93 View of Advocate General Kokott, *Opinion 2/13* ECLI:EU:C:2014:2475; View of the Commission, Opinion 2/13 ECLI:EU:C:2014:2454, partVI.

V. Conclusion

This article has argued that the review of the powers of governing authorities for human rights breaches as against norms external to that authority and by a body external to the jurisdiction of that authority constitute intrinsic characteristics of the institution of international human rights.

It has demonstrated that — despite positive signs in early years — the CJEU has rejected these fundamental aspects of the ECHR. Instead, the CJEU has suggested that, in order to protect the autonomy of the EU, there must be constraints on the external monitoring mechanism of the ECHR to a point that the use of that monitoring mechanism would prove almost futile. It has further suggested that internal review of human rights by the CJEU is adequate for human rights protection. This gives EU autonomy undue weight, an unnecessarily broad meaning, such as to leave little room for the fundamental features necessary for an effective international human rights system. In light of this, the CJEU's interpretation of the potential relationship between the EU and the ECHR shows an unwillingness to accept the role that international human rights plays in externally monitoring governing powers.

An analysis of origins of international human rights law shows that external human rights mechanisms are intended to review the powers of authorities and that to limit the review powers of international institutions is a rejection of the essence of human rights. The result of the CJEU's *Opinion 2/13* appears to be that the EU cannot accept an external monitor, even on its own terms.

Given that the turning point against the CJEU's reliance on the ECHR correlated with both the development of its own legally binding human rights instrument (the EUCFR) in 2009 and the prospect of the ECHR becoming formally binding in 2016, it can be argued that the CJEU only accepts external standards where these have limited legal value.

It can also be argued that the CJEU believes that an internal human rights system substitutes (rather than complements) a system of external review. As such, the CJEU presents a fundamental opposition to the very purpose of the ECHR as an institution of international human rights law.