

EDITORIAL COMMENTS

Keeping Europeanism at bay? Strategic autonomy as a constitutional problem

“Our hope that the emergence of a federated Europe and the dissolution of the present nation-state system will make nationalism itself a thing of the past may be unwarrantedly optimistic.”¹

When Hannah Arendt wrote these words in 1954, she sensed that “[o]n its more popular levels - not, to be sure, in the deliberations of statesmen in Strasbourg – the movement for a united Europe has recently shown decidedly nationalistic traits”, which she identified as “anti-American Europeanism”. Arendt lived long enough to see Europeanism take political centre-stage in de Gaulle’s idea of Europe,² and she would undoubtedly have noticed fairly unsubtle hints of European nationalism in current notions of “European sovereignty”³ or a “European way of life”.⁴ As it seems, the noble vision of a supranational Union has always had an awkward companion at its side: an intellectually less appealing drive towards Europeanism, which may nonetheless have been an effective engine of European integration. Traditionally focused on containing the harmful consequences of nationalism between Member States, the constitutional framework of the EU has so far been less tested as to whether its checks and balances keep nationalism at the Union level at bay, or whether on the contrary, this framework accommodates or even embraces Europeanism as a source of acceptance among EU citizens,

1. Hannah Arendt, “Dream and nightmare – Anti-American feeling in Europe”, *Commonweal*, 10 Sept. 1954, <www.commonwealmagazine.org/dream-and-nightmare> (all websites last visited 2 March 2022).

2. For a discussion of the geopolitical and economic motives of de Gaulle’s policy toward European integration, see Moravcsik, “De Gaulle between grain and *grandeur*: The political economy of French EC policy 1958–1970” (Part 1), 2/2 *Journal of Cold War Studies* (2000), 3 and (Part 2), 2/3 *Journal of Cold War Studies* (2000), 4, and the comments on Moravcsik’s contribution by Hoffmann, Keeler, Milward, Gillingham, Vanke and Trachtenberg, as well as a rejoinder by Moravcsik in 2/3 *Journal of Cold War Studies* (2000), 69.

3. Perhaps most clearly expressed by President Emmanuel Macron in his speech at Sorbonne University in 2017, <international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html>. The Programme for the French Presidency of the Council of the European Union, 1 January – 30 June 2022, p. 3, <presidence-francaise.consilium.europa.eu/en/programme/programme-of-the-presidency>, also refers to “A more sovereign Europe”.

4. As coined by Commission President Ursula von der Leyen, <politico.eu/article/von-der-leyen-on-european-way-of-life-we-cant-let-others-take-away-our-language>.

offering them an *ersatz* nation-State in a confusingly interconnected and increasingly unstable world. However, in the face of growing demands on the EU to play a more assertive geopolitical role, most urgently in reacting to Russia's war of aggression against Ukraine, but also in tackling global challenges in areas such as health and climate, and in securing the EU's economic "place in the sun" amid rapid technological change, scarce resources, and increasingly fragile supply chains, this constitutional issue is now coming to the fore. How can the Union be conceptualized as sufficiently independent and resilient in the face of these challenges without emulating the idea of a nation-State the EU is meant to overcome? From a legal perspective, this question can be approached by analysing constitutional limits that help focus the Union's actions on its values, while avoiding a eurocentric bias. Against this background, it is worth looking at recent efforts towards European strategic autonomy.

(Open) strategic autonomy: A panoply of instruments in search of a concept

A casual observer cannot help thinking that the concept of "strategic autonomy" owes much of its appeal among European politicians to its vagueness and to the fact that it avoids the other, more delicate, S-word: "sovereignty". While external policy experts have put a lot of effort into discussing an array of instruments required in order to achieve strategic autonomy,⁵ the definition of the goal itself has remained elusive, even more so when it is expanded into "open strategic autonomy", as preferred by the Commission.⁶ An interesting attempt at a conceptualization starts from the literal meaning of "autonomy" as "the ability of the self – *autos* – to live by its laws – *nomos*", and defines strategic autonomy as the ability of the EU "to live by its laws and norms both by protecting these internally and by partnering multilaterally in an international order based upon the rules it has contributed to shaping".⁷ "Autonomy" in that sense is evidently not the same as the

5. See e.g. Lippert, von Ondarza and Perthes (Eds.), "European Strategic Autonomy", SWP Research Paper 4, 2019; Helwig (Ed.), *FIIA Report: Strategic Autonomy and the Transformation of the EU* (FIIA, 2021); Molthof, Zandee and Cretti, *Clingendael Report: Unpacking Open Strategic Autonomy: From Concept to Practice* (Clingendael, 2021); Schmucker and Kober, *DGAP Policy Brief: Offene strategische Autonomie* (DGAP, 2021).

6. European Commission, COM(2021)66 final, "Trade Policy Review – An open, sustainable and assertive trade policy", p. 4; Commission Joint Research Centre (JRC) Science for Policy Report, *Shaping & securing the EU's Open Strategic Autonomy by 2040 and beyond*, 2021, <publications.jrc.ec.europa.eu/repository/handle/JRC125994>, followed by Commission, COM(2021)750 final, "2021 Strategic Foresight Report, The EU's capacity and freedom to act".

7. Tocci, *European Strategic Autonomy: What It Is, Why We Need It, How to Achieve It* (IAI, 2021), p. 3, <www.iai.it/en/publicazioni/european-strategic-autonomy-what-it-why-we-need-it-how-achieve-it>.

autonomy of the EU legal order. To be sure, a connection can be drawn: strategic autonomy could be said to refer to factual underpinnings of the autonomous legal order of the EU, guaranteeing essential prerequisites that have to be met so that EU citizens can live by the laws they regard as their own. But proponents of strategic autonomy clearly do not have such an austere interpretation of this concept in mind. We could all live by our laws without electric cars or smart lawnmowers, and even be good Kantian citizens on a wooden plank in the sea without a steady supply of batteries or microchips. Yet, strategic autonomy is meant to include “economic resilience”, making sure that the EU is not left behind in its economic and technological race with China and the U.S.⁸ Perhaps more fittingly, this concept can therefore be described as the ability of the EU to secure its citizens a life to the standards of prosperity, safety, health, and general well-being they are used to expect. As this is part of the promise of the Union (Art. 2(1), 3(1) TEU), there is nothing inherently wrong with this goal, except that it renders the whole concept somewhat unspecific.

However, strategic autonomy does not owe its popularity to its explanatory power as a theoretical concept, but to its practical versatility as a slogan that unites a panoply of instruments with which the EU tries to cope with the vanishing reliability of its connections and of its place in the world to its best advantage. As the Commission Joint Research Centre’s “Science for policy” report on open strategic autonomy put it: “Open strategic autonomy is about equipping the EU to manage interdependence in line with its interests and values.”⁹ We therefore need to look at the bundle of policies and measures assembled under the heading of strategic autonomy, rather than search for an overarching concept, in order to understand potential challenges for the EU constitution.

The sheer breadth of the task ahead for the EU is illustrated by the Commission’s 2021 Strategic Foresight Report “The EU’s capacity and freedom to act”.¹⁰ Transcending the origin of strategic autonomy in the sphere of the Common Foreign and Security Policy (CFSP),¹¹ the Report identifies ten areas “in which the EU could strengthen its open strategic autonomy and global leadership”.¹² This wish list includes a European Health Union; a sufficient supply of decarbonized and affordable energy; digital sovereignty; a guaranteed supply of critical raw materials; a first-mover global position in

8. Tocci, *op. cit. supra* note 7, p. 25.

9. JRC Science for Policy Report, *supra* note 6, p. 1.

10. *Supra* note 6.

11. European External Action Service, “Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union’s Foreign and Security Policy”, 2016; <eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf>.

12. *Supra* note 6, p. 1.

standard-setting; resilient and future-proof economic and financial systems; training and education policies in order to develop and to retain skills and talents matching EU ambitions; the strengthening of security and defence capacities and access to space; the promotion of peace, security, and prosperity for all; and the adaptation of democratic institutions to strengthen their resilience and capacity to anticipate change.¹³ While this carefully worded Report is hardly a rallying cry for “EU first”, it clearly indicates that the Commission envisages a future for the Union as a geopolitical player, asserting its interests on the world stage by leveraging its power if required, and if multilateral cooperation fails, not necessarily as a constitutive part of a multilateral world order, thus giving shape to President von der Leyen’s ambition to lead a “geopolitical Commission”.

In line with this geopolitical approach, the European External Action Service is working towards the adoption of a Strategic Compass for Security and Defence.¹⁴ Besides more traditional components (reinforcing multilateral partnerships with NATO, the UN, and regional partners; boosting cooperation with bilateral partners), the Strategic Compass includes innovative elements designed to support the EU in its quest for a global position of strength, such as the development of an EU Rapid Deployment Capacity of up to 5,000 troops; the reinforcement of civilian and military CSDP (Common Security and Defence Policy) missions and operations, and the strengthening of civilian CSDP through a new Compact; the boosting of EU intelligence capacities; the creation of an EU hybrid toolbox as a response to hybrid threats, in particular foreign information manipulation and interference; the development of an EU Cyber Defence Policy; and the creation of a Defence Innovation Hub within the European Defence Agency.

These efforts are paralleled by the orientation of EU trade policy “in support of the EU’s geopolitical interests”, as expressed in the Commission’s Trade Policy Review 2021.¹⁵ Just as in the field of CFSP/CSDP, a distinct feature of this part of the external face of the Union is a notable emphasis on autonomous measures intended to support “the objective to ensure that trade is sustainable, responsible and coherent with our overall objectives and values”.¹⁶ By way of example, the Trade Policy Review refers to the Carbon Border Adjustment Mechanism (CBAM) proposed by the Commission (although not as part of the EU’s Common Commercial Policy, CCP, but as part of the European Green Deal on the basis of the shared competence in the

13. *Supra* note 6, p.21.

14. European External Action Service, “A Strategic Compass for Security and Defence – For a European Union that protects its citizens, values and interests and contributes to international peace and security”, EEAS(2021) 1169.

15. *Supra*, note 6.

16. *Supra*, note 6, p. 13.

areas of environment and climate change).¹⁷ The CBAM is a complement to the Emissions Trading System (ETS) introduced by the EU in 2005, which combines a decreasing cap on overall carbon emissions in the EU with an obligation for companies in carbon-intensive sectors to purchase emission allowances they can either use for their own carbon emissions or, if they manage to reduce their emissions, sell to other companies. In order to avoid EU firms being put at a disadvantage as compared to producers in countries without comparable restrictions on carbon emissions, the CBAM requires importers of certain carbon-intensive products to buy emissions certificates for a fee linked to the prices of allowances under the ETS. Even assuming that this measure qualifies as a border tax adjustment, the CBAM would have to satisfy a double non-discrimination standard under the WTO rules: non-discrimination between domestic and foreign firms as well as non-discrimination between foreign firms.¹⁸ In particular, the lack of any differentiation in the pricing mechanism between rich and even the least developed countries and the problem of accounting for non-price related carbon reduction schemes in other countries could pose a risk regarding the compatibility of the CBAM with the WTO regime.¹⁹

This brings us to the theme of our comment: even in the pursuit of perfectly legitimate universal goals such as climate protection or, to mention another example, the fight against a pandemic, how “EU-centric” is the Union allowed to be under its own constitutional rules? The answer to this question depends on the degree to which respect for foreign actors required by international law and also the fundamental rights of those who are placed outside the EU territory, but affected by its actions, are integrated into the EU constitutional order. At this point, the autonomy of the EU legal order comes back into the picture, albeit not as an end, but as a constraint: could it be true that an excessive notion of autonomy in the legal sense prevents a proper integration of international law and thus paves the way for an inward-looking concept of “strategic autonomy” that ultimately reproduces the failings of traditional nation-States on a European scale?

While the CBAM illustrates the EU’s willingness to maintain its own aspirations in a global context, the recently proposed Anti-Coercion

17. Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, COM(2021)564 final.

18. Sapir, “The European Union’s carbon border mechanism and the WTO”, *Bruegel Blog*, 19 July 2021, <bruegel.org/2021/07/the-european-unions-carbon-border-mechanism-and-the-wto>; Dröge, *Ein CO2-Grenzausgleich für den Green Deal der EU*, 2021, pp. 14–5, <swp-berlin.org/publications/products/studien/2021S09_CO2-Grenzausgleich.pdf>.

19. As to the distinction between advanced and developing countries with regard to climate protection, Sapir, op. cit. *supra* note 18, refers to the principle of common but differentiated responsibilities under the Paris Agreement on Climate Change.

Instrument²⁰ provides an example for a defensive mechanism that is meant to protect the EU from external intrusions, here in the form of economic coercion by third countries. On the basis of Article 207(2) TFEU, the proposed regulation is meant to empower the Commission to take action, including imposing trade or investment restrictions, in order to respond to an interference by a third country “in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State . . . by applying or threatening to apply measures affecting trade or investment” (Art. 2(1) of the proposed regulation). Certainly, this proposal is aimed at an effective response to violations of international law. But questions have been raised regarding the compatibility of the Anti-Coercion Instrument with WTO law and general public international law.²¹ Again, this translates into the question of constitutional limits for the EU, whether derived from the integration of international law or otherwise, when facing the outside world.

To be sure, a freshly empowered “geopolitical” Union would not only carry a stick, but also a carrot. The Global Gateway initiative launched by the Commission and the HR/VP on 1 December 2021²² devises a plan for investment in infrastructure development around the world, aiming at mobilizing up to €300 billion between 2021 and 2027 for this purpose as part of the G7 initiative “Build Back Better World” that is meant to counter the Chinese Belt and Road Initiative. But, welcome as this may be, the overall effect of strategic autonomy remains the global projection of power by the EU. While it is far from clear whether this approach is supported by all relevant actors in the EU, at least the French Presidency of the Council in the first half of 2022 has embraced and expressed it in even stronger terms than the Commission: “To uphold and advance this model [of democratic freedom, solidarity, economic growth and social protection], Europe must assert its sovereignty, be free to make its own decisions, have control over its destiny and engage with its partners to address global challenges, with the support of united Europeans.”²³ Regardless of the admirable pro-European pathos of this statement, the idea of the Union as an upscaled model of a nation-State on

20. Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, COM(2021)775 final.

21. Raju, “Proposed EU Regulation to address third country coercion – What is coercion?”, <ejiltalk.org/proposed-eu-regulation-to-address-third-country-coercion-what-is-coercion>; Baetens and Bronckers, “The EU’s anti-coercion instrument: A big stick for big targets”, <ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets>.

22. Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank – The Global Gateway, JOIN(2021)30 final.

23. *Supra*, note 2, p. 2.

which it is apparently based is open to criticism from a constitutional perspective. While it is impossible to explore any of these aspects in depth, let us briefly sketch three ways in which the quest for European strategic autonomy is potentially constrained by EU law, all of which start from familiar features of the structure of the Union: its system of competences, its openness to international law, and its respect for fundamental rights.

Strategic autonomy and the division of competences in the EU: is weakness a virtue?

As has become evident from our brief survey of some construction sites of strategic autonomy, there is neither a single competence nor a straightforward process that would allow the EU to formulate a coherent concept of strategic autonomy taking account of all dimensions of the independence the Union strives for. The quest for strategic autonomy is rather an issue that cuts across the whole range of external and internal competences of the EU, from the CFSP and the CCP to the internal market and specific competences such as the environment or energy, and also to the Area of Freedom, Security and Justice (AFSJ). Self-evidently, it makes a significant difference for the EU's ability to form and to implement its strategic goals whether the measures envisaged fall under an exclusive competence (such as the CCP), a shared competence (such as the internal market), or merely a supporting competence (such as health). In particular, EU measures, whether (bilaterally or multilaterally) coordinated with other countries or institutions or just unilateral, that explicitly or implicitly reach beyond the Union's borders are characterized by the faultlines created by the division of competences and the diverging institutional and procedural arrangements that follow from them.

When the EU relies on coordination via trade agreements, these faultlines become visible in the much pondered over distinction between "mixed" and "EU-only" agreements, the latter being in the hands of the Commission, the Council, and the European Parliament, while the former may require additional ratification of all Member States according to their own national procedures, which may not only involve votes by national, but also by regional parliaments.²⁴ However, this is just the tip of the iceberg. Broadening the perspective to include all areas and all instruments that (potentially) serve the purpose of securing the strategic autonomy of the EU in an unstable world, we are confronted with a dizzying array of diverging institutional setups and procedures that can essentially be said to go back to peculiarities of the Union's competence order.

24. For a recent overview see Rosas, "Mixity and the Common Commercial Policy after Opinion 2/15" in Hahn and Van der Loo (Eds.), *Law and Practice of the Common Commercial Policy: The first 10 years after the Treaty of Lisbon* (Brill, 2020), 27.

At one end of the spectrum, there are provisions that grant considerable power to the Union executive, providing for centralized powers that do not lag behind the organization of a unitary State when it comes to protecting the interests of its citizens or its market with unilateral measures. For example, unlike former Article 133(2) EC, Article 207(2) TFEU allows for an exclusive role of the Commission in the implementation of trade policy,²⁵ thus creating the basis for the authorization of the Commission (without the involvement of the Council) to order measures such as the temporary control of the export of COVID 19 vaccines,²⁶ which, even though only a symbolic gesture, signalled the Union's willingness to enter the race of vaccine nationalism. Or to name an example for measures on the basis of an internal competence with extraterritorial significance, the Merger Control Regulation that was adopted on the basis of ex Articles 83 and 308 EC (now Arts. 103 and 352 TFEU) entrusts the Commission with the appraisal of mergers regarding their competitive effects in the internal market, including non-EU mergers with such effects, even (in exceptional cases) at the risk of major jurisdictional conflicts.²⁷

At the other end of the spectrum, there are still policies and measures in support of strategic autonomy that are in effect determined intergovernmentally. In this regard, exhibit A would certainly be the CFSP: while typically regarded as a centrepiece of executive power that not only in unitary States but also in federal ones is exclusively located at the highest level, the organization of foreign policy and defence in the EU under the framework of the CFSP falls into this category. Supported by the EEAS, the HR/VP, the Commission, the Council, and the Member States can be said to form the Union's "compound executive order" in which the Member States, acting by consensus in the Council, remain in control of the direction of foreign policy.²⁸

Quite naturally, this mosaic of the division of competences and the complex institutional and procedural arrangements resulting from it are perceived as obstacles to the effective pursuit of strategic autonomy by the EU.²⁹ This is undeniable, as is the fact that the present order of competences is not the result

25. Bourgeois and Chamon, "The integration of EU trade defence in the horizontal comitology regime", in Hahn and Van der Loo, op. cit. *supra* note 23, 512, at 515–6; Hahn, "Art. 207 AEUV", in Calliess and Ruffert (Eds.), *EUV/AEUV*, 6th ed. (Beck, 2022) Art. 207 AEUV paras. 95–8.

26. Implementing Regulations (EU) 2021/111, 2021/442, 2021/521, 2021/1071, 2021/1728 and 2021/2071 on the basis of Regulation (EU) 2015/479.

27. The most notable example is still Commission decision of 30 July 1997, Case No. IV/M.877 – Boeing/McDonnell Douglas.

28. Thym, "Intergouvernementale Exekutivgewalt. Die Verfassung der europäischen Außen-, Sicherheits- und Verteidigungspolitik", 50 *Archiv des Völkerrechts* (2012), 125.

29. E.g. Koenig, "The 'geopolitical' European Commission and its pitfalls", 2019, <hertie-school.org/fileadmin/user_upload/Policy_Brief_Nicole_geopolitical_commission.pdf>.

of a masterplan, but a snapshot of a contingent and ongoing historical process that cannot be rationalized in each and every detail. However, it seems worth exploring whether the perceived structural weakness of the Union in terms of strategic autonomy could also be analysed as an antidote for Europeanism. While it is clear that the interests of States and people outside the Union are not directly represented in the processes at Union or Member State levels that shape the Union's actions affecting these interests, the argument can be made that by debiasing the calculus of interests within the Union, these processes also produce the external benefit of moderating the assertion of EU interests at the expense of the outside world. It does not seem unreasonable to believe that the diversity of interests among its citizens represented by the Union and its Member States that leads to the often cumbersome decision-making in the EU is a countervailing force against nationalistic exuberance not only in the relationship between the Member States, but also in external relations (in particular regarding rivalries between neighbouring EU and non-EU countries such as Greece and Turkey, or France and the UK). Moreover, a process that, however messy, takes account of infra-EU diversity is surely a better, albeit far from perfect, reflection of the global diversity of interests affected by the Union's actions than a streamlined process that prioritizes effectiveness over the representation of diversity.

The integration of international law into the EU legal order: Is there room for improvement?

The second legal constraint on Europeanism, the EU's openness to international law, ranks high in its constitutional order. As Article 3(5) TEU solemnly declares: "[The Union] shall contribute . . . to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." This is reiterated in Article 21(1) TEU and reflected in the Court's case law: "Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union."³⁰ As in the case of any State or other entity bound by international law, this commitment of the EU to international law defines the outermost limits of an EU-centric pursuit of interests at the expense of other international actors. However, at least since the *Kadi* saga,³¹ it has been subject of a longstanding debate whether the ECJ has fully realized the potential of international law as a "gentle civilizer of

30. Case C-366/10, *Air Transport Association of America*, EU:C:2011:864, para 101.

31. Joined Cases C-402 & 451/05 P, *Kadi v. Council and Commission*, EU:C:2008:461; Joined Cases C-584/, 593 & 595/10 P, *Commission and Others v. Kadi*, EU:C:2013:518.

nations”,³² including the EU.³³ As has been observed, the Court’s understanding of the autonomy of EU law creates a selective permeability of the Union’s internal legal system for external norms, with the ECJ as a gatekeeper.³⁴ Looking back at this discussion, some would agree with the conclusion of a commentator: “the EU has always been highly ambivalent towards international law, and has carved out an ethos to justify this: what matters – and has always mattered – is the protection of the integrity of the EU legal order and the autonomy of EU law”.³⁵

Certainly, the EU’s recent enthusiasm for strategic autonomy does not change the fundamental constitutional tenets of the ECJ’s position. But, as can be seen from the examples of proposed legislation such as the CBAM and the Anti-Coercion Instrument as well as from single incidents such as the EU-U.S. steel deal, which also raises potential WTO concerns,³⁶ the Union’s geopolitical turn goes hand in hand with a stronger emphasis on unilateral action on the international stage, creating risks of a conflict with international law on a broader scale than before. So there will possibly be significantly more occasions for lawyers to test the limits imposed on the Union under the rules of international law, and for the Court to rethink the way its case law has so far channelled the reception of international law within the EU legal order. This may be the time to reflect on what the purpose of the autonomy of EU law is in the first place. As has been argued recently,³⁷ though not uncontroversially,³⁸ the emergence of the concepts of direct effect and supremacy in the early case law of the Court may be read as an expression of the desire of the Court (or at least of its former judge and president Robert

32. Cf. the title of Koskenniemi’s seminal book, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001).

33. For assessments from different perspectives, see e.g. de Búrca, “The European Court of Justice and the international legal order”, 51 *Harvard International Law Journal* (2010), 1; Eeckhout, “The integration of public international law in EU Law: Analytical and normative questions”, in Eeckhout and López-Escudero (Eds.), *The European Union’s External Action in Times of Crisis* (Hart, 2016), p. 189; Lenaerts, Gutiérrez-Fons and Adam, “Exploring the autonomy of the European legal order”, 81 *ZaôRV* (2021), 47.

34. Cremona, “Extending the reach of EU law: The EU as an international legal actor”, in Cremona and Scott (Eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP, 2019), 64, at 67–8.

35. Klabbers, “Straddling the fence: The EU and international law”, in Arnulf and Chalmers (Eds.), *The Oxford Handbook of European Union Law* (OUP, 2015), p. 52, at 55.

36. EU-US Joint Statement of 31 Oct. 2021, “Steel and Aluminium”, <trade.ec.europa.eu/doclib/docs/2021/october/tradoc_159890.pdf>, discussed by Dadush, “What to make of the EU-US deal on steel and aluminium?”, <bruegel.org/2021/11/what-to-make-of-the-eu-us-deal-on-steel-and-aluminium>.

37. Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge University Press, 2019).

38. Horsley, “Rethinking judicial narratives: The Court of Justice and the Treaty of Rome”, 17 *EuConst* (2021), 553.

Lecourt) to provide “a mechanism that allowed the member states to give up the use of inter-state retaliation and reciprocity mechanisms to enforce European treaty obligations”.³⁹ Paradoxical as this may seem, the same motive that has arguably shaped the autonomy of EU law supports its openness to international law: while autonomy has promoted the effectiveness of EU law as a pacifier between the Member States, this concept can become an obstacle for international law to perform the same task in the relations of the Union with the rest of the world if it results in denying the norms of international law full integration into the EU legal order. Without passing this off as a doctrinal argument, it is legitimate to ask whether the Court has always done its best to remove this obstacle, and thus to prevent the Union from falling into the same nationalistic traps as the Member States once did.

Not stopping at borders: Respect for fundamental rights

Last but not least, EU law provides individuals with an instrument to constrain the exercise of the Union’s powers by granting them fundamental rights as guaranteed by the Charter of Fundamental Rights and the general principles of Union law based on the ECHR and the constitutional traditions common to the Member States (Art. 6 TEU). Moreover, the protection of human rights is among the guiding principles of the Union “[i]n its relations with the wider world” (Art. 3(5) TEU), specifically including the Union’s external action (Art. 21(1) and (2) TEU).

As far as the Union’s own acts are concerned, the scope of application of the fundamental rights guaranteed by Article 6 TEU is, in principle, fairly straightforward. *Ratione personae*, EU fundamental rights are not exclusively reserved for EU citizens, except for the citizens’ rights in Chapter V of the Charter, the right to express a political will through political parties (Art. 12(2) CFR) and the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State (Art. 15(2) CFR).⁴⁰ Quite generously, the General Court extended the personal scope of fundamental rights protection even to “legal persons which are emanations of non-Member countries”,⁴¹ thus granting State-owned companies from third countries a legal status that will help them to gain domestic standing in future disputes arising from more robust trade measures taken by the Union in pursuit of strategic autonomy. *Ratione materiae*, all EU acts, whether internal or external, unilateral or agreed with foreign States or other subjects of

39. Phelan, *op. cit. supra* note 37, at p. 53.

40. However, Art. 15(3) CFR provides that “[n]ationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union”.

41. Case T-494/10, *Bank Saderat Iran v. Council*, EU:T:2013:59, para 39.

international law, are subject to the limits set by fundamental rights as part of EU law. Accordingly, the ECJ did not hesitate to assess “the compatibility of an international agreement with the first subparagraph of Article 6(1) TEU and, consequently, with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties”.⁴²

Beyond the application of EU fundamental rights to the immediate effects of the Union’s own acts, the extraterritorial protection of human rights under EU law may even reach further and extend to Union omissions in protecting human rights in third countries (in accordance with the standards of either the Union’s own fundamental rights or international human rights) if a violation of a duty of the Union to assess the human rights impact of its international agreements in this country can be found.⁴³ In *Front Polisario*, the General Court held that notwithstanding a wide discretion, such a duty indeed exists, and chose as a reference point the standards provided by the Charter of Fundamental Rights.⁴⁴ On appeal, the Court of Justice reversed this judgment on other grounds.⁴⁵ However, Advocate General Wathelet spoke out in favour of a duty of the Union to take account of human rights, albeit not in accordance with the Charter (which he deemed territorially inapplicable), but with human rights standards under international law.⁴⁶

Taking both strands together, if implemented within the framework of EU law, human rights have the potential to be a very effective constraint of any attempts by the EU to gain strategic autonomy in disregard of individuals who are not fortunate enough to share in the blessings of the EU. As in the Grimms’ fairy-tale of the hare and hedgehog: wherever the hare of the Union runs, the hedgehog of human rights is already there. However, even if our sympathies lie with the hedgehog, we should not overlook legitimate concerns of the hare. In particular in trade scenarios where purely economic issues are at stake, a wide-ranging commitment of the Union to respect economic rights of third-country nationals (including private and State-owned companies) would ultimately hold the Union responsible to price in global welfare effects of its regulatory activities, which could hardly be justified. On the other hand, in the case of global public goods such as climate change, it may well be impossible to overcome a first-mover disadvantage of international actors without domestic legal constraints that may be derived from human rights.⁴⁷ As these sparse remarks show, there is still a great task ahead of us.

42. Opinion 1/15, *EU-Canada PNR Agreement*, EU:C:2017:592, para 70.

43. This is discussed in depth by Cremona, op. cit. *supra* note 34, 74–82.

44. Case T-512/12, *Front Polisario v. Council*, EU:T:2015:953 para 228.

45. Case C-104/16 P, *Council v. Front Polisario*, EU:C:2016:973.

46. Case C-104/16 P, Opinion of A.G. Wathelet, EU:C:2016:677 paras. 269–76.

47. This is an essential part of the reasoning of the German Federal Constitutional Court in its decision on the violation of fundamental rights due to insufficient climate action by the

The EU as a custodian of its foundational values

We have analysed the Union's openness for international law, its respect for fundamental rights and the diversity expressed through its order of competences as legal constraints against European nationalism. As part of the Union's outward-facing constitution, these constraints help focus the Union's economic and political weight as a global actor on its foundational values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, as set forth in Art. 2(1) TEU. By doing so, these constraints guide, but do not hinder, the Union's various efforts to "manage interdependence",⁴⁸ as characterized by the term "(open) strategic autonomy", and thus to redefine its place in a world marked by instability and multiple crises. While naturally inclined towards cooperation with like-minded States and organizations, the Union's constitutional commitment to its foundational values also requires it to stand up against those who negate human rights and democracy. In the face of Russia's war of aggression against Ukraine, this is the uncomfortable, yet unavoidable demand on the EU. Just as we take Hannah Arendt's warning against European nationalism seriously, we do not want an inhumane ideology like the one that drove her out of Europe to prevail again. By putting people and individuals before capricious imperial dreams, the EU takes its role as custodian of its foundational values seriously, and confronts excesses of nationalism that despite all efforts, have never ceased to exist. As can be seen from the first steps taken against the aggressor,⁴⁹ there is hope that the EU will rise to this challenge.

German Federal legislature, order of the First Senate of 24 March 2021, 1BvR 2656/18, <bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=E2C277C96A224623197B0DC19F0A90AC.2_cid354>.

48. *Supra* note 9.

49. For a chronological list of restrictive measures in response to the crisis in Ukraine as of 2 March 2022, see <consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/history-ukraine-crisis>.

