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Scarlett McArdle

School of Law, University of Sheffield.

s.mcardle@sheffield.ac.uk.

The EU as an autonomous international legal person: can international law address the eternally changing nature of the EU?

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Abstract:

The European Union is a unique entity with its own integrated legal order. It originated as a 'creature of international law' but has consistently sought to move away from being considered as a simple subset of international law. While international law has sought to describe and demarcate the EU as an international organisation, the EU has sought to position itself as a *sui generis* entity. This paper seeks to locate the EU within the overarching international legal order in light of its expanding activities as an autonomous legal actor. In examining the problematic relationship between these two legal orders, as well as the complex relationship between the EU and its Member States, the paper seeks to briefly identify a broader set of issues that arise in the context of a project on the international legal responsibility of the EU. The paper seeks to highlight some of the issues specific to the EU that may be seen with the current work of the International Law Commission in developing draft articles on the responsibility of international organisations.

Introduction

"An international order based on effective multilateralism."[1]

"[t]he relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate

[1] 'A Secure Europe in a Better World', European Security Strategy, Brussels, 12 December 2003, p.9

that legal order only under the conditions set by the constitutional principles of the Community."[2]

The European Union has developed a unique role at the international level. It originated as "a new legal order *of international law*"[3] and is viewed by many international lawyers as an international organization.[4] Most EU lawyers, however, seek to argue that the EU is sui generis, something different and unique which needs to be treated as such.[5] While the EU was created by international law instruments, this foundational case of *Van Gend en Loos* is often used to show the individuality of the EU, to distance itself from international law and to highlight its 'sui generis' nature.

This conflict is one which, it is argued, manifests itself in the development of the EU as an international entity. This progression seems to exist on the basis of, what some view as, a substantial paradox; the EU is progressing towards a role as an international actor within a multilateral international community but simultaneously desires to separate itself from the international legal order and ensure its own identity and autonomy. It wants to be a part of the international system but also distinct from it.

This combination raises a number of questions concerning the relationship between these two legal orders and how such an existence of the EU as existing within, but separate from, international law works within this relationship. The European Union is unique in character and constantly evolving. Its competences, and the division of those powers with its Member States, are constantly in flux with continual Treaty amendments and developments. It is, without doubt, however, becoming a stronger and ever more present international actor. This paper forms part of a research project on the potential development of international rules on responsibility that may

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[2] Case C-402/05 P Yassin Abdullah Kadi v Council and Commission, Advocate General (AG) Maduro's opinion, 16 January 2008, at para.24.

[3] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belassingen*, [1963] ECR 12.

[4] Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd Edn (Cambridge: Cambridge University, 2005), at p.12.

[5] Paul Craig and Grainne de Burca, *EU Law. Text, Cases and Materials*, 4th Edn (Oxford: Oxford University Press, 2008), at pp.168-169.

address and impact upon the European Union. While the development within international law of the law of responsibility forms a major part of this debate, another significant aspect is the development of the EU as an international actor and its role and evolution within international law. This paper forms the basis of the consideration of this relationship. The research project seeks to consider the application of international rules to the EU but considers the EU to be substantially more than an international organisation. It is important, therefore, to clearly determine this relationship and this paper will begin to examine this.

This paper examines the changing nature of the EU as an international actor and what this has meant for the changing nature of the relationship between these two legal orders. This relationship has often been portrayed as a problematic one; attempts to determine hierarchy or rank of norms between these two legal orders has inevitably led to the portrayal and argument of one over the other. The paper is informed by a pluralist approach and argue that this relationship is not an inherently conflicting one, but rather a symbiotic relationship with developments in both legal orders being core to developments in each other. The international legal order has been integral to the internal and external constitutionalisation of the EU. These are not inherently conflicting legal orders, but rather are complementary and positively influence the development of each legal order.

This paper first of all examine the origins of the EU in international law and the importance of international law to the EU. It then analyses the development of the EU as an autonomous international legal order. The paper then briefly uses the case of *Kadi* to examine how these two orders have clashed in practice and what this means for the EU as an autonomous international actor. The paper will conclude with some tentative thoughts on the impact of this uncertain relationship on the potential rules of international legal responsibility of the European Union.

1. **Constitutional Foundations of the EU as an international actor.**

The origins of the EU lie in international law.[6] The EU originates in the European Coal and Steel Community, created through an international agreement between six

[6] Treaty establishing the European Coal and Steel Community, 18th April 1951.

states.[7] Here it followed the functional traditional pattern of an international organisation; established by treaty, with states as its members, with some sort of 'separate will'.[8] The departure from this model came, firstly, with the creation of a judicial system and, secondly, with the case law developed by this legal system.[9] The case law of the European Court of Justice (ECJ) has been fundamental in developing the identity of the European legal order.

The foundational case of *Van Gend en Loos* may have begun such constitutional revolution by seemingly retaining an international law focus with the pronouncement that a "new legal order *of international law*"[10] had been created, but these foundations were soon left behind. The year following *Van Gend* came the judgment of the Court in *Costa v ENEL* where it was argued that the Communities had "created its own legal system"[11]. The ECJ had begun what would be a long road of distinguishing the European legal system as an autonomous entity; eventually a strong and significant international actor. The ECJ marked out the position of the EU as a *sui generis* actor, but also its own role in the development of the significance of the EU as, not just an autonomous actor within international law, but as an entire legal order, entirely separate from international law. This has been a development continually emphasised and reinforced over the years. This autonomy, and the role of the ECJ in its development, will be examined in the following section.

The constitutional origins of an external role for the EU in terms of policy areas can be found in the creation of the Common Commercial Policy (CCP); the first area of

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[7] Treaty establishing the European Coal and Steel Community, 18th April 1951.

[8] Nigel White, *The Law of International Organisations* (Manchester: Manchester University Press, 2005), at pp.1-2; Jan Klabbers, *An Introduction to International Institutional Law*, 2nd Edn, (Cambridge: Cambridge University Press, 2009), at pp.11-12; Paul Reuter, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (London: George Allen and Unwin, 1958), at p.195.

[9] Piet Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2005) at pp.206-209.

[10] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belassingen*, [1963] ECR 12.

[11] Case 6/64 *Costa v ENEL*[1964] ECR 585.

external action by the EU.[12] The basis for the original creation of the Coal and Steel Community was economic and what followed from there found its basis strongly in economic and trade policy; the European Economic Community.[13] The CCP is, therefore, the longest standing area of external policy of the EU and the developments made in this area have provide much of the basis for the expansion of external policy and the development of general principles of external relations. While it is clear that the explicit purpose behind the CCP was trade and economics, there existed underlying political ideals. One of the original purposes of such common action was the political desire to prevent any more wars within Europe. There has always existed this clear external element to the basis of the European legal order. It is argued that such political purposes, rather than economic, have simply become more overt and accepted over time.

Implied Powers and Parallelism: the impetus for external development?

One of the fundamental ways in which such development came about was through the case law of the ECJ. The principle of conferred powers, that action can only be taken at the European level if such powers have been conferred in the treaties, has always been in existence within this legal system.[14] With the limited number of treaty revisions that take place, this does not leave much room for expansion in terms of powers. The development by the ECJ, as early as the 1970s, of the principles of implied powers and parallelism, were, therefore groundbreaking in the expansion of the external powers of the European Communities. The ECJ developed a line of case law developing the principle that where there existed powers at the internal level, powers at the external level could be implied.[15]

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[12] Paul Craig and Grainne de Burca, *EU Law. Text, Cases and Materials*, 4th Edn (Oxford: Oxford University Press, 2008), at pp.182-183; *Opinion 1/75 (Understanding on a Local Cost Standard)* [1975] ECR 1355.

[13] Treaty establishing the European Economic Community (EEC), 25th March 1957.

[14] Paul Craig and Grainne de Burca, *EU Law. Text, Cases and Materials*, 4th Edn (Oxford: Oxford University Press, 2008), at p.101.

[15] Case 22/70 *Commission v Council* (ERTA*)* [1971] ECR 263; Joined Cases 3, 4, and 6/76 *Kramer* [1976] ECR 1279; *Opinion 1/76 re Inland Waterways* [1977] ECR 741;*Opinion 2/91 re ILO Convention No 170* [1993] ECR I-1061; *Opinion 1/94 re WTO Agreement* [1994] ECR I-5267; *Opinion 2/94 re Accession to the ECHR* [1996] ECR I-1759.

This principle developed the power of the European Communities to conclude international agreements and consequently began to assert its identity at the international level. This has inevitably made a huge contribution to the development of the EU as an international actor. It also begins to show, however, the desire that has existed to develop such an identity. When considering this principle, it is important to note its fundamental constitutional character, as no other organisations or any types of entities can be argued to have developed comparable powers. It is principles such as this that begin to simultaneously entrench international law within the European system, by enabling and encouraging such involvement, but also begin to remove this system from traditional notions of the international legal system. Following the development of such unique and landmark legal principles within what was clearly becoming a highly integrated legal order, it could no longer be simply argued that this was still just the newest 'legal order of international law'. This was the beginning of the European order pushing itself onto the international stage and arguing for its own unique identity.

Alongside this development of implied powers came other constitutional developments that clearly moved the EU beyond its international law foundations. The development of a single legal order can be seen with the creation and implementation of principles of supremacy and direct effect, for example, which, again, have been developed through the judicial system of the EU. The European system has moved far beyond simple treaty cooperation and international legal relations between states and exists comprehensively as an integrated legal order. The jurisprudence of the European Court of Justice has had a significant role in developing these principles and the constitutional foundations of the EU. While it is still a treaty based system and revisions are carried out to the Treaties to alter powers and abilities of the EU, the significant involvement of the ECJ shows how different this legal order is. While the ECJ cannot make any major changes to the basic principles enunciated in the Treaties, it is the ECJ which has been responsible for the elaboration of the principles within the Treaties and explanation of the understanding of them. It has also had a crucial role to play in development the external nature and powers of the EU, which clearly goes beyond the idea of a simple system of international cooperation.

Alongside judicial evolution of the competences of the EU, significant Treaty developments have occurred expanding policy areas such as freedom, security and justice, police and judicial cooperation, and the area which has the greatest potential for impact in the area of responsibility; the Common Foreign and Security Policy (CFSP) and more particularly the European Security and Defence Policy (ESDP) and the missions undertaken under this area.[16] This latter area, clearly the most overtly political and the most traditionally associated with the sovereignty of states, has been the most controversial and the most difficult to navigate. The true desire to move into such an area may have begun with the European Political Cooperation (EPC) from the 1970s but the increased attempt to achieve a move into international affairs came with the creation of the CFSP in the Treaty of Maastricht. After the fall of the Berlin Wall and the existence of a single superpower on the world stage, the EU was able to progress its attempts to develop as an international actor. Such moves within CFSP and claims towards its existence as an autonomous actor are integral to the constitutionalisation of the European Union.[17]

2. **The movement beyond the foundations towards an "autonomous [Community] legal order."[18]**

The Treaty of Lisbon has clarified a long-standing debate by expressly granting legal personality to the European Union.[19] The international legal personality of the previous European Communities had long since been affirmed by the ECJ and the interpretation of the previous Article 281 EC.[20] In light of the functionalist interpretation by the ICJ in the *Reparations* case on the international legal personality of the UN, the personality of the EU was said by some to exist by

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[16] Title V, Treaty on the European Union; Aurel Sari, ' The Conclusion of International Agreements by the European Union in the Context of the ESDP', (2008) 57 *ICLQ* 53,

[17] Paul James Cardwell, 'Institutional balances, competence and restrains. The EU as an Autonomous Foreign Policy Actor', in Richard Collins and Nigel White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011), p.354 at p.354.

[18] Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundationv Council,* [2008] ECR I-6351, para.317.

[19] Article 47 TEU.

[20] Case 22/70 *Commission v Council* (*AETR)* [1971] ECR 263, at paras.13-19.

implication, with it actually 'exercising and enjoying' components which could only be explained by the possession of international personality.[21] It is party to numerous international treaties and, where it has been possible to, it has become a member of international organisations.[22] In any event, such personality has now been conferred, and arguably with the evolution and expansion of the abilities of the EU, it was hardly possible to leave this any longer. The merging of the EC and the EU to create a single European Union has also made this necessary; with the EU taking on the functions of the EC, it only makes sense that it would have the same powers.[23] The EU does not simply exist as an international legal person capable of acting at the international level. There has been a continuous move towards the EU as an autonomous legal order.

The concept of autonomy is one that is often mentioned without there being a clear understanding of its meaning. It is quite an open term that can be understood and utilized in a number of ways. In its basic meaning, however, it is one that it is core to the nature and progress of the EU.[24] Autonomy is a relational, self-referential idea.[25] An autonomous legal order can be described as a self-referential order; an order distinct from others with its own foundations and its own reference for development.[26] Autonomy is a relational concept that only has any meaning when juxtaposed with other legal orders and so for the development of a distinct order,

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[21] *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion ICJ Reports,* 1949, p.174, at p.179.

[22] S. Marchisio, 'EU's Membership in International Organisations', in Enzo Cannizzarro (ed.) *The European Union as an Actor in International Relations* (Kluwer, 2002); *Opinion 1/76 re Inland Waterways* [1977] ECR 741; See also United Nations General Assembly Resolution, 'Participation of the European Union in the work of the United Nations', A/65/L.64/Rev.1 21st April 2011.

[23] Article 1 TEU.

[24] Nicholas Tsagourias, 'Conceptualising the autonomy of the European Union', in Richard Collins and Nigel White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011), p.339 at p.340;

[25] Nicholas Tsagourias, 'Conceptualising the autonomy of the European Union', in Richard Collins and Nigel White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011), p.339 at p.339-340.

[26] Nicholas Tsagourias, 'Conceptualising the autonomy of the European Union', in Richard Collins and Nigel White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011), p.339 at p.339.

such as the EU, as compared to the international legal order. This distinctiveness and individuality has proved to be core to the constitutional nature of the EU.

It has been central to important developments at the European level and to the constitutional foundations of the Union. The ruling in *Costa v ENEL* that the Community had "created its own legal system"[27] in an effort to demarcate the European legal order from all else after its ruling in the previous year in *Van Gend en Loos* where it had declared the Community to be "a new legal order of international law"[28] began this focus. The Court became conscious of ensuring the distinctive nature and 'otherness' of the European legal order to ensure an idea of autonomy.

There is a clear concern at the European level to ensure the protection of the autonomy of the Union, particularly vis-à-vis international law.[29] The meaning of autonomy, as an order having its own foundations and ability for development, is key for the Union and forms much of the argument of its independence and basis away from international law. It may have initially had its foundations in international law, as could be seen with the *Van Gend en Loos* case, but the EU has developed these beyond these foundations. The EU utilizes the tools of international law to develop its own unique nature and individual identity. While autonomy has both an internal aspect and an external aspect, it is the latter that provides the focus here. There also arises autonomy vis-à-vis Member States, as well as vis-à-vis international law. While the relationship between all three legal orders; national, European, and international, have important considerations and impact, it is specifically the relationship between the European and the international that provides the focus for this paper. The autonomy of the Union in its relationship with its Member States should briefly be mentioned to state that the autonomy of the EU would be

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[27] Case 6/64 *Costa v ENEL*[1964] ECR 585.

[28] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belassingen*, [1963] ECR 12.

[29] Case C-402/05 P Yassin Abdullah Kadi v Council and Commission, Advocate General (AG) Maduro's opinion, 16 January 2008, at para.24.

incomplete and its distinctive nature with international law would be problematic if this autonomy did not also extend to its relationship with its Member States.[30]

The EU is a unique actor, both in terms of its own integrated legal order, but also as an international actor. It is this latter role that is the focus here. The EU may have begun as a 'creature of international law' akin to an international organisation but it has clearly developed far beyond these foundations. It's origins in international law, and its development within the boundaries of international law, do leave it within this system, however, and so it does still need to be considered within the realms of international law. The consequence of this attachment to international law, however, is the same limitations discussed in the previous chapter. The EU may be an autonomous actor pursuing an ever-greater image and clear identity at the international level, but its actions and its developments, large or small, still heavily depend upon its Member States. The unprecedented expansion of the EU into the unique entity it has created has only exacerbated this situation. The push towards an autonomous international actor only increases as the years go by and the treaty revisions continue. This is accompanied, however, by a continued expansion of Member States, and so the number of individual elements able to influence and impact upon the development of the EU is also only increasing. The consequences of a clash between these two extremes was seen recently with the process of moving towards a constitutional treaty grinding to a halt as a result of a lack of agreement from individual states. Ultimately, a compromise was reached to achieve Lisbon.

A system that attempts to classify organisations as autonomous actors, fails with the EU because of its complex relationship with its Member States. The unique and constantly changing nature of the EU exacerbates the main problems that arise with the way in which international law addresses organisations. The interactions and cross over with Member States are also, arguably, more extreme than any others seen with international organisations. This begins to show that the expanding nature of the EU, internally with an increasing number of members, along with its increasing

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[30] Nicholas Tsagourias, 'Conceptualising the autonomy of the European Union', in Richard Collins and Nigel White, *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge, 2011), p.339 at p.340.

external moves towards a greater level of international autonomy, results in an organisation with a complex structure of institutions and a number of complexities with its relations with its Member States.

While the activity of the EU in a wide variety of areas is certainly not new, the growing autonomy of the EU in such areas is. This clearly does raise cause for concern. The other issue in this area, however, is that of uncertainty and a cross over between the EU and its Member States. In many of the areas which are of greatest concern in terms of responsibility, such areas are often most politically sensitive in terms of areas traditionally considered to be 'state' functions. As a result, although the EU may be acting autonomously, to a certain extent in some of these areas, this is something that Member States are reluctant to consider. This creates some confusion as to who is acting in certain areas and upon whom responsibility would fall. There is also the question of areas where action, power and competence is divided between the EU and its Member States. While this appears to be a very practical solution for the problem of division of power within the EU, it creates a number of issues for international responsibility. The way in which the EU implements such international action at a practical level furthermore highlights the issues that arise in attempting to attribute responsibility to the EU. The practical relationships between the EU and its Member States, and the EU and other international actors, such as third States, or NATO or the UN, for example, will also have an impact on the question of responsibility.

3. ***Kadi* and Lisbon…what does this mean for the autonomous EU legal order?**

There have been a number of recent developments that have enhanced the risk of conflicts between norms in the European and international legal orders. The potential for interaction of the EU with the European Convention on Human Rights, the WTO and the United Nations Security Council has existed for a number of years. The potential for cross over in these areas, and possible conflict between norms, has increased as a result of the EU increasing its external competences and interacting to a greater extent with such international bodies.

The case of *Kadi* is one that continually arises in the literature when considering the more recent relationship between the EU and international law. The joined cases of *Kadi* and *Al Barakaat* deal with Mr Kadi and the Al Barakaat Corporation both of which, in 2001, had their names listed by the United Nations Sanctions Committee subsequent to United Nations Security Council Resolutions concerning the freezing of assets of individuals involved in terrorist activity.[31] It was considered necessary for implementation of such Resolutions to take place at the European level by the Council of the European Union and Common Position 1999/727/CFSP and Regulation (EC) No. 337/2000 were adopted. A further UN Security Council Resolution was passed in December 2000 to strengthen the flight ban and asset freezing measures and the Council of the European Union subsequently adopted Common Position 2001/154/CFSP to incorporate such changes and amend the original common position. The Council then adopted Regulation 467/2001 to implement the strengthened sanction measures. This Regulation stated that individuals and entities listed in the UN Security Council Resolution would be listed in Annex I to the Regulation and would consequently subject to asset freezing and sanctions under the European Regulation. When Mr Kadi and the Al Barakaat Foundation were added to the list of the Sanctions Committee in 2001, therefore, they were also added to Annex I of Regulation 467/2001. A further Security Council Resolutions and European Common Positions (2002/402/CFSP) were adopted as well as two further European Regulations. Mr Kadi and Al Barakaat brought actions before the European Courts in order to seek annulment of these Regulations: Mr Kadi with respect to Regulations 467/2001 and 2062/2001 and Al Barakaat with respect to Regulations 467/2001 and 2199/2001. While Al Barakaat made some claims of a lack of competence by the Council, the focus of Mr Kadi's claim, and a substantial part of Al Barakaat's claim focused upon the argument that their fundamental rights had been breached.

One of the interesting aspects of the *Kadi* cases is the extent to which different opinions were reached within the Court of First Instance, as compared to the Opinion of the Attorney General, and also both of these as compared to the final judgment of the ECJ. These fundamental differences have a huge impact when considering the

[31] Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundationv Council,* [2008] ECR I-6351

relationship between the different legal orders at play here; the EU and international law. The European legal system was being forced to confront a situation where there had been European implementation of action at the level of the UN and what this meant for the potential to review such legislation. How do these different legal orders work together? They were forced to confront the question as to whether European Courts were even able to review such legislation.

The judgment of the CFI is interesting in a number of ways. In confronting such fundamental issues, the CFI determined that the EU was bound by the actions of the UN, despite it not being a member of the UN. It furthermore seemed to engage fully in hierarchical considerations of the UN being over and above the EU and the power of review only existing when norms that could be considered to be higher than the UN were at stake; *jus cogens*.

The judgment of the ECJ provided quite a different view on this subject. The Court considered that in reviewing whether there had been a breach of fundamental rights, it was reviewing the legislation passed by the Community, which was consequently amenable to judicial review by the European Courts and acts of European law would always be reviewable irrespective of their origin.[32] The Court, therefore, avoids any discussion of the relationship between the EU and the UN. It argues that the determination of the relationship between the EU and international law and the extent to which international legal norms form part of the European legal order is determined solely at the European level.[33]

This judgment has been critiqued in a number of ways. Some have argued that the ECJ failed to understand what the role of the EU on the global stage is[34], others have cited it alongside case law concerning the WTO Agreement as an example of

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[32] Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundationv Council,* [2008] ECR I-6351, para.278.

[33] Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundationv Council,* [2008] ECR I-6351.

[34] Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, 2nd Edn, (Cambridge: Cambridge University Press, 2010), at p.658.

"selective multilateralism"[35] The Court has been critiqued in this sense for only respecting international agreements when it is convenient. Much of this criticism, however, is focused around the idea of the EU as an 'implementing' order for the 'international community'. The judgment of the ECJ in *Kadi* contributes a great deal to the development of the constitutional framework of the EU and its autonomy as an integrated legal order. The ECJ was perhaps slightly too narrow in its approach and could have taken more from the European Court of Human Rights and the approach taken in *Behrami*, that legal orders may exist separately but they do not exist in a vacuum. Perhaps in going as far as the Court did in its concern about being "prejudiced" by an international agreement[36], it went slightly too far in ring fencing its own existence and consequently failed to recognise the interaction with international law that it does have, and that it does need to have in order to evolve as a global entity.

4. **Prospects for the project of International Responsibility.**

This discussion is part of a wider research project considering the impact of the developing work of the International Law Commission (ILC) on the Responsibility of International Organisations.[37] This body is seeking to codify existing legal principles of international responsibility, as well as progressively develop this area of law. International responsibility is a legal principle which determines that for any breach of an international obligation, consequences will arise, such as the recognition of a breach, the obligation to cease the breach or obligations of reparation. The ILC

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[35] Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, 2nd Edn, (Cambridge: Cambridge University Press, 2010), at p.658.

[36] Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundationv Council,* [2008] ECR I-6351, para.316.

[37] Extract from the Yearbook of the International Law Commission 2002, Vol.I, Summary record of the 2740th meeting, Document A/CN.4/SR.2740, at para.42; First report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 26 March 2003, A/CN.4/532; Second Report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 2 April 2004, A/CN.4/541; Third Report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 13 May 2005, A/CN.4/553; Fourth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 28 February 2006, A/CN.4/564; Fifth Report on responsibility of international organizations, by Mr. Giorgio Gaja. Special Rapporteur, 2 May 2007, A/CN.4/583; Sixth Report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 1 April 2008, A/CN.4/597; Seventh Report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur, 27 March 2009, A/CN.4/610.

completed its initial work on responsibility in 2001 with the adoption of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARISWA) by the United Nations General Assembly. When this project began in the 1950s, states were predominantly the only real actors at the international level and so a project on international responsibility became research solely on state responsibility. The conclusion of this work in 2001 led to calls for it to be expanded and for consideration to be made of international organisations as such entities had now become incredibly active international legal persons. As such, work began in 2002, and is currently continuing, to develop a comprehensive set of legal principles addressing the legal consequences should an international organisation breach a principle of international law.[38]

The EU has been heavily involved with the drafting of these articles and provides the focus for a broader research project on the ability of the principles, in their current form, to appropriately address the Union. This research project does not consider the EU to be a simple international organisation governed by principles of international institutional law. The current paper and the ideas contained within seek to set out the relationship between these two legal orders. In attempting to formulate ideas on the way in which such a relationship works, the paper seeks to lay the foundations for this broader research project. The EU is certainly an autonomous legal order that is separate and distinct from international law. It is, however, a fundamental principle of international law that any breach of an international obligation results in international responsibility for that breach.[39] It is, furthermore, clear that the actions of the EU at the global level are only increasing and, as considered by the European Commission, these rules on responsibility are probably more pertinent to the European Union than to any other entity that would be addressed by them.[40]

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[38] United Nations General Assembly Resolution56/82 of 18 January 2002, Fifty-sixth session Agenda item 162, at para.8; Extract from the Yearbook of the International Law Commission 2002, Vol.I, Summary record of the 2717th meeting, Document A/CN.4/SR.2717, at paras. 39-41.

[39] Factory at Chorzow, *PCIJ Series A, No.17*, 1928, p.29.

[40] Comments from the European Commission, Comments and Observations received from International Organisations, International Law Commission, 14th February 2011, A/CN.4/637, at pp. 7-8.

It is, therefore, important to consider this relationship and how these two legal orders interact. The EU may not be a subset of international law, but it does interact with international law and, when it does, it is necessary that it is addressed by adequate international legal norms. This is necessary from the perspective of international law, as it is important for the status of international law as a legal system that all international legal persons have some sort of consequences for actions against the legal system. It is also important for the European Union, however, in maintaining its image and identity at the international level as a significant global actor. The European Union also needs to ensure that such developing principles are adequate and appropriate in addressing its unique nature. In attempting to consider the true nature of the EU as an autonomous legal order and not a simple organisation, this research project hopes to examine this.

Conclusions.

This paper began with identifying what some have considered to be a fundamental paradox and the base of a conflict between the European and international legal orders; the simultaneous desire of the EU to be both a key actor within a multilateral international legal order but also a separate and distinct legal order. These two aims of the Union have formed the basis of much of its movement towards a greater international role. This paper has sought to argue, however, that far from representing a conflict between the European and international legal orders, these two aims represent a symbiotic relationship and the substantial development of the EU as a significant global actor.

This paper has sought to argue that the relationship of the EU with international law is a changing one. The EU has developed as a unique and autonomous legal entity that sits alongside, and interacts with, international law. It is far more than a simple of any international legal system and certainly any developments of the EU are determined from within and not by reference to the international legal order. This is not to ignore, however, the role that international law plays in the integration of the EU and its progression, particularly externally. International law forms part of the fundamental constitutional foundations of the EU. The continued use of international law instruments to develop the Union, as well as the close relationship between the

EU and international organisations, form a substantial basis of the development of the EU as a global entity.

There exists a fundamental aspect of the relationship between the EU and international law that is often overlooked or misconstrued and it returns to the starting point of this paper; the greater the interaction between these two legal orders, the more the Court, in particular, attempts to develop and reinforce the autonomy of the EU legal order. Rather than viewing this as a negative defence by the ECJ against an 'attack' by international law against the European legal order, it is preferable to consider this as demonstrating the fundamental nature of international law within the European legal order, and vice versa. International law has always been, and remains, a fundamental constitutional part of the European legal order that is integral to the constitutional development of the EU, particularly in an external sense. In having a greater interaction with international law, the EU *is able* to develop as a global entity and to further evolve as an autonomous legal order existing alongside international law.