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Taking Back Control

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The Paradox of EU External Relations

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Taking Back Control

Rede

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door

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*Mevrouw de Rector Magnificus,
Meneer de Decaan,
Collega's van de Universiteit van Amsterdam,
Studenten,
Mijn familie en vrienden,
Zeer gewaardeerde toehoorders,*

'Take back control' was the slogan of the vote leave campaign in the Brexit Referendum that was, at its heart, driven by concerns over UK sovereignty. Despite the fact, however, that foreign policy is considered a core aspect of sovereignty (whatever the concept precisely means), the European Union's external relations¹ (and their effect on UK foreign policy) were largely absent in the referendum campaigns. Only 7 months later, Theresa May introduced in her famous Brexit speech her image of 'a truly global Britain', with a clear focus on bold and ambitious trade relations around the globe.²

I stand here today to convince you of the paradox that EU external relations, despite their conspicuous absence in the campaigns for and against Brexit, hold at the same time great *potential* and great *risk* for the Union in its current state of democratic crisis. In other words, the specific particularities of EU external relations give power to the people, which can help the Union to demonstrate its added value to its citizens but may also become toxic in the current democratic crisis. Put differently again, EU external actions can both address and worsen the current democratic crisis.

In order to convince you of this main paradox of EU external relations, I will develop three inherent power paradoxes that are at play when the Union and the Member States act internationally. Power shifts and struggles occur in the context of external relations that fuel the main paradox. These power shifts are complex and difficult to grasp; and for that reason, do not lend themselves very well to superficial political exploitation. However, as I will conclude at the end of this lecture, justifying these power shifts and explicating the empowerment of EU citizens in external relations, is essential for addressing, as least in part, the democratic crisis.

The first inherent power paradox, I will call the regret paradox. Member States have conferred far-reaching external relations powers to the EU with the explicit but diffuse objective of increasing their own autonomy in a glob-

alized world. However, both national governments and citizens experience the resulting decrease of national autonomy more strongly when the EU exercises its powers than their overall increase of control in a globalised world via the Union. Concrete loss of national margin for action is felt more acutely than more abstract gain of collective autonomy.

The second is the compensation paradox. The EU compensates its comparatively weak position as a non-state actor under international law with additional internal constraints imposed on the Member States. This triggers additional integrative forces.

The third is the democratic paradox. While transferring powers to the EU limits the unilateral autonomy of national governments it increases control for EU citizens over central aspects of international relations, such as the conclusion of international agreements.

Some of these observations hold true to different degrees for EU law in general. Often, functional reasons speak in favour of transferring powers to the Union (sometimes called ‘spill-over effect’) and in principle any such transfer limits the scope for unilateral national action. When the EU exercises powers, including internally, individuals are at the same time empowered through EU channels of democratic control and disempowered through national channels of democratic control. Yet these power paradoxes are in several ways exacerbated in the context of EU external relations. This is the case because, on the one hand, EU external actions limit the scope for autonomous action of Member States *more stringently* in many ways than EU actions within the internal EU legal order and, on the other, individuals as EU citizens have a powerful, arguably *more powerful voice in external relations* than they have as national citizens. The latter point is different for internal law-making, simply because national parliaments are fully fledged legislators in the national system, while the European Parliament remains co-legislator without right to initiative.

I will now expand on these three power paradoxes.

First Paradox: Power Transfer and Regret

The first paradox is that Member States choose to vest the Union with ever more external powers but then disagree more and more often and more and more passionately when the Union exercises these powers. Since 2017, President Emmanuel Macron has repeatedly and provocatively stated in slightly different formulations that ‘only Europe can [...] guarantee genuine sovereignty or our ability to exist in today’s world to defend our values and inter-

ests'.³ The Commission President Jean-Claude Juncker entitled his last State of the Union in September 2018 (which admittedly passed largely unnoticed and when it was noticed, was harshly criticised for being naïve): 'The Hour of European Sovereignty'.⁴ Juncker's speech had a clear external relations focus, advocating the Union's global responsibility and added value in the current geopolitical situation. This political ambition for and of the Union is directly connected to its increased legal powers to take external actions.

Member States, as the predominant shapers of the European Treaties, have given the European Union more external powers with every Treaty amendment. Many of these amendments codified existing practices and case law of the Court of Justice. However, Member States have also strengthened the constitutional framework of EU external relations above and beyond existing practices because they want to increase their capacity to jointly through the European Union control their fate in an interconnected world.⁵ The Lisbon Treaty for example extended the Union's most extensive exclusive external competences, the common commercial policy, to include services, commercial aspects of intellectual property rights and foreign direct investment.⁶ The Lisbon Treaty also aimed to improve the formal logic and coherence of EU external actions by vesting the Union with legal personality and making it the entity behind all external actions. The Union's increased international role is hence the direct consequence of a political decision by national governments, backed by ratification by national parliaments.

At the same time, the Union's increased role is only possible and hence also partially a consequence of an evolution by stealth of international law. International law increasingly accepts non-state actors as autonomous subjects. Additionally, international law has more regulatory effects, broadening and deepening its reach into domestic legal orders. This amplifies the effects of EU external actions on and in national legal orders.

National governments, and to an extent also national parliament, experience the Union's exercise of its increased external powers as an acute loss of control. This experience triggers different forms of pushback. In the context of external relations, formal pushback happens, for example in the form of an unprecedented number of inter-institutional disputes that have been brought to the Court of Justice since the entry into force of the Lisbon Treaty, challenging the exercise of external powers by the Union in particular on competence and legal basis grounds.⁷ While the characterization that disputes between the institutions are battles between the Union and its Member States with substitutes⁸ may seem exaggerated, inter-institutional disputes concern often first and foremost the power division between the Union and its Member States. When the Council challenges an action of the Commission or the

Parliament, Member States also challenge Union action. When the Commission or the Parliament challenge a Council action, the Union also reigns in Member States.

In addition, individual Member States have brought cases against the EU institutions challenging EU external actions⁹ and the Court has been called on to review envisaged EU international agreements for their compatibility with EU law.¹⁰ Large numbers of Member States intervene in many of these cases, vocalising concerns about the limitations of their autonomy.¹¹ All of these cases were decided by a Grand Chamber.¹² In the words of Advocate-General Kokott: these legal actions are fought with ‘astonishing passion’ and ‘allegation[s are made] that the Commission wished to do everything possible to prevent international action by the Member States’, as well as that ‘the Council [was] compulsively looking for legal bases that always permit participation by the Member States’.¹³

In short, the first paradox is that Member States willingly and repeatedly confer formal powers on the Union in external relations, but feel regret when the Union exercises these powers.

Second Paradox: Compensating Weakness through Integration

The second paradox is that the Union (needs to) compensate(s) its weakness under international law by imposing particularly strong constraints on Member States under EU law.¹⁴ Despite the Union’s great economic and political weight, it remains, because it is a non-state actor, legally weak as compared to states. This translates internally into inevitable and particularly powerful integrative forces.¹⁵

First, the Union is a particularly pluralist international actor. Both the Member States and the Union are subjects of international law, who not only have the formal ability to enter into internationally binding obligations on their own but also actively pursue their own foreign policy.

Relations with non-EU actors, such as the conclusion of international agreements, require the Union and the Member States to agree, present, pursue or at least refrain from jeopardizing a concerted position, including when facing new information, negotiation tactics or political pressure of non-EU actors.¹⁶

Furthermore, in certain contexts, for example when the Union and its Member States jointly conclude a mixed agreement, the actions of both the Union and the Member States that are required to implement an interna-

tional agreement are often inextricably interlinked and interdependent. This means that, after the agreement is concluded, the Union and the Member States must continue to cooperate closely in order to avoid international responsibility for non-compliance with the obligations under the agreement.

Such international responsibility would moreover, on many occasions, be borne jointly by the Union and the Member States, even if only one of the actors breached their international law obligations.¹⁷ By contrast, in internal law or decision-making processes, each institutional actor and representative of the Member States may in principle at all times voice their position and even change their mind in the course of the process.¹⁸ Furthermore, each actor is directly and separately responsible under EU law for breaching procedural or substantive obligations.

The Union's internal pluralist complexity must be reduced in the practice of external relations. For example, the internal division of powers between the EU and the Member States is not identical to their powers under international law. At times, this requires the Member States to act on behalf of the Union, where the Union's external capacity does not allow it to exercise the competences conferred to it. Even more often, the Union and its Member States act as one party to an international agreement to avoid locking in the power division at any given point in time but allow for continuous development of the powers of the Union. Both constructions result in a formal mismatch between competences and actions that at least blurs and obscures responsibilities.

Additionally, the legal situation laid down in international agreements is significantly more entrenched and more difficult to amend. While the law-making process within the Union is often perceived as slow and cumbersome, the conclusion of comprehensive international agreements requires even more resources in terms of time and effort.¹⁹ Moreover, the risk of complete failure (no agreement at all) is significantly higher in the international context than within the Union.

Substantively, this results in a situation where the international norms agreed in an international treaty or produced by a body established as part of multilateral cooperation are at the same time difficult to change and difficult to ignore. They are often very influential within the legal and political discourse, including the domestic discourse.²⁰ While at the same time, these international norms are largely removed from domestic political struggles ('politics') and can often only be rejected categorically, rather than made subject to debate and amendment. This effect of removing issues from politics already takes place in the EU context; yet, it is even stronger when norms are adopted under international law. The same is true for the division of competences between the Union and its Member States. This legal and political entrench-

ment is precisely what makes constructions, such as mixed agreements and Member States acting on behalf of the Union, necessary to avoid freezing the division of powers between the Union and its Member States under an international agreement.

Second, the Union is in a comparatively weaker position under international law than the Member States. Internally, the Union's capacity to directly determine the law of the land and the rights and obligations of individuals through direct applicability and direct effect. While the origin of this capacity may be conceptually contested, it is accepted in day-to-day judicial practice of national courts. International law, by contrast, denies the very nature of the Union's legal order as an autonomous and domestic legal order, as well as its direct link with its citizens and its territory. International law is steeped in the concept of state sovereignty. It sees the Union as an international organization, or at best as a regional economic integration organization (REIO) which, while it enjoys additional rights in certain contexts, is still an international organization. While it can legally bind itself, in principle on eye level with states, the Union is 'neither sovereign nor equal'.²¹ It remains from the perspective of international law at least partially penetrable, in that behind the organization there are still the Member States. The Member States remain the sovereign actors that retain the legal capacity and formal powers to conclude binding agreements with regard to their territory, to an extent irrespective of the Union's actions and EU law.

Third, while internally unranked and irreconcilable claims of autonomy and authority exist side by side, externally the stakes and constraints are different.

Internally, pluralism and heterarchy work primarily for two reasons: firstly, national actors and law interlock with European actors and law in a tight embrace. This is illustrated by the formalized judicial cooperation between the Court of Justice and national courts, in particular in the preliminary ruling procedure. Secondly, all actors involved have a high level of interdependent stakes in a well-functioning and effective Union. Indeed, within the EU legal order, any structural non-compliance or fundamental challenge comes at great costs and even those who disobey or challenge the system are aware that a complete collapse would come at unimaginable costs, including for them.

Externally, the situation is very different. Non-EU actors are game changers for the cooperative relations of the Union and its Member States. External actors are not part of the interlocking embrace. They are not subject to the jurisdiction of the Court of Justice. They do not share the same interest in the functioning of the European project. They are not only able but also much

more likely to reject requests of adaptation of international law to accommodate the particularities of the Union and challenge the Union's (international) position.²²

Crucially, external actors are not subject to the primacy of EU law. While internally, the primacy of EU law requires disapplying a rule of national law that infringes EU law, non-EU actors are under no obligation to disapply an international rule that is contrary to EU law. On the contrary, they may legally be on safe and sturdy ground to ignore EU law.

Moreover, on a scale between normativity, i.e. the rule of law, and state power politics, international law gives considerably more room to the latter than EU law. EU law proceduralizes joint decision-making and submits state action within the scope of EU law to the control of (largely) autonomous, supranational institutions, i.e. the Court and the Commission.²³ Hence, when law-making takes place in external relations rather than within the EU legal order this strengthens the executive.

Additionally, judicial review of foreign affairs is traditionally subject to constraints, both under formal law and judicial practice. Courts demonstrate a higher level of deference to foreign relations than to internal policy-making.²⁴ This in turn vests national executives under international law with even more leeway than they already formally possess, as compared to their leeway with regard to 'internal' actions either under EU law or under national law, where the Court of Justice and national courts enforce EU law, including against the national executive. Furthermore, individuals often cannot directly rely on or challenge international agreements in court.²⁵ This makes the specific judicial cooperation mechanism of the preliminary ruling procedure less effective in the context of external relations and institutionally weakens the Union's ability to ensure the effectiveness of EU law via national courts within the national legal orders.

Member States remain able to enter into binding agreements that may have an entrenched and powerful normative force on and within the Union. They can create rights for non-EU actors that are not legally obliged to comply with EU law, are not subject to the primacy of EU law, and do not share the same interest in avoiding conflict and cooperation failure. They hence possess formally legally different means under international law than they possess under national law, where national courts hold them to respect the primacy of EU law.

To allow the Union to act as an autonomous and effective international actor, despite all these difficulties, requires a stringent interpretation and application of the agreed legal framework for cooperation under the European Treaties. This stringent interpretation triggers hidden but far-reaching inte-

grative effects of EU external actions, which become most apparent in the context of organizational principles and the choice of legal basis. In particular, the construction of EU loyalty, together with the ‘unity of international representation’, restrict Member States in the exercise of all their foreign relations powers, including in areas of reserved national competences. Furthermore, principles meant to counterbalance the Union’s increased competences, such as subsidiarity, are less effective in an international context, where the Union is arguably better placed to represent EU citizens and their interests. Moreover, harmonisation may at times be introduced through the backdoor by way of international agreements, falling under the exclusive competence of the Union, including in areas that internally are shared competences. This is exacerbated by the trend towards concluding increasingly comprehensive and regulatory trade agreements.

By way of conclusion, the second paradox is that the Union remains in comparison to its objectives a weak actor under international law, who needs to coordinate a plurality of actors that are ultimately more powerful than the Union is itself. It compensates this weakness with stronger legal constraints on the Member States under EU law.

To illustrate the first two paradoxes, I would like to concentrate for a moment on one specific challenge of Union powers by Member States: the OIV case. In this case, Germany, supported by 7 other Member States, challenged a Council Decision establishing the position to be adopted on behalf of the European Union in the framework of the International Organisation of Vine and Wine (OIV).²⁶ The decision was based on a new provision introduced under the Lisbon Treaty, that allowed the Council to adopt positions ‘on the Union’s behalf’. Germany’s argument was quite straightforward: if the Union is not a party to an international agreement, the Treaty does not allow the Council to establish positions to be adopted in a body set up by that agreement. The Court rejected this argument and upheld the Council decision.

This illustrates, first Member States’ regret when the Union exercises the powers newly given to it under the Lisbon Treaty and second the integrative force of the EU external action. In all its consequence and read in combination with the Court’s case law on sincere cooperation²⁷ the OIV case means that even where the Union is not present in the negotiations of an international agreement or in the international forums established under that agreement, that is where Member States have concluded the agreement alone, they may be prevented from submitting their own proposals within the organisation and ultimately be obliged to defend a Union position – even if they first opposed it internally within the Council. This combination of legal pushback that contributes to narratives of Union dominance over national politics and

the unprecedented far-reaching constraints on Member States' international actions triggered by the exercise of Union powers are part of the risk that Union's extended external powers may actually strengthen the anti-European currents. That is the second part of the overall paradox.

Third Paradox: Better Representing Citizens in External Relations

This brings me to third power paradox, which I called democratic paradox and which is a central plank of the overall argument. When the Union exercises its external powers and in particular when it concludes international agreements, individuals lose democratic control as national citizens and gain democratic control as EU citizens. I will argue that overall, they have better democratic control over the conclusion of international agreements through EU channels than through national channels.

I would first like to take a step back in order to place this point in context. Imagine two identical laws, one adopted by the European Parliament and one adopted by your national parliament. And please forgive me this shorthand, I am of course aware that the European Parliament does not in and of itself adopt legislation in the European Union. If all else were equal would you be indifferent as to which institution adopted the law? The underlying idea of the forceful concept of self-rule is that citizens prefer the law that they consider 'their' law – of which they consider themselves authors – laws over which they feel ownership. This may sound idealistic even in the national context but I would assume that it remains true that the majority of citizens would prefer the law adopted by their national parliament, *because they identify more strongly with their state structures* and their role as national citizens, probably even if the content of the laws were not identical but if the national law affected their position more negatively. Most individuals' identification with the European Union and their role as EU citizens is considerably weaker.²⁸

This is where the distinction of individuals as EU citizens and as national citizens come in. Jürgen Habermas developed the concept of 'divided sovereignty' (in other contexts: '*Pouvoir Constituant Mixte*'²⁹), in which the very same citizen acts in two capacities, namely, as citizen of their state and as citizen of the Union.³⁰ On the one hand, this concept must be understood in the context of the Habermasian understanding of sovereignty as dispersed and present only in the subjectless form of communication.³¹ That is different from the understanding that sovereignty relates to a group of people however

defined.³² On the other hand, it can be made very concrete – and Habermas does this – by identifying existing elements of this divided sovereignty within the EU. For example, in the ordinary legislative procedure, national citizens are represented as the peoples of the Member States through national representatives in the Council, and the citizenry of Europe as such is represented through the European Parliament.³³ Here, the core argument is that institutionally individuals are *better* represented as EU citizens, that is via EU channels, than as national citizens, when the conclusion of international agreements is concerned. Post-Lisbon, the European Parliament has received considerably extended formal powers in the context of the negotiation and conclusion of international agreements. It is immediately and fully informed at all stages of the negotiation and conclusion of international agreements.³⁴ It even has an extensive right to be informed about Common Foreign and Security Policy agreements, despite its limited powers in this area. It must consent to the conclusion of the absolute majority of international agreements.³⁵ Beyond the literal reading of these formal powers, Parliament has been very adept at exercising them, for example by vetoing controversial international agreements, bringing challenges before the Court of Justice to confirm a favourable reading of its formal prerogatives,³⁶ concluding inter-institutional agreements³⁷ and extending its influence informally behind the scenes.³⁸

Parliament's new role in the conclusion and negotiation of international agreements has allowed it to openly and externally contest the position of the other EU institutions by rejecting high profile agreements, such as in 2009 the SWIFT agreement making European financial information available to US counter-terrorism authorities and in 2012 Anti-Counterfeiting Trade Agreement (ACTA) establishing international standards for intellectual property rights enforcement. More importantly, while its Treaty powers are formally focussed on the final stage of actual conclusion, informally, Parliament has been able to exercise considerable influence on the content of post-Lisbon international agreements of the EU. An example is the failed Transatlantic Trade and Investment Partnership (TTIP). Parliament expressly recalled that it would have to give consent to the agreement and made specific recommendations to the Commission and also to the Member States that contained among other things, the exact building stones of the Commission's 2015 proposal to introduce an Investment Court System (ICS).³⁹

In other words, the EP is not side-lined in the conclusion of EU international agreements.

It has obtained a position in which it can credibly claim to give EU citizens a voice in international relations that, with all its flaws, draws on a source of

democratic legitimation that is independent and separate from the EU Member States.

In order to evaluate Parliament's ability to vest international agreements with democratic legitimacy, I would like to distinguish three different forms of linking decisions to citizens, present in most legal systems: first, passive acceptance by the fact that a law is not changed. This argument is often made in favour of Member States' acceptance of the case law of the Court of Justice: they could have – if reaching consensus between national governments and majority ratification by all national parliaments, most likely including referendums in several Member States – changed the Treaty to overrule the Court. If this argument stands at all, this form of acceptance is a very weak form of democratic legitimacy, particularly in light of the high threshold for Treaty amendment. The second form of democratic support for decisions is consent – an affirmative decision, a thumbs up-or-down-affair, with binary choices for the decision-maker. The third and strongest form is authorship, which is reached in an affirmative, constructive, and proceduralized manner – the actual writing of the law.

One argument that I would like to make here today is that the European Parliament has not only gained significant formal powers over external relations that vest it with the power to convey the second form of democratic legitimacy, that is giving consent. The practice, while not giving Parliament the power of authorship, has allowed Parliament to exercise its powers over the content of EU international agreements affirmatively and constructively – beyond the formal meaning of consent.

The European Parliament represents individuals as EU citizens and gives them an independent voice by positioning itself (to some extent) in opposition to national governments and parliaments, representing national citizens. Parliament's strengthened powers enhance the EU dimension of Habermas' dual sovereignty narrative. They also add a popular sovereignty element to the narrative of the Court of Justice that EU law is autonomous, that is that its validity does not depend either on national or international law, which is the standpoint of all case law of the Court of Justice from *van Gend en Loos* in 1963 to the rejection of EU accession to the ECHR in 2014.

Most importantly, the political system of the EU, which is more similar to the US presidential system than to the parliamentary systems of most Member States, arguably vests Parliament with *greater* powers than many national parliaments. In parliamentary democracies, the particular relationship between governments and parliaments is characterized by support of the majority of parliamentarians for the government in office. This makes effective control by the majority politically less likely and the majority logic of parliaments

makes it difficult for the opposition to exercise effective control. A strict application of the majority rule in committees and rapporteur allocation, for example, marginalizes the minority parties behind the scenes. Majorities and political powers in the EP are by contrast disconnected from national representation in the Council, which shifts in terms of political spreading more frequently. The European Parliament is, as a consequence, institutionally in an excellent position to substantiate and make visible its ability to act as an opposition and control the Council. Because of its institutional disconnection and its formal powers, Parliament can make a credible claim that it represents EU citizens directly and disconnected from the governing parties in national governments.

This is not to say that there are not particular problems with the representation of EU citizens through the European Parliament. The EP is subject to the same relevant and stringent constraints as national parliaments within Europe in terms of scarcity of time and resources. Furthermore, international relations generally remain, as I said before, the domain of the executive. Furthermore, Parliament's ability to exercise its veto-powers at the conclusion stage is also logically limited by its shared interest in the credibility of the EU as an international actor and democratization of international relations through parliamentary influence behind the scenes is much less visible. Finally, the main obstacle to making this representation effective and allowing individuals to feel ownership over EU external relations is the one I started with: citizens have difficulty identifying with EU structures and with their role as EU citizens in a similarly meaningful way as they do with their role as national citizens.⁴⁰

This last point is certainly not limited to the area of external relations but it does determine the risk inherent in the Union's increased external powers. If citizens could identify with their role as EU citizens, the Union's increased external powers may have significant potential to address the Union's current democratic crisis. So long as citizens do not identify with their role as EU citizens, the Union's increased external powers and resulting restrictions of Member States' autonomy may be the straw that breaks the camel's back.

External Relations as a Constitutional Moment: Taking Back Control or Losing it?

This is the moment in which I come around to the main paradox. Extending EU external actions create a constitutional moment for the Union and the jury is still out on whether EU external actions will give individuals the sense

that the Union helps them to take back control or whether EU external actions will contribute to their sense of losing control.

In a globalized world, self-rule and ownership over the procedure and content of decision-making are more and more difficult to establish or trace. Control and ownership have become core concerns of citizens. By contrast, lack of ownership and the resulting feeling of being exposed to decisions that one cannot influence political decisions is perceived as a risk by individuals and the national polity. Any domestic polity must fight against such a risk of heteronomy, as an act of sovereign rearing up.

Political representation in international relations is a very significant part of self-rule and ownership in the 21st century. So long as individuals do not identify with their role as EU citizens increased EU external relations powers are perceived as just another consequence of globalisation rather than an attempt to address it. This has triggered and will continue to trigger unprecedented formal backlash in a climate of widespread popular disenchantment with the European integration project. In other words, as long as the Union is seen by a large number (majority?) of citizens as the outside imposing constraints rather than offering structure of citizen empowerment and avenues to establish self-rule in a globalized world, the Union with its increased external powers is at risk of falling prey to its own success of becoming a global actor.

With every Treaty amendment, Member States consistently chose to continue building two parallel paths: they vested the Union with more external powers and strengthened the powers of the European Parliament. In the Lisbon Treaty, these two paths have come together with Parliament's empowerment in external relations. As a result, the Union can make its case that it offers citizens a legal and institutional structure for self-rule in a globalised world better than ever⁴¹ and Member States seem to have gotten cold feet.

The original purpose of the Union was primarily economic and legal interlocking in order to avoid the possibility of transforming relations between Member States into antagonistic relations. The idea of making national citizens of other Member States part of the same group as oneself and making as a result another war in Europe impossible.⁴² This objective still stands but may increasingly not be enough to justify the existing level European integration.⁴³ Nowadays, the Union can make its case that it offers citizens a legal and institutional structure for self-rule better than ever. Indeed, the Union could and should make a credible case that, in the 21st century, self-rule of EU citizens in a globalized world forms part of the very purpose of its existence.

From the perspective of the individual, the paradox of external relations plays out as a disempowerment of individuals as national citizens and an em-

powerment of individuals as European citizens. The inevitable tensions flowing from this paradox of losing and gaining control in different national and European contexts could only be alleviated if one takes the perspective of the individual and if the increased control of individuals as EU citizens is articulated and justified. This also requires a politicisation of EU external relations in which the tensions between the two roles of citizens can be imagined in a positive way, rather than leading to a destructive spiral.

The Union's ability to offer its citizens *as EU citizens* a comparatively high level of self-rule in an interconnected, globalized world, should be at the front and centre of the debate on the Union's legitimacy, added value, and constraining effects on national autonomy. Above all the European Parliament, individual Members of Parliament, but also the Commission and ultimately also pro-European national parties, in particular when they hold government, should explicate and could benefit from explicating the Union's strengths as an international actor. This would also make apparent that Brexit from the perspective of the individual (rather than the British Government) plays out as losing control in an interconnected globalized world.

Union law offers the necessary framework for discursive exchanges of arguments, permits politics, i.e. political struggle for the 'better' outcome. It also allows explicating and justifying in the context of external relations the necessary high commitment of Member States to the cause of making the Union an autonomous, effective and legitimate international actor. The more it seems inevitable that Member States must surrender their autonomy (to a large extent) to the Union in international relations, the more internal politics must engage individuals not only as national citizens but also as EU citizens. National governments, administrations, and politicians rather than only addressing the individual as national citizen, should do so as EU citizen to whom her increased control is explained and justified. The Union and the Member States should also initiate and allow an exchange of arguments on the *consequences of the Union's autonomous international actorness for the Member States continuous international presence*.

The Union depends on a two-track legitimation, in which power can be traced back to individuals *as national citizens* and *as EU citizens*. In order to maintain this two-track legitimation, Member States must, as strong bonding communities for national citizens, continue to play a significant role in the proceduralized process of decision-making. This places normative limits on integration and centralisation dynamics triggered by the Union's external actions. However, the two-track legitimation of the Union does not necessarily require Member States' presence, visibility and action on the international plane. Moreover, it is difficult to square preserving a significant international

role for the Member States with allowing the Union to be a strong autonomous international actor.

Internally, the Union built on inclusion, watering down the meaning of borders, making territory less important, interlocking jurisdictions, integration. Primarily economic and legal interlocking in order to avoid the possibility of transforming relations between Member States into antagonistic relations – which is always possible with the other in the Schmittian reading⁴⁴ – is the very purpose of the Union. The idea of making the other (national citizens of other Member States) part of the same group as oneself (EU citizens) and making as a result another war impossible.

A focus on relations within the EU might help individuals to realize the *interdependencies*, which might allow them to shift – even from an individualistic perspective – their concern to the integrity of the whole of which they understand themselves to be part. At the same time, an internal focus stresses the differences between the parts and divides EU citizens into groups of national citizens, as we have seen e.g. in the context of the economic crisis. As a result, political struggle within the Union is often reduced to and portrayed as struggles along nationality lines, with the position and interests of national citizens of one Member State opposed to the position and interests of the national citizens of another Member State. This may be one of the reasons why politically the interlocking and growing interdependencies within the EU are more and more vigorously challenged.

Externally, by contrast, the Union necessarily needs to exclude non-EU citizens and states to be able to function as a polity. The outside is necessarily incommensurable with the inside. This becomes apparent in the very concept of citizenship. Those who can politically influence the course of the polity and those who cannot. In external relations, the position and interests of EU citizens are naturally also opposed to the position and interests of citizens of non-EU countries. The potential of this ‘us’ and ‘them’ narrative to contribute to identity forming exists, irrespective of the desirability of developing and deploying it. Looking outwards may – from an optimistic standpoint – help to create internal communalities. Experiencing yourself as a part of the whole creates a joint experience.

Research Agenda

A professor at her inaugural lecture should, in my view, do two things: profess something and inform about her research agenda.⁴⁵ I chose to speak about the constitutional implications of EU external relations, their potential

for addressing the public disenchantment with the EU, and their risk to alienate individuals even further. I did so because I believe in the extraordinary relevance of external relations for the justification of the European integration project.

The remit of the chair which I am honoured to accept today is broader than external relations. It is European law. This is very broad and substantively covers – at least potentially – all areas of law, from criminal law to family law, from tax law to security and defense, from environmental law to trade. My research is focussed on horizontal, cross-cutting issues of European law that play in many, if not all of these substantive areas.

The particular role of law in European integration and hence also in the growing disenchantment with the European integration project, which was probably most markedly expressed in the ‘take back control’ slogan, is the trigger of my current and future research.

Today, I have given you a sense of the reach and relevance of external relations law for the representation of EU citizens in a globalised world. This forms part of a broader research agenda focusing on integration and counter-tendencies under EU law. Another aspect that has not come to the fore in this lecture but that I am planning to focus on for the years to come and across a number of policy fields is the consequences of the Court of Justice’s interpretation of EU law for integration and political choice within the system.

Law, including EU law, is subject to constant change; yet I would argue that particularly in law the past controls the present. Statements of what the law is or even should be justify themselves either in line with or in opposition to what the law was. Ideas for change come from, even potentially in opposition to, an accurate picture of the patterns of judicial reasoning as they exist. My research aims to examine the choices and interpretations of EU law that further integration and prevent political choice, identifies where functional arguments trump other internally logical alternatives. I want to adequately understand the legal room for construing EU law in specific contexts in a less functional, less purposive, and hence less integrative manner. That is no mean feat and I can assure you that I will do my best to offer something for everyone to dislike. EU legal scholars may disagree on the sheer possibility of interpreting EU law in a non-purposive, non-integrative fashion. For everyone else but EU legal scholars, I already expect the very starting point to be a red flag. The starting point is that, in my opinion, it is impossible to address the public disenchantment with the European integration project without re-thinking the way EU law is construed and interpreted. Taking back control would necessarily mean that EU law is – more consciously – construed to sacrifice some of its effectiveness in order to increase ownership of EU citizens.

Words of thanks

Dames en Heren,

Het is een mooie gewoonte om een oratie af te sluiten met een woord van dank en ook ik wil graag van deze gelegenheid gebruik maken. Eerst wil ik het college van bestuur danken voor het in mij gestelde vertrouwen. Hartelijk danken wil ik ook, André, de decaan van de Faculteit der Rechtsgeleerdheid.

To all of you, thank you for coming to this event. It is an honour to see you all here: colleagues and former colleagues, students and former students, family and friends.

In particular, I would like to thank the members of the Amsterdam Centre for European Law and Governance and the chair group European law. I look forward to working with you on both research and teaching in many years to come.

Special mention goes to Deirdre, my predecessor, you brought me to Amsterdam 10 years ago, believed in me and supported me. Martijn, thank you for always taking me seriously, sharing your wisdoms, and showing me the ropes within the faculty. Jonathan, thank you for all our past cooperation. I look forward to continuing that work in the context of the Amsterdam Centre for European Studies. Yvonne and Annette, thank you for making the admin side of things as enjoyable and 'gezellig' as possible. And of course, 'my' students and 'my' PhDs, I remain thankful for being allowed to see the world occasionally through your eyes.

Seeing so many of you, who have stood here, or in other locations, in similar ways, I must confess that I feel some relief that the format of inaugural lectures does not include a question and answer session.

Working as a full-time professor, being a mother of a toddler and proud preschooler, and having friends is also a paradox. Thank you to all those that came to celebrate this day with me despite the fact that I regularly neglect you. Susanne, danke dass du sowohl die traurigen als auch die frohen Momente in dieser Form mit mir teilst. Marija and Chantal, thank you for your friendship. And thank you to all my friends for helping me to put things into perspective. Let me just cite one reaction of one person in the audience to the invitation to today's lecture: 'Congratulations on that teaching job!'

Insbesondere möchte ich natürlich meiner Familie danken, meinem Vater, meiner Schwester, ihrer Familie. Zu wissen, dass ich immer auf euch zählen kann, bleibt ein wichtiger Ruhepol für mich. Viele Menschen haben mir gesagt, dass ich meine Mutter an besonderen Tagen wie diesen, am meisten

vermissen werde. Die Wahrheit ist jedoch, dass ich meine Mutter jeden Tag besonders vermisse.

Veel dank ook aan mijn Nederlandse familie. Ik heb mij altijd zeer welkom gevoeld bij jullie.

Mijn laatste woorden vandaag gaan uit naar mijn gezin. Dorian und Leonore, die ich aus Gründen, die hoffentlich später nicht zu deutlich werden, nicht zu diesem formellen Teil eingeladen habe. Ihr lehrt mich jeden Tag was wirklich wichtig ist: zum Beispiel, dass es eine natürliche Wahl ist, lieber Conny und Jacob als Europäisches Recht zu lesen.

De grootste dank gaat echter uit naar mijn partner, Dennis van Berkel. Zonder jouw steun, geduld en volharding zou het voor mij niet mogelijk zijn om mijn vele plannen en dromen te realiseren – zou ik ze zonder jou nog de moeite waard vinden.

Ik heb gezegd.

Notes

1. The terms ‘external relations’ (emphasis on the law and political interaction between international actors) and ‘external actions’ (emphasis on the Union’s participation and contribution in this), while expressing a different nuance, are used interchangeably.
2. Theresa May held her Brexit speech of 17 January 2017 in front of a background writing ‘A global Britain’ and used the term global 21 times, full transcript available for example at: <http://time.com/4636141/theresa-may-brexit-speech-transcript/>.
3. Macron, ‘Initiative pour l’Europe’, (hereafter “Sorbonne speech”) 26 September 2017. A full official transcript (in French) is available here: <http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/>. An English translation is available here: <http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html>
Macron reiterated these ideas in his address to the European Parliament on 17 April 2018. An official press release (in English) is available here: <http://www.europarl.europa.eu/news/en/press-room/20180411IPR01517/macron-defends-the-idea-of-european-sovereignty>. Full official transcript (in French only) here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20180417%2bITEM-004%2bDOC%2bXML%2bVo%2f%2fEN&language=EN>.
4. ‘The Hour of European Sovereignty’, State of the Union 2018, available at: https://ec.europa.eu/commission/news/state-union-2018-hour-european-sovereignty-2018-sep-12_en.
5. Different phases of globalisation have been identified in globalisation studies, largely carried out by sociologists: Ulrich Beck on interconnected world. See for more details Sørensen and Christiansen, *Ulrich Beck: An Introduction to the Theory of Second Modernity and the Risk Society* (Routledge, 2013) Chapter 5 on globalization and cosmopolitanism.
6. Article 207 TFEU. See for more details Eckes, *EU Powers Under External Pressure – How the EU’s External Actions Alter its Internal Structures* (Oxford University Press, 2019), Chapter 4 on the consequences of the choice of an external legal basis.
7. C-130/10, *Parliament v Council (UN Sanctions)* [2012] ECLI:EU:C:2012:472. Case C-28/12, *Commission v Council* [2015] ECLI:EU:C:2015:282. C-114/12, *Commission v Council* [2014] ECLI:EU:C:2014:2151. Case C-137/12, *Commission v Council (Services Convention)* [2013] EU:C:2013:675. C-377/12, *Commission v Council* [2014] ECLI:EU:C:2014:1903. C-660/13, *Council v Commission* [2016] ECLI:EU:C:2016:616. Case C-263/14, *European Parliament v Council* [2016] ECLI:EU:C:2016:435. Case C-425/13, *Commission v Council (Emission Trading System)* [2015] ECLI:EU:C:2015:483. Case C-389/15, *Commission v Council (Lisbon Agreement on Appellations of Origin and Geographical Indications)* [2017] ECLI:EU:C:2017:798. C-687/15, *Commission v Council (CMR-15)* [2017] ECLI:EU:

- C:2017:803. Joined Cases C-626/15 and C-659/16, *Commission v Council (Antarctica)* [2018] ECLI:EU:C:2018:925. See on the Antarctica case: Eckes, ‘Antarctica: Has the Court of Justice got cold feet?’, <http://europeanlawblog.eu>, November 2018.
8. Lenaerts, ‘EU Federalism in 3-D’ in Cloots, de Baere, and Scottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 24.
 9. Case C-399/12, *Germany v Council (hereafter: OIV case)* [2014] ECLI:EU:C:2014:2258. C-600/14, *Germany v Council* [2017] ECLI:EU:C:2017:935. C-656/11, *United Kingdom v Council* [2014] ECLI:EU:C:2014:97 (Third Chamber).
 10. Eg, Opinion 1/13 (*Accession of third states to the Convention on the Civil Aspects of Child Abduction*) ECLI:EU:C:2014:2303; Opinion 2/15 (*EU Singapore Free Trade Agreement*) ECLI:EU:C:2017:376; pending Opinion 1/17 (AG Bot is expected to deliver his opinion at the end of January 2019).
 11. Case C-28/12, *Commission v Council* (n 7): 12 intervening Member States. Case C-137/12, *Commission v Council* (n 7): 5 intervening Member States. Case C-263/14, *Tanzania Pirates Agreement* (n 7): 3 intervening Member States; Case C-425/13, *Commission v Council* (n 7): 8 intervening Member States. Case C-389/15, *Commission v Council* (n 7): 12 intervening Member States. C-687/15, *Commission v Council* (n 7): 4 Member States intervening. Case C-399/12, *OIV case* (n 9): 7 Member States intervening.
 12. *Ibid*, Case C-28/12, *Commission v Council*; Case C-137/12, *Commission v Council*; Case C-263/14, *Tanzania Pirates Agreement*; Case C-425/13, *Commission v Council*; Case C-389/15, *Commission v Council*.
 13. Opinion of AG Kokott, Joined Cases C 626/15 and C 659/16, *Commission v Council* [2018] EU:C:2018:362, para 75.
 14. See for a comprehensive argument: Eckes, *EU Powers under External Pressure*, note 6 above.
 15. *Ibid*.
 16. Eckes, *EU Powers under External Pressure* (n 6 above), case law in Chapter 2 on sincere cooperation. See in particular: Case C-246/07, *Commission v Sweden (PFOS)* [2010] EU:C:2010:203 (hereafter Case C-246/07, *PFOS*).
 17. Case C-53/96, *Hermès International* [1998] EU:C:1997:539, Opinion of AG Tesaurro, para 21. See also Kuijper, ‘International Responsibility for EU Mixed Agreements’ in Hillion and Koutrakos (eds), *Mixed Agreement Revisited – The EU and its Member States and the World* (Hart Publishing, 2010).
 18. Case C-166/78, *Italy v. Council (premium for potato starch)* [1979] ECLI:EU:C:1979:195 para 6 of the Decision. Reaffirmed in Case C-378/00 *Commission v Parliament and Council (Comitology)* [2003] ECLI:EU:C:2003:42 para 28 and Case C-355/10 *Parliament v Council (Schengen Borders Code)* [2012] ECLI:EU:C:2012:516 paras 37-40.
 19. The difficulty of agreeing multilateral treaties is illustrated by the Arms Trade Treaty which was registered in December 2014 (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-8&chapter=26&clang=_en), for which the General Assembly started seeking views of the UN member states on a legally binding instrument establishing common international standards for the import, export and transfer of conventional arms in 2008. See also GA Resolution 61/89 and the UN Convention on Contracts for the International Sale of Goods

- (CISG) 1980, which arose from the conclusions of a working group which was established in 1969.
20. For example, recommendations and opinions of several International Bodies feature prominently in the discourse around Ireland's recent repeal of its abortion ban. These included not only findings of international (quasi-)judicial bodies, such as the UN Human Rights Committee ("UNHRC") in *Mellet v Ireland*, Human Rights Committee, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013, (2016) and *Whelan v Ireland*, Communication No. 2425/2014 CCPR/C/119/D/2425/2014, (2017) and the ECtHR in *A, B and C v Ireland* (2011) 53 E.H.R.R. 13, but also the World Health Organization ("WHO") guidelines (see: WHO (2012) Safe abortion: technical and policy guidance for health systems (http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf).
 21. Brölmann, 'A Flat Earth? International Organizations in the System of International Law' (2001) 70 *Nordic JIL* 319.
 22. Eg when the EU sought to become an observer in the UN GA in 2010 and other states in the GA voted against this: see Leigh Phillips "EU wins new powers at global body, transforming global body" *EU Observer*, 3 May 2011 <https://euobserver.com/foreign/32262>. Likewise, despite a 2010 Commission announcement that it would explore the possibility of acceding to the International Convention on the Settlement of Investment Disputes ("ICSID"), and the increasing necessity of doing so, it is "practically impossible" that all contracting parties will agree to this. See August Reinisch; Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration, [2016] *J. Int'l Econ. L.*, Vol 19, No 4, 761 at 769). The ECtHR's *Bosphorus* doctrine of equivalent protection offered by the CJEU, on the basis of which the ECtHR exercises full judicial review only if the protection under EU law proves to be 'manifestly deficient' in the individual case is based on a view of the CJEU as 'international machinery for supervising fundamental rights' (*Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* App no 45036/98 (ECtHR, 30 June 2004), para 154 and following case law such as *Michaud v France* App no 12323/11, (ECtHR, 6 December 2012)).
 23. Including for fundamental rights infringements, see e.g. cases of C-617/10 *Fransson* [2013] ECLI:EU:C:2013:280 and C-206/13, *Siragusa* ECLI:EU:C:2014:126.
 24. This is often discussed under the label 'political question doctrine', see eg: Franck, *Political Questions Judicial Answers – Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press, 1992). Kuijpers et al, *The Law of EU External Relations* (2nd edn., Oxford University Press, 2015) p. 655. For recent developments in this area see also: Sara Poli, *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law* (2017) 54 *CMLR* 1799.
 25. For the EU context, see the CJEU's case law denying direct effect of WTO law.
 26. Case C-399/12, *OIV case* (note 9 above).
 27. Eckes, *EU Powers under External Pressure* (note 6 above), Chapter 2, see also Case C-246/07, *PFOS* (note 14 above).

28. Feelings of European citizenship are at an all-time high: 70% of EU citizens feel a sense of EU citizenship (Eurobarometer 89, *European Citizenship*, Spring 2018 at p.29 <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/83538>) compared with 64% in Spring 2016 (Eurobarometer 85, *European Citizenship*, Spring 2016 at p.14 <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/75905P> and its lowest point since Lisbon of 59% in Autumn 2013 (Eurobarometer 80, *European Citizenship*, Autumn 2013 http://ec.europa.eu/commfrontoffice/publicopinion/archives/eb/eb80/eb80_citizen_en.pdf). However, this belies the fact that the vast majority (approx 90%) of EU citizens consistently see themselves as primarily or solely national citizens. Only a consistently tiny minority (7-8%) consider themselves primarily or solely European citizens (See Eurobarometer Spring 2018 pp. 35-37, Eurobarometer Spring 2016 p.20 and Eurobarometer Autumn 2013 p.34).
29. Jürgen Habermas, 'Citizens and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte' (2017) 55 JCM 171.
30. Habermas, *Zur Verfassung Europas* (n 100) 69. Compare above Section 3.2 on direct and indirect representation.
31. Jürgen Habermas, *Zur Verfassung Europas*. Ein Essay (Suhrkamp 2011) 52 (hereafter: Habermas, *Zur Verfassung Europas*).
32. Axel Mueller: "A Public no Demos: What Supranational Democratic Legitimacy (in the EU and Elsewhere) Requires" (2017) Eur. J. Philos., Vol.25(4) and Sergio Dellavalle "'Top-down" vs. "Bottom-up": A Dichotomy of Paradigms for the Legitimation of Public Power in the EU' Perspectives on Federalism, 01 November 2017, Vol.9(2), p.E-18 at E-29 to E-33.
33. Jürgen Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How It is Possible' (2015) 21 ELJ 546.
34. Article 218(10) TFEU.
35. Article 218(6) TFEU.
36. Case C-263/14 *Parliament v Council*, EU:C:2016:435. Case C-658/11, *Parliament v Council* [2014] EU:C:2014:2025.
37. Institutional Agreements, Framework Agreement on relations between the European Parliament and the Commission [2010] OJ L 304/47, Annex 11 (hereafter Framework Agreement between Parliament and Commission).
38. See TTIP example below. See also: Christina Eckes, "How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures" (2014) ICON, Vol. 12(4), p 904 at pp. 913-918; Ariadna Ripoll Servent "The role of the European Parliament in international negotiations after Lisbon" (2014) JEPP Vol. 21(4), 568; and Davor Jančić "The Role of the European Parliament and the US Congress in Shaping Transatlantic Relations: TTIP, NSA Surveillance, and CIA Renditions" (2016) J.Com.Mar.St, Vol 54(4), p. 896
39. E.g.: Case C-246/07, PFOS (note 16 above). See for more details Eckes, *EU Powers Under External Pressure* (note 14 above) Chapter 5 and 6. The compatibility of the ICS is under review by the CJEU: Opinion 1/17, *pending*.

40. See note 28 above on the Eurobarometer.
41. In his uncharacteristically bleak perspective for Europe of 10 October 2018, Jürgen Habermas starts by highlighting the diffuse wish of Member States of vesting the Union with additional external relations powers, he does not draw the conclusion that this entails a hidden potential for the future of Europe. See Habermas “New Perspectives For Europe” 22 October 2018 <https://www.socialeurope.eu/new-perspectives-for-europe>.
42. For example, the Nobel peace prize motivation in 2012: ‘for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe’: Nobel Media AB 2018, 25 November 2018 “European Union – Facts” <https://www.nobelprize.org/prizes/peace/2012/eu/facts/>.
43. For example, the Spring 2012 Eurobarometer 53% of respondents said peace among the member states was one of the EU’s main achievements. This answer was most popular with those over 55 (57%) and least popular with those aged 25-39 (49%) (<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Result-Doc/download/DocumentKy/63162>, p.16).
44. Schmitt, *Der Begriff des Politischen* (Duncker & Humblot GmbH 1932); for a translation, see: *The Concept of the Political* (translated by G. Schwab tr, Chicago Press 2007).
45. Cf Jacques Derrida, *L’université sans condition* (Paris: éditions Galilée 2001) 34.