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ARTICLE

Demystifying Autonomy: Tracing the International Law Origins of the EU Principle of Autonomy*

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Abstract

CJEU case law has long emphasized the autonomy of the EU legal order, recently triggering the foreclosure of intra-EU investment arbitration. Though academic discourse has treated this as a European peculiarity, autonomy is not unfamiliar to international law as an inherent attribute of all international organizations (IOs). This Article traces how the CJEU employed this as the basis for the development of a legal principle of significant constitutional role in safeguarding the EU's jurisdictional integrity. First, It considers the EU conception of autonomy on the basis of two identified dimensions of IOs' autonomy under international law. Political autonomy characterizes the scope of an IO's powers and its independent legal personality. Institutional autonomy denotes its (im)permeability to external norms. Second, the Article examines autonomy's different normative status under international and EU law as a legal notion and a constitutional principle, respectively. Rather than viewing the latter as an EU invention, it amounts to a Pygmalian judicial creation—the CJEU drew inspiration from a notion of international law and adapted it within the Union framework. The Article justifies these adaptations by reference to international law in light of the EU's institutional-judicial architecture and the intertwining of autonomy with, *inter alia*, Article 2 TEU values.

Keywords: Autonomy; International organizations; European Union; Constitutionalization; EU external relations law

A. Introduction

The autonomy of the legal order of the European Union (EU or Union) has long been invoked by the Court of Justice of the EU (CJEU or Court) when reviewing the Union's external action and, in particular, international agreements. Recently, and controversially, the Court's autonomy analysis has triggered the foreclosure of investment arbitration in an intra-EU context; that is, between an investor from one member state against another member state, on the basis of both Bilateral Investment Treaties[1] and the multilateral Energy Charter Treaty.[2]

Still, much of the EU case law and subsequent academic focus suggests that autonomy is a European idiosyncrasy rather than a feature of all international organizations (IOs). This skews the legal discourse regarding the role of the autonomy principle in regulating the Union's relationship with entities established under international law. To the extent it has been examined,

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[1]Case C-284/16, Slovak Republic v Achmea BV (March 6, 2018), http://curia.europa.eu/; Case C-109/20, Poland v PL Holdings (April 22, 2021), http://curia.europa.eu/.

[2]Case C-741/19, Republic of Moldova v Komstroy LLC (September 2, 2021), http://curia.europa.eu/.

the relevance of autonomy in IOs has mainly been considered from the perspective of international relations, often in relation to the discretion afforded to IO bureaucrats by the organizations' member states.[3] However, there have only been limited discussions on the autonomy of IOs from a legal perspective; the relationship between autonomy and international law is thus relatively unexplored. Such an exploration will be attempted here, with a view to determining whether autonomy merely reflects the historical and institutional peculiarities of the European integration project or whether it is more broadly relevant as a characteristic of all IOs established under international law.

First, the EU conception of autonomy will be considered in light of the notion's understanding under international law. Relevant CJEU case law give expression to known aspects of the autonomy of IOs, namely their political and institutional dimensions. This will provide an opportunity to explore the "multifaceted"[4] notion of IOs' autonomy. The above suggests that, far from being an EU invention, it substantially draws from its international law conceptual origins. Second, the different normative status of autonomy under EU and international law will be analyzed. Autonomy has risen to the status of a legal principle within the Union legal order, whereas this is not the case under international law. Lastly, this difference will be sought to be justified. In particular, it will be argued that there is a positive correlation between the degree of an IO's autonomy and the robustness of the dispute settlement mechanisms for which it provides. This arguably betrays the underlying relationship between autonomy and the rule of law and, more fundamentally, reflects the objectives that each IO has been created to pursue. Such a view casts EU autonomy as different from the autonomy of ordinary IOs, but only in so far as the EU differs from typical, non-constitutionalized IOs. The qualitative uniqueness of the EU principle of autonomy is, in this sense, justified under international law, as would the principle's further intertwining with the Union's commitment to judicial protection and the rule of law under Article 2 TEU.

B. The EU Conception of Autonomy in Light of Its International Law Understanding

This section will consider the conceptual similarities between the EU and international law understandings of autonomy. This will not entail a comprehensive exploration of the case law in which the autonomy of the EU legal order appears.[5] Illustrative references to CJEU case law will be made to facilitate a comparison with how the notion is understood in the international legal order. In general terms, the Court has long characterized the EU legal order as autonomous in order to safeguard the structural integrity of the Union's legal and judicial system. This includes the allocation of competences between the EU institutions and member states and, crucially, its own

[3]For instance, see Michael W Bauer and Jörn Ege, *Bureaucratic Autonomy of International Organizations' Secretariats*, 23 Journal of European Public Policy 1019 (2016); Eva-Karin Olssona & Bertjan Verbeek, *Do Crises Enable or Constrain IO Autonomy?*, 21 Journal of International Relations and Development 275 (2021); and Andrew P Cortell and Susan Peterson, *Autonomy and International Organisations*, 25 Journal of International Relations and Development 399 (2022).

[4]Jean d'Aspremont, *The Multifaceted Concept of the Autonomy of International Organizations and International Legal Discourse, in* International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order 63 (Richard Collins and Nigel D. White eds., Routledge, 2011).

[5]For such reviews, see Ingolf Pernice, *The Autonomy of the EU Legal Order – Fifty Years After Van Gend, in* 50th Anniversary of the judgment in Van Gend en Loos 1963-2013 (2013), https://op.europa.eu/en/publication-detail/-/publication/de3db697-1f5c-4f83-8424-1663b43ac2d3/language-en/format-PDF/source-279417390?pk_campaign=VanGendenLoos&pk_source=li; Cristina Contartese, *The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again*, 54 Common Market Law Review 1627 (2017); Niamh Nic Shuibhne, *What is the Autonomy of EU Law, and Why Does that Matter?*, Nordic Journal of International Law 9 (2019); Damjan Kukovec, *The Court of Justice of the European Union for Hedgehogs*, The Jean Monnet Center for International and Regional Economic Law and Justice, Jean Monnet Working Paper 1/21 (2021), https://jeanmonnetprogram.org/paper/the-court-of-justice-of-the-european-union-for-hedgehogs>.

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jurisdiction under Article 19(1) of the Treaty on European Union (TEU)[6] and Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).[7]

Considering the extent to which the EU's understanding of autonomy is *sui generis* seems important in light of how it is often perceived by legal discourse. In particular, the autonomy principle has been painted as idiosyncratic to EU law—as a tool developed by the CJEU out of "fear"[8] if not "selfishness."[9] The Court's conceptualization of the autonomous nature of the Union legal order has been argued to "border on autarky."[10] The above criticisms are grounded in the assumption that the EU is asserting, in a self-interested manner, a systemic independence that is unjustified under international law. Indeed, as the relevant case law concerns the relationship between the EU and its Court with international dispute settlement, the EU conception of autonomy is often seen as being directly invoked at the expense of international law.[11]

The exploration below centers around two identified dimensions of the autonomy of IOs under international law: political and institutional.

By way of disclaimer, it should be noted that IOs constitute an international community of "an almost infinite diversity,"[12] which cannot be fully captured by the scope of this article. First, in general terms, this community includes organizations operating as a platform for state-to-state engagement; some have a global reach, such as the United Nations (UN) and the World Trade Organization (WTO), and others maintain a more regional focus, such as the Council of Europe (CoE). Second, some IOs promote regional (economic) integration. The European Union is the most developed organization of the latter category. However, the CJEU has long resisted accepting that the EU is merely an international—that is, intergovernmental—organization, emphasizing instead its supranational characteristics.[13] Other regional integration organizations include the African Economic Community, the Association of Southeast Asian Nations (ASEAN), the Caribbean Community (Caricom), and the Southern Common Market (Mercosur).

I. Political Independence, Volonté Distincte and International Legal Personality

Considerations of autonomy are relevant for all IOs, despite the morphological diversity outlined above, in the sense that the autonomy of an IO reflects its relationship with its member states. On the most basic level, autonomy may be conceived in political terms as it characterizes the scope of an IO's powers or, conversely, the extent of sovereign powers member states have granted to or share with it. Jean d'Aspremont framed this as "autonomy as political independence."[14] This could be seen to follow international law's traditional understanding of autonomy on a national, regional, or local level, "determined primarily by the degree of actual as well as formal

[6]Consolidated Version of the Treaty on European Union, 26 October 2012, 2012 O.J. (C 326) 13.

[7]Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47.

[8]Eleanor Spaventa, *A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13*, 22 Maastricht Journal of European and Comparative Law 35 (2015).

[9]Bruno de Witte, *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union, in* The European Court of Justice and External Relations Law: Constitutional Challenges 33 (Marise Cremona and Annie Thies, eds., Hart, 2014).

[10]Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, 38 Fordham International Law Journal 955 (2015).

[11]For instance, see Dimitry Kochenov and Nikos Lavranos, Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union, 14 Hague Journal on the Rule of Law 195 (2021).

[12]Max Sørensen, *Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order*, 32 International and Comparative Law Quarterly 559, 560 (1983).

[13]See Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12; and Case 6/64, Flaminio Costa v ENEL, 1964 E.C.R. 585, 594; cf. Opinion of Advocate General Szpunar at paras. 57–63, Case C-161/20, Commission v Council (November 25, 2021).

[14]d'Aspremont, *supra* note 4, at 65–70.

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independence enjoyed by the autonomous entity in its political decision[-]making process."[15] In the context of IOs in particular, autonomy in the political sense overlaps with an organization's *volonté distincte* (separate will).[16] An IO's ability to express and act upon a separate will is an essential by-product of a state's decision to "structure their cooperation, to institutionalise it . . . , to become a part of a larger whole because of a shared interest."[17] By virtue of such a decision, every IO must "be made capable of acting independently . . . in the exercise of its tasks"; such a separate will, distinct from those of the IO's members, needs to "emanate not from any *ad hoc* grouping of states," but by an institution or body to which the requisite competences have been allocated by states acting *qua* members.[18]

It is generally accepted that European integration initially followed a largely intergovernmental paradigm,[19] which increasingly assumed supranational characteristics.[20] Since its inception, the European Union[21] has had to address the organizational and administrative issues typically experienced by all IOs. These include defending its bureaucratic and operational autonomy; that is, its capacity to develop administrative procedures and to pursue its objectives in accordance with the powers granted by its member states. Indeed, such organizational matters still resurface occasionally.[22]

However, the CJEU has also been central in ensuring that the EU is and remains politically independent, as described by d'Aspremont. First, in its early case law, the Court emphasized that EU member states have "limited their sovereign rights" for their "benefit" to justify the doctrine of direct effect.[23] In *Costa v ENEL*, the Union's political independence was strikingly asserted by the finding that EU law, enacted within the framework established by member states, may not be "overridden by domestic legal provisions, . . . without the legal basis of the [Union] itself being called into question."[24] This was confirmed in *Internationale Handelsgesellschaft*.[25] It is in the spirit of maintaining this framework that the CJEU further distinguished the Union legal order from its member states by noting that "[Union] law uses terminology which is peculiar to it" and that "legal concepts do not necessarily have the same meaning [as in] the law of the various Member States."[26] This early development of the EU's autonomy vis-à-vis national law seems to have been motivated by the Court's desire "to prevent significant distortions as regards the application of EU law in the Member States."[27] Such a risk of interpretative anarchy or fragmentation would undermine the EU's ability to express a separate will effectively, which is a fundamental consideration for all IOs.

[15]Hurst Hannum and Richard B Lillich, *The Concept of Autonomy in International Law*, 74 American Journal of International Law 858, 860 (1980).

[16]d'Aspremont, *supra* note 4, at 63.

[17]Niels Blokker, *International Organizations and their Members: "International Organizations Belong to All Members and to None" – Variations on a Theme*, 1 International Organizations Law Review 139, 152 (2004).

[18]*Id.*, at 153–54.

[19]This is notwithstanding any larger aspirations which may have conceived intergovernmentalism as a first step towards the eventual formation of a quasi-federated entity.

[20]For a brief historical account, see Paul Pierson, *The Path to European Integration: A Historical-Institutionalist Analysis, in* European Integration and Supranational Governance 27 (Wayne Sandholtz and Alec Stone Sweet, eds., Oxford University Press, 1998).

[21]For the sake of simplicity, the term "European Union" will be used to refer to all stages of European integration, unless historically significant.

[22]Opinion of Advocate General Mengozzi at para. 30, Case C-28/12, Commission v Council (January 29, 2015), where the Advocate General discussed "the principle of autonomy of the [EU] institutions" in the context of the procedure of communicating the authorisation of the Council for the signing of an international agreement under TFEU art. 218(5).

[23]*Van Gend en Loos*, *supra* note 13, at 12.

[24]*Costa v ENEL*, *supra* note 13, at 594.

[25]Case 11/ 70, Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle fur Getreide, 1970 E.C.R. 1125, para. 3.

[26]Case 283/ 81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, 1982 E.C.R. 3415, para. 19.

[27]Jan W van Rossem, *Autonomy: More is Less?, in* Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations 13, 19 (Ramses A Wessel and Steven Blockmans, eds., TMC Asser, 2013).

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Second, the Court similarly safeguarded the effective expression of the Union's separate will by invoking autonomy in order to ensure that the "allocation of responsibilities defined in the Treaties" between the Union institutions and its member states is not "adversely ... affect[ed]."[28] This aims to safeguard the Court's own jurisdictional monopoly.[29] At the same time, the reference to the Treaties and the use of the term "allocation" serves as a reminder of the politically sensitive degree of independence that member states have granted the Union and its institutions. The Court thus used autonomy as a principle that structurally reinforces the Union framework.

Autonomy as political independence typically presupposes an independent legal personality under international law. This may be inferred in light of the objectives the IO was established to pursue and the powers it has been given by its members for this purpose, as was done by the International Court of Justice (ICJ) in the case of the United Nations.[30] In the EU context, this was similarly clarified by the CJEU in the *ERTA* judgment,[31] even though the relevant Treaty provision was textually ambiguous as to whether the scope of the Community's legal personality extends to international law as well as the national laws of its member states.[32] Article 47 TEU subsequently confirmed this. The international legal personality of the EU has previously been acknowledged as a constitutive part of the autonomy of its legal order.[33] This illustrates the connection between the objectives of an IO and the question of its legal personality and, importantly, the role of judicial bodies in the determination of the latter. Indeed, this role more broadly extends to the determination of the organization's autonomy, which seems to be a more complicated exercise. As the ICJ suggested in its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, autonomy is situated on a spectrum ("a certain autonomy")[34]— unlike legal personality, the recognition of which resembles a "yes or no question."[35] This suggests a degree of inherent conceptual flexibility, as identifying the autonomy of an IO entails not just the recognition of its existence but also a delineation of its scope. This exercise is typically undertaken by a judicial body, as with the ICJ Advisory Opinion and relevant CJEU case law. It requires a closer inspection of the organization's particular institutional features and administrative-political practices. It thus allows a greater degree of interpretative discretion. In this sense, its findings may be somewhat open to interpretation and may be subject to change over time as the organization's working realities evolve. Arguably, this casts a different light on criticism of the "self-aggrandizing" invocation of the autonomy of the EU legal order by the CJEU:[36] a court-centric

[28]Opinion 1/91, 1991 E.C.R. I-6079, para. 2.

[29]Francisco de Abreu Duarte, *"But the Last Word Is Ours": The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System*, 30 European Journal of International Law 1187 (2019).

[30]Reparations for injuries suffered in the Service of the United Nations, Advisory Opinion, 1949, I.C.J. Rep. 174. For more on the international legal personality of international organisations, see Eric C. Ip, *The Power of International Legal Personality in Regional Integration*, UNU-CRIS Working Paper W-2010/4 (2010), https://cris.unu.edu/sites/cris.unu.edu/files/W-2010-4.pdf; and Nicolae Purdă, 'Aspects on the International legal Personality of International Organizations', 2 CHALLENGES OF THE KNOWLEDGE SOCIETY 891 (2012).

[31]C-22/70, Commission v Council (European Agreement on Road Transport), 1971 E.C.R. 263, para. 14.

[32]For more, see Jan Wouters, Frank Hoffmeister, Geert De Baere & Thomas Ramopoulos, *Personality and Powers of the EU in* The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor 1 *et seq* (Oxford University Press, 2021).

[33]Ricardo da Silva Passos, *The Scope of the Principle of the Autonomy of the European Union Legal Order: Recent Developments, in* Building the European Union: The Jurist's View of the Union's Evolution 19, 20-22 (Koen Lenaerts, Nuno Piçarra, Carla Farinhas, Alessandro Marciano and Frédérique Rolin, eds., Hart, 2021).

[34]Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996, I.C.J. Rep. 66, para. 19, referring to "a certain autonomy" of international organisations

[35]Tarcisio Gazzini, *The Relationship Between International Legal Personality and the Autonomy of International Organisations, in* International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order 196, 200 (Richard Collins and Nigel D. White eds., Routledge, 2011).

[36]Daniel Halberstam, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, 16 German Law Journal 106, 145 (2015).

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approach to the determination of an organization's autonomy is required by virtue of the concept itself, as understood by international law.

In light of the above, the international legal personality of an IO (such as the EU) serves as the basis on which it may operate in a manner that is politically independent of its member states, in so far as this is envisaged by the treaties from which it was created. The autonomy of an IO is thus necessarily circumscribed by the powers "bestowed" upon them by its member states "with a view to the fulfillment of [particular] purpose[s]."[37] This is echoed by the CJEU's early case law, which speaks of the EU having "real powers stemming from ... a transfer of powers from the States to the Community."[38] Within this framework, the political independence of an IO can be expressed in terms of policy autonomy through an organization-level agenda and the joint pursuit of goals.[39]

II. Institutional Independence and the Interaction of the EU with the International Legal Order

The understanding of autonomy outlined above may be "too narrow,"[40] as it largely focuses on the dynamic between the international organization and its members. After all, in the EU context, this matter seems to have long been settled by the CJEU in the case law considered above. Subsequent case law, particularly Opinions rendered by the Court under Article 218(11) TFEU starting with Opinion 1/91,[41] instead focused on the relationship of the EU and its legal order with international law and dispute settlement mechanisms established thereupon. This dimension of the autonomy of the EU legal order reflects the "institutional independence" possessed by IOs. Though the term will be adopted, "institutional" is meant as encompassing "legal," as it characterizes the "impermeability of ... organization[s] to external institutional interferences"; that is, the "extent to which [IOs] constitute a legal order distinct from the general international legal order."[42] This is more sensitive to the autonomous global role of IOs, qualifying the traditional Westphalian outlook of international relations that emphasizes the dominant role of sovereign states.[43] This suggests that understanding autonomy as institutional independence would be more important for IOs that place an emphasis on having a global role as a single actor when interacting with other international entities. This appears particularly resonant with the EU, as it has increasingly, not least post-Lisbon, developed and pursued external policies *qua* Union.

Institutional independence implies a degree of systemic distinctiveness, as it would denote the ability of an IO to defend its "political project," which may be threatened by external "interferences" stemming from the broader international community.[44] It is well established that the EU legal order has a heightened sense of its own systemic distinctiveness. Indeed, the CJEU made such a claim on behalf of the EU early on and gradually refined it. First, it stated that "the [then European Economic] Community constitutes a new legal order of international law";[45] the Commission argued that EU law should not be "consider[ed] ... in the light *only* of the general

[37]Jurisdiction of the European Commission of the Danube between Galata and Braila, Advisory Opinion, 1927, P.C.I.J. Rep. (ser. B) No. 14, at 64. For more on the relationship between the autonomy and powers of international organisations, see Violeta Moreno-Lax and Katja S Ziegler, Autonomy of the *EU Legal Order – A General Principle? On the Risks of Normative Functionalism and Selective Constitutionalisation*, EUI Working Paper LAW 2021/15, 11-13 (2021), https://cadmus.eui.eu/handle/1814/73306.

[38]*Costa v ENEL*, *supra* note 13, at 593.

[39]Also see Bob Reinalda and Bertjan Verbeek, *Policy Autonomy of Intergovernmental Organizations, in* International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order 87 (Richard Collins and Nigel D. White, eds., Routledge, 2011).

[40]d'Aspremont, *supra* note 4, at 63.

[41]Opinion 1/91, *supra* note 28.

[42]d'Aspremont, *supra* note 4, at 63–64.

[43]For an overview of the ways in which globalisation, including the formation of international organisations, has challenged the traditional Westphalian understanding of state sovereignty, see Julian Ku and John Yoo, *Globalization and Sovereignty*, 31 Berkeley Journal of International Law 210 (2013).

[44]d'Aspremont, *supra* note 4, at 70–73 and 78.

[45]*Van Gend en Loos*, *supra* note 13, at 12.

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principles of the law of nations."[46] Then, the Court ceased to refer to international law and found that the EU simply constitutes "a new legal order."[47] In any event, Union law is of a "special and original nature."[48] More recently, the Court emphasized that the EU "has a new kind of legal order, the nature of which is peculiar to the EU, [and] its own constitutional framework."[49] In Opinion 1/17, the Court similarly noted that "the Union possesses a constitutional framework that is unique to it."[50] While such a persistent assertion of uniqueness by the CJEU may appear grating for its perceived defiance over general international law, it arguably follows the international law understanding of the autonomy of regional IOs. In this regard, d'Aspremont's reference to the "impermeability" of organizations to "external … interferences"[51] under international law is echoed by Christina Eckes, who observes, in the EU context, that the CJEU has sought to "shut external interference[s] out" of the Union legal order.[52] Indeed, the Court further developed its understanding of the Union's systemic uniqueness by safeguarding the jurisdictional integrity of the EU legal order. In particular, in Opinion 1/00[53] and, more controversially, Opinion 2/13[54] and *Kadi*,[55] it established that "foreign [that is, external] norms" may be incorporated into the EU legal order only if they comply with "the fundamental values on which the [EU] is founded."[56]

As understood by international law, institutional independence is an essential feature of organizations with a regional focus, for their "*raison d'être* lies in the creation of a separate regime from general international law."[57] This can be distinguished from organizations such as the World Health Organization and the International Labor Organization. EU discourse seems to conceive of this aspect of autonomy, focusing on IOs' institutional independence from other international entities, as its "external dimension."[58] By contrast, equivalence regarding IOs' political independence and the "internal dimension"[59] of autonomy in the EU sense seems less direct —they both broadly concern internal arrangements in accordance with which member states envisage the operation of their respective organizations.

As international, and particularly regional, organizations typically claim their ability to determine and pursue their own political priorities (within the framework determined by their members), it follows that "[t]he defence of [the institutional] dimension of autonomy has always been closely associated with the defence of the political project of the [IO] concerned."[60] The CJEU's defense thereof has been expressed in terms of guaranteeing coherence and self-sufficiency: the Union's institutional, structural independence grants it "the capacity to operate as

[46]Opinion of Advocate General Roemer at 20, Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen, 1963 E.C.R. 1. Emphasis in original.

[47]Joined Cases 90/63 and 91/63, Commission v Luxembourg and Belgium, 1964 E.C.R. 625, at 631.

[48]*Costa v ENEL*, *supra* note 13, at 594.

[49]Opinion 2/13, para. 158 (December 18, 2015), http://curia.europa.eu/.

[50]Opinion 1/17, para. 110 (April 30, 2019), http://curia.europa.eu/.

[51]d'Aspremont, *supra* note 4, at 63–64.

[52]Christina Eckes, *EU Autonomy: Jurisdictional Sovereignty by a Different Name?*, 5 European Papers 319, 322 (2020).

[53]Opinion 1/00, 2002 E.C.R. I-3493, paras. 21, 23, and 26.

[54]Opinion 2/13, *supra* note 49, at para. 183.

[55]Joined Cases C-402/05 P and 415/05 P, Yassin Abdullah Kadi and Al-Barakaat International Foundation v Council and Commission, 2008 E.C.R. I-6351, para. 282.

[56]Koen Lenaerts and José A Gutiérrez-Fons, *A Constitutional Perspective, in* Principles of European Union Law - Volume 1: The European Union Legal Order 103, 107 (Robert Schütze and Takis Tridimas, eds., Oxford University Press, 2018).

[57]d'Aspremont, *supra* note 4, at 64. This does not necessarily refer to, for instance, a *lex specialis* regime.

[58]See, for instance, Jed Odermatt, *in* Structural Principles in EU External Relations Law 291 (Marise Cremona, ed., Hart, 2018).

[59]The internal dimension of autonomy, as conceived by the CJEU, "emphasises the distinct nature of the EU legal order vis-à-vis the EU Member States"; Odermatt, *supra* note 58, at 313. Also, see Ramses A Wessel and Steven Blockmans, *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations – An Introduction, in* Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations 1, 2-3 (Ramses A Wessel and Steven Blockmans, eds., TMC Asser, 2013).

[60]d'Aspremont, *supra* note 4, at 78.

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a self-sufficient system of [substantive] norms."[61] This is only strengthened by the Court's assertion of the conceptual autonomy of EU law in *CILFIT*, discussed in the previous section. This amounts to a robust safeguarding of the institutional independence of the EU, so much so that the latter may even be elevated to the level of "jurisdictional sovereignty."[62] Still, it may be explained by reference to the EU's "political project"—or, in more constitutional terms, the Union's objectives under the Treaties.[63]

In reviewing the assessment of the EU conception of autonomy in light of its understanding under international law, the two seem significantly equivalent in conceptual terms. Importantly, the distinction between the two dimensions of the autonomy of IOs should not be overstated. Institutional independence remains "inevitably intertwined" with political independence: institutional independence means that an IO is able to "defend" its values, principles, and interests from external "interferences,"[64] but within the limits of the political independence afforded by its members. Furthermore, these principles and interests have been politically determined in accordance with the arrangement and processes established by the organization's members. The relationship between the two dimensions of autonomy seems to be one of complementarity, particularly in IOs such as the EU, which are more institutionally developed.

C. Principle or Notion? The Normative Status of Autonomy under EU Law and International Law

Notwithstanding the conceptual similarities, the normative status of autonomy seems to differ in EU and international law contexts. First, this section will examine whether autonomy may constitute a principle of international law. Though this does not seem to be the case, the importance of autonomy as an inherent characteristic of IOs is not diminished. Second, the important function of autonomy as a constitutional principle within the EU legal order will be demonstrated. In this light, though it may not (yet) be classified as a general principle of international law, autonomy can justify not only the creation of politically balanced and structurally distinct legal orders by IOs but also of self-contained systems of norms.[65] In the latter instance, an IO (in accordance with its attributed objectives, powers, and institutions) may well treat it as a general principle within its own internal legal order. The international law understanding of autonomy would then emanate as a principle of the IO's internal-domestic law and be treated as such by its institutions and members. It is argued that the European integration process, culminating in the formation of the European Union in its current form, is an illustration of this. Such an account would demystify the CJEU's autonomy-related case law, as the Court would be seen to largely follow trends that already existed within the international legal order. Reference to such case law will again be selective in order to illustrate particular points.

[61]Lenaerts and Gutiérrez-Fons, *supra* note 56, at 106.

[62]Eckes, *supra* note 52.

[63]See TEU arts. 1 and 3. These will be further discussed in subsequent sections.

[64]d'Aspremont, *supra* note 4, at 64.

[65]This term was famously analysed in Bruno Simma, *Self-contained regimes*, Netherlands Yearbook of International Law 111 (2009). For the way in which the term "self-contained" should be understood under international law, see Martti Koskenniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes'*, UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1 (2004); cf. Anja Lindroos and Michael Mehling, *Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO*, 16 European Journal of International Law 857 (2005). For examples of which international organisations may be said to comprise self-contained regimes, see Joseph H.H. Weiler, *The Transformation of Europe*, 100 Yale Law Journal 2403, 2422 (1991); and Math Noortmann, Enforcing International Law: from self-help to self-contained regimes (Ashgate, 2005).

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I. Autonomy as a Principle of International Law?

The analysis carried out in the previous section gives rise to a complicated understanding of international organizations' autonomy conceived as political and institutional independence, whereby both aspects, in principle, co-exist in varying degrees. On this basis, it shall be examined whether autonomy may be a fully-fledged, if underutilized, principle of law rather than merely a feature of IOs.

Jan Klabbers previously acknowledged the question regarding the normative status of autonomy, if only tangentially. However, he did so only with regard to international organizations' law in particular, though it was said that "there is no such thing as a separate corpus of rules and principle to be referred to as international organisations law" in the first place.[66] This is important, as an examination of the status of autonomy as a legal concept requires a clear delineation of the area of law within which it may operate as a principle. Notwithstanding the existence or otherwise of a distinct discipline of international organizations law, interactions *between* IOs are governed by international law as broadly understood.[67] Hence, autonomy could arguably only be a principle of *general* international law, as it would accord with the fundamental conclusion of the ICJ that IOs are subjects of an overarching system of international law.[68]

A finding that autonomy constitutes a principle of international law is not unavoidable, even if, as stated earlier, the ICJ has indicated that it is an attribute with which all international organizations are, to an extent, endowed by their member states.[69] Even so, this does not suffice to justify the existence of a legal principle. Takis Tridimas's broadly accepted formulation states that "a principle is a general proposition of law of some importance from which concrete rules derive."[70] It must be "general"; it must "underlie the legal system as a whole" and be widely recognized by key judicial-institutional, political, and social constituents.[71] A principle must also "carry added weight"[72] and bear "wider independent normative meaning."[73] Finally, on a conceptual, doctrinal, and functional level, principles "justify and underpin the specificity and detail of rules, both procedural and substantive."[74]

Violeta Moreno-Lax and Katja S. Ziegler do not believe that autonomy has passed the threshold of being such a general principle of international law, as they consider it to lack normative substance: autonomy is merely "an allusion to an empirical fact or a collective reference to the more defined specific rules" that underlie it.[75] Moreover, as autonomy is not relevant in purely national contexts, it may not be said to derive from domestic legal orders. The International Law Commission Draft Conclusions on General Principles suggested that general principles "formed within the international legal system" must be "widely acknowledged in treaties and other international instruments," "underlie general rules" of customary international law, or be "inherent in the basic features and fundamental requirements of the international legal system."[76]

[66]Jan Klabbers, *Interminable Disagreement: Reflections on the Autonomy of International Organisations*, 88 Nordic Journal of International Law 111, 115 (2019).

[67]See generally Jan Klabbers, *The Paradox of International Institutional Law*, 5 International Organizations Law Review 151 (2008).

[68]Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980, I.C.J. Rep. 73, para. 37.

[69]Legality of the Use by a State of Nuclear Weapons in Armed Conflict, *supra* note 34, at para. 19.

[70]Takis Tridimas, The General Principles of EU Law (Oxford University Press, 2007), at 1. Notwithstanding its derivation from a work on EU law, such a definition is not in principle restricted to the Union context.

[71]*Id.*

[72]*Id.*

[73]Moreno-Lax and Ziegler, *supra* note 37, at 14.

[74]Marise Cremona, *Structural Principles and their Role in EU External Relations Law*, *in* Structural Principles in EU External Relations Law 3, 13 (Marise Cremona, ed., Hart, 2018).

[75]Moreno-Lax and Ziegler, *supra* note 37, at 14.

[76]International Law Commission, *Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, UN Doc. A/CN.4/741, 53 (April 9, 2020).

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However, autonomy is not explicitly stated in international agreements, nor does it yet have a legal function that is generally recognized by the international community. Moreover, in the absence of a well-established international consensus, it is difficult to argue that autonomy is a general principle of international law due to it being inherent in the basic features of the international legal system; this has typically referred to principles such as consent to jurisdiction and *uti possidetis juris*, quasi-customary principles with a history of being invoked before and relied upon by international courts.[77] Indeed, autonomy has not been central to international judicial reasoning, with the exception of the CJEU.

Lastly, one seems inclined to agree with Moreno-Lax and Ziegler's assessment that no single normative claim can underpin a principle of autonomy under international law. The rich diversity of IOs, which differ dramatically in terms of organization, foundational objectives, modes of operation, and membership, is a main factor hindering the doctrinal maturity of the concept. In this sense, one could be tempted to merely view autonomy as an "idea,"[78] as an interpretative scheme that helps to conceptualize the operation of IOs. However, even if disregarded as "a kind of pseudo-sovereignty of international organisations," autonomy retains considerable importance precisely because it may be conceived as a "structural basis" of public international law.[79] This would be particularly valuable in explaining (or justifying) the international capacity and limits of the IOs' actions. Paradoxically, the notion of IOs' autonomy may be useful in illustrating their *dependence* on the international legal order. By virtue of their sovereignty, states do not need the legal-conceptual support that autonomy provides in order to (inter)act within the international community on such a basic, structural level.

Therefore, autonomy can be recognized as a legal notion under international law that concretely characterizes all international organizations. It is not a mere "idea" but an inherent feature of IOs as subjects and products of international law. As Klabbers rightly suggested, it may not be necessary to classify it as a principle of international law in order to recognize its importance: autonomy "need not be invoked as principle … in order to materialize."[80] Autonomy maintains an essential role in international law as an inherent feature in the establishment and operation of IOs. Though it may not correspond to a single normative claim *per se* and is rarely relied on by international courts, it has a profound *structural* importance in explaining IOs' distinctness from its member states. However, importantly, it also has a relevance in facilitating *substantive* policies pursued by IOs, which may develop organically in accordance with the particular characteristics of each organization.

This flexibility, encompassing the structural and the substantive, accounts for the ability of different organizations to rely, in varying degrees, on autonomy's political or institutional dimensions. Though all international organizations are concerned with the exercise of their attributed powers with respect to the framework established by their member states, some organizations seek to build on this externally and even claim a systemic distinctiveness for their own legal order vis-à-vis general international law. In other words, autonomy has a clear structural dimension, as it supports a political balance between an IO and its members and facilitates IOs' development of their own legal order. At the same time, autonomy can also have a substantive normative dimension, depending on the IO it characterizes: it can cultivate the substantive, rather than structural, normative features underpinning the organization's formally distinct legal order. This seems, in principle, more prevalent in regional integration organizations.

[77] *Id.*, at 47–51.

[78] International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order 63 (Richard Collins and Nigel D. White eds., Routledge, 2011).

[79] Moreno-Lax and Ziegler, *supra* note 37, at 20.

[80] Klabbers, *supra* note 66, at 131.

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II. The CJEU as Pygmalion and Autonomy as a (General) Principle of EU Law

Notwithstanding the close conceptual proximity of the international law understanding of the autonomy of international organizations and the CJEU's understanding of the autonomy of the EU legal order, one must note that the latter seems to operate as a principle of law, thus having a more robust role in an EU rather than in an international context. By contrast, there does not seem to be a formal principle of autonomy under international law, given that it is not recognized as such by international courts, notwithstanding the notion's considerable importance as an inherent attribute of all international organizations.

The Court has evolved the way in which it invokes autonomy. As seen, for instance, in *Van Gend*,[81] *Costa*,[82] Commission *v Belgium*,[83] and even the *ERTA* judgment,[84] the Court avoided explicit references to autonomy, which was treated more as a notion underpinning the development of the principles of direct effect and the primacy of EU law, and the implied external powers doctrine.[85] This matched international courts' typical treatment of autonomy as an underlying rationale for the development of the principle of international legal personality[86] rather than as a formal principle in itself. Following Opinion 1/91,[87] however, the CJEU revisited autonomy and began its judicial invocation *qua* principle. It is interesting to see that Theodor Schilling's 1996 observation that autonomy constitutes "[t]he single most far-reaching, and probably most disputed, principle" of EU law still seems apt today, more than twenty-five years later.[88]

This raises the question of the normative classification of autonomy. Marise Cremona classified autonomy as a structural principle alongside, *inter alia*, effectiveness, proportionality, sincere cooperation, and institutional balance; structural principles are argued to be "a type of general principle."[89] Autonomy is structural "in the sense of defining and being inherent to the deep structure of the EU."[90] Further, it is a "systemic" structural principle, together with effectiveness and coherence, as they "characterise the type of international actor the EU is, and the norms it produces in its external policymaking."[91] Indeed, contrary to autonomy's status under international law, the notion has been elevated to a constitutional principle[92] in the EU context:

> [A]utonomy, which exists with respect both to the law of the Member States and to international law, stems from the essential characteristics of the European Union and its law [which refers to the principles of direct effect and primacy of EU law]. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other.
>
> That autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it [which] encompasses the founding values set out in Article 2 TEU [including respect for the rule of law and human rights], ... the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which

[81] *Van Gend en Loos*, *supra* note 13.

[82] *Costa v ENEL*, *supra* note 13.

[83] See Case 149/79, Commission v Belgium, 1980 E.C.R. 3881, para. 19 to that effect.

[84] *Commission v Council* (*European Agreement on Road Transport*), *supra* note 31.

[85] For more on this "implicit" operation of autonomy, and its role in the Court's development of EU law principles, see Kukovec *supra* note 5.

[86] Reparations for injuries suffered in the Service of the United Nations, *supra* note 30; also see note 30 more generally.

[87] Opinion 1/91, *supra* note 28.

[88] Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARVARD INTERNATIONAL LAW JOURNAL 389 (1996).

[89] Cremona, *supra* note 74, at 15.

[90] *Id.*

[91] *Id.*, at 27.

[92] For instance, see Odermatt, *supra* note 58, at 293.

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> include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU.[93]

While criticism of the CJEU over the perceived tension between the robust interpretation of autonomy in Opinion 2/13[94] and the EU's commitment to human rights under Articles 2, 6, and 21 TEU is understandable,[95] one should not be too quick to dismiss autonomy as a non-principle within the EU legal order. As a matter of EU law, autonomy does not merely represent a value-less "ontological reality."[96] Instead, its relevance in case law[97] regarding the rule of law and fundamental rights indicates that it has both an axiological and an ontological dimension.[98] The Court's above elucidation of autonomy in Opinion 1/17, as referenced in *Komstroy*, suggests that it may "entail a claim of a wide or general normative content."[99] Namely, the Court has firmly intertwined the traditional role of the autonomy principle in safeguarding the jurisdictional integrity of the EU legal order with the Union's commitment to judicial protection and Article 2 TEU values, which include respect for the rule of law and human rights. The relationship between autonomy, judicial protection, and the rule of law will be revisited in the next section.

The way in which the CJEU understands autonomy suggests that it satisfies the definition of a legal principle:[100] it is a legal norm that provides "justification for concrete rules"[101] and is typically used to review the legality or constitutional compatibility of a measure or agreement. All general principles, including autonomy, are of a "fundamental nature," meaning that they "inform and guide the interpretation of rules even where those rules have not been adopted to give them specific expression."[102] Indeed, the significant evolution that autonomy has undergone since *Van Gend* and Opinion 1/91 is to be expected: principles "are open to adjustment and re-interpretation over time and in changing circumstances."[103]

However, the CJEU has intertwined autonomy with other EU law principles and doctrines in a way that almost makes one contingent upon the other. Autonomy "stems" from the principles of direct effect and primacy,[104] though, at the same time, it served as the underlying rationale for their development. It "resides in" the fundamental normative commitments of the Union – that is, Article 2 TEU values, general principles of EU law, and fundamental rights[105] – but it is also used to safeguard the judicial-institutional framework that gives effect to them. Further, *Achmea* showed that autonomy

[93]Opinion 1/17, *supra* note 50, at paras 109–10. This has also been referenced in *Komstroy*, *supra* note 2, at paras 43–44.

[94]Opinion 2/13, *supra* note 49.

[95]See generally Adam Łazowski and Ramses A Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 German Law Journal 179 (2015); and Violeta Moreno-Lax, *The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order, in* The Interface Between EU and International Law: Contemporary Reflections 46 (Inge Govaere and Sacha Garben, eds., Hart, 2019).

[96]Moreno-Lax and Ziegler, *supra* note 37, at 23.

[97]For instance, see *Kadi*, *supra* note 55; *Achmea*, *supra* note 1; and Opinion 1/17, *supra* note 50.

[98]Kukovec, *supra* note 5, at 30.

[99]Moreno-Lax and Ziegler, *supra* note 37, at 4.

[100]Indeed, autonomy is often considered in those terms in academic discourse: Odermatt, *supra* note 58; Steffen Hindelang, *Conceptualisation and application of the principle of autonomy of EU law – the CJEU's judgment in Achmea put in perspective*, 44 European Law Review 383 (2019); Jan Willem van Rossem, *Pushing limits: The principle of autonomy in the external relations case law of the European Court of Justice, in* The European Union as an Actor in International Economic Law 35 (Mads Andenas, Luca Pantaleo, Matthew Happold & Cristina Contartese, eds., Asser/Springer 2020).

[101]Tridimas, *supra* note 70, at 2.

[102]Cremona, *supra* note 74, at 13.

[103]*Id.*, at 14.

[104]Opinion 1/17, *supra* note 50, at para. 109.

[105]*Id.*, at para. 110.

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also relates to principles such as mutual trust.[106] Lastly, it is connected to the very objective of European integration under Article 1 TEU, the creation of an "ever closer union." In this sense, autonomy constitutes a *general* general principle, a foundational principle of EU law that both stems from and justifies the constitutional and institutional uniqueness of the EU as a systemically distinct form of international organization.

Nevertheless, the way in which autonomy has evolved into a legal principle and become integrated within the EU framework cannot eclipse the notion's conceptual origins in international law. Autonomy's connection to the EU's normative foundations still appears as a judicial elaboration based on the political and institutional independence that inherently characterizes international organizations, adapted to the European context. The CJEU's inspiration from international law cannot be obscured by its bold development of the concept, unlike other international courts, into a benchmark of constitutionality. As Amedeo Arena remarked in a different context, the Court "acted more as a Pygmalion than as a Demiurge: it did not create the principle … *ex nihilo*, but brought to life a [notion] already established in international law."[107] The EU principle of autonomy is not a Union invention *per se* but a Pygmalian judicial creation, clearly drawing from and building on an international law notion. It will be left to readers to decide whether the myth of Pygmalion,[108] who eventually fell in love with his own creation, is fully analogous to the CJEU's development of autonomy.

D. Autonomy *Mutatis Mutandis* and the (International) Rule of Law

The CJEU developed an understanding of the autonomy of the EU legal order which seems to encapsulate both the "political" and "institutional" dimensions of the notion as conceived by international law, and has transposed it into a fully-fledged constitutional principle. Arguably, this is owed to the process of constitutionalizing, whereby the EU's institutional structure developed concurrently with its emphasis on judicial protection, the rule of law, and individual rights; the one informed, shaped, and enhanced the other. Though constitutionalization is not, in principle, limited to the EU context,[109] no other IO has embarked on the path inaugurated by *Van Gend*. European constitutionalization has imbued the notion of autonomy with a broader normative aspiration going beyond a merely structural – that is, substantively agnostic – purpose relating to the systemic functionality of the EU legal order. In doing so, the CJEU made full use of the notion's conceptual scope, which already existed under international law; it employed autonomy's capacity to facilitate the creation of a distinct system of norms by asserting the EU's political and institutional independence.

More specifically, the adaptation by the Court of Justice of the notion of autonomy into a constitutional principle of EU law can be explained by reference to the "broader normative commitment [of the international community] to the realization of the rule of law."[110] International organizations were hoped to be able to constrain the arbitrary exercise of their members' sovereign will and represented a new way of taming international law's blunt positivism.[111] The autonomy of IOs, therefore, can be seen as an essential element of the international rule of law, the pursuit of which may

[106]Jens Hillebrand Pohl, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, 14 European Constitutional Law Review 774 (2018); *Achmea*, *supra* note 1.

[107]Amedeo Arena, *The twin doctrines of primacy and pre-emption, in* Principles of European Union Law - Volume 1: The European Union Legal Order 300, 311 (Robert Schütze and Takis Tridimas, eds., Oxford University Press, 2018).

[108]Ovid, Metamorphoses, Book X (A D Melville tr, Oxford University Press, 1986).

[109]See, for instance, Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann (Marise Cremona, Peter Hilpold, Nikolaos Lavranos, Stefan Staiger Schneider & Andreas Ziegler, eds., Brill, 2013).

[110]Richard Collins, *Modernist-positivism and the problem of institutional autonomy in international law, in* International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order 22 (Richard Collins and Nigel D. White eds., Routledge, 2011).

[111]*Id.*, at 22–23.

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be "the single most important goal of the international system, upon which all other goals – peace, prosperity, and effective international cooperation – depend."[112] This points to an underlying relationship between autonomy and the rule of law and suggests a positive correlation between the autonomy of an IO and the rule of law arrangements they establish, including their judicial-institutional framework and dispute settlement mechanisms.

As will be seen, the degree of an organization's autonomy typically corresponds to the robustness of its dispute settlement structures, as these introduce and regulate limits to the exercise of members' separate will. More fundamentally, an organization's dispute settlement mechanisms seem to reflect its intended objectives. An IO's objectives ("common goals") have also been closely related to its endowed degree of autonomy by the ICJ.[113] IOs generally tend to operate either as an *agora* that hosts political debate and "perhaps" fosters decisions[114] or as an independent, institutionalized entity acting collectively across policy areas. However, they may well partly draw from both "competing images."[115] By way of illustration, the United Nations and the Council of Europe will be briefly considered in these terms to explain why the conceptual borrowing of the EU conception of autonomy from its international law origins was coupled with its unique development into a concrete legal principle.

Closer to the *agora* concept of IOs, the United Nations was founded after World War II, *inter alia*, "[t]o maintain international peace and security, and to that end … to bring about … settlement of international disputes or situations which might lead to a breach of the peace"; "[t]o develop friendly relations among nations"; and "[t]o achieve international co-operation."[116] The ICJ, the judicial organ of the UN, is tasked with a significant role in adjudicating disputes between members and issuing advisory opinions, but its jurisdiction is based on the parties' consent.[117] If a party fails to comply with a judgment, the other party "may have recourse to the Security Council," which may "make recommendations or decide upon measures to be taken to give effect" to it.[118] This raises the possibility of a *de facto* veto to ICJ's decisions by permanent Security Council members[119] which would fall within a broader debate regarding the reviewability of Security Council decisions.[120]

The Council of Europe (CoE), another international organization, albeit with a regional reach, was itself founded with an aim "to achieve a greater unity between its members … by discussion of questions of common concern and by agreements and common action … and in the maintenance and further realisation of human rights and fundamental freedoms."[121] It was envisaged to be complementary to the UN.[122] The European Court of Human Rights (ECtHR) was established within the CoE framework in order to "ensure the observance of the engagements undertaken by" the parties to the European Convention on Human Rights (ECHR).[123] Though

[112]Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 Harvard International Law Journal 323, 331–32 (2008) (as cited in Collins, *supra* note 110, at 22).

[113]Legality of the Use by a State of Nuclear Weapons in Armed Conflict, *supra* note 34, at para. 19.

[114]Jan Klabbers, *Two Concepts of International Organization*, 2 International Organizations Law Review 277 (2005).

[115]Catherine Brölmann, The Institutional Veil in Public International Law: International Organisations and the Law of Treaties 30 (Hart, 2007).

[116]Charter of the United Nations (UN Charter) (1945) Art. 1.

[117]For more, see Vanda Lamm, Compulsory Jurisdiction in International Law (Elgar, 2014).

[118]UN Charter art. 94(2).

[119]As seen in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v USA*) (Merits) [1986] ICJ Rep 14, at paras 158–60.

[120]See, for instance, David Schweigman, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice 205–285 (Brill, 2001); and Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 European Journal of International Law 879 (2006).

[121]Statute of the Council of Europe (ETS No. 001) art. 1.

[122]*Id.*

[123]European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950) art. 19.

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members' national judiciaries have an important role in the application of the ECHR,[124] and the ECHR has had a profound influence on the development of human rights protection within the EU,[125] the ECtHR is a typical international court. Its jurisdiction only extends to the interpretation and application of the ECHR[126] and is subject to the parties' exhaustion of domestic remedies.[127] Lastly, there are no hard mechanisms for enforcing ECtHR judgments,[128] which limits the breadth and depth of the CoE's autonomy.

Important differences between the UN, the CoE, and the EU can be identified in this light. Though the EU also serves an *agora* function, as a whole, it is situated near the other end of the spectrum as a deeply institutionalized (indeed, constitutionalized) entity. The EU legal order is systemically distinct from but closely connected with the national legal orders of member states, not least by virtue of the principle of primacy.[129] Moreover, the system of preliminary reference procedure, the "keystone" of the EU judicial system, "set[s] up a dialogue" between the CJEU and national courts, by which the latter are tasked with applying EU law on the basis of the former's interpretation.[130] This transforms national courts into EU courts.[131] Article 19 TEU "established that the EU is bound by the rule of law and recognizes the separation of powers";[132] it also introduced an obligation for member states to ensure effective judicial protection in areas of EU law. The Union judicial system is further shaped by the Court's emphasis on individual rights[133] and by the operation of significant enforcement mechanisms.[134] The EU system thus emulates characteristics usually found in domestic rather than international legal orders, which it accommodates within a supranational framework. This is not surprising, given that the EU was conceived as merely a "stage in the process of European integration,"[135] and the "process of creating an ever closer union"[136] whose objectives, set out in Article 3 TEU, cover a wide range of areas, including, crucially, common external action.

Therefore, notwithstanding the CJEU's own role in the assimilation and development of the notion of autonomy in the EU context, the autonomy of the EU legal order is a natural by-product

[124]See, for instance, Eirik Bjorge, Domestic Application of the ECHR: Courts as Faithful Trustees (Oxford University Press, 2015).

[125]The interaction between the ECHR, EU law, and Europe's national legal orders is discussed in Giuseppe Martinico and Oreste Pollicino, The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws (Elgar, 2012). More broadly on the relationship between the CJEU and the ECtHR, see Elisa Ravasi, Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine (Brill, 2017).

[126]ECHR art. 32.

[127]ECHR art. 35.

[128]Élisabeth Lambert Abdelgawad, *The Enforcement of ECtHR Judgments, in* The Enforcement of EU Law and Values: Ensuring Member States' Compliance (András Jakab and Dimitry Kochenov, eds., Oxford University Press, 2017).

[129]Nial Fennelly, *The European Court of Justice and the Doctrine of Supremacy: Van Gend en Loos; Costa v ENEL; Simmenthal, in* The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 39 (Miguel Poiares Maduro and Loïc Azoulai, eds., Hart, 2010); Monica Claes, *The Primacy of EU Law in European and National Law, in* The Oxford Handbook of European Union Law 178 (Damian Chalmers and Anthony Arnull, eds., Oxford University Press, 2015).

[130]Opinion 2/13, *supra* note 49, at para. 176. For more on preliminary references, see Morten Broberg and Niels Fenger, *Preliminary Reference, in* Principles of European Union Law - Volume 1: The European Union Legal Order 981 (Robert Schütze and Takis Tridimas, eds., Oxford University Press, 2018).

[131]Roberto Baratta, 'National Courts as "Guardians" and "Ordinary Courts" of EU Law: Opinion 1/09 of the ECJ', 38 *Legal Issues of Economic Integration* (2011) 297.

[132]Takis Tridimas, *The Court of Justice of the European Union, in* Principles of European Union Law - Volume 1: The European Union Legal Order 581, 582 (Robert Schütze and Takis Tridimas, eds., Oxford University Press, 2018).

[133]Sara Iglesias Sánchez, *The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights*, 49 Common Market Law Review 1565 (2012).

[134]The Enforcement of EU Law and Values: Ensuring Member States' Compliance (András Jakab and Dimitry Kochenov, eds., Oxford University Press, 2017).

[135]TEU first recital.

[136]TEU art. 1.

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of the Union's nature as a highly institutionalized entity, quite removed from other *agora*-type organizations. After all, the EU's development of a robust judicial system, premised upon a limitation of member states' sovereignty within specified fields,[137] was a matter of practicality as well as values. It was imperative, if its objectives were to be achieved, for its institutional-judicial arrangements to ensure the uniformity and effectiveness of EU law.[138] If "[i]nternational law's ... institutional failings [stemming from a lack of autonomy], particularly when compared to national legal systems, are ... a source of constant apologia in international legal scholarship,"[139] it seems appropriate that the international organization with the most developed sense of autonomy is the one that is most integrated, supranationally, within the legal systems of its member states.

Such an understanding casts the differing normative status of autonomy under EU and international law in less dramatic terms. The autonomy of the EU legal order can be said to be *mutatis mutandis* equivalent to the international law understanding of autonomy. Their conceptual proximity and differing status – as a principle and a notion, respectively – may simply reflect the objectives of the organizations they characterize. Though not necessarily denoting a causal relationship, the presence of elaborate judicial-institutional arrangements and effective dispute settlement mechanisms suggests that an organization's objectives justify, and even require, a robust understanding of autonomy, as derived from the notion's international law origins.

E. Conclusion

Tracing the conceptual origins of autonomy by reference to international law perhaps qualifies its reputation as the "probably most disputed ... principle" of EU law,[140] notwithstanding the controversial policy outcomes it has facilitated lately.[141] Autonomy seems to be an inherent attribute of all international organizations rather than a European peculiarity. All IOs seek, to some extent, to safeguard their political independence in order to exercise their will separately from the will of their member states, in accordance with the powers the latter have attributed to it. Thus understood, autonomy is the consequence of an organization's international legal personality. Organizations that aspire to have a systemically distinct role within the international community are also characterized by a degree of institutional independence, which differentiates their own internal legal order from general international law. On a conceptual level, autonomy under international law can thus facilitate the creation of independent systems of norms.

Still, autonomy does not yet seem to constitute a principle of international law, as it lacks explicit recognition by the international community as a whole and by international courts in particular. However, the CJEU does seem to have developed a *principle* of autonomy of the EU legal order. Rather than viewing this as an EU construct *per se*, it should be seen as an instance of the Court drawing Pygmalian inspiration from notions of international law and giving them new life within the Union framework. This should help to demystify autonomy, as it would indicate that this process may not have been motivated by "fear"[142] or "selfishness."[143] A robust understanding of autonomy, as a legal principle firmly integrated into the institutional and normative foundations of the EU, appears as a natural by-product of the member states' own commitment to an "ever closer union" with global aspirations. The Court's use of autonomy both

[137]This was explicitly acknowledged in *Van Gend en Loos*, *supra* note 13, at 12.

[138]*Internationale Handelsgesellschaft*, *supra* note 25, at para. 3.

[139]Collins, *supra* note 110, at 23.

[140]Schilling, *supra* note 88.

[141]Matteo Fermeglia and Alessandra Mistura, *Killing All Birds with One Stone: Is this the End of Intra-EU BITs (as we know them)*, EJIL:Talk! (May 26, 2020), https://www.ejiltalk.org/killing-all-birds-with-one-stone-is-this-the-end-of-intra-eu-bits-as-we-know-them; Alan Dashwood, *Republic of Moldova v Komstroy LCC: arbitration under Article 26 ECT outlawed in intra-EU disputes by obiter dictum*, 47 European Law Review 127-140 (2022).

[142]Spaventa, *supra* note 8.

[143]de Witte, *supra* note 9.

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as an independent benchmark of constitutionality and as a normative rationale underpinning the broader constitutional edifice of the EU (which includes primacy, the preliminary reference procedure and mutual trust) would suggest that autonomy has become a general principle of EU law.

This seems to be in congruence with the notion's international law origins. Organizations like the United Nations and the Council of Europe are characterized by less developed senses of autonomy. This is appropriate as they primarily seek to operate as *agorae*-platforms rather than deeply institutionalized, much less constitutionalized, entities. Though contributing to the international rule of law in important ways, their respective institutional and judicial mechanisms confirm that their autonomy is inherently limited; this corresponds to a limited ability to develop and assert their own *volonté distincte* over the sovereign will of their members. On the other hand, the way in which the EU legal order has matured institutionally and judicially demonstrates greater commitment to the original objective of the international community that IOs may constrain state arbitrariness. For the EU to do that while also having a global presence, a well-developed network of judicial and institutional arrangements safeguarding its autonomy was required. This suggests a positive correlation between the robustness of the dispute settlement mechanisms established by an IO and its autonomy.

As autonomy under international law characterizes organizations that vary significantly in form, membership, and purpose, the notion demonstrates remarkable conceptual flexibility. The CJEU has adapted it into a constitutional principle in keeping with its nature as a supranational entity and has evolved with it in keeping with the various stages of European integration. The more recent integration of substantive considerations relating to judicial protection and Article 2 TEU values in the EU principle of autonomy, seen since *Achmea* and Opinion 1/17, is thus more easily understood. In this sense, it seems not only constitutionally acceptable in domestic terms but also justified by international law—in so far as this would address challenges posed by increasing EU global action in the process of creating an ever-closer union according to its attributed competences and objectives.

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