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Principle?**

**On the Risks of Normative Functionalism and  
Selective Constitutionalisation**

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## Abstract

This paper considers the different uses and conceptualisations of 'autonomy' in EU law and public international law (PIL) to explore its nature and legal character and determine whether it has (or should) become a general principle of EU law (GPEU). This is significant because of the powerful role and position of GPEU in the hierarchy of EU law, as self-standing legal sources, framing (and legitimising) the legal order, requiring conform interpretation, and displacing lower-ranking norms in case of conflict. We argue that autonomy should be deemed a descriptive umbrella term referring to the (functional) 'independence' of EU law. We take issue with the idea of autonomy being a normative one, capable on its own of providing a justification for legal decisions and related outcomes. The Court of Justice (CJEU)'s overarching claim to autonomy in *Opinion 2/13* goes in the opposite direction and appears to establish it as a GPEU. This would mean that autonomy is more than the (descriptive) consequence of a set of rules and the *sui generis* nature of the EU as an international organisation. An independent normative content of autonomy could then be taken as the cause and justifier of the independent legal personality, powers, law-making capacity, mission, vision, and institutional makeup of the EU, and as the ultimate source of validity of 'the structure and objectives of the EU'. It may, thus, become a sort of (self-standing) meta-teleological rule of interpretation of EU norms, introducing a federalist bias towards 'an ever closer Union', fostering regional integration through the realization of the EU's objectives (as interpreted by the CJEU) practically at any rate. As we demonstrate, this is problematic on a number of levels. It exposes the flaws of functionalism as normative underpinning of a (potential) GPEU of autonomy, as it would entail a claim to (unhindered) self-rule above and beyond the *relative* independence of international organisations, and even the sovereignty of states, which does not tally with the fundamental architecture of the international legal order. If this were the case, the EU would be rendered an unconstrained, unaccountable super-entity, unbound from the foundational premises of PIL.

## Keywords

Autonomy; General Principles; public international law; functionalism; constitutionalisation; federalist bias; human rights; Rule of Law.



## I. Introduction

This paper examines the role and status of autonomy in the EU legal order. The Court of Justice of the European Union (CJEU) first referred to autonomy in the relationship between the Union and the Member States, but then increasingly used it to construct the modalities of the EU's engagement in its external relations, eventually functioning as a 'shield' against (perceived) threats to the unity and integrity of the EU legal order from international law,<sup>1</sup> restricting certain interactions.<sup>2</sup> In its most basic form, autonomy signifies the EU as an independent actor and EU law as an 'independent source of law',<sup>3</sup> separate from domestic and other international regimes. But is it simply a descriptive umbrella term and shorthand for norms which demarcate the boundary between international and EU law or is it evolving into a (new) general principle of EU law (GPEU) endowed with independent normative force? This distinction is significant because of the powerful role and position of GPEU in the hierarchy of EU law, as self-standing legal sources, framing (and legitimising) the legal order, requiring conform interpretation, and displacing lower-ranking norms in case of conflict.<sup>4</sup>

For some, it has (already) become 'a self-standing principle of EU law' with 'constitutional' importance.<sup>5</sup> Although the EU Treaties do not mention 'autonomy' of the EU legal order as such,<sup>6</sup> the CJEU started referring to it from *Opinion 1/91*,<sup>7</sup> on the creation of the European Economic Area, and presumed or claimed it as a principle in its subsequent case law,<sup>8</sup> recently using the expression 'the principle of autonomy of EU law'.<sup>9</sup> The claim may be supported by an implied functional rationale, comparable to how the principles of direct effect, primacy, and effectiveness of EU law were established. These principles were claimed to be required by the 'new legal order' as constitutional bases and as GPEU.<sup>10</sup> Although primacy is still challenged occasionally, on the whole, these principles successfully established themselves, turning the

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<sup>1</sup> *Opinion 2/13* ECLI:EU:C:2014:2454.

<sup>2</sup> *Opinion 1/00* ECLI:EU:C:2002:231, para. 12.

<sup>3</sup> Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66.

<sup>4</sup> Päivi J Neuvonen and Katja S Ziegler, 'General Principles in the EU Legal Order: Past, Present, and Future Directions' in Katja S Ziegler, Päivi J Neuvonen and Violeta Moreno-Lax (eds), *General Principles in EU Law: Constructing Legal Orders in Europe*, (Edward Elgar 2022 forthcoming) ch 1.

<sup>5</sup> Jed Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart 2018) 291, 293, 313.

<sup>6</sup> 'Autonomy' is referred to in three technical contexts in primary law, Art. 152 TFEU (autonomy of the social partners); Art. 335 TFEU (autonomy of the institutions vis-à-vis one another); and Art. 28 of Protocol 5 on the Statute of the European Investment Bank (financial autonomy of the Board of Governors).

<sup>7</sup> *Opinion 1/91* ECLI:EU:C:1991:490, paras 30, 35, 47; *Opinion 1/92* ECLI:EU:C:1992:189, paras 17f, 22, 24, 29, 36.

<sup>8</sup> See René Barents, *The Autonomy of Community Law* (Kluwer 2004); Marcus Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) 42 *European Law Review* 815, 817.

<sup>9</sup> C-612/18 P *Client Earth v European Commission* ECLI:EU:C:2020:223, para. 42, paraphrasing the European Commission.

<sup>10</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1, 12; Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

'myth' of a 'new legal order' into reality.<sup>11</sup> Is autonomy part of this 'new legal order' and following a similar trajectory towards independent normativity? Is it acquiring a constitutional dimension that 'contribute[s] ... to the implementation of the process of integration that is the *raison d'être* of the EU itself...'?<sup>12</sup> Does it make a difference that its main focus is external, outward facing toward the international law environment of the EU?

This paper considers the different uses and conceptualisations of 'autonomy' in EU law and public international law (PIL) to explore its nature and legal character and determine whether it has (or should) become a GPEU. We will argue that autonomy constitutes a descriptive umbrella term referring to the (functional) 'independence', whether substantial, procedural, or institutional, to denote the self-sufficiency of individual norms, legal systems, and international organisations, of which the EU is but one example. It is part of the structural bases (or systemic principles) on which international organisations exist, co-exist, and interact with one another and with their member states. However, we take issue with 'the idea of autonomy' being a normative one,<sup>13</sup> capable on its own of providing 'a legal justification for certain decisions' and related outcomes.<sup>14</sup> The CJEU's overarching claim to autonomy in *Opinion 2/13*, precluding the EU's accession to the European Convention on Human Rights (ECHR), appears to take this approach and, therefore, may be seen to establish it as a GPEU.<sup>15</sup> This would mean that autonomy is more than the (descriptive) consequence of a set of rules and the *sui generis* nature of the EU as an international organisation. Rather, an independent normative content of autonomy could then be taken as the cause and justifier of the independent legal personality, powers (conferred and 'implied'), law-making capacity, mission, vision and institutional makeup of the EU,<sup>16</sup> and as the ultimate source of validity of 'the structure and objectives of the EU'.<sup>17</sup> It may, thus, become a sort of (self-standing) meta-teleological rule of interpretation of EU norms, introducing a federalist bias towards 'an ever closer Union',<sup>18</sup> fostering regional integration through the realization of the EU's objectives (as interpreted by the CJEU) practically at any rate. This is problematic on a number of levels, not only from the perspective of EU law (bar *Opinion 2/13*). It would entail a claim to (unhindered) self-rule above and beyond the relative independence of international organisations, and even the sovereignty of states, which does not tally with the fundamental architecture of the international legal order. The EU

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<sup>11</sup> Stephen Weatherill, 'From Myth to Reality: The EU's "New Legal Order" and the Place of General Principles Within It' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law European and Comparative Perspectives* (Hart 2017) 21.

<sup>12</sup> *Opinion 2/13* (n 1) para. 172.

<sup>13</sup> Richard Collins and Nigel D White, 'Introduction' in Richard Collins and Nigel D White (eds), *International Organisations and the Idea of Autonomy* (Routledge 2011) 1.

<sup>14</sup> *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 230 (Dissenting Opinion of President Winiarski).

<sup>15</sup> *Opinion 2/13* (n 1).

<sup>16</sup> Critiquing a normative approach to autonomy, see Violeta Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in Inge Govaere and Sacha Garben (eds), *The Interface Between EU and International Law* (Hart 2019) 45; Katja S Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Human Rights Law* (Edward Elgar 2017) 267, 291, 297f.

<sup>17</sup> *Opinion 2/13* (n 1) para. 170.

<sup>18</sup> *Ibid* para. 167. On the meta-teleological construction of EU law, see Mitchel Lasser, *Judicial Deliberations* (OUP 2004), 207ff; and Miguel PP Maduro, 'Interpreting European Law – Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 1. cf Violeta Moreno-Lax 'Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law' in Jean-François Durieux and David J Cantor (eds), *Refuge from Inhumanity* (Brill 2014) 295.



would be rendered an unconstrained, unaccountable super-entity, unbound from the foundational premises of PIL.

Inquiring into autonomy from the perspective of GPEU has different layers and triggers a series of questions: first, the ground will be laid by considering what is the meaning and content of autonomy in EU law? How is it used and what functions does it fulfil? (II). Does it display the characteristics of a GPEU? (III). Second, the paper will then juxtapose the meaning of autonomy in international law and assess the implications of the wider international legal context for the CJEU's conception of autonomy (IV). Third, against this backdrop, the meaning and legal nature of autonomy reflected in the CJEU's *Opinion 2/13* will be appraised, as the most far-reaching pronouncement to date, and whether it has gained an independent normative force beyond its components, which would make it a GPEU.<sup>19</sup> It will ask what can we learn from this about the method how GPEU are claimed and recognised, what problems, risks and limitations are revealed by it, and what are the consequences of recognising autonomy as a GPEU? (V). Fourth, interrogating whether autonomy should be recognised as such, the paper will return to discuss international law and the flaws of functionalism as normative underpinning of a (potential) GPEU of autonomy (VI).

## II. The Meaning of Autonomy in EU Law

Autonomy of the EU legal order is a multifaceted concept that has been invoked in different contexts, meanings, and functions.<sup>20</sup> The origins of claims and constructions of autonomy lie in and directly follow (ontologically) from the fact that the EU is a distinct or 'new' legal order, from its *lex specialis* character in relation to (other) international law.<sup>21</sup> It is often described as having an internal and external dimension.<sup>22</sup> The internal dimension is directed against and establishes autonomy of the EU legal order vis-a-vis the Member States. It was first articulated in *van Gend* and soon after in *Costa v ENEL*, where the Court derived consequences for how EU law is to be applied within the Member States from the special nature of the community they had created.<sup>23</sup> While this reasoning is based on far-reaching teleological, functionalist interpretation, it still locates the new legal order claim (structurally) in the *lex specialis* character of EU law to which Member States have agreed reciprocally in the Treaties. Its *lex specialis* character remains a standard part of the Court's reasoning in the context of autonomy, emphasising

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<sup>19</sup> See further on the distinction between principles, legal principles and constitutional principles Neuvonen and Ziegler (n 4), and Katja S Ziegler and Aristi Volou, 'Human Rights and General Principles: Beyond the EU Charter of Fundamental Rights' in Ziegler, Neuvonen and Moreno-Lax (n 4) ch 18.

<sup>20</sup> In more detail, Ziegler (n 16) 291-302.

<sup>21</sup> *van Gend* (n 10) 12. The Court dropped the reference to international law in its phrase the 'new legal order of international law' only a year later in *Costa v ENEL* (n 3). See Bruno de Witte, 'European Union Law: How Autonomous is its Legal Order' (2010) 65 *Zeitschrift für Öffentliches Recht* 141, 147.

<sup>22</sup> See for an overview of the different dimensions of autonomy developed in the case law Ziegler (n 16) 293-8; 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' (2017) 54 *Common Market Law Review* 1627, 1630-61. On the internal/external facets, their genealogy and evolution, see Moreno-Lax (n 16) 49ff.

<sup>23</sup> *van Gend* (n 210) 12; *Costa v ENEL* (n 3).

'... a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation...'.<sup>24</sup>

The Court refers to the *lex specialis* nature of *all* characteristics of EU law when invoking 'the specific characteristics of the Union and Union law'<sup>25</sup> of the 'new legal order':

'EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions that are applicable to their nationals and to the Member States themselves. 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'.<sup>26</sup>

Autonomy thus defined denotes that EU law is distinctive as an empirical and legal reality, as a separate, special, and 'autonomous' regime which pursues 'its own particular objectives'.<sup>27</sup> It does not (yet) entail a claim of a wider or general normative content beyond each one of the specific characteristics. *Sui generis* as the EU may be, as a starting point, this reflects the 'certain autonomy' of (all) international organisations inherent in their *lex specialis* character, recognised by the International Court of Justice (ICJ).<sup>28</sup>

The external dimension of autonomy vis-à-vis international law, relevant, for example, when the EU concludes international agreements and interacts with other international organisations, is narrower than the *lex specialis* character that the CJEU defends against its Member States. First, it is a 'reduced' autonomy, relating only to the *essential* aspects of the special characteristics of the EU legal order,<sup>29</sup> which are non-negotiable in an external context. In these situations

'[p]reservation of the autonomy of the Community legal order requires ... that the *essential character of the powers of the Community and its institutions* as conceived in the Treaty remain unaltered'.<sup>30</sup>

The CJEU has long held that autonomy comprised both the non-interference with 'the *independence of action* [of the EU] in its external relations' and with the '*essential elements* ... of the [EU's] structure as regards both the prerogatives of the institutions and the positions of the Member States vis-à-vis one another'.<sup>31</sup> More recently, *Opinion 1/17* held that an international agreement may affect, or even interfere with, the powers of the EU, as long as

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<sup>24</sup> *Opinion 2/13* (n 1) paras 157ff.

<sup>25</sup> *Opinion 2/13* (n 1) para. 42; *Opinion 1/17* ECLI:EU:C:2019:341, para. 110.

<sup>26</sup> *Opinion 1/17* (n 25) para. 109.

<sup>27</sup> *Opinion 1/91* (n 7) para. 30.

<sup>28</sup> *Legality of the Use by A State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) ICJ Rep 1996, para. 19.

<sup>29</sup> Contartese (n 22), e.g. 1670 and passim.

<sup>30</sup> *Opinion 1/00* (n 2) paras 12 (emphasis added).

<sup>31</sup> *Opinion 1/76* ECLI:EU:C:1977:63, para. 12 (emphasis added).

‘the indispensable conditions for safeguarding the *essential character of those powers* are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order’.<sup>32</sup> The source and rationale for (functional) autonomy (*qua* independence) in the external dimension are the essential characteristics of the EU and its law.<sup>33</sup>

Second, it is therefore fundamental to identify which of the specific characteristics, making up the *lex specialis* regime, are ‘essential’ characteristics of the EU legal order. The Court identifies as a first component its *ultimate interpretative authority over EU law*, which is key to its consistent and uniform interpretation, and ‘to ensure that those specific characteristics and the autonomy of the legal order thus created are preserved’.<sup>34</sup> In the (more limited) external dimension, the main element is the power to interpret EU law authoritatively for *the EU internally*.<sup>35</sup> Thus, the power of interpretation of EU law by other bodies only interferes with autonomy where they would make *internally binding* pronouncements on the interpretation of EU law (something that would already be precluded by the independent legal personality of the EU and *lex specialis* character of EU law, and is specifically forbidden by explicit rules on adjudication). The mere *consideration* of EU law by an external body therefore would not affect the autonomy of the legal order. This principle is directly reflected in the Treaty: Article 344 TFEU requires Member States to settle disputes concerning EU law through the EU’s dispute settlement mechanisms.<sup>36</sup>

A second component of the ‘essential elements’ is their link to substantive constitutional values of the EU legal order, such as ‘the principles of liberty, democracy and respect for human rights’.<sup>37</sup> The definition of essential elements of the EU and how they are distinguished from specific characteristics is not entirely resolved by the Court’s jurisprudence.<sup>38</sup> However, *Opinion 1/17* and references to a hierarchy of norms in the EU legal order elsewhere in the case law<sup>39</sup> strongly suggest that *higher order constitutional principles* (e.g. founding values, fundamental rights) are part of the essential characteristics.

‘[A]utonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, which states that the Union “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights”, the general principles of EU law, [and] the provisions of the Charter...’.<sup>40</sup>

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<sup>32</sup> *Opinion 1/17* (n 25) para. 107 (emphasis added). *Opinion 1/00* (n 2) para. 12.

<sup>33</sup> *Opinion 1/17* (n 25) para. 109.

<sup>34</sup> *Ibid* para. 110; C-284/16 *Slovak Republic v Achmea* ECLI:EU:C:2018:158, para. 35.

<sup>35</sup> *Opinion 1/91* (n 7) para. 46: ‘the very foundations’ of EU law. See also Contartese (n 22) 1663-9.

<sup>36</sup> Case C-459/03 *Commission v Ireland (MOX plant)* ECLI:EU:C:2006:345.

<sup>37</sup> Joined Cases C-402&415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union* [2008] ECR I-6351, ECLI:EU:C:2008:46 (*‘Kadi I’*), para. 303, see also paras 282ff, 304ff. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission et al v Yassin Abdullah Kadi* [2013] (*‘Kadi II’*), para. 67. See also C-362/14 *Maximilian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650, para. 60. Konstantinides ‘The Rule of Law as the Constitutional Foundation of the General Principles of EU Law’ in Ziegler, Neuvonen and Moreno-Lax (n 4) ch 16.

<sup>38</sup> Contartese (n 22) 1670; Cécile Rapoport, ‘Balancing on a Tightrope: Opinion 1/17 and the ECJ’s Narrow and Tortuous Path for Compatibility of the EU’s Investment Court System (ICS)’ (2020) 57 *Common Market Law Review* 1725.

<sup>39</sup> Above (n 37).

<sup>40</sup> *Opinion 1/17* (n 25) para 110.

In sum, autonomy, as constructed in the CJEU's case law in the internal dimension is identical with the *lex specialis* character of EU law, that is, the power to create separate — or autonomous — rules for the regime established by the EU Treaties. These are rooted in the consent of the Member States as contracting parties and ultimate 'masters of the Treaties'. It comprises *all* norms of EU law as 'an independent source of law',<sup>41</sup> including those governing the EU's relationship with the domestic legal orders of the Member States, which derogate from (in being more specific than) general international law. In the external dimension, autonomy is described by the essential constitutional characteristics of EU law, such as its constitutional values, competences, and the exclusive authority of the CJEU to interpret its entire *lex specialis* body of norms.

*Opinion 2/13*, however, took a much broader, absolutizing approach to defining the external dimension of autonomy than the one just described. The CJEU held that the draft accession agreement to the ECHR was incompatible with the autonomy of EU law.<sup>42</sup> In essence,<sup>43</sup> it constructed autonomy in the external dimension widely: first, it identified *all* specific characteristics or *lex specialis* elements of the EU as *essential elements*, thereby conflating 'specific' and 'essential' characteristics. Second, it also constructed expansively what amounted to interpretation of EU law, including almost *any consideration* of EU law by an external body, dropping the requirement that a ruling on EU law by an external body needed to be *internally binding* to conflict with autonomy. It thus unified the internal/external dimensions of autonomy, externalising the internal (*lex specialis*) meaning of autonomy.

Albeit the high watermark of the CJEU's autonomy jurisprudence, *Opinion 2/13* appears as an outlier. Firstly, because of the clarification by the more recent *Opinion 1/17*, which returns to the (more) established meaning of autonomy outlined in this section, and secondly, because of a softening of the CJEU's stance in a number of respects in which *Opinion 2/13* overshot its mark.<sup>44</sup> Nonetheless, *Opinion 2/13* has had an impact, which should not be disregarded. This will be analysed in section V to demonstrate the risks, inconsistencies, and consequences, if autonomy evolved towards a GPEU. For the time being we will continue the discussion of autonomy as a possible new GPEU by reference to its established (narrower) definition.

### III. Autonomy as General Principle of (EU) Law?

*Opinion 2/13* aside, are references to autonomy in the internal and external dimension a descriptive umbrella term for a variety of rules that 'protect' the independence of the EU legal order from the legal orders of its Member States and international law or a general principle of, or in, the EU legal order with separate normative force?

Considering the functions of GPEU, autonomy could potentially qualify as such. The CJEU has used autonomy in a way that indeed reflects several of the various roles of general principles:<sup>45</sup> as substantive standard of legality review, for example, in reviewing draft international agreements; as gap-filler; and as a coherence device, ensuring the effectiveness and

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<sup>41</sup> *Costa v. E.N.E.L* (n 3).

<sup>42</sup> Katja S Ziegler, 'The Second Attempt at EU Accession to the ECHR: Opinion 2/13' in Graham Butler and Ramses A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart 2022 forthcoming).

<sup>43</sup> See in more detail section V below.

<sup>44</sup> In relation to what amounts to an internally binding interpretation of EU law, the notion of mutual trust, the exclusion of jurisdiction in the Common Foreign and Security Policy, see Ziegler, 'Accession' (n 42).

<sup>45</sup> For an overview, see Koen Lenaerts and Jose A Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629; see also Neuvonen and Ziegler (n 4).

consistency of the EU legal order as a whole — at least in the internal dimension, when constructing it as a *lex specialis* regime. These functions are reflected in the case law more widely, but are strongly exemplified in *Opinion 2/13*. However, a normative claim based on a functional (integrationist) rationale alone does not (and should not) make autonomy a general principle, if the conceptual and methodological characteristics of a general principle are absent.

Both EU law and PIL conceptualise general principles as independent sources of law, characterised by their fundamental character (other rules of the system must conform with them) and their generality (referring to their level of abstraction and broad application). Both reflect two methods how general principles are recognised: first, by an *inductive operation* which often involves a *mixture of internal and external sources*, considering specific expressions of what may be a wider overarching axiom; a general principle is then established by an inductive empirical-comparative exercise (though the depth of engagement may vary), looking for support in other legal orders. This has the effect of validating or legitimising a new norm through external sources. Second, and more controversially, general principles may be derived *purely internally* from within the legal order concerned. This could happen *either by an inductive method*, extracting a common principle from specific rules of that legal order, *or by a deduction* from a higher order principle or value in the own constitutional context from which more specific norms are derived as general principles. This mechanism may be more problematic because the grounds and material by which to justify a general principle are more limited and there is no external reference point to check the ‘legitimacy’ of a claim to a general principle. The International Law Commission (ILC) has nonetheless recognised such endogenous derivation as a valid method.<sup>46</sup>

Therefore, it may be asked whether the CJEU makes a normative claim when referring to autonomy that is different from its identified components by applying one of these methods. The Court’s textual references to autonomy in themselves are inconclusive as to whether it considers autonomy to be a descriptive or normative concept beyond a shorthand for the *lex specialis* character of EU law. However, arguments pertaining to how the Court uses autonomy, that is, its functions, support an approach that autonomy is referred to in a descriptive way, as a result which follows if certain rules are complied with. Textually, the most frequent references to autonomy describe it as a *consequence* of specific aspects of the EU legal order rather than a source of normative repercussions:

‘an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, *consequently*, there is *no adverse effect on the autonomy* of the EU legal order’.<sup>47</sup>

From a methodological perspective, *Opinion 2/13* apart (to which we will return), the CJEU does not make self-standing normative deductions from autonomy. Rather its stance is consistent with an inductive approach that sources a GPEU from different norms *within* the EU legal order. Autonomy might be considered as a possible generalisation of more specific expressions of norms that give the EU legal order its *lex specialis, sui generis* character. These norms and their teleological interpretation, which may be captured in references to autonomy, form the basis and source for any normative effects of (the constitutional dimension of) autonomy. But, if autonomy is understood as the *lex specialis* character of EU law, it is not operating with an independent normative content of its own. It is sufficient to interpret the

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<sup>46</sup> Marcelo Vázquez-Bermúdez, *Second Report on General Principles of Law* (International Law Commission, A/CN.4/7741 9 April 2020), paras 164f, 171.

<sup>47</sup> *Opinion 2/13* (n 1) para. 183 (emphasis added).

specific rules to which it refers for that end. This means the Court does not treat autonomy as an independent source of law and hence should not be deemed a GPEU in the internal dimension. It refers rather to the bundle of special characteristics of the EU and its law, relating to 'the constitutional structure of the ... Union and the very nature of that law'.<sup>48</sup>

Similarly, in the external dimension, when the EU acts on the international plane, any normative consequences do not follow from autonomy itself. Autonomy constitutes a functional precondition for the EU to operate independently in the international sphere. Acknowledging and respecting that autonomy is a 'criterion'<sup>49</sup> or a 'requirement'<sup>50</sup> for the conclusion of international agreements.<sup>51</sup> It can be deemed a 'foundational concept',<sup>52</sup> a systemic 'premise',<sup>53</sup> or even a structural basis or 'principle'<sup>54</sup> — as the CJEU has come to designate it — describing the EU's capacity to self-rule in its external relations. But the normative implications themselves follow from the specific rules binding EU institutions when acting externally. They underlie references to autonomy that either directly, or as part of the overall legal framework,<sup>55</sup> require EU institutions not to act in conflict with the essential EU constitutional norms and values. One might ponder whether an independent normative content ascribed to autonomy might point to the obligation that the EU protect aspects of its legal order in the external dimension (such as its values), preserving the integrity of EU law vis-a-vis the international action of the Union or its Member States. But that also already follows from the interpretation of the specific norms themselves (and, as appropriate, in the balancing with other norms) and does not require autonomy as a separate source of obligation. If anything, from the perspective of independent normative force, it would make more sense to consider whether the inverse of autonomy, that is, openness to international law,<sup>56</sup> might be a general principle — but this is beyond the scope of this paper.

As an interim conclusion, autonomy emerges as an evocative umbrella term, describing the consequences derived from specific norms of the Treaties, both in the internal and external dimension of autonomy, but without independent normative effect. Functionally, there is even no need to rely on (a possible GPEU of) autonomy because there is no gap in the Treaties to fill. At present, it might be described as a label for the valve that regulates the EU/domestic and EU/international law interaction. In the external dimension, references to autonomy are functionally comparable with dualist approaches to international law,<sup>57</sup> but again, this would not give it independent normative content, and instead renders it a formal tool to open or close the EU legal order to exogenous rules. The specific substantive law, without autonomy's mediation, determines the normative decision as to whether and how this should happen.

A comparative perspective on how international law reflects the autonomy of international organisations illuminates the context of the traditional/narrow meaning of autonomy in EU law.

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<sup>48</sup> cf Case C- 621/18 *Wightman* ECLI:EU:C:2018:999, para. 45.

<sup>49</sup> *Opinion 2/15 (Singapore FTA)* ECLI:EU:C:2017:376, para. 301.

<sup>50</sup> *Opinion 1/17* (n 25), heading.

<sup>51</sup> Inter alia, Case C- 28/12 *Commission v. Council* ECLI:EU:C:2015:282, paras 38-43.

<sup>52</sup> Odermatt (n 5) 293-4.

<sup>53</sup> Jan-Willem van Rossem, 'The Autonomy of EU Law: More is Less?' in Ramses A Wessel and Steve Blockmans, *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (TMC Asser 2013) 13, 18.

<sup>54</sup> *Opinion 1/17* (n 25) under 'principles', paras 106-111; *Client Earth* (n 9) para. 42.

<sup>55</sup> E.g. not to confer jurisdiction over EU law to an international tribunal with internally binding effect (Art. 344 TFEU).

<sup>56</sup> Art. 3(5) TEU.

<sup>57</sup> Ziegler, 'Autonomy' (n 16) 296.

## IV. Autonomy in International Law

Turning from EU to international law, this section will first explore the different dimensions of autonomy of international organisations (1) and what they tell us about autonomy in the EU legal order (2). It will show that the narrow construction of autonomy in the EU coheres with the notion of autonomy of international organisations under general international law. We will then turn to potential normative deductions of autonomy in PIL and return to the question whether autonomy in EU law could or should evolve into a general principle in the following section (V).

### 1. Dimensions of Autonomy in the Law of International Organisations

Autonomy in international law is normally used in its plain, ordinary meaning to describe independence and capacity of self-rule of a subject of international law.<sup>58</sup> At its core, it is a relational concept, which can refer to the 'political', 'institutional', 'functional', or 'systemic' self-sufficiency of such entity and its ability to operate without the control or direction of others.<sup>59</sup> For states, autonomy is an existential precondition, a 'central criterion of Statehood'.<sup>60</sup> Unless capable, as a matter of fact, of self-government within a specific territorial domain, a state cannot be said to exist as a separate legal identity under international law.<sup>61</sup> International organisations, too, require a certain measure of independence to claim their own international legal personhood.<sup>62</sup> But there are important differences between the autonomy of organisations and that of states.<sup>63</sup>

First, while states are territorial entities with sovereignty and the right to rule 'in regard to a portion of the globe ... to the exclusion of any other State',<sup>64</sup> international organisations (including the EU) are 'functional' creatures<sup>65</sup> without separate territorial reality of their own.<sup>66</sup>

Second, states are originary subjects and plenipotentiaries under international law;<sup>67</sup> their powers are 'inherent' in their statehood. International organisations have 'derivative' powers,

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<sup>58</sup> Hurst Hannum and Richard B Lillich, 'The Concept of Autonomy in International Law' (1980) 74 *American Journal of International Law* 858.

<sup>59</sup> Jean D'Aspremont, 'The Multifaceted Concept of the Autonomy of International Organisations and International Legal Discourse' in Collins and White (n 13) 63.

<sup>60</sup> James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 62.

<sup>61</sup> However, that independence does not need to be absolute, neither in law nor in practice, for statehood to materialize. See *ibid* (n 60) 62. See also Krystyna Marek, *Identity and Continuity of States in Public International Law* (Droz 1954) 186-9.

<sup>62</sup> See below section IV(1)(a).

<sup>63</sup> Aurel Sari, 'Autonomy, Attribution and Accountability: Reflections on the *Behrami* Case' in Collins and White (n 13) 257, 258-9.

<sup>64</sup> *Las Palmas Case* [1928] 2 R.I.A.A. 829, 838 (per Max Huber).

<sup>65</sup> Kenneth W Abbott and Duncan Snidal, 'Why States Act through Formal International Organisations' (1998) 42 *Journal of Conflict Resolution* 3. See also Henry G Schermers and Niels M Blokker, *International Institutional Law* (6th edn, Brill 2018) 8-14.

<sup>66</sup> Nonetheless, international organisations may be entrusted with the administration of territory, see Ralph Wilde, *International Territorial Administration* (OUP 2008).

<sup>67</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 106.

dependent on conferral by states,<sup>68</sup> and which are not general, but limited to a delegated sphere ‘governed by the “principle of speciality”’.<sup>69</sup>

Third, differently from states, international organisations are multiplex legal entities, constituted by other ‘autonomous’ international legal ‘units’ (states), which maintain their capacity to act independently from the organisation.<sup>70</sup>

These three differences point to one key ontological distinction: the autonomous existence of states is, ultimately, a matter of fact, while international organisations are contractual entities. They cannot ‘emerge’ as a result of secession or de-colonisation. Organisations need to be ‘created’ through (international) law by states. This does not mean they are incapable of exercising (a certain degree of) autonomy, once established. However, that autonomy cannot be ‘absolute’, but remains determined and constrained by the powers they are given to fulfil the functions for which they were constituted, and is, therefore, more limited than that of states.<sup>71</sup> Autonomy of international organisations in international law is, thus, multifaceted, manifesting itself as ‘political’, ‘institutional’, or ‘systemic’ independence,<sup>72</sup> with regard to their legal personality and responsibilities, but within the realm of their allocated competences.

a. *Autonomy and Legal Personality of International Organisations*

Autonomy is closely related to the legal personality of an international organisation, depending on two key elements: one legal, the other factual.<sup>73</sup> The first is the will of the member states, formally expressed in the constituting act to create an international organisation,<sup>74</sup> a new subject of international law ‘endowed with a certain autonomy, to which the parties entrust the task of realizing common goals’.<sup>75</sup>

The second, factual element, ‘the *actual* establishment of the organisation’,<sup>76</sup> is decisive for the concrete exercise of the powers conferred on it,<sup>77</sup> because, as Gaja put it, ‘an organisation merely existing on paper cannot be considered a subject of international law’.<sup>78</sup> The organisation needs to affirm itself as a distinct subject of international law, separate from its ‘creators’, and demonstrate ‘the capacity to operate upon an international plane’ independently of the founding states to make its legal personality real.<sup>79</sup> Autonomy refers to the ability of the

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<sup>68</sup> Such conferral of powers can take different shapes, see Dan Sarooshi, *International Organisations and Their Exercise of Sovereign Powers* (OUP 2005).

<sup>69</sup> *Nuclear Weapons* (n 28) 78; *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep. 174, 180.

<sup>70</sup> cf José E Alvarez, ‘International Organisations: Then and Now’ (2006) 100 *American Journal of International Law* 324.

<sup>71</sup> de Witte (n 21), 142. cf Christina Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019) 31, arguing that the claim to ‘normative autonomy’ of EU law by the CJEU ‘is best understood as absolute ... rather than a matter of degree’.

<sup>72</sup> D’Aspremont (n 59).

<sup>73</sup> Tarcisio Gazzini, ‘Legal Personality of International Organisations’ in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organisations* (Elgar 2010) 33.

<sup>74</sup> *Nuclear Weapons* (n 28) para. 19.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> *Reparation for Injuries* (n 69) 179.

<sup>78</sup> Giorgio Gaja, First Report on Responsibility of International Organizations, 26 March 2003, UN Doc. A/CN.4/532, 10-11.

<sup>79</sup> cf Finn Seyersted, ‘International Personality of International Organizations: Do Their Capacities Really Depend upon their Constitutions?’ (1964) 4 *Indian Journal of International Law* 1, 39-40.



organisation to express a will separately from its members, a *volonté distincte*.<sup>80</sup> It translates 'the *effective capacity* necessary for [the organisation] to act as an international subject'.<sup>81</sup>

As in EU law, this has an internal and external dimension. Internally, autonomy is indicated by the extent to which the organisation can function, regardless of the abstention or opposition of one or more of its member states, marking both political and institutional independence from its membership. Externally, it refers to the treaty-making powers and the capacity of the organisation to enter into legal relations with other subjects of international law independently.<sup>82</sup>

However, autonomy and legal personality of international organisations are different in one important respect: while legal personality is 'a yes or no question', autonomy 'is a matter of degree'.<sup>83</sup> Autonomy depends on the type and extent of the competences and of the control maintained by its member states, as defined in the institutional arrangements, voting procedures, and veto powers retained over certain decisions. Depending on its founding treaty, the international organisation will be more or less autonomous.<sup>84</sup> The autonomy of an international organisation, thus, reflects its (relative) freedom to lead an independent international life, to act and speak autonomously on the international stage separately from its member states. But this does not tell us which powers it has or how they may be exercised.

#### *b. Autonomy and the Powers of International Organisations*

Treaties constituting international organisations are distinguishable from 'ordinary' international treaties in that they confer powers upon the institutions or organs of the organisation through which it becomes visible as an autonomous subject of international law.<sup>85</sup> They define and limit the organisation's competences to the 'functions [specifically] bestowed upon it' for a specific purpose, which must be exercised 'with a view to the fulfilment of that purpose'.<sup>86</sup> Depending on the extent of the transfer of competences, organisations will be more or less autonomous. Even though their powers are not plenary, they cannot be arbitrarily curtailed. International organisations should be able to 'exercise these functions to their full extent, in so far as the Statute [by which they come into being] does not impose [explicit] restrictions'.<sup>87</sup> The principle of effectiveness may even compel to recognise 'implied powers' out of 'functional necessity',<sup>88</sup> if they are required for the organisations in question 'to achieve

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<sup>80</sup> Nigel D White, 'Discerning Separate Will' in Wybo P Heere (ed.), *From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System* (TMC Asser 2004) 31. cf Dapo Akande, 'International Organisations' in Malcolm Evans (ed.), *International Law* (4th edn, OUP 2014) 248.

<sup>81</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005), 137 (emphasis added).

<sup>82</sup> José E Alvarez, *International Organisations as Law-makers* (OUP 2005) 129; Bob Reinalda and Bertjan Verbeek (eds), *Autonomous Policy Making by International Organisations* (Routledge 1998).

<sup>83</sup> Tarcisio Gazzini, 'The Relationship between International Legal Personality and the Autonomy of International Organizations' in Collins and White (n 13) 196, 200.

<sup>84</sup> Niels Blokker, 'International Organisations and its Members: "International Organisations belong to All Members and to None"—Variations on a Theme' (2004) 1 *International Organisations Law Review* 139; Nigel D White, 'Separate but Connected: Inter-Governmental Organizations and International Law' (2008) 5 *International Organisations Law Review* 175.

<sup>85</sup> *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (Advisory Opinion) [1927] PCIJ Series B, No 14, 36.

<sup>86</sup> *ibid* 64.

<sup>87</sup> *ibid* (emphasis added).

<sup>88</sup> Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale' in Suzanne Bastid et al. (eds), *La communauté internationale* (Pédone 1974) 277. Critically: Guy Fiti Sinclair, *To Reform the World: International Organisations and the Making of Modern States* (OUP 2017).

their objectives'.<sup>89</sup> The doctrine of implied powers, therefore, reinforces the autonomy of international organisations as independent subjects of international law.<sup>90</sup>

Member states no longer control or retain the conferred powers. They become powers of the organisation itself, which cannot be recalled — other than by treaty amendment or when the organisation is dissolved. The organisation thus acquires 'agency' and assumes 'policy autonomy': it becomes independent to construct the problems to be confronted and formulate solutions, framing the issues, setting the agenda, and deciding the course of action, following its foundational instrument.<sup>91</sup>

The 'will' of the organisation is not merely an aggregate of the positions of its members, it 'reformulates them at a higher level of complexity',<sup>92</sup> assembling powers that no single member state has or could otherwise exercise in isolation. The organisation does not need the consent of each and every one of them *qua* founding party for each and every decision it takes (requirements depend on legal procedures provided for in the constitutive treaty). According to the theory of 'abstract consent', once states adhere to a treaty establishing an organisation, they are deemed to have agreed to assume future legal obligations stemming from the decisions taken by the institutions or organs of the organisation without needing to express their actual consent in each individual case. This may be considered a consequence of the *pacta sunt servanda* rule in relation to the constitutive treaty.<sup>93</sup> Thus, the conferral of powers, too, reinforces the autonomy of the organisation.

Whether a power has in fact been conferred remains subject to interpretation, in particular for implied powers. What constitutes a situation of 'functional necessity' when certain powers might be implied? Depending on one's perspective, organisations will be perceived to either represent community interest or as overstepping their mandate. The *exercise* of legal competences demonstrates the autonomy of international organisations. However, if that exercise is to be accepted, it must be perceived to be legitimate.

There is a dialectical relationship between autonomy and legitimacy. Legitimacy requires autonomy (on the part of the organisation) and autonomy needs legitimacy (expressed, at minimum, in the acceptance of the acts of the organisation by its members). Because of this, autonomy constitutes 'a fundamental requirement' of the legitimacy of the conduct of an organisation.<sup>94</sup> There are other criteria by which to judge the legitimacy of an exercise of power, but procedurally, the *perception* of autonomy *qua* independence from external interference or internal pressure is key. At the same time, legitimacy needs to be corroborated and manifested in that the members abide by the rules and decisions of the organisation. As Engström explains, '[i]n the dichotomous relationship between organisations and members, powers ... assume a dual role'. An independent exercise of powers leads to the autonomy of the organisation. But autonomously exercised powers by the organisation are, in turn, dependent

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<sup>89</sup> *Nuclear Weapons* (n 28) para. 25. See Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organisations' (1970) 44 *British Yearbook of International Law* 111.

<sup>90</sup> *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 182.

<sup>91</sup> Bob Reinalda and Bertjan Verbeek, 'Policy Autonomy of Intergovernmental Organizations' in Collins and White (n 13) 87, 94-5.

<sup>92</sup> Chiara Martini, 'States' Control Over New International Organisations' (2006) 6 *Global Jurist Advances* 1, 25; David J Bederman, 'The Souls of International Organisations: Legal Personality and the Lighthouse at Cape Sparte' (1996) 36 *Virginia Journal of International Law* 275.

<sup>93</sup> Ingrid Detter, *Law Making by International Organisations* (Norstedt & Söner 1965) 322.

<sup>94</sup> Viljam Engström, 'Powers of Organizations and the Many Faces of Autonomy' in Collins and White (n 13) 213ff; Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organisations* (United Nations University Press 2001).

on the support by the members for their full realisation. Paradoxically, 'dependence' becomes a condition for 'autonomy'.<sup>95</sup> The organisation's powers are, in the end, both an expression of the (underlying) consent of the member states, as well as the embodiment of its autonomy in the international plane.

*c. Autonomy, Legitimacy and Accountability of International Organisations*

While autonomy enables the organisation to fulfil its mandate effectively, the power of independent action requires it to be accountable for its (legitimate) exercise.<sup>96</sup> (Substantive) legitimacy requires international actors to be accountable for the autonomous performance of their competences. This is why there is a perceived tension between autonomy and accountability.<sup>97</sup>

Accountability implies that international organisations as international law actors are subject to certain standards of behaviour,<sup>98</sup> and sanctions if they fail to comply with them;<sup>99</sup> after all, the organisation's will is separate from its members' but not completely 'free', it can only be directed towards the specific objectives and functions determined by the founders in its constitutive instrument. 'International responsibility' represents the legal expression of accountability that follows from the principle that 'any breach of an engagement involves an obligation to make reparation'.<sup>100</sup> It is the inevitable consequence of the legal capacity of an actor to assume — and failing to discharge — obligations under international law.<sup>101</sup> The 'dependency' of international organisations on their members to implement decisions and fulfil obligations makes the allocation of responsibility a complex exercise.<sup>102</sup> Cooperation of multiple actors within (and through) international organisations bears the risk of dissipation of responsibility — the 'problem of many hands'.<sup>103</sup> While organisations are their own legal persons under international law, they are also forums of inter-state cooperation. It is the member states that provide the organisation with the material resources, territorial base, and policy tools to act. They also participate in the decision-making process, staff the organs/institutions of the organisation, and, at the same time, retain their own subjectivity under international law. They can even try to 'hide' behind the 'institutional veil' of the organisation to evade responsibility, instrumentalizing it to undertake conduct contrary to

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<sup>95</sup> Engström (n 94) 214.

<sup>96</sup> ILA Accountability of International Organizations Committee, Final Report, Report of the Seventy-First Conference, 16-21 August 2004, Berlin, 168.

<sup>97</sup> Sari (n 63) 257.

<sup>98</sup> Gerhard Hafner, 'Accountability of International Organisations' (2003) 97 *Proceedings of the American Society of International Law* 236.

<sup>99</sup> Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29f.

<sup>100</sup> *Chorzów Factory (Merits)*, [1928] PCIJ Series A, No 17, 29.

<sup>101</sup> See generally, Ewa Butkiewicz, 'The Premises of International Responsibility of Inter-governmental Organisations' (1981-1982) 11 *Polish Yearbook of International Law* 117; Manuel Pérez González, 'Les organisations internationales et le droit de la responsabilité' (1988) 92 *Revue générale de droit public* 63; and Rosalyn Higgins, 'The Legal Consequences for Member States of the Non-Fulfilment by International Organisations of their Obligations towards Third Parties' (1995) 66 *Annuaire de l'Institut de Droit International* 254.

<sup>102</sup> cf Articles on the Responsibility of International Organisations, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly, UN Doc. A/66/10. See Maurizio Ragazzi (ed.), *Responsibility of International Organisations. Essays in Memory of Sir Ian Brownlie* (Brill 2013); and André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (CUP 2015).

<sup>103</sup> Jan Klabbers, 'Transforming Institutions: Autonomous International Organisations in Institutional Theory' (2017) 6 *Cambridge International Law Journal* 105, 117.

international law.<sup>104</sup> The equilibrium between autonomy and accountability of organisations is, thus, fragile. Maintaining it is essential for the perception of conduct as legitimate.

## 2. Implications from International Law for Autonomy as a GPEU

It may be concluded from the discussion of international organisations in international law that their autonomy relates to specific expressions of separateness and independence of derived subjects of international law. They refer to the independent legal personality, distinctiveness as an entity, and competences to fulfil allocated functions. As such, autonomy does not carry an independent normative meaning. It is rather an allusion to an empirical fact or a collective reference to the more defined specific rules that underlie autonomy.

The narrow definition of general principles in the ILC Draft Conclusions on General Principles of Law supports this argument. The ILC requires recognition of general principles by the whole international community.<sup>105</sup> General principles derived from domestic legal orders must be ascertained in ‘the various legal systems of the world’ by a ‘wide and representative’ comparative analysis and their ‘transposition to the international legal system’ proven.<sup>106</sup> For general principles formed in the international legal order, the Special Rapporteur suggested that they be established by widespread acknowledgment in international instruments.<sup>107</sup> Thus, general international law seems to confirm the conclusion reached for autonomy in EU law (excluding *Opinion 2/13*) as reflecting the far-reaching *lex specialis* character in an internal dimension and, in a more limited relational way, in the external dimension.

As such, neither the international nor the European notion of autonomy seems to reflect the characteristics of a general principle as an independent source of law. It lacks additional normative content over and above its use as an umbrella term. The meaning and scope of a GPEU of autonomy would be limited to the specific expressions it already has. However, its labelling *qua* GPEU may, nevertheless, provide a starting point for acquiring an independent normative force.

The question then may be asked whether autonomy *could (or should) become* a GPEU with a wider independent meaning. It would not be inconceivable to construct a GPEU of autonomy inductively from individual norms in the Treaties. An independently (autonomously) constructed GPEU of autonomy, protecting the specificity and independence of the EU, would become fundamental and have significant implications: as a GPEU, it would be both an independent source of law, from which further norms could be derived, and a principle of interpretation, which could ‘trump’ other norms in case of conflict.<sup>108</sup>

However, defining its content would be fraught with inconsistencies. If autonomy acquired an independent wider normative content, beyond preserving the *lex specialis* character of the EU internally and essential characteristics externally, it would be difficult to reconcile with the nature of international organisations and to find an external analogue by reference to which autonomy could be legitimised (externally ‘validated’). One might think of sovereignty as the closest in content and thrust. But sovereignty is inextricably linked to statehood, and for that reason alone unsuitable to support the elevation of autonomy of international organisations (as

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<sup>104</sup> Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007). See also August Reinisch, ‘Securing the Accountability of International Organizations’ (2001) 7 *Global Governance* 131; Karel Wellens, ‘Fragmentation of International Law and Establishing an Accountability Regime for International Organisations’ (2003-2004) 26 *Michigan Journal of International Law* 1159.

<sup>105</sup> Draft Conclusions 2 and 4, UN Doc A/CN.4/L.955 (28 July 2021) and Add.1 (29 July 2021).

<sup>106</sup> Draft Conclusions 4 and 5 (n 105).

<sup>107</sup> Draft Conclusion 7 of Special Rapporteur Vázquez-Bermúdez (n 46) Annex.

<sup>108</sup> Neuvonen and Ziegler (n 4) (II, fundamental character).

derived subjects of international law) to a general principle. Sovereignty (without more) is not in itself a principle of international law from which normative implications could be extracted for the interpretation and application of international rules. It is a structural premise of the international legal order, which is based on the existence of equal and independent states entering into and abiding by mutual commitments.<sup>109</sup> The capacity to freely conclude international agreements is in fact 'an attribute of state sovereignty'.<sup>110</sup>

PIL does not accept an *in dubio mitius* approach to interpreting treaty obligations (which would construe obligations restrictively and maximise sovereignty), even with regard to states. The Vienna Convention on the Law of Treaties (VCLT), codifying relevant customary norms, does not contain such a principle.<sup>111</sup> It has long been established that sovereignty *as such* has no independent relevance in the interpretation of international duties. It has been excluded as an independent source of law impacting on the construction of legal commitments. The reverse is true: although '[r]estrictions upon the independence of States cannot ... be presumed',<sup>112</sup> once a state concludes a treaty it undertakes to exercise its sovereign rights in conformity with it.<sup>113</sup> It is international law instruments, rather than the sovereignty of states, which 'must be given their maximum effect'.<sup>114</sup>

Likewise, interpretations that seek to maximise the autonomy of an international organisation are limited by international law. According to accepted canons of interpretation, it is the 'object and purpose of a treaty, taken together with the intentions of the parties, [which] are the prevailing elements' to construe international obligations.<sup>115</sup> This is the general principle of effectiveness, also called the 'teleological principle',<sup>116</sup> which is 'one of the fundamental principles of interpretation'.<sup>117</sup> Therefore, allocating some special character to autonomy, as a meta-rule of interpretation, let alone a general principle, providing a standard of validity, filling a gap, or superseding 'lower' norms in case of conflict would go even further than the interpretative exercise in light of a specific *telos* — which is in itself considered problematic. Object and purpose of a treaty are often not clearly defined, and there may be tensions between multiple goals of a treaty.<sup>118</sup> Moreover, teleological interpretation is not boundless. It needs to be anchored in specific, clearly demonstrated purposes and hence is limited by them.<sup>119</sup> An unconstrained (and unproven) meta-teleological rule of autonomy is, thus, not warranted under international law, and cannot be used to support such a rule under EU law.

Nonetheless, if one accepts methodologically that a general principle also might be derived deductively from a value purely internal to a legal order, there is no need for an external analogue to validate and legitimise it. But what would be its internal justification? What would

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<sup>109</sup> See Marija Dordeska, *General Principles of Law Recognized by Civilized Nations (1922-2018)* (Brill 2020), chs 7 and 8 and international case law referred therein.

<sup>110</sup> *Case of the S.S. "Wimbledon"* [1923] PCIJ File E. b. II. Docket III. I., 25.

<sup>111</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331. See also *Arbitration Regarding Iron Rhine Railway (Belgium v. Netherlands)*, Award of 24 May 2005, para. 53; cf Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 414; Hersch Lauterpacht, 'Restrictive Interpretation and Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 48, 69; and Brownlie (n 67) 635.

<sup>112</sup> *The case of the S.S. "Lotus"*, [1927] PCIJ Series A, No 10, 18.

<sup>113</sup> *Case of the S.S. "Wimbledon"* (n 110) 25.

<sup>114</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase [1966] ICJ Rep 6, 91.

<sup>115</sup> *Iron Rhine Railway* (n 111) para. 53. See also Arts 31 and 32 VCLT.

<sup>116</sup> *South West Africa Cases* (n 114) 91.

<sup>117</sup> *Territorial Dispute (Libya v. Chad)*, Judgment [1994] ICJ Rep 6, 51.

<sup>118</sup> Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill 2020) 191, 212.

<sup>119</sup> *Ibid* 212-13.

be the higher order value that it would protect, if not the sum of pre-existing constitutional rules (*lex specialis* character/essential characteristics), which is already covered by the specific rules themselves? It could not be the autonomy of the international organisation *for its own sake*, for the same reason that state sovereignty cannot be used in the inductive construction of a general principle.

The common value might be rooted in a fact: the ontological existence in the international legal order of an international organisation; and the (perceived) necessity for such existence to be 'defended' by any means.<sup>120</sup> In the case of the EU: to preserve its regional integration objectives, giving rise to a presumption in favour of federalism that protects from interference with (a particular interpretation of) the EU's goals.

One may question whether a fact is sufficient to derive normative consequences. A teleological approach to international organisations (rather than to the international norms that constitute and sustain them), which emphasises their supranational/constitutionalising nature over their contractual roots, is not unknown in international law.<sup>121</sup> This approach elevates the purposes of the organisation as a vivifying force, giving it a cause and sense of direction. But it conflates means with ends, cloaking the aspirational with the legal. Under this reading, the organisation's mission not only constitutes its *raison d'être*, it also becomes an independent normative grounding that serves to justify specific legal outcomes.<sup>122</sup> Maximising the organisation's mandate, rather than a potential consequence of the interpretation and application of the relevant norms, then becomes the normative justification for their implementation in a particular way; this prioritises the realisation of the organisation's goals, shifting the focus from effectiveness of rules to convenience of results to advance the organisation's mission. The reasoning is circular: if an outcome facilitates the performance of the organisation's *telos* is justified by that very *telos* without limits.

Such a tautology is an unsuitable basis for normative deductions. It also disregards that the existence of international organisations is not an absolute but derives from the will of states — membership can change and the organisation disbanded. Unless the derived nature of the EU is contested, arguing for a constitutional revolution in international law, there is no coherent way to construct a general principle of autonomy to protect the existence of an international organisation (and a peculiar understanding of its mission) at all costs. It would pit the creation against its creators, breaking legitimacy links and reversing the relationship of dependence between the Union and its Member States, who would no longer figure as 'masters of the Treaties' but become subservient to (a specific conception of) the integration project.

The general meanings and manifestations of autonomy discussed thus far (in both international and EU law), reveal that the CJEU should be seen as having used it as a limited concept or umbrella notion, using the word 'principle' perhaps to add rhetorical weight and to send a less technical message to the EU institutions and the Member States by using the term. In essence, autonomy refers to specific *substantive* features of the EU legal order (the constitutional arrangement with the Member States) and substantive values, giving the EU legal order its 'specific characteristics', some of which have an 'essential character' in the external dimension. Both meanings (the rhetorical and the substantial), in one form or another, are driven by an inward-facing concern for the constitutional order of the EU and the division of competences between the EU and its Member States in light of possible contestations by

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<sup>120</sup> Nikos Lavranos, 'Protecting European Law from International law' (2010) 15 *European Foreign Affairs Review* 265.

<sup>121</sup> Tim Clark, 'The Teleological Turn in the Law of International Organisations' (2021) 70 *International and Comparative Law Quarterly* 533.

<sup>122</sup> cf *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47.

the latter, which may be particularly challenging in the external dimension. However, to regulate the relationship with the Member States, no new norms are necessary. A wider claim to autonomy as a GPEU would also be inconsistent with the structure of international law and the derived nature of the EU's existence and competences. Nevertheless, *Opinion 2/13*, suggests such a wider claim to which we turn next.

## V. Independent Normative Power? The Autonomy Claim in *Opinion 2/13*

As argued above, depending on its content, there is either no added value or a logical/conceptual flaw in conceptualising autonomy as a GPEU. Yet, it cannot be precluded that claims based on autonomy may develop normative power, however legally unfounded, inconsistent, and incoherent their starting point.<sup>123</sup> This has been demonstrated by the far-fetched and unprecedented assertion of autonomy in *Opinion 2/13*. This prominent high watermark of the CJEU asserting autonomy fits into a wider context of a more closed slant on international law, and the ECHR in particular.<sup>124</sup> But for the more specific question of whether autonomy is acquiring the status of a general principle with independent normative content, the Opinion has remained an outlier. Yet, it demonstrates well the risks inherent in a methodologically unsound approach to identifying GPEU generally and especially one of autonomy. The following will outline the Court's stance in *Opinion 2/13*, unveil its deficiencies, consequences, and risks, and provide reasons why autonomy should not be developed into a GPEU with independent normative power.

*Opinion 2/13*, in contrast to preceding and superseding case law, asserted autonomy against international law in a more far-reaching way. Holding that the international agreement by which the EU would have acceded to the ECHR was incompatible with the autonomy of the EU legal order was a particularly strong assertion of autonomy: the ECHR shares the same values as the EU, enjoys a 'special status' in the EU and in the regional legal order in Europe, and has 'special significance' in the multi-layered sources of human rights in the EU, amongst others, informing EU human rights *qua* general principles.<sup>125</sup>

The strong and prominent assertion of autonomy against accession to the ECHR is reflected in the following aspects of *Opinion 2/13*: the Court continues to affirm autonomy as a *consequence* of<sup>126</sup> the constitutional/'specific characteristics',<sup>127</sup> or 'essential character',<sup>128</sup> of the EU in the external dimension.<sup>129</sup> But other passages reflect a textual shift that appears to separate the 'specific characteristics' from autonomy, which could suggest an independent

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<sup>123</sup> Georg Jellinek, *Allgemeine Staatslehre* (Häring ed, 3rd edn, 1914), 337-60; Jens Kersten, 'The Normative Power of the Factual: Georg Jellinek's Phenomenological Theory of Reflective Legal Positivism' in Torben Spaak and Patricia Mindus (eds), *The Cambridge Companion to Legal Positivism* (CUP 2021) 248; Nicoletta Bersier Ladavac, Christoph Bezemek and Frederick Schauer (eds), *The Normative Force of the Factual. Legal Philosophy Between Is and Ought* (Springer 2019). See also Weatherill (n 11) for the precedents in the history of EU constitutionalism.

<sup>124</sup> cf Bruno de Witte, 'The Relative Autonomy of the European Union's Fundamental Rights Regime' (2019) *Nordic Journal of International Law* 65; Ziegler, 'Autonomy' (n 16) 269ff, 280-8, 297-8; and Moreno-Lax (n 16) 61ff, for the legacy of *Opinion 2/13* regarding international human rights and refugee law.

<sup>125</sup> e.g. C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* ECLI:EU:C:1991:254, para. 41. See further Ziegler and Volou (n 19).

<sup>126</sup> *Opinion 2/13* (n 1) paras 183, text above (n 47).

<sup>127</sup> *Opinion 2/13* (n 1) para. 178ff (and also paras 172, 174, 200, 215, 217, 235, 248, 257f).

<sup>128</sup> *Opinion 2/13* (n 1) para. 183 (cf also para. 167).

<sup>129</sup> *Opinion 2/13* (n 1) paras 170ff.

normative claim ('[i]n order to ensure that the specific characteristics *and* the autonomy of that legal order are preserved...'<sup>130</sup>).

More importantly, the CJEU draws more extensive conclusions from autonomy than merely safeguarding the *lex specialis*/essential elements of the EU, suggesting a new (independent normative) content: it both interprets autonomy expansively and applies it liberally to the provisions of the accession agreement,<sup>131</sup> revealing an antagonistic approach towards the international legal order.

First, it widens the specific characteristics of the EU legal order to the external dimension of autonomy. *Opinion 2/13* drops the distinction between 'specific' and 'essential' characteristics in the external dimension and, at the same time, further extends the specific characteristics of EU law, elevating the notion of mutual trust to a constitutional value akin to those in Article 2 TEU,<sup>132</sup> paving the way to define it also as an essential characteristic. Similarly, the absence of judicial review in the Common Foreign and Security Policy, a shortcoming of the EU legal order, becomes a special characteristic as well.<sup>133</sup> Both hence form part of the thrust of autonomy, which is directed against an international agreement (and the international legal order more generally), and human rights in the external dimension specifically.<sup>134</sup> In doing so, the Court places any international engagement under a reservation, in essence, of all of EU law applicable in the EU-internal dimension.

'The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured *within the framework of the structure and objectives of the EU*'.<sup>135</sup>

The reservation as to the 'structure and objectives of the EU' is consequential, but also selective. 'Structure and objectives' are defined by the 'EU's objectives, as set out in Article 3 TEU' and made concrete by 'a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy'. For the Court, '[t]hose provisions ... are part of the framework of a *system that is specific to the EU* ... to contribute ... to the implementation of the process of integration that is the *raison d'être* of the EU itself ...'.<sup>136</sup> The objectives then encompass *all* of EU law, but the selectivity is noteworthy, too. The description of the structures and objectives omits any reference to human (or fundamental) rights — which since *van Gend* have 'become part of [the] legal heritage' of the EU.<sup>137</sup> The enumeration draws

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<sup>130</sup> *Opinion 2/13* (n 1) para. 174 (emphasis added).

<sup>131</sup> cf Tobias Lock, 'The Future of EU Accession to the ECHR after Opinion 2/13: Is it Still Possible and Is it Still Desirable?' (2015) 11 *European Constitutional Law Review* 239, 243, 262ff., for possible misunderstandings of the CJEU. See also Ziegler, 'Accession' (n 42).

<sup>132</sup> *Opinion 2/13* (n 1) para. 191, 194. On mutual trust see also Saéñz Pérez, 'Mutual Trust as a Driver of Integration: Which Way Forward?' in Ziegler, Neuvonen and Moreno-Lax (n 4) ch 29. See also Violeta Moreno-Lax 'Mutual (Dis-)Trust in EU Migration and Asylum Law: The Exceptionalisation of Fundamental Rights' in Maribel González Pascual and Sara Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (CUP 2021) 77.

<sup>133</sup> See also Wessel, 'General Principles in EU Common Foreign and Security Policy' in Ziegler, Neuvonen and Moreno-Lax (n 4) ch 34.

<sup>134</sup> See further Moreno-Lax (n 16) 55ff (especially 67-72).

<sup>135</sup> *Opinion 2/13* (n 1) para. 170.

<sup>136</sup> *Opinion 2/13* (n 1) para. 172.

<sup>137</sup> *van Gend* (n 10) 12.



entirely from the objectives in Article 3 TEU, rather than the constitutional values in Article 2 TEU.

This facilitates a (superseding) teleological interpretation based on the EU objectives, rather than its constitutional framework, competences, values, and limits,<sup>138</sup> which inverts the constitutional hierarchy of norms, placing the objectives of EU integration above (and beyond) the values that motivate it.<sup>139</sup> Human rights protection through ECHR accession is presented as contrary to (an unwritten, unsubstantiated normative claim to) autonomy. This is striking in itself and, even more so, because it contradicts the constitutional requirement in EU primary law to accede in Article 6 TEU<sup>140</sup> and the hierarchical status of fundamental rights in the EU legal order (which binds the Court by virtue of Article 19 TEU).

Second, *Opinion 2/13* construes broadly what amounts to an interpretation of EU law by an international tribunal outside the EU legal order that is internally binding on the EU, stretching it to the mere consideration of, or repercussions for, EU law.<sup>141</sup> Through a wide conception of autonomy, *Opinion 2/13* projects the *lex specialis* nature of the EU legal order onto the international context and precludes interference.

This approach to autonomy, which injects it with an expanded meaning and additional consequences, thus, introduces a separate normative dimension which could thereafter be viewed as a claim to a general principle without a methodologically sound and transparent justification. The arbitrary nature both of the definition and the consequences of autonomy conceived with an independent normative content make it problematic. The concern is not the judicial development of the law *per se* but that it occurs without transparent justification as to the method, reasoning, and anchoring of such a development, transcending the unambiguous wording of Article 6 TEU and ignoring the explicit will of the Treaty's framers. Autonomy pursuant to *Opinion 2/13* would, in addition, give rise to double indeterminacy when defining its content and establishing its legal consequences — opening the door to legal uncertainty, if not arbitrariness. This would make it a limitless concept that could be used to rationalise any outcome with regard to both the EU and the international legal order — in particular when seen in the light of subsequent case law, which shows a restrictive trend towards international law, allocating an exiguous role to exogenous rules, even though without directly referring to autonomy.<sup>142</sup>

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<sup>138</sup> Like in *Kadi* (n 37) the Court does not consider an interpretative alignment of international and EU law in the area of human rights which could lead to a harmonious interpretation of the two bodies of law.

<sup>139</sup> cf Moreno-Lax (n 16) 55f. The relationship between market freedoms and fundamental rights before their formal constitutionalisation, when fundamental rights were mostly presented as obstacles to integration/market freedoms that required justification; e.g., C-112/00 *Schmidberger v. Austria* ECR 2003 I-5659, ECLI:EU:C:2003:333; C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* ECLI:EU:C:2007:772.

<sup>140</sup> *Opinion 2/13* (n 1) para. 200.

<sup>141</sup> Mere consideration of EU law does not amount to an internally binding interpretation. It is a 'normal' scenario for any Court applying a limited, defined standard of review. Likewise: Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue - Autonomy or Autarky?' (2015) 38 *Fordham International Law Journal* 955; Ziegler, 'Autonomy' (n 16) 301.

<sup>142</sup> e.g. with regard to the Convention on the Rights of Persons with Disabilities ('CRPD'), 2515 UNTS 3, see Joined Cases C-335/11 and C-337/11 *HK Danmark* ECLI:EU:C:2013:222; C-356/12 *Glatzel* ECLI:EU:C:2014:350; Case C-363/12 *Z* ECLI:EU:C:2014:159; Case C-354/13 *FOA* ECLI:EU:C:2014:2463; and concerning the Convention relating to the Status of Refugees ('Geneva Convention'), 189 UNTS 150, see Case C-481/13 *Qurbani* ECLI:EU:C:2014:2101, deploying autonomy-inspired reasoning to 'close off' the EU legal order to the full impact of a ratified Treaty, in the case of the CRPD, and of an 'embedded' Treaty (substantively incorporated as the cornerstone of the Common European Asylum System by direct reference in Art 78 TFEU and Art 18 EUCFR), in the case of the Geneva Convention. See further Moreno-Lax (n 16) 62-7; and Ziegler, 'Autonomy' (n 16) 277ff.

Thus constructed, autonomy has far-reaching consequences. It is deployed as an overarching, unqualified principle. That is apparent from autonomy in the external dimension not being balanced against other treaty norms, which may comprise accountability as a dimension of autonomy — such as the constitutional requirements of ECHR accession (Article 6(2) TEU), openness and engagement with international law (Article 3(5) TEU), or the founding value of the rule of law (Article 2 TEU) — and the own constitutional hierarchy — between economic integration and the protection of fundamental rights (Article 6(1) TEU). It is used as a device to displace even primary law (*contra legem*) within and to the detriment of (a holistic vision of) the EU legal order. Interpreted in this way, autonomy in the external dimension goes beyond the consequences of an interpretation of state sovereignty as a putative general principle of international law. Taken as such an abstract and absolute principle, autonomy may justify *whatever* restrictive approach to international law is considered appropriate to shield the EU from international obligations.<sup>143</sup>

A normative claim of autonomy alone, like the one put forward in *Opinion 2/13*, would be insufficient justification for a GPEU. But would a potential GPEU of autonomy be desirable or even legally possible?

## VI. Normative Deductions from Autonomy? The Value of (Posited) Constitutional Values

The autonomy of international organisations in international law oscillates between the analytic-descriptive-empirical and the programmatic-aspirational. In these two forms, it constitutes both a structural precondition and a policy imperative for international organisations to be able to exist, function effectively, and discharge their mandate according to their founding act.<sup>144</sup> It demarcates the line between the internal and the external ‘world’: delineating what belongs to the legal order of the organisation and what lies beyond. In this sense, autonomy constitutes a relational, legal-empirical characteristic that can only be defined in relative terms and ‘in relation to’ another international actor/regime/rule originating ‘outside’. What lies ‘inside’ allows the functioning of the international organisation as an independent legal entity in international law. The same holds true for autonomy in EU law with its internal and external dimensions — the approach in *Opinion 2/13* apart. Thus, autonomy can be pictured as a kind of pseudo-sovereignty of international organisations in the international sphere and, therefore, as a structural basis of PIL.

Further normative deductions, as in *Opinion 2/13*, including whether autonomy can be characterised as a general principle of law in the international legal order or a GPEU, should be approached with caution, because of the differences between states and international organisations and the inescapable rootedness of international organisations in the international legal order.<sup>145</sup> The EU is no different in this regard. Considering it to be different in this sense would require to acknowledge that the EU, by claiming autonomy, has completely detached itself from its foundations in international law and committed an act of legal revolution giving it the same kind of original (non-derivative) sovereignty as states.

One important consequence of the autonomy of international organisations are the ‘products’ of their political and institutional independence. From their own decisions and procedures, a

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<sup>143</sup> For an alternative approach Katja S Ziegler, ‘Beyond Pluralism and Autonomy: Systemic Harmonisation as a Paradigm for the Interaction of EU Law and International Law’ (2016) 35 *Yearbook of European Law* 667.

<sup>144</sup> Sari (n 63) 257.

<sup>145</sup> Violeta Moreno-Lax and Paul Gragl, ‘The Quest for a Theoretical Framework: Co-implication, Embeddedness and Interdependency between EU Law and Public International Law’ (2016) 35 *Yearbook of European Law* 455.

corpus of 'secondary' law, dedicated to the fulfilment of the organisations' goals, emerges as a separate legal order. Organisations create their own special regimes (*leges speciales*), separate from the system of general international law (*leges generales*). The level of self-sufficiency of these special regimes will vary, depending on the 'thickness' of institutional arrangements and the existence of an internal court or dedicated body, vested with power of authoritative interpretation with internally binding effect — like the CJEU in the EU. The *lex specialis* character can indeed be extremely significant, as the EU legal order demonstrates with its doctrines of direct effect, primacy, and effectiveness, to an extent that it has been considered of *sui generis* character. However, this only works in the internal dimension of an international organisation, not in its interaction with the international environment in which it is still anchored. This is why references to autonomy in the external dimension structurally cannot externalise the entire body of *lex specialis* (which is internally only limited by non-derogable *ius cogens*). Externalisation would negate the autonomy of *other* bodies of international law (including non-member states and other international organisations with which the EU may interact).<sup>146</sup>

By virtue of being a subject of international law, the law of the organisation (here: EU law), remains inextricably linked to, and bound by, general international law. They are not just constrained under their own derivative law.<sup>147</sup> Although there is significant scholarly debate as to the level of autonomy of special regimes, it is impossible even for special regimes to be *completely* self-contained and impermeable to 'outside' general international rules,<sup>148</sup> because all international organisations are 'creatures' of international law and, thus, necessarily embedded in the system of general international law. At least, international law remains applicable in a residual capacity to fill gaps and in relation to overarching principles, in particular, duties flowing from secondary rules of international law (on creating obligations, such as the law of treaties, and on international responsibility) as well as *ius cogens* norms.<sup>149</sup>

As much as autonomy may enhance the effective functioning of international organisations, the functional benefits of autonomy are increasingly questioned: too much autonomy conflicts with the rule of law.<sup>150</sup> Human rights, and their constitutionalizing effects at international law,<sup>151</sup> can be invoked both as sources of legitimacy and as necessary restrictions on autonomy.<sup>152</sup> Functionalism cannot be used to justify *whatever* effects on the rights of individuals.<sup>153</sup> Autonomy linked to the effectiveness of organisations in fulfilling their functions, only serves to answer the empirical question of *what* organisations are supposed to achieve. Assessing *how* they are meant to achieve it, requires a normative, value-based perspective as a reference

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<sup>146</sup> Limiting the WHO's competence by reference to the purposes/powers of other international organisations, see *The Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73.

<sup>147</sup> *ibid* para. 37.

<sup>148</sup> cf Weiler (n 10) 2422: 'The Community legal order ... is a truly self-contained legal regime'.

<sup>149</sup> See e.g., Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 484.

<sup>150</sup> Richard Collins and Nigel D While, 'Moving Beyond the *Autonomy-Accountability* Dichotomy: Reflections on Institutional Independence in the International Legal Order' (2010) 7 *International Organisations Law Review* 1, 3.

<sup>151</sup> See Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 559; and Erika de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51.

<sup>152</sup> See further Moreno-Lax (n 16); and Violeta Moreno-Lax, 'Systematising Systemic Integration: "War Refugees", Regime Relations, and a Proposal for a Cumulative Approach to International Commitments' (2014) 12 *Journal of International Criminal Justice* 907.

<sup>153</sup> Jan Klabbers, 'Theorising International Organisations', in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook on the Theory of International Law* (OUP 2016) 618.

point — which is external to autonomy and also lying outside the *lex specialis* regime of an international organisation because, as Klabbers put it, ‘not all paths to effectiveness are equally acceptable’.<sup>154</sup> Purely formal, non-axiological formulations of autonomy would detach international organisations from (substantive conceptions of) the rule of law, making them illegitimate.<sup>155</sup>

There is, indeed, a growing recognition that the protection of human rights is ‘the ultimate purpose of all law’,<sup>156</sup> including the law produced by, or within, international organisations. And preoccupations with the effectiveness of laws and policies cannot override this ‘ultimate purpose’. No system governed by the rule of law can free itself from the constraints imposed by human rights as ultimate demarcation between legitimate uses and abuses of power.<sup>157</sup> Meta-teleological conditions (or inertia) imposed by the overarching objectives of an organisation cannot do away with ‘elementary considerations of humanity’<sup>158</sup> and the *erga omnes* obligations deriving from ‘the principles and rules concerning the basic rights of the human person’.<sup>159</sup> From the international legal perspective, imposing a ‘quasi-federal discipline’ within the EU,<sup>160</sup> to preserve the specific ‘structure and objectives of the EU’ at all costs,<sup>161</sup> remains subordinate to compliance with what has been called the ‘General International Human Rights Law’,<sup>162</sup> including, at minimum, the provisions of the Universal Declaration on Human Rights and the UN Charter,<sup>163</sup> whose ‘expressed aim’ is ‘to promote freedom and justice for individuals’.<sup>164</sup> This is also clear from a non-selective reading of the ‘special characteristics’ of EU law itself. If autonomy were a faithful reflection of the main constitutional features of the EU legal order, it would include fundamental rights as founding values and higher order primary law norms binding both the Member States and the EU as a whole.

Promoting autonomy-based constructions, maximising the realization of the organisation’s objectives, especially if this goes to the detriment of basic constitutional values, such as human rights (and similar general substantive principles of international law), is not supported by the system. The ‘higher purpose’ of international law is not to maximise abstract conceptions of the sovereignty of states (or the autonomy of organisations), but only as a precondition of peaceful co-existence and interaction based on the rule of law ‘in conformity with the principles

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<sup>154</sup> Klabbers (n 103) 118.

<sup>155</sup> Moreno-Lax (n 16); Lucas Lixinski, ‘Taming the Fragmentation Monster through Human Rights? International Constitutionalism, “Pluralism Lite” and the Common Territory of the Two European Legal Orders’ in Vicky Kosta, Nickos Skoutaris, and Vassilis P Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 231; Emmanuel Voyakis, ‘International Law and the Objectivity of Value’ (2009) 22 *Leiden Journal of International Law* 51.

<sup>156</sup> Hersch Lauterpacht, *International Law: Collected Papers*, Vol. 2 (CUP 1975) 47. See further, Stephen Gardbaum, ‘Human Rights as International Constitutional Rights’ (2008) 19 *European Journal of International Law* 749; Ian D Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001); Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009).

<sup>157</sup> Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law* (CUP 2010).

<sup>158</sup> *Corfu Channel Case (UK v. Albania)*, Judgment [1949] ICJ Rep 4, 22.

<sup>159</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment [1970] ICJ Rep 3, para. 34. See also Arts 55 and 56 of the UN Charter; and *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion)* [1971] ICJ Rep 16.

<sup>160</sup> Eckes (n 71) 11.

<sup>161</sup> *Opinion 2/13* (n 1).

<sup>162</sup> Nigel Rodley, ‘Is There General International Human Rights Law?’ (*EJIL:Talk!*, 16 October 2014) <<https://www.ejiltalk.org/is-there-general-international-human-rights-law/>>.

<sup>163</sup> *United States Diplomatic and Consular Staff in Tehran*, Judgment [1980] ICJ Rep 3, para. 91.

<sup>164</sup> *Effect of Awards* (n 122) 57.

of justice', 'promoting and encouraging respect for human rights and for fundamental freedoms'.<sup>165</sup> Therefore, elevating (a partial vision of) the EU's goals to justify a normative conception of autonomy that neglects the founding values of the organisation, inspired as they are by this universal axiology, goes far 'beyond what can reasonably be regarded ... a process of interpretation' by the CJEU, straying into 'a process of rectification or revision' of the Treaties,<sup>166</sup> 'contrary to their letter and spirit'.<sup>167</sup> Methodologically, the process is also defective. It conflates the necessity of overcoming a (perceived) problem of efficacy of the system (and the maximisation of its goals) with a peculiar solution formulated by the Court, breaking substantive and procedural legitimacy links foreseen in the constitutive instruments.

## VII. Conclusion

Constraining the interpretation of fundamental rights to preserve 'the structure and objectives' of EU integration (instead of the other way round) as in *Opinion 2/13*, may benefit the autonomy of the EU legal order and the monopoly of the CJEU's interpretation of EU law. But it is a super-functional approach that radically departs both from the explicit wording in Articles 2 and 6 TEU and the Charter of Fundamental Rights, and from the ordinary understanding of autonomy in international law. The construction of autonomy as a GPEU as per *Opinion 2/13* would affect not just the relationship with the international legal order, but also the construction of the EU legal order internally.

Autonomy, as an ontological reality, is part of the systemic architecture of international organisations. It is their structural and existential *sine qua non*, denoting the self-sufficiency of their organs, policies, and procedures. It also lends credence and legitimacy to the law 'produced' by the organisation, whether leading to a self-contained system of norms or not. The *lex specialis* character of the law of international organisations can be extensive, with few limits in the internal dimension vis-a-vis its membership. In the external dimension, however, the *lex specialis* nature of an autonomous legal order does not give rise to a normative force to replace the axiological sources of validity found in general international law.<sup>168</sup> If it did, this would amount to a constitutional revolution that would see the EU transcending its constituting principle that, as an international organisation with specific conferred powers, it is still a derived subject of international law, rather than an originary, independent sovereign.

The leap towards a normative claim to untrammelled, plenary autonomy can happen factually, but not coherently within the existing system of international law. Like any revolutionary act, it then depends on acceptance and recognition by other subjects of international law, and principled resistance is the more likely response. Recoiling to a narrow, descriptive conception of autonomy (as a 'criterion', 'requirement' or structural 'principle'<sup>169</sup>), recognising its role in establishing the EU as an international actor with the ability to interact with the outside world, while ensuring its effective engagement and participation in the international legal order, is a much better investment. The integrity of EU law does not necessitate isolation by the rejection and 'exclusion ... of any other law'.<sup>170</sup>

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<sup>165</sup> Art. 1(1) and (3) UN Charter.

<sup>166</sup> *South West Africa Cases* (n 114) 91.

<sup>167</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 221, 229.

<sup>168</sup> In so far as PIL limits the autonomous interpretation of the concept of autonomy as a GPEU.

<sup>169</sup> *Opinion 2/15* (n 49) para. 301; *Opinion 1/17* (n 25) heading; and *Client Earth* (n 9) para. 42.

<sup>170</sup> *Opinion 2/13* (n 1) para. 193.



