

4 The multifaceted concept of the autonomy of international organizations and international legal discourse*

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The idea of the autonomy of international organizations classically reflects the political independence of the organization when it comes to making its own decisions.¹ Autonomy as political independence essentially touches upon the different relationships – eg of control, subordination, partnership – existing between the organization and member states.² Being autonomous in this case thus refers to the degree of impermeability of the organization's decision-making process to states acting, for example, as creator (master), member (subordinate) or as a peer on the international stage.

This aspect of autonomy – classically referred to as the separate will or the *volonté distincte*³ – is often envisaged together with the question of legal personality. Such an association can be traced back to the classical contention that the ability to act and speak autonomously on the international plane is a constitutive element of the legal personality of international organizations.⁴ It can also be explained, more pragmatically perhaps, by the simple fact that international organizations that can express a separate will from member states usually constitute organizations endowed with an international legal personality. The interconnections between autonomy as political independence and legal personality are very well illustrated by the case law of the International Court of Justice (ICJ), for it is probably that aspect of autonomy that the Court had in mind when it referred to the 'large measure of personality' of the United Nations (UN).⁵ While this is not the place to discuss the relationship between legal personality and this aspect of autonomy,⁶ the kinship between the two – and the debates that it has fuelled – suffice to demonstrate the central place that this aspect of autonomy has occupied in international law literature. Being so central, this aspect of autonomy has caused difficulties squaring the multidimensional character of international organizations with largely 'one-dimensional' areas of international law – eg the law of treaties or legal responsibility.⁷

However, an account of autonomy restricted to the political independence of the organization would certainly be too narrow. Indeed, autonomy can also refer to the degree of institutional independence possessed by the organization; that is, the impermeability of the organization to external institutional interferences.⁸ This aspect of autonomy begs the question of the extent to which international organizations constitute a legal order distinct from the general international legal

order. Autonomy as institutional independence also pertains to the ability of the organization to behave as an independent member of the international community to which it belongs. Institutional independence is thus what bolsters the ability of the organization concerned to fulfil its functions autonomously without being subject to broader constraints imposed by the international community.

Like the idea of autonomy as political independence (separate will), the idea of autonomy as institutional independence has also enjoyed a central position in international institutional law, for it has been elevated into a fundamental linchpin of any institutional regime. Institutional independence is a necessary condition of the identity of – especially regional – international organizations whose *raison d'être* lies in the creation of a separate regime from general international law. Establishing a separate regime dedicated to the fulfilment of certain goals which serve the particular interests (and ideals) of certain members naturally requires a significant degree of institutional independence from the international legal order as a whole. However, the extent to which an international organization is institutionally autonomous has remained the object of much controversy. Indeed, while some have argued that the legal order of an international organization is necessarily embedded in the general international legal order – a position seemingly followed by the ICJ⁹ – others have defended the full impermeability of the legal order of international organizations to general international law.¹⁰ In spite of the absence of scholarly consensus on the degree of that autonomy, it is nonetheless uncontested that some degree of institutional independence constitutes a central tenet of any international institutional regime.¹¹

It must be conceded that autonomy as political independence (separate will) and autonomy as institutional independence do not constitute two completely watertight dimensions of autonomy, for they are inevitably intertwined. Indeed, any encroachment in the institutional independence of the organization will often result in a diminished separate will, the organization being bound by norms to which it has not formally consented. This is so because institutional independence is undoubtedly instrumental in the exercise of a separate will by an organization. To that extent, the distinction between the political independence (separate will) and the institutional independence of an organization is somewhat artificial. The permeability of these two dimensions of autonomy to one another is however inescapable, as it is inherent in the nature of international organizations which are – as insightfully described by Brölmann – continuously oscillating between an open and closed set up,¹² an oscillation which is illustrated fundamentally by the various capacities in which states may be acting within the framework of the organization, alluded to above. Hence, any taxonomy of the various dimensions of autonomy will necessarily fail if it seeks to isolate them completely. Despite such a reciprocal permeability, it is however argued here that international legal scholars cannot overlook this taxonomy based on the distinction between autonomy as separate will and autonomy as institutional independence. It will be shown here that the permeability between the two does not call for a uniform concept of autonomy. On the contrary, what is needed is not only a clear distinction between these two fundamental dimensions of the concept of autonomy of international

organizations but also an understanding that each of these dimensions is multifaceted and cannot be explained in one-dimensional (or ‘zero-sum’) terms.¹³

The need to disentangle the various aspects of each of these two dimensions of the autonomy of international organizations can be explained by the tendency – that accompanies their centrality in the literature – to portray autonomy in such one-dimensional terms. Indeed, as will be explained in the final section, the autonomy of international organizations, whether envisaged from the vantage point of political or institutional independence, has to be explained in such one-dimensional terms in order to meet the underlying agenda sought – that is, the preference for the international over the sovereign will, or ensuring the furtherance or effectiveness of the particular political project of the organization itself.

However, this chapter submits that the centrality of the idea of the autonomy of international organizations, either as political independence or as institutional independence, should not lead to a monolithic and one-dimensional conception of autonomy. The chapter starts by showing some of the multiple facets of each of these two dimensions of autonomy before turning to the various purposes which the idea of autonomy has served in the discourse of international legal scholars and which explain why international legal scholars are so amenable to a one-dimensional conception of autonomy, whether as political or institutional independence.

The multifaceted character of autonomy

This section broaches four hypotheses where autonomy has been given a different meaning and has been directed at different ends. This section does so in espousing the above-mentioned distinction between autonomy as political independence and autonomy as institutional independence. The following paragraphs present two diverging conceptions of autonomy as political independence and two diverging understandings of autonomy as institutional independence.

These four ensuing examples require a caveat, however. The following manifestations of autonomy, both as political independence and as institutional independence, are not always the most ostensible nor the most obvious manifestations of autonomy, such as those being addressed in other chapters of this volume.¹⁴ Some of the examples examined here have been the object of limited attention in the literature, despite the fact that they pertain to fundamental mechanisms of international institutional law, such as, for instance, the termination of international organizations. These examples, however, help to illustrate the multifaceted character of the autonomy of international organizations.

Autonomy as political independence

The political independence (separate will) of the organization, that is the ability of the organization independently to take decisions of its own, is itself a multifaceted and heterogeneous concept which manifests itself both in treaty law and the law of state responsibility. Indeed, as alluded to above, autonomy as political

independence inextricably raises the question of the interaction between the organization and states acting in various capacities: as creator of the organization or as member states per se. Autonomy as political independence can be envisaged from each of these perspectives. The following paragraphs provide one example for each of these manifestations of the political independence with a view to demonstrating the concept's inherent heterogeneity. It accordingly examines the autonomy of international organizations from states in their capacity as creators, and from states in their capacity as members.

Autonomy from its creators: The life and death of the organization

The ability of a legal subject to terminate itself is probably the quintessence of political independence. In that sense, such a right to die embodies the most absolute form of separate will. Applied to personified international organizations, this contention proves very illustrative of the multifaceted character of autonomy as separate will. Indeed, one of the most crucial differences between states and international organizations lies in the fact that a state can decide to bring an end to its existence, whilst an international organization cannot autonomously terminate itself. Indeed, states are created by facts and not by law,¹⁵ whereas international organizations are created by international legal instruments.¹⁶ International organizations, not being themselves party to their constitutive treaty,¹⁷ cannot in any way terminate it. The idea that the organization, as an autonomous legal subject with a will of its own, has the inherent power to terminate its own existence is not commonly accepted.¹⁸

It must, however, be acknowledged that there are a few constitutive treaties of international organizations that provide for the liquidation of the international organization concerned by one of its organs as is illustrated by the World Bank,¹⁹ the IMF²⁰ or the Korean Peninsula Energy Development Organization (KEDO).²¹ But these are very exceptional provisions, for the constitutive treaty is usually silent on this point. In the absence of any special provision, it must be considered that only member states can terminate the treaty.

If international organizations were truly (or absolutely) autonomous entities, they would be able to dissolve themselves. The point is not that they should be able to terminate their constitutive treaty: they obviously cannot terminate a treaty to which they are not a party. However, once the organization has vanished, it could be possible that the disappearance of the organization amounts to the permanent disappearance or destruction of an object indispensable for the execution of the treaty and constitute a ground for terminating the treaty in the sense of Article 61 of the Vienna Convention on the Law of Treaties.²² Recognizing the implied entitlement for any organization to dissolve itself and hence terminate the object of its constitutive treaty – which would lead to its termination – without any express provision in the constitutive treaty would make it a truly autonomous subject, at least from the perspective of it demonstrating a separate will from its member states. Although it has not yet wholly materialized itself in positive international law, the independence of the organization from its creators, even at the

stage of its termination, would be a necessary dimension of the full political independence of international organizations.

Autonomy from member states: The problem of joint or concurrent responsibility

Autonomy as political independence not only triggers questions of treaty law. It also touches upon problems of international responsibility. It is true that questions of the responsibility of international organizations are not commonly discussed from the vantage point of autonomy in the literature.²³ However, the political independence of the organization towards its member states has been deemed a central tenet of the regime of responsibility of international organizations and, as such, is presented in largely one-dimensional and unquestioning terms.²⁴ It is argued here that, in the context of international responsibility, the idea of autonomy can act to hide the material control that members may continue to exert over the organization.

It is not disputed that international responsibility is the necessary consequence of international legal personality. As soon as an entity can be the bearer of (rights and) duties, it can be held responsible if found in breach of these obligations. It is no different with respect to international organizations, which can incur international responsibility if they are found to be in breach of their international obligations. In this case, there is indeed a wide consensus in mainstream legal scholarship on the idea that member states do not incur responsibility for the wrongful act of the organization even though it would breach their international obligations if it were formally attributed to them.²⁵ It is only if the organization is a mere ‘association of states’ devoid of international legal personality that member states can be held responsible whatever the extent of their control over the decision-making process of the organization.²⁶

Both the International Law Commission (ILC)²⁷ and the *Institut de droit international*²⁸ have espoused this idea. The International Law Association (ILA), in its own consideration of the topic of the accountability of international organizations, did not seek to challenge the answer provided by the *Institut de droit international* on this particular point.²⁹ There are, however, a few hypotheses – which are far from being uncontroversial – where it is recognized that member states can be held responsible for an act formally committed by an international organization. These situations classically relate to organs placed at the disposal of international organizations:³⁰ the acceptance of the international responsibility by the member states or the conduct of the member states causing third parties to rely, in their dealings with the organization, upon the subsidiary responsibility of the member states;³¹ the responsibility of member states arising out of the establishment of an international organization;³² or the coercion over the commission of a wrongful act by an international organization.³³

However, none of these exceptions includes the situation where the organization is stripped of its autonomy as political independence. This means that constraints on the autonomy of international organizations are currently without consequence in terms of international responsibility. It is true that, as a matter of

principle, states necessarily exercise some form of control over the decision-making process of an international organization.³⁴ With the exception of some highly integrated international organizations, all decisions adopted by an international organization require the backing of all member states or at least a majority of them.³⁵ The control exercised by member states may nonetheless become problematic if it undermines the autonomy of the organization. When member states effectively and overwhelmingly control the decision-making process of an international organization, it can be argued that, if autonomy were taken seriously, the legal personality of that organization could no longer constitute a shield behind which member states can evade the responsibility that they would have incurred if they had themselves committed the contested action.³⁶

This proposition does not come out of the blue. When it pondered the question, the *Institut de droit international* acknowledged the possibility of an abuse of the legal personality of international organizations in the course of their actions. This led the *Institut* to assert that ‘a member State may incur liability to a third party [...] if the international organization has acted as the agent of the State, in law or in fact’.³⁷ Both the resolution of the *Institut* and the *travaux préparatoires*,³⁸ however, fell short of providing any indications as to the kind of ‘abuse’ that the *Institut* had in mind. The ILC tepidly followed in the footsteps of the *Institut* as regards the possibility of an abuse of the legal personality of the organization.³⁹ The way in which the ILC has construed the abuse of the legal personality of the organization may nonetheless prove baffling. The ILC has understood the abuse of legal personality in a very peculiar sense and has conflated it with the circumvention of international obligations by member states in the establishment of an international organization.⁴⁰ This narrow interpretation of the abuse of international legal personality is limited to the creation of international organizations. It does not address the abuse of legal personality at the decision-making level, which arguably frustrates the autonomy of the organization.

The foregoing does not mean that the ILC and its special *rapporteur* on the responsibility of international organizations have totally ignored the difficulties caused by a degree of control exercised by member states that would severely impede the autonomy of the organization. They came to terms with the fact that the control exercised by some member states may fault the application of a theory of exclusive responsibility to international organizations. However, as understood by the ILC, the type of control that may give rise to the responsibility of member states is restricted. Indeed, according to the ILC, the responsibility of a member state can be derived also from the exercise of direction and control over the commission of an international wrongful act by an international organization. In this situation, it is admitted that the wrongful act itself is attributable to the state and not to the organization.⁴¹ The scope of this principle – as it currently stands in the *lex ferenda* – reflects the similar provisions of the rules on state responsibility.⁴² Accordingly, this principle only relates to ‘domination over the wrongful conduct’⁴³ and is alien to any exercise of oversight or influence. It does ‘not simply consist in participating in the decision-making process of the organization’.⁴⁴ Moreover, as currently devised, this rule seems to apply to both member states and non-member states.⁴⁵

This excludes situations where member states exercise control over the decision-making process, leading them to bridle the autonomy of the organization.

The absence of any exception to the principle of the exclusive responsibility of the international organization in the case of an overwhelming control exercised by one or several member states constitutes further evidence of the inconsequential nature of the concept of autonomy as political independence in positive international law and in international legal scholarship. Indeed, it is widely agreed that the legal personality of an organization arises out of an (express or implied) will of the member states and the factual autonomy and effective independence granted to the organization.⁴⁶ In other words, the organization must be, in fact, endowed with the functional, material and organic means necessary to express a will distinct from that of its member states.⁴⁷ Short of any hints of factual autonomy, the organization would fail to meet the criteria for international legal personality. While the application of these criteria to a new international organization does not commonly cause many problems,⁴⁸ it is argued here that the extent to which subsequent failure to meet these criteria bears upon the personality of the organization is less simple. Indeed, it may turn out that, occasionally, the organization is stripped of its autonomy, which is one of the constitutive elements of its international legal personality. Such a forfeiture of the autonomy of the organization cannot go without consequences. That is not to say that, in this situation, the organization loses its international personality.⁴⁹ Even when governance structures break down in previously 'effective' states, they are not deprived of their legal personality, despite the fact that the existence of an effective government is generally perceived as a constitutive element of statehood.⁵⁰ The same applies to an international organization. They remain international legal persons despite any important dent in their autonomy. If autonomy is significantly restricted, however, it must be considered that the personality of the organization no longer suffices to shield member states from the consequences of the wrongful act of the organization that would also constitute a breach of states' obligations if committed by them. This means that when the organization proves to be under the overwhelming control of member states, the corporate veil erected by the organization's legal personality would be pierced and member states wielding such control would be held jointly or concurrently responsible for any wrongful act of the organization that would have constituted a violation of their own obligations if committed by them.

It is interesting to note that the advocates of the exclusive responsibility of international organizations have themselves resorted to the argument of autonomy to oppose any new exception whereby member states could be held jointly or concurrently responsible. Indeed, they classically contend that any extension of the hypotheses of joint or concurrent responsibility of international organizations would encourage interventions of states into the decision-making process, thereby curbing the autonomy of the organization.⁵¹ The *Institut de droit international* – later followed by the ILC⁵² – drew on these arguments to conclude that 'there is no general rule of international law whereby states members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an

international organization of which they are members⁵³ and that ‘[i]mportant considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and comprehensive rule of liability of member states to third parties for the obligations of international organizations’.⁵⁴

The author of the present chapter has argued that the presupposition that concurrent or joint responsibility of member states faults the autonomy of the organization is ill-founded.⁵⁵ It can be argued that the ‘shield’ offered by the exclusive responsibility might also encourage member states to intervene in the decision-making process of the organization to make it pass a decision that serves their interests and without running the risk of being held internationally responsible for any ensuing wrongful act. The joint or concurrent responsibility of member states for overwhelming control over the decision-making process makes it possible for those member states (arguably) abusing the legal personality of the international organization at the decision-making level to be held responsible for the international wrongful consequences of these undue interferences, which may deter such interferences. An overwhelming control by one or a few member states deprives the organization of a very important, although separate, aspect of its autonomy. That aspect of the autonomy is another fundamental aspect of the political independence of international organizations which should not remain without consequences in terms of responsibility.

Autonomy as institutional independence

Just as the idea of the political independence of the organization presents a multifaceted, complex picture, in this section there is revealed a similarly complex, multifaceted picture of the idea of autonomy as institutional independence. As was explained above, this dimension of autonomy relates to the extent to which international organizations constitute a legal order distinct from the general international legal order. Constituting an autonomous legal order, international organizations are protected from institutional interferences originating in the international legal order and can accordingly defend their own political project. Autonomy as institutional independence is also what gives the organization the possibility to behave as an independent member of that international community. In that sense, autonomy as institutional independence constitutes the bedrock of both the identity of the organization and its membership within the broader international community. The following paragraphs expound on two instances where the ability of the organization to decide independently on its role in the international community as well as its own political project has manifested itself very differently. Mention is made of the ability of international organizations in general independently to defend the general interest of that community, compared to the (im)permeability of the legal order of one particularly developed institutional order, the European Union, to the apparently universal rules of the UN.

Autonomy from the international community: The defence of the general interest

The ability of international organizations to defend the general interest of the international community when they deem it threatened provides an example of how institutional independence is limited by the openness of the organization to the rules of the broader international legal order. In this case, the independence enjoyed by the organization when it takes measures in the interest of the international community touches upon the relation of the organization with states acting in their capacity as fellow members of the international community whose interests are at stake. The debates about that type of autonomy show that this ability of the organization to act freely as an independent actor within the international community and to defend the general interest of that community is often impeded by some more general institutional and scholarly choices. Yet they simultaneously show that this is a type of autonomy that cannot be ignored.

It is not contested that international organizations can take countermeasures⁵⁶ – whether or not this possibility rests on a capacity inherent within legal personality. It is also agreed that countermeasures by international organizations are subject to a legal regime somewhat similar to that of state countermeasures (especially regarding the obligations not affected by countermeasures: proportionality, prior notification, suspension of countermeasures *pendente lite* etc). As far as the standing to take countermeasure is concerned, the solution that seems to prevail is also patterned after the regime of state countermeasures. Indeed, like states,⁵⁷ an international organization is entitled to take countermeasures when it is injured by the initial wrongful act. It can be considered injured when the obligation breached is owed to it individually, or the obligation breached is an *erga omnes* (*partes*) obligation and the breach specifically affects the organization.⁵⁸

There is, however, a significant difference between the legal regime of state countermeasures and that of countermeasures by international organizations when it comes to violations of obligations *erga omnes* and obligations *erga omnes partes* which do not specifically affect the organization (such as a violation of human rights obligations). Even though the rules on state countermeasures on that point are themselves far from being unambiguous,⁵⁹ it is well accepted that the controversial ‘saving clause’ in Article 54 of the ILC Articles on State Responsibility has been somehow supplemented by the Resolution on ‘Obligations and rights *erga omnes* in international law’ adopted by the *Institut de droit international* at its 2005 session.⁶⁰ According to the *Institut*, nothing precludes the adoption of countermeasures by non-injured states in the case of a ‘widely acknowledged grave breach’ of an *erga omnes* (*partes*) obligation. It is important to stress that this possibility is clearly more restricted with respect to international organizations. Indeed, even if the measure itself falls within the powers of the organization concerned, several states,⁶¹ some international organizations⁶² and, ultimately, the ILC⁶³ have advocated the idea that a non-injured international organization is entitled to invoke responsibility in relation to a breach of an *erga omnes* obligation upon the condition that safeguarding the interest of the international community underlying the obligation breached is included among the functions of that organization.

Strictly speaking, the idea that an international organization can only take countermeasures in the general interest if the obligation breached is directed at a goal that is included among the functions of that organization probably rests on some confusion between the standing of an organization to resort to countermeasures – which is a question of general international law – with the competence of the organization to take a particular countermeasure – which is a question pertaining to the rules of that organization.⁶⁴ One cannot make the standing of the organization in the international legal order conditional upon the rules of the organization; that is, a treaty only applicable to a limited number of states. This position also seems to be at odds with the practice of states and organizations.⁶⁵ There may nonetheless be some weighty political and practical motives to strip a personified subject of the international community of its ability to take countermeasures in the defence of the general interest of the community to which it belongs. One of them is probably that we are not ready to bestow the role of ‘guardian of the general interest’ upon all institutional subjects, and appear to have exclusively reserved the defence of the general interest to states acting alone – or acting collectively in the framework of the UN. In the end, it is all about how the enforcement of rules, and especially, rules of general interest, is organized in the international legal system. It simply is regrettable that the ILC and the other actors which have advocated a restricted entitlement of international organizations to take countermeasures in the general interest have failed to unveil these underlying political and practical motivations, for that would have helped clarify this debate and its conceptual ramifications.

If one leaves these conceptual oddities aside, it suffices for the sake of the present study to emphasize that the restricted entitlement of international organizations to take countermeasures in the general interest provides further support to the observation that organizations cannot be fully autonomous subjects of the international legal system. According to the above-mentioned legal regime regarding the implementation of responsibility, international organizations, contrary to states, are barred from taking countermeasures in the general interest,⁶⁶ for instance in cases of grave violations of human rights, if the obligation that is violated does not correspond with the competences which have been awarded to them. If the autonomy of international organizations was taken seriously, there is no reason why they could not, as autonomous legal subjects (ie part of the *omnes*), be entitled to gauge autonomously how the general interest should be defended and decide to react accordingly, irrespective of the competences that have been bestowed upon them by member states.⁶⁷ In other words, the mainstream position that only states can act as guardians of the general interest – whether acting individually or in the framework of the UN – negates the idea that international organizations can independently take the initiative to protect the rules of general interest which are not strictly related to the powers that were attributed to them, especially if states acting alone or in the framework of the UN are unable to agree on any protective measures. Such an institutional constraint undoubtedly curtails the organization’s ability to act independently as a member of the international community to defend the very interests of that community – arguably a

fundamental dimension of the autonomy of international organizations which can hardly be ignored.

Autonomy from the United Nations: Institutional independence within the (universal) collective security system

Recent developments in the fight against international terrorism have shown how another dimension of autonomy as institutional independence can be subject to severe restrictions. These developments cast doubt upon claims within recent 'constitutionalist' legal scholarship, where the support for the idea that regional institutional regimes are embedded into the UN collective security system – even though the international organization concerned is not party to the UN Charter – has been thriving.⁶⁸ The developments in question focus upon the recent controversy pertaining to the legality of the measures taken by the European Community to implement sanctions of the UN Security Council and the decision of the Court of First Instance of the European Communities (CFI) in the cases of *Yusuf* and *Kadi*.⁶⁹ Many scholars enthused over the ruling of the CFI, according to which the EC is bound by UN obligations which are deemed part of Community law, despite the fact that it is not a party to the UN Charter. These positions have been described by the author of the present chapter as reflecting an international constitutionalist leaning.⁷⁰ They can be criticized as ignoring the fundamental autonomy of the Community legal order and resting on a misunderstanding of the relationship between Community law and the UN collective security system.

Although the aforementioned ruling of the CFI has recently been set aside by the European Court of Justice (ECJ), this kind of discourse will undoubtedly outlive the judgment of the CFI. This is precisely the reason why it is worth recalling the motives used by the CFI in its judgments to subjugate the Community legal order to the UN Collective system. In *Yusuf*, the action for annulment brought before the CFI concerned an EC regulation by which the applicant had been included in a list of persons whose financial resources were to be frozen as persons suspected of supporting terrorism. The regulation had been adopted in order to implement Security Council resolutions adopted under Chapter VII of the UN Charter. The applicant contended, inter alia, that the regulation infringed certain of his fundamental rights protected by the general principles of Community law. The CFI eventually dismissed the action. Basically, its reasoning is premised upon the alleged existence of structural limits on the judicial review powers that the Court is entitled to wield with respect to the contested regulation, owing to the UN origin of this regulation.⁷¹ More precisely, the Court started by pointing out that while the EC as such – unlike its member states – is not bound by the UN Charter and is therefore not required to carry out Security Council resolutions as a matter of general public international law, it nevertheless 'must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it'.⁷²

In itself, this finding is already remarkable: significantly, the Court inferred the obligation of the EC to implement the Security Council resolutions from the European legal order, thereby assuming that the Community spontaneously subordinates itself to a legal order which is deemed superior and must not go unheeded.⁷³ For an international legal person which is not itself bound by the UN Charter, this position mirrors the existence of some kind of international unilateral commitment⁷⁴ to respect the law generated by a treaty to which it is only a third party.⁷⁵ But the CFI went on to hold that any review of the lawfulness of the contested regulation would amount to considering ‘indirectly’ the legality of the Security Council resolutions since the European institutions ‘acted under circumscribed powers’ when implementing those resolutions.⁷⁶ Drawing upon the assumption that it is itself bound by the aforementioned obligation to carry out Security Council resolutions, or at least the obligation not to impede the performance of the obligations imposed on member states under the UN Charter,⁷⁷ the Court concluded that it had no authority to review the lawfulness of the Security Council resolutions in the light of fundamental rights as enshrined in Community law.⁷⁸ It is thus here that the CFI touched upon the ‘structural limits’ referred to above: in the opinion of the Court, the UN resolutions fall outside the scope of the judicial review that it has to carry out. The CFI, not being itself an organ of a party to the UN system, was under no obligation to respect the internal distribution of powers within the UN system and, in particular, the prevailing powers of the Security Council under Chapter VII of the Charter.⁷⁹ However, the CFI chose to yield to the powers of the Security Council and, more generally, to the UN institutional structure. This respect for the UN collective security system comes arguably from the assumption of the CFI that the EU – like UN member states – acts as an agent of the Security Council, which seems to have been perceived as a sort of world executive.

The CFI’s tendency to entrench the Community legal order in the UN collective security system was further buttressed by its findings pertaining to the status of *jus cogens*, that is, peremptory norms of general international law. The CFI held that it is ‘empowered to check, indirectly, the lawfulness of the resolutions of the Security Council [...] with regard to *jus cogens*’.⁸⁰ Technically speaking, it might be asked why such an exception to the non-existence of judicial review is inserted:⁸¹ as has been pointed out by the ICJ,⁸² the peremptory nature of norms does not in itself confer on tribunals powers with which they otherwise are not entrusted.⁸³ What is important to notice here is nevertheless that, according to the CFI, the UN Security Council is subjected to *jus cogens*.⁸⁴ This argumentation once again demonstrates the strains of a (constitutionally) systemic and hierarchical conception of the international legal order. In so doing, the CFI institutes itself as a court of international law,⁸⁵ in sharp contrast to that body of opinion – which I have termed elsewhere ‘European constitutionalist’⁸⁶ in approach – which stresses the *sui generis* or autonomous nature of the European legal order. Instead, the CFI and ECJ become constitutional courts of a global, hierarchical and vertical legal system encapsulating three tiers: respectively, *jus cogens* norms, Security Council resolutions adopted under Chapter VII of the UN Charter and implementing acts by states or regional organizations such as the EU.

Such a subordination of the Community legal order to the UN collective security system amounts to a complete denial of the divide between legal orders. The introduction of international law in a domestic or regional legal order is not a question of international law but is determined by the legal order concerned. In that sense, each legal order decides for itself whether or not it introduces rules made in another legal order and, if so, how such an introduction must be carried out.⁸⁷ The relation between European law and international law is governed by European law to the same extent as the relationship between international law and municipal law is governed by municipal law, even if the EU is created by an instrument of international law.⁸⁸ The fact that the EU is an organization created by virtue of an instrument of international law does not make international rules binding upon the EU automatically incorporated in the European legal order. If international rules binding upon an international organization are not automatically part of the legal order of that organization, it will be no surprise that the rules which are not binding upon the organization also fail to be part of the legal order of the organization. This applies to UN law – and in particular Security Council resolutions – to which the EU (and the Community) is not a party. It follows that the rules of the UN system cannot automatically form part of the legal order of another international organization.

It is important to note that the mechanism of Article 103 of the UN Charter designed to solve conflicts of norms arising between UN obligations and other international obligations does not impinge on that conclusion as it simply addresses such a conflict from the vantage point of the UN Charter. This mechanism does not resolve conflicts of norms that may arise within the legal order of member states⁸⁹ or within the legal order of international organizations. But even if one considers that the Union has voluntarily subjected itself to UN law, and leaves the strong flaws of the succession-theory aside, the ensuing international constitutionalist approach adopted by the Court remains gravely problematic. Indeed, the fact that the EU is bound by UN law does not make UN law an integral part of the European legal order, and there is therefore absolutely no reason why the CFI needed to take into account the limits that apply to the action of the Security Council, as it did in applying peremptory norms of international law. This means that there is no justification for the CFI elevating itself into a guardian of legality of UN Security Council resolutions within the European legal order. On this very point, I contend that the positions adopted by the ECJ and Advocate General Póitres Maduro are much more consistent with the fundamental estrangement of the European and international legal orders. It is true that international organizations can no longer be exclusively viewed from a contractual perspective⁹⁰ and seen in total isolation from general international law.⁹¹ However, that does not bear upon the fact that the only norms of reference upon which the judicial review of community acts carried out by European courts should be based are those provided by European law itself, that is, the general principles of Community law which embody fundamental rights.⁹²

This above-mentioned subordination of the EC to the UN collective security system also leads to a complete denial of the substantive⁹³ and systemic⁹⁴ autonomy

of the European Community. This was rightly recalled by Advocate General Maduro,⁹⁵ as well as the ECJ.⁹⁶ Being an organ of the European legal order and being only entrusted with the powers bestowed upon it by this legal order, the CFI could only review the legality of the impugned regulation in the light of the general principles of Community law and not on the basis of international legal principles of another legal order. If the EU were to be deemed endowed with a fully-fledged autonomy (as institutional independence), it should be considered immune from any foreign law until it has itself pledged to abide by it and introduced the rules concerned in its own legal order. The above-mentioned reasoning of the CFI, as well as the fact that it has been much celebrated and welcomed by so many scholars, shows that the ability of the organization independently to carry out its political project is sometimes demoted, for many legal scholars as well as judges thus seem to accept this aspect of autonomy must yield to the collective security system.⁹⁷ This is not the place to grapple with that question. The foregoing suffices to show that when we speak about the relationship between international organizations and the collective security system another aspect of institutional autonomy is at stake, the fundamental importance of which can hardly be overlooked.

The discourse about autonomy: A few remarks

The diverse examples provided in the previous section demonstrate that each of the two ideas of the concept of autonomy of international organizations – that is, political independence and institutional independence – is very multifaceted. Yet, because autonomy, either as political or institutional independence, is deemed a cornerstone of any international institutional regime, international legal scholars are very easily swayed by a one-dimensional conception of autonomy. It is accordingly interesting briefly to examine how a monolithic idea of autonomy proves so appealing.

First, it must be noted that it is often possible to ignore the heterogeneity inherent in the notion of autonomy because experts have often failed to explore all the various ways in which the concept is employed and understood. In the same vein, magnifying a homogenous concept of autonomy has been made possible as a result of an over-generalization. Indeed, too often, autonomy, in its various dimensions, has been conceptualized in terms of either a zero-sum relationship between members and organization, or between the institutional order and the broader rules of the international legal order. This is not to say that international legal scholars deny that there are degrees in the political and institutional independence of international organizations. That autonomy can be a matter of degree has been insightfully captured by Brölmann through the concept of the ‘institutional veil’.⁹⁸ However, international legal scholars have been unable systematically to conceptualize these various degrees and their consequences. As a result, autonomy has largely remained a static concept. This, however, is hardly surprising. No one will doubt that factually appraising the degree of autonomy of an international organization is extremely complex. The extent of the autonomy of an international organization hinges on a range of different criteria which

continuously vary. More fundamentally, assessing the autonomy of an international organization proves complicated because of the uncertainty related to the dual and ambiguous role played by states within the framework of the organization. While being the original creators of the organization, they are also member states and agents of the organization.⁹⁹ It follows that it is always hard to evaluate the extent to which states that intervene in the decision-making processes of organizations do so in their capacity as state (furthering their own agenda) or in their capacity as member state (and in that sense furthering the organization's agenda). The uncertainties make it much more complicated to determine the degree of autonomy enjoyed by an international organization, perhaps explaining therefore the tendency to construe autonomy as a uniform concept.

It is not only the factual difficulty of appraising autonomy in each of its two above-mentioned dimensions that has impeded the elaboration of a more dynamic concept of autonomy. It is also the difficulty of capturing these facts through a formal scale. It is close to impossible to devise formal yardsticks allowing one to translate in formal language the various degrees of the factual autonomy of an international organization, which would seem to require more dynamic conceptual tools. In the absence of such conceptual tools, autonomy has been able to develop as a static concept which could easily be placed at the centre of international institutional law.

While the static character of autonomy provides the necessary condition to portray autonomy as a one-dimensional paradigm, this does not explain why legal scholars have remained so amenable to such a homogenous image of autonomy. To fathom the reasons why a homogenous conception of autonomy has been so appealing, the distinction between autonomy as political independence and autonomy as institutional independence must again be made, for each of them has rest upon a different agenda.

As far as autonomy as political independence is concerned, one explanation for the appeal of a one-dimensional conception probably rests in the political advantage brought about by that idea of autonomy. Indeed, it cannot be excluded that autonomy has been partly devised by international legal scholars as a political banner under which one could demonstrate support for the role of international institutions – seen as a necessarily positive development – as opposed to the sovereign prerogatives of states, seen as harmful to the general interest. In that sense, autonomy as political independence has proved a useful catchword to legitimize the attempts of the organization to preserve its powers while fending off any attempt by states to encroach upon its exercise of those powers for the promotion of their particular interests.¹⁰⁰ Because they are autonomous, international organizations are seen as helping to rein in the allegedly self-interested conduct of states in the international arena. It seems hardly disputable that this objective partly rests on a chimera, for there is no reason why the preservation of the powers of international organizations should necessarily be seen as a good thing. Yet the preservation of the political independence of organizations seems to serve a lofty purpose, one which has been widely shared by scholars and experts. The fulfilment of such an ambition has required that the multifaceted character of autonomy be toned down and that

autonomy be construed as a one-dimensional concept. Indeed, only a unified – and simplified – conception of political autonomy can efficiently protect the organization against the self-interested interferences of states.

The centrality of the idea of autonomy as institutional independence, although enjoying a wide support in legal scholarship, is probably subject to greater contestations than the idea of autonomy as political independence. As a result, scholars have been less prone to regard institutional independence as a wholly one-dimensional concept. Hence, autonomy as institutional independence is more generally recognized as multifaceted. The heterogeneity of that dimension of autonomy is particularly accepted by those scholars who have always rejected a principled impermeability of international organizations to the rules of the international legal system. However, international organizations – at least those endowed with international legal personality – are simultaneously still perceived by international legal scholars, even by those who reject their impermeability to the rules of the international legal system, as being autonomous legal subjects which should independently decide on their political project without interferences originating in the broader international legal system. The defence of that dimension of autonomy has always been closely associated with the defence of the political project of the organization concerned. It is because the values or the principles of the organization concerned have been seen at risk that some international organizations have grown more impermeable to general international law or the collective security system. It is also because their political project has been seen as encompassing the defence of the interest of the general community that claims have been made that there are international organizations which should be entitled to participate autonomously in the defence of the general interest.

The defence of the political project pursued by the organization has required that autonomy as institutional independence be defended with one voice and hence on the basis of a uniform concept of autonomy. In that sense, the different agendas supporting the idea of autonomy as political independence, on the one hand, and autonomy as institutional independence, on the other, may seem to bear much resemblance with each other, thereby justifying a uniform concept of autonomy. However, it must be made clear here that the motives for defending the ability of the organization to pursue its own political project differ from motives which justify the defence of the autonomy as political independence. In the discourse of international legal scholars, the ambition of those defending institutional independence is not to limit a state's influence on the international plane through international institutional law. The ambition of those who place institutional independence at the heart of any international institutional regime is the protection of the political project of the organization which is seen as just as worthy as those of states. Such a posture does not go as far as claiming that international organizations are equal subjects but rests on the assumption that their legal order – and the political project that underlies it – operate in a similar way to that of states.¹⁰¹

The different agendas that inform these two types of autonomy are thus slightly conflicting. On the one hand, international organizations are seen to deserve autonomy, for they tame the otherwise unbridled and self-interested behaviour of

states and necessarily pursue a lofty goal. On the other hand, they seem to deserve autonomy because they are not that different from states with whom they share a common appetite for self-preservation and privacy. This contradiction between the objectives sought under the banner of each type of autonomy, however, confirms the need for the distinction made in this chapter between autonomy as political independence and autonomy as institutional independence. It simultaneously reflects the hybrid character of the actors to which autonomy is supposed to benefit. Created by sovereign states from which they receive their powers, inextricably dependent on their member states to function properly, whilst at the same time being a full member of, and acting within the international arena for the satisfaction of their interests and the achievement of their political projects, international organizations are composite and heterogeneous creatures.

Yet, and somewhat paradoxically, unearthing these two diverging agendas reinforces the image of homogeneity of each of the two above-mentioned dimensions of autonomy, thereby dissimulating their multifaceted character which we have tried to unravel in this chapter. Indeed, for this contradiction between these agendas – and the hybrid character of the international organizations which such a contradiction reflects – to be captured by international institutional law, each of the main dimensions of autonomy needs to be construed as one-dimensional. As a result, legal scholars cannot help carving autonomy in binary terms, without which this basic hybridity could not be translated. However, the multifaceted concept of autonomy, upon which this chapter has tried to shed some light, calls for a disentanglement of that binary conception of autonomy and the acknowledgement that autonomy is too complex to be captured in such simplistic terms. The autonomy of international organizations should be seen as nothing more than a receptacle of all the inner contradictions of the political projects and institutional structures of international organizations, which rely as much upon the continued support of member states as they do upon the organization's ability to distinguish itself from the broader international legal order.

Notes

- * The author wishes to thank Ms Yvonne McDermott for her helpful and insightful comments during the preparation of this chapter. Exchanges with Richard Collins have significantly helped to sharpen the argument made here.
- 1 On the question of the autonomy of international organizations in law-making, see N. White, 'Separate but Connected: Inter-Governmental Organizations and International Law', *International Organizations Law Review*, 2008, vol. 5, 175–95.
- 2 N. Blokker, 'International Organizations and Their Members. "International Organizations Belong to All Members and to None" – Variations on a Theme', *International Organizations Law Review*, 2004, vol. 1, 139–61.
- 3 *Ibid.*
- 4 On the relationship between international legal personality and separate will, see N. White, *The Law of International Organisations*, 2nd edn, Manchester: Manchester University Press, 2005, pp. 30 *et seq.* See also H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn, Leiden: Martinus Nijhoff, 2003, pp. 34–35, at para. 44.

- 5 White, *ibid.*, p. 32. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports, 1949, p. 174, at p. 179.
- 6 But see the contribution by Gazzini in Chapter 11.
- 7 On these tensions, see C. Brölmann, *The Institutional Veil in Public International Law: International Organizations and the Law of Treaties*, Oxford: Hart, 2007.
- 8 Schermers and Blokker, *op. cit.*, pp. 34–35, at para. 44.
- 9 *The Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports, 1980, p. 73, at pp. 89–90.
- 10 On this debate, see generally Schermers and Blokker, *op. cit.*, paras 1142–48. See also Brölmann, *op. cit.*, pp. 29–33.
- 11 *Ibid.*
- 12 Brölmann, *op. cit.*, pp. 4–5 and 29 *et seq.*
- 13 See the Introduction (Chapter 1) to this book, as well as the criticisms of J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn, Cambridge: Cambridge University Press, 2009, pp. 308–11.
- 14 See principally Chapters 11–15.
- 15 J. d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', *Leiden Journal of International Law*, 2007, vol. 20, 649–68; See also J. d'Aspremont, *L'Etat non-démocratique en droit international, Etude critique du droit positif et de la pratique contemporaine*, Paris, Pedone, 2008.
- 16 The case of the OSCE is, however, a rare exception: C. Bertrand, 'La Nature juridique de l'Organisation pour la Sécurité et la Coopération en Europe (OSCE)', *Revue générale de droit international public*, 1998, vol. 102, 365–406.
- 17 Schermers and Blokker, *op. cit.*, pp. 28–29.
- 18 Klabbers does not rule it out but recognizes that this construction is not unproblematic. See Klabbers, *Introduction to International Institutional Law*, *op. cit.*, pp. 295–98.
- 19 See Article VI, para. 5 of the Articles of the Agreement of the World Bank.
- 20 See Article XXVII, section 2 of the Articles of the Agreement of the IMF.
- 21 See in particular Article XIV of the agreement on the creation of Korean Peninsula Energy Development Organization: 'This Agreement may be amended, terminated, or suspended by written agreement of all Executive Board Members, or, if such agreement is not achievable by written agreement of a majority of the Executive Board Members'. In application of that provision, the Executive Board of KEDO decided on 31 May 2006 to terminate the LWR project. This decision was taken based on the continued and extended failure of the Democratic People's Republic of Korea (DPRK) to perform the steps that were required in the KEDO-DPRK Supply Agreement for the provision of the LWR project. The organization will continue to exist as necessary to settle financial and legal obligations stemming from the termination of the LWR project, including, in particular, those related to the termination of the Turnkey Contract for the Supply of the LWR Project to the DPRK, signed between KEDO and the Korea Electric Power Corporation (KEPCO) on 15 December 1999 (<http://www.kedo.org/>). On the legal difficulties pertaining to the situation of KEDO, see the presentation of Kigab Park (Korea University, Seoul), 'Legal Problems Arising from the Dissolution of an International Organization: the Case of the Korean Peninsular Energy Development Organization (KEDO): Dissolution de facto or Hibernation?', *Biennial Conference of the European Society of International Law*, Heidelberg, 5 September 2008 (manuscript on file with the author).
- 22 Article 61 'Supervening impossibility of performance', provides that:
1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

- 23 But see the contribution by Sari in Chapter 14 of this book.
- 24 See the report of R. Higgins to the Institut de droit international, *Yearbook of the Institut de droit international*, 1995, vol. 66– I, 375–420, especially at 419; second addendum to the Fourth Report of the Special Rapporteur on the Responsibility of International Organization, UN Doc. A/CN.4/564/Add.2, 26 April 2006, at 13 available at: http://untreaty.un.org/ilc/documentation/english/a_cn4_564_add2.pdf (last accessed 3 July 2010); see also the first report of the International Law Association Committee on Accountability of International Organizations presented to the 68th Conference of the ILA in Taipei, 24–30 May 1998, ILA Report of the 68th Conference, p. 602; K. Wellens, *Remedies against International Organizations*, Cambridge: Cambridge University Press, 2002, p. 25.
- 25 See recently the debate at the International Law Commission on the inappropriateness of including a provision stating a general residual rule about the absence of responsibility of member states for the wrongful act of an international organization. See International Law Commission, ‘Report of the International Law Commission on the work of its fifty-eighth session’ (1 May–9 June and 3 July–11 August 2006), UN Doc. A/61/10, at 287 available at: <http://untreaty.un.org/ilc/reports/2006/2006report.htm> (last accessed 3 July 2010).
- 26 C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge: Cambridge University Press, 1996, p. 85; P. Klein, *La responsabilité des Organisations Internationales dans les ordres juridiques internes et en droit des gens*, Brussels: Bruylant, 1998, p. 433.
- 27 See Addendum to the Fourth Report of the Special Rapporteur on the Responsibility of International Organizations, op. cit.
- 28 See Higgins, op. cit., especially at 419. See also the 1995 resolution of the Institut de droit international on the Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties, 1 September 1995, session of Lisbon available at: http://www.idi-iil.org/idiE/resolutionsE/1995_lis_02_en.pdf (last accessed 3 July 2010).
- 29 Report of the ILA (2004) adopted at the Berlin Conference on the Accountability of International Organizations (2004), reprinted in *International Organizations Law Review*, 2004, vol. 1, 221–93, at 225, 255.
- 30 Proposed Article 5 of the ILC articles on the Responsibility of International Organizations, contained in International Law Commission, *Second Report on the Responsibility of International Organizations*, 2 April 2004, UN Doc. A/CN.4/541, p. 23 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/296/68/PDF/N0429668.pdf?OpenElement> (last accessed 3 July 2010). See also Report of the Committee on the Accountability of International Organizations adopted at the ILA’s 71st Conference in Berlin in August 2004, op. cit., especially at pp. 258–60.
- 31 See the proposed Article 29 of the International Law Commission, second addendum to the Fourth Report, op. cit., pp. 12–14. See also the opinion of Lord Ralph Gilson in the judgment of the Court of Appeal concerning the International Tin Council, Judgment of 27 April 1988, *Maclaine Watson & Co Ltd v Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others*, 80 ILR 172.
- 32 Draft Article 28 of the ILC Articles on the Responsibility of International Organizations, ILC Report (2006), op. cit., at 283: ‘a State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation’.

- 33 Proposed Article 27. See International Law Commission, Addendum to the Fourth Report of the Special Rapporteur on Responsibility of International Organization, 12 April 2006, UN Doc. A/CN.4/564/Add.1, at 6 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/308/65/PDF/N0630865.pdf?OpenElement> (last accessed 3 July 2010).
- 34 Wellens, *op. cit.*, p. 44.
- 35 R. Sadurska and C. M. Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?', *Vanderbilt Journal of International Law*, 1989–1990, vol. 30, p. 888.
- 36 This argument is further developed in J. d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States', *International Organizations Law Review*, 2007, vol. 4, 91–119.
- 37 Article 5 of the aforementioned IDI resolution (1995), *op. cit.*
- 38 See Higgins, *op. cit.*, pp. 375–420.
- 39 See the Addendum to the Fourth Report of the Special Rapporteur on Responsibility of International Organization, *op. cit.*, at 9.
- 40 Draft Article 28 ILC Articles on the Responsibility of International Organizations, Report of the ILC (2006), *op. cit.*, at 283.
- 41 See proposed Article 28 of the ILC, Addendum to the Fourth Report of the Special Rapporteur on the Responsibility of International Organization, *op. cit.*, at 6.
- 42 See Article 8 of the ILC's Articles on State Responsibility (2001) available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last accessed 3 July 2010).
- 43 Commentary to Article 17 of the Articles on State Responsibility (2001), included in UN Doc. A/56/10, at 164 available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 3 July 2010).
- 44 Addendum to the Fourth Report of the Special Rapporteur on the Responsibility of International Organization, *op. cit.*, at 5.
- 45 *Ibid.*
- 46 See Schermers and Blokker, *op. cit.*, para. 1566; Klabbers, *Introduction to International Institutional Law*, *op. cit.*, pp. 55–56. See also note 1 above.
- 47 J. Verhoeven, *Droit international public*, Brussels: Larquier, 2000, p. 214.
- 48 Some controversy still impinges on the existence of the personality of NATO. See the controversial opinion of Verhoeven whereby NATO has no international legal personality: *ibid.*, p. 613. See also H. Kelsen, *The Law of the United Nations*, London: Stevens, 1951, p. 328; T. Gazzini, 'NATO Coercive Military Activities in Yugoslav Crisis (1992–1999)', *European Journal of International Law*, 2001, vol. 12, 391; Similar controversies are also swirling around the OSCE. See M. Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation', *American Journal of International Law*, 1995, vol. 89, 631–637; Bertrand, *op. cit.*
- 49 But see A. Geslin, 'Réflexions sur la Répartition de la Responsabilité entre l'Organisation Internationale et ses Etats Membres', *Revue générale de droit international public*, 2005, vol. 109, 564.
- 50 See generally J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford: Oxford University Press, 2006. See also J. Verhoeven, 'La reconnaissance internationale, déclin ou renouveau', *AFDI*, 1993, vol. 39, 7.
- 51 See Higgins, *op. cit.*, p. 419; second addendum to the Fourth Report of the Special Rapporteur on the Responsibility of International Organization, *op. cit.*, at 13; see also the first report of the International Law Association Committee on Accountability of International Organizations, *op. cit.*, p. 602; Wellens, *op. cit.*, p. 25.
- 52 See Draft Article 29 of the ILC Articles on the Responsibility of International Organizations: 'Responsibility of a State that is a member of an International Organization for the internationally wrongful act of that organization', which provides that: 'Except as provided in the preceding articles of this chapter, a State that is a member of an

International Organization is not responsible for an internationally wrongful act of that organization unless: (a) It has accepted with regard to the injured third party that it could be held responsible; or (b) It has led the injured third party to rely on its responsibility'. See second addendum to the Fourth Report of the Special Rapporteur on the Responsibility of International Organization, *op. cit.*, at 14.

- 53 Article 6(a) of the Resolution adopted by the Institute at Lisbon (1995), *op. cit.*
- 54 *Ibid.*, Article 8.
- 55 d'Aspremont, 'Abuse of the Legal Personality of International Organizations', *op. cit.* See also J. d'Aspremont, 'The limits to the exclusive responsibility of International Organizations', *Human Rights and International Legal Discourse*, 2007, vol. 2, 215–28.
- 56 See Draft Article 19, para. 1, of the ILC Articles on the Responsibility of International Organizations which reads as follows: 'Subject to paragraph 2, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a lawful countermeasure on the part of the former international organization'; International Law Commission, 'Seventh report on responsibility of international organizations', 27 March 2009, UN Doc. A/CN.4/610, p. 22 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/282/75/PDF/N0928275.pdf?OpenElement> (last accessed 3 July 2010).
- 57 See Articles 42 and 49, para. 1 of the ILC Articles on State Responsibility.
- 58 See Draft Articles 51 and 57 of the ILC Articles on the Responsibility of International Organizations, proposed by the Special Rapporteur. International Law Commission, 'Sixth report on responsibility of international organizations', 1 April 2008, UN Doc. A/CN.4/597 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/291/52/PDF/N0829152.pdf?OpenElement> (last accessed 3 July 2010). The ILC did not directly tackle the question of the entitlement of international organizations to take countermeasures against third states; the reference in Draft Article 57 to Draft Article 51 implies that this possibility is only open to those organizations 'that ha[ve] been given the function to protect the interest of the international community underlying th[e] obligation [concerned]'. This was rubber-stamped by the Drafting Committee. When reconsidering Article 51 (renumbered 52) the Drafting Committee nonetheless preferred the wording 'included among the function' than 'the Organization has been given the function to protect the interest of the international community underlying that obligation'. See the statement of the chairman of the Drafting Committee, Mr Pedro Comissário Alfonso on 4 June 2008 available at: http://untreaty.un.org/ilc/sessions/60/2008_DC_Chairman_RIO.4June2008.pdf (last accessed 3 July 2010).
- 59 See generally C. Hillgruber, 'The Right of Third States to Take Countermeasures', in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden: Martinus Nijhoff, 2006, pp. 265–93; M. Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council', *British Yearbook of International Law*, 2006, vol. 77, 333–418.
- 60 Resolution of 27 August 2005 available at: <http://www.idi-iiil.org> (last accessed 3 July 2010).
- 61 See the interventions before the Sixth Committee of the delegates of Argentina (UN Doc. A/C.6/62/SR.18, para. 64), Denmark, on behalf of the Nordic countries (*ibid.*, para. 100), Italy (UN Doc. A/C.6/62/SR.19, para. 40), Japan (*ibid.*, para. 100), the Netherlands (UN Doc. A/C.6/62/SR.20, para. 39), the Russian Federation (UN Doc. A/C.6/62/SR.21, para. 70) and Switzerland (*ibid.*, para. 85). All available at: <http://www.un.org> (last accessed 3 July 2010).
- 62 See the observations made by the OPCW and the EU Commission (International Law Commission, 'Responsibility of International Organizations: Comments and Observations received from international organizations', 31 March 2008, UN Doc. A/

- CN.4/593 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/290/54/PDF/N0829054.pdf?OpenElement> (last accessed 3 July 2010)). The European Commission insisted that this restriction also applies to countermeasures taken by non-injured international organizations in relation to a breach of an *erga omnes* obligation.
- 63 See Draft Article 51, para. 3, proposed by the Special Rapporteur, Sixth Report, op. cit., provisionally adopted (with a few language modifications) as Draft Article 52, para. 3, by the Drafting Committee (see UN Doc. A/CN.4/L.725).
- 64 On this point, I owe much to numerous discussions that I have had with Frédéric Dopagne, who recently published *Les Contre-Mesures des Organisations Internationales* (Paris LGDJ/Brussels: Anthémis, 2010). See also the contribution of the same author on the occasion of the ESIL Biennial Conference, 2008, ‘Sanctions by International Organizations: The Decentralized Society in the Heart of the Institutionalized Society’, 5 September 2008 (manuscript on file with author).
- 65 With respect to the sanctions adopted by the EC in case of human rights obligations, see the ECJ Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759.
- 66 See D. Alland, ‘Countermeasures of General Interest’, *European Journal of International Law*, 2002, vol 13, 1221–39.
- 67 See Resolution of the *Institut de droit international* on Obligations erga omnes in international law (Krakow 2005) available at: http://www.idi-ii.org/idiE/navig_chon2003.html (last accessed 3 July 2010).
- 68 See C. Tomuschat, ‘Case-note on Yusuf/Kadi-judgments’, *Common Market Law Review*, 2006, vol. 43, 537–51, especially at 546; see more generally A. Peters, ‘The Position of International Law Within the European Community Legal Order’, *German Yearbook of International Law*, 1997, vol. 40, 9, at 38, 76.
- 69 Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, 21 September 2005, [2005] ECR II-3533 (under appeal: C-415/05 P); Case T-315/01, *Kadi v Council and Commission*, 21 September 2005, [2005] ECR II-3649 (under appeal: C-402/05 P). See the decision of the ECJ in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation*, 3 September 2008 (unpublished). See also the earlier opinion of Advocate General Poiares Maduro, 16 January 2008, Case C-402/05 P, *Yassin Abdullah Kadi v Council and Commission* available at: <http://curia.europa.eu> (last accessed 3 July 2010).
- 70 J. d’Aspremont and F. Dopagne, ‘Two Constitutionalisms in Europe: Pursuing an Articulation between the European and the International Legal Orders’, *ZöRV*, 2008, vol. 68, 939–78.
- 71 *Yusuf*, op. cit., at para. 263.
- 72 *Yusuf*, op. cit., at paras 242–43. The CFI relies in this regard on an analogy with the case *International Fruit Company* (paras 245–46, 250 and 253). On this analogy, see the scepticism of R. Schütze, ‘On ‘Middle Ground’. The European Community and Public International Law’, *EUI Working Papers – Law* 2007/13, p. 21 available at: <http://cadmus.eui.eu/dspace/bitstream/1814/6817/3/LAW-2007-13.pdf> (last accessed 3 July 2010).
- 73 It is interesting to note that in his Opinion Advocate General Poiares Maduro implicitly considered that the EC is effectively bound by international obligations: ‘[...] the effect of international obligations within the Community legal order [...]’ (para. 23), ‘[...] once the Community is bound by a rule of international law [...]’ (para. 24). However, he seemed to contend that this submission of the EC to international law does not result from the EC Treaty, but rather from international law itself, as he referred to ‘the obligations that are incumbent on the Community by virtue of international law’ (para. 24, emphasis added).
- 74 See J. Rideau, ‘Les Accords Internationaux dans la Jurisprudence de la Cour des Communautés Européennes’, *Revue générale de droit international public*, 1990, vol. 94, 289,

- at 411. On binding unilateral acts in international law, see E. Suy, 'Unilateral Acts of States as a Source of International Law: Some New Thoughts and Frustrations', in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, Bruxelles: Bruylant, 2007, pp. 631–42; See also J. d'Aspremont, 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats', *Revue générale de droit international public*, 2005, vol. 109, 163–89.
- 75 See the judgment of the International Court of Justice in *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports, 1974, p. 253.
- 76 *Yusuf*, op. cit., at paras 265–66.
- 77 *Ibid.*, paras 254, 269.
- 78 *Ibid.*, especially at paras 272, 276.
- 79 Confusingly, the Court held that 'determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts' (*ibid.*, at para. 270, emphasis added).
- 80 *Ibid.*, at para. 277. Assuming (para. 279) that *jus cogens* encompasses (at least certain) fundamental rights (see the remarks above), the Court then engages in a review of the conformity of UN resolutions with the peremptory norms which it deems relevant, and decides that no violation has occurred (paras 284–347).
- 81 See E. de Wet, 'Holding the United Nations Security Council Accountable for Human Rights Violations Through Domestic and Regional Courts: A Case of Be Careful What you Wish For?', expert lecture on invitation of the University of Oxford Public International Law Discussion Group, 24 April 2008 (on record with the author), p. 15.
- 82 Case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Judgment, ICJ Reports, 2006, at para. 64. On this decision, see F. Dopagne, 'Les exceptions préliminaires dans l'affaire des Activités armées sur le territoire du Congo (nouvelle requête: 2002)', *Annuaire français de droit international*, 2007, 328–46.
- 83 See Article 53 of the Vienna Convention on the Law of Treaties.
- 84 *Yusuf*, op. cit., explicitly at para. 280.
- 85 See on this question J. Allain, 'The European Court of Justice Is an International Court', *Nordic Journal of International Law*, 1999, vol. 68, 9.
- 86 This is the terminology used by J. d'Aspremont and F. Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation between the European and the International Legal Orders', *ZaōRV*, 2008, vol. 68, 939–78.
- 87 This understanding has famously been rejected by H. Kelsen, 'Les rapports de système entre le droit interne et le droit international public', *Recueil des Cours*, 1926–IV, vol. 14, 276–320.
- 88 For a similar understanding of the EU legal order as a domestic legal order, see A. von Bogdandy, 'Pluralism, direct effect and the ultimate say: On the relationship between international and domestic constitutional law', *International Journal of Constitutional Law*, 2008, vol. 6, 1–17, especially at 3. See also Arangio-Ruiz who, more generally, advocates that the relationship between the legal order created by the constitutive treaty of international organizations and international law should be patterned after the relationship between domestic legal orders and international law. G. Arangio-Ruiz, 'International Law and Interindividual Law', in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law*, Oxford: Oxford University Press, 2007, pp. 39–43, especially at p. 42.
- 89 See the ambiguity of the wording of the CFI. See for instance the decision in *Yusuf*, op. cit. On this particular point, see the criticism of Eeckhout, op. cit., p. 185. See, however, the recent decision of the UK House of Lords, *Judgments – R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58.
- 90 White, 'Separate but Connected', op. cit., at 190; White, *The Law of International Organizations*, op. cit., pp. 19–20.

- 91 See eg P. J. Cardwell, D. French and N. D. White, 'Case Comment: *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, (Joined Cases C-402/05P and C-415/05P) Judgment of 3 September 2008', *International and Comparative Law Quarterly*, 2009, vol. 58, 229–40.
- 92 *Yussuf*, op. cit., paras 281–85 and 316; Opinion of Advocate General Poiares Maduro, op. cit., at paras 39–40.
- 93 Case 29/69 *Stauder v City of Ulm* [1969] ECR 419. See generally T. Ahmed and I. de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective', *European Journal of International Law*, 2006, vol. 17, 771–801.
- 94 See, respectively, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1 and Case 6/64, *Costa v ENEL* [1964] ECR 585.
- 95 Opinion of Advocate General Poiares Maduro, op. cit., at para. 24: 'Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community'.
- 96 Op. cit., paras 305, 316.
- 97 This criticism is further developed in d'Aspremont and Dopagne, 'Two Constitutionalisms in Europe', op. cit.
- 98 Brölmann, op. cit., especially at pp. 14–19 and 24–33.
- 99 Klabbers, *Introduction to International Institutional Law*, op. cit., p. 46 and pp. 194–95. See also Blokker, 'International Organizations and Their Members', op. cit., especially at 140.
- 100 On this point, see the remarks of Klabbers, *ibid.*, pp. 336 *et seq.*
- 101 d'Aspremont and Dopagne, 'Two Constitutionalisms in Europe', op. cit.