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**Non State Sovereignty: A case of the European Union**

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San Francisco, CA

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Master of Arts in International Studies

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**Non State Sovereignty: A case of the European Union**

In Partial Fulfillment of the Requirements for the Degree

MASTER OF ARTS in INTERNATIONAL STUDIES

by **Natalie Murphy**

November 20, 2018

UNIVERSITY OF SAN FRANCISCO

Under the guidance and approval of the committee, and approval by all the members, this thesis project has been accepted in partial fulfillment of the requirements for the degree.

APPROVED:

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**Capstone Adviser** **Date**

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**MAIS Director** **Date**

## **I. Introduction**

The creation of the European Union and European Integration has prompted many questions about how sovereignty operates and what is necessary for a body to be considered sovereign. The traditional Weberian definition of the state and sovereignty as “the form of human community that (successfully) lays claim to the monopoly on legitimate physical violence.”<sup>1</sup> This definition has persisted over time and is highly influential to the way sovereignty and the role of the state are viewed. The creation and operations of the European Union have created a space where conversation about state sovereignty are diverging from the Weberian norm. This is because the structure of the EU contradicts the previous understandings of what were immutable characteristics of sovereign state bodies.

The European Union is developing a new form of non-state sovereignty which diverges from traditional conceptions in three ways: The EU is a non-state actor; unlike in the past, a body is operating with and exercising sovereign rights outside of the nation-state formation. Secondly, the sovereignty of both the European Union and its member states overlaps. Both maintain exclusive responsibilities often tied to the state, but with the EU also taking over some essential functions of the state and sharing some responsibilities with the member states. Finally, the state no longer has a monopoly on the security apparatus within the state; the EU has an influence on the makeup of the police and military in individual countries within its domain. Despite these divergences from what is traditionally considered necessary for a body to be sovereign, the E.U. has created a structure which is de facto sovereign.

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<sup>1</sup> Weber, M. (2004) The Vocation Lectures. Eds. D. Owen, D. Strong; translated by R. Livingstone. Indianapolis, Hackett Publishing Company. 33.

## A. History of the European Union

The European Union grew out of a series of communities and organizations preceding it which brought together the great powers of Europe. The first of these was the European Coal and Steel Community (ECSC) which eventually evolved into the European Union of today. Proposed in 1950 by French Minister Robert Schuman, the ECSC was designed to make war between Germany and France “not merely unthinkable, but materially impossible.”<sup>2</sup> The wake of World War II was the backdrop of the creation of a united European community and thus made the idea put forth by Schuman of the utmost importance in the creation of a European community. The six founding countries (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands) were committed to the idea was that by integrating the steel and coal industries in Europe no single country would be able to amass a supply sufficient enough to wage war without the other countries in the community noticing.

The ECSC was established as an economic community and while it was political in its development and goals, its functions were economic. Later, after several failed attempts at creating political and defense communities (European Political Community and European Defence Community, respectively), the European Economic Community (EEC) was formed. The European Atomic Energy Community was formed at the same time in 1957 with the signing of the Treaty of Rome.<sup>3</sup> The formation of the European Union had many organizations which preceded and which helped to cement the idea of a unified European supranational body. This

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<sup>2</sup> Schuman, R. (2005). Declaration of 9 may 1950: The schuman plan for european integration. In N. W. Karmis D. (Ed.), *Theories of federalism: A reader* (pp. 203-205). New York: Palgrave Macmillan.

<sup>3</sup> Europa.eu. A peaceful europe – the beginnings of cooperation. Retrieved from [https://europa.eu/european-union/about-eu/history/1945-1959\\_en](https://europa.eu/european-union/about-eu/history/1945-1959_en)

helped usher in the European Union and give it legitimacy in the eyes of the people and the governments of the individual member states.

The European Union in its modern form was created in February of 1992 when the Maastricht Treaty was signed. The EU milestone set “clear rules for the future single currency as well as for foreign and security policy and closer cooperation in justice and home affairs.”<sup>4</sup> The single market of the European Union was established on four pillars: the free movement of goods, services, people, and money. By 1995 the Schengen Agreement entered into force and allowed for the free movement of citizens from seven member countries with no passport control between the countries. 1997 marked the expansion of the powers and agreement in the Maastricht treaty. The Amsterdam Treaty laid out EU institutional reform, and gave the Union more power to work on EU issues such as citizen employment and citizen’s rights.

The history of the European Union is an evolution, starting with one organization and morphing into others as it grew. But the responsibilities of the community, eventually the Union, and the number of member states has constantly been in flux over the course of the last seventy years. The nature of constant change is embedded in the history and the character of the European Union. This makes it unsurprising that this community has also changed the way sovereignty operates in Europe. As a powerful organization of member states, and powerful in its own right, the European Union will continue to have a broad impact on the world and on the member states within the Union.

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<sup>4</sup> Europa.eu. Europe without frontiers. Retrieved from [https://europa.eu/european-union/about-eu/history/1990-1999\\_en](https://europa.eu/european-union/about-eu/history/1990-1999_en)



## II. Literature Review

Questions of sovereignty have plagued political discussion around the world since the beginning of its creation and implementation. Some accept the common platitude that state sovereignty was created along with the Peace of Westphalia in 1648. Others argue that that it manifested even earlier;<sup>5</sup> or perhaps much later, even as recent as the twentieth century.<sup>6</sup> Regardless of these and other musings on when the idea came to the fore, it is clear by the prevalence of debate that sovereignty has long been a charged topic both theoretically and practically and continues to be to this day. With the lengthy history of academic and political debate over the construction and fate of sovereignty, it is helpful to break it down. The first section of this literature review will cover the ways that sovereignty has shifted over time, and more specifically in the last several decades. Some of the changes which have prompted shifts in sovereignty have also been involved in the creation and development of the European Union. Also important to the concept of sovereignty is how it interacts with security, military, and policing. The concept of monopoly of force as presented by Weber and others in relation to sovereignty fits into the conversation on security, the military and policing. All of these combine to set the backdrop for the creation of a new form of sovereignty being shaped and formed by the creation and operations of the European Union.

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<sup>5</sup> Bueno de Mesquita, B. 2000. Popes, Kings and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty. *International Studies Review* 2: 93–118.

Hinsley, F. H. 1986. Sovereignty. Cambridge: Cambridge University Press.

Spruyt, H. 1994. The Sovereign State and its Competitors. Princeton: Princeton University Press.

<sup>6</sup> Croxton, D. 1999. The Peace of Westphalia of 1648 and the Origins of Sovereignty. *The International History Review* 21: 569–91.

Krasner, S. D. (2001). Sovereignty. *Foreign Policy*, 20-29.

## A. Shifting Sovereignty

The 21st century has seen changes in the international system and how people, corporations, and states interact in the international political sphere and global markets. Interstate interactions often center around security and how states protect their own interests, citizens, and borders. This has long been defined by ideas of sovereignty and the agency that governments have to act without international interference and intervention. But certain trends in state action and international relations as a whole have created questions over the relevancy of traditional understandings of state sovereignty.

The traditionally accepted definition of sovereignty assured states' exclusive control over their defined territory without the threat of arbitrary interference from outside forces. This definition of sovereignty originated with the Peace of Westphalia in 1648 which ended the Thirty Years' War. Though an old concept, this idea has not only shaped how policies on intervention have evolved, but also the idea of the nation-state itself. Some definitions of sovereignty are more oriented towards the modern day, referencing institutions that were non-existent at the time of the Thirty Years War.<sup>7</sup> The traditional definition of sovereignty stemming from the seventeenth century has been challenged in many ways, including the interceding redefining of the concept, and also the increasing interconnectedness of the world which has cause

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<sup>7</sup> R. Niblett defines sovereignty this way: "At its most basic level, sovereignty is the legal status that all states possess when they are recognized by their peers through the United Nations, reflecting their jurisdiction over a territory and the permanent population living there."

Niblett, R. (2016). Britain, the EU and the Sovereignty Myth. *Chatham House The Royal Institute of International Affairs*, 19.

Crawford, J. (2012). Brownlie's Principles of Public International Law, 8th Edition, Oxford: Oxford University Press, pp. 447–48.

reconceptualization of its own. Starting at the end of the last century, and certainly in the beginning of the 21st century, discussions over how understandings and expressions of sovereignty have been altered in a changing and globalizing world have been crafted and published extensively.

Few, if any, notable scholars argue that notions of sovereignty have been static since their original conceptualization in the 1600s. But there is great variance among scholars on exactly what changes have occurred and what has been their cause. Many explanations are offered including the the creation of the institutions of the international human rights regime which scholars like Saskia Sassen (1995) and Louis Henkin (1999) claim have contributed to shifts in sovereignty by changing the relationship between states, and changing how states interact with a supranational power.<sup>8</sup> Globalization has also opened communication channels, changed market interactions, and allowed for multinational corporations that operate outside of the jurisdiction of any one state. The changing time have created a changing sovereignty, but there are still some characteristics of sovereignty which have remained central to the idea.

Part and parcel with the idea of sovereignty and states having territorial control is the role of the state itself, particularly as it relates to the economy. Globalization and the rise of supranational organizations have had impacts beyond just the political. Increasing interconnectedness through technology has allowed for faster communication, faster exchange and transportation of goods, and the expansion of international capital markets. Due to these

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<sup>8</sup> Henkin, L. (1999). That “S” word: Sovereignty, and globalization, and human rights, et cetera. *Fordham Law Review*, 68(1), 1-14.

Jackson, J. H. (2003). Sovereignty-modern: A new approach to an outdated concept. *The American Journal of International Law*, 97(4), 782-802.

Sassen, S. (1996). *Losing control? sovereignty in the age of globalization*. New York: Columbia University Press.

shifts, scholars are arguing for not only the diminished importance of the concept of sovereignty, but in some cases the wholesale devaluation of the nation-state as an actor in the international economy.<sup>9</sup> The importance of the nation-state as a unit and center for activity in the new world economy is under review. Paul Taylor who suggests the renewal of the concept of World Cities, and their ability to eschew some of the costs and difficulties socially and militarily that nation-states have to endure.<sup>10</sup> Saskia Sassen makes a similar argument that a place-centered system is taking the place of the old system. Sassen's place-centered system would have financial centers and other hubs of activity take an increasingly central role in the world economy, but are not tied to the concept of the nation-state as they are in the current system.<sup>11</sup> Another theory in this vein is Kenichi Ohmae's consideration of the rise of regional economies. He argues, like Taylor and Sassen, that the nation-state as a unit has lost its importance, but he contests that in its place, regional economies have taken hold and usurped control as they once did back in the days of regional dominance in Italy, Germany, and other (mainly European) hubs. The European Union, OPEC (Organization of Petroleum Exporting Countries), NAFTA (North Atlantic Free Trade Agreement), and ASEAN (Association of Southeast Asian Nations), among others, operate in regional units to carry out political and economic agreements on an

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<sup>9</sup> Ohmae, K. (1995). *The end of the nation state: the rise of regional economies*. New York: Free Press.

Sassen, S. (1995). The state and the global city: Notes towards a conception of place centered governance. *Competition and Change*, 1(1), 31-50.

Brown, W. (2010). *Walled states, waning sovereignty*. New York, NY: Zone Books.

<sup>10</sup> Taylor, P. (1995). World cities and territorial states: the rise and fall of their mutuality. In Knox, P and Taylor, P, *World cities in a world system*. Cambridge, UK. Cambridge University Press. 48-61.

<sup>11</sup> Sassen, S. (1995). The state and the global city: Notes towards a conception of place centered governance. *Competition and Change*, 1(1), 31-50.

international and regional scale.<sup>12</sup> Some of these regional units are primarily economic, but others like the EU, are also political. Their emphasis within this theory further support the altered state of the role of sovereignty, politically and economically.

There is a strong argument within the literature that not only is the nation-state system shifting, it is crumbling. Wendy Brown speaks directly to this point stating that with the slow deterioration of the old system of sovereign nation states, governments are doing whatever they can to keep a hold on the land and resources within their borders.<sup>13</sup> This changing world order doesn't sit well with many modern nations, who are trying anything and everything to secure their borders. Mike Davis agrees with Brown in his assessment of the U.S.-Mexico border barrier, dubbing it a "hyperbolic assertion of nation-state sovereignty."<sup>14</sup> Governments are trying to regain control over a global system that is leaving the old idea of nation states and walls behind. Jean-Jacques Roche explores the idea of the place of walls in a globalizing world, saying that walls have no place as they are "ill-adapted" to this new world order.<sup>15</sup> The increasing presence of border walls is a manifestation of the uncertainty born from the turn of the century changes to the global political and economic system. R. Niblett fires back at states trying to assert this hyper-securitized version of sovereignty, calling the idea of absolute sovereignty "illusory."<sup>16</sup> Nation states are attempting to go back to a system of absolute sovereignty through

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<sup>12</sup> Ohmae, K. (1995). *The end of the nation state: the rise of regional economies*. New York: Free Press.

<sup>13</sup> Brown, Wendy. *Walled States, Waning Sovereignty*. New York, NY: Zone Books, 2010.

<sup>14</sup> Davis, Mike. "The Great Wall of Capital." In *Against the Wall: Israel's Barrier to Peace*, edited by Sorkin, Michael, P. 88. New York, NY: New Press, 2005.

<sup>15</sup> Roche, Jean-Jacque, "Walls and Borders in a Globalized World: The Paradoxical Revenge of Territorialization," in *Border Regions Series: Borders, Fences and Walls: State of Insecurity?*. ed. Elizabeth Vallet, p.121 (New York, NY: Routledge, 2016).

<sup>16</sup> Niblett, R. (2016). Britain, the EU and the Sovereignty Myth. *Chatham House The Royal Institute of International Affairs*, 19.

hyper-securitization which is idealized for absolute control over borders and security. In practice, this system was never actually a reality, and as such cannot be achieved now, especially in a world as interconnected as the one we have today. This system has been shown by previously mentioned authors to have shifted, whether or not they agree on how those shifts have manifested. It is from this upheaval that the current and new trends have been born. These attitudinal shifts are what make the emergence of the new sovereignty of the European Union so surprising. The aspirational idea of unity fires back in the face of increased want for separation, regardless of internal rhetoric calling for it.

Central to any discussion on sovereignty in the modern era are Carl Schmitt's arguments in *Nomos of the Earth* (1950).<sup>17</sup> Schmitt describes the period of 1492 to 1890 as a time of nomos, meaning "law" or "custom." This was a time in which the world was held under the European sphere of influence and control. But the nomos began to unravel in the 1890s with the carving up of Africa and the entry of the U.S. into the international world sphere. This led to a disruption of the Eurocentric world order of the previous four centuries, thus preserving order in the world became increasingly difficult, and led to the construction of such supranational institutions as the United Nations, the European Union, and others. Schmitt argues that before 1890 European power centers conducted themselves in anyway they saw fit in their colonial territories. Through "bracketing," the colonial powers could do whatever they wanted in their territories in order to maintain order in their home countries. The power of the European countries in their various colonies and conquered territories infringed upon the ability of those areas to organize into their own sovereign states. After this period described by Schmitt, the European powers now have to

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<sup>17</sup>Schmitt, C. (2006). *The nomos of the earth in the international law of the jus publicum europaeum* (G. L. Ulmen Trans.). (reprint ed.) Telos Press.

find a new way to operate in the world system as they no longer have access to colonies in the same way where they can act however they choose in order to maintain order in the home countries. States are now attempting to exert control over their own borders in the same way that they once exerted control over their colonial subjects. What is most ironic about the Schmitt's hypotheses in relation to the current moment is that now the European Union is exerting control over its member states and closing in on the sovereignty of those member states. As will be shown later in this paper, the sovereignty of the European Union overlaps with that of the member states in a way that restricts the ability of the member states to exercise their own sovereign powers.

Much of the literature that was written on the implications for sovereignty in the age of globalization, politically and economically, came out of the turn of the last century. It reflects a time of change and of questioning the new world order in a world more interconnected in every way than ever before. Scholars question whether or not sovereignty is fundamentally altered by the changing world and the changing circumstances that surround it. This thesis takes these ideas and contributes to them by examining the present practices of sovereignty at a new point in history. In particular, it examines how some new practices of sovereignty are expressed in the formation and practices of the European Union.

## **B. Arguments of sovereignty in the EU**

Aside from broader discussions on sovereignty, sovereignty in the European Union has been widely discussed in a specific manner. Joan Cocks notes that “sovereignty today is widely

seen as the prerequisite and inner substance of a freely lived life.”<sup>18</sup> But many people see sovereignty as an unchanging concept and also as one closely linked to freedom. What they fail to recognize, and what Cocks points out is that “...sovereignty might have its logical end point not in freedom but in discrimination, persecution, even genocide. That a struggle for sovereignty could signify freedom for one group and obliteration for another...”<sup>19</sup> What the European Union has found and created in their new form of sovereignty is a way to include many, to the benefit of the greatest number, into one system which maintains sovereignty without having to dismantle any group within. As it related to Cocks’ point, though no group had to be obliterated at the expense of European sovereignty, it did come at the cost of some sovereignty of all of the countries involved. Buying into the system entails the sacrifice of some internal sovereignty, in order to benefit the whole. In that way, Cocks’ point stands; that in the service of greater European sovereignty, the powers of any given country are curtailed in part.

The creation of the European Union and the establishment of its sovereignty is at odds with the way Carl Schmitt describes land appropriation as a constitutive political event. He underlines this process as essential to the creation of a political body, and thereafter keeping a country and society in order. But the structure of the European Union has shown that this body without territory (though it presides over many countries, it doesn’t have defined borders of its own) can operate and function to control the population within as well as contribute as an international actor.

Even still, there has been some resistance to individual countries giving up some of their sovereignty for to the good of the whole of the European Union. Brexit, the British referendum

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<sup>18</sup> Cocks, J. (2014). *On sovereignty and other political delusions*. New York: Bloomsbury. 36.

<sup>19</sup> Cocks, J. (2014). *On sovereignty and other political delusions*. New York: Bloomsbury. 23.



vote to leave the E.U., which has been plodding along in negotiations over the last two years represents a push back from an EU member state to reclaim their sovereignty. “Many argued that the EU’s transnational governing system over-regulated Great Britain, while at the same time elevated foreign and corporate interests above Britain’s own. This sacrifice of parliamentary sovereignty to a continental body, they argued, was detrimental to state agency.”<sup>20</sup> Many of the voters in the UK who supported the referendum were the very people who were left behind by the economic benefits of EU membership. Older, lower skilled workers who had been excluded from the opening of markets with membership to the EU had the opportunity to seize choice to take back what they saw as the sovereignty that had been given away.<sup>21</sup> This compliments Joan Cocks’ description of the want for sovereignty and how it has become the yardstick by which all international power is measured. Brexit is just one example of a larger trend of right wing movements across Europe which are pushing back against the expanding power of the European Union and its ability to usurp individual national interest.

Against the backdrop of the 2016 referendum for the United Kingdom to exit the European Union, R. Niblett commented on the the state of sovereignty in the U.K. as it relates to their relationship with the E.U. Niblett makes the point that sovereignty does not ensure the security of a state: “A sovereign government can be overthrown by a revolution or insurgency, and its state can be broken into pieces by separatist movements.”<sup>22</sup> Since states are still subject to

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<sup>20</sup> Anker, E., & Youmans, W. (2017). Sovereign aspirations: National security and police power in a global era. *Theory & Event*, 20(1), 12.

<sup>21</sup> Guàrdia, Arnau Busquets , “How Brexit Vote Broke Down,” *Politico*, June 24, 2016.

Higgins, A., “Wigan’s Road to ‘Brexit’: Anger, Loss and Class Resentments,” *The New York Times*, July 5, 2016.

<sup>22</sup> Niblett, R. (2016). Britain, the EU and the Sovereignty Myth. *Chatham House The Royal Institute of International Affairs*, 19. 2-3.

outside forces, even as they are sovereign, they often choose to sign agreements, treaties, and join organizations (like NATO, the UN and any conventions created therein) which some may purport curtail sovereignty, but which in effect support the security of the states. Essentially states have accepted that absolute sovereignty is less important than peace and security. These international agreements and small concessions of sovereignty constitute a supranational power separate from that of the sovereign state. This is described by Jurgen Habermas not as eclipsing that of the nation state, but as co-existing alongside it, with neither being dominant over the other.<sup>23</sup>

At its basic level, the agreements for states to join the European Union involves provisions which preserve a large degree of the state's sovereign rights. Although the Union has powers of collective bargaining and the necessity of cooperation, countries still maintain the ability to shape the construction of the regulations put in place. Additionally, national parliaments have the final say over the implementation of E.U. regulations in their state because they have to be ratified by the parliaments.<sup>24</sup> These measures were all put in place in order for the member states to maintain some of their sovereignty despite entering into an agreement of collective action politically, economically, and socially. Nevertheless, subsequent agreements and amendments have given the EU broader power to 'assist' and regulate in areas where member states are unable, or preclude member states from regulating in areas where the EU has already done so. So despite measures to preserve the sovereignty of individual member states, the EU has been able to grow around them and expand their capacity.

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<sup>23</sup> Habermas, J. (2012). *The crisis of the European Union: A response*. Polity.

<sup>24</sup> European Union (2007), 'Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community', Articles 28 and 29, OJ C 306, 13 December 2007.

Sovereignty in the European Union has been discussed and challenged, especially in recent years. In the lead up to and the wake of the U.K. vote to leave the E.U. many questions have been asked about the cost of being a member of the E.U. and what it means for member state sovereignty. This thesis will show that that along these lines, a new form of sovereignty has arisen out of the European Union which builds upon the individual powers of the singular member state.

### **C. Sovereignty and military force/policing**

Max Weber<sup>25</sup> characterized the monopoly of the legitimate use of physical force, known more commonly as the monopoly of force, as the feature which distinguishes states from other political formations. According to Markus Jachtenfuchs, “The monopoly of force is a precondition for the emergence of complex social interactions that rely on interpersonal and intertemporal trust.”<sup>26</sup> The concept of the monopoly of force is regarded as an important guiding concept in what makes a state and a sovereign body; it is essential for preserving control and a state’s control over its own people and borders. Additionally, considering the emerging international influences on state control and the monopoly of force is essential in considering the relevancy, legitimacy, and power of sovereignty as a concept.

Historically, Thomas Hobbes theorized that people required the rule of a sovereign power holding the monopoly of force to maintain order and provide for the good of the people. This sovereign power would prevent the emergence of failed states as the sovereign would have the right to the use of violence in any capacity. According to Hobbes, this was essential in order to

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<sup>25</sup> Weber, M. (1965). *Politics as a Vocation*.

<sup>26</sup> Jachtenfuchs, M. (2005). 2 The monopoly of legitimate force: denationalization, or business as usual. *European Review*, 13(S1), 38.

escape the State of Nature and prevent the war of all against all.<sup>27</sup> Weber, writing nearly three centuries later, took a view more centered around the State than the sovereign. Instead of emphasizing the state's capacity to do whatever is necessary in the avoidance of the war of all against all, Weber focussed on the state's legitimate use of violence and force, and the monopoly of force which states maintain. Writing much more recently, Jachtenfuchs concludes that presently there is no alternative to the state as the controller of the monopoly of force, be it an all powerful sovereign or otherwise. Despite the claim that any organizations which facilitate internationalization and policies of responsibility sharing, these do not fundamentally alter the concept of state monopoly of force. Rather than losing their claim to the monopoly of force overall, states are losing their ability to legitimately use their right to the monopoly of force. This is happening through the embedding of monopoly of force into international institutions.<sup>28</sup>

The concept of monopoly of force distinguishes two subsets of how the state is able to execute their force, this is either through the military or the police. The military acts as the outward facing manifestation, being used traditionally in international capacities and away from the domestic arena. On the other hand, the police focus the power of the state inward and their purview is primarily regarded as domestic in scope. Globalization and the modern era has blurred the lines between these two, with many police forces becoming increasingly militarized, and national militaries carrying out operations on domestic soil. A more interconnected world has shifted the scope of many transactions to a level that exists outside of traditional state control

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<sup>27</sup> Hobbes, T. (1968). *Leviathan: Edited with an Introd. by CB Macpherson*. Penguin Books.

<sup>28</sup> Jachtenfuchs, M. (2005). 2 The monopoly of legitimate force: denationalization, or business as usual. *European Review*, 13(S1), 49.

and which also goes beyond the reach of the state.<sup>29</sup> Some use the shifting of how the police and the military operate as evidence of a new shift in global politics and the structure of nation-states.

<sup>30</sup> Michael Hardt argues that the events of 9/11 caused a shift in how sovereignty is expressed and how it operates; arguing that it shifted from something existing under a structure of nation-states instead to a “new global sovereignty.”<sup>31</sup> This new global sovereignty operates outside the sphere of the traditional nation state and without regard for territorial division. As Anker and Youmans put it, Hardt “joins other seminal scholars of sovereignty, including Giorgio Agamben and Wendy Brown, to argue that sovereignty has detached from state power to expand across the globe, whether through Empire (Hardt and Negri), worldwide productions of bare life (Agamben), or neoliberal capital as the new sovereign (Brown).”<sup>32</sup>

The change in how police and military are used and how they operate is also seen in the large scale privatization of militaries around the world. This is especially prevalent in the United States. Brinkman and Brinkman use this trend as evidence to claim that sovereignty is dead as a result of the sacrifice of the state monopoly of force to private corporations.<sup>33</sup> Nevertheless, not every scholar agrees that the shifts described by Hardt actually represent a shift to something that is entirely new and apart from state sovereignty, it may perhaps be just a new expression of the

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<sup>29</sup> Henkin, L. (1999). That “S” word: Sovereignty, and globalization, and human rights, et cetera. *Fordham Law Review*, 68(1), 1-14.

<sup>30</sup> Hardt, M. (2001). Sovereignty. *Theory & Event*. 5(4).

<sup>31</sup> Hardt, M. (2001). Sovereignty. *Theory & Event*. 5(4).

<sup>32</sup> Anker, E., & Youmans, W. (2017). Sovereign aspirations: National security and police power in a global era. *Theory & Event*, 20(1), 3-18.

Hardt, M., & Negri, A. (2001). *Empire*. Harvard University Press.

Agamben, G. (1998). *Homo sacer: Sovereign power and bare life*. Stanford University Press.

Brown, W. (2017). *Walled states, waning sovereignty*. Mit Press.

<sup>33</sup> Brinkman, R. L., & Brinkman, J. E. (2008). Globalization and the Nation-State: dead or Alive. *Journal of Economic Issues*, 42(2), 425-433.

old system. Anker and Youmans push back against Hardt, arguing that “State sovereignty has, in many instances, re-oriented the monopoly of violence back inside territorial boundaries, targeting individuated threats, communities, and bodies that are presumed to threaten from within.”<sup>34</sup> Where Hardt claims a new global sovereignty, Anker and Youmans see a sovereignty which is exercised harshly by the state over its own people through such mechanisms as “widespread surveillance, police militarization, and mass incarceration”<sup>35</sup> Despite Hardt’s claims, countries largely maintain control over their military and police forces sometime through the means described by Anker and Youmans. Countries that are not able to maintain control over their military or police are considered failed states by the international system and constitutes a failure by the state to maintain the monopoly of force.

Political and economic formations like NATO, the European Union, the OECD, and others chip away at a state’s abilities to explain and legitimize their use of force because of international obligations under treaty regimes, or obligations to other states through alliances. The E.U. has developed mechanisms, some of which fall under the purview of NATO, that pool the sovereignty of individual states. “The institutions that the EU has developed in order to deal with military affairs only pool sovereignty, they do not delegate it. Nevertheless, they release the use of force from complete state control.”<sup>36</sup> Though Jachtenfuchs seems wary of the implications of the countries in the European Union voluntarily releasing some of their control and ability to oversee the monopoly of the use of force in their country, others like Robert Keohane see this

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<sup>34</sup> Anker, E., & Youmans, W. (2017). Sovereign aspirations: National security and police power in a global era. *Theory & Event*, 20(1), 4.

<sup>35</sup> Anker, E., & Youmans, W. (2017). Sovereign aspirations: National security and police power in a global era. *Theory & Event*, 20(1), 5.

<sup>36</sup> Jachtenfuchs, M. (2005). 2 The monopoly of legitimate force: denationalization, or business as usual. *European Review*, 13(S1), 45.

release of power as a concept of pooled sovereignty and power which member states have bought into.<sup>37</sup>

Some authors theorize that an ultimate blow to states' monopoly of force would be regionalized, or at least collectivized military or police forces. Either one, be it a regional army within a country, or one which spans multiple countries could, to some, be considered a disintegration of the monopoly of force; “[a] Bavarian, Scottish or Basque army would be as revolutionary as a European army.”<sup>38</sup> Jachtenfuchs places strong emphasis on the point that although we are unlikely to see the formation of an European army operating as a single entity, at least not anytime soon, the countries of the European Union are moving in a direction which sacrifices absolute control for international cooperation.<sup>39</sup>

They are bound under such political and economic systems mentioned before like NATO, the European Union, the OECD and others. This “system of norms and institutions regulating the use of the means of force” is more rigorous and requires more diligence than the “general and universal UN-based system.”<sup>40</sup> It incorporates Article 5 of the NATO treaty which includes the stipulation that force be used in the defense of an allied country and members are obligated to act in the case of attack against other members. Jachtenfuchs notes that “This falls short of the plan for an integrated European army, which failed in 1954, but goes considerably beyond a purely

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<sup>37</sup> Keohane, R. (2002). Ironies of Sovereignty: The European Union and the United States. *Journal Of Common Market Studies*, 40(4), 743-765.

<sup>38</sup> Jachtenfuchs, M. (2005). 2 The monopoly of legitimate force: denationalization, or business as usual. *European Review*, 13(S1), 39.

<sup>39</sup> Forster, A.; Wallace, W. (2000) Common foreign and security policy. From shadow to substance? In H. Wallace and W. Wallace (Eds) *Policy-Making in the European Union*, 4th edn (Oxford: Oxford University Press): 461–491.

<sup>40</sup> Jachtenfuchs, M. (2005). 2 The monopoly of legitimate force: denationalization, or business as usual. *European Review*, 13(S1), 45.

defensive alliance in which members participate on a strictly voluntary basis and are entirely free to determine their policies.”<sup>41</sup> It seems that states would and do push back against the collectivization of their police and military, but still their actions of entering into agreements which diminish their ability to act entirely on their own to maintain the monopoly of force internally and externally demonstrate a will toward collective action to protect their countries most effectively.

Indeed, formalized collective police action has an established history. One such organization, Interpol was founded in 1923, speaking to the long history of collectivized policing.<sup>42</sup> Nevertheless the organization is constructed in such a way that it does very little to restrict the action of member states. As most countries in the world are members, there is little ability for states to act independently through the mechanisms of Interpol. Instead it acts largely as an intelligence gathering and sharing organization.<sup>43</sup>

Stanley Hoffman once referred to the state as resembling an artichoke, though its outer layers can be stripped away with little resistance (by the international community, in the case of the state) getting to the core is much harder and the state will protect it fiercely.<sup>44</sup> Echoing this sentiment in “Scratching the heart of the artichoke? How international institutions and the European Union constrain the state monopoly of force” the authors note that “as it is their core sovereign power, states will protect their monopoly of force from external influence and attempt

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<sup>41</sup> Jachtenfuchs, M. (2005). 2 The monopoly of legitimate force: denationalization, or business as usual. *European Review*, 13(S1), 45.

<sup>42</sup> Anderson, M., (1989) *Policing the World. Interpol and the Politics of International Police Co-operation* (Oxford: The Clarendon Press at Oxford University Press).

<sup>43</sup> Jachtenfuchs, M. (2005). 2 The monopoly of legitimate force: denationalization, or business as usual. *European Review*, 13(S1), 37-52.

<sup>44</sup> Hoffmann, S. (1966). Obsolete or obsolete? The fate of the nation-state and the case of Western Europe. *Daedalus*, 883-883.



to retain as much domestic policy autonomy as possible.”<sup>45</sup> This thesis will contribute to these ideas showing that though individual states try to deny the will of the collective in order to maintain as much control over the monopoly of force as possible, in the end they are thwarted. Despite their best efforts to protect what they see as their core, states have at one point or another voluntarily surrendered a mite of the sovereign powers, and collectively this has led to the accumulation of power within the European Union system.

Much has been written on the state of sovereignty in the modern era. Arguments over whether or not sovereignty is dead or stronger than ever remain unsettled. This thesis endeavors to add to the existing literature on the topic by showing that regardless of what other scholars say about how state sovereignty is operating in the present day, and how states attempt to hold on to the powers they see as unique to the individual nation-state, there is a new form of sovereignty emerging. This sovereignty is exemplified by the European Union and its pillars diverge from those of traditional state sovereignty. Additionally, the new form of sovereignty exemplified in the European Union has contributed to the rise of populism across the continent and member states of the EU. That said, the classification of the European Union as a de facto sovereign power could have farther reaching consequences towards the growing tide of hyper-nationalism across Europe.

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<sup>45</sup> Herschinger, E., Jachtenfuchs, M., & Kraft-Kasack, C. (2011). Scratching the heart of the artichoke? How international institutions and the European Union constrain the state monopoly of force. *European Political Science Review*, 3(3), 446.

### **III. Methods**

This paper uses the European Union as a case study to look at sovereignty and the formation of a new type of sovereignty which both diverges and interacts with existing state sovereignty. There are many different potential aspects to look at in the formation of the type of sovereignty which has emerged in the European Union, in particular this case study examines three characteristics: the idea of the European Union is explored through the idea of the EU as a non state actor, and also the idea of public opinion and perception shaping which bodies are sovereign or not. The primary sources of data in this section are pulled from independent researchers looking at public opinion in Europe on the European Union, as well as the European Barometer surveys conducted by the EU. The European Barometer measures many things related to life in the European Union, but in particular this paper focuses on questions regarding how citizens within EU countries regard themselves as citizens of the EU, and how they view the EU.

The second section focussing on the overlapping nature of European Union sovereignty looks at the duties and responsibilities of both the EU and its member states. The Treaty on the Functioning of the European Union provides the basis for this analysis. The table in this section demonstrates the different roles of the two bodies, and the points where they overlap. By looking at the defined responsibilities and abilities of the member states and the EU, and those that are shared show the overlapping nature of the sovereignty between the EU and member states.

The final section uses the example of Frontex and European external border security to show how the idea of overlapping sovereignty is crumbling, and instead the EU has more control over the national governments of the member states. Much of the analysis in the section comes

from looking at stated objectives and operations on the Frontex website. Additionally, this paper uses the findings of L. Marin in her analysis of Frontex joint operations at the southern maritime border of the European Union.

These three sections seem at some points to be contradictory. But in fact what they show is that the sovereignty of member states and the European Union is supposed to be shared under the common system, but Frontex provides an example of how this is not the case in practice. The question this thesis is answer is: How does the existence of non-state sovereignty exist and interact with existing state sovereignty? As demonstrated in the three sections of the findings, the answer to this question depends on where you look.

#### **IV. Findings**

There are three characteristics which define the new type of sovereignty which has been created by the European Union and which distinguishes it from traditional conceptions and formations of sovereignty. The form of sovereignty created by the European Union is different in the following three ways: (1) it is not a traditional nation state actor. The EU is supranational and encompasses multiple member states. (2) The European Union and its member states share in sovereign duties, creating a system of overlapping sovereignty. This leaves both with some responsibilities and powers of traditional sovereignty, but neither with absolute sovereignty. (3) The final distinguishing factor of the European Union's distinct form of sovereignty is the shared nature of border security and policing. The supranationalization of EU security and border policy takes away from individual member states' monopoly of force and the ability to control all policy relating to national security. At the same time, supranationalization also allows the

European Union as a whole to enforce its own collective will on the member states. Conversely, the nature of shared policing and border patrol allows the European Union to create and implement shared policing policy without necessitating that the European Union maintain the monopoly of force in entirety over all of its member states, leaving some of the duties to the member states.

This findings section will be divided into three parts discussing each of the three key components of European Union Sovereignty. The first will explore the idea of the EU as a sovereign power and a non-state actor. The sovereignty of the European Union has been strongly influenced by the integration of Europe in the creation of the EU as a non-state actor. Furthermore, this section will explore the idea of public perception, and how the view that the people have of the reach of the EU and its abilities shapes and gives legitimacy to EU sovereignty. Brexit will act as one case study showing how the increasing nationalist sentiment across Europe is impacted by the power of EU Sovereignty. The second subsection of the findings will explore the idea of overlapping sovereignty. Specifically, this section will look at the powers and responsibilities of the EU and of the member states as defined by their guiding documents. The powers conferred to the EU are clearly defined in these documents, but in practice they go far beyond and frequently overlap with member states. The final section will focus on the idea of security, policing, and border patrol. Specifically, it will look into the creation and implementation of the EU organization of Frontex and its operations regarding migration in Southern European countries and in the Mediterranean. This subsection will highlight how organizations like Frontex remove some of the monopoly of force of the individual EU member states and construct a supranational security and border patrol body.

An important factor across all of the components which make up European Union sovereignty is public perception. Many of the aspects that define this sovereignty are not codified into law or addressed explicitly in the founding and guiding documents of the European Union. But as the people of Europe view Europe as a unified entity with the power to reach past the powers of the member states to create overreaching regulation, then the EU has more capacity to make that happen. Since the sovereignty of the EU is de facto and not actually codified into law, the EU only really exists as sovereign if it is perceived as sovereign by the people.

**A. EU Integration: the European Union as a non-state actor and the creation of a body politic?**

One of the unique characteristics of the European Union which contributes to how it has changed the face of sovereignty is its status as a non-state actor. The traditional requirement of being a nation-state in order to have sovereignty has been confronted by the formation and growing power of the European Union as a political and economic entity. The collective power of the European Union gives it strength in the international arena and power to keep in line member states who might be more resistant to the collective policies set forth by the European Union. Through the integration processes and political formation, the European Union has created both a body politic and a strong supranational, political decision-making body. In order to become an effective organization, the European Union has had to undergo a transformation on the national level of individual member states and on the supranational level regarding the organization as a whole. But overall integration has created a union of states bonded together by

politics and economics, each with their own borders creating an area where the European Union has control in a cross-border formation.

If “[t]he physical borders of a state define its territory, which is normally the area over which a state exercises its sovereignty,”<sup>46</sup> these borders act as the limits for a state’s jurisdiction. In the case of the European Union, this definition is applicable aside from the identifier of “state.” The European Union is a multi-state, supranational body. Despite its non-state character, the European Union still has a territorial limit to its jurisdiction. The European Union diverges from the traditional conception of sovereignty in the sense that it is a non-state entity. The physical borders of a state normally define the area over which that state is able to exercise their sovereignty. But in the case of the European Union its jurisdiction does not cover only one state. It spans across all of the member states, and reaches farther than the traditional nation-state.

The Schengen area opens up the borders within the EU, giving it state like characteristics, but still



Figure 1: EU member states

<sup>46</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 469.

making it distinct from the traditional state formation. The European Union has created a form of sovereignty which is not linked to nation-state status, and which isn't bound by territory in the traditional way. But as shown above, it does maintain certain territorial characteristics linked to the external borders of its member states. Part of European Union membership for the majority of EU member states has involved joining the Schengen area. The original agreement was signed in 1985 by only a handful of the countries that are part of the European Union today and has since expanded to include all EU member states except for Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom, with Bulgaria and Romania currently in the process of joining Schengen.<sup>47</sup>

In the Schengen acquis, the member states signing on agreed to work towards the “gradual abolition of checks at their common borders.”<sup>48</sup> Because of the policies in place under the European Union “borders among [Member States] have lost most of their meanings with the enforcement of freedoms of movement. Lately, the Schengen process has achieved the removal of internal frontiers and the strengthening of external borders.”<sup>49</sup> The focus of the European Union has been to bring down barriers between member states and create a vast area over which they maintain authority. The Schengen area diminishes the power of internal state borders and encourages, even requires, European Union countries to further protect external European Union

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<sup>47</sup> European Commission. Schengen area. Retrieved from

[https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en)

<sup>48</sup>*The Schengen acquis*. (14 June 1985). Retrieved from [https://European-Union-lex.European-Unionropa.European-Union/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922\(01\)&from=EN](https://European-Union-lex.European-Unionropa.European-Union/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922(01)&from=EN)

<sup>49</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 469.; See also Guild, E., Moving the Borders of Europe, inaugural lecture, available at [www.jur.ru.nl/cmr/docs/oratie.eg.pdf](http://www.jur.ru.nl/cmr/docs/oratie.eg.pdf); Groenendijk, C. A., Guild, E., & Minderhoud, P. E. (2003). In search of Europe's borders.

borders for the good of all of the other member countries within the Schengen area. Since this European Union policy has led to the decreased force of internal state borders and the increasing security of external European Union borders, the sovereignty of the European Union is still linked to defined territory.

The many changes that have come with the creation of the Schengen area have led to changes for member states and how they maintain jurisdictional responsibilities as well as demonstrate their sovereignty.<sup>50</sup> This is what sets EU sovereignty apart from individual nation-state sovereignty. Entering into the Schengen agreement is one piece in the larger puzzle of EU integration where the member states and the whole of the EU must balance the sovereignty of both to keep everybody happy. The process of EU integration can be traced back to early treaties and the creation of European economic communities following the devastation of World War II. The European Coal and Steel Community, the European Defence Community (EDC), the European Political Community (EPC), and the European Economic Community (EEC) among others all set the stage and laid the groundwork for the creation of the European Union. The process has been long and has encompassed many phases including all of the aforementioned organizations. Early on in the process of Integration, political decisions were beginning to be made at the supranational EU level, but the public sphere remained largely focused on national issues.<sup>51</sup> The political infrastructure was being put into place and decisions

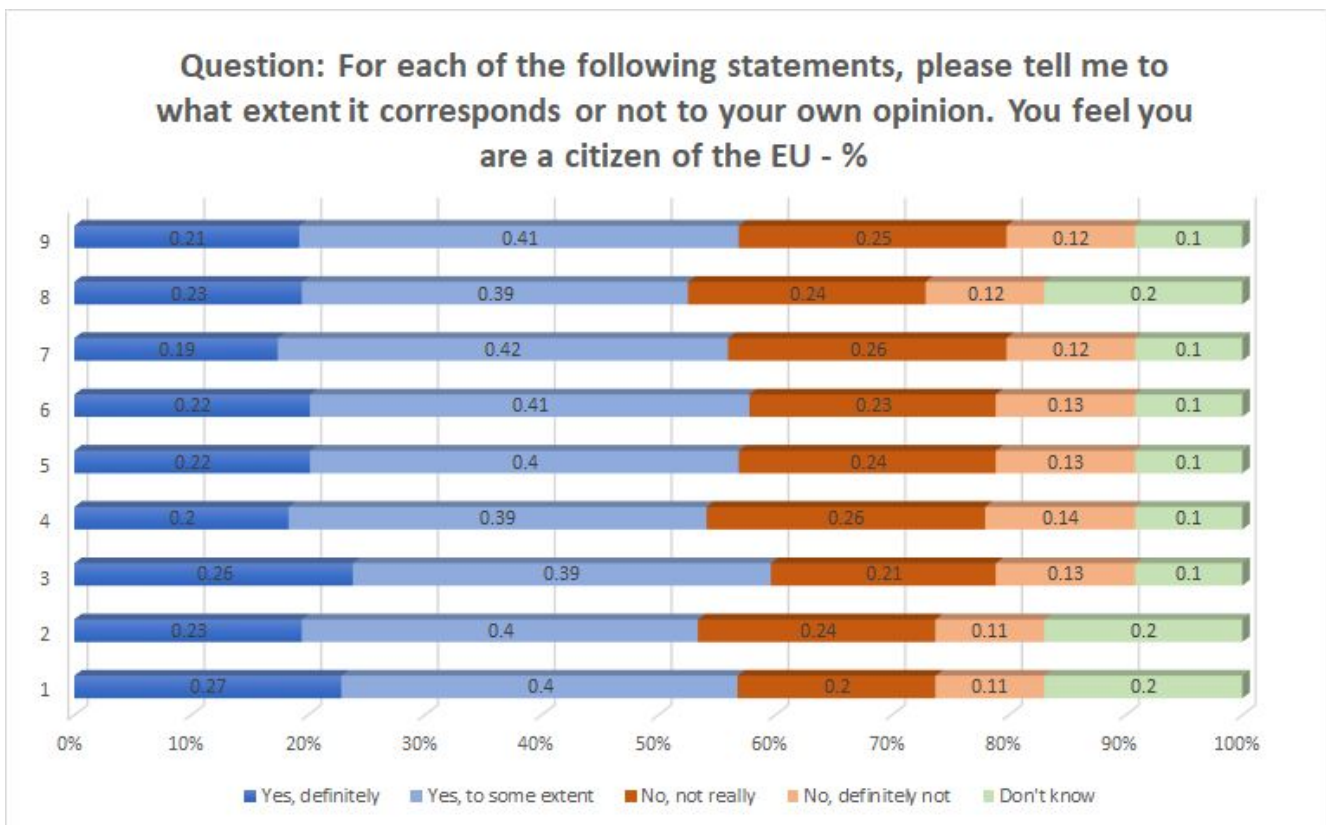
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<sup>50</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 470.

<sup>51</sup>Gerhards, J. (2000). Europäisierung von Ökonomie und Politik und die Trägheit der Entstehung einer europäischen Öffentlichkeit. *Die Europäisierung nationaler Gesellschaften. Sonderheft*, 40(2000), 277-305.



made on a large scale for all of the member states, but the people within individual member states were not yet involved in the decision making process or a part of identifying issues the Union should be focussing on. But over time, critical debate has arisen at the level of the general public across national borders to encompass an EU territory and people to debate EU issues.<sup>52</sup> Following the entry into force of the Maastricht treaty in 1992, the body politic of the European Union was encouraged to engage in debate and political action in regards to the Union as a



**Figure 2: Public perceptions of being European Citizens**

Barth, C., & Bijmans, P. (2018). The Maastricht Treaty and public debates about European integration: the emergence of a European public sphere?. *Journal of Contemporary European Studies*, 1-17.

<sup>52</sup> Grande, E., and S. Hutter. 2016. "The Politicisation of Europe in Public Debates on Major Integration Steps." In *Politicising European Union. Integration and Mass Politics*, edited by S. Hutter, E. Grande, and H. Kriesi, 63–89. Cambridge: Cambridge University Press.

Meyer, J.-H. 2010. *The European Public Sphere. Media and Transnational Communication in European Integration 1969–1991*. Stuttgart: Franz Steiner Verlag.

whole and the process of Integration. This came after that period where little discussion was had over the nature and progress of EU integration and represents great progress toward creating a Union which would be effective in making policy relevant and reasonable across all member states. Once the Maastricht treaty conferred some power from the member states to the Union as a supranational body, people began to engage more vigorously in debate.<sup>53</sup>

The emergence of an EU public sphere, defined by Barth and Bijsmans as “a publicly accessible communicative space in which EU affairs can be critically discussed”<sup>54</sup> lends credibility to the idea of a unified EU political body under the European Union. One way which this can be measured is people’s feelings regarding their own personal membership to the European Union. Twice yearly since 1974, the European Union has conducted a survey called the European Barometer to gauge the public’s opinion on a wide variety of topics including receipt of benefits and services, immigration, identity, and citizenship, among others. In recent years they have asked people how they feel in regards to their citizenship and whether or not they feel they are citizens of the European Union. Figure 2 shows the results for the September 2010 survey through the September 2015 survey. Nine surveys over five years show quite consistent results, with around 60% of respondents reporting that they feel at least somewhat of a citizen of the European Union.<sup>55</sup> Similar results have been found more recently in a Pew

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<sup>53</sup> Sternberg, C. (2013). *The Struggle for European Union Legitimacy: Public Contestation, 1950-2005*. Springer.

<sup>54</sup> Barth, C., & Bijsmans, P. (2018). The Maastricht Treaty and public debates about European integration: the emergence of a European public sphere?. *Journal of Contemporary European Studies*, 1-17.

<sup>55</sup> European Commission, Directorate General for Communication. (Nov 2015). *Standard eurobarometer 84 autumn 2015*. ( No. 84). Retrieved from file:///C:/Users/Natalie/Downloads/eb84\_citizen\_en.pdf

Research Center survey<sup>56</sup> of ten EU countries in the spring of 2017. Following the Brexit referendum it might seem natural that the view of the European populace would be turning away from the collectivity of the European Union. Instead, the Pew Research center found in a poll of 9,935 respondents across ten countries that there was an upward trend in the favorability of European Union. Figure 3 shows the results of the survey displaying the positive trend in the view of the EU.

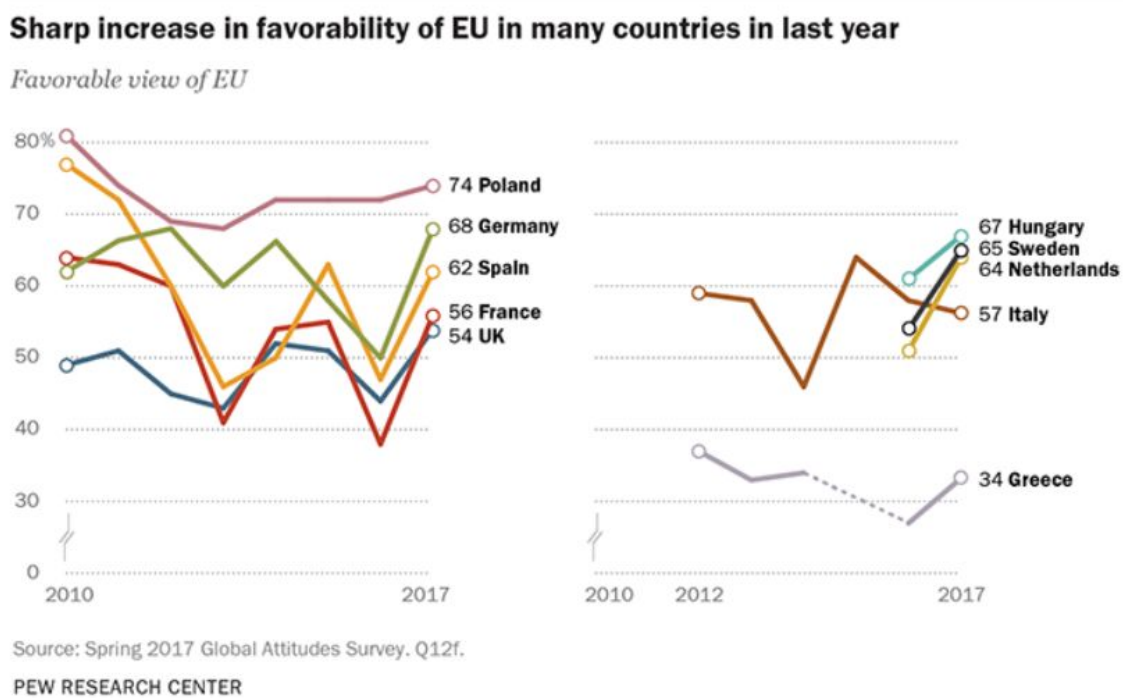
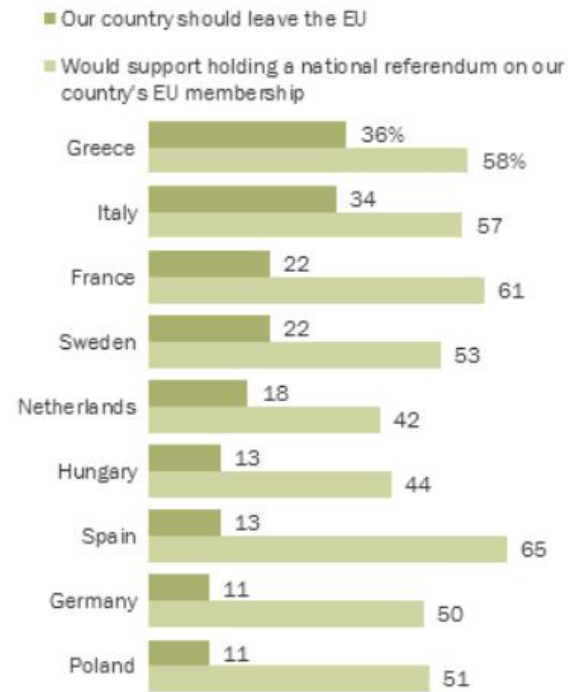


Figure 3: European Union member state citizen sentiment regarding the EU

<sup>56</sup> Stokes, B., Wike, R., & Manevich, D. (2017). *Global attitudes survey: Post-brexite, europeans more favorable toward EU*. Pew Research Center. Retrieved from <http://www.pewglobal.org/2017/06/15/post-brexite-europeans-more-favorable-toward-eu/>

### Little support for leaving EU, but many want a referendum on membership



Source: Spring 2017 Global Attitudes Survey, Q44 & Q45.  
PEW RESEARCH CENTER

Figure 4: Citizens of EU member countries who want a referendum and want to remain in the EU

Along with an overall increase in people’s positive view of the European Union, the Pew Research Center survey<sup>57</sup> shows that while European citizens have a more positive view of the Union, they also want to have a say in whether or not they remain in the Union. Even if the populace has a strongly positive view of the Union as a whole and little desire to actually leave the EU, they want to have their voices heard insofar as their country deciding to stay in the Union. Across the ten countries surveyed, 42% to 65% of those citizens surveyed reported supporting a referendum on EU membership in their country (Figure 4). These results point to a level of engagement in the process of EU membership. The people are not complacent in their

<sup>57</sup> Stokes, B., Wike, R., & Manevich, D. (2017). *Global attitudes survey: Post-brexite, europeans more favorable toward EU.* ().Pew Research Center. Retrieved from <http://www.pewglobal.org/2017/06/15/post-brexite-europeans-more-favorable-toward-eu/>

EU membership, nor do they wish to leave outright. They are asking to be engaged in the process of their country's membership to the EU. This gives credibility to the European Union, showing that the the people are engaged in the process and are involved in the the European Union as a whole, and not just the politics and everyday life of their individual country.

If there is a body politic, there exists the basis for a sovereign entity, in this case, the European Union. The European Union populace is multinational, but its governance under the European Union remains firm. The European Union interacts with the governments of member states to create policy. "the European Union as a multilevel governance system becomes an integral part of the "domestic" as well as the "transnational" realms."<sup>58</sup>

The European Council and the Council of the European Union (ECC) make up the executive and legislative center of European politics and decision making. One of the main things that they do is to promote "the general interest of the European Union by proposing and enforcing legislation as well as by implementing policies and the European Union budget."<sup>59</sup> These three bodies have the power to make decisions on behalf of the Union which may be opposed by some member states and were never explicitly agreed to in any treaty; nevertheless, they are obligated to comply with them because of their membership to the whole. The members of the ECC make these decisions and function on the whole through collective governance. Jose Magone suggests that "one of the more remarkable traits of the ECC is the high proportion of legislative decisions taken by consensus without recourse to any formal vote at all."<sup>60</sup> The ECC

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<sup>58</sup> Risse, T. (2015). "Introduction." In *European Public Spheres: Politics is Back*, edited by T. Risse. Cambridge: Cambridge University Press. 10.

<sup>59</sup>Europa.eu.European commission overview. Retrieved from [https://europa.eu/european-union/about-eu/institutions-bodies/european-commission\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en)

<sup>60</sup> Magone, J. M. (Ed.). (2014). *Routledge handbook of European politics*. Routledge. 219.

is a system made up of national government officials involved in a myriad of policy issues and levels of seniority meeting together to solve issues and legislate on a supranational, European Union level. As Jose Magone notes, “in 2011, this included just under 4,600 official ‘institutional’ meetings...with an operating budget of over 500 million euros.”<sup>61</sup> Through the networked structure of the ECC, they have created a supranational body which can act and wield some level of autonomous power in the regulation of the European Union. The ability for this networked structure of many member states coming together to effectively and efficiently legislate on issues which affect the whole of the EU shows the power that the EU has created for itself through these institutions.

## **B. Overlapping Sovereignty**

In modern times the idea of sovereignty has become less absolute than it was during the time of Thomas Hobbes and the Thirty Years War. The idea of absolute sovereignty has been eroded by international institutions and modern political structures. Nevertheless many states still hold on to their sovereignty and try to protect in the most absolute formation as possible. The European Union has gone the opposite direction and created a form of sovereignty which is shared and overlapping with member states. The sovereignty created by the European Union has created several sets of responsibilities for the member states and for the Union as a whole. But these duties aren't always discrete, and sometimes converge.

In this formation of sovereignty which is overlapping and shared, neither the member states or the European Union maintain exclusive sovereignty. The responsibilities of both are

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<sup>61</sup> Magone, J. M. (Ed.). (2014). *Routledge handbook of European politics*. Routledge. 219.

referred to as competencies. The competencies of the EU, and the competencies of member states by extension, are defined in the Treaty on the Functioning of the European Union (TFEU).

The four categories defined in the TFEU are:

1. Exclusive competence (Article 3 TFEU);
2. Shared competence (Article 4 TFEU) ;
3. Competence to support, coordinate, or supplement actions of the member states (Article 6 TFEU);
4. Competence to provide arrangements within which EU member states must coordinate policy (Article 5 TFEU).<sup>62</sup>

Exclusive competence describes certain areas where the EU maintains exclusive control, and is solely allowed to pass laws in those areas. In areas of exclusive competence “the role of member countries is limited to applying the law, unless the EU authorizes them to adopt certain laws themselves.”<sup>63</sup> Shared competencies allow both the EU and member states to pass laws which apply to these areas. The caveat with shared competencies is that member countries can only regulate in these areas if the European Union has not already done so or if the EU has expressly said they will not regulate in that area. The shared categories include Freedom, Security, and Justice. In the case of this example, the EU has already implemented regulations in this area. As such, EU member states are severely limited in their ability to create legislation and enact laws relating to Freedom, Security and Justice. Even though this area is shared under the Treaty on the

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<sup>62</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>

<sup>63</sup> European Commission. Areas of EU action. Retrieved from [https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action\\_en](https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en)

Functioning of the European Union, in practice it becomes strongly regulated by the EU and very difficult for the member states to regulate themselves. The third competency does as it says and allows the European Union to “support, coordinate, or supplement actions of the member states.”

<sup>64</sup> Again, this is a category which contains largely shared competencies. Though they are designed for the member states to take the lead, the EU still maintains a role in regulating these competencies. The last category of “competence to provide arrangements within which EU member states must coordinate policy” enables the EU to function in ways not normally allowed under treaties in areas such as:

- coordination of economic and employment policies
- definition and implementation of the Common Foreign and Security Policy
- the ‘flexibility clause’, which under strict conditions enables the EU to take action outside its normal areas of responsibility<sup>65</sup>

This category and its inclusion of common foreign and security policy gives the EU even broader power to regulate on security and supersede member states.

These competencies describe the general categories of responsibilities taken on by the European Union, and in so doing also define the general categories that the member states are

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<sup>64</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>

<sup>65</sup> European Commission. Areas of EU action. Retrieved from [https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action\\_en](https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en)



responsible for. Table 1 (below)<sup>66</sup> shows the distribution of specific functions to the member states and to the European Union, as well as their shared competencies.

Table 1: Powers Shared and Powers Divided: The breakdown of overlapping responsibilities of the European Union and its Member States		
Member States	Shared	European Union
Direct taxation	Internal market	Customs union
Public health	Social policy, limited to the aspects defined in the TFEU	Concluding international agreements including trade
Industry	Economic, social and territorial cohesion	Monetary policy for the member states whose currency is the euro
Culture	Area of freedom, security, and justice	The establishing of the competition rules necessary for the functioning of the internal market
Tourism	Environment	Common commercial policy
Education and training, youth and sport	Consumer protection	Conservation of marine biological resources under the common fisheries policy
Civil protection	Transport	
Administrative cooperation	Trans-European networks	
	Energy	
	Common safety concerns in public health matters, limited to the aspects defined in the TFEU	

<sup>66</sup> Table 1 information collected from several sources including: European Commission. Areas of EU action. Retrieved from [https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action\\_en](https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en); European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>; European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b179f222.html>;

	Research, technological development, and space	
	Development cooperation and humanitarian aid	
	Agriculture and fisheries, excluding the conservation of marine biological resources	

This original table shows that there are more categories which are shared between the member states and the European Union, and even that there are a few more duties which are assigned to the member states than those assigned to the European Union. But what the previous descriptions of the four competencies of the EU and the member states shows is that even if a category is defined as a shared competency, the EU often has broad power to influence the legislation in areas in which the member states have de jure control. There are specific powers which are taken away from the member states under the TEFU and given to the European Union, but there are also many powers which are ambiguously conferred as shared responsibilities and which, in practice, the EU has largely take control of.

Through the shared nature of many of these areas of responsibility, the sovereignty of both the European Union and the member states is shared. Neither one is exclusive in most areas of control, whether it is that way by law or has evolved that way in practice, the sovereignty of the member states and the European Union overlaps.

### **C. FRONTEX, the Mediterranean, and the Migrant Crisis**

The European Union maintains rights to shared policing, taking away the monopoly of force from the individual member states. One of the biggest instances of shared security policy

within the European Union in recent years has been over the issue of border security and action to stem the flow of migrants coming into the EU, especially through countries in the Mediterranean, like Greece, Italy, and Malta. Figure 6 shows the numbers of migrants entering the European Union at illegal border crossings. This demonstrates the extent of the crisis that the Union must handle. Policies of “Supranationalization” have moved the European Union towards a place where the individual member states often defer to an European Union body, in this case, the European Unionropean Border and Coast Guard Agency, an institution more commonly

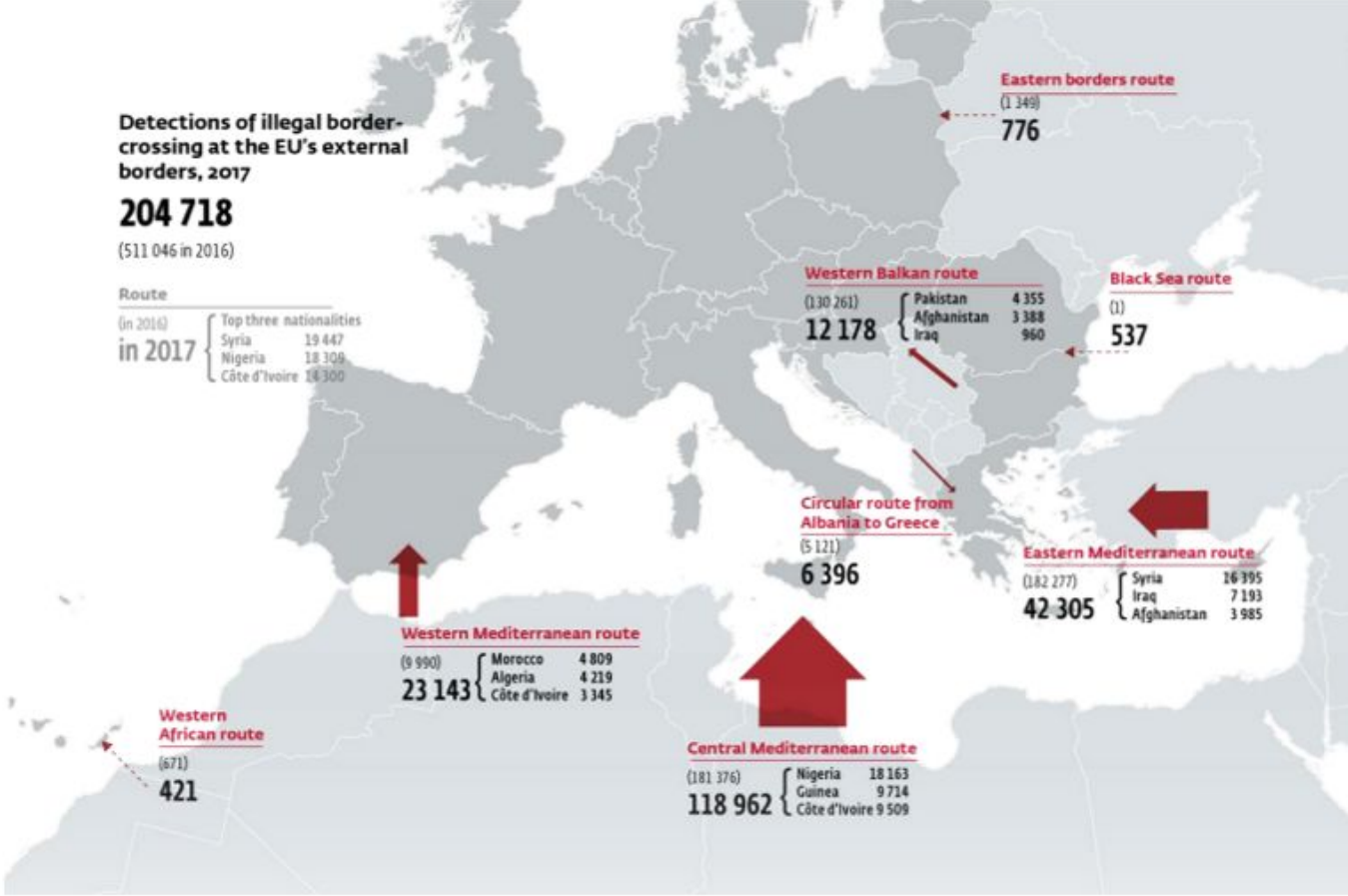


Figure 6: Detection of illegal border crossing at the EU’s external borders, 2017

known as Frontex, in order carry out actions generally attributed to the state. These include operations like border patrol, rescue missions, and surveillance. This section will focus on the

influence of Frontex in the European Union particularly in the southern Mediterranean countries, and how that influence has added to the accumulation of non-state sovereignty of the European Union.

Roberta Mungianu defines supranationalization as the process by which “centralized European Union governmental structures, here, the European Union institutions, exercise power on policy areas within the territory of the Member States as a consequence of the conferral of power from the Member States to the European Union within those policy areas.”<sup>67</sup> In the process of supranationalization, as Mungianu notes, member states pass on some of their rights to the European Union body. The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, more commonly known as Frontex, has been conferred rights by the member states to protect the external borders of the European Union. Frontex, along with other supranational agencies operating in and working to create security in Europe. Starting with the Maastricht treaty (1992) the European Union has formalized their cooperation regarding shared policing. The establishment of the Europol in 1995 continued this trend.<sup>68</sup> Frontex was formed in 2004 and has been reformed several times since.<sup>69</sup> Headquartered in Warsaw, Poland, Frontex now maintains a

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<sup>67</sup> Mungianu, R. (2013). Frontex: Towards a common policy on external border control. *European Journal of Migration and Law*, 15(4), 359-385.

Sweet, A. S., & Sandholtz, W. (1997). European integration and supranational governance. *Journal of European public policy*, 4(3), 297-317.

<sup>68</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border.

<sup>69</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1; hereinafter: Frontex Regulation.

staff of about 315 and a budget of about 250M European euros.<sup>70</sup> This agency acting with powers conferred by member states was set up as ten new countries were granted membership to the European Union in 2004. These countries, including Cyprus, Slovenia, and Malta, and their acceptance in the European Union were viewed fearfully by other member states who were highly skeptical of their ability to maintain external border integrity. Although explicit European Union cooperation on issues relating to borders and migration began in 1992 with the institution of the Maastricht treaty, such cooperation initially began in 1985 after it was developed by some European Union member states in the Schengen group.<sup>71</sup> Likewise, since the Tampere European Council<sup>72</sup> developments in the European Union “have demonstrated recognition of the importance of closer cooperation and mutual technical assistance between the border control services of the Member States.”<sup>73</sup>

In order to address this perceived issue, other European Union member states drew together to strengthen border control policies. Tightening of border controls has also been an effective way to combat terrorism. According to their website, the main role of Frontex is to help “European Union countries and Schengen associated countries manage their external borders. It also helps to harmonise border controls across the European Union. The agency facilitates

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<sup>70</sup> European border and coast guard agency (Frontex). Retrieved from [https://europa.eu/european-union/about-eu/agencies/frontex\\_en](https://europa.eu/european-union/about-eu/agencies/frontex_en)

<sup>71</sup> Monar, J. (2006). The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of the External Borders. *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme*, 73-90.

<sup>72</sup> European Council, Tampere 15 and 16 October 1999, Presidency Conclusions.

<sup>73</sup> Mungianu, R. (2013). Frontex: Towards a common policy on external border control. *European Journal of Migration and Law*, 15(4), 359-385.

cooperation between border authorities in each European Union country, providing technical support and expertise.”<sup>74</sup>

With the growing influence of Frontex and other organizations such as Europol, the European Union is growing as a multi-level governance system. Some scholars such as Deidre Curtin describe a “third wave” of agencies. Frontex is considered to be an example of these types of agencies which are “agencies with more overtly regulatory and far-reaching tasks in many instances.”<sup>75</sup> As a result, sovereignty is shifting, with the European Union and its supranational institutions claiming their own sovereignty separate from the state. Marin notes that this process “has an impact also on policing: European integration added a transnational dimension to policing.”<sup>76</sup>

Frontex is one institution which is consolidating power and the resources traditionally held by the state, by taking a whole network of actors which normally reside domestically and placing it under one umbrella institution. It does so with the aim to in “to increase cooperation, coordination, convergence and consistency between borders’ practitioners in the European Union

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<sup>74</sup> European border and coast guard agency (Frontex). Retrieved from [https://Europa.eu/European-union/about-eu/agencies/frontex\\_en](https://Europa.eu/European-union/about-eu/agencies/frontex_en)

<sup>75</sup> Curtin, D. (2009). *Executive power of the European Union: law, practices, and the living constitution* (Vol. 12). Collected Courses of the Acade.

<sup>76</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 469.

Walker, N. (2012). The pattern of transnational policing. In *Handbook of policing* (pp. 147-174). Willan.

MSS<sup>77</sup> but is nevertheless changing the landscape of security in the European Union and the individual member state's monopoly of force in their own countries.

Article 1 of the European Council document on integrated border management says that Frontex was created in the effort to “improv[e] the integrated management of the external borders of the Member States (...).” This concept was defined in a Council document<sup>78</sup> and was endorsed by the European Council in December of 2006.<sup>79</sup> The roles of Frontex which are encapsulated in “integrated border management” are as follows:

- a. Border control (checks and surveillance);
- b. Detection and investigation of cross-border crime;
- c. four-tier access control model which is comprised of measures in third countries (TC), neighboring country cooperation, border control, and measures to control movement;
- d. Inter-agency cooperation;
- e. Coordination and coherence on actions at European Union level.

Frontex maintains that European Union countries which border non-European Union countries are solely responsible for their borders and that Frontex only offers support in efforts to maintain external border integrity by providing equipment like aircraft and boats, and trained border

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<sup>77</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 472.

<sup>78</sup> Council document No 14202/06, draft Council conclusions on integrated border management. The concept has been previously referred at in Commission's Communication -Toward integrated management of the external borders of the Member States of the European Union, COM(2002)233 final, cit.

<sup>79</sup> Council Conclusions on Justice and Home Affairs Council, Brussels, 4-5 December 2006.

agents. On their website they describe their activities this way: “Frontex coordinates maritime operations (e.g. in Greece, Italy and Spain) but also at external land borders, including in Bulgaria, Romania, Poland and Slovakia. It is also present at many international airports across Europe.”<sup>80</sup> But looking further into the activities of Frontex, reveals that perhaps Frontex operations aren’t solely supportive of the actions of member states, but often act in a way which sets the priority for certain operations, and Frontex takes a leading role in carrying out these operations.

One such example described by Luisa Marin is Joint Operation Nautilus which was conducted in several parts from 2006-2009. This operation was conducted with the primary goal of stemming the flow of migrants through the Mediterranean and entering Europe. The primary areas of concern at the time were Italy and Malta, which at the time was not yet a member of the Schengen Agreement. The Frontex website provides scarce details on many of the portions of the operation, leaving the information gathering to non-governmental sources. However, the information that they do report differs vastly from information obtained and reported by NGOs and academic sources. Maritime forces working on the operation have denied the discrepancies which were primarily related to the number of migrants apprehended and the number who were deterred from making the journey.<sup>81</sup> Information regarding the organizational structure of the operations was also missing from the reporting by Frontex. This lack of information has caused scholars to question the involvement of Frontex and their role as a support organization. Luisa

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<sup>80</sup> European border and coast guard agency (Frontex). Retrieved from [https://europa.eu/european-union/about-eu/agencies/frontex\\_en](https://europa.eu/european-union/about-eu/agencies/frontex_en)

<sup>81</sup> Klepp, S. , ‘A Contested Asylum System: the European Union between Refugee Protection and Border Control in the Mediterranean Sea’, (2010)12 European Journal of Migration and Law, 1, 16.



Marin questions the actions of Frontex, and their supposed supporting role in operations like Nautilus: “how can someone accept that there was no overlap among operational areas if Frontex operational plans remain secret?”<sup>82</sup> Furthermore, JO Nautilus was conducted without a clear legal basis or code to return the migrants to their home countries. This was because at the time Malta was not a part of the Schengen Agreement and as such the Schengen Border code did not apply.

Marin remains skeptical of the extent of the involvement of Frontex in operations like Nautilus. She implies that the reach and operations of the organization go further than are disclosed to the public.<sup>83</sup> Whether or not the operations of Frontex go beyond the international law to infringe upon human rights, they certainly go beyond the authority of the member states in patrolling and conduction operations along the external borders of the European Union. Even still, Frontex operations are conducted with some joint effort by member states. Integrated border management is of utmost importance to Frontex and the European Union. Roberta Mungianu notes that this is one of two ways that sovereignty is shifting from member states to European Union institutions. The two ways that she identifies are: “(i) Frontex is called to the realization of the ‘integrated management system’; and (ii) it is required to carry our joint operations along with Member States.”<sup>84</sup>

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<sup>82</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 477.

<sup>83</sup> Marin, L. (2014). Policing the European Union's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 477.

<sup>84</sup> Mungianu, R. (2013). Frontex: Towards a common policy on external border control. *European Journal of Migration and Law*, 15(4), 384.

In February of 2018, a new year-long operation was launched by Frontex.<sup>85</sup> This operation, called Themis changed the policy from a previous operation (Triton) which required all migrants rescued at sea to be taken to Italy even if there were ports, such as those in Malta or Greece that were closer. This policy was often and loudly protested by the Italian authorities, even leading them to introduce a plan to open other European Union ports to migrants. But they were often shot down by the leaders of other European Union countries.<sup>86</sup> Operation Themis changed this policy and will now allow for migrants rescued at sea to be taken to the nearest safe port. Izabella Cooper, a spokeswoman for Frontex, told Reuters that in 2017 Frontex conducted operations in Italy, Greece, and Spain which rescued 38,000 people at sea and that the Frontex ships involved in the Themis operation will continue to carry out rescues in accordance with the new policy.<sup>87</sup>

Italian authorities were bound to the original policy under Triton despite their protest. If it were left to them to enforce the policy they might not have done so with vigor, but the contributions of Frontex bound the Italians to the policy. While this was to the benefit of the migrants, so they weren't left at sea or diverted to unsafe ports in other countries, Italy had little say over their fate. Under Operation Triton they were at the mercy of the will of the European Union, whose policies were enforced by Frontex. Through the enforcement power of Frontex,

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<sup>85</sup> Frontex. (1 Feb 2018). *Frontex launching new operation in central med.* (Press Release). <https://frontex.European Unionropa.European Union/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7>

<sup>86</sup> Barigazzi, J. (7 June 2017, ). Germany rejects Italian proposal to open European Union ports to migrants. *Politico* Retrieved from <https://www.politico.European Union/article/germany-rejects-italian-proposal-to-open-European Union-ports-to-migrants/>

<sup>87</sup> Scherer, S. (1 Feb 2018, ). In new European Union sea mission, ships not obliged to bring migrants to Italy. *Reuters World News* Retrieved from <https://www.rEuropean Unionters.com/article/us-European Unionrope-migrants-italy/in-new-European Union-sea-mission-ships-not-obliged-to-bring-migrants-to-italy-idUSKBN1FL62M>

the European Union was able to implement migration policy which they felt benefitted the whole of the European Union at the expense of the national interests of the Italian government. In a June press release from the European Commission, they announced that the budget for Frontex for the next cycle (which will cover the next 7 years) will be €34.9 billion. This is an increase of over 60% for the previous financial period. This increase in the overall budget encapsulates a 51% increase in the budget for migration policy from €6.9 billion to €10.4 billion, and an increase of more than 200% for border management €2.7 billion to €9.3 billion.<sup>88</sup> While these increases on their own cannot be taken as evidence of the force of the institution, they can be used as a evidence and a piece of the puzzle which shows the European Union contributing money and effort into supranational bodies which in practice remove responsibilities and powers from member states, in this case in regards to border security and migration.

The use of Frontex as a border and security policy enforcer shows the strength of the European Union in enforcing their policies on individual member states. Frontex is able to operate sometimes outside of the public view and so have lesser accountability. Likewise, their policies, while necessitating some member state agreement, have the capacity to supersede national interests when it comes to border policy in order to protect the whole of the Union. In this way, the organization, and the European Union in constructing it have encroached upon member states' sovereign rights over the monopoly of force. Though the European Union does require member states to sacrifice rights, there is a larger conclusion to be made here that the way the European Union is expressing its power as security and border patrol marks a shift in

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<sup>88</sup> European Commission. (12 June 2018). *Questions and answers: Future European Union funding for borders and migration*. (Press Release). [http://europa.eu/rapid/press-release\\_MEMO-18-4127\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-4127_en.htm)

sovereignty. Sovereign power is shifting from the member states to European Union institutions like Frontex.

The process of European Integration has created an economic and political community with strong external borders, while still having the member states within maintain some autonomy. The sovereignty of the European Union is conferred upon it through the creation of a body politic which engages in debate over the future of the Union. And though the European Union does have a strong external border, the territory of the Union is not bounded to a specific area and instead is linked to the borders of its member states. These conditions shift the traditional conceptions of sovereignty and show that the European Union maintains its sovereignty despite diverging from the definition which requires specifically defined territory and that the entity is a state body.

Brexit and the negotiations which have come out of it have also enhanced the argument towards the sovereignty of the European Union. By demonstrating that the European Union can lack distinct territory and still maintain sovereignty. The UK is threatened by the possibility of them being left out of the European economic community and it leaves the European Union considerable leverage to control the UK despite their attempts to leave the European Union. The European Union is negotiating from a position of power, showing their ability to exert control over their own organization and exclude others from the organization if they are not going to comply with all of the agreements and concessions required to take part in the benefits.

The ability of Frontex to shape the actions of member states at the borders of the European Union show the power of the Union to enforce the decisions made at the collective level on individual member states. Frontex and other aspects of the European Union's security

apparatus remove the monopoly of force from the member states and bestow some of those responsibilities onto the European Union. By law, the European Union also does not hold a monopoly of force over the area which it governs as member states still have sovereign rights to certain aspects of security within their country. But practically, the European Union has the power, especially on the borders of the European Union, to act with little regard for internal resistance from European Union member states.

The example of Frontex also shows that in some instances, the European Union is overriding state sovereignty. This relationship between the two shows also that EU sovereignty and member state sovereignty are not exactly overlapping. Although there are many things that are shared, and some responsibilities and abilities of the member states and the EU which are discrete and separate, there are some which are meant to be shared, but which in practice become overruled and run by the EU despite the protest or actions of member states. The sovereignty looks shared, but Frontex is going beyond the shared model and overriding the state powers. This demonstrates the strength of the reach of the EU and demonstrates its ability to overrule to the sovereignty of the member states.

#### **IV. Conclusion**

European Union sovereignty has diverged from traditional absolute state sovereignty. Its non-state character makes it fundamentally different. Additionally, it allows for shared duties and powers with member states, creating a sovereignty which is overlapping. European Union sovereignty also changes the way the member states control security in their countries and it

takes away the monopoly of force. These three main changes in the make up of EU sovereignty compared to traditional state sovereignty constitute a new form of sovereignty. The Union, and its sovereignty has been given legitimacy by the people of the EU through their buy in and trust in the system. The founding documents and pillars of the European Union were not created with the idea that the community would become sovereign. But through the evolution of the body, and the increasing overlap and take over of the duties and reach of the EU over the member states has made the EU a de facto sovereign power.

#### A. Implications of EU Sovereignty

The new form of non-state sovereignty created by the European Union has many benefits. The original idea of the European Coal and Steel Community was to make it so no country would be able to amass sufficient quantities of weapons and supplies to wage war against any other country on the European continent, with particular focus on the previously frequent conflicts between Germany and France. The new global economy makes this idea a moot point, giving countries the ability to outsource their weapons production and get supplies elsewhere. Nevertheless, the European Union has the power, through collective action, to temper the more hawkish member states, and leverage influence to let cooler heads prevail and continue the original focus of the organization to prevent European war by bringing together the member states and linking them in such a way which discourages military action of against one another.

The same idea of the European Union as a collective entity lessening the influence of radical parties within member states is influential as it relates to immigration policy in the European Union. Luisa Marin notes in her piece on the policing of EU borders that “[a]ccess to Europe’, ‘the fortress’, is a sensitive political issue for the EU and [member states’] governments

nowadays.”<sup>89</sup> A benefit of the creation of EU sovereignty is the ability that the collective has to temper the opinions of the group. Right wing sentiment has been increasing in individual member states in the European Union, but the Union as a whole is doing its level best to keep the policy of the Union consistent across member states. This benefits citizens of the EU and people from abroad facing dire circumstances and trying to migrate to Europe. Likewise, if extreme anti-immigrant sentiment continues and permeates further into the infrastructure of the EU as a whole, European Union Sovereignty and the collective voice of the EU could make it difficult for more liberal states to push against those policies which they see as going too far in regards to immigration or other.

In its original formation, the European Union wasn't supposed to gain sovereignty. Despite the aim of a European community being to make it impossible for the member states to wage war on each other, the Union was still supposed to allow for the sovereignty of its member states. But over time the Union has amassed responsibilities and created overlapping jurisdictions which take over some functions of the state. Some of the responsibilities are written into law in the formational and guiding documents of the European Union, others have developed through the extension of the powers of the EU. But on the whole, the sovereignty that has been developed by the European Union is not defined by law. It has developed through the expansion of powers and the reach of the EU. The sovereignty is de facto, not de jure.

This condition of de facto sovereignty is revolutionary for the way sovereignty is thought of internationally. The creation of sovereignty by a supranational body changes what were

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<sup>89</sup> Marin, L. (2014). Policing the EU's external borders: A challenge for the rule of law and fundamental rights in the area of freedom, security and justice? An analysis of Frontex joint operations at the southern maritime border. 470.

considered to be immutable characteristics of states. These changes create cause for the international community to rethink the conditions of sovereignty, whether it has to be bounded to states or if it can also apply to intra-state bodies. This also applies to other non-state actors in the international community. Terrorist organizations like the Taliban fit the categories laid out in this paper for having their own sovereignty. They are a non-state actor, in some areas they provide essential services to citizens, and they remove the monopoly of force within their controlled territory from official state control. If the conditions for European Union sovereignty apply to other non-state bodies around the world, it raises the question of whether or not those bodies should be given power and weight in the international system, and be officially recognized within the systems of power. Whether or not this is a positive change, it should give us pause to consider the many actors in the international system and whether or not they could fall under the umbrella of having become de facto sovereign, and whether or not this means they should be treated differently in how they are dealt with in the international system.

## **B. The Difference in Regulation**

The shared sovereignty between the the member states and the European Union is not equal and it is not the same in all areas of governing. The expressions of shared sovereignty that come out in the de jure shared duties of the EU and the member states are clearly regulated and governed by treaties such as the *Treaty on the Functioning of the European Union*. The duties of the member states and the EU are specified and separate, but shared. But the example of Frontex displays the fundamentally different character of the shared responsibilities of the member states and the EU as a whole.



Table 1 shows the different responsibilities of member states and the EU and shows that those assigned to each party are carried out as they should be, but that those responsibilities meant to be shared can be overshadowed by the influence of the EU. In the area of border security, the EU has eclipsed the role of the member states in some places. The idea that the EU and the member states would each have their own responsibilities and powers created the precedent for shared responsibility and eventually opened the door for the expansion of powers and responsibilities of the EU and its eventual sovereignty.

The question asked in this paper, how does the existence of non-state sovereignty exist and interact with existing state sovereignty?, is not answered simply. This paper shows that the overlapping nature of the sovereignty between the EU and the member states creates for a messy situation and unclear boundary lines of who is responsible for what. In the arrangement that the member states and the EU share responsibilities, there is also a lot of opportunity for the EU to expand their powers through the mechanisms which made some responsibilities shared.

The EU having a type of non-state sovereignty could have significant implications across Europe. But it could be particularly strong in places where the state is already weak. In periphery EU countries, like in Greece, the EU is becoming stronger with the expansion of their border control duties. If this is to continue it is possible that the EU could start to become more sovereign than the member state. This might change how states wanting to enter the EU view the benefits they would get from membership, versus the trade offs and sacrifices they would have to make to become members. Though while the strengthening of EU sovereignty could have quite major impacts for weaker member states, the stronger states which we tend to think of as major players in the EU would likely be impacted much less by the strengthening of EU sovereignty.

These stronger member states like France and Germany are more interior in Europe. The EU has less to do in a state like Germany in regards to external border security, and thus has less ability to expand their powers, and less cause for encroaching upon the stated responsibilities of that member state.

The relationship of EU non state sovereignty to existing member state sovereignty is fraught and complicated. It overlaps in places, and expands past its stated boundaries in others. The concept of shared and overlapping, non state sovereignty is important for the EU and its member states to consider as it evaluates the responsibilities of each, and determines its priorities for protection and regulation.

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