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UNIVERSITY OF AMSTERDAM

THE EUROPEAN UNION FROM AN  
INTERNATIONAL PERSPECTIVE:  
SOVEREIGNTY, STATEHOOD, AND SPECIAL TREATMENT

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# **The European Union from an International Perspective**

**Sovereignty, Statehood, and Special Treatment**

*Christina Eckes and Ramses A. Wessel*

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## 1. Introduction

The European Union's ability to conduct its own foreign policy is not contested as a matter of principle. The Union is for instance the only non-state actor that participates in certain international functional regimes on equal footing with states.<sup>1</sup> At the same time, the Union's ability to conduct its own foreign policy remains under constant pressure, both from the outside and from the inside. This pressure is created by states, which use both external and internal legal narratives to try to rein in the at least at times quasi-sovereign external posture of the EU. Under international law the narrative goes that only states are vested with 'original rights' and hence are 'primary subjects' of international law.<sup>2</sup> And even though other international actors accept that the Union takes at times a state-like position, "the EU is, under international law, precluded by its very nature from being considered a State"<sup>3</sup> and classified as an international organization.<sup>4</sup> In that capacity, the Union remains seen as exercising delegated rights and at least partially as penetrable in that behind the organization there are still the Member States as the ultimate point of reference.<sup>5</sup> These pressures have from the outset led to the idea that the EU "cannot be fitted into traditional categories of international or constitutional law".<sup>6</sup> Yet, the inside pressure exercised by the Member States, politically and legally, is well explored. They continuously use a sovereignty narrative to remain visible and autonomous – next to, behind, and in front of the Union. The focus in this chapter will be the external legal narratives.

The EU's foreign policy after the entry into force of the Lisbon Treaty goes beyond a supportive or supplementary character. The objectives set out in the European Treaties require the EU to take the role of an international actor separate from its Member States.<sup>7</sup> At the same time, the basic assumption remains that European external actions develop in a supportive parallelism to the EU's internal policies.<sup>8</sup> This has also for long been the position of the Court of Justice of the European Union (CJEU).<sup>9</sup> Part of this contribution aims to demonstrate that the opposite can also be true, namely that the Union's participation in international relations reflects back onto its internal constitutional landscape.

The question of how the EU's external actions, i.e. its participation in international relations, could influence the sovereignty debate is conspicuously absent in the literature. The focus of the existing inquiries is on the EU internally, and very different conclusions are drawn whether or not Member States have lost sovereignty,

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<sup>1</sup> Examples are the World Trade Organization, the Food and Agriculture Organization, and potentially in the future the European Convention on Human Rights. The EU is of course not a member of the UN, nor can it bring cases before the International Court of Justice.

<sup>2</sup> A. Carty, *Philosophy of International Law*, Edinburgh: Edinburgh University Press, 2007, Chapter 3, International Legal Personality, p. 81. See also: International Court of Justice, *Reparation For Injuries Suffered In The Service Of The United Nations*, Advisory Opinion of 11 April 1949 (the Reparations case, ICJ Reports, 1949, p. 174), discussed below.

<sup>3</sup> CJEU, Opinion 2/13 of 18 December 2014, para 156.

<sup>4</sup> At best as a particular type of international organization that enjoys additional rights in certain contexts, a regional economic integration organization (REIO). See further below.

<sup>5</sup> C. Brölman, 'A Flat Earth? International Organizations in the System of International Law', in: J. Klabbers (ed.), *The Law of International Institutions*, Series: Library of Essays in International Law, Ashgate, 2006, pp. 183-206: 'International organizations are neither sovereign nor equal'.

<sup>6</sup> H.L. Mason, *The European Coal and Steel Community: Experiment in Supranationalism*, Dordrecht: Martinus Nijhoff, 1955, at p. 126.

<sup>7</sup> See Article 21 TEU for the Union's general objectives for its external actions.

<sup>8</sup> Treaty on the Functioning of the European Union (TFEU), Articles 3 and 216.

<sup>9</sup> Case 22/70, *Commission v Council (ERTA)* [1971] E.C.R. 263.

whether the EU has gained it, whether it can be shared in some way, or whether we have entered a ‘post-sovereign’ era.<sup>10</sup> With regard to the EU’s relationship with the outer world, scholars commonly speak of ‘autonomy’ rather than sovereignty.<sup>11</sup> Yet, the qualifying criterion to enjoy full international legal capacity remains sovereignty<sup>12</sup> and from the perspective of individual sovereignty remains a fiction of belonging and representation that has become rather more than less prominent in recent times. This continues to be the case despite all gradual changes of what being sovereign means in modern international relations. It therefore makes sense to question whether and possibly to what extent the EU acts as a sovereign actor under international law.

Given the notion that the European Union may very well be “an international legal experiment”,<sup>13</sup> the main underlying question in this Chapter is: How does the European Union fit into the international legal conceptions and what impact has the fact that the EU is increasingly given extensive rights to take a quasi-sovereign or state-like position under international law? In section 2 we will examine the practices of the European Union as a global actor. Section 3 will relate the Union’s external posture to the concept of sovereignty by approaching the EU’s exercise of sovereign rights from these practices rather than from abstract criteria for statehood.

## 2. The European Union as a Global Actor

### 2.1 ‘State-Like’ Actions of the EU in International Relations?

In recent years, the EU has been taking up ‘state-like functions’ in more areas than before.<sup>14</sup> Indeed, it appears to have developed greater global ambitions.<sup>15</sup> Indications for this development are not only the establishment of an ‘EU Foreign Ministry’ in the form of the European External Action Service (EEAS) as “the first structure of a common European diplomacy”<sup>16</sup> with ‘embassy-like’ delegations all over the globe,

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<sup>10</sup> See above all: N. MacCormick, *Questioning Sovereignty*, Oxford: Oxford University Press, 1999 and N. Walker, ed., *Sovereignty in Transition: Essays in European Law*, Oxford: Hart Publishing, 2003.

<sup>11</sup> E.g.: T. Molnár, ‘The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States’, 3 *Hungarian Yearbook of International Law and European Law*, 2015, pp. 433-459; C. Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’, *Modern Law Review*, 76(2) 2013, p. 254–285; R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Independence: The EU Legal Order Under the Influence of International Organisations*, The Hague: T.M.C. Asser Press/Springer, 2013, in particular: J. W. Van Rossem, ‘The Autonomy of EU Law: More is Less?’, pp. 13-46.

<sup>12</sup> An overall more conservative approach would claim that the qualifying criterion is statehood, which confers legal sovereignty.

<sup>13</sup> B. De Witte, ‘The European Union as an International Legal Experiment’, in: G. De Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge: Cambridge University Press, 2011, pp. 19-56.

<sup>14</sup> This contribution is a reflection of ongoing research. Parts of this section are based on R.A. Wessel, ‘Can the European Union Replace its Member States in International Affairs? An International Law Perspective’, in: I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden/Boston: Martinus Nijhoff Publishers, 2013, pp. 129-147; as well as on Chapter 1 of B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press 2014. References to other related publications can be found throughout the text.

<sup>15</sup> See B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU’s Role in Global Governance: The Legal Dimension*, Oxford: Oxford University Press, 2013.

<sup>16</sup> *Consular and Diplomatic Protection: Legal Framework in the EU Member States*, Report of the EU CARE project; available at <<http://www.careproject.eu/images/stories/ConsularAndDiplomatic->

but also the development of the EU as an actor in international security on the basis of its Common Security and Defence Policy (CSDP)<sup>17</sup> and the more outspoken wish to play a role in international institutions, be it as a full member (as in the case of the WTO) or simply as a visible and audible representative (as in the UN General Assembly).<sup>18</sup>

The EU regularly concludes international agreements with third countries, ie. non-Member States.<sup>19</sup> It has done so before the entry into force of the Lisbon Treaty, including as European *Union*. Since the entry into force of the Lisbon Treaty, the Union has succeeded the Community and taken over all international obligations flowing from the latter's treaty making activities. Also, the EU Treaties have made an attempt at clarifying and strengthening the Union's competences and applicable procedures for treaty making. Article 47 TEU explicates in simple words: "The Union shall have legal personality." Yet also the codification of the Union's legal personality exemplifies the above-described pressures. Firstly, no reference is made to 'international legal personality'; and secondly, the Member States immediately felt the need to attach Declaration 24, reiterating the existing legal situation that the codification of the Union's legal personality does not interfere with the principle of conferral, ie. that the Union may only act where this is provided by the Treaties. Article 218 TFEU lays down a general procedure for the conclusion of international agreements. This provision determines the roles of the different institutions depending on the policy field under which the international agreement falls. It is subject to the Court's jurisdiction, including where the conclusion of a CFSP agreement is contested,<sup>20</sup> and indeed the new procedural prerogatives of the institutions have already given reason to litigation.<sup>21</sup> Post-Lisbon the Treaties also made an attempt to codify the CJEU's case law by circumscribing Union's competences, both exclusive and shared, to conclude international agreements.<sup>22</sup> Agreements concluded by the EU range from the broad controversial ones, such as the Transatlantic Trade and Investment Partnership that is currently under negotiation, to narrow subject matters, such as specific fisheries agreements with neighbouring countries. The former are usually concluded as mixed agreements, with both the Union and its Member States acting as one party to the agreement.

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[Protection.pdf](#)> (accessed 31 December 2010). See in general on the EEAS: M. Gatti, *European External Action Service*, Leiden/Boston: Brill, 2016.

<sup>17</sup> F. Naert, *International Law Aspects of the EU's Security and Defence Policy*, Antwerp: Intersentia, 2009.

<sup>18</sup> More extensively: R.A. Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions', *Journal of European Integration*, 2011, pp. 621–635 (republished in S. Oberthür, K.E. Jorgenson and J. Shahin (eds.), *The Performance of the EU in International Institutions*, London/New York: Routledge, 2013, pp. 23-37).

<sup>19</sup> For an overview see: <https://treaties.un.org/>.

<sup>20</sup> Confirmed by: C-658/11, *Parliament v Council*, Judgment of the Court (Grand Chamber) of 24 June 2014, para 73.

<sup>21</sup> See for an analysis of recent case law in relation to the EU's foreign policy some of our earlier publications: C. Eckes 'Common Foreign and Security Policy: the Consequences of the Court's Extended Jurisdiction', *European Law Journal*, 2016; R.A. Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy', *European Papers*, 2016, No. 2, pp. 439-468; as well as C. Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy', in M. Cremona and A. Thies (Eds.), *The European Court of Justice and External Relations Law*, Oxford: Hart Publishing, 2014, pp. 47-70; C. Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy', *European Papers*, 2016, pp. 55-66.

<sup>22</sup> Articles 3(2) and 216 TFEU.

By now we are also used to a separate role of the EU in international institutions. The EU is a full member of the World Trade Organization (WTO), as well as most fisheries organizations.<sup>23</sup> This corresponds to the EU's exclusive competences in the field of common commercial policy (CCP) and fisheries (Art. 3(1)(d) TFEU). The EU has also adopted considerable legislation in areas of shared competence covered by the scope of activities of international organisations. In some cases, such extensive EU legislation has not lead to membership, e.g. the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO). In others, such as the Food and Agriculture Organisation (FAO)(1991)<sup>24</sup> and the *Codex Alimentarius* (2003),<sup>25</sup> the Union has indeed become a member.<sup>26</sup> In these cases, the exercise of its membership rights, such as voting rights, requires particular adaptation, as it is for example the case in the *Codex* where the Union may exercise its voting rights but for the determination of a quorum only the delegate of its Member States count.<sup>27</sup>

Two particular examples are the United Nations (UN) and the European Convention of Human Rights (ECHR). While the EU Member States actively engage within numerous UN specialized agencies, EU membership to the UN itself would require amending Article 4(1) of the UN Charter, which at present is not on the political agenda. However also in the UN, the EU has extended its influence through other channels. After a failed first attempt in September 2010, in which the Union did not take sufficient account of the position and willingness of other UN member states, the Union was granted an extended status of participation in the General Assembly (GA) in May 2011.<sup>28</sup> As is well-known by now, the EU has also made quite some strides in order to accede to the ECHR. The negotiators presented the final draft accession agreement in April 2013. The intense negotiations, the need to amend the ECHR and the detailed draft accession agreement can be read to confirm two opposing points. On the one hand, all this was necessary because the EU is not a state. On the other, the EU will join the ECHR on an equal footing with the other Contracting Parties, who are all states. Under this agreement, the Union would essentially have the same rights and obligations. If anything, one could argue that it enjoys additional rights.<sup>29</sup> Yet, in December 2014 this process has come to a halt with the CJEU's opinion finding the draft agreement incompatible with EU law.<sup>30</sup>

Less well discussed are examples such as the World Customs Organization (WCO), where the EU enjoys status "akin to WCO membership"<sup>31</sup> and the particular

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<sup>23</sup> See R.A. Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions', *op.cit.*

<sup>24</sup> Articles II (8)-(11) FAO Constitution.

<sup>25</sup> Council Decision 2003/822/EC of 17 November 2003, O.J. 2003, L 309/14, Annex II and III.

<sup>26</sup> It is the only 'Member Organization', alongside Member States.

<sup>27</sup> See Article II.3 and 8 of the Rules of Procedure of the Codex Alimentarius Commission respectively.

<sup>28</sup> Sixty-fifth session, Agenda item 120, Strengthening of the United Nations system, Resolution A/65/276.

<sup>29</sup> Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', 76(2) *Modern Law Review* 2013, pages 254-285

<sup>30</sup> This will be discussed in more detail in Chapter XX. Cf. also A. Łazowski and R.A. Wessel, 'When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR', 8(1) *German Law Journal*, 2015, pp. 179-212.

<sup>31</sup> [http://www.wcoomd.org/en/about-us/wco-members/~/\\_media/WCO/Public/Global/PDF/About%20us/WCO%20Members/List%20of%20Member%20with%20membership%20date.ashx](http://www.wcoomd.org/en/about-us/wco-members/~/_media/WCO/Public/Global/PDF/About%20us/WCO%20Members/List%20of%20Member%20with%20membership%20date.ashx).



status of the EU within the International Organisation for Vine and Wine (OIV).<sup>32</sup> The WCO example is instructive because it illustrates, just as the UN GA example, that the Union's status does not only depend on the position of the EU Member States, but also crucially on recognition by other states. In 2007, the Union's request to join the WCO was accepted; yet, full membership is contingent on ratification by its 172 members of a new clause to the WCO Convention allowing economic and customs unions to join. The OIV example illustrates the need for rather detailed rules on communication and collaboration triggered by disagreement between the Member States and the EU institutions, about the procedural rules on the representation of positions within the international organisation to which the EU is not a member.<sup>33</sup>

In particular since the entering into force of the Lisbon Treaty, several EU Treaty articles provide a solid basis for the Union to establish a formal and substantive presence not only in international organizations, but also in third countries.<sup>34</sup> The EU's physical presence through its delegations is based on Article 221(1) TFEU: "Union Delegations in third countries and at international organisations shall represent the Union." The ambition flowing from this new provision in the TFEU should be quite clear: the Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission delegations), or through the diplomats of the Member State holding the rotating Presidency.<sup>35</sup> Its purpose was to have "less Europeans and more EU",<sup>36</sup> i.e. a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally. Implementing this ambition has meant that the former 'Commission Delegations' have been turned into 'Union Delegations'<sup>37</sup> and that for all practical diplomatic purposes they are seen as EU 'embassies'.<sup>38</sup>

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<sup>32</sup> See: Special arrangement related to the particular status of the European Union within the International Organisation for Vine and Wine, ANNEX 1 to the Communication from the Commission to the Council On reaching an agreement conferring special status on the European Union within the International Organisation of Vine and Wine (OIV) (COM(2016) 735 final; Brussels, 25.11.2016).

<sup>33</sup> Case C-399/12, *Germany v Council*, ECLI:EU:C:2014:2258 (Germany was supported by Czech Republic, Luxembourg, Hungary, The Netherlands, Austria, the Slovak Republic, and the UK; the Council was supported by the Commission). See also R.A. Wessel and S. Blockmans, '[The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union](#)', in P. Eeckhout, M. Lopez-Escudero (Eds.), *The European Union's External Action in Times of Crisis*, Hart Publishing, 2016, pp. 223-248.

<sup>34</sup> Articles 220 and 221 TFEU *jo* Articles 3(5) and 21(1) TEU.

<sup>35</sup> But see the EEAS document 'EU Diplomatic Representation in third countries – First half of 2012', Council of the European Union, Doc. 18975/1/11, REV 1, 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

<sup>36</sup> A. Missiroli, 'The New EU Foreign Policy System After Lisbon: A Work in Progress', *European Foreign Affairs Review* 25-4 (2010), pp. 427-452.

<sup>37</sup> European External Action Service, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, 16 and see also F. Bergmüller, 'The EEAS: A Loss for the European Commission's External Relations Capacities?', in: P. Quinn, (ed.), 'Making European Diplomacy Work: Can the EEAS Deliver?', *EU Diplomacy Papers* 8/2011, Bruges/Natolin: College of Europe, 2011, pp. 14-18.

<sup>38</sup> See also the view of the European Parliament: 'The institutional aspects of setting up the European External Action Service', European Parliament resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service (2009/2133(INI), Art. 6(e), OJ 2010 C-265 E/9; and J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?', *Hague Journal of Diplomacy*, 2012, pp. 31-49; as well as P. Kerres and R.A. Wessel, 'Apples and Oranges? Comparing the European Union Delegations to National Embassies', *CLEER Papers*, No.2, 2015.

Indeed, distinctions with states representations are increasingly blurred. Heads of Delegations *de facto* act as ‘EU ambassadors’.<sup>39</sup> The EU Heads of Delegations representing the Union in third states and at international organisations are thus vested with the authority to perform functions equivalent to those of national diplomats. In third states the EU aims at a status of the Heads of Delegation comparable to national ambassadors and prefers to have them listed alongside the representatives of states rather than with the representatives of international organisations.<sup>40</sup> Accreditation of EU Heads of Delegation largely follows the general rules of international diplomatic law.<sup>41</sup> In the reverse situation, the EU also continues the traditions of inter-state diplomacy: it is now President Tusk who receives the letters of credence of the Heads of Missions to the EU of third countries, accompanied with the usual (i.e. state-like) protocol and official photograph.<sup>42</sup>

Issues relating to ‘sovereignty’ under public international law come to the fore in the regulation of the privileges and immunities of the Delegations. The regulation of the immunities of the EU in fact mirrors that of states.<sup>43</sup> This implies that, again, the starting point is that the EU follows the rules of states, rather than the rules for international organisations. The ‘arrangement’ agreed on by the High Representative and the third state, grants the EU a special position, which differs from that of most international organisations.<sup>44</sup> In addition, the TEU mandates that “essential state functions”<sup>45</sup> of the Member States are to be respected by the Union and diplomatic relations are particularly prone to affect these state functions.<sup>46</sup>

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<sup>39</sup> J. Wouters and S. Duquet, ‘The EU and International Diplomatic Law: New Horizons?’, *Hague Journal of Diplomacy*, 2012, pp. 31-49, who point out that this is granted as a ‘courtesy title’ by receiving states. See also for example the letter of credence presented to President Obama by Mr. Vale de Almeida opening with the words “As I assume the role of the European Union’s Ambassador and Head of Delegation to the United States [...]” See the introduction to the “Letter of Credentials from Ambassador Vale de Almeida to President of the United States Barack Obama.” An extract of the letter is available through the Press Release of the EU delegation to the United States ‘New EU Ambassador presents his credentials’, *EU/NR* 35/10 (10 August 2012). See also F. Fenton, ‘EU Ambassadors: A New Creed?’, in: P. Quinn (ed.), *supra*, pp. 26-30.

<sup>40</sup> Yet, the presentation of the letters of credence reflects the complex and sensitive power sharing on the side of the EU: “on behalf of the European Council President *Herman van Rompuy* and Commission President *Jose Manuel Barroso*, and under the authority of the High Representative *Catherine Ashton* [...]”. See also K. Schmalenbach, ‘Die Delegationen der Europäischen Union in Drittländern und bei internationalen Organisationen’, *Europarecht*, Beiheft 2, 2012, pp. 205-215 at 212.

<sup>41</sup> See the Statement of the Presentation of Credentials by Mr. Gilles Hervio, Ambassador and Head of Delegation of the European Union to Zambia, 3.2.2011 (available at [http://eeas.europa.eu/delegations/zambia/press\\_corner/all\\_news/news/2011/20110128\\_02\\_en.htm](http://eeas.europa.eu/delegations/zambia/press_corner/all_news/news/2011/20110128_02_en.htm))> (accessed ...). See more extensively: K. Schmalenbach, see *supra* note 39.

<sup>42</sup> European Council, the President, ‘Presentation of letters of credentials to President Van Rompuy’, *EUCO* 9/12 (Brussels, 18 January 2012). Here President Van Rompuy received the credentials of the Ambassadors of Saudi Arabia, Rwanda, FYROM, Malaysia, Colombia, Peru, Turkey and Afghanistan.

<sup>43</sup> Article 5(6) of the 2010 EEAS Decision addresses the necessary arrangements with the host country, the international organisation, or the third country concerned. It requires the High Representative to “take the necessary measures to ensure that host States grant the Union delegations, their staff and their property, privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations of 18 April 1961.” See further R.A. Wessel, ‘Immunities of the European Union’, *International Organizations Law Review*, 2014 (re-published in N.M. Blokker and N.S. Schrijver (Eds.), *Immunities of International Organizations*, Boston/Leiden: Martinus Nijhoff Publishers, 2015).

<sup>44</sup> K. Schmalenbach, see *supra*.

<sup>45</sup> Cf. Article 4 (2) TEU.

<sup>46</sup> The EEAS Decision acknowledges this in Article 5(9): ‘The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States’. See also B. Van Vooren, ‘A Legal-Institutional Perspective on the European External Actions Service’, *Common Market Law Review*, 2011, pp. 475-502 at 497, who points out that due to consistency obligations this

Finally, from an international law perspective, one of the key problems is that the relevant international rules depart from the notion of ‘nationality’, defined as “the status of belonging to a state for certain purposes of international law”.<sup>47</sup> Public international law scholars would argue that it is in particular the diplomatic protection that cannot be established by the EU unilaterally, given the non-existence of the concept of ‘European nationality’. After all, the essential ‘solid link’ between the intervening state and the protected citizen is missing. It has, however, been argued that the International Law Commission’s (ILC) Draft Articles on Diplomatic Protection establish minimum standards under public international law which permits the states to go beyond these rules as long as they respect the condition of obtaining the express unanimous consent of all the states involved in the new model, i.e. both EU Member States and, at least implicitly, also by third states.<sup>48</sup> It is true that the general international rules apply “in the absence of a special agreement” and third states can simply agree to allow for the protection by states or the EU of non-nationals. In any case, under international law, the consular protection of a citizen by another state requires the consent of the receiving state.<sup>49</sup> Allowing the European Union to protect the nationals of its Member States would thus be a new step. As third states are not bound by EU law they will have to recognise European citizenship to allow the EU to protect or assist its citizens abroad.<sup>50</sup>

## **2.2 *Classifying the EU under Public International Law***

For many the explicit recognition of the European Union’s legal personality (Art. 47 TEU) – or perhaps even more the dissolution of the European Community<sup>51</sup> – formed a reason to reassess the Union’s international role and to take a different perspective as to its international legal status.<sup>52</sup> The question of what the international legal nature of the European Union has been raised throughout the EU’s (and Communities’) existence and different answers were given.<sup>53</sup> Post-Lisbon, the debate is set against a new background.

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should be read as a general obligation to cooperate between the EEAS and the national diplomatic services.

<sup>47</sup> P. Malancuk, *Akehurst’s Modern Introduction to International Law*, London/New York: Routledge, 2007, at p. 263. Cf. Article 3 VCDR and Article 5 VCCR.

<sup>48</sup> See M. Moraru, ‘The Protection of Citizens in the World: A legal Assessment of the EU Citizen’s Right to Protection Abroad’, in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, EUI Working Paper LAW (2011/10), pp. 107-124, p. 122.

<sup>49</sup> This becomes apparent in Article 8 VCCR: “Upon appropriate notification to the receiving state, a consular post of the sending state may, unless the receiving state objects, exercise consular functions in the receiving state on behalf of a third state.”

<sup>50</sup> P. Vigni, ‘The Protection of EU Citizens: The Perspective of International Law’, in: J. Larik and M. Moraru (eds.), p. 92.

<sup>51</sup> See the last sentence of Article 1 TEU: “The Union shall replace and succeed the European Community”. The European Atomic Energy Community (Euratom) still exists as a separate international legal entity.

<sup>52</sup> See for a recent contribution to the classic debate on the Union’s legal status: W. Schroeder, ‘Die Europäische Union als Völkerrechtssubjekt’, *Europarecht*, Beiheft 2, 2012, pp. 9-23. Schroeder also refers to a purpose of the explicit recognition of the Union’s legal personality: it provides legal certainty in international relations (p.17). See earlier: R.A. Wessel, ‘The International Legal Status of the European Union’, *European Foreign Affairs Review*, 1997, pp. 109-129; and ‘Revisiting the International Legal Status of the EU’, *European Foreign Affairs Review*, 2000, pp. 507-537.

<sup>53</sup> See for a good overview De Witte, see supra.

As said, the Lisbon Treaty strengthens the international role of the Union in an unprecedented number of provisions,<sup>54</sup> which calls for a clearer qualification of the EU under international law. Most international rules apply to states, some (also) to international organisations and a limited set also to other internationally active entities (such as liberation movements or multinationals). Few would argue that the EU is a state;<sup>55</sup> many would say that it is an international entity *sui generis*.<sup>56</sup> International law, however, only works when it is applied across the board for certain categories of international actors. Its rationale is to offer clarity and set the conditions for a smooth cooperation between different subjects. At the same time, it is of course possible to create special rules for special entities. The clauses on Regional Economic Integration Organisations (REIOs) in some multilateral agreements<sup>57</sup> are a good example.

The European Treaties are still silent on the international legal status of the Union. They do not give an answer to the classic question of whether the EU is an international organisation or something else. This may be the reason that also textbooks are still uncertain about the legal nature of the Union and seem to have a preference for more political notions. In their leading textbook, Chalmers *et al.* refer to the EU as “amongst other things, a legal system established to deal with a series of contemporary problems and realise a set of goals that individual states felt unable to manage alone.”<sup>58</sup> And, the “nature of the Union’s international presence” is related to its international legal personality only, whereas the nature of the entity as such is left open.<sup>59</sup>

Indeed, the Union’s nature is mostly debated in the light of internal considerations. Much less has been written on how it would be perceived by third states. A possible reason was presented by Tsagourias: “By appropriating the instruments of its creation, the Union liberated itself from external – international – contingencies and also moved the source of its validation from the international legal order to the Union.”<sup>60</sup> Yet, irrespective of the inward-looking basis for its creation and its ‘liberation’ from international contingencies, the Union’s current competences and

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<sup>54</sup> Van Vooren, Blockmans and Wouters, see supra.

<sup>55</sup> As noted above this was (for the first time) underlined by the CJEU in Opinion 2/13, para 156. Yet, it can be argued that there are close resemblances with federations; see further below.

<sup>56</sup> Yet, see the critique on the use of the ‘*sui generis*’ notion by R. Schütze, ‘On “Federal” Ground: The European Union as an (Inter)national Phenomenon’, *CMLR*, 2009, pp. 1069–1105, at 1091-1092. Republished in R. Schütze, *Foreign Affairs and the EU Constitution: Selected Essays*, Cambridge: Cambridge University Press, 2014, Chapter 1.

<sup>57</sup> A REIO is commonly defined in UN protocols and conventions as “an organization constituted by sovereign states of a given region to which its member states have transferred competence in respect of matters governed by [...] convention or its protocols and [which] has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it [the instruments concerned].” See for example the 2004 Energy Charter Treaty (Art. 3). See also E. Paasivirta and P.J. Kuijper, ‘Does one size fit all?: The European Community and the Responsibility of International Organisations’, *Netherlands Yearbook of International Law*, 2005, The Hague: T.M.C. Asser Press, 2007, pp. 169-226 at 205. In the new Convention on the Rights of Persons with Disabilities the REIO clause seems to have evolved to a RIO (Regional Integration Organisation) clause, which does justice to the large scope of activities of the EU these days (see Art. 44: “‘Regional integration organisation’ shall mean an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.”)

<sup>58</sup> D. Chalmers, G. Davies and G. Monti, *European Union Law*, Cambridge: Cambridge University Press, 2010 (2<sup>nd</sup> ed.), p. 3.

<sup>59</sup> *Idem*, p. 632.

<sup>60</sup> N. Tsagourias, ‘Conceptualizing the Autonomy of the European Union’, in: R. Collons and N.D. White (eds.), *International Organizations and the Idea of Autonomy: Institutional in the International Legal Order*, London/New York: Routledge, 2011, pp. 339-352 at 340.

ambitions require the Union to function and be recognised as an international legal entity that somehow connects with the conditions and rules of international law. Indeed, many would agree with Curtin and Dekker “that the legal system of the European Union is most accurately analysed in terms of the institutional legal concept of an international organisation [...]”<sup>61</sup> But even this quote reveals how difficult it seems to simply argue that the European Union *is* an international organisation (albeit a very special one).<sup>62</sup> Throughout their handbook on the law of international organisations, Schermers and Blokker nevertheless take the EU along as an international organisation, while noting of course the “far-reaching forms of cooperation” and the “supranational features”.<sup>63</sup> The EU is indeed “considered special not because of its identity problems but because of the high degree of ‘constitutional’ development, supranational components and the rule of law features within this organization making it look almost like a federation of states [...]”, as argued by Bengoetxea.<sup>64</sup>

Irrespective of the difficulty to classify the European Union from the perspective of international law, there is agreement that as an international actor, the EU is subject to international law in its relations with third states and international organisations.<sup>65</sup> It is bound by the international agreements to which it is a party as well as to customary international law.<sup>66</sup> More recent developments show that international law is capable of taking the differences between states and international organisations into account.<sup>67</sup> However, against the background of this binary system of rules third states continuously experience that the EU remains special. In certain areas, it holds exclusive competence to act, which is unprecedented. Moreover, EU Member States, and in particular national courts, accept that, in the end, they should give priority to EU law in cases of a conflict with international law.<sup>68</sup> Indeed, recent

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<sup>61</sup> D.M. Curtin and I.F. Dekker, ‘The European Union from Maastricht to Lisbon: Institutional and Legal Unity out of the Shadow’, in: P. Craig and G. De Búrca (eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, pp. 155-185 at 163.

<sup>62</sup> Compare the qualification as “eine internationale Organisation eigener Art”, by Schroeder, see supra note 60. More in general, the status of the EU as an ‘international organization’ seems to be accepted implicitly by many authors. Cf. P. Eeckhout, *EU External Relations Law*, Oxford: Oxford University Press, 2011 (2<sup>nd</sup> ed.), at p. 3, who does not at all address the external legal nature of the EU, but merely refers to the fact that “[t]he EU is also a member of a number of *other* international organizations [...]” (emphasis added).

<sup>63</sup> H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity in Diversity*, Leiden/Boston: Martinus Nijhoff Publishers, 2011, p. 55 and p. 57.

<sup>64</sup> J. Bengoetxea, ‘The EU as (More Than) an International Organization’, in: J. Klabbers and Å. Wallendahl, *Research Handbook on the Law of International Organizations*, Cheltenham/Northampton: Edward Elgar Publishing, 2011, pp.448-465 at 449. The author argues that it is above all the ‘transitional’ status of the EU (from international organization to federation) that justifies its ‘specialness’, at p. 450.

<sup>65</sup> See for a recent survey of the many facets of the relationship between international and EU law: R.A. Wessel, *Close Encounters of the Third Kind: The Interface Between the EU and International Law after the Lisbon Treaty*, Stockholm: Sieps Report, 2013.

<sup>66</sup> More extensively: Idem, p. 106. See also clearly the judgment of the CJEU in case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change*, 2011.

<sup>67</sup> Respectively to be found at <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf)>; and <[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_11\\_2011.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf)>. Obviously, the extent to which these instruments successfully take the complex position of international organizations into account may be subject to debate.

<sup>68</sup> See more generally J. Klabbers, *Treaty Conflict and the European Union*, Cambridge: Cambridge University Press, 2009.

case law underlines that the principle of sincere cooperation (*Gemeinschaftstreue*) is believed to influence international law obligations in the sense that Member States may be forced to renegotiate or withdraw from existing international agreements.<sup>69</sup> While for EU Member States (and most EU legal scholars) these may be logical consequences of a dynamic division of competences, third states (and most public international scholars) would remind us of the rule of *pacta tertiis nec nocent nec prosunt*: third states are in principle not bound by the EU Treaty as to them it is an agreement between others.<sup>70</sup> From a legal perspective they should not be bothered with a complex division of competences that was part of a deal between the EU and its own Member States.

### ***2.3 The Division of Competences between the EU and its Member States: Special Treatment?***

As we have seen, the Treaty of Lisbon has certainly strengthened the EU's 'international actorness' and confirms the separate legal status of the EU (Art. 47 TEU). We have argued that from a legal perspective it makes sense to continue distinguishing between the European Union as an international organization of which states can be members, and the (member) states themselves. In that sense the EU is something different than the collection of 28 states. It has a distinct legal status, both in relation to its own members as well as towards third states. But, importantly, the Member States may no longer be allowed to act once competences have been transferred and have been placed 'exclusively' in the hands of the Union. It is a fact that "the prominence of the international role of the EU has had an impact on the Member States and the manner in which they exercise their powers as sovereign subjects of international law both in terms of their interactions with third countries and their participation in international organisations."<sup>71</sup> As a consequence, depending on the legal existence, scope and nature of the EU's external powers, the Member States have to a lesser or greater degree a prominent role in the formation and execution of international action in the relevant area. Conversely, the role of the European Union (as the legal person) and its supranational institutions will then shift depending on the policy area at issue. The relationship between the EU and international law is based on this phenomenon and the Treaty of Lisbon has maintained this ambiguity, which continues to make it difficult to live up to the demands of coherence and consistency in its external relation policy, which can be found throughout the treaties (e.g. Article 21(3) TEU). This means that also in practice the question remains when the European Union can act internationally (next to or on behalf of its Member States) in international treaty negotiations and in

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<sup>69</sup> See for an analysis for instance A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?', *European Law Review*, 2011, no. 4, pp. 524-541. See more generally on the principle of sincere cooperation in external relations B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2014, Chapter 6.

<sup>70</sup> This rule is laid down in Article 34 of the Vienna Convention on the Law of Treaties, adopted in Vienna, 22 of May 1969 (hereinafter: VLCT): "A treaty does not create either obligations or rights for a third State without its consent".

<sup>71</sup> P. Koutrakos, 'In Search of a Voice: EU law Constraints on Member States in International Law-Making', in: R. Liivoja and J. Petman (eds.), *International Law-Making: Essays in Honour of Jan Klabbers*, London/New York: Routledge, 2014, pp. 209-224.

international organisations.<sup>72</sup> In October 2011 the EU agreed on a set of rules in this regard in an internal document,<sup>73</sup> which also states that in issuing declarations on behalf of the European Union account should be given to the division of competences.

It has been argued that there are remarkable parallels when the international relations competences of the EU and its Member States are compared to the division of these competences in a federal state such as the US.<sup>74</sup> This would put the ‘specialness’ of the EU into perspective and the question has come up to which extent non-EU states (‘third states’) will have to be aware and take into account the complex and dynamic division of competences between the EU and its Member States.<sup>75</sup> Special rules in multilateral treaties may refer to a transfer of competences from the EU Member States to the organization and to the consequences of that transfer, for instance that the EU and its Member States are not allowed to exercise their competences simultaneously.<sup>76</sup> The EU as such is responsible to the full extent once it is a party to a treaty in an area where it enjoys exclusive competences, but this rule may also hold in cases where the EU is only partly competent, due to the principle of loyal cooperation.<sup>77</sup> In other situations it would be up to the respective treaty to deal with this.<sup>78</sup> In international legal terms, however, Member States of the EU cannot be bound by a treaty to which they are not a party. This is different from internal EU rules, which may trigger their responsibilities *domestically*. Vice versa, the EU may not be able or allowed to join a treaty or international organizations, despite its competences in that area. In those cases Member States will have to act ‘on behalf of the EU’ in areas where they have transferred their competences.<sup>79</sup>

Taking into account the complex division of competences between the EU and its Member States, the question is to which extent this may have consequences under international law. The starting point is given in treaty law, pursuant to which an

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<sup>72</sup> See for example the recent discussions between the Council and the Commission on the composition of a negotiating team in the framework of UN cooperation on mercury. G. De Baere, ‘Mercury Rising: the European Union and the International Negotiations for a Globally Binding Instrument on Mercury’, *European Law Review* vol. 37, issue: 5, pp. 640-655.

<sup>73</sup> ‘EU Statements in multilateral organisations - General Arrangements’, Council of the European Union, 24 October 2011.

<sup>74</sup> G. De Baere and K. Gutman, ‘Federalism and International Relations in the European Union and the United States: A Comparative Outlook’, in E. Cloots, G. De Baere, S. Sottiaux (eds.), *Federalism in the European Union*, Oxford and Portland, Oregon: Hart Publishing, pp. 131-166.

<sup>75</sup> See also the Report of the Advisory Committee on Issues of Public International Law (CAVV) on *External Action of the EU and International Law*, The Hague: Ministry for Foreign Affairs, 2014 ([http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV\\_mei\\_2014\\_Extern\\_optreden\\_EU\\_en\\_internationaal\\_recht.pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_mei_2014_Extern_optreden_EU_en_internationaal_recht.pdf)).

<sup>76</sup> Cf. Article 4 of Annex IX of the UN Convention on the Law of the Sea.

<sup>77</sup> E. Neframi, ‘The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations’, (2010) 47 *Common Market Law Review*, Issue 2, pp. 323-359; C. Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’, in: M. Cremona (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, pp. 10-36.

<sup>78</sup> Cf. Article 24(2) of the Kyoto Protocol: “Any regional economic integration organization which becomes a Party to this Protocol without any of its member States being a Party shall be bound by all the obligations under this Protocol. In the case of such organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under this Protocol concurrently.”

<sup>79</sup> An example being the ILO. See ECJ Opinion 2/91 (ILO) and N. Neuwahl, ‘Annotation: Opinion 2/91 (ILO Convention No 170)’, (1993) 30 *Common Market Law Review*, p. 1193. Cf. also Annex IX, Article 8(c)(i) UNCLOS, which does not allow the EU to leave the treaty regime as long as its member states are still a party.



international organization may not invoke the rules of the organization as justification for its failure to perform a treaty (Art. 27(2), 1986 Vienna Convention). Article 46 (2) of the 1986 Convention adds that an international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance. Article 46(3) specifies that a violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.<sup>80</sup> Given the manifold international relations and the dynamic and extensive competences of the Union, the question comes up to which extent the division of competences should be objectively evident to other international actors. It has been argued that once this division is made known, the rules are no longer purely internal, but may form part of the international agreements, or at least form a source for interpretation.<sup>81</sup> This would in particular be true in cases where a ‘declaration of competence’ has been issued by the EU.<sup>82</sup> Such a declaration is often (at the request of other parties) attached to the agreement. Yet, it remains difficult to view these declarations as an independent source of international law,<sup>83</sup> in which their role would be limited to an interpretative role (Art. 31(2)(b) VCLT) and perhaps lead to the establishment of obligations ‘in good faith’,<sup>84</sup> which in turn may be relevant under Article 46 of the 1986 Convention.

One additional problem is that despite the dynamic changes in the division of competences between the Union and its Member States, declarations are hardly ever updated, in which case their role as an interpretative instrument becomes less evident. Yet, in some cases – in particular when the R(E)IO-construction was followed to underline the special nature of the EU in a multilateral setting – it could perhaps be argued that the internal division of competences should not be without any effect under international law. After all, in these situations all treaty-partners have been aware of this complexity from the outset.<sup>85</sup>

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<sup>80</sup> This seems to have been accepted by the European Court of Justice as well. See for instance the cases *France v. Commission* (C-327/91, Jur. 1994, I-3641) and the PNR-cases in Joined Cases C-317/04 and C-318/04 *European Parliament v. Council and Commission* [2006] ECR I-04721.

<sup>81</sup> CAVV Report 2014, see supra note 74.

<sup>82</sup> See for an overview of “Agreements with a declaration of competence by the EU” the website of the EU Treaties Office: <http://ec.europa.eu/world/agreements/viewCollection.do>. See on the declarations also J. Heliskoski, ‘EU Declarations of Competence and International Responsibility’, in: M. Evans and P. Koutrakos (eds.), *International Responsibility: EU and International Perspectives*, Oxford: Hart Publishing, 2013, pp. 189-212.

<sup>83</sup> See also Case C-29/99, *Commission v. Council*, in which the European Court of Justice implied that the Declarations would primarily have an internal effect related to a loyal cooperation between the Institutions to live up to the rules of international law.

<sup>84</sup> CAVV Report 2014, see supra note 74. The International Court of Justice has referred to this principle as “[o]ne of the basic principles governing the creation and performance of legal obligations”. See *Nuclear Tests Case (Australia v France; New Zealand v France)* [1974] ICJ Reports 253 at 268.

<sup>85</sup> See also Case C-94/03 *Commission v Council*, para 55, 2006 on the Rotterdam Convention on the Prior Informed Consent procedure for certain hazardous chemicals and pesticides in international trade: “Finally, it is important to note that, by basing the decision approving the Convention on the dual legal basis of Article 133 EC and Article 175(1) EC, the Community is also giving indications to the other parties to the Convention both with regard to the extent of Community competence in relation to that Convention which, as has been shown earlier, falls both within the scope of the common commercial policy and within that of the Community environmental policy, and with regard to the division of competences between the Community and its Member States, a division which must also be taken into account at the stage of implementation of the agreement at Community level.” (emphasis added)



It goes beyond the scope of this contribution to address questions of international responsibility in detail.<sup>86</sup> Yet, in cases where no ‘declaration of competence’ has been issued the presumption would be that both the EU and its Member States are responsible (or perhaps better: ‘addressable’). Article 6 of Annex IX of UNCLOS seems to form a good example of a workable solution: “Any State Party may request an international organization or its member States which are States Parties for information as to who has responsibility in respect of any specific matter. [...] Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability.” Another example is Article 3 of the agreement on the accession of the EU to the ECHR. At the same time these examples underline that international law is trying to invent rules to allow the Union to participate among states, rather than as an international organization. Indeed, “In the execution of its legislative choices, European law thus still “largely follows the logic of State responsibility in public international law”.<sup>87</sup>

### **3. Reconsidering the Union’s External Posture in the Light of Sovereignty**

The fact that the Union exercises authority through various channels – both over its Member States and its citizens – is undisputed. The aim here is to push the debate one step further and consider what this could mean in the context of sovereignty.<sup>88</sup> This requires conceptually distinguishing the concepts of authority and sovereignty.<sup>89</sup> Authority avoids questions about the complex basic structures of public international law, which presuppose sovereignty. A debate on (public) authority captures legal capacity; yet, it consciously does so without rooting it either in public international law’s structures or popular sovereignty. Authority puts the actor, or at times the norm, central (whose authority?) and describes a top-down or descending influence. Even if it may be defined as power that claims to be legitimate,<sup>90</sup> it does not capture the bottom-up or ascending legitimacy that lies at the core of (popular) sovereignty, which aims to connect to (groups of) individuals, as the only ultimate bearer of original rights. Nor does it relate to the basic structures that pervade public international law. Hence, discussing ‘authority’ offers a convenient way out of the dilemma of how to square the EU’s self-conception as a (quasi-)sovereign entity, which is regularly recognised in practice by its citizens, its Member States and other international actors, with the basic structures of international law, as well as the

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<sup>86</sup> See for an extensive analysis: A. Delgado Casteleiro, *The International Responsibility of the European Union: from Competences to Normative Control*, Cambridge: Cambridge University Press, 2016.

<sup>87</sup> S. Kadelbach, “European administrative law and the law of a Europeanized administration”, in: Joerges and Dehousse (eds.), *Good Governance in Europe’s integrated Market*, Oxford University Press, 2002, p. 167, at 176. See also Schütze, *op.cit.*, at 1088.

<sup>88</sup> Part of the following argument draws on: C. Eckes, 17(2), ‘The Reflexive Relationship between Internal and External Sovereignty’, *Irish Journal of European Law*, 2014.

<sup>89</sup> See for authority: A. Von Bogdandy, R. Wolfrum, J. Von Bernstorff, P. Dann and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Springer, 2010; see also J. Pauwelyn, R. Wessel and J. Wouters, *The Exercise of Public Authority through Informal International Lawmaking: An Accountability Issue?*, Jean Monnet Working Paper, series on Global Governance as Public Authority: Structures, Contestation, and Normative Change, No. 06/11, New York University School of Law, 2012.

<sup>90</sup> J. Raz, ‘Authority, Law, and Morality’ in J. Raz (ed.), *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, p. 194 at 196.

national law of the Member States.<sup>91</sup> The choice for sovereignty or authority as a theoretical lens also reflects a deeper difference in the understanding of what the law is about.<sup>92</sup> While in continental Europe law is a matter of universal rights and principles, from the Anglo-American perspective law is first of all an expression of popular sovereignty and closely interlinked with a narrative of self-identity.<sup>93</sup> Hence, while from a continental European perspective law is about rights, principles and ultimately authority, from an Anglo-American perspective and large parts of the world it is about (popular) sovereignty. The present paper aims to discuss the EU from an outside perspective; it hence aims to step outside of the constraints of the continental European perspective. Reconsidering the Union's external posture in the light of sovereignty additionally offers a link between its internal claim to quasi-national power and its external claim to quasi-sovereign powers.

### ***3.1 Sovereignty and Statehood***

Scholars in a broad range of disciplines have engaged with sovereignty for many years and one could hence question whether this somewhat aged and seemingly unproductive debate should not rather be put aside. The concept of sovereignty has been redefined many times since its introduction in the 17<sup>th</sup> century and more recent developments both within and outside of state structures have resulted in a reduction in autonomy of sovereign entities. Its meaning and implications may be considered blurry and certainly are subject to the dynamics of the respective historical context. Yet, sovereignty remains relevant because it continues to be a central consideration in legal practice and political reality even when it is not directly mentioned, particularly internationally.

As indicated in the Introduction to this Chapter, with regard to the EU's relationship with the outer world, scholars commonly speak of 'autonomy' rather than sovereignty. This is predominantly the case because the latter term is associated with states. In this regard, it is sensible to strive for an alternative terminology when describing new phenomena in a different context since known concepts have developed their specific meaning and essential content within a given context, i.e. state context, and thus remain context dependent. As we have seen above, the EU generally uses a parallel vocabulary for its participation in international relations, such as 'external actions' and 'delegations' instead of 'foreign policy' and 'embassies'. This is a conscious choice, which became probably most obvious in the change from 'Minister of Foreign Affairs' in the Constitutional Treaty to 'High Representative of the Union for Foreign Affairs and Security Policy' in the Lisbon Treaty. At the same

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<sup>91</sup> This finds a parallel in Caroline Webb's characterization of the 'policy-making focus' as 'a coward's way out of a theoretical dilemma', in: Helen Wallace, William Wallace, and Carole Webb (eds) *Policy-Making in the European Communities* (London: John Wiley & Sons, 1977), 28.

<sup>92</sup> See in detail on the difference in perception: Paul W. Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order' (2000), *Yale Law School Faculty Scholarship Series*, Paper 329, pp. 1-6.

<sup>93</sup> This is most apparently reflected in the American commitment to their Constitution as a sacred text, which shapes their deeply parochial imagination of the political. A recent telling example: 'Treaty modelled after Americans with Disabilities Act fails to pass as conservative Republicans argue it threatens US sovereignty', *The Guardian*, 4 December 2012, available at: <http://www.theguardian.com/world/2012/dec/04/senate-rejects-un-treaty-disability>. It is equally reflected in the British commitment to parliamentary sovereignty, albeit tempered through EU law and the ECHR.

time, the qualifying criterion to enjoy full international legal capacity remains ‘the status of an entity as (sovereign) state’.

The more abstract term ‘sovereignty’, although it is regularly used as a shorthand for the rights associated with statehood, will allow us to discuss whether and possibly to what extent the EU acts as a (quasi-)sovereign, and hence state-like actor under international law. The distinction between sovereignty and statehood is central to the debate surrounding the EU’s position under international law. This raises a host of questions: Would meeting (some of) the statehood criteria strengthen the EU’s claim to exercise sovereign rights? How many characteristics of a state would the EU have to display to be considered sovereign? Is it helpful to start from abstract criteria? In what way are its ‘national’ characteristics, i.e. the exercise of national (i.e. state-like) powers over EU citizens and territory relevant?

Sovereignty is a multifaceted and evasive notion. Its different interpretations can be related to two important points of theoretical reference, which are represented by Carl Schmitt and Hans Kelsen.<sup>94</sup> Essentially, Schmitt argued that law is secondary to factual power. The opening sentence of his treatise *Political Theology* became a well-known representation of this position: ‘Sovereign is he who decides on the exception.’<sup>95</sup> Kelsen by contrast rejected the idea that factual decision can establish a normative ‘ought’. He understood sovereignty as defined by and within the law.<sup>96</sup> Politics had no privileged position from his perspective. Martti Koskeniemi lays out in great detail how the two underlying theoretical approaches, which he calls ‘legal’ (Kelsen) and ‘pure fact’ (Schmitt),<sup>97</sup> have determined the understanding of sovereignty of international courts and parties to legal action. The two approaches influence the discussion on the scope of sovereignty and the relevance of recognition for statehood. Most importantly, Koskeniemi explains how they are often combined in the different strands of argument of the same party and that they are both in their pure form indefensible because both dissolve into politics.<sup>98</sup> The pure fact approach does not distinguish law from force. The legal approach legitimizes the legal *status quo* and the privileged position of existing states.

Sovereignty is here understood as consisting of at least three dimensions, none of which can be understood, interpreted or explained without the others: sovereignty as a legal status; sovereignty as a factual (political) condition; and sovereignty as a fiction.<sup>99</sup> This conceptualisation attempts to solve the tension between the legal and the pure fact approach. It combines the understanding of sovereignty as a legal status governed by law with its factual and fictitious dimensions, which influence our thinking and which are not governed by law. In the end, the explanatory power of sovereignty cannot be understood by only studying the law but it equally cannot be

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<sup>94</sup> See also: M. Koskeniemi, *From Apology To Utopia - The Structure Of International Legal Argument* (Reissue with a new Epilogue, 2005), 224-302.

<sup>95</sup> ‘Souverän ist, wer über den Ausnahmezustand entscheidet’: C. Schmitt, *Politische Theologie – Vier Kapitel zur Lehre von der Souveränität*, Duncker&Humblot, 2004. This position is part of the same strand as Austin and Bentham, see e.g. J. Austin, *Province of Jurisprudence Determined*, ed. W. Rumble, Cambridge University Press, 1995 and J. Bentham, *Of Laws in General*, ed. HLA Hart, Athlone Press, 1970, pp. 18-30.

<sup>96</sup> H. Kelsen, *Das Problem Der Souveränität* (2<sup>nd</sup> ed., 1927). This position is part of the same strand as Hart and Raz, see e.g. HLA Hart, *The Concept of Law*, 2nd ed., Oxford University Press, 1994, chapters 1-4 and J. Raz, *The Concept of a Legal System*, 2nd ed., Clarendon Press, 1980, pp. 27-43.

<sup>97</sup> Koskeniemi, see above note 92, pp. 228 et seq.

<sup>98</sup> *Idem*, p. 282. See also recently: P Eleftheriadis, ‘Law and Sovereignty’, 29 *Law and Philosophy*, 2010, p. 535-569.

<sup>99</sup> See in more detail: C. Eckes, see above note 86.

understood without studying the law. Sovereignty is hence indeed more than an aggregate of sovereign powers, factually and under international law. It also has a fictional dimension, which exercises a framing function in our minds in a parallel reality of emotional belonging and expectation.<sup>100</sup> So does the legal status – within the parallel reality created by law. Specific legal rights lead to particular claims about how the world is and how it should be. This all leads to an interpretation of the factual circumstances, which in turn influences the decision of whether or not an entity enjoys the legal status, can claim specific rights and can maintain the fiction of sovereignty.

Sovereignty's relation with law and factual political power is complex. In the words of Hent Kalmo, sovereignty roots 'law in factual power that ultimately determines the limits of its reach.'<sup>101</sup> This explains the "paradoxical possibility that, when illegality becomes extreme, it can convert itself into a new standard of legality."<sup>102</sup> Yet, law determines at the same time the accepted content and consequences of sovereignty. The ultimate step towards a new standard of legality would be the creation of a new sovereign actor. Under public international law, this new sovereign actor would be a state. Indeed, some authors put it as concisely as: "[t]he exercise of sovereignty and sovereign rights is contingent on statehood."<sup>103</sup> The EU does not claim to be a state; yet, as we have seen, it exercises certain powers and is accepted to hold certain rights that are otherwise under international law reserved to states and closely connected with sovereignty. Within the joint territory of the Member States, the EU exercises (quasi-) 'national' authority. Under public international law, the EU concludes agreements, joins international organisations, and acts at times as an equal to states.

When the question of whether an entity enjoys the legal status of being sovereign or not is brought up it leads to a binary decision on whether or not a legal entity enjoys sovereign rights as defined by law. Yet, such decision is taken at a given point in time (i.e. in legal proceedings) throughout an on-going process and has – even though it is declaratory and not constitutive – itself an influence on the process. Under international law, states become states through a political process, when they indeed more or less meet the statehood criteria. The process of overcoming a competing claim to territorial integrity or of replacing one sovereign with another is only partly regulated by law. There is no clearly definable tipping point when a state comes into being. Entities do not become states automatically by meeting certain legal requirements, such as the Montevideo criteria or Jellinek's *Land, Volk und Herrscher*.<sup>104</sup> As a result it has been acknowledged that "[i]t is quite natural that the establishment of sovereignty maybe the outcome of a slow evolution, of a progressive

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<sup>100</sup> The fictional dimension and its strong force of identification may also be the reason for the survival of sovereignty in law and philosophy despite its evasiveness and the evolution of its meaning(s) over time. It encapsulates the idea of an irresistible and ultimate power that is more than the sum of circumscribed sovereign factual and legal powers.

<sup>101</sup> H. Kalmo, *A matter of fact? The many faces of sovereignty*, in: H. Kalmo and Q. Skinner (eds.), *Sovereignty in Fragments – The Past, Present and Future of a Contested Concept*, Cambridge: Cambridge University Press, Chapter 6 at 114.

<sup>102</sup> *Ibid.*

<sup>103</sup> R. Rayfuse and E. Crawford, *Climate Change, Sovereignty and Statehood*, Legal Studies Research Paper No. 11/59, September 2011, Sydney Law School, p. 4.

<sup>104</sup> See J. Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood', *Chinese Journal of International Law*, 2013, pp. 1-; this is controversial, see different e.g.: S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 2001.

intensification of [...] control.”<sup>105</sup> The legal status is then constitutive, it applies to an entity that meets certain factual conditions and at the same time confers rights under law that enhance the factual sovereignty of that entity once it is acquired.

Hence, even if often referred to as the benchmark of statehood, the Montevideo criteria in practice are not read as a stringent set of rules that must be fulfilled and an entity becomes a state.<sup>106</sup> They are interpreted with considerable fluidity and leeway. It is fair to conclude that, despite certain governments in exile, and other examples where the criterion of territory is interpreted generously, territorialisation became the foundational principle of sovereign statehood in the early-modern period.<sup>107</sup> Indeed, “[t]he global existence of the sovereign states system, its pre-emption of every separate or rival system of territorial authority and power, its enclosure of the entire land surface of the earth, is often seen – when noticed at all – as a commonplace and mundane fact.”<sup>108</sup> At the same time, the practice of state creation itself is not static. In the postcolonial period after 1990 it has changed as compared to the colonial past. In any event, the EU is established on the joint territory of the Member States, who have no intention to surrender this territory to the EU. References to ‘territory’ in the EU Treaties are mainly related to the Member States’ territories. Nevertheless, one may find some hints at the possible existence of an ‘EU territory’. Article 3(3) TEU for example refers to the Union’s objective to “promote economic, social and territorial cohesion, and solidarity among Member States.” At the same time “It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.”. References like these are meant to create some unity while preserving the diversity, and the objective of ‘territorial cohesion’ has merely been the driver behind the allocation of the so-called cohesion funds aimed at “reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.”<sup>109</sup> In a way, ‘economic, social and territorial cohesion’ intends to view the territories of the Member States as a whole. In general however, the question of whether in the case of international organizations (including the EU) one may speak of a ‘territory’ is not settled in international law,<sup>110</sup> and during the process of drafting the Convention on the Law of Treaties, the International Law Commission had difficulties in accepting the existence of a ‘territory of the organization’.<sup>111</sup>

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<sup>105</sup> Arbitrator Huber (Perm. cf Arb. 1928) 2 UN Rep. Intl. Arb. Awards, 829.

<sup>106</sup> Montevideo Convention on the Rights and Duties of States (1933).

<sup>107</sup> R. Jackson, *Sovereignty: The Evolution of an Idea*, Cambridge: Polity Press, 2007, p. 104.

<sup>108</sup> *Idem*, 145.

<sup>109</sup> Art. 174 TFEU.

<sup>110</sup> Article 29 (on the ‘Territorial scope of treaties’) of the 1986 Vienna Convention basically copied Article 29 of the 1969 Convention and provides: “Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.” It is interesting to note that, while international agreements concluded by international organizations are included, the obligations are imposed on “each State party” only.

<sup>111</sup> The 1982 ILC Commentary explains this choice in the following terms: “Is it possible to imagine a parallel provision concerning the obligations of international organizations? Despite the somewhat loose references which are occasionally made to the ‘territory’ of an international organization, we cannot speak in this case of ‘territory’ in the strict sense of the word. However, since this is so and since account must nevertheless be taken of the variety of situations which the multiple functions of international organizations may involve, it seemed preferable to avoid a formula which was too rigid or too narrow. If the draft articles said that, in the case of an international organization which is a party to a treaty, the scope of application of the treaty extended to the entire territory of the States members of that organization, the draft would diverge from article 29 of the Vienna Convention by raising the question of the scope of application of a treaty, which is not expressly covered by that Convention.”

It is therefore argued that for several reasons it is more helpful to approach the EU's exercise of sovereign rights from practice (see part one of this chapter) rather than from abstract criteria for statehood. Firstly, the EU expressly avoids giving the impression that it aspires to become a state. Secondly, the statehood criteria are only indicative. The creation of a sovereign entity, traditionally a state, remains a political process and the greatest obstacle is not public international law but the will of other sovereign entities. In the case of the EU, these are predominantly the Member States, who collectively share the territory over which the EU claims authority, but also third countries, who would have to support the new standard of legality. Thirdly, analysing the EU's exercise of sovereign rights against the background of the broader concept of sovereignty that consists of more than an aggregate of sovereign rights and expresses a reflexive relationship between facts, fiction and law, may allow grasping the underlying tensions. It may explain why national governments and courts, as well as public opinion demonstrate their concern with regard to the EU's extending claim to (exercise) sovereign powers, i.e. why they fear losing more (sovereignty) than they transfer (sovereign rights). And why this is the case irrespective of the fact that the statehood of Member States is not put into question.

### ***3.2 Sovereignty Under Public International Law: a Popular Element?***

Public international law's relationship with sovereignty is paradoxical. On the one hand, it limits the rights of states to wage war and act as they please. On the other hand, it enables states to act under international law with a comprehensive set of rights.<sup>112</sup> The UN Charter perhaps best illustrates this paradoxical relationship: despite all legal fetters that it may impose on the classic concept of sovereignty, the concept of sovereign equality is simply presupposed.<sup>113</sup> A sovereign state possesses certain rights under public international law, including centrally the UN Charter, the Vienna Convention on the Law of Treaties (VCLT) and the above discussed VCDR;<sup>114</sup> and, while other non-sovereign entities may play the game, only entities that are sovereign have a say in determining the formal rules.<sup>115</sup> Sovereignty further remains the dominant logic and the point of reference according to which disputes before the

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<sup>112</sup> See Permanent Court of International Justice, Case of the *SS Wimbledon* (PCIJ, Ser. A., No. 1, 1923), concerning the question whether Germany could deny the passage of the steamship Wimbledon through the Kiel canal.

<sup>113</sup> See in particular: UN Charter Article 2, para. 1.

<sup>114</sup> Under customary international law, which works parallel to the VCLT, international organizations or subunits of states can also conclude international agreements.

<sup>115</sup> E.g. only *state practice* and *opinion juris* form customary international law.

International Court of Justice are decided.<sup>116</sup> It determines, in international relations, the standard of “appropriateness for organizing political life”.<sup>117</sup>

Public international law places a sovereign entity in the position that it does not have to justify its (internal and external) actions – subject to an increasing number of limits imposed by international law. It ensures that under public international law sovereign states are formally equal.<sup>118</sup> Legal sovereignty has been summarized as “having a license from the international community to practice as an independent government in a particular territory”<sup>119</sup> or as “the totality of international rights and duties recognized by international law residing in an independent territorial unit.”<sup>120</sup> This license is a product of historical and cultural circumstances.<sup>121</sup>

Controversies over secession for instance relate to the question of whether an entity is, or more in abstract what kind of entities are, endorsed with statehood and hence legal sovereignty. In the absence of a public international law definition of sovereignty, its meaning is mostly derived from general considerations of the nature of the international legal system and the role and legal capacities of international legal actors. This brings a certain tautology as to the criteria according to which sovereignty is attributed.

Part of the debate on international sovereignty and its recognition relates to elements of self-determination and popular sovereignty. This part of the debate ultimately relates the (legitimizing force of) international sovereignty to the political autonomy of individuals. Jürgen Habermas for example writes: “The old Machiavellian idea of strategic self-assertion against potential enemies gains the additional meaning of an existential self-assertion of ‘the nation.’ Therewith a third concept of ‘freedom’ is introduced, in addition to the liberties of private persons and the political autonomy of citizens.”<sup>122</sup>

It should be added though that from a more conservative perspective, the link between popular internal sovereignty and external sovereignty is denied. In this view, the sovereignty of states under international law is completely separate from popular sovereignty as a constitutional principle. James Crawford correctly points to state practice and explains that states are extremely reluctant to recognize unilateral

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<sup>116</sup> Of the 8 judgments (not counting orders or advisory opinions) that the ICJ gave since January 2011 (list as of 20.3.2013) 6 explicitly referred to sovereignty, several discussed sovereignty issues at some length. ICJ, Territorial and maritime dispute (Nicaragua v. Colombia), Judgment of 19 November 2012; Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), Judgment of 3 February 2012; Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 4 May 2011; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 4 May 2011; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Judgment of 1 April 2011.

<sup>117</sup> S. Krasner, *The Durability of Organized Hypocrisy*, in: H. Kalmo and Q. Skinner (eds.), *Sovereignty in Fragments – The Past, Present and Future of a Contested Concept*, Cambridge: Cambridge University Press, 2011, Chapter 5 at 96.

<sup>118</sup> N. McCormick, ‘Sovereignty and After’, in: H. Kalmo and Q. Skinner, at p. 115: ‘[I]ndependence implies an equality among sovereigns, each being, in a formal sense at least, the equal of every other’.

<sup>119</sup> P. Taylor, *The United Nations in the 1990s: Proactive Cosmopolitanism and the Issue of Sovereignty*, in: R. Jackson (ed.), ‘Sovereignty at the Millennium’, *Political Studies* 47/3 (Special Issue 1999), at p. 538.

<sup>120</sup> J. Crawford, *The Creation of States in International Law*, Oxford University Press, 1979, at p. 26.

<sup>121</sup> See e.g. M. Wind, *Sovereignty and European Integration – Towards a Post-Hobbesian Order*, New York: Palgrave Macmillan, 2001, p. 86 *et seq.*

<sup>122</sup> J. Habermas, ‘The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship’, *Ratio Juris* vol. 9 No. 2, 1996, pp. 125-137.

secession outside the colonial context.<sup>123</sup> Indeed, an indication is that no state formed after 1945 has been admitted to the UN against the will of the predecessor state. Hence, one could conclude that no claim to self-determination must be allowed to infringe the principle of territorial integrity of existing states.<sup>124</sup> It can also be pointed to legal evidence that international law does not look to the internal organization of collectivities for the qualification as a state and that nothing requires that organs be representative.<sup>125</sup> At the same time, the presumption in favour of intervention under certain circumstances has strengthened over time<sup>126</sup> and the right to democratic governance is accepted as a ground of *legitimacy* under international law.<sup>127</sup> There are grounds to assume that, even though many existing sovereign states are not democracies, popular sovereignty and the resulting democratic legitimation strengthens an entity's claim to external sovereignty.<sup>128</sup> This is also the position of the EU Guidelines of recognition of states, which refer to democratic basis.<sup>129</sup>

For the EU itself, this is a double-edged sword. On the one hand, the Union is not only directly linked to its citizens through the legal construction of direct effect by the CJEU, which allows them to rely directly on their rights under EU law. EU law also provides EU citizens with a direct democratic channel into the EU institutions. The European Parliament is since 1979 directly elected and offers democratic legitimacy to the actions of the Union. Article 10(1)2 TEU sets out a legal presumption that “[c]itizens are directly represented at Union level in the European Parliament.” ‘European citizenship’ is furthermore a key element in the process of European integration. Art. 30(2) TFEU *inter alia* provides: “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have [...] the right to move and reside freely within the territory of the Member States”. Indeed, the rights of European citizens have largely been harmonised and European citizenship is frequently used by the Court of Justice of the EU to rule on

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<sup>123</sup> J. Crawford, ‘State Practice and International Law in Relations to Secession,’ *Bybil* 69/1 (1998), pp. 85-117 at 114.

<sup>124</sup> A. Carty, see *supra* note 3, p. 80.

<sup>125</sup> E.g. Tinoco Claims Arbitration (Great Britain v. Costa Rica), (1923) 1 R.I.A.A. 369, but also: International Court of Justice, *Nicaragua v. United States of America*, Judgment, I.C.J. Reports 1986, 14: no rule of international law, treaty or custom, demands a particular political system or electoral method; similarly: A. Carty, see *supra* note 3, p. 97, on the (French) position of Jean Combacau and Serge Sur, *Droit international public*, 1st edition (1993).

<sup>126</sup> Consider e.g. the NATO campaign against Yugoslavia.

<sup>127</sup> See the debate in G. Fox and B. Roth, *Democratic Governance and International Law*, Cambridge University Press, 2000. Consider also that East Timor, a Portuguese non-self-governing territory, was occupied by Indonesia in 1974. On 5 May 1999, East Timor and Indonesia agreed with the UN to conduct a process of popular consultation in the territory over its future; President Wilson’s ‘democratic requirement’; President Rutherford Hayes’ popular support condition and Secretary of State Seward’s criterion of ability to honour international obligations [US Department of State, DUSPIL, 1977, pp. 19 and 20]. Furthermore (the latter examples are taken from M. Shaw, *International Law*, Cambridge University Press, 2008, p. 458).

<sup>128</sup> In 1965, the Organization of American States recommended in a resolution that states contemplating recognition of a new government should take into account whether that government proposes to hold elections within a reasonable time [5 ILM, 1966, 155].

<sup>129</sup> Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Community on 17 December 1991, reprinted in *Europe* (No. 5632, n.s.), 18 December 1991: ‘The [Union] and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.’



extensive rights for individuals. Citizenship has thus become an essential element in the right to seek or accept jobs, to start a business or to provide cross-border services. At the same time, European citizenship entails “the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State [...]”.<sup>130</sup> Hence, outside the EU a European citizen may rely on the help of another EU Member State. Thus, the traditional national diplomatic and consular assistance is extended to an EU-wide system of protection of European citizens abroad. The term ‘supranational citizenship’<sup>131</sup> has been introduced to grasp this development.

On the other hand, the absence of a ‘European demos’ is in political science often used as an argument not to apply state-notions (e.g. in relation to questions on sovereignty, democracy and legitimacy) to the EU.<sup>132</sup> This is related to the EP’s struggle to connect *in practice* to its electorate. This struggle is reflected both in opinion polls and in the tragically low turnout in the elections to the EP, which has been on the decline ever since 1979.<sup>133</sup> This is problematic in the light of the fact that the directly elected European Parliament forms part of the institutional background for the EU’s exercise of quasi-national powers. Post-Lisbon, Parliament’s extended powers in external relations have given EU citizens a new voice on the international plane. This may ultimately contribute to the legitimacy of the Union’s claim to exercise sovereign powers;<sup>134</sup> yet, this is unlikely to remedy the demos problem.

### **3.3 EU Law’s ‘Original’ Nature Built on Assumed Sovereign Rights**

Exceptional actors join states as quintessential international actors and the law may be seen as lagging behind these factual developments. However, sovereignty as a totalizing and indivisible legal and political status continues to pervade public international law and continues to create a link between power and responsibility. Its ordering effect depends on the totalizing claim to which many other considerations are subordinated.

With the Union engaging ever more closely with the outside<sup>135</sup> the debates about EU autonomy or sovereignty under public international law and under EU

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<sup>130</sup> Art. 23 TFEU. Emphasis added.

<sup>131</sup> See F. Strumia, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU*, Leiden/Boston: Brill | Nijhoff, 2013.

<sup>132</sup> P. Howe, ‘A Community of Europeans: The Requisite Underpinnings’, *Journal of Common Market Studies* 33 (1995), pp. 27-45; A. Etzioni, ‘The Community Deficit’, *Journal of Common Market Studies* 45 (2007), pp. 23-42; D. Green, 2007. *The Europeans: Political Identity in an Emerging Polity*. Boulder: Lynne Rienner, 2007.

<sup>133</sup> 1979: 61.99 %; 1984: 58.98 %; 1989: 58.41 %; 1994: 56.67 %; 1999: 49.51 %; 2004: 45.47 %; 2009: 43 %; 2014: ?, available at: [http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-\(1979-2009\).html](http://www.europarl.europa.eu/aboutparliament/en/000cdcd9d4/Turnout-(1979-2009).html). Some theories of democracy consider the opportunity to vote as sufficient to ensure democratic legitimacy.

<sup>134</sup> C. Eckes, ‘How the European Parliament’s Participation in International Relations Affects the Deep Tissue of the EU’s Power Structures’, 12(4) *International Journal of Constitutional Law (ICON)* 2014, pages 904-929.

<sup>135</sup> See above; the Lisbon Treaty has vested the Union with new powers (e.g. foreign direct investment (Article 206 TFEU); it has extended the Union’s external objectives (Article 21 TEU); it paved the institutional way for new engagement with the outside (e.g. establishment of the European External Action Service (Article 27(3) TFEU); and it introduced an obligation to accede to the ECHR (Article 6(2) TEU in combination with Article 218(8) TFEU)).

constitutional law must be seen together and related to each other. The EU was created as a construction of public international law. In its foundations, it consequently embraces the logic of state sovereignty, as it is inherent in modern international law. Originally largely motivated by reasons pertaining to the relationship between the EU and its Member States, the CJEU distinguish EU law from a very traditional image of public international law. Indeed, by depicting international law as traditional inter-states law and by ignoring already existing international mechanisms that immediately determined the legal heritage of individuals,<sup>136</sup> the Court was able to differentiate its own “new legal order of international law”.<sup>137</sup>

The European Treaties do not explicitly refer to the concept of sovereignty, either for the Member States or their Union. Yet, the Treaties determine the framework for the division of powers between the Union and its Member States, which is closely related to the concept of ‘sovereignty’ and ‘sovereign rights’. The concept of sovereignty even seems to celebrate a recent revival in the internal EU context.<sup>138</sup> Unsurprisingly, the CJEU invokes the concept of sovereignty only scarcely. At the same time, it grounds its reasoning regularly in a sovereigntist self-conception and openly speaks of the ‘autonomy’ of the EU legal order. In order to establish its own source of power, autonomous from the Member States, the Court had to identify original rights of the Union. It did so by using sovereigntist language both explicitly (“a transfer of powers from the States to the Community, the Member States have limited their *sovereign rights*, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves”<sup>139</sup>) and implicitly (“the law stemming from the treaty, an *independent source of law*, [that] could not because of its [...] *original* nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the *legal basis of the Community itself* being called into question”<sup>140</sup>). The Court left hence no doubt about the separate independent origin of EU law that is not rooted in the sovereignty of the Member States. It further explicitly established the link to the nationals of the Member States, which has been further strengthened throughout the EU’s internal constitutional development. Nationals of the Member States became EU citizens and the electorate of the European Parliament.<sup>141</sup>

Since this original conception of permanently transferred sovereign rights, the Court and the Treaties, have hand in hand, pushed forward a process of fortifying the European construction. “[I]n the eyes of the European Court and the majority of European scholars, the normative force of European law derives no longer from the normative foundations of international law. The ultimate normative base within the

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<sup>136</sup> Public law that aims at regulating the activities and determine the legal position of individuals have increased tremendously since the 60s but the ECHR is an example of a prominent instrument that existed at the time the CJEU made its argument.

<sup>137</sup> Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1, at para 12.

<sup>138</sup> See recently: AG Kokott, View in Case C-370/12, *Pringle*, para 137: ‘The first issue here is the protection of the sovereignty of Member States. The Union was established by still sovereign States. The principle stated in the first sentence of Article 5(1) TEU of conferred powers in order to define the competences of the Union is both an expression of that sovereignty and a safeguard of it’. A remarkable use of ‘sovereignty’ for an AG. See also the German Federal Constitutional Court’s Lisbon Treaty decision discussed below.

<sup>139</sup> Case 6/64, *Flaminio Costa v. ENEL*, pp. 593-4, emphasis added.

<sup>140</sup> *Idem.* at 585, emphasis added.

<sup>141</sup> See in particular Article 10(2) TEU: Citizens are directly represented at Union level in the European Parliament.

European Union – its “originality hypothesis” or “Grundnorm” – is the Rome Treaty as such. “[T]he EC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on a rule of law....” While ‘international’ in formation, the European treaties have assumed ‘national’ characteristics.”<sup>142</sup> Yet, as also argued by Schütze, “the European Union’s powers remain enumerated powers. Its scope of government is ‘incomplete’. The *reach* of its powers is not national – that is: sovereign – in *scope*.”<sup>143</sup>

The Court has at times placed exceptional limitations on the exercise of core sovereign rights by the Member States, including rights that they have explicitly retained under EU law. Illustrative examples of this limitation in the *external* sphere are the extensive interpretation of the duty of sincere cooperation<sup>144</sup> and the Court of Justice’s nuanced interpretation of Article 351 TFEU, which differentiates between the full respect for the rights of third countries as sovereign subjects of international law and the *nuanced* respect for the sovereign rights of the EU Member States. The Court for example requires Member States not to insist on their rights, but allows them under certain conditions to comply with their obligations towards third countries.<sup>145</sup> Given the EU’s autonomy in certain areas, as a corollary of its exclusive competences in those areas, could we argue that the EU has obtained a ‘sovereign’ status under international law? If at least the exercise of sovereign rights under public international law relates to the power to exclusively make, implement, enforce rules in a certain area, one may argue that the EU is (quasi-)sovereign in the areas of (absolute) exclusive competence. This seems also to be the CJEU’s position in its construction of functional succession of the Member States by the Union in areas where a ‘full transfer of powers’ has taken place.<sup>146</sup> Member States (and third countries) have accepted this construction for the 1947 GATT, later the WTO.

*Internally*, Union law has at times interfered with rights of the Member States that are considered to lie at the core of their sovereignty. An example is the case of *Rottmann*, where the CJEU limited the sovereign right of Member States to withdraw nationality because this would have also ended EU citizenship. EU citizenship “should be additional to [...] national citizenship”,<sup>147</sup> but it was in this case seen as the determinative factor. Similarly at the time of writing, the Commission is considering to look into Malta’s practice of granting nationality. While Malta’s choice to sell national passports to third-country nationals falls within the competences Member States have on the basis of the EU Treaty, nationality of an EU Member State implies citizenship of the Union (Art. 9 TEU), which in turn implies that Malta is “in fact selling the right to live in all 28 EU countries”.<sup>148</sup> This could be an infringement of the principle of sincere cooperation under Article 4(3) TEU and under

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<sup>142</sup> Schütze *op.cit.*, at 1082.

<sup>143</sup> Schütze, *op.cit.*, at 1087, emphasis added.

<sup>144</sup> Article 4(3) TEU. In the US this would translate as ‘duty of federal loyalty’.

<sup>145</sup> See already: Joined Cases 21- 24/72, *International Fruit Company and Others*, [1972] E.C.R. 1219; on the far-reaching obligations of the Member States under Article 351(2) TFEU, C. Hillion, Case note on Case C-62/98, *Commission v. Portugal*, and Case C-84/98, *Commission v. Portugal*, 38 CML Rev. (2001), 1269–1283.

<sup>146</sup> See e.g.: ECJ, Case C-308/06, *Intertanko*, [2009] E.C.R. I-405; ECJ, C-402/05 P and C-415/05 P, *Kadi*, [2008] E.C.R. I-6351; ECJ, Case C-188/07, *Commune de Mesquer*, [2008] E.C.R. I-450; see first: Joined Cases 21-24/72, *International Fruit Company*, see *supra* note 138.

<sup>147</sup> Article 20(1) TFEU; Case C-135/08, *Rottmann*, E.C.R. [2010] I-1449; see: J. Shaw (ed.), *Has the European Court of Justice Challenged Member States Sovereignty in National Law?*, EUI Working Papers, RSCAS 2011/62.

<sup>148</sup> ‘EU Commission prepares legal challenge on Malta passport sales’, *EU Observer*, 23 January 2014.

“tremendous pressure” by the European Commission Malta is said to have accepted restrictions on what is usually seen as an essential element of state sovereignty.<sup>149</sup>

Over time, more and more nuanced safeguards have been built into the Treaties to maintain a division of powers between the Member States and the Union, often in the name of protecting or restraining the sovereignty of the Member States.<sup>150</sup> Internally, the Treaties set out the principles, such as attribution and subsidiarity in Article 5(1) TEU,<sup>151</sup> as well as the respect for national identities in Article 4(2) TEU. At the same time however, they establish increasingly stringent ways of ordering the relations between the EU and its Member States, which is inherently constitutional. The relations are guided by principles of transparency, subsidiarity, proportionality, and human rights. The Court elevated the latter even to unwritten ‘self-standing’ legal norms that can be relied on as a benchmark in order to assess the legality of EU and Member State conduct.<sup>152</sup> Additionally, the strengthening of the transparency requirements and the introduction of more extensive participatory rights under the Lisbon Treaty, are attempts to improve the environment for a direct political connection between the EU institutions and its citizens. Indeed, transparency is necessary for active citizenship, including in the EU context.

Towards the outside, the Treaties have been rather ambiguous than nuanced. On the one hand, the existence or absence of the Union’s international legal personality has been subject to much debate. On the other hand, the Treaties have always taken a strong position as regards the Union’s ability to internationally bind the Member States.<sup>153</sup> Furthermore as mentioned above, the Treaties always explicitly recognize and respect international law and the sovereign rights of third countries.

Irrespective of its qualification under international law, the autonomous presence of the EU in the global legal order has called for the question of whether we are moving towards perhaps not a *post*-Westphalian order, but at least a *neo*-Westphalian one.<sup>154</sup> Academic debates on this issue often started from the presumption that the transfer of powers from the Member States to the EU implied a ‘pooling of sovereignty’ or at least of elements of sovereignty.<sup>155</sup> After all, for all practical purposes, EU Member States are simply no longer competent to fully and freely act under international law. The debate is fuelled once more by the UK’s declared intention to leave the Union and the surrounding debates, including on the interpretation of the rules that any such withdrawal under Article 50 TEU needs to follow.

### 3.4 The National Perspective

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<sup>149</sup> See ‘Malta bows to EU ‘pressure’ on passport sales’, *EU Observer*, 30 January 2014.

<sup>150</sup> See e.g. the documents submitted, considered, and drafted by the Convention on the Future of Europe. According to a search by the author on <http://european-convention.eu.int/>, 2,050 of these documents refer to the terms ‘sovereign’ or ‘sovereignty’.

<sup>151</sup> The principle of subsidiarity was strengthened under the Treaty of Lisbon, see Protocol 2.

<sup>152</sup> Cases C-402/05 P and C-415/05 P, *Kadi I* [2008] ECR I-6351, para 304.

<sup>153</sup> Article 216(2) TFEU. This clause, for example, does not have an equivalent in the US Constitution [see US Supreme Court cases *Bond v. US*, 564 U.S. (2011), of 16 June 2011 and *Missouri v. Holland*, 252 U.S. 416 (1920)].

<sup>154</sup> A. Cuyvers, *op.cit.*, at 712.

<sup>155</sup> Cf. for instance J. Peterson, ‘The European Union: Pooled Sovereignty, Divided Accountability’, *Political Studies* (Special Issue 1997), pp. 559–578.

As a starting point, we would probably agree with Bruno De Witte that “there is no evidence that the member States ever accepted any [...] substantive limits to their treaty-amending power. They act, to use a famous German expression, as the *Herren der Verträge*, bound by nothing else than their respective national constitutional rules and by the rules of international treaty law.”<sup>156</sup> Yet, one could argue that this merely implies that they would ultimately be free to leave the European Union and have a final say in any treaty amendments. However, the moment they decide to stay in and continue to play the game, they will have to accept some loss of sovereign powers. Over the years, the principle of sincere cooperation (Art. 4(3) TEU; see above) played an increasingly important role in restraining the external competences of the Member States in the negotiation or conclusion of international agreements and other areas of foreign policy.<sup>157</sup> In Treaty amendments, this has led Member States to include provisions that codify a static division of powers, which aim to protect core sovereign rights of the Member States on the international plane, such as Article 207(6) TFEU or Declarations 13 and 14 to the Lisbon Treaty.

As is well known, the national perspective on the origin of the EU’s sovereign rights differs from the EU perspective. The “pluralist position” claims “that there is no objective basis – no Archimedean point – from which one claim can be viewed as more authentic than the other, or superior to the other within a single hierarchy of norms”. “Rather the claims of the Member States and the claims of the EU to ultimate authority within the European legal order are equally plausible in their own terms and in their own perspective.”<sup>158</sup> With regard to the discussed (quasi-)national powers of the Union, the isolated basic fact that the EU is vested with transferred sovereign rights is in principle accepted under national constitutional law, implicitly or explicitly.<sup>159</sup> The controversy relates to the locus of ‘ultimate authority’, *i.e.* who is the sovereign that has authority over people and territory, rather than the question that sovereign rights are shared or transferred in some way. This becomes most apparent in the supremacy debate. While the supremacy of EU law is accepted (in practice),<sup>160</sup> the source of this supremacy is controversial. As mentioned above, the CJEU understands supremacy to flow from the autonomous (sovereign?) EU legal order. National constitutional courts, by contrast, tend to understand supremacy to be a quality delegated to EU law by their respective national legal orders.

In the United Kingdom, parliamentary sovereignty is a central constitutional principle. It entails that Parliament cannot bind future parliaments and that Parliament “can, if it chooses, legislate contrary to fundamental principles of human rights.”<sup>161</sup>

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<sup>156</sup> De Witte, see supra note 15. at 36.

<sup>157</sup> See Koutrakos, see supra note 70. for references to the many recent cases (including *PFOS* and the *BITS* cases) in which Member States found themselves restraint in the exercise of international powers. These restraints are also present in the area of the EU’s foreign and security policy; see C. Hillion and R.A. Wessel, ‘[Restraining External Competences of EU Member States under CFSP](#)’, in: M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, pp. 79-121.

<sup>158</sup> Cf. N. Walker, ‘Sovereignty and differentiated integration in the European Union’, 4 *ELJ* (1998), p. 355, at 361–2.

<sup>159</sup> See explicitly e.g. Article 23 German Constitution/ Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl. I (Ger.).

<sup>160</sup> Except for the original six all Member States accepted Van Gend and Costa/ENEL with their accession. The national courts and legislators of the original six have accepted supremacy in practice.

<sup>161</sup> Under UK law the so-called Simms principle [*R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, at 131, *per* Lord Hoffmann]; see however under international law: *Tinoco Claims Arbitration (Great Britain v. Costa Rica)*, (1923) 1 R.I.A.A. 369: International law looks to the

Indeed, traditionally there have been no legal limits on the sovereignty of the UK Parliament and “the only exceptions are those entailed by membership of the EU”.<sup>162</sup> The UK adopted the European Union Act 2011 in order to clarify its relations with the European Union. The EU Act 2011 contains *inter alia* a so-called ‘sovereignty’ clause (Section 18), originally intended to reaffirm the sovereign character of the legislative power of the UK Parliament. Moreover, Section 18 explains what has all along been the position of the UK:<sup>163</sup> that EU law is “recognised and available” “only by virtue of” the EC Act 1972.<sup>164</sup> The wording itself only refers to validity rather than supremacy of EU law. However the title of Section 18 is: “status of EU law dependent on continuing statutory basis”. Status is different from validity. It refers to the place within the national hierarchy of laws and hence to the supremacy of EU law. The wording ‘continuing statutory basis’ implies that this status could also be taken away by a future act of Parliament.<sup>165</sup>

The German Federal Constitutional Court (GFCC), while always presupposing that the conferral of ‘sovereign powers’ is conditioned by and depending on the German Constitution, has in more recent years increasingly turned to the concept of sovereignty in its case law on European integration. As is well-known, in *Solange I* and *Solange II*, the GFCC insisted that it continues to hold the ultimate power to review whether EU law is compatible with the German Constitution, and in particular the human rights protection under the German Constitution. In the *Maastricht Treaty* decision, it established an *ultra vires* control, checking whether acts of the EU go beyond the limits of EU competence. As in all constitutional complaints (*Verfassungsbeschwerden*) under the German Constitution,<sup>166</sup> the starting point both for the *Maastricht Treaty* decision (1993) and for the *Lisbon Treaty* decision (2009) was an alleged violation of individual rights, here the right to cast a meaningful vote under Article 38 German Constitution.<sup>167</sup> However, the focus of the debate has shifted from individual rights (*Maastricht*) towards the national collective and more specifically towards *state sovereignty* (*Lisbon*). Indeed in the *Lisbon Treaty* decision, sovereignty was a theme that dominated the substantive grounds in an unprecedented form.<sup>168</sup> The GFCC expressed more clearly than before that the concept of sovereignty lies at the core of its understanding of the relationship between German law and EU law and of the limits of European integration. It argued that sovereign

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State, not the government entity within the state. As long as an authority is the government of a certain state it binds this state, including future governments.

<sup>162</sup> F. Jacobs, *The Sovereignty of Law— The European Way*, *The Hamlyn Lectures 2006* (2007), p. 7. See the lecture version at: [http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/9780521878876\\_HAML\\_Jacobs.pdf](http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/9780521878876_HAML_Jacobs.pdf).

<sup>163</sup> Lord Bridge in *Factortame* (No. 2) [1991] 1 A.C. 603.

<sup>164</sup> Section 18 EU Act 2011: ‘Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.’

<sup>165</sup> See also most recently the UK Supreme Court’s emphasis on national constitutional principles, including Parliamentary sovereignty: UK Supreme Court, *HS2* judgment of 22 January 2014, [2014] UKSC 3, in particular para 78-9 (*per* Lord Reed), see also the critical note on the CJEU at para 81.

<sup>166</sup> Article 93(1)(4a) German Constitution.

<sup>167</sup> Article 38 German Constitution.

<sup>168</sup> Both qualitatively and quantitatively: *Lisbon*: 73 times ‘sovereign’ or ‘sovereignty’ in the substantive grounds (paras 207-419); *Maastricht*: 54 times ‘sovereign responsibilities’, ‘sovereign powers’, ‘sovereign rights’, ‘sovereign territory’, ‘sovereign State’, and ‘sovereign equality with other States’.

statehood is exclusive (only states can be sovereign) and that any sovereign rights exercised within the EU legal order are of a derivative character.<sup>169</sup> Indeed, the GFCC does not use ‘sovereign’ in the EU context but speaks of ‘autonomy’ and emphasises that the Member States “permanently remain the masters of the Treaties”.<sup>170</sup> Indeed, the Court held that the Union was “designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred”. Yet, the further description by the Court comes close to generally accepted definitions of an international organisation: “The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation.”<sup>171</sup> Most recently, it should be added, the GFCC has for the first time made a reference for a preliminary ruling to the Court of Justice.<sup>172</sup> The case concerns the bond-buying scheme of the ECB.<sup>173</sup> In the present context, the reference is relevant because it demonstrates that the GFCC accepts the EU rules of cooperation. The reference is a formal recognition of the CJEU’s privilege to exercise jurisdiction over acts of EU institutions, irrespective of the possible direct factual consequences in Germany.

Despite being used in many contexts and with many meanings, sovereignty remains the currency, in which concerns about self-determination and authority are expressed both in legal practice (by courts and legislators) and in the literature, including in the European Union. Despite all criticism, no equally appropriate alternative has been identified to understand and explain, as well as legitimize and challenge power. In short: you can dislike it but you cannot disregard it.<sup>174</sup> However, this does not mean that there is an agreed understanding of what sovereignty means. Different actors use it from their perspective and within their own intellectual frame – national constitutional, EU and international legal scholars. It is therefore also impossible to draw any conclusions on the EU’s sovereignty or its nature that will be generally accepted.

#### **4. Classification and Conclusion**

The European Union is not a state and few would argue that it should aspire to become a (super-)state. Under public international law, the EU is considered an international organisation with special privileges. It is in certain functional regimes

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<sup>169</sup> D. Thym, ‘In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court’, (2009) 46 *Common Market Law Review*, pp. 1795-1822, at 1798-1799.

<sup>170</sup> GFCC, *Lisbon Treaty Decision*, para 231.

<sup>171</sup> GFCC, *Lisbon Treaty Decision*. See also A. Steinbach, ‘The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration’, *German Law Journal*, 2010, p. 367.

<sup>172</sup> GFCC, decision of 14 January 2014, 2 BvR 2728/13; 2 BvR 2729/13; 2 BvR 2730/13; 2 BvR 2731/13; 2 BvE 13/13 (Outright Monetary Transactions of the ECB).

<sup>173</sup> C. Eckes, ACELG blog of 13 February 2014, available at: <http://acelg.blogactiv.eu/2014/02/14/the-german-federal-constitutional-court-as-part-of-a-new-european-judicial-network/>.

<sup>174</sup> See below for theoretical approaches that offer elaborate ways of avoiding the question of ultimate authority and divisibility.



classified as REIO. Others classify it as integration organisation as opposed to cooperation organisations.<sup>175</sup>

We follow this latter qualification of the EU as ‘integration organization’ and root this first of all in the fact that the Member States still exist and remain in fact essential for the organisation of public authority.<sup>176</sup> The Union is not the primary point of comprehensive reference, neither for its citizens nor for other international actors. At the same time, it has established itself as the primary point of reference in confined (and growing) areas of law, where both its citizens and other international actors have come to rely on its authority as in practice prevailing over the authority of its Member States. ‘Integration organisation’ expresses hence that from the perspective of international law, the Union is an international organisation that at times requires adaptation of the usual paradigms applied to international organisations and that the sovereignty of Member States has not been taken away but has adapted. The Union may not possess original sovereign rights, except for from its own perspective, but it has been successful in changing the international position and the self-conception of its Member States.<sup>177</sup> Indeed, EU membership has transformed States into Member States, both internally and externally. This has consequences for their sovereignty, which are subtler than the controversy over original rights may make us believe and not an exclusively legal debate.

Other EU legal scholars have a tendency to stress the ‘specialness’ (and related ‘autonomy’<sup>178</sup>) of the EU due to its continuous development (“even if the EEC did conform to the status of international organizations in its early days (which is unlikely) it has now moved well beyond that.”<sup>179</sup>) Indeed, more bold analyses have assessed the EU as a confederation,<sup>180</sup> or even in federal terms<sup>181</sup> (the latter sometimes as a warning<sup>182</sup>). The federative argument was for instance presented by Schütze when he argued in relation to the EU that: “Its formation was clearly international and its amendment still is. However, its international birth should not

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<sup>175</sup> See also M. Virally, ‘Definition and classification of international organizations: a legal approach’, in: G. Abi-Saab (ed.), *The Concept of International Organization* (UNESCO, Paris, 1981), pp. 50–66; as well as I.F. Dekker and R.A. Wessel, ‘Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions’, in: I.F. Dekker and W. Werner (eds.), *Governance and International Legal Theory*, Leiden/ Boston: Martinus Nijhoff Publishers, 2004, pp. 215-236.

<sup>176</sup> Habermas, *supra* note 117.

<sup>177</sup> On the latter see: Christopher Bickerton, *European Integration*, Oxford University Press, 2012.

<sup>178</sup> See on the arguments: R.A. Wessel and S. Blockmans, *supra* note 12.

<sup>179</sup> S. Douglas-Scott, *Constitutional Law of the European Union*, London: Longman, 2002, at p. 260; but many more similar quotes can be found.

<sup>180</sup> A. Cuyvers, ‘The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World’, *European Law Journal*, Vol. 19, No. 6, November 2013, pp. 711–738. See also his recently defended thesis at the University of Leiden: *The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, Meijers-series no. MI-227, Leiden: Wohrmann / Meijers, 2014.

<sup>181</sup> See for instance M. Cappelletti, M. Secombe and J.H.H. Weiler (eds), *Integration through Law—Europe and the American Federal Experience*, Vol. I, De Gruyter, 1986; K. Lenaerts, ‘Federalism: Essential Concepts in Evolution—the Case of the European Union’, (1998) 21 *Fordham International Law Journal* 746; A. von Bogdandy, ‘The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty’, (2000) 6 *Columbia Journal of European Law* 27; R. Schütze, ‘On “Federal” Ground: the European Union as an (Inter)National Phenomenon’, (2009) 46 *Common Market Law Review* 1096; J.H.H. Weiler, ‘The Transformation of Europe’, *Yale Law Journal*, 1991, pp. 2403-2484; G. De Baere and K. Gutman, , *supra* note 73.

<sup>182</sup> S.J. Boom, ‘The European Union After the Maastricht Decision: Will Germany Be the Virginia of Europe?’, *American Journal of Comparative Law* , 1995, pp. 177-226 at 208.



prejudice against the ‘federal’ or ‘constitutional’ status of the EC Treaty. [...] The fact remains that the European legal order has adopted the ‘originality hypothesis’ and cut the umbilical cord with the international legal order. The Treaty as such – not international law – is posited at the origin of European law. Functionally, then, the European Union is based on a ‘constitutional treaty’ that assumes and stands on federal middle ground. The same conclusion was reached when analysing the European institutions. The Community’s dominant legislative procedure strikes a federal balance between ‘international’ and ‘national’ elements. And while the scope of its powers is limited, the nature of these powers is predominately ‘national’. Overall then, the legal structure of the European Union is – in analogy to the American Union before the Civil War – ‘in strictness, neither a national nor a[n] [international] Constitution, but a composition of both’.<sup>183</sup> Hence, in Schütze’s words the Union is ‘a federation of States’.<sup>184</sup>

It has also been argued that “the EU has combined a confederal foundation with some crucial federate reinforcements in its constitutional superstructure.”<sup>185</sup> In fact, taking a confederal notion as the basis for an international approach of the EU would also not undermine our claim that the Member States still exist as (sovereign) states. Following Cuyvers, “A confederation also forms a compound entity under a common government, albeit a less integrated one where the constituent parts remain primary and no single people underlies the different governments. In the brief definition of Forsyth a confederation is ‘a union of states in a body politic’. The key characteristic is that the different parts are not subsumed in or brought under a single superior authority. Instead the central authority remains dependent on the constituent parts.”<sup>186</sup> Applied to the European Union, Cuyvers argues for a modified confederal model to explain the Union’s international legal status: “First, the EU can be seen as an inverted confederation. In contrast to the US Confederation it has an internal and economic focus, not an external military one, which provides a far more continuous and stable basis for confederal cooperation: in the marketplace there are no times of peace. Second, the EU rests on a confederal foundation but has both reinforced and burdened this foundation with a federate superstructure. This federate superstructure helps to explain the remarkable effectiveness and stability the EU has achieved for a confederal system, yet it has also created or exacerbated risks and weaknesses in that system. Third, utilising the stable and well-developed legal and bureaucratic systems of its Member States, the EU has used these federate elements to develop a truly confederal rule by law. Though clearly not fail-safe, this mechanism is secured by the reliance on the rule of law of the Member States themselves and is so effective because it reduces the need for the EU to enforce, one of the key weaknesses of confederal systems.”<sup>187</sup> As regards Cuyvers’ first point, it should be referred back to the first part of this chapter. The Union’s external powers and ambitions have grown, particularly since the entry into force of the Lisbon Treaty. They may not be focused on the military, but the Union has clear external ambitions in external trade, data

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<sup>183</sup> Schütze, *op.cit.*, at 1089; in the last sentence quoting Madison, *The Federalist No. 39*, in: Hamilton, Madison, and Jay, *The Federalist*, Cambridge University Press, 2003, at p. 187.

<sup>184</sup> Schütze is echoing a phrased used by Carl Schmitt earlier: C. Schmitt, *Constitutional Theory*, Durham, N.C.: Duke University Press, [1928] 2008.

<sup>185</sup> A. Cuyvers, see *supra* 174, at 712.

<sup>186</sup> *Idem*, at 714. In this respect he refers to M. Forsyth, *Unions of States: The Theory and Practice of Confederation*. Leicester University Press, 1981, as well as to D.J. Elazar, *Exploring Federalism*, University of Alabama Press, 2006.

<sup>187</sup> *Idem*, at 737.

protection, and environmental matters. It is incomplete to portrait the Union as exclusively pursuing internal ambitions.

In the end, it may largely be a semantic discussion. Some confederations are quite similar to international organizations and when federations are not equated with federal states<sup>188</sup> the discussion becomes more nuanced. And, as noted by Cloots, De Baere and Sottiaux, the epithet ‘federal’ even seems to denote two opposite concepts: “When used in relation to the EU, federalization appears to signify more unity, uniformity and (formal) equality throughout the Union, at the expense of the autonomous powers of its territorial subdivisions (ie, the Member States). In the context of multinational Member States, by contrast, federalism refers to increased self-governing powers for sub-State entities (eg, regions, communities) and accordingly, to more legal diversity and less formal equality.”<sup>189</sup> The literature referred to reveals that there are clear federal as well as confederal elements in the set-up and the current functioning of the European Union. This then perhaps allows for an easy compromise: the EU is “a developed form of international organization which displays characteristics of an embryonic federation”.<sup>190</sup> Our choice for an ‘integration organization’ seems to fit the practice of current international relations and does not exclude the EU from that category in respect to the international rules making up the ‘law of international organizations’.<sup>191</sup> At the same time, it reflects the potential of change, which is precisely what leads to the Member States’ firm formal position in the sovereignty debate.

Under current public international law, sovereignty remains closely connected to statehood and is based on territorial exclusivity. And, while the EU Member States have accepted and supported the exercise of sovereign rights by the Union, including on the international plane, any expression of an ambition of the EU to meet (some of) the statehood criteria will necessarily meet opposition by its Member States. Indeed, the development of the EU’s relationship with (other) sovereign international actors, i.e. states, demonstrates that the EU best ensures a quasi-sovereign position by expressly not aspiring to meet the statehood criteria. Member States take their own external sovereignty seriously and guard it against encroachment by the Union. What might be needed though is a more formal adaptation of public international law to the phenomenon of an integration organisation that exercises a state-like function in international relations.

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<sup>188</sup> Cf. also M. Burgess, *Federalism and the European Union: The Building of Europe 1950–2000i*, Routledge, 2000, at pp. 28–29.

<sup>189</sup> E. Cloots, G. De Baere and S. Sottiaux, ‘Introduction: Federalism’s Janus Face’, in: E. Cloots, G. De Baere and S. Sottiaux (eds.), see supra note 73, pp. 1-10, at 2. Cf. also K. Lenaerts, ‘EU Federalism in 3-D’, pp. 13-44, as well as other contributions in the same volume.

<sup>190</sup> D. Wyatt at al., *Wyatt and Dashwood’s European Union Law*, London: Sweet & Maxwell, 2006 (5<sup>th</sup> Ed.) at 132.

<sup>191</sup> Cf. De Witte, see supra note 14, at 36. De Witte also stresses the point that the European Union continues to belong to the legal category of international organizations.