

# Yearbook of European Law

## Special Issue- Introduction: Beyond Monism, Dualism, Pluralism

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## Introduction: Beyond Monism, Dualism, Pluralism

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### The Quest for a (Fully-Fledged) Theoretical Framework: Co-Implication, Embeddedness, and Interdependency between Public International Law and EU Law

Violeta Moreno-Lax\* and Paul Gragl\*\*

#### 1 Introduction

This Special Issue is the result of a year-long collective reflection on the relationship between the EU legal order and international law. Discussions took place within the 2014-15 Annual Seminar Series ‘*Beyond Pluralism? Co-Implication, Embeddedness and Interdependency between Public International Law and EU Law*’ of the Centre for Law and Society in a Global Context of Queen Mary, University of London, convened by the co-editors of this volume.<sup>1</sup>

The Series analysed specific legal areas from the viewpoint of both the EU and public international law in a range of ‘thematic dialogues’ (on monetary policy; energy and environmental law; human rights; crime, justice and terrorism; and common foreign and security policy). An inductive methodology was applied, based on direct observation of the respective thematic field, intended to allow contributors to draw conclusions on the actual processes of reception, compliance and/or contestation between the EU and international legal orders on that basis. A final one-day workshop: ‘*Constructive Links or Dangerous Liaisons? The Case of Public International Law and European Union Law*’, closed the Series and served to put findings into perspective, reflect upon them, and consider how best to articulate the link between the two regimes.<sup>2</sup>

The current state of affairs provided the background to this exercise. Ever since *Van Gend en Loos*,<sup>3</sup> the character of the Union’s system as ‘a new legal order’ has fascinated legal scholars.<sup>4</sup> Although international lawyers may instinctively assume the direct applicability of general international norms to the EU, particularly taking into account its treaty origins and distinct legal personality, there are complex ramifications originating in its *sui generis* nature as a (constitutionalising) system of ‘supranational’ law.<sup>5</sup>

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<sup>1</sup> For further details, see: <<http://www.law.qmul.ac.uk/research/centres/clsgc/events/seminars/index.html>>.

<sup>2</sup> The programme is available at: <<http://www.law.qmul.ac.uk/events/items/135279.html>>.

<sup>3</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1. See also Case 106/77 *Simmenthal* [1978] ECR 629; and Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>4</sup> See, generally, Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Leiden/Boston: Martinus Nijhoff 2012); Piet Eeckhout, *EU External Relations Law* (2<sup>nd</sup> edn, Oxford: OUP 2011); Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders* (Hart 2011); Jan Wouters, André Nollkaemper and Erika de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, (The Hague: T.M.C. Asser Press, 2008); Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law*, (Oxford: Hart Publishing, 2008); Martti Koskeniemi (ed), *International Law Aspects of the European Union*, (Leiden: Martinus Nijhoff 1998).

<sup>5</sup> Jan Klabbers, ‘The Changing Image of International Organisations’, in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organisations*, (NY: United Nations University Press, 2001) 221; Trevor C. Hartley, ‘International Law and the Law of the European Union – A Reassessment’ (2001) 71

On the other hand, as it is further detailed in the following sections, the piecemeal approach followed by the Court of Justice of the European Union (CJEU) thereafter has not helped providing a coherent or systematic basis to the relationship between the two legal orders. Although the Court has repeated its commitment to international law in constant jurisprudence, reiterating that the Union ‘must respect international law in the exercise of its powers’<sup>6</sup> and that provisions in agreements signed by the EU ‘form an integral part of [EU] law’ from the moment in which they come into force,<sup>7</sup> this recognition has resulted in varying strategies of integration of international norms into EU law, ranging from unswerving compliance to blatant instrumentalisation.<sup>8</sup>

There is, in fact, nothing in the EU Treaties determining the place of international rules within the hierarchy of sources of EU law, nor in relation to its particular effects.<sup>9</sup> The limits of dichotomous accounts to describe the impact of international law on the EU system – relying on concepts such as ‘monism’ and ‘dualism’, from the international/domestic discourse – have been exposed by several commentators, who focus instead on the asymmetric and constantly adjusting nature of this relationship.<sup>10</sup> In the absence of specific provisions in the founding Treaties, the systematisation of this relationship has been articulated *ad hoc* by the CJEU. But the case law on this matter has been fragmentary, allocating different ranking and effects to international norms, depending on the type of instrument and the function it may perform in the particular circumstances.<sup>11</sup> The Court has distinguished several degrees of intensity in the effects of international law, differentiating several methods of incorporation, each of them subject to different conditions. Ziegler has discerned, at least, three distinct mechanisms: direct effect; indirect effect or conform interpretation; and ‘substantive borrowing’.<sup>12</sup>

At the same time, since the Lisbon Treaty came into force it is an explicit objective of the Union to ‘uphold and promote’ its values in the relations established with the wider world, thereby contributing not only to ‘the strict observance’, but also to ‘the development of international law’.<sup>13</sup> The EU, therefore, according to the literal tenor of Article 3(5) TEU,

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*British Yearbook of International Law* 1; René Barents, *The Autonomy of Community Law*, (The Hague: Kluwer Law International, 2004); Bruno de Witte, ‘European Union Law: How Autonomous is its Legal Order?’ (2010) 65 *Zeitschrift für öffentliches Recht* 141.

<sup>6</sup> Case C-286/90 *Poulsen* [1992] ECR I-6019, para 9; Case C-405/92 *Mondiet* [1993] ECR I-6133, paras 13-15; *Racke* (n 16) para 45; Case C-308/06 *Intertanko* [2008] ECR I-4057, para 51.

<sup>7</sup> Case 181/73 *Haegeman* [1974] ECR 449, para 5; Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; Case C-311/04 *Dordrecht* [2006] ECR I-609, para 25.

<sup>8</sup> Bruno de Witte, ‘International Law as a Tool for the European Union’ (2009) 5 ECLR 265.

<sup>9</sup> P. Gragl, ‘The Silence of the Treaties: General International Law and the European Union’ (2015) 57 *German Yearbook of International Law* 375.

<sup>10</sup> Katja S. Ziegler, ‘International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation’, in Alexander Orakhelashvili (ed), *Research Handbook on the Theory of International Law*, (Cheltenham: Edward Elgar, 2011) 268. See also, Enzo Cannizzaro, ‘The Neo-Monism of the European Legal Order’, in Cannizzaro, Palchetti and Wessel (n 4) 35.

<sup>11</sup> Ramses A. Wessel, *Close Encounters of the Third Kind: The Interface between the EU and International Law after the Treaty of Lisbon*, Swedish Institute of European Policy Studies (Dec. 2013) <<http://www.sieps.se/en/publikationer/close-encounters-of-the-third-kind-the-interface-between-the-eu-and-international-law-after-the-treat>>. Cf. Allan Rosas, ‘The European Court of Justice and Public International Law’ in Wouters, Nollkaemper and de Wet (n 4) 75.

<sup>12</sup> See Ziegler (n 10) 298-309. See also, Katja S. Ziegler, ‘The Relationship between EU Law and International Law’, in Dennis Patterson and Anna Södersten (eds), *A Companion to EU Law and International Law* (London: John Wiley & Sons, 2016) 42, 45.

<sup>13</sup> Art. 3(5) TEU. See also Art. 21(1) TEU.

should emerge not only as a passive norm recipient, but also as a shaper and generator of international norms.<sup>14</sup>

The relationship between the two regimes has, however, been put under constant strain after the entry into force of the Lisbon Treaty. Negotiations regarding the accession of the EU to the ECHR have stalled after the Court of Justice delivered its *Opinion 2/13*,<sup>15</sup> drawing heavily on the notion of ‘autonomy’ of both the EU legal order as such and of the jurisdiction of the Court as the last arbiter over its correct interpretation.<sup>16</sup> And with ‘autonomy’ being hailed as a key tool to preserve ‘the specific characteristics of the EU and EU law’,<sup>17</sup> a new era (of closure and isolationism) seems to have been inaugurated in the relationship between the EU legal order and international law.

Against this background, the objective of this Special Issue is to examine the interplay between EU law and international law, from both the perspective of the EU and the international legal system, searching for a sound theoretical foundation that explains and systematizes the link between the two. But before going into the presentation of the specific structure and content of the volume, some observations mapping out the origins and evolution of this complex relationship are in order. In the next two sections, we will explore and problematize the roots of the multiple entanglements that unite the two legal systems and set the basis of our collective quest for a comprehensive theoretical framework, embracing the co-implication, embeddedness, and interdependency between public international law and EU law that give the title to this Special Issue.

## 2 Enigmatic entanglements

The law of the European Union, and especially its growing interlacing with the law of its Member States, continues to beguile legal scholars, as the vast array of literature in this area demonstrates. And even though the question of the legal status of EU law within the legal order of the Member States remains an evergreen in European legal studies,<sup>18</sup> lawyers should be wary of focusing too much on this relationship, while blanking out the EU’s relationship with public international law and just treating it as mere ‘background law’ or the reflection of State will.<sup>19</sup> As Christiaan Timmermans, former CJEU judge, meaningfully observed, ‘[t]he relationship between European [Union] law and public international is a complex one’,<sup>20</sup> and it remains as such to this day. Compared to the burgeoning studies on the Union’s role as an actor in international relations, the relationship between international and EU law receives far less attention and remains an almost arcane area in legal scholarship.<sup>21</sup>

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<sup>14</sup> For a detailed review, see Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union’s Shaping of the International Legal Order* (Cambridge: CUP 2013).

<sup>15</sup> *Opinion 2/13 EU Accession to the ECHR* [2014] ECLI:EU:C:2014:2454.

<sup>16</sup> Art. 19 TEU. See further, P. Gragl, ‘The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR’ (2015) *European Yearbook of Human Rights* 2015 27.

<sup>17</sup> *Opinion 2/13* (n 15), para 174.

<sup>18</sup> Bruno de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’, in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2<sup>nd</sup> edn, Oxford: Oxford University Press, 2011) 323.

<sup>19</sup> Samantha Besson, ‘How International is the European Legal Order?’ (2008) 5 *No Foundations* 50, 50.

<sup>20</sup> Christiaan Timmermans, ‘The EU and Public International Law’ (1999) 4 *European Foreign Affairs Review* 181, 181.

<sup>21</sup> Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel, ‘Introduction: International Law as Law of the European Union’, in Cannizzaro, Palchetti, and Wessel (n 4) 1.

The key problem in analyzing the relationship between international and European Union law is that the perspectives on it are predominantly informed by certain preconceptions, notions, and theories of these two respective bodies of law – depending on the respective lawyer’s tradition and academic upbringing.<sup>22</sup> This means that a clear vision of this issue is, from the outset, blurred by a ‘level-of-analysis problem’, or the question whether – to borrow terms from international relations theory – one selects a macro-, meso- or micro-level of analysis.<sup>23</sup> In other words, it depends on whether one views the EU from either an *international legal* or *EU legal* vantage point.

Public international lawyers principally regard the character of EU law as particular international law and the EU as an international organization,<sup>24</sup> as it has been created by States and is founded on treaties. Therefore, it is nothing more than an – albeit highly sophisticated – international law construct.<sup>25</sup> Conversely, European Union lawyers would object to this position. Although they might agree that EU and international law might have been a happy family once,<sup>26</sup> the umbilical cord between the maternal (international law) and the filial legal order (European Union) has been severed, leading to what may constitute a ‘self-contained’ regime.<sup>27</sup> Because of its high degree of ‘constitutional’ development, supranational components, and the density of legal regulation among the EU and the Member States,<sup>28</sup> the European Union may accordingly be seen as a quasi-constitutional, autonomous and *sui generis* legal order that is certainly not a State, but not a classic international organization either.

This question of viewpoint is, however, not a mere theoretical sophism. By choosing one of these two particular perspectives, one implicitly also chooses the way normative relations between international and EU law will be framed – and it is evident that an international legal analysis leads to different results in cases of conflict than one starting from European constitutionalism.<sup>29</sup> If we assumed that the Union legal order were mere regional international law, the question of status and effects of international norms within EU law, including that of normative conflicts between those two bodies of law, would need to be answered on the basis of international rules on the conflict of treaties and by the principles governing the internal law of international organizations. But according to its case law, the CJEU, conversely,

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<sup>22</sup> Ziegler (n 10) 269-270.

<sup>23</sup> J. David Singer, ‘The Level-of-Analysis Problem in International Relations’ (1961) 14 *World Politics* 77, 77-78.

<sup>24</sup> Cf. e.g., Pierre-Marie Dupuy, ‘L’unité de l’ordre juridique international’ (2002) 297 *Recueil des Cours* 9, 438 et seq.; Ingolf Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?’ (1999) 36 *Common Market Law Review* 703, 711; Theodore Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’ (1996) 37 *Harvard International Law Journal* 389-409; Alain Pellet, ‘Les fondements juridiques internationaux du droit communautaire’ (1994) 5 *Collected Courses of the Academy of European Law* 193, 245.

<sup>25</sup> Nicholas Tsagourias, ‘Conceptualizing the Autonomy of the European Union’, in Richard Collins and Nigel D. White (eds), *International Organizations and the Idea of Autonomy* (London: Routledge, 2011) 340.

<sup>26</sup> Jan Klabbbers, ‘Völkerrechtsfreundlich? International Law and the Union Legal Order’, in Panos Koutrakos (ed), *European Foreign Policy* (Cheltenham: Edward Elgar, 2011) 95.

<sup>27</sup> Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 *European Journal of International Law* 483.

<sup>28</sup> Joxerramon Bengoetxea, ‘The EU as (More than) an International Organization’, in Jan Klabbbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Cheltenham: Edward Elgar, 2011) 449.

<sup>29</sup> Ziegler (n 10) 270.

considers Union law to be a distinct body of law and the Union itself – not unlike States – a subject of international law with its own internal legal order.<sup>30</sup>

### 2.1 Constitutional fusion with Member State law

It was clear since the Union's inception as the European Coal and Steel Community in 1952 and the European Economic Community in 1957, respectively, that EU and international law were inextricably related. After this new legal entity had been established by sovereign nation-States ('the Member States') on the basis of international treaties, there was no doubt that the Union's predecessors all were creatures of international law.<sup>31</sup> Yet, the following decades saw certain developments, which raised considerable doubts regarding the EU's legal nature. If we consider the 'internal' viewpoint of EU law, the CJEU pursued an ever-deepening integration among the Member States by claiming that EU law not only had direct effect under certain conditions,<sup>32</sup> but also was supreme vis-à-vis Member State law.<sup>33</sup> Apart from that, the Court also identified the Treaties as 'the basic constitutional charter' of the Union,<sup>34</sup> which allows for a reading of the EU Treaties in which they have been 'constitutionalized'. Consequently, the EU has become an entity, which is no longer a 'pure' international organization, but something akin to a super-State-like polity.<sup>35</sup>

These far-reaching effects on the legal orders of the EU Member States have often been interpreted as a near-fusion of European Union and Member State law into one unified legal system<sup>36</sup> – and thus as a monist interweaving of two kinds of legal bodies in which Union law reigns supreme.<sup>37</sup> Yet, at the end of the day, the EU is plainly not a State.<sup>38</sup> It appears to remain in a position of limbo, halfway between confederation and federation.<sup>39</sup> Other designations of the European Union encompass terms as diverse as 'supranational' organisation,<sup>40</sup> 'association of sovereign States' (or *Staatenverbund*, a term originally coined by the German Constitutional Court),<sup>41</sup> and a 'new type of authority'.<sup>42</sup> But, all in all, these phrases only describe the empirical uniqueness of the European project and the conceptual perplexity surrounding it,<sup>43</sup> without capturing its normative dimension in all its facets.

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<sup>30</sup> Anne Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9, 10-11.

<sup>31</sup> Schilling (n 24) 403, and J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2413.

<sup>32</sup> *Van Gend & Loos* (n 3), 13.

<sup>33</sup> *Costa v ENEL* (n 3), 594.

<sup>34</sup> Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23.

<sup>35</sup> J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) 12.

<sup>36</sup> Michael Potacs, 'Das Verhältnis zwischen der EU und ihren Mitgliedstaaten im Lichte traditioneller Modelle' (2010) 65 *Zeitschrift für öffentliches Recht* 117, 137-138.

<sup>37</sup> Stefan Griller, 'Völkerrecht und Landesrecht – unter Berücksichtigung des Europarechts', in Robert Walter, Clemens Jabloner, and Klaus Zeleny (eds), *Hans Kelsen und das Völkerrecht* (Vienna: Manz, 2004) 109.

<sup>38</sup> Cf. Tobias Lock, 'Why the European Union is not a State' (2009) 5 *European Constitutional Law Review* 407-420. Cf. also Opinion 2/13 (n 15), para 156, wherein the CJEU explicitly asserted for the first time(!) that the EU could not be considered a State under international law.

<sup>39</sup> Kimmo Kiljunen, *The European Constitution in the Making* (Brussels: Centre for European Policy Studies, 2004) 21-26.

<sup>40</sup> Cf. e.g., the Schuman Declaration, 9 May 1950, available at <[http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm)>.

<sup>41</sup> BVerfGE 89, 155 – *Maastricht*; 2 BvR 2134, 2159/92, 12 October 1993.

<sup>42</sup> Armin von Bogdandy, 'Supranationale Union als neuer Herrschaftstypus: Entstaatlichung und Vergemeinschaftung in staatsrechtlicher Perspektive' (1993) 16 *Integration* 210-224.

<sup>43</sup> Thomas Gehring, *Die Europäische Union als komplexe Internationale Organisation* (Baden-Baden: Nomos, 2002) 9.

Eventually, the European Union seems to be more than an ‘ordinary’ grouping of States, and because of its high degree of ‘constitutional’ development, the most meaningful (and, at the same time, the most meaningless) way to define the EU is as a *sui generis* organization – which is, despite the uniqueness of every single international organization, even more *sui generis* than others.<sup>44</sup> However, the interest of this discussion notwithstanding, the relationship between the EU and its Member States is not the principal issue here, which has been discussed at length in other academic works.<sup>45</sup> It is rather the ‘external’ viewpoint, which is the central question to be examined in this Special Issue.

## 2.2 *Legal autonomization from international law*

Whilst the CJEU pursued an integrating approach towards Member State law, it concurrently sought to differentiate EU law from its legal basis, i.e. international agreements, and its maternal legal order, i.e. public international law. Whereas the Court still considered the then-Community a ‘new legal order of *international law*’ in *Van Gend en Loos*,<sup>46</sup> it simply dropped the addendum ‘international law’ in *Costa v ENEL* one year later and maintained that ‘[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system ...’.<sup>47</sup> In addition to that, the CJEU subsequently postulated that the Union legal order was ‘autonomous’ from international law, and pursued ‘its own particular objectives’.<sup>48</sup>

This concept of autonomy, *inter alia*, entails, as the Court later held, that international agreements cannot affect the autonomy of Union law,<sup>49</sup> that ‘the validity of any [Union] measure ... must be considered to be the expression ... of a constitutional guarantee stemming from the [EU] Treaty as an autonomous legal system’,<sup>50</sup> and that international agreements concluded by the Union must not alter the functional nature of its organs, for instance that of the Court of Justice.<sup>51</sup> This can only be done through the ‘constitutionally’ foreseen treaty amendment mechanism under Article 48 TEU.<sup>52</sup>

By separating EU law from the rest of international law, the Court privileged the application of Union law, instead of general international law, within the legal systems of the Member States and thereby further consolidated the supremacy of Union law. As a consequence, Member States whose constitutions required non-domestic law to be transformed into national law in order to have effect, could not extenuate or nullify the effectiveness of EU law by adopting a derogating *lex posterior*.<sup>53</sup> In legal theoretical terms, the CJEU appropriated the instruments of its creation and ‘liberated’ the Union from the contingencies of general international law. It moved the source of its validation from international law to its

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<sup>44</sup> Bengoetxea (n 28) 448-449.

<sup>45</sup> Cf. e.g. the fine analysis by Barents (n 5).

<sup>46</sup> *Van Gend en Loos* (n 3) 12 (emphasis added).

<sup>47</sup> *Costa v ENEL* (n 3) 593.

<sup>48</sup> Opinion 1/91 *Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relation to the creation of the European Economic Area (EEA I)* [1991] ECR I-6079, para 30.

<sup>49</sup> Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635, para 123.

<sup>50</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 282.

<sup>51</sup> Opinion 1/09 *European and Community Patents Court* [2011] ECR I-1137, paras 76-89.

<sup>52</sup> Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para. 58.

<sup>53</sup> Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker & Humblot, 2001) 244.

own legal order and transformed the Treaties into the basic norm upon which the EU's constitutional edifice is built.<sup>54</sup>

From the perspective of the European Union and its Court of Justice, the question whether the Union has originary or derivative international legal personality has, therefore, become superfluous<sup>55</sup> – the crucial point is that by ‘elevating’ the Union to a legal order which is autonomous from the rest of international law, the CJEU has helped the EU legal ‘child’ to outgrow its international legal matrix. It is accordingly unquestionable that, as the distance from traditional international law augmented, the EU legal order became more ‘domestic’ or ‘internal’ in nature as a result.

### 2.3 Reception despite autonomization

Despite the autonomization of European law, the dynamics of the EU-international law relationship are not straightforward. It may seem extremely paradoxical that while the European Union ‘withdrew’ from its international legal sources and was gradually ‘autonomized’, it also started to display – not unlike regular domestic systems – a certain ‘openness’ towards the international legal order. After all, the EU's constitutional aspirations – similar to those of State law – remain ultimately subordinate to public international law.<sup>56</sup> It is worth noting in this context that the EU does not seem to take issue with allowing binding international norms to become part of the Union legal order, either general international law, including customary norms,<sup>57</sup> or international agreements,<sup>58</sup> concluded by its own institutions.<sup>59</sup> On the contrary, as already mentioned, the Court does not tire to stress that the Union ‘must respect international law in the exercise of its powers’<sup>60</sup> and that international law forms ‘an integral part of [Union] law’.<sup>61</sup>

From this perspective, the case law of the CJEU on international law has shown (at least, at first sight) a very ‘monist’ and open attitude towards international law.<sup>62</sup> As pointed out above, both customary international law and international agreements concluded by the EU (Article 216(2) TFEU) become, *ipso facto*, part of EU law without the need for further measures of transposition or incorporation.<sup>63</sup> This is why, when the Court, quite controversially, stated in the *Banana Market* case, that the provisions of the General Agreement on Tariffs and Trade (GATT) – to which the EU is a party – cannot be invoked to

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<sup>54</sup> Tsagourias (n 25) 340.

<sup>55</sup> Werner Schroeder, *Das Gemeinschaftsrechtssystem* (Tübingen: Mohr-Siebeck, 2002) 153-154.

<sup>56</sup> Lucas Lixinski, ‘Taming the Fragmentation Monster through Human Rights? International Constitutionalism, “Pluralism Lite” and the Common Territory of the Two European Legal Orders’, in Vasiliki Kosta, Nikos Skoutaris, and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2014) 231.

<sup>57</sup> Cf. *inter alia*, Case C-162/96 *Racke GmbH v Hauptzollamt Mainz* [1998] ECR I-3655, paras 25 et seq.; and Case T-115/94 *Opel Austria GmbH v Council* [1998] ECR II-2739, para 77.

<sup>58</sup> Cf. *inter alia*, Case 104/81 *Kupferberg & Cie KG (Kupferberg I)* [1982] ECR 3641, para 11.

<sup>59</sup> Ramses A. Wessel and Steven Blockmans, ‘Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organizations – An Introduction’ in Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence* (Berlin/Heidelberg: Springer, 2013) 1.

<sup>60</sup> Case C-162/96 *Racke GmbH v Hauptzollamt Mainz* (n 57) para 45; Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019, paras 9-10; Case C-405/92 *Mondiet* [1993] ECR I-6133, paras 13-15.

<sup>61</sup> Case 181/73 *Haegeman v Belgian State* [1974] ECR 449, para 5.

<sup>62</sup> Ziegler (n 10) 292-293.

<sup>63</sup> Rosas (n 11) 75.



challenge the lawfulness of Union law<sup>64</sup> and, in *Portugal v Council*, that the legality of measures adopted by the EU institutions are not to be reviewed in the light of the World Trade Organization (WTO) agreements – to which the Union is also a party, it was seen as a break with this monist approach.<sup>65</sup>

Further ruptures in the hitherto monist fabric of the relationship between EU and public international law transpired in subsequent cases. Prominently, in *Intertanko*, the Court refused to review the legality of a Directive which practically incorporated an – albeit for the EU not binding – international convention into Union law;<sup>66</sup> and, most significantly, in the *Kadi* saga, the CJEU annulled a Regulation implementing a United Nations Security Council Resolution, because of its infringing of fundamental rights (*Kadi I*)<sup>67</sup> – a stance that the Court later confirmed, despite considerable, yet still insufficient, developments for the protection of fundamental rights at the UN level (*Kadi II*).<sup>68</sup>

These judgments raise the questions whether the CJEU has become reluctant in ensuring compliance with international law,<sup>69</sup> and whether and how this significant shift in the Union's focus, from building bridges with international law to apparently burning them, can be explained on a legal theoretical basis. One might, therefore, ask whether the EU's current position towards international law should now be characterized as a dualist 'wall', which is intended to safeguard the Union's autonomy,<sup>70</sup> or if this relationship has become a new testing ground for pluralist theories of law and legal relationships.<sup>71</sup> What is evident is that the EU currently lacks a clear and coherent approach towards international law,<sup>72</sup> which could be satisfactorily described as a genuine theoretical framework – the usefulness of the monist/dualist parallel increasingly emerging as rather limited.

### 3 The quest for a theoretical framework

There is far more to theorizing and classifying than just tidy-mindedness or 'a common-sense prejudice pedantically expressed',<sup>73</sup> in particular because the debate about the relationship between international and domestic law (given the premise that the EU can actually be classified as a internal legal order to a *sui generis* organisation) has not been entirely fought

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<sup>64</sup> Case C-280/93 *Germany v Council (Bananas – Common Organization of the Markets)* [1994] ECR I-4973, para 112.

<sup>65</sup> Piet Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems' (1997) 34 *Common Market Law Review* 11, 28-29; Kirsten Schmalenbach, 'Art. 216 AEUV', in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV-Kommentar* (4<sup>th</sup> edn; Munich: C.H. Beck, 2011) para 31.

<sup>66</sup> Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport (Intertanko)* [2008] ECR I-4057, paras 49-50.

<sup>67</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* [2008] ECR I-6351.

<sup>68</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Yassin Abdullah Kadi (Kadi II)* [2014] 1 C.M.L.R. 24.

<sup>69</sup> Federico Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation', in Cannizzaro, Palchetti, and Wessel (n 4) 395.

<sup>70</sup> Achilles Skordas, 'Völkerrechtsfreundlichkeit as Comity and the Disquiet of Neoformalism: A Response to Jan Klabbers', in Panos Koutrakos (ed), *European Foreign Policy* (Cheltenham: Edward Elgar, 2011) 126.

<sup>71</sup> Ziegler (n 10) 274.

<sup>72</sup> Gráinne de Búrca, 'The ECJ and the International Legal Order: A Re-Evaluation', in Gráinne de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism* (Cambridge University Press 2012) 108.

<sup>73</sup> Bertrand Russell, *A History of Western Philosophy* (reprint; London: Routledge, 1996) 160.

out.<sup>74</sup> It is obvious that the Court of Justice of the EU has, so far, not furnished a theoretically substantiated reason for the existence of the Union as an autonomous system that prevails over the law of its Member States, and how this body of law in turn interrelates with public international law. Its case law is consequently seen as mainly based on pragmatic and teleological arguments, such as the proper functioning of EU law and hence the achievement of the goals set out in the Treaties.<sup>75</sup> One may doubt whether the judges in Luxembourg really had a fully-fledged theory of EU law in mind when they pronounced it an autonomous legal order.<sup>76</sup> Of course, judges must in all cases make a final decision, and, by doing so, they do not necessarily always rely on a firm theoretical grounding.<sup>77</sup>

This raises the question whether it is actually sensible to force the Court's jurisprudence, which is ostensibly based on functionality and effectiveness arguments, into a theoretical corset.<sup>78</sup> On the other hand, although in 'the interpretation of a badly drafted Commission regulation concerning the fat content of skimmed-milk powder there is little place for competing national theories of legal philosophy',<sup>79</sup> pragmatic jurisprudence usually develops into a certain system which may be described in theoretical terms. So, why should we not attempt to embed this system and its relationship to another body of law into a clear and working theoretical framework?

This is all the more important because the object and purpose of such a theoretical exercise is normally to clarify the relevant *corpus juris*, to provide the rules for the future development of the system, and thus to safeguard the Rule of Law and the principle of legal certainty underpinning it.<sup>80</sup> The same applies in a theory describing the relationship between the law of the European Union and public international law. If successful, it would provide us not only with an answer to the question regarding the EU's lineage (is it a mere sub-system of international law or an autonomous, if not self-contained, legal regime?), but also to the problem of how the Court's incoherent case law regarding international law and normative conflicts between international and EU norms can be resolved.

Former President of the International Court of Justice, Rosalyn Higgins, aptly pinpointed that '[a]t the heart of any chapter on international and national law is always an explanation of the two theories of monism and dualism'.<sup>81</sup> This relationship is often presented in terms of conflict of legal orders at a level of high theory,<sup>82</sup> which – to a certain extent – also pertains to the interface of international law and the law of the European Union. And although the EU is not a State in the classical Westphalian meaning, questions with regard to the role of international norms within the Union legal order can be raised in a similar fashion to that in which nation-States receive and interact with international law. However, since 'there is

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<sup>74</sup> Robert Pfeffer, *Das Verhältnis von Völkerrecht und Landesrecht* (Tübingen: Mohr Siebeck, 2009) 82.

<sup>75</sup> Schroeder (n 55) 196.

<sup>76</sup> Mark L. Jones, 'The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System' (1984) 17 *Cornell International Law Journal* 1, 51-52.

<sup>77</sup> Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2012) 19.

<sup>78</sup> Schroeder (n 55) 197.

<sup>79</sup> Lord Jack Mackenzie Stuart, 'The Acceptance of Community Law in the English Legal Order' (1991) 6 *Vorträge und Berichte – Zentrum für Europäisches Wirtschaftsrecht* 1, 6.

<sup>80</sup> Henry G. Schermers, 'The Role of the Member States in Filling Lacunae in EC Law', in Roland Bieber and Georg Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts/The Dynamics of EC-Law* (Baden-Baden: Nomos, 1987) 311-312.

<sup>81</sup> Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (Oxford: Oxford University Press, 1994) 205.

<sup>82</sup> James Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn; Oxford: Oxford University Press, 2012) 48.

nothing more practical than a good theory',<sup>83</sup> the question remains what kind of legal theoretical tools are required to explain the relationship of this legal order with general international law,<sup>84</sup> particularly since the concepts of monism and dualism are subject to fervid criticism, as falling short of providing a comprehensive account, and are sometimes denounced as 'unreal, artificial and strictly beside the point',<sup>85</sup> or even likened to creatures of the horror genre and despised as 'intellectual zombies'<sup>86</sup> or the 'undead'.<sup>87</sup> But one should admit that, despite the pitfalls of these dichotomous conceptions, they still offer at least a starting point from where to begin the theoretical enquiry,<sup>88</sup> a certain minimal basis for the understanding of how to conceptualize the relationship between an internal (yet supranational) legal system vis-à-vis international law in a theoretical normative dimension.<sup>89</sup> The purpose should be to take the analysis a step further, recognising the limits of the monism-dualism dyad, while building upon it, to identify the key elements of a sound, holistic framework.

#### 4 The objective and structure of this Special Issue

Against this background, the objective of this Special Issue is to examine the interplay between EU law and public international law, and – most importantly – their impact, 'interlockedness', and formative influence on one another, respectively, from the perspective of the EU and the international legal system. Building on the research already undertaken in the field, this volume will thus focus on the methods, processes, and mechanisms of cross-fertilisation, mutual supportiveness, and conflict between international law and EU law.

By examining the means, dynamics, and underlying rationales of reception (and rejection) between the two legal orders, the contributions herein will fill an important gap in the existing literature. They will improve our understanding of law in the post-modern, globalised world,<sup>90</sup> and open new directions to future research on (and beyond) legal pluralism. The final, overarching goal they jointly pursue is to analyse, both theoretically and practically, the co-implication, embeddedness, and interdependency between public international law and EU law, heralding a process of re-definition of their relationship, capable of offering a comprehensive account of their interaction that overcomes the limitations of monist, dualist, and pluralist approaches.

The contributions have been grouped around three main criteria, going from the macro-, to the meso-, to the micro-level of interaction between international and EU law, taking account of both perspectives – to try overcome the 'level-of-analysis' problem. At the first level,

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<sup>83</sup> Anne Peters, 'There is Nothing more Practical than a Good Theory: An Overview of Contemporary Approaches to International Law' (2001) 44 *German Yearbook of International Law* 25-37.

<sup>84</sup> Keith Culver and Michael Giudice, 'Not a System but an Order', in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012) 54.

<sup>85</sup> Gerald Fitzmaurice, 'The General Principles of International Law' (1957/II) 92 *Recueil des Cours* 1, 71.

<sup>86</sup> Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397, 400.

<sup>87</sup> Alexander Somek, 'A Tale of the Undead', in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012) 343.

<sup>88</sup> Joseph G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Yearbook of International Law* 66, 66.

<sup>89</sup> Janne Nijman and André Nollkaemper, 'Introduction', in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007) 3.

<sup>90</sup> Cf. e.g., Sionaidh Douglas-Scott, *Law after Modernity* (Oxford: Hart Publishing, 2013).

contributions focus on the systems of norms taken as a whole and tease out their interplay at that general level. Then, the second group of contributions look at the concrete means and tools that organise the interaction between legal regimes, taking account of the nature and rank of the different sources at play, with the final set of contributions descending to the bottom of legal relations as they are played out within specific policy areas, engaging with the particulars of substantive law. A closing chapter theorises on the whole, taking the discussion in the other parts of the Special Issue into account and attempting a re-formulation of the links between the two legal orders and their means of interaction, setting the ground for an alternative, comprehensive theory of EU-international law relations.

Hence, starting from the beginning, the first group of contributions investigates the role of rules of general international law in the structural shaping of the EU legal order, whether by conscious choice of the EU legislator/CJEU or in the more subtle, yet inevitable, way in which legal principles and secondary rules of recognition, personality, or interpretation fill lacunae in special regimes of (international/regional/supra-national) law.

*Niels Blokker* opens up this part with a diachronic investigation of the international legal personality of the European Communities first and the European Union in present times, and how the gradual development of this concept is inspired by corresponding developments in international law. Beyond the historical depiction of this progress, he will also flag up important legal questions as to whether and to which extent individual EU institutions and entities of the organisation may *themselves* enjoy international legal personality and what the implications of such a finding may be for their role in the international plane. Especially when taking into consideration Union agencies, such as Frontex, the question of international legal responsibility, which would then also entail responsibility for wrongful acts under international law, becomes extremely relevant.

*Gunnar Beck*, in turn, engages in an exhaustive examination of the interpretative strategies employed by the Court of Justice of the EU. By scrutinizing the case law of the Court in several key areas of European law, it will become apparent how frail the boundary between legal interpretation and judicial activism is. Beck will take us through different key decisions that exemplify the selective approach the Court has followed to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, enshrining customary norms of interpretation. His findings on the ‘cumulative’ methodology of the Luxembourg judges will have a decisive impact on the issue of legal (un-)certainty. The overarching question in this regard will be whether and to which extent general rules of interpretation are being re-defined and exploited to foster a targeted, teleological development of EU law.

On these bases, the second group of contributions deals with the instruments of inter-penetration that operationalize the links between EU and international law. Direct effect, indirect effect, and persuasive influence are taken into consideration, with the authors in this part of the Special Issue looking at particular sources of international law and the ways in which they are ‘absorbed’ within the EU legal order. Processes of transformation and adaptation of international sources, once ‘Europeanised’, will be highlighted here, as will also be the reverse operation, whereby EU law rules may become a source of international law.

*Theodore Konstadinides* and *Ramses A. Wessel*, respectively, will look into the interaction between EU law and (customary) international law in terms of mutual influence, further development, and potential cross-fertilization. The contribution by *Theodore Konstadinides* will start off by examining the place of international customary international law within the

EU legal order, in particular with regard to the question as to how custom can be relied upon by individuals and Member States against EU law acts to contest their validity. The last section will then ponder the question of whether EU law could be considered a special kind of customary international law and whether it could contribute to its generation. *Ramses A. Wessel* will further address this issue by ‘flipping the question’, i.e. not by studying what effects international norms have within EU law, but by asking whether and to which extent European Union law itself is being received in the international legal order, especially given the EU’s ambitions as a global rule-maker. Thus, he will raise the question of how Union law influences international law through international agreements, unilateral acts, customary international law, international institutions, and judicial referencing and interpretation. In other words, his contribution will enquire whether EU law does constitute a source of international law in the sense of Article 38 of the Statute of the International Court of Justice.

*Elena Basheska* and *Dimitry Kochenov*, in turn, will analyze the status of general principles of international law, focusing in particular on the principle of good neighborly relations underpinning UN law. They will investigate the nature and specific rights/obligations content of the principle, both at international law and as part of the EU legal order. The close connection of the principle with other foundational values of EU law, including democracy, the Rule of Law, and the principle of loyalty (to other Member States and the EU as a whole) will have special significance for the framing of the crises currently plaguing the EU (Eurocrisis/refugee crisis) and may determine as such the illegality of certain courses of action adopted by specific Member States, not only from an international good neighbourliness perspective, but crucially also from the viewpoint of EU constitutional principles. As the authors will demonstrate, good neighbourliness necessarily points in the direction of the very *raison d’être* of the EU.

The final set of contributions, as already announced, focuses each on a specific policy area, looking at sometimes diverging, sometimes converging modes of governance in different realms. *Eileen Denza* launches this part of the Special Issue, analysing how links between legal systems can be forged or broken, in particular between the EU and the United Nations (in terms of the *Kadi* saga), and the EU and the European Convention on Human Rights (in terms of *Opinion 2/13*). She thus explores the conditions of co-existence and interaction at institutional and substantive level between the EU and other organisations and instruments of international law of fundamental importance to the EU legal order. She thereby helps making the transition between Parts 1-2 and Part 3 of the volume.

*Christian Tomuschat* dwells further on the substantive relationship between the European Convention on Human Rights and the system of fundamental rights within the EU. He will provide an outlook on how the issue of human rights protection, both before the entry into force of the Lisbon Treaty and after that, influenced the further evolution of EU law. Given the lack of a codified ‘EU Bill of Rights’ before the Charter of Fundamental Rights, the Court of Justice necessarily had to rely on international human rights law (particularly the European Convention on Human Rights) in order to ensure an effective protection of fundamental rights. The interaction between these two bodies of law in this specific area and the risk of isolationism, particularly in the aftermath of *Opinion 2/13*, is of utmost significance to the process of European integration.

Besides human rights, there are, however, several other substantive areas of the law where the EU legal order interacts with international law, which require elucidation. To this end, *Rafael Leal-Arcas* and *Stephen Minas* will map out international and European governance

tools and processes regarding the management of renewable energy in order to identify gaps and overlaps in this regard. They will also propose ways in which these gaps could be filled and overlaps eliminated in the context of the interplay between public international law and EU law, identifying spaces for multi-level cooperation and harmonisation. They will demonstrate that there is indeed considerable mutual interconnection and reciprocal influence between these two legal orders, despite the lack of normative or institutional coordination, which remains to be adequately cultivated.

Building on the findings of Parts 1, 2 and 3 of the Special Issue, *Katja Ziegler* will piece the puzzle together, returning to the systemic, macro-level perspective and systematising the instruments used at the meso level, revisiting the key forms of interaction between the two regimes and assessing their benefits and limitations. She will focus on the dualist turn taken by the Court of Justice, culminated in *Opinion 2/13*, and revise its conception of ‘autonomy’.<sup>91</sup> Her contribution will show that there is a trend in the jurisprudence of the Court that tends toward closing off EU law vis-à-vis international law. She will argue that isolating EU law from international law is not only damaging to the international legal order, but could also eventually undermine the legitimacy and the very foundations of the EU. She will offer instead an alternative model in which to ground EU-international law relations, based on a constructive rule of engagement between EU and international law that, mediated by the principle of systemic integration, preserves the uniqueness of the European legal order, but transcends the conception of autonomy understood as autarky and isolation, propounding a harmonious complementarity with international law.<sup>92</sup>

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<sup>91</sup> For a detailed account of the different ‘meanings’ of autonomy within the EU legal framework, see Katja S. Ziegler, ‘Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law’, in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Human Rights Law* (Cheltenham: Edward Elgar, forthcoming), available as University of Leicester School of Law Research Paper No. 15-25 at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2665725](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665725)>.

<sup>92</sup> In this line, see also V. Moreno-Lax, ‘Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law’, in J.-F. Durieux and D. Cantor (eds), *Refuge from Inhumanity: Enriching Refugee Protection Standards through Recourse to Humanitarian Law* (Boston/Leiden: Brill, 2014) 295; and V. Moreno-Lax, ‘Systematising Systemic Integration: “War Refugees”, Regime Relations, and a Proposal for a Cumulative Approach to International Commitments’ (2014) 12 *Journal of International Criminal Justice* 907.