1. The European Union in International Law

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1 Introduction

How is the European Union understood from the perspective of international law? Much of the discussion about the European Union in international law scholarship has dealt with questions such as whether the EU can still be considered a 'creature of international law'[1], and whether EU law should be considered international law.[2] The question addressed here is different. It focuses on how the EU fits within the wider system of international law. The way that the EU is perceived and dealt with from the perspective of international law is legally relevant when the EU acts on the plane of international law. The issues addressed in the following chapters regarding the EU's international responsibility, the application of the law of treaties, and the EU's reception in international organizations, all touch upon this deeper question about how the EU fits within a state-centric international legal order.

The chapter first shows the different ways in which the EU is perceived in legal scholarship. It shows how there are diverging views about how to understand the EU and its place in the international legal order. It explores some of the reasons that these diverging views emerged, including academic and professional specialization, the state-centric nature of public international law, as well as the underlying interests that lie beneath each of these emerging conceptions of the EU. The chapter also addresses some of the ways that EU and international law scholars have sought to address these diverging views. Much of the focus has been on the issue of normative conflict between these legal orders. The focus on conflict, however, obscures the many other ways in which the EU interacts with the international legal order.

The Internal View: An EU Law Perspective

The EU has developed its own self-understanding about the type of entity it is, and its relationship with international law. This internal or 'EU law view' tends to present the EU as a unique, or *sui generis*, international actor. This view tends to be accepted, not only by EU

[1] T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389, 403–404: "At least at its inception, the European Community was clearly a creature of international law. As there are no indications that a revolution in its legal sense has subsequently occurred … the European Treaties are still creatures of international law."

[2] See D. Wyatt, 'New Legal Order, or Old?' (1982) 7 *European Law Review* 147; B. de Witte, 'Sources and the Subjects of International Law: The European Union's Semi-Autonomous System of Sources', in S. Besson, J. d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford: Oxford University Press, 2017) 769; O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *European Journal of International Law* 763, 770.

judges and officials, but also within the scholarly community working on EU law. This view accepts the EU's self-perception as a 'new legal order', one that is now analytically distinct from international law. Such 'self-perception' was developed largely by the CJEU, which in *van Gend en Loos* held that the EEC Treaty was "more than an agreement which merely creates mutual obligations between the contracting states".[3] The CJEU continues to employ the logic of the 'new legal order' in its legal reasoning.[4]

The new legal order narrative was one of the foundational myths used to construct the elements of the EU legal order. [5] Like national myths, it is immaterial whether the 'new legal order' story is technically or historically correct – rather, the account provides a useful symbolic narrative of the polity's construction and self-identity. The CJEU continued to put in place the cornerstones of EU law, including the notions of direct effect and primacy, in part, by building upon the new legal order narrative, which tends to set EU law apart from 'ordinary' international law.[6] The Court could have conceivably derived EU law principles such as direct effect and primacy by referring to existing public international law principles, such as customary rules of treaty interpretation.[7] Concepts such as supremacy and primacy pre-date the Union and its Court, and have been described as an "appropriate synonym of *pacta sunt servanda*"[8], a fundamental principle of the law of treaties.[9] The EU is distinct from other polities, not because of these distinct features, but the *degree* to which the EU possesses and

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[3] Judgment of 5 February 1963, *van Gend & Loos*, 26/62, EU:C:1963:1, 12.

[4] Opinion 2/13, 18 December 2014, EU:C:2014:2454, para 157. Judgment in *Commission v. Council*, 28 April 2015, Case C-28/12, EU:C:2015:282, para. 39. T. Isikiel, 'European Exceptionalism and the EU's Accession to the ECHR', (2016) 27 *European Journal of International Law* 565, 566.

[5] "[I]l n'est nul besoin de se raccrocher au mythe de la rupture totale du droit communautaire par rapport au droit international général pour rendre compte de sa spécificité, qui est réelle et profonde. En réalité, l'ordre juridique communautaire, ancré dans le droit international, y trouve l'essentiel de sa force et de ses caractéristiques." A. Pellet, 'Les fondements juridiques internationaux du droit communautaire', *Collected Courses of the Academy of European Law*, (1997) Volume V, Book 2, 268. "[O]ne of the greatest received truisms, or myths, of the European Union legal order is its alleged rupture with, or mutation from, public international law and its transformation into a constitutional legal order." J.H. Weiler, U.R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 411, 420. See A. Cohen, A. Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited' (2011) 7 *Annual Review of Law & Social Science* 417, 426.

[6] As Lowe points out, the CJEU "imagined into existence an entire new, legal order, hammering into place the other great beams of that legal order, such as the supremacy of Community law …" V. Lowe, 'The Law of Treaties; or Should this Book Exist?' in C.J. Tams, A. Tzanakopoulos, A. Zimmermann (eds) *Research Handbook on the Law of Treaties* (Cheltenham: Edward Elgar, 2014) 3, 6.

[7] E. Denza, 'The Relationship Between International Law and National Law' in M. D. Evans, *International Law*, 4th edn (Oxford: Oxford University Press, 2014) 412, 416: "This formulation of the supremacy of Community law – not self-evident on the face of the European Community Treaties – is among the features distinguishing European Community law from international law." See B. de Witte, 'Retour à "Costa" La primauté du droit communautaire à la lumière du droit international' (1984) *Revue trimestrielle de droit européen*, 425.

[8] O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *European Journal of International Law* 766, 785. Spiermann argues that "compared to other parts of the international law of cooperation, there is nothing new about direct effect and nothing innovative about precedence." 787.

[9] Denza (n 7) 428. Denza points out that "*Contrary to what is sometimes suggested, the ECJ did not invent the doctrine of direct effect, which can be traced back to rulings of the Permanent Court of International Justice and to cases in European jurisdictions, but it did lay down criteria to be uniformly applied throughout the European Community. It is this uniformity which is one of the most striking features distinguishing European Community from public international law."* De Baere and Roes argue that they are founded on the duty of loyalty. G. De Baere and T. Roes, 'EU Loyalty as Good Faith' (2015) 64 *International and Comparative Law Quarterly* 829, 840.

exercises them.[10] The position of individuals in the EU legal order; the exercise of governmental powers by EU institutions; the role of the Court of Justice in interpreting and applying EU law; and the inability of Member States to enforce EU law through traditional countermeasures[11] are put forward as features that set the EU apart from other forms of international legal cooperation. International law was presented as relatively weak and unenforceable, whereas EU law could be held up as superior to national law, and capable of direct effect, because the Member States had created something different, a new legal order.[12]

The view of the EU as a 'new legal order' is now largely accepted, not only by the CJEU, but also by those who deal with EU law in practice. Few EU lawyers would conceive of themselves as working with a 'creature of international law'. Even if the EU has international law origins and its constitution is an international legal instrument,[13] treating the EU as a form of specialized international law is not useful for those who deal with EU law in everyday practice.

This conception of the EU works when applied to the 'internal sphere', that is, in the relations between the EU and its Member States, and relations between EU Member States. The new legal order narrative encounters opposition, however, when the EU seeks to apply this to the relationship between the EU and third states and organizations. As discussed below and in following chapters, the EU's self-perception remains contested at the international level.

Sui Generis

Closely associated with the new legal order narrative, is the description of the EU as a *sui generis* legal and constitutional entity.[14] This accepts that the EU is unique but tells us nothing about what legal consequences flow from this. The idea is that the EU is so different from other forms of political and legal organization that it does not fit existing categories in international

[10] B. de Witte, 'The European Union as an International Legal Experiment' in G. de Búrca & J. Weiler (eds) *The Worlds of European Constitutionalism* (Cambridge, Cambridge University Press, 2011) 20-21: "the effort to sharply separate the EU from the field of international law might be misguided for two complementary reasons: because it overestimates the novelty of EU law, and because it underestimates the capacity of international law to develop innovative features in other contexts than that of European integration." T.C. Hartley, *European Union Law in a Global Context: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2004) xv. "Some people say that the EU is unique – that it resembles no other entity and, in its concept and design, owes nothing to anything found anywhere else. That is not true. Although the breadth and depth of its powers put the EU in a special position, this is merely a matter of degree. The EU is simply the foremost among a whole pack of international bodies that have the power to control what countries do."

[11] See J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, 2422.

[12] "Par ses faiblesses intrinsèques, le droit international public diffère profondément du droit communautaire. Plusieurs traits du droit international sont ainsi devenus, par contraste, d'utiles repères pour apprécier la spécificité du droit communautaire et, par là même, pour mesurer l'écart qui s'est creusé entre les deux orders juridiques." O. Jacot-Guillarmod, *Droit communautaire et droit international public* (Genève: Librairie de l'université Georg, 1979) 258.

[13] Barents argues that "[a]lthough the EC is based on a document which bears the name 'treaty', this has but a formal meaning. In a material sense the EC Treaty has the character of an autonomous constitution and, as a result, it constitutes the exclusive source of Community law." R. Barents, *The Autonomy of Community Law* (The Hague: Kluwer Law International, 2004) 112.

[14] B. de Witte, 'The Emergence of a European System of Public International Law: the EU and its Member States as Strange Subjects' in J. Wouters, A. Nollkaemper and E. De Wet (eds) *The Europeanisation of International Law* (The Hague, TMC Asser Press, 2008) 39-54.

or constitutional law.[15] For most international lawyers, however, the idea that the EU belongs in its own legal category is inaccurate[16] or unhelpful.[17] Schütze is highly critical of the *sui generis* 'theory' because it is conceptually useless – it cannot be used to analyse or measure the Union and its evolution.[18] The label is entirely negative.[19]

Yet international lawyers rightly question both the 'new legal order' and *sui generis* descriptions. Such conceptions imply that the EU is not only a highly distinctive legal order, but also an *exceptional* one. Being unique can imply the need for special treatment. This has given rise to discussion of so-called 'European exceptionalism', a term has been given multiple meanings in the literature. [20] European exceptionalism often implies the EU justifying certain legal exceptions for itself, both in its own case law, but also in its legal relationship with third States. [21] One consequence of this is that other states and organizations "have to arrange themselves with particularities of the special status of the EU."[22] International lawyers may be skeptical of the new legal order and *sui generis* narratives because the creation of a distinct legal order might have a negative effect on the universal application of international law. International law is often presented as a universal system applicable to all international legal persons; international law is thus reluctant to view an entity of somehow 'escaping' that system.[23] The EU's claims of autonomy can feed into anxieties about the fragmentation of international law, caused by "the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice."[24]

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[15] De Baere describes the EU is a *sui generis* legal concept, and that "cannot be fitted easily within either constitutional or international law…" G. De Baere, *Constitutional Principles of EU External Relations* (Oxford, Oxford University Press, 2008) 1.

[16] R. Schütze, *European Constitutional Law*, (Cambridge, Cambridge University Press, 2012) 67: "the *sui generis* 'theory' is historically unfounded. All previously existing Unions of States lay between international and national law."

[17] "European lawyers are given to saying that the European Union is *sui generis*—which is true but not helpful." E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford: Oxford University Press, 2002) 1. P. Hay, *Federalism and Supranational Organizations: Patterns for New Legal Structures* (Illinois University Press, 1966) 44. Arguing that the notion of *sui generis* "not only fails to analyze but in fact asserts that no analysis is possible or worthwhile."

[18] R. Schütze (n16) 67.

[19] "[T]here exists only a consensus about what Community law does not represent (constitutional or international law). However, this conclusion offers no explanation about the nature of Community law. In particular, it does not provide answers to fundamental questions …" R. Barents, *The Autonomy of Community Law* (Kluwer Law International, 2004) 45-6.

[20] G. Nolte, H. Aust, 'European Exceptionalism?' (2013) 2 *Global Constitutionalism* 407, 416; G. de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649, 690.

[21] Nolte & Aust (n20) 416. M. Ličková 'European Exceptionalism in International Law' (2008) 19 *European Journal of International Law* 485.

[22] Nolte & Aust (n20) 407.

[23] A. Orakhelashvili, 'The Idea of European International Law' (2006) 17 *European Journal of International Law* 315, 344: "the fact that the EEC Treaty differs from ordinary international agreements is no warrant for presuming that the law it establishes is not part of, and governed by, international law."

[24] 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 p. 1-256 and 18 July 2006, UN Doc. A/CN.4/L.702, para. 8. See M. Koskenniemi, P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 533.

Despite these criticisms, the EU law perspective presents a relatively coherent conception of the EU. It is a body founded on international law instruments, which over time, transformed into something else, which fits neither into the realms of international nor municipal law.[25] It accepts that rules of international law (for the most part) no longer apply in the internal sphere to regulate the relations between the EU Member States in areas where EU law applies. Yet this internal narrative loses relevance when applied to the external sphere.

External Views: International Law

Whereas the EU's internal narrative presents a rather coherent picture of the EU, international law does not have such a clear understanding of the EU. In these debates, there is some confusion between discussing the nature of the EU legal order, and the nature of the EU as a legal entity in international law. The first question relates to the internal sphere, and is focused on whether EU law remains a creature of international law. The second question relates to the external sphere, and concerns the status of the EU as an autonomous legal person acting on the plane of international law. In its internal dimension, the EU is a constitutional legal order, one that regulates the rights and responsibilities of the EU Member States in their mutual relations. At the international level, when the EU interacts with other subjects of international law, the EU is often considered to be international organization.[26] As will be further elaborated in the following chapters, the EU's practice at the international level is often shaped by its internal legal order and characteristics.

Self-contained regime

The EU is sometimes referred to as a 'self-contained regime' in international law. Like the new legal order narrative, it accepts the autonomy of the EU, but unlike the new legal order narrative, it still accepts that the EU is very much a part of the wider international legal order. According to one definition, a system can be considered 'self-contained'

> if it comprises not only rules that regulate a particular field or factual relations laying down the rights and duties of the actors within the regime (primary rules), but also a set of rules that provide for means and mechanisms to enforce compliance, to settle disputes, to modify or amend the undertakings, and to react to breaches, with the intention to replace and through this to exclude the application of general international law, at least to a certain extent.[27]

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[25] Weiler and Haltern point out that "[t]here is no doubt that the European legal order started its life as an international organisation in the traditional sense, even if it had some unique features from its inception." Weiler and Haltern (n5) 419.

[26] Gardiner captures the internal/external dichotomy in relation to the EU: "In its internal aspect, that is viewing relations between the member states themselves, the Community is an organism for collective exercise of sovereignty in matters over which competence is transferred to the Community by treaty. In its external aspect, the Community functions as an international organization, entering into treaties in matters within its competences." R. Gardiner, *Treaty Interpretation*, 2nd edn (Oxford: Oxford University Press, 2015) 129.

[27] E. Klein, 'Self-Contained Regime', Max Planck Encyclopedia of Public International Law < opil.ouplaw.com/home/EPIL>.

A self-contained regime is a 'sub-system' of international law; it not only regulates a certain sphere of activity, but also contains its own secondary rules, largely or completely replacing the application of general international law. Some possible examples of self-contained regimes include the legal system of the World Trade Organization, the regime of diplomatic law, and various systems in international human rights law. One of the characteristics of a self-contained regime is that, since they possess a complete system of rights and remedies, there is no 'fall-back' to general rules. This is based on the concept of *lex specialis* – states are free to establish a sub-system of legal rules that is more specialized and displaces the application of general rules. The ILC study on *Fragmentation of International Law* recognized that a system may develop into a self-contained regime over time:

> The establishment of a special regime in the wider sense (S.S. Wimbledon, any interlinked sets of rules, both primary and secondary) would also normally take place by treaty or several treaties (e.g. the WTO "covered treaties"). However, it may also occur that a set of treaty provisions develops over time, without conscious decision by States parties, perhaps through the activity of an implementing organ, into a regime with its own rules of regime-administration, modification and termination.[28]

The ILC's study lists 'EU law' as a possible self-contained regime.[29] The EU has been described as "the most convincing example of a self-contained regime"[30] and there are a number of very strong arguments that the EU should be considered as such. The main reason is that Union law provides an exhaustive system to deal with breaches of the EU Treaties.[31] It is now clear that EU Member States may not resort to traditional inter-state countermeasures against other Member States for breaches of EU law, thus excluding a key aspect of public international law from the powers of the Member States.[32] From a public international law perspective, the concept that general international law does not apply within scope of the EU Treaties, is a revolutionary development. As Weiler points out, this is one of the key features that sets the EU legal order from international law:

> The Community legal order … is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure. Without these features, so central to the classic international legal order, the Community truly becomes something new.[33]

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[28] Fragmentation of International Law (n24) para. 157.
[29] Id., para. 129.
[30] Klein (n27) 27; B. Simma, D. Pulkowski, 'Leges Speciales and Self-Contained Regimes, Responsibility in the Context of the European Union Legal Order', in J. Crawford, A. Pellet, S. Olleson (eds) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 152.
[31] Kuijper argues that upon establishing the European legal order, "[a]mong the Member States … general international law is no longer applicable within the scope of 'the Treaties.'' P.J. Kuijper, '"It Shall Contribute to ... the Strict Observance and Development of International Law" The Role of the Court of Justice' in A. Rosas, E. Levits, Y. Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (The Hague: TMC Asser Press, 2013) 589, 594.
[32] See e.g. Judgment in *Commission v. Luxembourg & Belgium*, Joined cases 90/63 and 91/63, EU:C:1964:80, 631 in which the Court found the principle of *exceptio non adimpleti conctractus* (enforcement of an obligation may be withheld if the other party has itself has failed to perform the same or related obligation) could not be applied in the EU legal order.
[33] Weiler (n 11) 2422.

While there appears to be no more room for inter-state countermeasures in the EU legal order, Simma and Pulkowski argue that these could still exist in certain narrow 'emergency' situations. These are (i) the continuous violation of EU law by a Member State and (ii) state to state reparation for breaches of EU law.[34] Even in these hypothetical scenarios, resort to public international law would only take place because the EU system would have effectively failed. The argument is that Member States have only given up their rights to institute inter-state countermeasures to the extent that the procedures under EU law remain effective. In these situations, there would be a 'fallback' to the general system of state responsibility. One could argue that since international law can continue to operate as such a 'fallback', this would imply that the EU is not fully self-contained system.[35]

International law tends to treat claims of self-containment with caution. As Special Rapporteur Arangio-Ruiz points out, "[g]enerally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties…".[36] Indeed, whenever states create an international organization they decide to create new legal relationships between themselves and derogate (to a certain extent) from general international law.[37] A reason that the self-contained regime label may be resisted is that it contributes to the fragmentation of international law, caused by "the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice."[38] The consensus on the topic seems to the be that, while the EU is probably the closest thing to a 'self-contained regime', the application of public international law has not been completely excluded, and international law would apply in order to solve problems not addressed by the Treaties, or to fill gaps. This means that the EU "… is very close to a genuine self-contained regime, but even here the umbilical cord to general public international law has not yet been cut."[39] Like the new legal order and *sui generis* narratives, the 'self contained regime' category has little explanative value when seeking to understand the EU's

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[34] B. Simma, D. Pulkowski 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, 518.

[35] See G. Conway, 'Breaches of EC Law and the International Responsibility of Member States' (2002) 13 *European Journal of International Law* 679, 695 concluding that "[d]espite the uniqueness and comprehensiveness of the system created by the European Communities, it remains the case that the term 'self-contained regime', strictly understood, cannot be applied to it." K. S. Ziegler, 'International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation' in A. Orakhelashvili, *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar, 2011) 268, 285. "… in principle, secondary norms of international law (for example of the law of treaties or state responsibility) remain available as a subsidiary fall-back position, because the EU Treaties foresee no mechanism beyond the penalty payments in Art 260 TFEU (ex Art 228 EC), leaving scope, for example, for the suspension of the Treaty in regard to a Member State according to Art 60(2) lit. a) VCLT which is in material breach of an obligation. This implies that the EU is not a fully self-contained regime."

[36] Quoted in Simma & Pulkowski (n30) 148.

[37] "It was possible for the parties to the original EC Treaty to establish a system under which rules of general international law (at least those of the character jus dispositivum) would not apply; in fact, the point of establishing a new legal regime by means of a treaty is to derogate from the general law, so it could be expected that rules of general international law could play no more than a limited role within that regime." O. Elias, 'General International Law in the European Court of Justice: From Hypothesis to Reality' (2000) 31 *Netherlands Yearbook of International Law* 3, 5.

[38] Fragmentation of International Law (n24) para. 8.

[39] Klein (n27).

relationship with other legal entities. Presenting the Union as a self-contained or closed system of law only describes how principles of public international law should apply within the EU legal order.

Regional Economic Integration Organization

The EU is also conceived as a 'Regional Economic Integration Organization' (REIO) in some instances. Whereas the new legal order and self-contained regime models discussed above focus on the internal sphere, the REIO model tells us more about how the EU relates with other subjects of international law. The REIO model accepts that the EU is a type of international organization, albeit one with particular unique characteristics. The REIO model is reflected in a number of international treaties that allow EU participation. Few multilateral treaties to which the EU is a party specifically mention the EU.[40] Instead, they tend to allow for participation of 'regional economic integration organizations' (REIO), or alternatively (recognizing the EU's competence beyond economic matters) 'regional integration organizations' (RIO).[41] The REIO model has only been applied in the EU's external relations, and is not often used to describe the EU as a political entity outside that context. It captures the idea that the EU started as an international organization,[42] but has transformed over time into special type of organization.

Classic International Organization

The EU has also been understood as a classic intergovernmental organization. This view downplays the unique characteristics of the EU and the constitutional character of the EU Treaties. It may accept that the EU possesses certain unique features, but rejects the notion that is a qualitatively different entity other international organizations or groups of states. Viewing the EU as 'just another' international organization may be conceptually appealing to international lawyers who see the compartmentalization of international organizations into discrete categories as a threat to the universal application of international law. Orakhelashvili reminds us that, despite its unique qualities, the EU is still an international organization:

> It is true that there is a substantive difference between the European Union and other international organizations as the former possesses specific aims of European integration and extensive powers to bind Member States and their nationals to that end. However, there are no consistent criteria for constructing a workable juridical distinction between supranational organizations and international organizations, especially in relation to general international law. Being a supranational organization means also being an international organization.[43]

The Classic IO model thus also dismisses arguments for EU exceptionalism. Since the EU is, according to this view, merely an international organization, there is little need to develop

[40] For example, the EU (formerly European Communities) was a founding member of the WTO (Agreement Establishing the World Trade Organization, signed on 15 April 1994, 1867 UNTS 154).
[41] See the discussion of REIO clauses in Chapter 2 on Treaties. X
[42] Weiler and Haltern point out that "[t]here is no doubt that the European legal order started its life as an international organisation in the traditional sense, even if it had some unique features from its inception." Weiler and Haltern (n5) 419.
[43] Orakhelashvili (n23) 343.

specialized rules. It tends to view the EU, not as a distinct legal entity with its own personality and powers, but as a group of like-minded States. The EU has been described as an 'association of states'.[44]

If the 'new legal order' model overstates the EU's unique nature and its autonomy, the 'Classic IO' model downplays it. Discussing the EU as just another international organization is also an unhelpful conceptual tool. As will be elaborated upon in further chapters, international lawyers tend to analyze the EU from this starting point, but often run into difficulties due to the unique features of the EU. Many EU lawyers would reject the notion that the EU is an intergovernmental organization, in the same category as the World Meteorological Organization. Yet it should be acknowledged that when the EU acts on the international plane and interacts with other legal subjects, it is often confronted with this view. For example, within the United Nations General Assembly, where the EU Member States are a minority, the EU has struggled to be accepted as a distinct legal actor.[45] In this context, the EU is not widely viewed as a special or unique entity, but as another international organization or even a political bloc.[46] The EU's self-perception, that of a unique type of supranational organization, is not universally accepted, not least in many of the multilateral bodies where the EU seeks to enhance its participation and visibility.

Models of European Union

In 1961 McMahon wrote that "although the [European] Communities were brought into being in the form of an international treaty, one should not allow the circumstances of their birth to obscure their real nature…"[47] The discussion above shows how there are a number of ways that the EU is understood in EU and international law scholarship, and the 'real nature' of the EU remains contested. Generally, the 'EU law' view emphasizes the unique nature of the EU legal order and its autonomy and presents the Union as a 'new legal order'. The international

[44] M. Shaw, *International Law*, 7th edn (Cambridge: Cambridge University Press, 2014) 177: "[t]he European Union is an association, of twenty eight states". The EU is presented alongside the Commonwealth of Nations and the Commonwealth of Independent States (CIS). Likewise Triggs discusses the EU alongside ASEAN, the Arctic Council and the CIS and tells us that the "most well-recognised association of states is the European Union." G. D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 175.

[45] See E. Brewer, 'The Participation of the European Union in the Work of the United Nations: Evolving to Reflect the New Realities of Regional Organizations' (2012) *International Organizations Law Review* 181-225; G. De Baere, E. Paasivirta, 'Identity and Difference: The EU and the UN as Part of Each Other', in H. de Weale, J. Kuijpers (eds) *The European Union's Emerging International Identity: Views from the Global Arena* (Leiden: Martinus Nijhoff, 2013) 42; J. Wouters, J. Odermatt, T. Ramopoulos, 'The Status of the European Union at the United Nations General Assembly', in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds), *The European Union in the World. Essays in Honour of Marc Maresceau* (Leiden: Martinus Nijhoff Publishers, 2014) 212-213.

[46] United Nations, Press Release, 'General Assembly, in Recorded Vote, Adopts Resolution Granting European Union Right of Reply, Ability to Present Oral Amendments', 3 May 2011: "The European Union would be able to present oral proposals and amendments, which, however, would be put to a vote only at the request of a Member State. The bloc would have the ability to exercise the right of reply, restricted to one intervention per item."

[47] J F McMahon, 'The Court of the European Communities: Judicial Interpretation and International Organisation' (1961) 37 *British Yearbook of International Law* 320, 329.

law view stems from a different foundational myth, that of the unity and universalism of international law.[48]

According to the international law view, the EU is not a qualitatively unique entity from the perspective of public international law; while it may display some unique features, these are viewed as a difference of degree, not of kind.[49] These models illustrate the ends of the spectrum, and in reality there are nuances between them. Yet these diverging views continue to pervade this debate.[50] The table below captures the different models.

[48] See the discussion in A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016) 240.

[49] '[t]he difference between the legal orders of EC law and public international law is one of degree rather than of principle.'165 G.Betlem, A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 *European Journal of International Law* 569, 588. "The argument is advanced that no other group of states has pooled sovereignty to the degree that EU member states have done. No other entity would have brought about such a distinct form of supranational governance which also acts alongside its member states on the international level. This would have particular consequences on the international level, for instance when other states have to arrange themselves with particularities of the special status of the EU." Nolte & Aust (n20).

[50] "Public international lawyers generally presume the application of public international law and the character of the EU as an international organisation (i.e. focusing on its formal sources), while EU lawyers tend to adopt the perspective of the EU as an autonomous legal order or even a self-contained regime, stressing its sui generis nature, allowing the substantive perspective to prevail in the evaluation." K. S. Ziegler (n 35) 270.

Fig. 1 Models of the European Union in International Law

	Internal sphere	External sphere
Unique legal entity; high degree of autonomy	**1. 'New Legal Order'** • EU has developed into a 'new' type of legal/political entity of a constitutional nature	**3. 'Regional Economic Integration Organization' (REIO)** • EU is a 'special type' of international organization • Specialized rules are required to take into account its nature and autonomy
Fits within existing categories; low degree of autonomy	**2. 'Self-contained Regime'** • EU is a part of international legal order, but has developed specialised internal rules	**4. 'Classic' International Organization** • EU is not qualitatively different from other international organizations • Existing rules can be applied to the EU

The four models differ with respect to a number of assumptions about the EU and its relationship with international law. The four models are placed on two axes. The first relates to the extent to which the EU is viewed as a 'unique' entity in international law. The 'New Legal Order' model and the 'REIO' model both assume there is something special about the EU, which sets it apart from other legal entities. The 'Self-contained regime' model and 'Classic IO' model see the EU as something that fits within existing international law categories; they either deny that the EU is unique at all, or reject that any legal consequences should flow from its unique features. The second axis relates to the 'sphere' that is concerned, either the perspective of the internal legal order of the EU, or the perspective of the EU's place within the wider international legal order. The 'New legal order' and 'self-contained regime'

models are mostly concerned with the relationship between the EU and the Member States and are less concerned about the EU's relationship with other entities. The 'REIO' and 'Classic IO' model focus on the EU's relationship with the wider world of international law. It should be stressed that these four models are not mutually exclusive, nor do they fully capture the range of views that exist. The models are useful because they capture the different conceptual 'starting points' that lawyers take when addressing legal questions dealing with the EU's place in international law. The next section examines some of the reasons for these diverging views.

Explaining Diverging Views

A practical illustration of the diverging views can be seen by the academic response to the line of *Kadi* judgments from the CJEU.[51] In this famous line of case law, the CJEU held that it was capable of exercising judicial review regarding EU measures intended to implement UN sanctions. *Kadi* is a landmark judgment in setting out the EU's relationship with the wider international legal order. Not only did the judgment spark intense scholarly debates among EU law experts, it also brought about debate in the international law scholarship. The diverging reactions to the case are often shaped by the perspective of the author, which often depends on whether the case is analyzed from an EU law or international law angle.[52] To many international lawyers, it was not the outcome in *Kadi* that was problematic, but the rather blunt way in which the Court dealt with international law. While many praised the outcome of the judgment for its approach to fundamental rights, it also led to a great deal of negative responses, mostly from those looking at the legal dispute from an international law perspective.[53] The judgment, it was argued, downplays the important and special character of the UN system for peace and security, over emphasizes the separateness of the EU from that the wider legal order. [54] Given the complex and controversial issues that the case dealt with, it is understandable that this scholarship led to such differing views. Yet this divergence stems not only from disagreements about the interpretation of the UN Charter or the status of certain human rights norms; it stems from a more fundamental disagreement about the EU's very legal character and its relationship with international law.[55] There is nothing particularly novel in pointing out that a legal assessment depends on one's points of reference or foundational assumptions.[56]

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[51] Judgment in *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, EU:C:2008:461.

[52] An edited volume on the Kadi cases includes separate sections on the 'public international law perspective' and 'constitutional perspective'. M. Avbelj, F. Fontanelli, and G. Marinico (eds), *Kadi on Trial: A Multifacted Analysis of the Kadi Trial* (London: Routledge, 2014).

[53] G. de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard International Law Journal* 1. See P. Margulies, 'Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime After Kadi II'(2014) 6 *Amsterdam Law Forum* 51–63, arguing that the Court failed in Kadi II to display the appropriate level of deference to Sanctions Committee decisions.

[54] A. Aust, *Handbook of International Law*, 2nd edn (Cambridge: Cambridge University Press, 2010) 198.

[55] P.J. Cardwell, D. French, and N.D. White, 'Kadi: the Interplay between EU and International Law'(2009 58 *International and Comparative Law Quarterly* 229-240 "… the reason that the Kadi judgment should not be characterised as radical is because it reflects the long-standing view of the Court that the EU legal system is an autonomous legal framework independent of, and not reliant upon, public international law."

[56] Cardwell et al (*id*) point out how *Kadi* "highlights a growing sense of divergence in opinion between EU and public international lawyers, especially in terms of our respective normative 'points of reference'—in the case of

Yet the *Kadi* example demonstrates a much broader problem when discussing the EU's role in the international legal order: highly divergent views about the very nature of that legal subject. Ličková points to this larger problem of 'partial inquiries' when conducting research at the intersection of EU law and international law.[57]

Academic specialization & Professional Communities

One reason for the emergence of the different perspectives is academic and professional specialization, whereby communities identified as EU law or international law scholars have failed to engage with one another. This does not mean, however, that international lawyers have ignored the EU or that EU law specialists do not pay much attention to international law. Rather, the identification with a particular discipline tends to shape the conceptual starting points for these debates.[58] To those practicing and teaching EU law, the EU is not conceived as a specialized branch of international law, but as a separate discipline. Some other specialized legal disciplines, such as international human rights law, WTO law, or international environmental law, are still viewed as a sub-field of public international law. This is not the case with EU law. Academic disciplines are also associated with a broader project. Many of those scholars focusing on EU law, for example, are interested in and supportive of the broader European project. An 'EU lawyer' tends to accept some basic tenets and beliefs about what the EU is, and is part of an academic culture which applies and reasserts those principles.[59] This is not to say that EU law scholarship is uncritical of the EU institutions or the CJEU. Yet the conceptual starting point of the EU as a 'new legal order' is widely accepted in EU law scholarship.

A similar phenomenon takes place in international law scholarship. Of course, one should not lump together all international lawyers as having the same view. Yet just as EU lawyers have an attachment to the European project, much of international law scholarship is similarly connected to supporting and upholding an international legal system, or the 'project' of international law. International law as a legal discipline has long confronted questions regarding its very legality and legitimacy. This has now given way to new questions of how to ensure that the legal order would not be pulled apart by competing and overlapping regimes of

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EU lawyers, the EU treaties, in the case of international lawyers, the UN Charter." See C. Tomuschat, 'The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?' (2009) 28 *Yearbook of European Law* 654, 655.

[57] M. Ličková 'European Exceptionalism in International Law' (2008) 19 *European Journal of International Law* 463, 465. "Only a tiny number of scholarly writings have examined the issue from both European and international sides. Rather, these two aspects have been dealt with separately. Such partial inquiries are useful, but they remain incomplete because both legal orders intervene and interplay when normative conflicts between them appear."

[58] See Simma & Pulkowski (n30) 148, discussing how "[o]ften, a scholar's approach seems to depend on whether her intellectual home is the sphere of public international law or that of a specialized subsystem."

[59] On the 'managerial approach' to international law, see M. Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education', 1 *European Journal of Legal Studies* 1 (2007). "What is significant about projects such as trade, human rights, or indeed "Europe", is precisely the set of values or purposes that we link with them. To be doing "trade law" or "human rights law", or "environmental law" or "European law" – as the representatives of those projects repeatedly tell us – is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that "box.""

international law.[60] The increase in the number of international organizations, multilateral conventions, bilateral investment treaties, as well as the growth of international courts and tribunals led to new concerns that the coherence and unity of the international legal order would be destabilized.[61] The community of international lawyers therefore have a similar interest in conceiving international law as a system and to be cautious of claims – like those made those by EU lawyers – that some entities have evolved and escaped that system. The divergences between EU law and international law scholarship is therefore not only spurred by different academic disciplines, but also by the interests of these disciplines in defending and promoting their underlying project.

Another possible reason may also be that the scholarship is embedded within a professional discipline. EU judges and bureaucrats orient themselves towards the EU law perspective, but so does the academic community engaged in EU law scholarship. There is a tendency, then, to identify as an 'EU lawyer' or an 'international lawyer' (or even 'trade lawyer', 'investment lawyer'), not only because they are academic specializations, but because they are connected with a field within the legal profession or project. When legal questions surrounding the clash between EU law and international law arise, does one first turn to the EU Treaties or to the UN Charter? The answer to this question may depend on the professional discipline with which the scholar identifies.[62]

State-centrism

Another reason that international law has difficulty conceptualizing the EU is that international law remains a state-centric discipline. Although there has been a great debate about the role of non-state actors in international law, international law continues to view states as the principal unit of analysis. Corporations, armed rebel groups, NGOs, and even international organizations are studied through the lens of the state; they are seen as exceptions to the rule that the international legal order remains one where states are the main drivers of lawmaking. According to this traditional view, the EU is understood as a vehicle of its Member States, rather than an independent legal actor in its own right. International law's state-centrism prevents one from viewing how other legal subjects can also contribute to the development of international in addition to states. Schütze, for example, explains how international law is built on the idea of the sovereign state, which prevents the discipline from fully understanding 'compound subjects' such as the EU.[63] This is symptomatic of a broader challenge of public

[60] Fragmentation of International Law (n24); G. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks'(1999) 31 *New York University Journal of International Law and Politics* 919; M. Craven, 'Unity, Diversity and the Fragmentation of International Law' (2003) 3 *Finnish Yearbook of International Law* 14.

[61] J. I. Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours* 101, 347.

[62] Fragmentation of International Law (n24) para. 483. "This is the background to the concern about fragmentation of international law: the rise of specialized rules and rule-systems that have no clear relationship to each other. Answers to legal questions become dependent on whom you ask, what rule-system is your focus on."

[63] "Classic international law is built on the idea of the sovereign state. This State-centered structure of international creates normative difficulties for non-State actors. The European Union is a union of States, and as such still encounters normative hurdles when acting on the international scene. These normative hurdles have become

international: understanding the role of legal entities that do not fit neatly into legal categories, such as state or international organization. The way international law deals with the EU therefore sheds some light on how non-State entities are conceived of in international law.

Interests and values

The 'diverging views' cannot be explained only be academic specialization and the state-centric nature of international law. The four models discussed above are also the outcome of deeper political tensions. They show how the acceptance of the EU in the international legal order is shaped by power relations. For instance, when the EU is accepted as a unique 'REIO' in international settings, it is usually because the EU has been able to successfully push for that model in international negotiations. In instances where the EU is viewed as a classic international organization, it is often because the EU is in a multilateral setting where it has less diplomatic influence to persuade other states.

The diverging approaches are not only symptomatic of professional and academic communities, but also the attachment to certain values in that community. Kennedy discusses international lawyers as a "a group of people pursuing projects in a common professional language" and that in that project, international lawyers "tend to think that international law is a good thing, and there should be more of it…"[64] The idea that international law is a 'good thing' should be challenged. In many instances, the EU legal order and EU law are put forward as normatively superior. In addition to contributing to the strict observance and the development of international law, the EU in its relations with the wider world the EU is to contribute to "peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child…"[65] This points to another ambiguity about the EU and its place in the world. Is it an IO set up primarily for the benefit of its Member States and citizens, or can it also be regarded as an organization that is truly working for the 'greater good'? The EU was awarded a Nobel Peace Prize for having "for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe".[66] The EU is often discussed in terms of being a 'normative power'.[67] Klabbers argues that "the idea that the EU is an international organization created for the common good must be discarded: the common good the EU stands for is, by and large, the common good of itself and its 27 member states."[68] While the EU is primarily a self-interested actor, the way in which it

fewer, but there remains situations in which the Union cannot externally act due to the partial blindness of international law towards compound subjects." Schütze (n16) 217.

[64] D. Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', P. Korkman & V. Mäkinenin (eds) Universalism in International Law and Political Philosophy (Helsinki: Helsinki Collegium for Advanced Studies, 2008) 257.

[65] Article 3(5) Treaty on European Union.

[66] Statement of the Norwegian Nobel Committee, 'The Nobel Peace Prize for 2012', 12 October, 2012. Available at < http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/press.html>.

[67] I. Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) *Journal of Common Market Studies* 235.

[68] J. Klabbers, *The European Union in International Law* (Paris: Pedone, 2012) 91.

defines and pursues those interests does involve the pursuit of certain values. This tension also helps explains the EU's place in the international legal order.

Many of the legal conflicts between EU law and international law are, at a more basic level, conflicts over values. The classic example of collision between the EU and international legal orders, the *Kadi* saga, was more than a legal conflict over competing norms. Behind the legal conflict is a clash of values: between respect for individual human rights on the one hand and the respect for the UNSC system of international peace and security on the other. Many of the legal disagreements or clashes discussed in the next chapters reveal similar tensions about which legal order is 'ethically' superior. To those associated with the EU law view and the European project, EU law is put forward as more democratic and better able to protect fundamental rights and values. To those associated with the international law project, international law is viewed as the superior legal order, and can be used to challenge the validity of certain EU acts that allegedly violate international law. In fields where 'clashes' have emerged, such as in the fields of individual sanctions, data protection, animal welfare, climate change, investment arbitration, there are underlying questions about which legal order is best equipped to govern these topics. In some instances, the EU seeks to work with states and multilateral institutions to address these issues. However, in recent years the EU has sought to adopt its own approach in some areas, and has adopted more unilateral measures.[69]

Overcoming Divergent Views

The models discussed above show different, often competing, conceptions of the EU. How can these divergent views be overcome?

Multiple Nature of the EU

One approach has been to accept the multiplicity and diversity of the international legal system, and to accept that the EU may exist in multiple states, depending on the forum and type of legal interaction involved. Rather than finding one model that applies in each set of circumstances, this approach requires one to examine the nature of the legal dispute and the forum in which it takes place. Under this relativistic approach, the EU's legal position depends on the perspective and the standpoint of the observer.[70] This was the approach adopted by the arbitral tribunal in *Electrabel SA v. The Republic of Hungary*.[71] The tribunal noted the 'multiple nature' of EU law, stating that "EU law is a sui generis legal order, presenting different facets depending on

[69] On EU unilateralism see J. Odermatt, 'Convergence through EU Unilateralism' in E. Fahey (ed) *Framing Convergence with the Global Legal Order: The EU and the World Hart* (Oxford: Hart, 2020).

[70] L. Kirchmair 'The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law' (2012) 4 *Goettingen Journal of International Law* 677, 679. "Depending on its perspective – and not on a different standpoint of the observer – the ECJ applies a monistic doctrine relating to its Member States and a dualistic doctrine relating to international law, two completely diverging doctrines."

[71] *Electrabel SA v. The Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability (2012) 4.117.

the perspective from where it is analysed. It can be analysed from the perspectives of the international community, individual Member States and EU institutions."[72] It argues that 'many scholars' accept that "EU law is international law because it is rooted in international treaties."[73] The tribunal's reasoning demonstrates this relativistic approach: the nature of the EU and EU law depends on the legal site in question: national courts of EU Member States, the courts of non-EU Member States, the CJEU, international courts and tribunals, or other legal forums.

This view attempts to capture the 'dual nature' of the EU. In *Kadi,* Advocate General Maduro sought to capture this duality when he described the EU legal order using the term "municipal legal order of trans-national dimensions".[74] Crawford and Koskenniemi also seek to capture the 'dual nature' of the EU legal order as one that is both international and domestic in nature.[75] This captures the idea that the EU legal order has international law origins and dimensions, but possesses municipal law, even constitutional characteristics. This also recognizes that the EU legal order has both an internal and external dimension. Which model we apply in a given case will depend on which dimension is being discussed. Gardiner captures this internal/external dichotomy in relation to the EU:

> In its internal aspect, that is viewing relations between the member states themselves, the Community is an organism for collective exercise of sovereignty in matters over which competence is transferred to the Community by treaty. In its external aspect, the Community functions as an international organization, entering into treaties in matters within its competences.[76]

In its *internal dimension*, the EU can be thought of as a constitutional legal order, one that regulates the rights and responsibilities of the EU Member States in their mutual relations. From this perspective, it makes sense to treat the EU as new legal order or self-contained regime. In these instances, the CJEU would be justified in treating the EU through the constitutionalist lens and to stress EU autonomy, since it dealing only with the internal level. At the *external level*, however, a different set of assumptions apply. When the EU acts on the international scene, when it mediates with other subjects of international law (which are not bound by EU law) and enters into commitments on the place of international law, it acts at the external level. Here, the EU is not in a position to assert the new legal order narrative, and must abide by rules of public international law along with other IOs. This internal/external divide allows the EU and the CJEU to continue to apply the 'new legal order' narrative and assert the EU's autonomy vis-à-vis the international legal order, since in these instances internal, constitutional law issues arise. [77] At the same time, when the EU acts on the international

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[72] *Id.,* 4.117.
[73] *Id.,* 4.120 and fn 7.
[74] Opinion of the Advocate General Maduro, *P Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case C-402/05, EU:C:2008:11, para. 21.
[75] J. Crawford and M. Koskenniemi, 'Introduction', in J. Crawford and M. Koskenniemi, (eds) *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 12.
[76] R. Gardiner, *Treaty Interpretation,* 2nd edn (Oxford, Oxford University Press, 2015) 129.
[77] O. Elias, 'General International Law in the European Court of Justice: From Hypothesis to Reality' (2000) 31 *Netherlands Yearbook of International Law* 6: "The distinction to be drawn, then, is between the role of public international law as a source of law governing legal relations within the Community on the one hand, and legal relations between the Community and third states on the other. In the latter context, general international law can

plane, the EU would be viewed more along the lines of traditional IO. This internal/external divide may be conceptually appealing, but as the following chapters show, it is difficult to apply in practice. First, it is not always easy to divide the internal/external dimension of EU action. Second, the relativistic view tends to undermine legal certainty, since the legal status of the EU will often depend on the viewpoint of the observer. A litigant seeking to bring the EU or a Member State before an international dispute settlement body, for example, wants to know what the applicable rules will be; a discussion of the 'multiple nature' of EU law may not be helpful.

The legal view of the EU thus becomes dependent on these shifting power relations. The EU's legal status will depend on political, rather than objective legal conditions. International law can provide rules that are applicable equally to all subjects irrespective of power.[78] The relativistic approach means that that the nature of the EU depends less on objective criteria, and more on how far the EU could push and persuade in treaty negotiations or within international organizations.

Pluralist visions accept that there may be multiple systems working at the global level, and tend to reject notions of unity and universality of public international law.[79] The idea of multiple sub-systems and regimes exercising autonomy, including the European Union, is not necessarily viewed as a problem, and accepts multiple overlapping orders, without hierarchy or a 'centre'. International Relations scholars seem to have less problem with the multiple nature of the EU, and can study it as a type of international organization, proto-state or federation. International law seems to have more difficulty with accepting multiple conceptions of the EU, as the labels given to the polity have legal consequences. As discussed in the following chapters, whether the EU is viewed as an international organization, a municipal legal order, or something else, will determine the legal framework that applies to that entity.

Integrating the EU into the International Legal Order

The constitutionalist vision, on the other hand, tends to view 'autonomous' regimes as a form on institutional fragmentation.[80] The EU may contribute to such fragmentation. A constitutionalist approach tends to find ways for the EU to 'fit' within this broader framework of international law. According to this approach, international law is undergoing a process of

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be expected to have more relevance, given that such third parties are not bound by the EC Treaty, so that the relations between such third parties would be regulated primarily by international law."

[78] C. Eckes and R. A. Wessel, 'The European Union from an International Perspective: Sovereignty, Statehood, and Special Treatment' in T. Tridimas and R. Schütze (eds.), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford: Oxford University Press, 2015): "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."

[79] See, e.g., G. Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23 *European Journal of International Law* 669; M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Oxford: Hart, 2009).

[80] M. Prost, *The Concept of Unity in Public International Law* (Oxford: Hart, 2012); E. de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51, 59; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging Constitutional Order' (2006) 19 *Leiden Journal of International* Law 614; A. Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

constitutionalization, one that mirrors a process that took place within the EU itself. It seeks to bring greater coherence to the disorder brought about by multiple overlapping legal regimes. The EU cannot 'escape' the international legal order; the task is to find ways to integrate sub-systems and resolve normative conflicts between legal orders. This has included discussions of various conflict management techniques, such as system integration, treaty interpretation (*lex posterior* and *lex specialis*) or normative hierarchy.[81] Much of the focus in this debate has been on the role of international and regional courts, including the CJEU. Yet the CJEU has not shown much interest in the unity of international law, and is more focused on preserving the autonomy of the EU legal order.[82]

Much of this debate has focused on the issue of conflict between legal orders. There is a tendency to focus on courts, and the 'clashes' that occur, especially in high profile judgments. Much of the discussion, then, has been on finding techniques to be used by court to promote integration or avoid conflicts. The present research seeks to go beyond an analysis of legal clashes and conflicts. Nor is the research intended to present ways of resolving normative conflict or to establish a formula for integrating the EU and public international law. The following chapters demonstrate how these various visions of the EU legal order play out in different international legal forums and legal debates. It is through these processes that the EU has had a role of influencing and developing international law.

Conclusion

This chapter has explained how EU law and international law scholarship has different views of the EU's place within the international legal order. These different conceptions have different assumptions and starting points. The EU law view starts from the understanding that the EU is an autonomous, municipal legal order; the EU's relationship with the international legal order is governed primarily by EU law. The international law view takes the starting point that the EU is a part of the international legal order, and whose special features can be taken into account in certain situations; the EU's relationship with the international legal order is governed by public international law. The following chapters will explore how these views of the EU in academic scholarship play out in different forums.

[81] A. Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization' (2017) 15 *International Journal of Constitutional Law* 671.
[82] See J. Odermatt, 'The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law' in A. Skordas (ed) *Research Handbook on the International Court of Justice* (Cheltenham: Edward Elgar, 2020).