The State(hood) of the Union: The EU's Evolving Role in International Law

Jed Odermatt

1 The State(hood) of the Union

Various labels have been used to describe the legal nature of the European Union: international organization, supranational organization, regional economic integration organization, confederation, *sui generis* entity, new legal order, among others.[1] But in these discussions, there is one thing that lawyers – from both European Union and international law perspectives – agree on: the EU is not a state.[2] An international lawyer assessing the statehood of the European Union might start with the usual criteria included in the Montevideo Convention on the Rights and Duties of States.[3] In this respect, the EU might display some of the traditional criteria under customary international law: a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states. Yet as the Union is itself composed of sovereign states, which have transferred certain powers to be exercised at the Union level, it does not possess sufficient independence to be considered a state. This is because the Union is viewed as not being capable of being a sovereign entity under international law. Eckes explains that "[t]he Union is not conceived as sovereign. Under international law it does not possess the rights associated with sovereignty. States do."[4] The Court of Justice of the European Union (CJEU) has also rejected the idea that the Union is, or could ever be, a state under international law. In *Opinion 2/13*, the Court reiterated that the Union is 'a new legal order' and opined that "the EU is, under international law, precluded by its very nature from being considered a State."[5] Some legal scholars have noted how the Union exercises certain 'state-like functions'.[6] While the Union may display certain characteristics often associated with statehood – citizenship, a common currency, foreign policy and diplomatic representation – the idea that the Union could be considered a state under international law has been widely dismissed.

A common reason for denying European statehood is due to the non-absolute nature of the EU's authority. Schütze reveals how discussions of sovereignty in the EU context are often based on the idea that sovereignty is inherently indivisible, and thus legal scholars are unable to conceive of forms of

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[1] See C. Binder, J. Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' (2017) 8 *European Yearbook of International Economic Law* 139; Jed Odermatt, 'Unidentified Legal Object: Conceptualising the European Union in International Law' (2018) 33 *Connecticut Journal of International Law* 215.

[2] C. Eckes and R.A. Wessel, 'An International Perspective' in T. Tridimas, R. Schütze (eds.), *The Oxford Principles of European Union Law - Volume 1: The European Union Legal Order* (Oxford University Press, 2018) "The European Union is not a state and few would argue that it should aspire to become a (super-)state. Under public international law, the EU is considered an international organization with special privileges." See T. Lock, 'Why the European Union is Not a State: Some Critical Remarks' 5 *European Constitutional Law Review* (2009) 407. This conclusion is also supported by political scientists who focus on Weberian statehood e.g. S. Borg, 'Introduction' in S. Borg (ed), *European Integration and the Problem of the State* (Palgrave Macmillan, 2015) 2: "The EU is of course not a state in the legal or politico-institutional sense of the word." B. O'Leary, 'The Nature of the European Union', 27 *Research in Political Sociology* (2020) 20 "the EU is not a state".

[3] Montevideo Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1933, 165 LNTS 19, Article 1.

[4] C. Eckes, 'The Autonomy of the EU Legal Order' (2020) 4 *Europe and the World: A Law Review* 1.

[5] Opinion 2/13, para. 156.

[6] Eckes and Wessel (n2) note that "[i]n recent years, the EU has been taking up 'state-like functions' in more areas than before."

divided or shared sovereignty.[7] This leads to the conclusion that "the European Union is either an international organisation (confederation) or a federal state. And because the Union is not a state, it must be an international organisation."[8] This conception of statehood as an all or nothing legal concept accords with the view in international relations theory which associates state sovereignty as *absolute authority* over a given territory.[9] Yet some have elaborated upon the notion that sovereignty in the contemporary context should be seen as a relational concept. This was first discussed in relation to territorial entities that can be regarded as meeting the traditional criteria for statehood, but only as a matter of degree. Clapham illustrates how various entities and power structures over time "enjoy greater or lesser *degrees of statehood*."[10] When Clapham describes degrees of statehood, he is illustrating how state and non-state entities exercise degrees of political and economic power in the international system. Such an approach would go against the statist view in international law that sovereignty cannot be a matter of degree. Besson echoes this conception of sovereignty as a "it is either all at once or not at all."[11] This view of sovereignty makes it difficult to view the bundle of rights and duties of sovereign states as being capable of being divided, shared, or exercised as a matter of degree. The conclusion that the European Union is an international organization in international law, albeit one of a special kind, does not reflect the way that the Union acts on the international stage, which often resembles that of a state, rather than a traditional international organization.

This special issue is focused on the question whether the EU Member States are still sovereign states under international law. According to the view of sovereignty as absolute and indivisible, the EU Member States are capable of transferring powers to an international organization without losing their status as sovereign states. This contribution focuses on a different, but related question. Could the European Union be considered, from the perspective of international law, as possessing *degrees* of legal statehood? The paper takes the example of one field of Union practice where it exercises rights and duties in a way that resemble that of a sovereign state: its treaty practice. When the Union acts on the international plane, it does not resemble a traditional international organization like the United Nations. Rather, it exercises many of the legal functions of a state. Indeed, the Union concludes and participates in treaties (both bilateral and multilateral), it is represented in international organizations and treaty bodies, it appears before international dispute settlement bodies and can accept international responsibility for breaches of international obligations in its own right. Internally, the CJEU is developing a conception of autonomy that goes beyond that of any international organization, but in a way that resembles the sovereignty language of a state.[12]

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[7] R. Schütze, *European Constitutional Law* (OPU, 2021) 35: "In such times of constitutional conflict, Europe's federal tradition offers only a polarised and idealised alternative: the European Union is either an international organisation (confederation) or a federal state. And because the Union is not a state, it must be an international organisation." See R. Schütze, 'On "Federal" Ground: The European Union As an (Inter)national Phenomenon', 46 *Common Market Law Review* (2009) p. 1069.

[8] Schütze, p. 35: "In such times of constitutional conflict, Europe's federal tradition offers only a polarised and idealised alternative: the European Union is either an international organisation (confederation) or a federal state. And because the Union is not a state, it must be an international organisation."

[9] J. Agnew, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics' (2005) 95 *Annals of the Association of American Geographers* 2, 439. "state sovereignty may be understood as *the absolute territorial organization of political authority*. Most accounts of sovereignty accept its either/ or quality: a state either does or does not have sovereignty." Phillpot defines sovereignty as "supreme authority within a territory. supreme authority within a territory." 'Sovereignty', *Standford Encyclopaedia of Philosophy*, https://plato.stanford.edu/entries/sovereignty/ .

[10] C. Clapham, 'Degrees of Statehood' (1998) 24 *Review of International Studies* 2, 157. Emphasis added.

[11] Samantha Besson, 'Sovereignty' in Max Planck Encyclopedias of International Law [MPIL].

[12] KS Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Human Rights Law* (Edward Elgar, 2017).

What are the implications of these developments for international law and our conceptions of sovereignty? This contribution does not seek to make the argument that the Union should be considered a sovereign state under international law. Rather, it seeks to raise a provocative question – could the Union be understood as exercising degrees of statehood? That is, could the Union be considered and accepted as a state for certain purposes under international law? A conception of sovereignty as functional and relational, rather than absolute and indivisible, would allow the Union to be accepted as a state *for certain purposes* in international law. This would require not only the EU Member States to accept such a position but would have to be accepted and recognised by non-EU states. Given the current state of political affairs, it is unlikely that states would accept EU limited statehood in this way. This contribution explores this idea. It seeks to go beyond the accepted narrative in legal and political science scholarship that quickly dismisses the concept of statehood in relation to the European Union.

2 The EU as a state in international agreements

The EU has developed a significant treaty practice over the years, and through this has contributed to the development of international law.[13] In particular, the Union's treaty practice has shown how rules and principles of international law initially developed in the context of inter-state relations can be applied in relation to a composite legal entity such as the Union.[14] Much of this has been through the inclusion of language in international agreements that seeks to take into account the particular nature of Union law and the autonomy of the EU legal order. A common example is the use of different forms of 'EU participation clauses' in international agreements. The use of such clauses in international agreements is based on the understanding that the Union would otherwise not be able to participate in a treaty without explicit acknowledgement that it is legally capable. This can include various types of 'regional economic integration organization' clauses in multilateral agreements or specific references to the European Union in the text of a treaty. In addition to allowing Union participation in an agreement, such agreements may also restrict the rights and responsibilities of the Union, or impose certain other requirements.

Such EU-specific language is usually required to allow the EU to join a treaty – from both the EU and international law perspective. From the perspective of EU law, EU-specific clauses can be designed to preserve the specific nature of the EU legal order. For example, disconnection clauses, which are designed to ensure that EU Member States apply EU law in their bilateral relations, are designed to preserve the integrity of the EU legal order. Another example can be found in the draft agreement to allow the Union to accede to the European Convention on Human Rights. The EU sought to include, among others, provisions that ensure that the CJEU has the right to hear cases relating to Union law before an applicant can bring a claim to Strasbourg. This procedure, which is not afforded to any other ECHR Contracting Parties, was included to take into account requirements of the EU legal order, in particular to safeguard the autonomy of EU law. Such special treatment is justified, therefore, on the basis that the Union is not a state. Yet other clauses are included on the basis of international law, or to address the concerns of non-EU states. For example, from the perspective of the Union, the requirement to submit a declaration of competences might be seen as an unnecessary burden that only complicates the participation of the EU and its Member States. Yet these types of clauses are often included to satisfy concerns at the international level. They seek to clarify to all parties involved that the Union indeed has competences in the field covered by an international agreement.

[13] See M. Cremona, 'Who Can Make Treaties? The European Union' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (2nd ed. Oxford, OUP 2020), 117-149.
[14] This argument has been developed further in J. Odermatt, *International Law and the European Union* (CUP, 2021) pp. 59-130.

The use of such clauses derives from the fact that, contrary to other parties to the agreement, the EU is not a state, and special arrangements need to be made to allow its participation. What is remarkable, however, is how little EU-specific language is needed to allow the Union to join or participate in a treaty.

Take, for instance, the *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (Istanbul Convention).[15] This is an example of the Union joining a human rights treaty, a type of agreement that was once exclusively the realm of states. Yet here the treaty does not require a great deal of language to accommodate its participation. Some of the provisions in the Convention use language that refers to the European Union specifically. Therse are mainly procedural provisions related to the treaty: clauses on amendments (Art. 72), signature and entry into force (Art 75), territorial application (Art. 77), reservations (Art. 78), notification (Art 78) all refer to 'any state *or the European Union'*. Yet beyond these specific references to the EU, these do not impose any obligations that differ from contracting parties that are states. Substantive parts of the Convention, however, do not refer to 'any state or the European Union', but rather outline the obligations of the *parties*. Article 4, for example, sets out the obligation that "*[p]arties* shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere." While there are references to 'states' in the Convention, these relate to the obligations of state authorities.[16] For the most part, the obligations relating to contracting parties that are states can also be applied to the context of the European Union, without any provisions applying state obligations *mutatis mutandis* to the EU context.

What is the significance of this? The absence of EU-specific clauses or language can suggest that the parties accepted, for the purposes of this treaty, that the EU can be treated akin to a state. Neither the demands of the EU legal order, nor the requirements of international law, meant that the treaty included clauses specifically aimed at addressing issues of autonomy or division of competences. What if such 'EU-specific' language were to subside over time? That is, what if the EU and its treaty partners no longer felt the need to include treaty provisions that treat the Union as qualitatively different from that of a state? Of course, such practice would not mean that the Union is recognised as a state. Such practice could develop over time to capture the idea that the EU has been accepted – for the purposes of concluding treaties – as exercising a degree of statehood.

3 The EU as a state under the 1969 Vienna Convention

Another perspective comes from the practice of the CJEU. When analysing which rules of international law are applicable to interpreting and applying international agreements concluded by the Union, the Court could apply provisions of the *Vienna Convention on the Law of Treaties* (1969)[17] or the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986).[18] Since the 1986 Vienna Convention applies with respect to "treaties between one or more States and one or more international organizations", one might expect this would be the most appropriate stating point. Indeed, during the drafting process of the 1986 Vienna Convention, the International Law Commission (ILC) invited international organizations, including the

[15] Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, CETS 210.
[16] Article 5 sets out the obligation: "Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation."
[17] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980 ('VCLT').
[18] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) 25 ILM 543 (1986), not yet in force ('VCLT-IO').

European Economic Community (EEC), to provide comments. The EEC provided extensive input on the draft articles, and in particular welcomed the basic principle that the 1986 Convention would keep as far as possible the text of the 1969 Vienna Convention.[19] While the Union is not a party to either convention, this drafting history suggests that the 1986 convention was viewed as the appropriate set of rules in relation to EU treaty practice.

Yet the CJEU has used the 1969 Vienna Convention – applicable between states – as a starting point, finding that these represent the rules and principles of customary international law binding upon the Union. [20] In *Front Polisario*[21] the Court analysed the provisions of the 1969 Vienna Convention when addressing a treaty concluded between the Union and the Kingdom of Morrocco. In *Wightman*,[22] the Court also addressed issues related to the law of treaties. It that case, the Court found that it would be contrary to the EU Treaties to force a Member State "to leave the European Union despite its will".[23] While its analysis and conclusions are based on EU law, the Court also adds that this analysis is "corroborated by the provisions of the Vienna Convention on the Law of Treaties, which was taken into account in the preparatory work for the Treaty establishing a Constitution for Europe."[24]

One might argue that, as the provisions of the 1986 and 1969 conventions are similar, the Court's use of the 1969 convention does not have legal significance. Moreover, the Court is not applying the 1969 Vienna Convention, but rules of customary international law that are enshrined in those conventions. Yet the point is that, according to the Court, the most appropriate rules applicable to the Union's treaty practice are not those related to international organizations, but those applicable to states. Like with the discussion above, this does not suggest Union statehood. It shows how, for the purposes of the law of treaties, the Union can be considered akin to a state both internally and externally.

4 The EU as a state in international dispute settlement

Issues related to the Union and the law of treaties have also arisen before various international dispute settlement bodies. In the field of WTO law, the Union has for years been dealt with as a 'state-like entity' and its legal system viewed as analogous to a domestic legal order of a state.[25] This is not just the position of the EU and the Member States, but one that has been largely accepted by other WTO members.

In other contexts, arbitral tribunals have also dealt with questions related to the law of treaties. In a number of cases, tribunals have faced questions about whether the law of the European Union should be considered as 'applicable law' for the purposes of defining the tribunal's jurisdiction. Some tribunals have considered the Union legal order as having a multiple nature, depending on the type of legal

[19] UN Doc. A/36/10, Report of the International Law Commission on the work of its Thirty-third session, 4 May - 24 July 1981, Official Records of the General Assembly, Thirty-sixth session, Supplement No. 10, at 201-203.
[20] Article 2 VCLT defines "treaty" for the purposes of the Convention as "an international agreement concluded between States in written form and governed by international law".
[21] Case T-279/19, *Front Polisario v. Council*, Judgment of the General Court of 29 September 2021, ECLI:EU:T:2021:639 and Joined Cases T-344/19 and T-356/19, *Front Polisario v. Council*, Judgment of the General Court of 29 September 2021, ECLI:EU:T:2021:640.
[22] Case C-621/18, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, EU:C:2018:999.
[23] *Wightman*, para. 65.
[24] *Wightman*, para. 70.
[25] "The position the Dispute Settlement Body (DSB Panel and Appellate Body (AB)) takes towards the EU and its common market is to a large extent similar to a statelike entity." C. Binder and J.A. Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' (2017) *European Yearbook of International Economic Law* 139, 167.

question that arises.[26] They have accepted that in certain cases, EU law can be considered as domestic law for the purposes of the law of treaties. In *AES v Hungary*, the tribunal also reflected on the dual nature of EU law, and determined that the Union could not invoke EU law (as domestic law) to excuse breaches of its international obligations.[27]

In these cases, tribunals are often faced with complex questions about the legal nature of EU law. In successive case, tribunals established under the Energy Charter Treaty (ECT) have heard arguments that the tribunal does not have jurisdiction to hear 'intra-EU' disputes (between an investor in an EU Member State and an EU Member State) based on arguments about the autonomy of the EU legal order.[28] In these cases, the Union and Member States argue seek to invoke the EU's internal law and cases of the CJEU as being relevant for determining jurisdiction. Without going into the merits of these complex legal arguments, it is illustrative that in order to address these questions, tribunals have examined EU law as existing in dual or multiple states, and have considered it 'state-like' for certain purposes. As with the examples above, this practice alone does not suggest EU statehood. Rather, it provides examples of an external view of the Union having state-like characteristics that are relevant for resolving disputes at the international level. As with the EU's practice in relation to treaty-making and the CJEU's practice in relation to the law of treaties, the practice of these tribunals also shows that the Union cannot be regarded as an 'international organisation' for the purposes of the law of treaties. In these cases, the more appropriate stating point is to consider the EU as a state and EU law as the domestic law of a state.

5 Degrees of Statehood?

Debates about European statehood are hardly new.[29] Besides the legal questions about the possibility of the EU becoming a state, these debates are also infused with political questions about the nature of this polity. The consensus in legal discussions that the EU is something 'more than' an international organization, especially since it displays certain state-like features, both internally and on the plane of international law. Yet few, if any, legal consequences flow from this indeterminate nature. International practice often treats the EU as if it exercises state powers, but few recognise that this could have legal implications. Thus, legal discussions about the nature lead to somewhat unsatisfactory descriptions of the Union and discussions about its indeterminate or dual nature.

This contribution has argued that the Union has been treated and accepted as akin to a state in a variety of settings. Through concluding and participating in international treaties, through the CJEU interpreting and applying international agreements; and through dispute settlement bodies accepting the multiple nature of EU law, the Union presents challenges to international law.

Over time, such practice could lead to an understanding that for the purposes of the law of treaties, the Union has functionally become a state. If other non-EU states were to accept this view (for the limited purposes of the law of treaties) – this could pave the way for the development of a new principle, whereby the Union can be accepted as having limited statehood. This could mean, for example, that the Union would be able to accede to international agreements and join international organizations that it had previously been excluded from, due to it not being a state. Rather than modifying the constitutive

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

[27] "[EU law] will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of international obligations."
AES v Hungary, ICSID Case No. ARB/07/22, Award (23 September 2010)

[28] See e.g. *Green Power Partners K/S & SCE Solar Don Benito APS v. Spain,* Award of 16 June 2022 (SCC 2016/135).

[29] See G.F. Mancini, 'Europe: The Case for Statehood' (1998) 4 *European Law Journal* 1, 29; J.H.H. Weiler, 'Europe: the Case Against the Case for Statehood' (1998) 4 *European Law Journal* 1,43.

instrument of an international organization that is only open to states, or modifying a human rights treaty that can only be signed by states, a principle of limited statehood would allow the Union to be considered a 'state' for the purposes of those instruments. While the EU is not considered a state under international law, there may be a possibility that over time, the term 'state' in international agreements could be interpreted to include legal persons such as the European Union. Of course, given the political environment the Union faces, it is doubtful that the EU's treaty partners, nor its Member States, would accept such limited statehood. The argument is not that the EU is a state, nor that it is transforming into one – rather, the contribution makes the case for a limited, functional statehood that would recognise that the Union exercises degrees of statehood at the international level.

Such an approach would not only be in the interests of the EU, but could also be welcomed by non-EU states. By joining international treaties that were previously only open to traditional states, other states would be capable of bringing the Union before international tribunals and treaty bodies, which could engage the international responsibility of the Union. In time, it could even allow the Union to be a party to the Statute of the International Court of Justice and have proceedings brought against it for violations of international law. This is, I accept, a rather radical concept. Yet the Union of today does not resemble that only a few decades ago, and its role and functions on the international plane have transformed over time. If the Union acts as a state-like entity and other states and legal bodies treaty the EU as a state-like entity, there will be a growing case for legal consequences to flow from this. Stretching legal concepts developed in the context of international organizations will not longer be applicable for a legal entity that has moved beyond those origins.