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# THE EU'S PARTICIPATION IN THE GLOBAL LEGAL ORDER AS A POSTNATIONAL DEMOCRACY: MANIFESTATIONS OF SOVEREIGNTY

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## *Summary*

Sovereignty is arguably neither popular nor conventional nor does it transpose itself into discourses of rule-making beyond the Nation State. For some, to speak of sovereignty in the context of global governance leads to bewildering identification of a 'global sovereign'. The multi-directional nature of the global reach and effects of EU law has been shown in this account to comprise boundaries and competences extensions to various degrees. It is argued to constitute manifestations of sovereignty, with spatial, action and transboundary dimensions to it that require 'unpacking'. This paper argues that postnational rule-making practices conducted by the EU may usefully be captured by sovereignty, as an over-arching framework beyond an analysis for power, influence and interactions between legal orders. Much scholarship on sovereignty and the EU has been developed prior to more recent invocations in the EU treaties to evolve as a postnational democracy. Participation by the EU in the global legal order is a multi-faceted construct but is argued here to be rooted in an understanding of the EU as an actor, i.e. what it is and what it does. Legal scholarship appears to place a high premium on the *ability* of the EU to participate externally as an actor, seamlessly, coherently and with consistency. Accordingly, as has been argued here, the *enabling* character of sovereignty at the postnational level appears insufficiently studied. The physical and metaphysical space of EU rules is argued here to require more nuancing, method and study as to its components. There are as many methodological as substantive challenges to such a thesis, which this text has sought to address as part of a research agenda. Legal texts providing for active participation in the global legal order can be most imperfect even in integrated spheres of action. What is more pressing to consider is the merger of sovereignty, territoriality and jurisdiction in a global world as an emerging matter for EU law.

## Introduction

How the EU impacts, effects, participates and interacts in and with the global legal order presents many challenges for orthodoxy. One of the greatest challenges that it presents as a leading postnational democracy is argued here to be for our understanding of sovereignty. Accounts which depict or describe the EU as a postnational actor do not tend to invoke sovereignty, neither as a construct nor as a method or process thereof. Instead, such accounts are more concerned with the place within breakdowns of orthodoxy conceived broadly, the shortcomings of postnational democracy and its institutional components and rule-making practices. And there are many accounts in legal scholarship as to how the EU has evolved as an international actor, particularly after its last

Treaty revision process.<sup>1</sup> Such accounts suggest that the EU plays an ‘active role in shaping the international order’,<sup>2</sup> in terms of its objectives and practices and many policies, but it is similarly not a discourse mediated through sovereignty. The EU’s participation in the global legal order is argued to show manifestations of ‘late sovereignty’, or at least be atypical of postnational sovereignty.<sup>3</sup> It has spatial, action and transboundary dimensions to it that require unpacking. Sovereignty is arguably neither popular nor conventional nor does it transpose itself into discourses of rule-making beyond the Nation State. For some, to speak of sovereignty in the context of global governance leads to bewildering identification of a ‘global sovereign’. International relations ‘constructivists’ emphasise that sovereignty in its internal and external facets is a socially-constructed trait.<sup>4</sup> They are social facts that are usually produced and reproduced through the *practices* of States. Sovereignty comes from ‘some place’ and is heavily influenced by other social norms and practices. One of the most appealing and useful features of sovereignty for understanding the EU’s actions in the world is that the EU, similar to sovereignty itself, has both an internal and external dimension.

As Keohane states, a means to interpret the essence of sovereignty is to view it as a thesis about norms of sovereignty being possibly violated.<sup>5</sup> *Social norms* are conventionally depicted as shared

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<sup>1</sup> See Steven Blockmans, Bart van Vooren, and Jan Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2012).

<sup>2</sup> Eg Dimitry Kochenov and Fabian Amtenbrink (eds.), *The EU’s Shaping of the International Legal Order* (Cambridge: Cambridge University Press, 2014).

<sup>3</sup> Manifestations: ‘An event, action, or object that clearly shows or embodies something abstract or theoretical’: <<http://www.oxforddictionaries.com/definition/english/manifestation>> accessed 20 January 2015.

<sup>4</sup> See John Searle, *The Construction of Social Reality* (New York: Free Press, 1995); John Gerard Ruggie, ‘Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis’ in Robert Keohane (eds.), *Neorealism and Its Critics* (Columbia University Press 1986); See David Lake, ‘The New Sovereignty in International Relations’ (2003) 5 (3) *International Studies Review* 303.

<sup>5</sup> I.e. drawn from Krasner (note 24), yielding hypocrisy when applied to Nation States, developing countries or countries at war or rife with instability Robert Keohane, ‘Stephen Krasner: Subversive Realist’ (2010) APSA 2010 Annual Meeting Paper. Available at SSRN: <<http://ssrn.com/abstract=1643351>> accessed 20 January 2015; Robert Keohane, ‘Ironies of Sovereignty: The European Union and the United States’ (2002) 42 *Journal of Common Market Studies* 743; see Stephen D Krasner, *Sovereignty. Organised Hypocrisy* (Princeton: Princeton University Press, 1999).

expectations on the part of a group about appropriate behaviour.<sup>6</sup> In the Nation State context, when norms are espoused they may not make a difference but they are important sources of behaviour in world politics. Norms do not per se determine behaviour but they exercise an impact. However, for norms to be relevant they must be advocated. At supranational level, i.e. as to a regional organisation, these terms carry a different force, as considered here in. Norm agency is usually intended to imply where States act as advocates, non-State organisations act as advocates and international organisations act as norm agents.<sup>7</sup> The EU maybe said to be a rising but complex norm agent because of its porous openness to *inter alia* external and internal norms and their interaction onwards into EU rules. The active and developing component of this process has the appearance of a manifestation, as a tendency, an incremental process or development. Norms act as a focal point for decentralised networks of organisations and individuals and as a result, International organisations are major promoters of norms in world politics. This paper focusses upon one aspect of the theorisation of sovereignty which is the *manner* in which norms are promoted by the EU through its participation in the global legal order.

This paper argues that this participation may usefully be captured by sovereignty, as an over-arching framework beyond an analysis for power, influence and interactions between legal orders. It is argued that sovereignty comprises dynamic internal and external interfaces and that it captures the flexible, fluid but also pragmatic way in which the EU gradually asserts itself in the global legal order. Accordingly, the account unpicks and unravels manifestations of the EU's emerging postnational sovereignty done through a consideration of social practice, active conduct and the space of and for EU rules and their boundaries.

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<sup>6</sup> E.g. Martha Finnemore, *National Interests in International Society* (Cornell University Press 1996) 22. Contrast Katerina Linos in her recent book who argues that there is a body of evidence indicating that international norms are spreading within regions across the globe and causing radical policy shifts: *The Democratic Foundations of Policy Diffusion: How Health, Family, and Employment Laws Spread Across Countries* (Oxford University press, 2013).

<sup>7</sup> See M. Finnemore and K. Sikkink, "International Norm Dynamics and Political Change". *International Organization* 52 (1998) 887-917.

This paper explores in Section 1 the lexicon of the ‘postnational’ as applied to the EU. Section II assesses the understandings and many paradoxes of sovereignty. Section III considers the exceptionalism of EU sovereignty, including EU sovereignty, as developed by Walker. Section IV considers what the EU participates towards the global legal orders and how it does this, in four sub-sections, as to its (1) goals, (2) its social practices, (3) the ‘space’ of and for EU rules and (4) the construction of (trans)boundaries under EU law.

By way of a preliminary overview, this paper outlines what is understood by the term ‘postnational’ as applied to the EU and its legal order in this account.

## I. The lexicon of the postnational

The demise of the Nation State as a solitary actor and its increasing propensity to operate within transnational constructs is a fact of contemporary life. Nonetheless, it still remains the ultimate actor.<sup>8</sup> The terms such as ‘postnational law’ or ‘postnational democracy’ have been deployed to depict ‘the state of the State’ as much as the *decline* of the boundaries of societal orthodoxy.<sup>9</sup> Less so, the term is used more incidentally in respect of the rule-making or legal instruments resulting therefrom, in the postnational ‘space’.<sup>10</sup> Ostensibly, postnationalism implies that the performance of constitutionalism and politics is no longer configured around or constructed *within* the territorial strictures of the Nation State. Postnationalism signifies the importance of the proliferation of new

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<sup>8</sup> See, most famously, Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (Columbia University Press 1996); also Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2nd edn, Princeton University Press 2008).

<sup>9</sup> See Colin Crouch, *Post-democracy* (Polity Press, 2004); Jürgen Habermas, *The Postnational Constellation: Political Essays* (1<sup>st</sup> ed. MIT Press 2001); Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2012); Deirdre Curtin, *The European Union: A Postnational Democracy in search of a Political Philosophy* (The Hague: Kluwer Law, 1997).

<sup>10</sup> See Damian Chalmers, ‘Post-nationalism and the quest for constitutional substitutes’ (2000) 27 (1) *Journal of Law and Society* 178; Karl-Heinz Ladeur, ‘The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-relationships’ EUI Working Paper Law No 99/3; Erik Eriksen, Christian Joerges and Florian Rödl (eds.), ‘Law and Democracy in the Post-National Union’ ARENA Report No 1/2006; Neil Walker, ‘Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms’ (2012) 3 *Transnational Legal Theory* 61.

forms of law and politics, interactions between legal orders and political disordering.<sup>11</sup>

Postnationalism is arguably less a study of single or specific instruments or policies and instead is probably more accurately a broader methodology to study shifts in norms, actors and processes.

However, postnationalism has not resulted in any accepted normative idea of postnational 'law' as a phenomenon, especially not in legal scholarship. Nor has it evolved with any express relationship to sovereignty as a construct, method or process of legal orders or ordering. At its height, the deployment of post-nationalism in legal scholarship has even been critiqued as 'EU-centric' and 'Court-centric', thereby lacking relevance to any legal order or field outside of the context of the EU, constructed largely through judicialised understandings of conduct.<sup>12</sup> Postnational conceptualisations of the EU are not perceived to have a broad reach precisely because, as some wryly note, there is no postnational world.<sup>13</sup> Moreover, its inherent direction may become problematic. For example, can postnational legal orders such as the EU become post-postnational in the event of institutionalisation taking place between it and the US (for example in the Transatlantic Trade and Investment Partnership)?<sup>14</sup> Postnationalism may be said to capture most accurately the aspirations of the last Treaty revision process of the EU. It was sought there to create an autonomous democratic life of the EU, legal personality, dispersed external executive power and a regularisation of its most sensitive field for Nation State sovereignty, its Area of Freedom, Security and Justice (AFSJ). In this regard, to speak of the EU as a postnational democracy is more commonplace in scholarship.<sup>15</sup> Postnational

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<sup>11</sup> Damian Chalmers, 'Post-nationalism and the quest for constitutional substitutes' (2000) 27 (1) *Journal of Law and Society* 178.

<sup>12</sup> Gregory Shaffer, 'A Transnational Take on Krisch's Pluralist Postnational Law' (2012) 23(2) *European Journal of International Law* 565; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2011).

<sup>13</sup> Ibid.

<sup>14</sup> Established after the EU-US Summit in 2011, followed by an Interim Report on 19 June, 2012. See Final Report High Level Working Group on Jobs and Growth.

<[http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc\\_150519.pdf](http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf)> accessed 20 January 2015. See Marija Bartl and Elaine Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' in Elaine Fahey and Deirdre Curtin (eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge: Cambridge University Press, 2014).

<sup>15</sup> See Deirdre Curtin, *The European Union: A Postnational Democracy in search of a Political Philosophy* (The Hague: Kluwer Law, 1997); Damian Chalmers, 'Post-nationalism and the quest for constitutional



democracy has a heavy descriptive component in the EU treaties, expressly developed in the autonomous section on the democratic life of the EU. Its 'promise' is of significance to many.<sup>16</sup> But this is not to reify the significance of the use of the postnational. The lexicon of the postnational is not necessarily a term of art and rather a broader one to understand the development of the EU. Yet it is not one which offers an account of the dynamics of power or the superstructure of hierarchy and authority. What this account attempts to develop then is the usefulness of sovereignty for the depiction of the postnational as it applies to the EU.

## II. The 'useful uselessness' of sovereignty

### i. Overview

Sovereignty is conducted within a rhetoric that is usually conducted either in terms of *negativity*, loss, breakdown and reference to the past,<sup>17</sup> or in terms of *positivity*, which is constructive eg as to sovereignty in conflict,<sup>18</sup> competitive sovereignty, mixed sovereignty or pooled sovereignty. In this way, it offers a parallel to post national rule-making in its emphasis upon disorder but also upon the space of postnational rule-making. The essential incoherence and even uselessness of sovereignty in contemporary legal scholarship is an omnipresent feature, be it in UK Constitutional law, supranational discourse or emerging polities.<sup>19</sup> Its ability to confuse and cloud debate is one

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*substitutes'* (2000) 27 (1) *Journal of Law and Society* 178.

<sup>16</sup> Armin Van Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations' (2012) 23 (2) *European Journal of International Law* 315.

<sup>17</sup> See Joschka Fischer, 'Europe's Sovereignty Crisis' <<https://www.project-syndicate.org/commentary/europe-s-sovereignty-crisis>> accessed 20 January 2015.

<sup>18</sup> Samantha Besson, 'Sovereignty in Conflict' (2004) 8(15) *European Integration Online Papers* 1. Available at SSRN: <<http://ssrn.com/abstract=594942>> accessed 20 January 2015.

<sup>19</sup> Eg Hans Lindahl and Bert van Roermund, 'Law Without a State? On Representing the Common Market' in Zenon Bankowski and Andrew Scott (eds.), *The European Union and its Order: The Legal Theory of European Integration* (Oxford: Blackwell/Wiley, 2000) 1; Bert Van Roermund, 'Sovereignty: Unpopular and Popular,' in Neil Walker (eds.), *Sovereignty in Transition. Essays in European Law* (Oxford: Hart Publishing 2003) 33. But see Alison Young, 'Sovereignty: Demise, afterlife or partial resurrection?' (2011) 9(1) *I.CON* 163, arguing that it requires a shift in focus from a definition of sovereignty in terms of law-making power to an analysis of sovereignty in terms of power over constitutive rules. See Jean Cohen, *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012).

frequently observed, especially across subject disciplines.<sup>20</sup> Similarly, its tendency to raise the rule of recognition ‘finders trail’ garners it little support. The contestable and ‘*acriterial*’ nature of sovereignty is asserted as both a normative and descriptive standard, yet few accounts of sovereignty may be said to be truly preoccupied with the latter.<sup>21</sup> As a result, sovereignty remains a strikingly malleable ‘construct’, with broader appeal than its detractors suggest,<sup>22</sup> despite assertions of its demise and futility. It is argued that the meaning of sovereignty is open to change across time and space, more so than ever before.<sup>23</sup> Others depict sovereignty as a common ground where the concerns of lawyers and political scientists can meet.<sup>24</sup> The need for a conceptual framework for sovereignty to settle immediately a series of paradoxes often involving legitimacy and authority makes it no small task. The discursive nature of sovereignty can render it attractive to emergent polities, less so for ‘deeper’ integration mechanisms.

The classical ‘orthodoxy’, if one may term it that, is well-put by Loughlin, reminding us that it is a relational interface between law and politics that separates and binds both domains together.<sup>25</sup> Nonetheless his assertions that the proliferation of new international institutions does not in any way necessitate a *new* form of sovereignty, whereby it remains undisturbed by international integration is argued here to be far from compelling.<sup>26</sup> It does not engage with the enabling characteristics of postnational actors/ organisations and their participation in the global legal orders. It appears to this

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<sup>20</sup> See Beth Simmons, ‘Review Essay: Is Sovereignty still Relevant’ (2000) 94(1) *American Journal of International Law* 226, emphasising the distance between disciplines on the place of law in the global context. Similarly Cohen, *ibid*, adopts no specific definition of law in this account, despite the place of law and legality within her account. See Nick Barber, ‘The Afterlife of Parliamentary Sovereignty’ (2011) 9(1) *J.CON* 144.

<sup>21</sup> See Samantha Besson, ‘Sovereignty in Conflict’ (2004) 8(15) *European Integration Online Papers* 1. Available at SSRN: <<http://ssrn.com/abstract=594942>> accessed 20 January 2015.

<sup>22</sup> On its evolution, see Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995) 88; Quentin Skinner, ‘The Sovereign State: a Genealogy’ in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010). On constructivism, see Hans Lindahl, ‘Sovereignty and Symbolization’ (1997) 28 *Rechtstheorie* 347.

<sup>23</sup> See Jens Bartelson, ‘The Concept of Sovereignty Revisited’ (2006) 17 *European Journal of International Law* 463.

<sup>24</sup> *Ibid*.

<sup>25</sup> Martin Loughlin, ‘Ten Tenets of Sovereignty’ in Neil Walker (eds.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 55. See Hans Lindahl, to the effect that it elaborates the contingent unity of a political community. See also Hans Lindahl, ‘Why Sovereignty?’ in Richard Rawlings, Peter Leyland & Alison Young (eds.), *Sovereignty and Law: Domestic, Regional & Global Perspectives* (Oxford: Oxford University Press, 2013).

<sup>26</sup> Because it is a foundational concept of the discipline of public law, see Loughlin, *ibid* 56.

author more compelling to argue as Keating does, that although sovereignty may be ebbing away, new sovereignty claims are being made all the time.<sup>27</sup> For example, in the context of the EU, while there may be no single European demos, he proposes instead 'plurinational democracy', to locate democracy *inter alia* in communities of will.<sup>28</sup> The openness of such a construction and its realist acceptance of the complex dual role of the EU alongside its Member States is worth reflecting on. The sovereign State is self-evidently unlikely to remain the only locus of political authority and community in the future but at the same time it remains a very potent, even tricky, source of authority and community.<sup>29</sup> Nonetheless, there is one particularly valuable feature of sovereignty and that is its ability to form a lexicon *for* the transition of the world of sovereign states to a world where sovereignty has been relocated in many different levels, above and beyond the Nation State.<sup>30</sup>

Bellamy's assertion of sovereignty and post-sovereignty as two sides of the one coin are argued to be particularly problematic in so far as he states that post-sovereignty views other forms of sovereignty as a threat to rights. As he states, the EU certainly reflects the positive and negative aspects of the passage from sovereign to post-sovereign (promotion of liberal democracy versus the race to the bottom and/ or legitimacy challenges), as much as an awkward space between them, for example, the limited integration of the EU's AFSJ. However, others contend with some force that the difficulty with post-sovereignty is its blindness to the epistemic as much as the normative role of sovereignty, irrespective of what it is attached to.<sup>31</sup> Rather, Besson has claimed, post-sovereignty fails to engage with the countless later claims to *finalité* that will arise. Yet there is something rather unpalatable about an assertion, as Besson makes, as to the 'correct' use of sovereignty, given the highly constructivist nature of sovereignty and its acknowledged contestability. It is constantly the

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<sup>27</sup> Michael Keating, 'Sovereignty and Plurinational Democracy. Problems in political science' in Neil Walker (eds.), *Sovereignty in Transition* (Oxford: Hart Publishing 2003) 191.

<sup>28</sup> Keating *ibid*, 208.

<sup>29</sup> See Stephen D Krasner, *Sovereignty. Organised Hypocrisy* (Princeton: Princeton University Press, 1999); Wouter Werner and Jaap H de Wilde, 'The Endurance of Sovereignty' (2001) 7 *European Journal of International Relations* 283.

<sup>30</sup> Neil Walker, 'The Cosmopolitan Local: Neil Mac Cormick's Post Sovereign World' in John Eric Fossum and Agustin Jose Mendez (eds.), *The Post-Sovereign Constellation* (Springer, 2011).

<sup>31</sup> See Samantha Besson, 'Sovereignty in Conflict' (2004) 8(15) *European Integration Online Papers* 1. Available at SSRN: <<http://ssrn.com/abstract=594942>> accessed 20 January 2015, 18.

subject and object of aggressive reinterpretation arising from globalisation, new claims to territoriality and the EU itself. Contrariwise, theorisations of its essential features by Besson by means of 'cooperative sovereignty' suggest that its dynamism and reflexive-ness undermine her efforts to dichotomise the correct and even 'incorrect' use of sovereignty. Yet it is equally unsatisfactory or inadequate to settle on flexibility or malleability alone as the gold standard. These latter developments suggest distinct new challenges for sovereignty, for understanding for example, new layers of autonomous action.

The compartmentalised debates on the force of the Nation State or new manifestations of sovereignty remain an enduring feature of this analysis. This leads to a more specific discussion on the place of the EU therein and its starting points and premises.

## ii. Sovereignty and EU exceptionalism

EU scholarship on sovereignty begins from the premise of its exceptionalism as a construct. In the worlds of the greatest critics of claims of EU exceptionalism in discussions of sovereignty, the EU is inconsistent and contradictory as an entity- and not necessarily a straightforward model for an organisational representation of sovereignty.<sup>32</sup> There is a dominance of *tripartite* formulations of sovereignty in EU law scholarship itself.<sup>33</sup> For example, Chalmers suggests that sovereignty has been cast in three ways in the EU legal order. The first sees sovereignty as a series of activities which go to making up a domestic human order which transcends and constrains government, protected from EU law as it is a governmental order.<sup>34</sup> The second views sovereignty as something that ordains EU law

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<sup>32</sup> See the transcript of the interview with Krasner 'Sovereignty: an interview', available at <<http://globetrotter.berkeley.edu/people3/Krasner/krasner-con3.html>> accessed 20 January 2015.

<sup>33</sup> See Jean Cohen, *Sovereignty and Globalization: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press, 2012), emphasising dualistic sovereignty as an optimum descriptor of contemporary global governance- i.e. the importance of the Nation State, without developing the relevance of law therein.

<sup>34</sup> Damian Chalmers, European Restatements of Sovereignty LSE Law, Society and Economy Working Papers 10/2013.

and grants it authority and retains the prerogative to patrol the democratic quality of EU law.<sup>35</sup> The third argues that if EU government involves these bodies as most capable of expressing the will of this sovereign human order in its decision-making, it can enjoy sovereignty.<sup>36</sup> However, overall, he argues that the ‘genius and folly of EU debates on sovereignty lie in their fluidity’. Yet there is a tremendous gap concerning how cultural, geographic and geopolitical considerations come into play more broadly in non-European analyses of sovereignty.<sup>37</sup> In a similar methodology, Besson outlines the three main camps within EU sovereign-ists to be the national intergovernmentalists, the European supra-nationalists, both advocating unitary accounts of sovereignty and then the post-sovereign-ists.<sup>38</sup> Such tripartite models used to explain and understand sovereignty demonstrate its flexible lexicon, its multi-faceted dimension and its constructability. Sovereignty theorisations remain awkwardly wedded to taxonomies of their content, usually tripartite ones, as if to reinforce its inherent intractability. Such tripartite analytical lens engage little with its exceptionalism despite operating from the assumptions thereof- and instead treat it as *sui generis*.

Much scholarship on sovereignty and the EU has been developed prior to more recent invocations in the EU treaties to evolve as a postnational democracy. For example, for Krasner, the EU remains solely a product of sovereign States and as a *sui generis* organisation, he argues that it is not capable of replication or imitation. He appears fixed to the idea that the EU Member States have *effective* democratic sovereignty but not Westphalian sovereignty. For him, withdrawal of member States from the EU is a not viable option nor is a truly federalised United States of Europe- but this analysis begs the question as to its application to contemporary developments in the EU legal order.<sup>39</sup> These

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<sup>35</sup> Damian Chalmers, European Restatements of Sovereignty LSE Law, Society and Economy Working Papers 10/2013, 3, citing Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995) 88 and Benno Teschke, ‘Geopolitical Relations in the European Middle Ages: History and Theory’ (1998) 52 *International Organisation* 325, 350-355.

<sup>36</sup> Ibid.

<sup>37</sup> See Antony Anghie, ‘Rethinking sovereignty in international law’ (2009) 5 *Annual Review of Law and Society* 291; Michael Byes and Adriana Sinclair, ‘When US scholars speak of sovereignty, what do they mean?’ *TransState Working Papers* 597 No 44, 1. See the historical account of Brendan Simms, *Europe: The Struggle for Supremacy, from 1453 to the Present* (Lane, 2013).

<sup>38</sup> See Samantha Besson, ‘Sovereignty in Conflict’ (2004) 8(15) *European Integration Online Papers* 1.

<sup>39</sup> Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Stanford University Press, 1999).

innovations include withdrawal from the Union, a (postnational) democratic life of the Union, the development of formal legal coherence of EU action in the world by creating specific external representation in the form of the ('actively' named) European External Action Service, separate legal personality,<sup>40</sup> and the 'conventionalisation' of the most sensitive field traditionally guarded jealously by the Member States, the EU's AFSJ. It also precedes a vast range of legislative efforts to manipulate legal constructs so as to save the Eurozone through international agreements by the Member States, *outside* of the EU treaties and *outside* of EU accountability and legitimation structures.<sup>41</sup> These developments demonstrate the weakness of postnational democracy as an ideal and its incompleteness, especially in the face of crisis.

### iii. The EU's late sovereignty: the development of post sovereignty

Walker's formula of *late sovereignty* as a development of postnational sovereignty merits further attention here. As Walker states, late sovereignty is still sovereignty. 'Late Sovereignty', in his own words was 'by way of a retreat' from the assumptions of 'post-sovereignty'- which he explains as taking effect 'without returning to the oxymoron's of disaggregation or the myopia of the *unitary* approach'.<sup>42</sup> It conceives of sovereignty in terms of a plurality of unities and in terms of the emergent possibilities of the relationships amongst this plurality of unity. For Walker, 'late

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<sup>40</sup> See of many, Ramses Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5 *European Foreign Affairs Review* 507; Rafael Leal-Arcas, 'EU Legal Personality in Foreign Policy?' (2006) 24 (2) *Boston University International Law Journal* 165; Matthias Ruffert, 'Personality under EU Law: A Conceptual Answer towards the Pluralisation of the EU' (2014) 20 *European Law Journal* 346.

<sup>41</sup> See Bruno De Witte, 'Using International Law in the Euro Crisis Causes and Consequences' *ARENA Working Paper* No 4, June 2013; Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34(5) *Fordham International Law Journal*; Bruno De Witte and Thomas Beukers, 'Case C-370/12, Thomas Pringle v Government of Ireland, Ireland, The Attorney General, Judgment of the Court of Justice (Full Court) of 27 November 2012', (2013) 50(3) *Common Market Law Review*; See Elaine Fahey and Samo Bardutzky, 'Judicial Review of Eurozone law: the Adjudication of postnational norms in the EU courts, plural. A Casestudy of the European Stability Mechanism' (2013) 34 *Michigan Journal of International Law Online* <<http://mijonline.org/?p=694>> accessed 20 January 2015.

<sup>42</sup> Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing 2003) 1; See also Neil Walker, 'Sovereignty Frames and Sovereignty Claims' Edinburgh School of Law Research Paper No 2013/14. Available at SSRN: <<http://ssrn.com/abstract=2240941>> accessed 20 January 2015, in Richard Rawlings, Peter Leyland and Alison Young (eds.), *Sovereignty in Question* (Oxford: Oxford University Press, forthcoming).

sovereignty' is characterised with an atypical typology, which includes *fundamental continuity over discontinuity, a distinctive phase in the career of the term, irreversibility, no way back to early sovereignty and transformative potential*. He maintains that it is distinctive in that the claim to authority flowing from it is no longer combined with the notion that it need be monopolistic, within the territorial boundaries of the polity. The advantage of 'late sovereignty' is that it explicitly captures new and supplementary tiers of transnationally connected legal and political authority. More significantly, is his acceptance of the possibility to conceive of autonomy without territorial exclusivity. Arguably the most problematic criterion thereof is the 'no way back' element, now defunct after the possibility of withdrawal from the Union being provided for in the Treaties.<sup>43</sup> Walker's defence of the precariousness of late sovereignty encompasses conflict and boundary maintenance, diffusion of sovereign power and reflexivity and suggests a high degree of conceptual elasticity.<sup>44</sup> For Walker, however, late sovereignty ultimately permits an organisation to flourish in a broad range of contexts. It offers a wide variety of mechanisms to understand participation in the global legal order.

The present account would readily subscribe to later accounts of MacCormick, particularly on the nature of a kind of compendious legal external sovereignty exercised towards the rest of the world, written before innovations in the EU treaties on legal personality. They nonetheless appear to have featured significantly (implicitly) in his work in terms of their possible legal and political impact.<sup>45</sup> The essence of the attractiveness of the formulation of MacCormick was that sovereignty had never been lost in the process of European integration. Politically, it had enhanced the action of its members collectively and perhaps even individually, in his assessment. Rather the process of division and combination had taken us beyond the sovereign state, albeit well beyond it.

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<sup>43</sup> Article 50, which was in force at the time of Walker's piece.

<sup>44</sup> Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing 2003) 1, 23; See Neil Walker, 'Surface and Depth: The EU's Resilient Sovereignty Question' in Jurgen Neyer and Antje Wiener (eds.), *Political Theory Of The European Union* (Oxford: Oxford University Press, 2010).

<sup>45</sup> Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 133.

It is argued here that those who contend that new and evolving international institutions do not necessitate a new conceptualisation of sovereignty, such as Loughlin, are unduly myopic to the challenge of postnational rule-making.<sup>46</sup> Such a premise has been developed on the basis that sovereignty is the representation of autonomy of the political and provides the foundational concept for public law. Yet this same premise seems to fail to explicitly acknowledge changes in the nature of international organisations and the empirical rise of postnational rule-making.<sup>47</sup> It is worth noting that for all of the provocation of critics of the EU specifically such as Krasner, they must be remarked to have a particularly limited perspective on the EU and not a particularly contemporary one. The nature of EU regulatory powers and their use, increasingly beyond their boundaries in law, practice and competence shows its limits. Nonetheless, its use thereof for the betterment of its subjects is significant in the context of its place as an aspirant postnational democracy. Similarly, the efforts of the EU to gain specific new statuses in international organisations is of significance. It is vivid evidence of active and participatory practice in the global legal order, even if esoteric.<sup>48</sup>

### III. The EU's participation towards the global legal order

#### i. Postnational rule-making with a goal of the 'good life'

The diffusion of higher standards, practices and the offer of the 'good life'<sup>49</sup> and well-being for its peoples maybe said to represent the broadest premise of the EU as a new international organisation

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<sup>46</sup> Martin Loughlin, 'Ten Tenets of Sovereignty' in Neil Walker (eds.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 55.

<sup>47</sup> Michael Zürn, 'The politicization of world politics and its effects: Eight propositions' (2012) 6 (1) *European Political Science Review* 47; Gary Marks and Liesbet Hooghe, 'Delegation and Pooling in International Organizations, with Gary Marks' (2014) *Review of International Organizations*, forthcoming.

<sup>48</sup> Jan Wouters, Jed Odermatt and Thomas Ramopoulos, 'The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities' KU Leuven Working Paper No 121 – September 2013, <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp121-130/wp121-ramopoulos-odermatt-wouters-1.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp121-ramopoulos-odermatt-wouters-1.pdf)> accessed 20 January 2015.

<sup>49</sup> On what is the good life, this account does not purport to advocate the classical political theory interpretation thereof, and instead implies the benefits of EU integration as conceived in the EU treaties, for example in the Preambles to the TFEU and TEU in particular, beyond the goal of the 'ever closer union'.



and postnational democracy, albeit it is not the only premise of a postnational democracy.<sup>50</sup> The same can be said for many places, countries and bodies or regimes predicated upon similar ideals yet which what might be said to fall short of a liberal democracy.<sup>51</sup> More specifically, a central difficulty associated with the development of the EU's AFSJ, its most sensitive and evolving field but also the most closely associated with the Nation State in terms of offering justice, peace, security and overall well-being, is that it has evolved with considerably less coherence than desirable in its efforts to deepen cooperation, substantively and procedurally (e.g., procedural before the substantive, variable geometry, human rights instruments with specific or limited effects). It has occurred in a manner which does not offer its citizens the benefits of a 'good life' overall. The AFSJ has become so contested that its status as a policy field or mode of governance remains a contentious one.<sup>52</sup> There are also many who protest as to its justice deficit but it is never stated to the effect that the 'good life' is jeopardised.<sup>53</sup>

The development of the AFSJ is a vivid reminder of the limitations of aspirations beyond the Nation State. Also constructions of the good life are too easily premised on the malleable boundaries of EU law. The rule-making toolkit of the EU to act as an innovative organisation are incredibly limited. Moreover, the construction of competence where it straddles classical internal market law and the AFSJ demonstrates how the EU has yet to carve out a sophisticated rule-making toolkit.

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<sup>50</sup> See Colin Crouch, *Post-democracy* (Polity Press, 2004); Jürgen Habermas, *The Postnational Constellation: Political Essays* (1<sup>st</sup> ed. MIT Press 2001); Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2012) who both focus upon citizen participation and the attainability of some form of meaningful representative democracy over the good life at postnational level.

<sup>51</sup> On Singapore, see 'Singapore is taking the first steps to true democracy' *The Guardian* (10 May 2011) <<http://www.theguardian.com/commentisfree/2011/may/10/singapore-election-democracy-new-media>> accessed 20 January 2015; 'Is Culture Destiny? The Myth of Asia's Anti-Democratic Values' *Foreign Affairs* (November/ December 1994), <<http://www.foreignaffairs.com/articles/50557/kim-dae-jung/is-culture-destiny-the-myth-of-asias-anti-democratic-values>> accessed 20 January 2015.

<sup>52</sup> Helena Carrapico and Florian Trauner (eds.), 'The External Dimension of EU Justice and Home Affairs: Post-Lisbon Governance Dynamics' (2012) 17(2) *European Foreign Affairs Review* 1.

<sup>53</sup> See Dimitry Kochenov, Grainne de Búrca and Andrew Williams, *Europe's Justice Deficit?* (Oxford: Hart Publishing 2014).

## ii. Participation within the global legal order as a social practice

Sovereignty is an inherently *social* concept in that it entails the recognition by other similar entities that an entity is also 'one of them'.<sup>54</sup> It thus implies a social relationship of formal equality.<sup>55</sup> Participation in the global legal order is a multi-faceted construct but is argued here to be rooted in an understanding the EU as an actor, i.e. what it is and what it does. This implies social recognition and understanding qua sovereign. Some such as Cohen have sought to refine the global legal order as an evolving political construct in terms of political participation, within a highly specific formulation of political rights as part of a constitutionalised version of the international system.<sup>56</sup> And such a thesis of constitutionality presupposes a particular view and definition of 'law' in that context. There is a hypothetical yet highly 'active' content to the measurement of sovereignty as regards the EU. Some measure the loss of sovereignty in 'real' versus 'formal' terms of active participation in the global arena and this account draws from this as a point of reflection.<sup>57</sup>

One such arena for analysis is Union participation in international organisations as a social practice, generating recognition, perception and acceptance. *Internal* legal order issues mostly dominate the question of Union participation in, for example, international organisations. The EU treaties provide permissively for participation in Article 218 TFEU, for UN participation in Article 220 TFEU and permissive third country and international organisation representation in Article 221 TFEU. The EU treaties are considerably more detailed as regards treaty negotiation and conclusion than as regards actual participation in international organisations. The EU treaties may be argued to have provided for an incomplete or open-ended legal construction of *active* participation in international

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<sup>54</sup> David Lake, 'The New Sovereignty in International Relations' (2003) 5 (3) *International Studies Review* 303.

<sup>55</sup> See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Macmillan 1977/ Columbia University Press, 2002).

<sup>56</sup> Jean Cohen, *Sovereignty and Globalization: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press, 2012). See Grainne De Búrca, Review, *Global Law Books* <<http://www.globallawbooks.org/reviews/detail.asp?id=776>> accessed 20 January 2015; Friedrich Kratochwil, Review of 'Sovereignty and Globalization: Rethinking Legality, Legitimacy and Constitutionalism' (2014) 27 *Leiden Journal of International Law* 297.

<sup>57</sup> Alan Hervé, 'The Participation of the European Union in Global Economic Governance Fora' (2012) 18 *European Law Journal* 143.

organisations.<sup>58</sup> It is worth reflecting on the value that scholarship places on the EU treaties construction thereof. Legal scholarship appears to place a high premium on the ability of the EU to participate externally. It varies from being 'imperfect' or having 'persistent shortcomings' to being open, flexible and permissive.<sup>59</sup> The EU treaties maintain in fact a silence concerning the active social practices and conventions such as the right to participate or even to become a member of international organisations, not concerning itself with social activities such as discussion, cooperation or negotiation. Representation in international organisations between the institutions is often a source of conflict and may be governed by pragmatism, something which international relations scholars focus upon in greatest detail.<sup>60</sup> While, for example, the Commission's role as negotiator has been endorsed in the treaties in Article 17 (1) TEU, there are clear exceptions for common foreign and security policy. Instead, what is referred to as a bicephal arrangement<sup>61</sup> including the presence of Member States, the presidency of the EU and Commission has prevailed in the OECD, the United Nations Conference on Trade and Development and the Socio-Economic Council of the United Nations. This can create external and internal problems- external, for third parties and internal, as between the rotating presidency and the Member States, who (i.e. the latter) are compelled by this arrangement to listen and defer, i.e. remain silent.<sup>62</sup> Here, the principle of sincere cooperation does not suffice and case law alone maybe insufficient to govern institutional inertia or turf-battles. Yet ambiguity in social and active practices is long tolerated as part of EU external relations law.

A balanced and effective external representation may afford broad benefits to the EU. But it may be at the expense of circumscribing the actions of the institutions in external relations, often the Commission. As a result, some consider the distinction between a formal loss of sovereignty (for the

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<sup>58</sup> See Alan Hervé, 'The Participation of the European Union in Global Economic Governance Fora' (2012) 18 *European Law Journal* 143161.

<sup>59</sup> See Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford: Oxford University Press, 2011) 220.

<sup>60</sup> See Alan Hervé, 'The Participation of the European Union in Global Economic Governance Fora' (2012) 18 *European Law Journal* 143; Compare Sophie Meunier and Eugenia da Conceicao-Heldt, (2014) 21 (7) *Journal of European Public Policy* 961; Edith Drieskens and Louise G van Schaik (eds.), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Abingdon: Routledge, 2011).

<sup>61</sup> Derived from the Greek, meaning 'two-headedness'.

<sup>62</sup> Mary Farrell, 'EU Representation and Coordination at the United Nations' in Katie Verlin Laatiainen and Karen E Smith (eds.), *The European Union at the United Nations* (Basingstoke: Palgrave, 2006).

Member States) and a gain in terms of real sovereignty (for the EU Member States) as a dichotomy.<sup>63</sup> Yet it is a complex dichotomy to accept. Some posit a gain for the EU in the context of understanding how the EU can reform global governance.<sup>64</sup> There are manifold assumptions, explicit and implicit, in such a thesis concerning the nature of actual and potential global influence through sovereignty. And examples from one context (e.g. the specificity of international economic law) may not be so easily transposed to another. Nevertheless, the *enabling* character of sovereignty at the postnational level arguably remains insufficiently studied. States can clearly enter, for example, international agreements or can set up new organisations or institutions, so long as it is without force. This 'characteristic' and practice is more commonplace outside of a domestic order with a single hierarchy of authority. Nonetheless, the 'enabling' component appears key to the understanding of the formal loss and/ or gain of sovereignty. This question of enablement is an active one which requires considerable room for manoeuvre and the paper thus returns to consider this further detail. It reflects next on the formulation of the space for and of EU rules and the impact of EU rules externally.

### iii. The Physical and Metaphysical Space of EU Rules and the 'Global Approach' to Rule-Making

There are specific assumptions made in contemporary scholarship worth reflecting upon on the physical or territorial space of EU 'external' rule-making, outside of the EU, *vis a vis* international law. It raises the question as to how it should impact on our understanding of EU rule-making and the EU's participation in the international legal order. Some offer reasons to explain the success of and reasons for the use of EU law *instead of* International law, including path dependence, geography,

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<sup>63</sup> Alan Hervé, 'The Participation of the European Union in Global Economic Governance Fora' (2012) 18 *European Law Journal* 143, 161.

<sup>64</sup> *Ibid.*

ease of decision-making and the effectiveness of the EU.<sup>65</sup> In this analysis, there is a normative assumption as to a physical gap between EU and International law as a regulatory choice in rule-making. It presupposes that they are distinct rule-making processes and distinct forums capable of such a comparison which is not necessarily methodologically accurate.

The external *impact* of the EU's rules, i.e. in the context of the metaphysical space for EU rules, is both a normative and descriptive challenge but it is a different question to EU law in place of International law as a regulatory choice. Yet it is a question which also flows from considering the space of EU rules. Some such as Young have contended that the depiction of the EU as a global shaper of rules has been an exaggerated one of influence, especially in literature on the EU's regional capacity, drawing extensively on literature on what the EU *says* and *does* rather than what it *achieves*.<sup>66</sup> Young challenges the explicit assumption that the EU always seeks to export or upload EU regulatory solutions globally and instead pursues a more relative regulatory solution overall. However, as a proposition it requires more nuancing not least from a legal perspective.

It is increasingly common for the EU to harbour 'global governance' goals with its third country partners- for example, the aims of the EU-US Transatlantic Trade and Investment Partnership (TTIP), aiming for global standards, similar to the EU-US Cybercrime and Security negotiations, also aiming for global standards as an outcome but arguably differing somewhat from the 'global approach' to AFSJ data transfer, as depicted here. Also it may be both over-inclusive and inaccurate to depict the EU's rule-making which has implications, effects and force outside of its territory as 'global' rule-making per se, thereby formulating the rule-making in territorial terms.<sup>67</sup> Descriptions of the

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<sup>65</sup> Anne Thies and Bruno de Witte, 'Why Choose Europe? The Place of the European Union in the Architecture of International Cooperation', in Steven Blockmans, Bart van Vooren, and Jan Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2012) 23.

<sup>66</sup> Alasdair Young, 'Perspectives on the changing global distribution of power: concepts and context' (2010) 30 (1) *Politics* [2](#); See Alasdair Young and John Peterson, *Parochial Global Europe: 21st Century Trade Politics* (Oxford: Oxford University Press, 2014).

<sup>67</sup> See Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87; Joanne Scott, 'The New EU Extra-territoriality' (2014) 51 *Common Market Law Review* 1343. See Geert De Baere and Cedric Ryngaert, 'The ECJ's Judgment in *Air Transport Association of America* and the International Legal Context of the EU's Climate Change Policy' (2013) 18 *European Foreign Affairs Review*,

(regulatory) impact of the EU often do appear to overstate its influences, possess different understandings of what is regulatory impact. It also is easy to neglect outlining instances where the EU did *not* exercise regulatory influence.<sup>68</sup> However, as a broader proposition, the space of EU rules is argued here to require more nuancing, method and study as to its components, especially in the context of the AFSJ. In short there are as many methodological as substantive challenges to such a thesis, which this text has sought to address as part of a research agenda.

This leads to the question of the construction of boundaries and transboundaries, which this paper considers in further detail.

#### iv. Transboundary control and EU law

While there has been a charted empirical explosion in the late 20<sup>th</sup> Century in the number of so-called ‘transnational’ cases arising, where national laws are applied extra-territorially, to attempt to typologise categories of control as it manifests itself in ‘transboundary’ action- descriptively or normatively- is a steep challenge.<sup>69</sup> It reflects the enduring relevance of boundaries as interests for political ends. Extra-territorial laws have been argued to be a necessary impetus to spur negotiations and provide incentives to cooperate internationally.<sup>70</sup>

In this regard, territoriality and extra-territoriality are and seem likely to remain legal constructs defined traditionally by claims to and resistance from authority. As Buxbaum states, the essence of such claims to authority is that particular actors usually wish to promote specific substantive

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<sup>68</sup> See R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Massachusetts: Harvard University Press 2011) (on the judicialisation of governance); R. Daniel Kelemen, ‘Globalizing EU Environmental Regulation’ (2010) 17(3) *Journal of European Public Policy* 335; Anu Bradford, ‘The Brussels Effect’ (2012-2013) 107 *Northwestern University Law Review* 1; Scott (note 61).

<sup>69</sup> Rodney Falvey and Peter J Lloyd, ‘An Economic Analysis of Extraterritoriality’ Working Papers Series 675 (1999), Department of Economics, The University of Melbourne.

<sup>70</sup> See Austen L Parrish, ‘Reclaiming International Law from Extraterritoriality’ (2009) 93 *Minnesota Law Review* 815; See Jennifer Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’ (2010) Harvard Corporate Social Responsibility Initiative Working Paper No 59 available at <[http://www.hks.harvard.edu/mrcbg/CSRI/publications/workingpaper\\_59\\_zerk.pdf](http://www.hks.harvard.edu/mrcbg/CSRI/publications/workingpaper_59_zerk.pdf)> accessed 20 January 2015.

interests.<sup>71</sup> As a result, practical, but mainly political questions inevitably dominate these constructs. As Lindahl has argued persuasively, no legal order is in reality thinkable absent boundaries in space, time, subjectivity and content, even if are various forms of 'alegality'.<sup>72</sup> This is because legal boundaries join and separate within the unity of a legal order.<sup>73</sup> This does not necessarily meet the challenge of the postnational level where one witnesses a specific reconfiguration of directions of authority.

The phenomenon of the EU leveraging its rule-making outside of its territory has been depicted variously as 'territory extension' or 'counter-territoriality'.<sup>74</sup> Yet the traditional 'triumvirate' of sovereignty, territory and jurisdiction conventionally used to theorise borders of laws is arguably of little use in the conceptualization of much contemporary conduct of the EU.<sup>75</sup> Instead, the globalised world of trans-boundary conduct and overlapping jurisdiction suggests that these three elements merge more frequently.<sup>76</sup> That EU law should similarly reflect this is not surprising. Moreover, the conduct of the EU externally as a legal actor is not necessarily unitary and instead its actors remain non-unitary. Thus, to assert that the EU acts unilaterally so as to expand its territory has been argued here not to grasp the structural indirectness of the EU's rule-transfer. This point is neatly demonstrated by recalling Scott's argument as to 'Territorial extension' of EU law,<sup>77</sup> who proposes 'territory extension' as a (positive) phenomenon of EU rule-making beyond its territory, without necessarily addressing the authority or legitimacy of this endeavour of postnational rule-making. One

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<sup>71</sup> Hannah Buxbaum, 'Territory, Territoriality and the Resolution of Jurisdictional Conflict' (2009) 57 *American Journal of Comparative Law* 631.

<sup>72</sup> Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013).

<sup>73</sup> Nonetheless, the specific argument of 'alegality' remains a particularly obscure and difficult one to apply or even to transpose or apply to the EU context.

<sup>74</sup> See Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87; Joanne Scott, 'The New EU Extra-territoriality' (2014) 51 *Common Market Law Review* 1343.

<sup>75</sup> Paul Schiff Berman, 'The New Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science* 225; Buxbaum (note 70).

<sup>76</sup> Antony Anghie, 'Rethinking sovereignty in international law' (2009) 5 *Annual Review of Law and Society* 291.

<sup>77</sup> See Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87; Joanne Scott, 'The New EU Extra-territoriality' (2014) 51 *Common Market Law Review* 1343.

may note how few legal theorisations of the EU develop extra-territoriality or territorial extension from the premise of broader theorisations of conduct and necessity, for example, cosmopolitanism, so as to justify moral, ethnic or other legal duties outside of its territory.<sup>78</sup> From the perspective of sovereignty, there is something unsatisfactory about constructing territorial extension alone as a (quasi)normative standard, if it is that at all, because of the failure to engage with the blurring of sovereignty, authority and territory therein.

#### IV. Concluding Reflections: On manifestations of sovereignty

This paper has sought to place of sovereignty in the context of postnational rule-making and to consider the exceptionalism of EU sovereignty. Postnationalism is more accurately a broader methodology to study shifts in norms, actors and processes and fits well with the task of unpacking the global reach and effects of EU law. It has been argued here that those who argue that new and evolving international institutions do not necessitate a new conceptualisation of sovereignty are unduly myopic to the challenge of postnational rule-making. EU scholarship on sovereignty begins from the premise of its exceptionalism. However, much scholarship on sovereignty and the EU has been developed prior to more recent invocations in the EU treaties to evolve as a postnational democracy.

Sovereignty as an inherently *social* concept entails the recognition by other similar entities that an entity is also ‘one of them’. This implies social recognition and understanding of actors. Participation by the EU in the global legal order is a multi-faceted construct but is argued here to be rooted in an understanding the EU as an actor, i.e. what it is and what it does. Legal scholarship appears to place

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<sup>78</sup> Compare Noah Feldman, ‘Cosmopolitan Law’ (2007) 116 *Yale Law Journal* 1022 on the normative form of cosmopolitanism in extra-territoriality.



a high premium on the *ability* of the EU to participate externally as an actor, seamlessly, coherently and with consistency. Accordingly, as has been argued here, the *enabling* character of sovereignty at the postnational level appears insufficiently studied.