Unidentified Legal Object: Conceptualising the European Union in International Law

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I. Introduction: What is the European Union?

What is the European Union? This seemingly simple question gives rise to a multitude of different answers from EU lawyers, international lawyers, political scientists, and the media. 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…"[1] What the 'real nature' of the EU is, however, remains a mystery. As is often the case with these questions, the answer still depends on whom you ask.[2] In an article on the topic of 'European Exceptionalism', it was noted "[t]he debate over whether the EU is a state, federation, international organization or flying saucer is as old as European integration itself."[3] The answer to the question 'what kind of legal entity is the EU?' still eludes us.[4]

Do such arguments and debates matter from a legal standpoint? One might argue that these are purely academic questions. To the European

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

2 '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. 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."

3 T. Isiksel 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 *European Journal of International Law* 565, 571.

4 For a discussion on the perception of the EU focusing on dispute settlement bodies, see C. Binder and J.A. Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' 8 *European Yearbook of International Economic Law* (2017) 139–200.

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Commission lawyer working on food safety standards, or the Legal Associate in London working on competition law, the question of what kind of legal entity the EU is not really significant. This article makes the case that legal categories do matter. In many cases, such characterizations are the 'starting points' in legal debates, which then shape legal outcomes. As the EU seeks to play a greater role in the international legal order, and one of the Member States has left the EU, the Union, its Member States, and third states will be faced with legal questions that touch upon the EU's legal nature. Developing a single theory of EU legal character will assist in providing legal certainty as new questions and problems arise.

The article sets out four main ways in which EU has been conceptualized in the international law and EU law literature. The article is structured according to these four models: (i) the EU as a 'new legal order'; (ii) the EU as a 'self-contained regime' in international law; (iii) the EU as a 'Regional Economic Integration Organization' (REIO); and (iv) the EU as a 'Classic intergovernmental organization' (Classic IO). These four models appear in the table below.

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 first view reflects the EU's own self-perception, that of the EU as a 'new legal order' or even a 'sui generis' entity. The second model is that of a 'self-contained regime' in international law, a legal system that remains a part of the international legal order but has for the most part developed specialized internal rules. The third model views the EU international organization, albeit one with special unique features, commonly described as a regional economic integration organization ('REIO'). The fourth model views the EU as a traditional intergovernmental organization, or 'classical' IO, that is not qualitatively different from other IOs. Each of these models is explained, analyzed and debated in more detail in the following section.

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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. Debates about what kind of entity the EU is often revolve around this question of uniqueness. The 'New Legal Order' model and the 'REIO' model both assume that there is something special about the EU, which sets it apart from other legal entities. The 'Self-contained regime' model and 'Classic IO' model both 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 from the perspective of the internal legal order of the EU, or from 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 (internal sphere). The 'REIO' and 'Classic IO' model focus on the EU's relationship with the wider world of international law (external sphere).

These four models are not mutually exclusive. In practice, one's conception of the EU may combine elements of these models or lie in between categories. Nor does the table seek to answer the vexed question of what type of legal entity the EU is. Rather, the four models highlight the different conceptions of the EU that we find in the legal literature, case law, and international legal practice. The four models are ideal types; few would subscribe fully to any of these models. While the CJEU and many EU lawyers gravitate towards the 'new legal order' model, their views are much more nuanced in reality. Likewise, even international lawyers who subscribe to the 'Classic IO' model would accept that the EU possesses certain characteristics that set apart from other IOs.

The reason for highlighting these four models is to illustrate the various conceptual 'starting points' that lawyers take when addressing legal questions dealing with the EU's place in international law. The article demonstrates how the legal outcome in different scenarios have been shaped by the assumptions associated with each of these models. In order to illustrate this, I rely on a number of examples from recent legal practice where the legal character of the EU played a role in determining the legal outcome. The examples discussed in the following sections include, among others, *Opinion 2/13* regarding the EU's accession to the European Convention on Human Rights; the *Miller* litigation on the invocation of Article 50 TEU; the EU's practice before the International Law Commission, in particular

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during work on the responsibility of international organizations; and the EU's participation in international organizations and international dispute settlement mechanisms. In each of these instances, the legal outcome was shaped, at least in part, by these 'starting points' and the deeper conceptual understandings about the nature of the EU and EU law.

The different models in this article emerged from a review of international law and EU law literature. Although debates about the nature of the EU exist in international relations literature, this article restricts itself to the legal scholarship. IR 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.[5] Legal scholarship, on the other hand, appears to have more difficulty with such characterisations, since legal characterisations often lead to legal consequences.

A. Divergent Approaches

The United States of America, Botswana, Russia and Palau differ in terms of culture, language, military power, economic development, and legal systems, but we agree that they have at least one thing in common: they are all recognized as States in international law. However, there is no such consensus when it comes to the legal character of the European Union. How can it be that the EU (and its previous incarnations) has existed for over sixty years, but there is still no consensus among lawyers about how such a strange legal entity is to be identified?

One reason for the divergent views is academic specialisation. The topic is approached from different angles and academic fields. Public international lawyers, while not necessarily ignoring the European Union, often fail to engage in serious discussion about the EU's place within the international legal order. The EU and EU law is therefore often viewed as a separate, specialised field of study, and international lawyers are often reluctant to enter this terrain. Another reason is complexity. The EU, viewed by some as a complicated byzantine structure, is considered too complex and too specialised to be discussed seriously without in-depth knowledge of the EU and its institutions. This can also be explained in part by the 'managerial approach' to international law, which renders international

5 For an overview of this discussion, see W. Phelan, 'What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self-Contained Regime' 14 *International Studies Review* (2012) 367–385.

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law scholarship increasingly compartmentalised.[6] The study of the EU has for a long time been its own field of specialization, its own special box, one which many international lawyers are reluctant to open. The literature on the EU's place in the international legal order is then highly influenced by the intellectual community with which an author identifies. Simma and Pulkowski observe 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."[7] A particular analysis may be shaped depending on whether one identifies as an EU or public international law expert.[8]

The EU lawyer may see herself as part of a wider community that seeks to uphold and promote the European project, and therefore more willing to accept that the Union is somehow special or unique. In a similar way, many who view themselves as part of the community of international law cling to the notion of international law as a universally applicable system of rules. The idea that the EU is a 'new legal order' implicitly challenges this idea of universality and adds to anxiety over the fragmentation of international law.[9]

From the EU law side, there is also a similar lack of engagement with the EU's role in the international legal order. Much of the literature examining the EU's place in international law falls into the category of 'EU external relations law'.[10] Such literature engages with legal issues arising

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6 M. Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies* 1.

7 B. Simma and 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) 139, 148.

8 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, 270.

9 See M Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 533. 'Fragmentation of International Law', *supra* note 79, para. 219. "[o]ne phenomenon that does contribute to fragmentation is the way the Union as an international actor is present in a number of different roles on the international scene."

10 "The existing EU literature is mostly devoted to the study of the EU's internal legal framework. As a result, analysis of the EU's place in the international legal arena tends more often than not to be limited to the rules governing the EU's external relations." Book Review, 'Kronenberger, Vincent (ed). The European Union and the International Legal Order: Discord or Harmony? The Hague: T.M.C. Asser Press. 2001' (2003) 14 *European Journal of International Law* 1051.

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from the EU's participation in the international legal order, focusing on internal questions regarding issues like the EU's competence to conclude international agreements or to be represented in international institutions. Literature in this field remains inward-looking, debating legal issues facing the Member States and the institutions, but lacks self-reflection on the EU's place within the wider international legal order.

The effect of such academic specialisation and compartmentalization is that EU lawyers and international lawyers talk past one another. EU lawyers, for their part, tend to have a relatively well-developed and consistent idea of what the EU is. This 'self-perception' is discussed in more detail in Part II.A below. International law scholarship, on the other hand, has far more difficulty conceptualising the EU. Part of this lies with the state-centric approach that still pervades international law. Schütze explains how international law's assumptions that it is built on the sovereign state obscure the way it approaches 'compound subjects' such as the EU.[11]

The study of the EU from an international law perspective suffers from a broader challenge, that is, the inability to fully understand entities that do not neatly fit with existing categories such as 'state' or 'international organization'. The last three models discussed in the following section demonstrate how international lawyers disagree on a number of key points. Does the EU remains a creature of international law at all, or has it developed into something else? Which rules of public international law are to be applied to this kind of entity, and to what extent (if at all) should they be modified or adapted to take into account the EU's special status? Is the EU truly an autonomous actor on the international plane, separate from its Member States, as it often claims? Or does the EU simply represent the collective will of its members, each of which remain fully sovereign subjects of international law. Whereas the EU lawyer has a relatively robust understanding of how to conceive the EU legal order, international law scholarship diverges on these and many other points.

11 R. Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012) 217.

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II. Conceptualizing the EU in International Law: Four Models

A. The Union's Self-Perception: A 'New Legal Order'

It is now well-established that the CJEU conceives the Union as a 'new legal order', holding in *van Gend en Loos* that the EEC Treaty was "more than an agreement which merely creates mutual obligations between the contracting states".[12] The Court continues to apply the logic of the 'new legal order' in its legal reasoning. In *Opinion 2/13*, before finding that an agreement designed to allow for the EU's accession to the European Convention on Human Rights was incompatible with the EU Treaties, the CJEU recalled its mantra: "the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals."[13] The Court continues to invoke this "shibboleth"[14] in its judgments in various and sometimes surprising ways.[15]

This model of the EU as a 'new legal order' is closely linked with the EU's own self-perception and identity. It is one of the foundational myths used to construct the elements of the EU legal order.[16] Like national myths, it does not matter whether the 'new legal order' is technically or

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

13 Opinion 2/13 of 18 December 2014, EU:C:2014:2454, para. 157 (referring to *van Gend & Loos*, *supra* note 12).

14 Isiksel, 'European Exceptionalism', *supra* note 3, 571.

15 Opinion 2/13 *supra* note 13; Judgment of 28 April 2015, *Commission v. Council*, Case C-28/12, EU:C:2015:282, para. 39.

16 "[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*, Volume V, Book 2 (1997) 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 and 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 and 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.

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historically correct – rather, the account provides a useful symbolic narrative of the polity's construction and self-identity. The Court continued to put in place some of 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.[17] 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.[18] 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*"[19], a fundamental principle of the law of treaties.[20]

In this sense, it is not the unique features of the Union that set it apart from other polities, but the degree to which the Union possesses and exercises these features.[21] The Court did not use public international law as a building block of the EU legal order, but built these new concepts in contradistinction to international law. In order to do this it had to

17 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, *Research Handbook on the Law of Treaties* (Cheltenham, Edward Elgar, 2014) 3, 6.

18 E. Denza, 'The Relationship Between International Law and National Law' in M. D. Evans, *International Law,* 4th edn (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.

19 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." (at 787).

20 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.

21 "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." T.C. Hartley, *European Union Law in a Global Context: Text, Cases and Materials* (Cambridge, Cambridge University Press, 2004) xv.

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caricature international law as relatively weak and unenforceable.[22] EU law, on the other hand, could be superior to national law and capable of direct effect, since the Member States had created a 'new legal order'.

EU lawyers now largely accept the 'new legal order' narrative developed by the Court. Those who deal with EU law in day-to-day practice do not imagine themselves working with a 'creature of international law'[23] but in what resembles in most respects a national legal order. The EU may have international law origins and its constitution is formally an international legal instrument,[24] but this is largely irrelevant to lawyers in Brussels and London working on state aid and competition law. This does not mean that questions of legal character do not have legal significance. More complex questions arise when this new legal order narrative is applied, not just to the relationship between the EU and its Member States, but to understand the EU's relations with third parties.

1. The EU as sui generis

Closely tied to the 'new legal order' narrative is the description of the EU as a *sui generis* entity.[25] Stating the EU is *sui generis* tells us that it is a unique creature, but nothing whatsoever about the legal consequences that flow from this. Like 'new legal order' it is also a malleable concept, which

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22 "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.

23 T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 2 389, 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."

24 Barents argues, for instance, 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.

25 "The EU is usually considered a special, or *sui generis*, organization." B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge, Cambridge University Press, 2014) 208.

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can be used in different situations to mean different things. The idea is that the EU is so special, so different from other forms of political and legal organization that it simply does not fit in any existing category of international or constitutional law.[26] Since the EU is not a state, and does not neatly fit easily among classical international organizations, there is a tendency to attach the label *sui generis* as some kind of mid-way category.

For most international lawyers, however, the idea that the EU fits into its own legal category is inaccurate at worst or unhelpful at best.[27] It is not a helpful conceptual model, but an "unsatisfying shrug'".[28] Schütze is highly critical of the *sui generis* 'theory'.[29] The first line of argument is that the term is conceptually useless – it cannot be used to analyse or measure the Union and its evolution. Moreover, the *sui generis* theory is an entirely negative one; the label only tells us what the EU is not, but does nothing to describe what type of polity the EU is, or how international law should apply to it.[30] The second argument is that the *sui generis* label is inaccurate: "the *sui generis* 'theory' is historically unfounded. All previously existing Unions of States lay between international and national law."[31] As discussed above, many of the supposed unique features of the Union which are put forward in favour of the EU being *sui generis,* can be found in entities outside the context of the EU.

Terms like 'new legal order' and *sui generis* were adopted because international law and constitutional law were missing the vocabulary to

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26 De Witte summarizes the view of many EU lawyers: "the dominant strand in the EU law literature takes the view that the European Union, whilst not a federal state, is also no longer and international organizations, but rather an ill-defined *sui generis* legal construct."de Witte, *supra* note , 20. De Baere similarly 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.

27 Denza points out that "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.

28 Hay argues that the notion of *sui generis* "not only fails to analyze but in fact asserts that no analysis is possible or worthwhile, it is fact P. Hay, *Federalism and Supranational Organizations: Patterns for New Legal Structures* (Illinois University Press, 1966) 44.

29 Schütze, *supra* note 11, 67.

30 Barents (*supra* note 24, 45–6) argues that "[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 …".

31 Schütze, *supra* note 11, 67.

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describe an entity such as the EU. International lawyers tend to have an aversion to the *sui generis* concept, in part because it could imply that general international law should not, or cannot, apply to it. The international landscape consists of not just States but a highly heterogeneous array of complex legal structures and diverse entities. Could the WTO, with its unparalleled role in world trade and unique dispute settlement system be described as *sui generis*? Could the UN Security Council – which has no counterpart in the realm of international peace and security- also be described as *sui generis*? A completely negative definition such as *sui generis* tells us nothing about how international law should approach the subject.[32]

Some point out the distinctive features of the EU legal order, pointing to issues such as direct effect and supremacy; the position of individuals; the exercise of governmental powers by EU institutions; the role of the Court of Justice in interpreting and applying EU law; the inability of Member States to enforce EU law through traditional countermeasures;[33] and so on. The reply to this will often be that these are all features that make the EU distinctive, but cannot alter the EU's character as an international organization.[34] The fact that the EU is a well-developed or complex legal order does not mean that its character as a legal order of international law is lost.[35] The common story is that the EU was originally conceived using international law instruments, but it has since transformed into 'something else' which fits neither into the realms of international nor municipal law.[36] This 'something else' was described as *sui generis*.

International lawyers have often questioned the 'new legal order' and *sui generis* models. One reason for this is that such conceptions imply that

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32 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.

33 See J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 8 2403, 2422.

34 See T. Moorhead, European Union Law as International Law (2012) 5 *European Journal of Legal Studies* 126, arguing that "the Union legal order is essentially one of international law."

35 Ibid.

36 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, *supra* note 16, 419.

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the EU is not only a highly distinctive legal order, but also an *exceptional* one. Being unique can imply special treatment. This has given rise to discussion of so-called 'European exceptionalism',[37] a term has been given multiple meanings in the literature. Some refer to European exceptionalism as a form of double standards.[38] Isikiel, for instance, understands this exceptionalism as the Union seeking to release itself from international standards based on its "purported fidelity to principles of human rights, democracy, and the rule of law."[39] Nolte and Aust[40] and Ličková[41] view exceptionalism more in the sense of the EU justifying certain legal exceptions for itself, both in its own case law, but also in its legal relationship with third States. Both understandings of exceptionalism flow from a common idea: that the EU is not just distinctive, but special. One consequence of this is that other states and organizations "have to arrange themselves with particularities of the special status of the EU."[42] Such claims of exceptionalism can be seen in the CJEU's reasoning in *Opinion 2/13*. The following section discusses how the 'new legal order' narrative in this judgment was a starting point that shaped the ultimate legal outcome.

2. *Opinion 2/13 and the New Legal Order Narrative*

In *Opinion 2/13*, the Full Court of the CJEU decided that the Draft Accession Agreement, designed to allow the EU to join the ECHR, was inconsistent with EU law. The Court based its Opinion, in large part, on the idea of the EU as a 'new legal order':

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37 G. Nolte and H. Aust, 'European Exceptionalism?' 2 *Global Constitutionalism* (2013) 407, 416.

38 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.

39 Isikel, *supra* note 3, 566, fn 4.

40 G. Nolte and H. Aust, 'European Exceptionalism?' 2 *Global Constitutionalism* (2013) 407, 416.

41 M. Ličková, 'European Exceptionalism in International Law' (2008) 19 *European Journal of International Law* 463.

42 "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 and Aust, *supra* note 37.

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> "The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR."[43]

Here, the Court is using this new legal order narrative and the concept of autonomy to approach the question of how and under which conditions the EU can participate in an international convention.

Opinion 2/13 came as a surprise and was met with heavy criticism.[44] Not only academics but also the EU institutions and EU Member States were of the view that the Accession Agreement was compatible with the EU Treaties. One of the reasons for such a sharp divergence of views is the diverging view of the EU's legal character. Academic discussion following *Opinion 2/13* has focused on the Court's analysis of particular aspects of the Accession Agreement.. While the Court expressed its disapproval of the draft agreement through a discussion of technical details, the more fundamental disagreement was about the very nature of the EU and its legal order. One passage of the Opinion is particularly illuminating in this regard:

> The approach adopted in the [Accession Agreement] envisaged, which is *to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party*, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.[45]

The CJEU is not just critical of the Accession Agreement, but of the very 'approach adopted' by its drafters. These drafters approached the EU

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43 Opinion 2/13, *supra* note 13.

44 Some of this criticism includes: Isiksel, *supra* note 3; 'Editorial Comments' (2015) 52 *Common Market Law Review* 1–16; B. de Witte, Š. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' 40 *European Law Review* 5 (2015) 68; T. Locke, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: is it Still Possible and is it Still Desirable?' (2015) 11 *European Constitutional Law Review* 239, 243.

45 *Opinion 2/13*, *supra* note 13, para. 193. Emphasis added.

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from the perspective of an international organization. According to this approach, the EU was to be treated in the same manner as other contracting parties, unless there was a clear reason to treat the EU differently. The Accession Agreement introduced certain innovations – the co-respondent mechanism and prior involvement procedure, for example – but these were exceptions designed to protect the autonomy of the EU legal order. For the most part, the EU was to be treated as another contracting party. Such an approach was an anathema to the Court. The starting point should not have been the EU's equality, as the drafters believed, but its *exceptionalism*.

The EU's self-conception as a 'new legal order' gives rise to problems when the EU seeks to apply that model to its relationship with other States and international organizations. Why should other members of the Council of Europe accept that the EU is to be afforded special treatment due to the CJEU's understanding of the EU as an autonomous legal order? The CJEU did not demand certain tweaks or adjustments to the Accession Agreement, but called for its redesign, based on the EU's autonomy and special characteristics. No such special treatment is afforded to any other contracting states to take into account, for example, their sovereignty or constitutional idiosyncrasies. Isiksel points out how "these questions throw into high relief why characterizing the EU as a *sui generis* entity is, in addition to being analytically unsatisfactory, politically and normatively problematic."[46] The new legal order narrative makes sense only as long as it is applied in the internal sphere, to regulate the relations between the EU Member States and the institutions. Problems arise when the Court asserts its conception of autonomy – an ill-defined and malleable concept – must also apply to the EU's participation in the international legal order.

B. The EU as a 'Self-contained Regime'

The second model is the conception of the EU as a 'self-contained regime'. Like the new legal order narrative, this model 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'

46 Isiksel, *supra* note 3, 577.

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> 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.[47]

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 examples of self-contained regimes that have been put forward 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 specialised 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.[48]

The ILC's study lists 'EU law' as a candidate for a possible self-contained regime.[49] The EU has been described as "the most convincing example of a self-contained regime"[50] 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.[51] It is now clear that EU Member States may not resort to traditional inter-state countermeasures against other Member States for

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

48 'Fragmentation of International Law', *supra* note 2, para. 157.

49 Ibid., para. 129.

50 Klein, *supra* note 47; Simma and Pulkowski, *supra* note 7, 152.

51 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.

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breaches of EU law, excluding a key aspect of pubic international law from the powers of the Member States.[52] 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.[53]

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.[54] 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.[55]

International law tends to treat claims of self-containment with caution. As Special Rapporteur Arangio-Ruiz pointed out, "[g]enerally, the special-

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52 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.

53 Weiler, *supra* note 33, 2422.

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

55 See G. Conway, 'Breaches of EC Law and the International Responsibility of Member States' 13 *European Journal of International Law* 3 (2002) 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."

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ists 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…".[56] 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.[57] Another reason that the self-contained regime label may be resisted is that it is viewed as contributing 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."[58] 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."[59]

Like the new legal order and *sui generis* narratives, the 'self-contained regime' model has little explanative value, especially when understanding the EU's 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. The next section discusses how some of these tensions have appeared during the legal debates in the United Kingdom related to its withdrawal from the European Union.

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56 Quoted in Simma & Pulkowski, *supra* note 7, 148.

57 "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.

58 'Fragmentation of International Law', *supra* note 2, para. 8.

59 Klein, *supra* note 47.

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1. The Brexit Debate

The question of whether EU law is a 'self-contained regime' is not only an academic exercise, but can have legal consequences for the EU and its Member States. The question of whether EU law provides a complete system of remedies and whether a fallback to principles of public international law are appropriate has already been discussed in the context of the UK's withdrawal from the EU. Brexit will give rise to further questions about the EU's legal character.

On 29 March 2017, British Prime Minister Theresa May officially gave notice under Article 50(2) of the Treaty on European Union (TEU) of the United Kingdoms' intention to leave the European Union.[60] This notice was given only after British Parliament passed the *European Union (Notification of Withdrawal) Act (2017)*[61] earlier in the month, giving the Prime Minister the power to give formal notice to the Council of the European Union. However, the UK Government without having involved British Parliament. This gave rise to litigation the High Court of England and Wales, and eventually the UK Supreme Court, on whether the British Parliament had to be consulted before Article 50 could be triggered.

R (Miller) v Secretary of State for Exiting the European Union (*Miller* case) ostensibly did not involve issues of public international law or even EU law; it involved a UK constitutional law question about the role of Parliament and the powers of the executive. Yet, *Miller* did address these questions tangentially by focusing questions on the legal character of the Union. The EU's legal character is not only defined by the CJEU and EU institutions, it is also co-shaped through other judicial institutions at multiple levels. This includes the legal systems of the EU Member States, which are a key part of the EU legal order.[62]

The UK Government had argued that there was no constitutional requirement to involve Parliament in invoking Article 50 TEU because such a step – the withdrawal from a treaty – is customarily done via royal prerogative. As the Government argued before the High Court: "[s]uch a notification [under Article 50 TEU] would be an administrative act on the

60 Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf [hereinafter Letter to the European Council].

61 European Union (Notification of Withdrawal) Act (2017).

62 "…the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties." Opinion 1/09, EU:C:2011:123, para. 85.

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international law plane …"[63] The argument was the EU Treaties are, after all, international *treaties*, at least from the viewpoint of UK law. When withdrawing from these instruments, it was argued, the UK should follow its standard constitutional practice. Yet such a view overlooks the fact that when the UK joined the EU, the EU legal order had already transformed into something else, the constitutional foundations of a system that has in time become closely entwined with British law and confers rights upon individuals.

On January 24, 2017 the Supreme Court upheld the decision of the Divisional Court on appeal by an 8–3 majority.[64] One of the key issues influencing its decision on the issue of Article 50 TEU notification was the EU's legal character and the nature of EU law. The High Court acknowledged that "in normal circumstances"[65] the withdrawal from a treaty on behalf of the UK would be a matter for the Crown. In the case of leaving the European Union, however, this would not only produce legal effects on the international plane, but would also have the effect of modifying domestic law, including the rights enjoyed by residents in the UK.[66]

The Supreme Court also notes the *unique* nature of the EU Treaties and the way in which EU law is given effect in the UK legal order. EU law is a "dynamic, international source of law":

> The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts.[67]

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63 *R (Miller) v Secretary of State for Exiting the European Union*, 'Detailed Grounds of Resistance on Behalf of the Secretary of State', 2 September 2016, para. 5.

64 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

65 *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (Q.B.), [94] (Eng. & Wales), para. 30: "as a general rule applicable in normal circumstances, the conduct of international relations and the making and unmaking of treaties on behalf of the United Kingdom are regarded as matters for the Crown in the exercise of its prerogative powers."

66 *Miller* (UKSC), *supra* note 64, para. 69: "Although article 50 operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected."

67 *Ibid.*, para. 90.

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The Supreme Court found that EU law is a "source of UK law."[68] The European Communities Act 1972 (*ECA 1972*) is not the only Act that gives effect to international instruments; in a dualist system such as the UK legislation is required to give legal effect to international treaties. The *ECA 1972* goes much further, however, since it authorises a process by which "EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes."[69] In this way the *ECA 1972* acts as a "conduit pipe"[70] between European and British legal systems. The Court acknowledges, therefore, that it is not just the *ECA 1972* that is unique, but also the EU legal order to which it is linked. Given the nature of EU law as an independent source of law, the British Government could not, through an act of royal prerogative, 'switch off' the effects of EU law by withdrawing from the EU Treaties.

Miller shows the divergent views about the nature of the EU and the EU legal order. The Court finds that the EU Treaties are not a form of ordinary international law. This contrasts with the approach of the British Government, whose starting point was that the EU Treaties remain instruments that produce effects on the *international plane* and are not a direct source of law in the UK. The dissenting judges in *Miller* also had a different conception of the EU and EU law. Lord Reed rejects the doctrine developed in *Van Gend en Loos*, stating that it "is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty."[71] To Lord Reed, EU law is not an independent source of law, but one that remains on the international plane, and is given effect via the *ECA 1972*.[72]

This is another example of how the legal result in a case can turn on the starting point taken. In *Miller*, the legal identity of the EU played an important role.[73] In a commentary on the Article 50 process, Eeckhout and Frantziou point out:

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68 *Ibid.*, para. 60.
69 *Ibid.*
70 *Ibid.*, 65.
71 *Miller* (UKSC), *supra* note 64, Dissenting Opinion of Lord Reed, para. 182.
72 *Ibid.*, para. 17. According to Lord Reed (dissenting), the *ECA 1972* "simply creates a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be."
73 As Elliott argues, the differing views in *Miller* illustrates "fundamentally different views about the constitutional status that EU law has (and will, until Brexit, continue to have) within the UK's legal system." M. Elliot, *Analysis: The Supreme Court's Judgment in Miller*, Public Law for Everyone, 25 January, 2017. <https://pu

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> Article 50 raises important constitutional concerns not only for the withdrawing state – an issue that thrives in the UK blogosphere – but also from the perspective of the EU and its identity as a new legal order that creates rights and duties and safeguards them through accountable institutions, rather than being merely an international treaty signed by states.[74]

The legal arguments in *Miller* were focused on issues of UK constitutional law. Yet behind this dispute lies divergent views on the EU's legal identity. The *ECA 1972* is a statute of constitutional significance. However, this is not only because UK law decided that this would be the case, but also because the EU has evolved into a dynamic and independent source of law.

C. The EU as a Regional Economic Integration Organization (REIO)

The third model is that of the EU as a 'Regional Economic Integration Organization' (REIO). The two models discussed above – the EU as a 'new legal order' and the EU as a 'self-contained regime' – relate to the nature of the EU's internal legal order. They tell us little about how the EU is to relate with other subjects of international law, or where it fits within this wider international legal order. The REIO model seeks to address that question. This model accepts that the EU is unique in many ways but reiterates that it still belongs to the world of international organizations. This is perhaps the most common view among international lawyers: the EU is an international organization, albeit one with certain distinct features.

This conception of the EU is reflected in a number of international treaties which allow for participation of the EU. Only a small number of treaties specifically mention the EU as a party;[75] most allow for participation of 'regional economic integration organizations' (REIO), or alternatively (recognizing the EU's competence beyond economic matters) 're-

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bliclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/>.

74 *See* P. Eeckhout and E. Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading', UCL European Institute Working Paper, Dec. 2016, 42. Emphasis added.

75 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).

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gional integration organizations' (RIO).[76] The European External Action Service's Treaties Office Database shows that the EU is a party to 91 international agreements containing a REIO clause.[77] According to this model, the EU is first and foremost and international organization. While some may reject the description of the EU as an 'international organization', the EU has accepted the REIO label by joining international agreements and participating in international organizations via REIO clauses. On the one hand, the REIO model accepts that the EU is an international organization when it acts on the international plane. On the other hand, it also reflects the idea that such an organization is different from the classical form of intergovernmental organization, reflecting somewhat the EU's self-conception of a unique type of legal entity.

1. REIOs Before the International Law Commission

Is a REIO a distinct type of international organization for the purposes of international law? The EU has argued at the International Law Commission (ILC) that specialized rules should be developed with respect to REIOs.

The ILC has on many occasions been faced with questions regarding which rules of international law apply to subjects other than States. An early example of this can be found in the ILC's Waldock Report, referring to the EU in the context of succession of obligations of states. The question arose as to what type of entity the EU is according to international law. Waldock draws a sharp distinction between unions of States, which aim to create a new entity on the international plane (e.g. the UN or Council of Europe) and unions intended to create a new political entity on the plane of internal constitutional law (e.g. US, Switzerland or the former United

76 Art. 44, Convention on the Rights of Persons with Disabilities, UNTS (adopted 13 December 2006, entered into force 3 May 2008) GAOR 61st Session Supp 49 vol 1, 65: "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention."

77 European External Action Service (EEAS) Treaties Office Database, 'Ready Inventory of Agreements Containing the Regional and International Organisation Clause. http://ec.europa.eu/world/agreements/ClauseTreatiesPDFGeneratorAction.do?clauseID=30.

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Arab Republic). The European Union, however, does not easily fit within either of these categories.[78]

The ILC's Study on the Fragmentation of International Law points out "the European Community […] is a subject of international law and for practical purposes may be treated towards the outside world as an intergovernmental organization, with whatever modification its specific nature brings to that characterization."[79] The ILC has had to deal with the legal character of the EU in a number of codification projects. For example, when the ILC embarked on its project on the International Responsibility of International Organizations, it included the European Union in its work, implying that the EU is to be treated as an IO for the purposes of international law.[80] The evident problem with this approach is that it considers the EU alongside a host of different types of international organizations that share very few characteristics with the EU apart from the fact that they were established by an international treaty. The EU and some legal commentators questioned the usefulness of dealing with entities as diverse as the European Union, International Monetary Fund and World Meteorological Organization in one set of draft articles.[81] The European Commission, representing the Union, consistently argued that any draft articles must take into account the special nature of the EU legal order. Rather than frame this argument around the unique nature of the EU, however, the European Commission argued that the ILC should consider the EU as a REIO for which a different set of rules had developed.[82]

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78 EEC appears without any doubt to remain *on the plane of intergovernmental organisation"* Fifth Report 'On Succession in Respect to Treaties' (Special Rapporteur Sir Humphrey Waldock) 2 *Yearbook of the International Law Commission* (1972) 18. Emphasis added.

79 'Fragmentation of International Law', *supra* note 2, para. 219.

80 Draft Articles on the Responsibility of International Organizations with Commentaries, in Report of the International Law Commission, 63rd sess, Apr. 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/66/10, at 52; GAOR, 66th Sess., Supp. No. 10 (2011).

81 See J. Klabbers, 'Self-control: International Organizations and the Quest for Accountability' in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing 2013) 76: "surely, it will not do to have an identical regime for entities as disparate as the World Bank, the EU, and say, the European Forest Institute; hence to the extent that organisations welcome a general responsibility regime, they nonetheless feel that their situation is different."

82 The use of REIO clauses may also be significant in terms of developing customary international law. See J. Odermatt, 'The Development of Customary International

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The academic literature on the international responsibility of the EU[83] is marked with the same set of divergent views as discussed in the introduction. International lawyers tend to discuss international organizations generally, and include the discussion of the EU in that analysis. According to this view, secondary rules of responsibility should be capable of applying to *all* international organizations irrespective of their particular type, including the EU. The other view in the literature (often written by EU lawyers or those working in the EU institutions) focuses on the EU itself, and discusses the particular issues arising from the nature of the EU and the EU legal order.[84] Much of this second strand of literature is inward-looking, focusing upon internal legal issues such as competences and mixity, rather than situating the EU among other international organizations. It is unsurprising that the latter strand of literature endorsed more EU-specific rules in the draft articles.

This cleavage in the academic literature could also be seen played out within the ILC. Of the many conceptual issues the ILC and the Special Rapporteur faced when developing the Draft Articles, one of the most perplexing was how to find a set of universally-applicable rules that could be applied to a highly diverse set of international bodies. The European Commission consistently argued that the draft articles had to take into account the unique nature of the Union, specifically its role as a REIO.[85] Indeed, the European Commission was sceptical about whether it would be possible or desirable to have rules applicable to all international organizations, given the high degree of diversity of international organizations that exist.[86] From the outset the European Commission highlighted the

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Law by International Organizations' *International and Comparative Law Quarterly*, Volume 66, Issue 2, pp. 491–511.

83 See e.g. A. Delgado Casteleiro, *The International Responsibility of the European Union From Competence to Normative Control* (Cambridge, Cambridge University Press, 2016); M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013).

84 P-J. Kuijper, E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013) 35. E. Paasivirta and P-J.Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations' (2005) 36 *Netherlands Yearbook of International Law* 169.

85 See Paasivirta & Kuijper, *supra* note 84.

86 "The European Commission expresses some concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which

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unique nature of the EU.[87] They comments build upon the idea of the EU as "a rather specific international organization."[88] The European Commission argued that, given this special nature, specialised rules were needed to take this into account in the draft articles. It was also argued that "concepts such as 'regional economic integration organization' have emerged in the drafting of multilateral treaties, which seem to reflect some of these special features."[89] For example, the European Commission argued that special rule of attribution should be included "so that responsibility could be attributed to the organization, even if organs of member states were the prime actors of a breach of an obligation borne by the organization."[90] Despite the arguments put forward by the European Commission, as well as much of the academic commentary, the ILC did not support the idea that any specialised rules of attribution had developed regarding the Union.[91] Rather than develop a set of rules applicable to REIOs only, the ILC chose instead to develop rules that applied equally to all international organizations, irrespective of their type or categorization. The ILC arguably did allow the diversity of international organizations to be taken into account through the inclusion of a *lex specialis* rule,[92] which sets out that general rules of responsibility may be supplemented by more specific ones. This

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the European Community is itself an example." International Law Commission, Sixtieth session Geneva, 5 May-6 June and 7 July-8 August 2007, Responsibility of International Organizations, Comments and Observations Received from International Organizations, 4.

87 Statement on behalf of the European Union, Professor G. Nesi, Legal Adviser of the Permanent Mission of Italy to the United Nations. Sixth Committee, Report of the International Law Commission Chapter IV, Responsibility of International Organizations Item 152, New York, 27 October (2003) <http://eu-un.europa.eu/articles/en/article_2940_en.htm>.

88 "The European Commission attaches great importance to the work of the International Law Commission, but necessarily looks at it from the perspective of a rather specific international organization." 'Comments and Observations received from International Organizations', Yearbook of the International Law Commission, Documents of the Fifty-Eighth Session (2006) 127.

89 'Comments and Observations received from International Organizations', Yearbook of the International Law Commission, Documents of the Fifty-Sixth Session (2004), 28.

90 Observations of Mr. Kuijper (Observer for the European Commission), Sixth Committee, Summary Record of its 21st Meeting, 18 November 2004, UN Doc. A/C.6/59/SR.21, para. 18.

91 G. Gaja, Special Rapporteur, International Law Commission, Second Report on Responsibility of International Organizations, 2 April 2004, UN Doc. A/CN.4/541, 5–8.

92 Art. 64 ARIO, *supra* note 80.

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provision could potentially allow for the development of specialised rules in the context of the European Union.[93]

The REIO/RIO model of the EU accepts the EU as an international organization but implies that the EU possesses certain unique features that should be taken into account. However, as illustrated from the ILC's draft articles of responsibility of IOs, it is far from agreed upon what, precisely, these unique features are, and the extent to which they should be relevant for the purposes of identifying rules of international law.

D. The EU as a (Classic) International Organization

The final model is that of a classic intergovernmental organization. This view downplays the unique characteristics of the EU and the constitutional character of the EU Treaties. It accepts that the EU has certain unique features, but rejects that this sets it apart as a qualitatively different entity other international organizations or groups of states. Viewing the EU as 'just another' international organization may be conceptually appealing to many international lawyers who see the compartmentalisation of international organizations into discrete categories as a threat to the universal application of international law.[94]

The Classic IO model also dismisses arguments in favour of EU exceptionalism. It goes against the EU's self-perception as a 'new legal order'. Some describe the EU as an 'association of states'[95] which also tends to deny the characteristics of the EU as a distinct legal entity in its own right. In some instances, the EU is referred to as a 'bloc', which presents the EU

93 ARIO, *supra* note 80 (commentary) p. 100. But see J. d'Aspremont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union' in V. Kosta, N. Skoutaris, V. Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford, Hart Publishing, 2014) 75, 76.

94 A. Orakhelashvili, 'The Idea of European International Law' (2006) 17 *European Journal of International Law* 2, 315, 343.

95 M. Shaw, *International Law*, 7th edn (Cambridge University Press, 2014) 177 stating that "[t]he European Union is an association, of twenty eight states". The EU is presented in a section 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.

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as a group of like-minded countries, rather than an organization with its own personality and powers.

EU lawyers would reject such characterizations. As discussed above, even if the EU is technically founded on international law instruments, they would argue, treating the EU as an international organization is not helpful as an analytical tool. Yet they should be reminded that outside of the EU, the Union continues to be viewed in such a manner. We can see such a divergence of views in international forums where the EU Member States are in minority, such as at the United Nations General Assembly.[96] Here the EU is not viewed as a special or unique entity. It is viewed as an international organization or a political bloc. When the EU gained 'enhanced observer' status at the UN General Assembly in 2011, the UN Press Release described the Union as a 'bloc'.[97] Since the EU gained such observer status in the UN system, the Union has had difficulty asserting itself as an independent legal entity separate from its Member States. This, of course, is explained more by political than legal reasons – States that are not members of the EU may be sceptical or hostile to the idea of European states gaining greater power within multilateral bodies through separate membership of the EU. But this shows how the EU's own self-perception, that of a unique type of supranational organization, is not accepted universally, not least in many of the multilateral bodies where the EU seeks to enhance its participation and visibility.

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96 On the diplomatic saga involving the EU's efforts to upgrade its status at the UNGA, 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.

97 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."

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III. Theorizing the EU's International Legal Character

The previous section outlined four views of the European Union that exist in the international and EU law. Using examples from recent legal practice, it showed that these views are not confined to academic literature. It showed howlegal outcomes are shaped, in part, by which model is taken as a starting point in a given circumstance. Moreover, the legal identity of the EU is shaped not only by the CJEU and the EU institutions, but also the judicial systems of the EU Member States, and at other levels, such as the International Law Commission or UN General Assembly. What are we to make of these diverging views? Which of these models is correct?

It is tempting for legal scholars to seek a single 'answer' to this question. The EU is not a subatomic particle that exists in multiple states or whose character depends on the observer. It is a legal entity. It enters into international agreements and appears before courts. In order to resolve some of the most complex legal issues – the responsibility of the EU, the legal fallout from Brexit, the EU's participation in multilateral fora, and so on – there should be a consistent understanding about what type of legal entity the EU is.

There is a tendency to argue that everything is relative and that the answer to this question will always be a matter of perspective and the standpoint of the observer.[98] In its 'Decision on Jurisdiction, Applicable Law and Liability' in *Electrabel SA v. The Republic of Hungary*, the arbitration tribunal was called upon to decide whether EU law should be considered international law, for purposes of defining the applicable law. The Tribunal noted the 'multiple nature' of EU law, stating that "EU law is a sui generis legal order, presenting different facets depending on the perspective from where it is analysed. It can be analysed from the perspectives of the international community, individual Member States and EU institutions."[99] The tribunal cites two academic articles to demonstrate that 'many scholars' accept that "EU law is international law because it is

98 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."

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

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rooted in international treaties."[100] This reasoning feeds into the idea that the nature of the EU and EU law depends on the legal domain in question – national courts, EU courts, or international tribunals. It stresses that EU law can exist in multiple states.

The description of the EU legal order as "un ordre juridique interne d'origine internationale"[101] used by Advocate General Maduro in *Kadi I* seeks to capture the duality of the EU legal order, one with international law origins and dimensions, but with municipal, even constitutional, characteristics. 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.[102]This 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.[103]

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. At the *external level*, when the EU participates on the international scene and mediates with other subjects of international law, these descriptions lose their value, and the EU is best treated as an international organization.

Such an approach might be conceptually appealing. It allows the CJEU and EU lawyers to continue with the 'new legal order' narrative, since this

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100 *Ibid.*, 4.120 and fn 7.

101 Opinion of the Advocate General Maduro in *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. The original language of the Opinion is in English, which uses the more awkward phrase: "municipal legal order of trans-national dimensions."

102 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.

103 R. Gardiner, *Treaty Interpretation*, 2nd edn (Oxford, Oxford University Press, 2015) 129.

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only applies in the internal sphere, while at the same time mollifies fears of some international lawyers that the EU is seeking special treatment or undermining the universality of the international legal order. However, it is unlikely that such a strict dichotomy can always work well in practice. Take, for instance, the legal dilemma that arose in *Opinion 2/13*. One could argue that the new legal order narrative was justified because the legal issue concerned the EU's internal legal order: whether a proposed accession agreement complies with EU law. However, this would ignore the fact that the case involved an external dimension too, since it dealt with the EU's interaction with other legal subjects and participation in another legal order (the ECHR system). By requiring the EU to obtain a high level of special treatment from the other ECHR contracting parties, the CJEU made it difficult for the EU to accede in practice. By viewing the dispute as one that involves the purely internal dimension, the Court overlooked the wider context of the dispute.[104] As was discussed above, one of the reasons that *Opinion 2/13* remains controversial is that involved a clash of two very different views of the EU and EU law. As the EU seeks to participate in the international legal order – through trade agreements, dispute settlement mechanisms, or via participation in international organizations and processes – it is likely that such clashes will arise in the future.

The relativistic approach – that the legal character of the EU depends on the legal domain in question – is also problematic in that it reduces legal certainty. For international law to work effectively, it must be possible for it to be applied consistently across different situations and to different subjects of international law.[105] The legal characterisations of the EU in any circumstance will often reflect deeper power relations. Where the EU is in a stronger position, it will be able to assert its 'new legal order' narrative. However, where it sits beside 193 members of the UN, it is less likely to dictate to others that it is unique and requires special treatment.

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104 J. Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU Law' in M. Cremona (ed), *Structural Principles in EU External Relations Law*, Hart Publishing (2017).

105 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."

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If one applies this relativistic approach, legal outcomes will be shaped, in part, by these power dynamics. It is difficult, therefore, to develop a consistent conceptual model since legal arguments about the legal nature of the EU are closely entwined with political debates about the EU's place in the international legal order.

Is this really a problem? One might argue that the international legal character of the EU has, and always will be, the subject of contestation and debate, but this has rarely given rise to serious problems in practice. Academics and lawyers will continue to debate the nature of the EU in lengthy articles and at academic conferences, but the real world will move on. This article has argued, however, that such theoretical disagreements can have practical consequences. One should remember that the 'new legal order' narrative, while now accepted for the most part within the EU, was also subject to decades of debate and contestation. The debate today is no longer whether the EU is an autonomous legal order but whether this autonomy can be applied at the international level to the EU's relationships with third states and international organizations. The EU's self-perception continues to be challenged when it steps out into the world. It is unlikely that the EU will be successful in convincing third states that the EU is qualitatively different and requires international law to take into account this status. As the EU seeks to increase its interaction at the international level, and as one Member State seeks to extricate itself from the EU legal order, we are likely to see the question of the EU's legal character come up again.

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Jed Odermatt

My iCourts experience

I became aware of iCourts during my PhD research on the European Union and international law. Writing about the EU Court of Justice, I was discussing whether it should be considered an international or domestic court. The research resulted in the article 'The Court of Justice of the European Union: International or Domestic Court?'[106] which discussed the definition of an 'international court'. A web search on the topic quickly brought me to the iCourts website. I saw that the Court of Justice of the European Union was included in iCourts' list of international courts.[107] This, I felt, corroborated my view that the EU Court should be considered an international court, or at least one with a dual character, possessing features of both an international and domestic court.

This concept of 'legal identity' continued to develop during my time at iCourts. I worked at iCourts when the UK Supreme Court delivered its judgment in *R (Miller) v Secretary of State for Exiting the European Union*, which addressed the question whether the UK government needed permission of Parliament to trigger Article 50 TEU, and starting the process of the UK's departure from the Union. In this judgment, I saw how the UK Supreme Court discussed the legal nature of EU law and the identity of the European Union. I had also been writing on the International Law Commission's (ILC) work on the Identification of Customary International Law. In a different legal setting, the ILC's work also touched upon the very question of whether the EU Court of Justice should be viewed as an international or domestic court.

The discussion of 'identity' has been the focus of some International Relations scholars.[108] It seeks to understand how actions can be shaped by the actor's self-understanding within wider social arrangements. Identity theory has also been applied in the context of international organizations

106 J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' 3 *Cambridge International Law Journal* (2014) 696.

107 iCourts Database of International Court Decisions <https://jura.ku.dk/icourts/research-resources/database/>.

108 See e.g. B. Bucher and U. Jasper, 'Revisiting 'identity' in International Relations: From Identity as Substance to Identifications in Action' (2016) *European Journal of International Relations* 1.

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such as the EU.[109] Its actions can also be shaped by its self-perception. The EU has developed a set of beliefs and attitudes about itself: along with the new legal order narrative, the EU views itself as a body strongly dedicated to democracy, human rights, and the rule of law. Identity is further shaped, challenged, and given meaning by the perceptions of others.[110] The EU finds its self-perception challenged when it steps out into the world and engages other actors, each of which may have a different view of the EU. My first presentation at iCourts focused on this issue of 'legal identity' and resulted in the publication 'Unidentified Legal Object: Conceptualising the European Union in International Law', in *Connecticut Journal of International Law.* This article was influenced by the comments and feedback from the seminar.

These weekly presentations are one of the best academic initiatives of iCourts. I knew that each week, I could come to the 'iLab' and hear a talk by a colleague or visitor, touching upon topics as diverse as the resolution of territorial disputes by the ICJ, to judicial politics of the European Union, and there would be a lively and enriching discussion. After only a few of these talks, I began to realise that my iCourts colleagues tended to have their favourite types of questions and comments. 'But what's the point!?'; 'This reminds me of a situation in German law'; 'something something Bourdieu' emerged as some of the common refrains. I mentioned this to Mikael. I told him that his comment was usually some version of 'Isn't this all about power?'. I remember his immediate response: 'But it is!'.

Is it all about power? As a law student, discussions of power were often missing. The lasting effect of working at iCourts and the discussions I had with Mikael Rask Madsen, Marlene Wind, Achilles Skordas and others, was that we should openly discuss the role of power and the political context in which legal decisions are made. It is one thing for me to discuss the legal identity of the European Union and EU law. It is another to try to understand and reveal the reasons behind these diverging views, which are often explained, not by diverging legal interpretations, but by power

109 See S. Cho, 'An International Organization's Identity Crisis' (2014) 34 *Northwestern Journal of International Law & Business* 359, 379 using identity theory to understand the autonomy of international organizations over time. "An organizational identity is shaped by an IO's conscious interactions with the environment and guided by an organization's role expectation, as well as the expectations that the organization perceives from its environment (society)."

110 E. Elisabeth Johansson-Nogués, 'Is the EU's Foreign Policy Identity an Obstacle? The European Union, the Northern Dimension and the Union for the Mediterranean' (2009) 9 *European Political Economy Review* 24, 27.

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relations. Professor Wind helped me to understand that academics (including me) are also affected by this. Academics, especially legal academics, can find themselves tied to a particular project, be it the European integration project or the constitutionalisation of international law, and their work should also be understood in this context.

Mnoindenty lasting memories of iCourts will be about the strong friendships I made and the close community we built.

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