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## Misfit or Model? The European Union in the Law of International Organizations

Jan Klabbers<sup>1</sup>

### I. Introduction

Ever since the European Union (EU) first emerged on the scene, in the early 1950s, observers have been puzzled about this curious creature and its place in the grander scheme of things. The three original communities (European Coal and Steel Community, European Economic Community, Euratom) clearly did not add up to a state, not even a federal or confederal one. So, if the EU<sup>2</sup> is not a state, it must be something else, but what? The closest analogy, so it seemed, was with international organizations, so in those heady early days, the EU was often treated as such.<sup>3</sup> But it was immediately also clear that the EU was an organization unlike others. Unlike other organizations, it had powers of such a nature as to pre-empt its member states from acting. Its court was expected to work closely with national courts through a preliminary reference procedure, and it would even have a parliamentary assembly. The EU was supposed to develop its own external relations, including the conclusion of treaties with third parties. In the early 1960s, its court made clear that law emanating from the EU could be directly effective in the legal orders of the member states, regardless of what those member state themselves would think<sup>4</sup>, and that the law emanating from the EU could be hierarchically superior to domestic law<sup>5</sup>, identifying the resulting construction as a new, hitherto unfamiliar, legal order. And in the 1970s, the same court made clear that the EU could interact with third parties even if the foundational treaty had not specifically planned this.<sup>6</sup> All this prompted observers, by the early 1980s, to proclaim the EU as a constitutional organization, not so much out of concerns about political accountability (as is regularly the case when constitutionalization is invoked), but because the EU had become something rather different from other organizations, and the word 'constitutional' briefly seemed to capture this difference.<sup>7</sup> The EU was

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<sup>2</sup> For ease of reference I will consistently speak of EU even when referring to its predecessors EEC and EC, except where the context demands a greater level of specificity.

<sup>3</sup> One example is J.W. Schneider, *Treaty-Making Power of International Organizations* (Geneva: Droz, 1959).

<sup>4</sup> Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

<sup>5</sup> Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

<sup>6</sup> Case 22/70, *Commission v Council (AETR)*, ECLI:EU:C:1971:32.

<sup>7</sup> The *locus classicus* is Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *American Journal of International Law*, 1-27.

‘constitutional’ in a way which did not quite apply to any other organization, although the same label was later used with the same inspiration (albeit different contents) to describe the special nature of the UN<sup>8</sup> and even, briefly, the WTO.<sup>9</sup>

The emergence and development of the EU resulted in two mutually reinforcing sentiments. On the one hand, the EU was often characterized as occupying its own category, a creature best characterized as *sui generis* or, alternatively, as belonging to a class of one. Thus, the EU is often labelled a ‘supranational’ organization, as if it fits a particular group.<sup>10</sup> Yet, on closer scrutiny, this group has no any other members.<sup>11</sup> The same rhetorical strategy is used when referring to the EU as a ‘regional economic integration organization’, tantalizingly suggesting the possibility that it has peers which, eventually, turns out never to be the case.<sup>12</sup> Taken seriously, all these qualifications merely stipulate that the EU is an international organization unlike any other. Yet, simultaneously, they also suggest that the EU must be considered the most highly evolved specimen of the species, a model for other international organizations to emulate - something that other organizations can only aspire to become. It may not be a ‘regular’ international organization, but instead of this being shameful or awkward, vice is turned into virtue.<sup>13</sup>

Making this sort of assessment (*sui generis*; most highly evolved) presupposes that there is something of a standard model of international organizations, against which the peculiarities of the EU can be highlighted. This model, I suggest, does indeed exist, however implicitly often, and is captured by the functionalist approach to the law of international organizations. In what follows, I will attempt to trace how the emergence and

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<sup>8</sup> Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’, (1998) 36 *Columbia Journal of Transnational Law*, 529-619.

<sup>9</sup> See the trenchant critique, effectively ending the debate, by Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, 2005).

<sup>10</sup> With great subtlety though, Schermers claimed early on that not even the EU was truly supranational, although it came close. To his mind, the EU and the East African Community were the ‘most supranational’, while the UN too had some ‘supranational characteristics’. See H.G. Schermers, *International Institutional Law: Volume I* (Leiden: A.W. Sijthoff, 1972), at 21. The East African Community he discussed, however, proved short-lived (1967-1977) and is no longer in existence, having been replaced by a different, intergovernmental entity under the same name.

<sup>11</sup> Lindseth, in a fine discussion, refers to the EU as the ‘leading exemplar’ of a supranational organization. This suggests that there might be others, but he never gets around to identifying those others. See Peter L. Lindseth, ‘Supranational Organizations’, in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016), 152-170, at 152.

<sup>12</sup> Some treaties are explicitly open to participation by ‘regional economic integration organizations’, but it is widely understood that the only entity qualifying as such is the EU. An example is the 2000 Palermo Convention on Organized Crime.

<sup>13</sup> See generally Jan Klabbers, ‘*Sui Generis?* The European Union as an International Organization’, in Dennis Patterson and Anna Södersten (eds.), *A Companion to European Union Law and International Law* (Chichester: Wiley Blackwell, 2016), 3-15.

development of the EU has come to affect the way we (roughly: the invisible college<sup>14</sup> of international organizations lawyers) think about international organizations and their role in regional and global governance. I will do so by concentrating on two crucial issues, both related to the architecture of the international legal order rather than with the different legal techniques the EU has developed or whose emergence the EU has stimulated. Such techniques are plenty (think of mixity, the Open Method of Coordination, the preliminary ruling reference, to name just a few), but a discussion thereof merely captures the impact of the EU on a surface level.

Instead, I aim to probe a little deeper. First, I will explore how the emergence of the EU has come to affect the way international organizations interact with individuals. Before the EU emerged, it is fair to say, little attention had been paid to the possible effect of the activities of international organizations on ordinary citizens in whatever capacity: as workers, as senders of letters or post cards, as tourists, as seafarers, as consumers, et cetera. Second, I will discuss how the emergence of the EU came to affect the theory of functionalism: in a world made up, however much socially constructed, of functional organizations, the EU presented and presents a challenge for the underlying theoretical framework.

## II. International Organizations and the Individual

In the late nineteenth century, the world of international law was an orderly world, despite the emergence of a new group of actors in the form of the public international unions – what are nowadays usually referred to as international (or intergovernmental) organizations. The basic premise underlying the international legal order was that international law was to states what domestic law was to individuals. The former applied exclusively in inter-state relations, the latter applied within state boundaries, and ‘ne’er the twain shall meet’. On this premise, Heinrich Triepel was able to formulate his classic dualist adage: international law and domestic law were completely independent, and simply could not get in touch or enter into conflict with each, precisely because they had different spheres of application. This was not a mere matter of normative theory, moreover, but based on empirical reality. There simply, so Triepel suggested, was no international law that could possibly apply within state boundaries, although he was scholar enough to recognize, in 1923, the possibility that the

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<sup>14</sup> This pays homage, if nothing else, to Oscar Schachter, ‘The Invisible College of International Lawyers’, (1977) 72 *Northwestern University Law Review*, 217-226. On the role of interpretative communities in international organizations generally, see Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011).

minority treaties, which eventually aim to safeguard groups of individuals, could one day come to change this picture.<sup>15</sup>

Whether Triepel was right in any meaningful way was, in retrospect, impossible to verify: legal truths can be true without having an empirical correspondence, simply because everyone believes them to be true, and they are 'true' by the legal standards prevailing. Law is, essentially, a Münchhauseneseque academic discipline, capable of pulling itself up by its own bootstraps or, more academically put, largely an exercise in hermeneutics. So as long as everyone believes that international law has no effect on individuals (who are, after all, neatly organized in territorial units), international law will be seen as not having any effect on those individuals.

But regardless of empirical correspondence, Triepel's perspective is no longer considered tenable, and may not even have been tenable in his own day and age, as a certain Hans Kelsen started to argue when developing his opposing idea of monism. After all, even if one can say that such things as the rules on diplomatic intercourse only affect states (individuals are affected but only by virtue of representing their states), or that the rules on the use of force and self-defense only affect states directly (states can decide to use force and exercise self-defense in a way not open to individuals), even on such a basis it might be possible to say, with hindsight, that some of the rules and institutions of international law affected individuals. Surely, it becomes artificial to say, as dualism does, that the work of the international intellectual property unions has no bearing on individuals but only on states: after all, whose intellectual property was being protected?<sup>16</sup> Surely, it becomes artificial to suggest that the work of the various international health bureaus only affected states but not individuals: after all, states can only get sick or recover in metaphorical ways, in the manner in which Greece can be portrayed as the 'sick man' of Europe. In real life, it is individuals who really get sick and may need to be cured or cared for. And surely, it would be more than a little artificial to claim that the 200 or so agreements (never mind the recommendations) sponsored by the International Labour Organization since 1919 do not aspire to affect the lot of individual workers but only have the competitive positions of states in mind – those conventions may and do affect the competitive positions of states as well<sup>17</sup>, but also affect, well-nigh by definition, the plight of workers (and thus also employers) within those states.

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<sup>15</sup> Heinrich Triepel, 'les rapports entre le droit interne et le droit international', (1923) 1 *Recueil des Cours*, 75-121. Triepel first set out his ideas in Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899).

<sup>16</sup> And some recognized as much, seeing the unions as harbingers of a global law. See, e.g., Friedrich Meili, *Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums* (Leipzig: Duncker and Humblot, 1889).

<sup>17</sup> And have the effect of stifling the class struggle, as some would say. From a neo-Gramscian perspective, the ILO has been referred to, and not unreasonably, as the international manifestation of state corporatism. See Robert W. Cox,

Kelsen, like Triepel, invoked empirical considerations, albeit in a somewhat non-descript manner. For him, the ‘actual development’ of the law tended towards increasing centralization, and appeared to have ‘as its ultimate goal the organizational unity of a universal legal community’. At the same time, though, considerations of logic worked in favour of monism: this followed from the ‘epistemological requirement that all law be considered in one system’, in the same way that the natural sciences need to conceive of their object of study as a unity.<sup>18</sup> And any conflict between norms from a domestic system and international law (itself a sign that the premises underlying dualism would no longer apply) could be recast as conflicts between higher-level and lower-level norms within the same legal order<sup>19</sup>, with international law containing the higher-level norms.<sup>20</sup>

If only to illustrate how little legal thought owes to empirical correspondence, despite Kelsen’s recognition of the emergence of norms claiming validity and applicability in both domestic and international law Triepel’s dualism continued (and still continues) to exercise a great hold on the imagination of governments. While some governments have seen fit to adopt some version of monism, many have continued to adhere to dualism, even if it is clear that the empirical conditions which prompted Triepel to formulate his thoughts have long been sent to the dustbin of history. For surely, it is now generally recognized that much international law has the express ambition to affect the individual. This applies, most obviously, to international human rights law and international humanitarian law, but goes much, much further than this, e.g. to investment protection mechanisms.<sup>21</sup> Treaties to avoid double taxation affect individuals; international labour rules affect individuals; and rules on nationality affect individuals. Governments may be keen on keeping these domains to themselves, but even then: the PCIJ as early as 1923 suggested that even though states enjoy some freedom in matters of regulating nationality, they must remain within the limits of international law.<sup>22</sup>

Since the late 1920s, the tension between the possible existence of separate spheres and the possibility of rules nonetheless crossing the boundaries between these spheres, has been managed by the doctrine of direct effect. This was first developed by the PCIJ in 1928, and was presented in terms of state intentions: ‘The intention of the parties, which is to be ascertained from the contents of the Agreement, taking into

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*Production, Power, and World Order: Social Forces in the Making of History* (New York: Columbia University Press, 1987), at 101.

<sup>18</sup> See Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992 [1934], Litschewski Paulson and Paulson trans.), at 111-112.

<sup>19</sup> *Ibid.*, at 118

<sup>20</sup> On this, see Jochen von Bernstorff, *Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Baden-Baden: Nomos, 2001).

<sup>21</sup> For a general survey concerning these domains, see Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011).

<sup>22</sup> *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, advisory opinion, [1923] Publ. PCIJ, Series B, No. 4.

consideration the manner in which the Agreement has been applied, is decisive.<sup>23</sup> In other words, if states intended their agreements (or provisions thereof) to directly enter their national legal orders, they could do so by making those treaties fit a certain pattern. If seemingly addressed at individuals, and cast in forms requiring no legislative intervention, then treaty provisions could be considered directly effective, meaning that such provisions could be invoked before and applied by domestic courts without further ado. In very strict dualist systems this might not work (the strict dualist might have to insist on transformation between legal orders), but most dualist systems are not that strict to begin with, and most will at least allow for domestic rules to be interpreted in light of international law – which for all practical purposes might be indistinguishable from applying international law directly.<sup>24</sup>

This allowed the fiction to be maintained, in two ways. First, it allowed for the separation thesis to continue to flourish: there is still a widely shared view that, at least as a rough indication, international law applies between states, while domestic law applies within states – and the main exceptions are constituted by, well, the exceptional: by human rights, and by the existence of a situation of armed conflict triggering the applicability of international humanitarian law. And even here the fiction continues to play a role in the enduring distinction between international conflicts (to which international law applies) and non-international armed conflicts (where international law often has a hard time getting to be applied).

This, second, has the pleasant collateral effect of allowing states and their governments to continue to think they are in charge. If international law, however fictitiously, only applies to states, then it follows that states retain their privileged position in legal theory and practice. Other actors may gradually come to be seen as subjects of international law (in itself a phrase too empty to be of much use), but only because states allow this and tolerate this, and set the conditions. The result hereof is that whatever sociological correspondence once may have existed between international law and the empirical world has lost most of its meaning: the world of international lawyers is a rarefied, stultified world, inhabited by diplomats and law professors who tell the rest of the world what to do, and cannot understand why the rest of the world no longer listens. The lawyers have developed the most glorious ideas in the most glorious terms to protect the individual (*jus cogens! erga omnes!*), but ignore the plights of workers in conditions of slavery or bondage building football stadiums in Qatar. The lawyers and diplomats have developed wonderful idea of a responsibility to protect, but somehow cannot seem to apply this when asylum seekers are at the border. The lawyers and diplomats have invented

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<sup>23</sup> See *Jurisdiction of the Courts of Danzig*, advisory opinion, [1928] Publ. PCIJ, Series B, no. 15, at 18.

<sup>24</sup> Heiskanen suggested already a quarter of a century ago that the dualism-monism debate had effectively been displaced by an uneasy pragmatism. See Veijo Heiskanen, *International Legal Topics* (Helsinki: Finnish Lawyers' Publishing Company, 1992).

clever slogans ('a rising tide lifts all boats') to sell the conclusion of trade liberalization agreements affecting each and every working individual, but refuse to give those individuals the means to enforce these standards<sup>25</sup>, and cannot imagine that what is good for some (industrialists and the professional classes) might not be so good for others.

International organizations, in other words, were never expected to affect individuals or any other third parties – their only legitimate partners, and the objects of their activities, were their member states. Nothing illustrates this better than the absence of provisions granting organization international legal personality. While the founders of international organizations quickly realized that a grant of domestic legal personality or legal capacities might be useful<sup>26</sup>, few organizations (if any) were explicitly endowed with international legal personality. That organizations might have to act within the legal system of member states seemed rather obvious: they would need to be able to contract and own property, if nothing else. But the absence of anything on international legal personality can only signify that international organizations were never seriously expected to engage in affairs that could affect anyone but their member states.

And the absence of such clauses was resounding. Not to put too fine a point to it, the International Telegraph Union and Universal Postal Union had no (and still<sup>27</sup> have no) provision on international legal personality. Neither did the League of Nations, neither does the ILO. The International Civil Aviation Organization, the Food and Agriculture Organization as well as both the International Monetary Fund and the International Bank for Reconstruction and Development lack clear clauses on international legal personality. The EU, likewise, lacks a clear clause, and it took a curiously un-argued decision by its Court of Justice to interpret the pithy phrase 'The Community shall have legal personality' (nowadays 'the Union shall have legal personality'<sup>28</sup>) to authoritatively interpret this as meaning that the EU shall have personality under international law.<sup>29</sup> And as is well-known, the UN Charter too was and remains silent on the organization's international legal personality – this too had to be settled, eventually, by judicial decision.<sup>30</sup>

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<sup>25</sup> WTO law is still law between states: only states can seize dispute settlement proceedings at the international level, and domestically the major trading powers are agreed that WTO law should have no direct effect in their respective legal orders. For a fine discussion of how this plays out within the EU, see Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press, 2013).

<sup>26</sup> See, e.g., article 39 ILO.

<sup>27</sup> The ITU is now the International Telecommunication Union.

<sup>28</sup> Article 47 TEU.

<sup>29</sup> The Court asserted as much in Case 22/70 (*AETR*), but without providing even a whiff of a hint of argument.

<sup>30</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] ICJ Reports 174.

If anything, then, the emergence of the EU has made clear that international organizations can and do affect the lives of individuals. Indeed, the EU was explicitly set up to do so, complete with the institutions to legitimize it. As the Court made clear in *Van Gend & Loos*, the existence of a court and a parliamentary assembly helped to justify the conclusion that a new legal order had been created. How ‘new’ this really was remains open to debate and depends on perspective as much as on anything else: as pointed out earlier, organizations affected individual lives already much earlier, despite admonitions to the contrary and even without boasting courts or parliamentary assemblies. But at least the EU was ‘new’ in the sense that it made this ambition explicit, and created the institutional environment to legitimize it. Here, the classic *quod omnes tangit* maxim was taken seriously: what affects all, should be decided by all or, in more accurate terms, if policies are to affect individuals, then these individuals should have some possibilities to exercise control *ex ante* (through a parliament) and *ex post* (through a court).

Following the EU’s lead, other organizations also illustrate that the earlier strict separation between states and individuals is no longer fully compelling. The Security Council of the UN imposes sanctions on individuals – a stronger individual effect is hardly conceivable.<sup>31</sup> The UN and others, including the EU, engage in territorial administration, directly touching the lives of people – in doing so, they follow practices already engaged in by the League of Nations during the interbellum. NATO can drop bombs on cities and engage in policing tasks in faraway lands, touching the lives of both the citizens of member states and the citizens of other states. Through its international criminal tribunals, the UN can lock up individuals, as can the International Criminal Court, sometimes considered as an international organization in its own right. Indeed, to the (limited) extent that human rights courts and tribunals can be considered as international organizations, they affect individuals by definition. UNHCR manages refugee camps, directly controlling the lives of hundreds of thousands of peoples, and may assist in making individual refugee determinations, therewith too affecting individuals in rather direct manner.<sup>32</sup> The International Organization for Migration, in turn, runs migrant processing centers, often on assignment from and thus as an extension of its member states. In short, Triepel’s observation that international law and domestic law have different addressees is no longer accurate, if it ever was – in many cases, individuals have become the direct addressees or recipients of the activities of international organizations.

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<sup>31</sup> The leading study is Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007).

<sup>32</sup> See, e.g., Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press, 2011).

One cannot say that but for the EU, this would not have happened, partly because the practice pre-dates the EU. This is not the same as claiming the work of international organizations may have benefited some individuals at the (possible) expense of others, although such an argument can be made and has been made: early organizations already paved the way for some business activities to be supported and facilitated, with organizations taking on state-like colours and doing things that earlier were expected from state governments in terms of organizing and structuring industries.<sup>33</sup>

But one can probably claim that the EU helped to make respectable the idea of direct governance by international organization. This may have always taken place in fits and starts, but the emergence of the EU, and the way in which it was set up, suggested that sovereignty could actually be 'divided'<sup>34</sup>, that governmental authority could stem from various equally authoritative sources, that several 'constitutions' could govern overlapping groups of people simultaneously<sup>35</sup>, and that the monopoly on the use of force, considered so characteristic for the modern state, is not a necessary element for the exercise of governmental authority.

From a different angle, much the same is suggested by the emergence of a huge and sprawling discussion on the accountability or responsibility of international organizations. This discussion does not come out of the blue; it is, instead, a response to an urgently felt problem, the problem that international organizations are sometimes perceived to act with impunity, that public authority can be exercised without any form of control.<sup>36</sup> While there is in society generally a drive towards mechanisms of accountability visible, so much so that some speak ominously of an 'audit society'<sup>37</sup>, international organizations too have been identified as sources of injustice to individuals. This comes to the fore in judicial decisions on the human rights responsibilities of international organizations, cases such *Waite and Kennedy* before the European Court of Human Rights.<sup>38</sup> It comes to the fore in decisions by national courts shielding organizations from responsibility or, occasionally, lifting the immunities of international organizations in cases of perceived injustice<sup>39</sup> or construing immunity

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<sup>33</sup> A strong argument to this effect is made by Craig Murphy, *International Organization and Industrial Change: Global Governance since 1850* (Cambridge: Polity, 1994).

<sup>34</sup> See Carmen Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority* (Oxford University Press, 2015).

<sup>35</sup> See generally Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, 1999).

<sup>36</sup> Principal/agent theory anticipates control by the member states, but this is often of limited reach. For a good political science study, see Randall W. Stone, *Controlling Institutions: International Organizations and the Global Economy* (Cambridge University Press, 2011).

<sup>37</sup> Michael Power, *Rituals of Verification: The Audit Society* (Oxford University Press, 1997).

<sup>38</sup> *Waite and Kennedy v Germany* (application no. 26083/94), judgment of 18 February 1999.

<sup>39</sup> In February 2015, The Hague Court of Appeal held that the internal justice system of the European Patent Office (EPO) was 'manifestly deficient', and that therefore the immunity from suit should be lifted in a case involving the right of assembly and the right to strike (ECLI:NL:GHDHA:2015:255, § 3.7). Two years later, the Dutch High Court ('Hoge Raad') set

narrowly so as not to encompass commercial activities.<sup>40</sup> But mostly it comes to the fore in the voluminous production of books and articles addressing issues of accountability and adopting new approaches required in particular by the circumstances that organizations have come to affect individuals directly, and in attempts by professional bodies of international lawyers to formulate rules and guidelines on the matter.

Scholars in New York and Rome as well as Heidelberg have attempted to subject the activities of international organizations to administrative law disciplines, under headings like 'global administrative law'<sup>41</sup> or 'international public authority'<sup>42</sup>. Individual scholars have written extensively about the responsibility of international organizations<sup>43</sup> or their member states<sup>44</sup> for acting in contravention of international law. The Institut de Droit International Law adopted a resolution in the mid-1990s on the (absence of) member state responsibility for misbehavior by international organizations; the International Law Association adopted a set of Recommended Rules and Practices on the accountability of international organizations in 2004, while the International Law Commission adopted, in 2011, a set of authoritative articles on the responsibility of international organizations. While these articles miss most of the target (they apply only in cases where organizations violate their international law obligations towards other organizations or states, rather than in situations where organizations exercise international authority), they nonetheless underscore at the very least the increased realization that organizations do not only act in the self-spun cocoon of relations between the organization and its member states.<sup>45</sup>

For those relations (between the organization and its members) have always remained subject to control and, in some ways, responsibility: as the member states set up the organization, they also retain the means to control it, and can hold the organization to account if it ignores or violations directives emanating from the

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this holding aside, finding that even though employees' organizations have no access to justice, individual employees do have access to the International Labour Organization Administrative Tribunal (ECLI:NL:HR:2017:57, § 5.7). Hence, the system of EPO cannot be considered 'manifestly deficient', according to the Dutch High Court.

<sup>40</sup> Also a case involving the EPO and a catering tender: this was found not to be part of EPO's official activities, and thus not shielded by immunity: see ECLI:NL:GHSGR:2011:BR0188, § 14.

<sup>41</sup> A manifesto is Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems*, 15-61; a systematic overview is offered by Sabino Cassese (ed.), *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar, 2016).

<sup>42</sup> Armin von Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010).

<sup>43</sup> Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels: Bruylant, 1998).

<sup>44</sup> Moshe Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (Dordrecht: Martinus Nijhoff, 1995); Ana Sofia Barros, *Governance as responsibility: member State Participation in International Financial Institutions and the Quest for Effective Human Rights Protection* (doctoral thesis, University of Leuven, 2017).

<sup>45</sup> For commentary, see Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013).

member states. Hence, for those situations, a distinct regime on responsibility of organizations is not strictly necessary: the law itself, and its underlying theoretical framework, offers in theory (if not always in practice) sufficient mechanisms of control. It is precisely where third parties are affected that a separate and distinct regime is required. The very emergence of a discourse on standards and mechanisms of accountability thus suggests that international organizations are no longer restricted to solely affecting their member states.

### III. Functionalism Oh Functionalism?

While early students of international organizations, during the third part of the nineteenth century, generally refrained from studying organizations as a distinct object and refrained from theorizing about organizations in general, towards the end of the nineteenth century such thinking started slowly to occur. The German author (and authority) Georg Jellinek posited that organizations such as the International Telegraph Union and the Universal Postal Union, which had recently been created, were driven by what he called a *Verwaltungszweck* – in today's terminology, a function.<sup>46</sup> After Kazansky had started to come around to the idea that organizations could actually be subjected to some common general theorizing<sup>47</sup>, this was picked up by Paul Reinsch, whose work in the early twentieth century exercised a decisive influence on the formation of theory – an influence still recognizable today.<sup>48</sup>

Reinsch, following Jellinek, gave the functions of international organizations pride of place. To his mind, in a proposition still generally adhered to, organizations exercise functions delegated to them by their member states, usually because they either cannot or will not take care of that function on their own – political scientists refer to this as principal-agent theory.<sup>49</sup> These functions tend to be of a highly technical, a-political nature, rendering organization technical, a-political creatures, capable of operating at low cost, both financially and politically: precisely because they engage in technical tasks, their work does not constitute a loss of sovereignty on the part of their member states. And to make things even better: they all work for the common

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<sup>46</sup> Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Berlin: Verlag von O. Haering, 1882).

<sup>47</sup> See, e.g., Pierre Kazansky, 'Théorie de l'administration internationale', (1902) 9 *Revue Générale de Droit International Public*, 353-367.

<sup>48</sup> See Paul S. Reinsch, *Public International Unions, Their Work and Organization: A Study in International Administrative Law* (Boston: McGinn & Co., 1911); for discussion, see Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', (2014) 25 *European Journal of International Law*, 645-675.

<sup>49</sup> See Darren G. Hawkins et al. (eds.), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006).

good (however precisely defined), and carry the glorious promise of bringing about universal peace, turning swords into plowshares.<sup>50</sup> As another authority put it in 1958, without a trace of irony, international organizations are expected to contribute to the 'salvation of mankind'.<sup>51</sup>

The EU fits few, if any, of these elements. For functionalism to have any kind of empirical traction, it would need to be possible to delimit the function or functions of any organization with a minimum amount of precision. With organizations such as the World Health Organization or the Universal Postal Union, such is often plausible: while observers may disagree on the precise formulation of the functions of such organizations, there will be rough agreement that their tasks are to try and ensure global health and the regulation of postal communication, respectively. Things are different with multi-purpose organizations such as the EU, however. The stated aim of the EU, following Article 3(1) TEU, is so general as to be opaque: the Union is 'to promote peace, its values, and the well-being of its peoples'. There is nothing wrong with these ambitions per se, but they can hardly be called specific in any way; the same phrase would not look out of place in the constitution of Canada, or Denmark, or even North Korea.<sup>52</sup>

Things get a little bit more concrete in the remainder of Article 3: the EU shall offer an area of freedom, security and justice; it shall establish an internal market; and it shall establish an economic and monetary union. If these are to be taken as functions, then it would seem that the EU has various functions – it is a multi-purpose organization. Alternatively, they could be seen as the most crucial means to the end mentioned in paragraph 1, in which case the function of the EU remains opaque.

Equally problematic is an interpretation along colloquial lines. Some might say, under reference to the TEU's preamble, that the EU's function is to achieve an ever closer union among the peoples of Europe; and they would not be wrong. Others might say that the real function of the EU, pointing to history and the circumstances of its creation, is to prevent war in Europe – they too would not be wrong. Yet others might say, at least since the days of Margaret Thatcher, that the function of the EU is to facilitate commerce between European states – and they too would not be wrong. Long story short, though: it is not very clear what the function of the EU is, and for purposes of functionalism (which, after all, is a theory revolving around function), it might be the case that the EU's function is not clear enough. Functionalism presupposes a function, and a reasonably identifiable one at that; the EU, however, does not provide one. It is not alone in this. Multi-

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<sup>50</sup> For a broad overview, see Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law*, 9-82.

<sup>51</sup> Nagendra Singh, *Termination of Membership of International Organisations* (London: Stevens and Sons, 1958), at vii.

<sup>52</sup> The Dutch Constitution for example provides in Article 90 that the government of The Netherlands 'shall promote the development of the international legal order'.

purpose organizations such as the League of Nations or the United Nations suffer from similar problems: they too have a hard time fitting the template of a functional organization.<sup>53</sup>

It is also, second, hopelessly unclear whether one can meaningfully say that the EU is exercising powers delegated to them by their member states. In one sense, this remains the case, and is carved in the soft stone of the Lisbon Treaty: Article 5 TEU stipulates that the limits of EU competences are governed by what is referred to, rather imprecisely, as the 'principle of conferral'.<sup>54</sup> Thus, the EU has no competences flowing from God, or nature, or any suchlike construction; if taken seriously, it cannot even claim any powers that might inhere in being an international organization. It is probably the case that not many powers can persuasively be called 'inherent'<sup>55</sup>, but one example of a power inhering in organizations might be the power to conclude a headquarters agreement.

More importantly though, given the role of the Commission, the European Parliament and the Court of Justice, it cannot plausibly be argued that the EU is merely a vehicle for its member states, exercising delegated tasks. The EU can legislate against the will of some of its members; countless policy initiatives spring from the Commission rather than from the member states; even if the member state governments are unanimous in their support of some initiative, it can be torpedoed by the European Parliament; and quite a few legal provisions have been given a legally binding interpretation by the Court that went beyond what the member states initially intended. Indeed, Stein's conclusions about the constitutionalization of the EU<sup>56</sup>, and Everling's classic question whether the member states were still 'masters of the Treaties'<sup>57</sup>, only make sense against a background of doubt on this point: both indicate and symbolize that the EU is far more than just a vehicle exercising a delegated function, and that same message is also conveyed by labelling the EU a 'supranational' organization.

Few of the tasks exercised by the EU, third, are classifiable as technical, or a-political. This is most likely of wider application, in that also the regulation of global health by the WHO can be seen to have political

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<sup>53</sup> For further reflection see Jan Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organization', (2013) 14 *Melbourne Journal of International Law*, 149-170.

<sup>54</sup> There is no principle of conferral, and there probably cannot exist such a principle to begin with. What this refers to is probably the idea that powers need to be granted by member states, but to call this a principle is, as most pedants would agree, not a particularly precise or even elegant way of putting it.

<sup>55</sup> For a different (if isolated) take on inherent powers, see Finn Seyersted, *Common Law of International Organizations* (Leiden: Martinus Nijhoff, 2008).

<sup>56</sup> See Stein, *Lawyers, Judges and the Making of a Transnational Constitution*.

<sup>57</sup> See Ulrich Everling, 'Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht', in Rudolf Bernhardt *et al.* (eds.), *Völkerrecht als Rechtsordnung; internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Heidelberg: Springer, 1983), 173-191.

elements, as can the regulation of telecommunications by the ITU – in this sense, there simply are no purely technical tasks, and Reinsch was wrong (though far from alone) in thinking otherwise. That said though, it is clear that the EU is intensely political, and about as a-technical as it can possibly get. Surely, the unification of the currency or the abolition of internal borders in the Schengen area, both covering most of the EU's territory, have been – and continue to be - intensely political projects. The Common Agricultural Policy has likewise been inherently political and politicized, as are indeed most of the activities of the EU. Often enough, the institutions find themselves at loggerheads with the member states: it is well-known in policy circles that the Commission is far 'greener' than many of the member states, and far more inclined to take steps towards the conservation of marine resources, or the protection of plant species, than many of the member states are. Be that as it may, the rosy picture of the Commission as something of a glorified secretary pool faithfully executing the wishes of the EU's member states was never accurate, and already pierced in the early 1960s. Inadvertently, quite a few political scientists continue to make the point when listing the EU and the European Commission as separate international organizations – incorrect as this is, it does suggest that the EU defies any simple functionalist analysis or classification.<sup>58</sup> Perhaps Lindberg, another political scientist, put it best in the early 1970s, when lamenting that the EU is a multidimensional phenomenon requiring multivariate measurement<sup>59</sup>; and that was under reference to a far more simple and straightforward version of the EU than today's incarnation.

And then there is, fourth, the idea about functional organizations serving the common good, and doing so at little or no political cost. Here too, the EU has a hard time fitting into the functionalist model. Many politicians habitually complain that joining the EU results in, or has resulted in, a loss of sovereignty. Whether correct or not is not all that relevant, and largely depends on how exactly 'sovereignty' is conceived of; the important point though is that they can make the claim precisely because the EU involves a loss of control. Some policy-making powers are transferred to Brussels, and while this may be a reversible process, reversing it is by no means easy. This is well illustrated by the circumstance that the announced withdrawals of the US and Israel from UNESCO may have raised some political eyebrows, but have not sparked any serious legal debate, largely because there is not all that much to debate.<sup>60</sup> There may be a few legal loose ends to tie up (what will be the status, e.g., of UNESCO world heritage sites in either of these two states upon their withdrawal?), but not much more. By contrast, the United Kingdom's decision to withdraw from the EU has sparked not only a new word (Brexit), but also a veritable legal cottage industry, and understandably so, as the very interwoven-ness of the

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<sup>58</sup> See e.g. Tana Johnson, *Organizational Progeny* (Oxford University Press, 2014).

<sup>59</sup> L.N. Lindberg, 'Political Integration as a Multidimensional Phenomenon Requiring Multivariate Measurement', (1970) 24 *International Organization*, 682-702.

<sup>60</sup> See <https://www.theguardian.com/world/2017/oct/12/us-withdraw-unesco-december-united-nations> (visited 25 January 2018).

economies and cultures of the member states of the EU will have to be unraveled with respect to one of them, and this affects numerous practical legal issues, ranging from the status of UK nationals within the EU after Brexit (and vice versa) to such issues as to whether UK pensioners can still retain their pensions in Spain or Portugal and whether UK-based scientists will still be eligible for EU-based research funding.

Perhaps more importantly still, while the EU proclaims to promote peace, this is mentioned in the same breath as the promotion of EU values and the well-being of its peoples. The formulation suggests that first and foremost, the EU is an organization keen on protecting the interests of its member states and citizens. Where this coincides with the global common good, all the better; but close scrutiny suggests that what matters for the EU is the elevation of the EU's economic and political position in the world. Its concept of the common good is mostly a regional common good, the common good of the EU, its member states and the citizens thereof. And the EU's behavior bears this out: think only of its restrictive market access policies, or its reluctance to receive refugees. Concentrating on the European interest may well be justifiable in ethical terms<sup>61</sup>, but that is not the point: the point for present purposes is that the EU is not obviously devoted to the common good, unlike the template developed by Reinsch.

The above would suggest rather strongly that the EU is not best seen as a functional organization, and yet, for some, it is a role model for functionalism. The only explanation of this state of affairs is that there are, among observers of international organizations, two different versions of functionalism circulating, one of which tends to overshadow the other. For purposes of the theory of political integration, it may make sense to think of the EU as 'functional'. This theory claims, first launched by David Mitrany<sup>62</sup> and later followed by other political scientists interested in how inter-state cooperation can be stimulated, that cooperation in one domain will more or less automatically<sup>63</sup> be followed by further cooperation in neighbouring domains (through a 'spillover' effect, or the logic of ramification), eventually resulting, according to the prediction, in a patchwork of cooperative patterns, perhaps even leading to the creation of a state. This functionalism works on similar

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<sup>61</sup> For the position that cosmopolitanism can be reconciled with prioritizing the good of smaller communities, see Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge University Press, 2004).

<sup>62</sup> An accessible rendition is David Mitrany, 'The Prospect of Integration: Federal or Functional?', (1965) 4 *Journal of Common Market Studies*, 119-149.

<sup>63</sup> The degree of automaticity tends to separate functionalists from neo-functionalists. Classic functionalists expected spillover to happen automatically; neo-functionalists realized that political intervention would be required. A very good analysis of integration functionalism is J.K. de Vree, *Political Integration: The Formation of Theory and its Problems* (The Hague: Mouton, 1972).

axioms and postulates as does Reinsch's legal functionalism: organizations are supposed to exercise delegated tasks, and eventually result in 'a working peace system'<sup>64</sup>: not federal, but functional.

But if its underlying axioms and postulates are related, this integration functionalism nonetheless asks radically different questions from its legal brethren. The integration theorists are wondering how cooperation can beget further cooperation; for the lawyers, by contrast, the focus does not rest on furthering cooperation (although this may well be a welcome side effect), but on how cooperation is structured: what rules apply to the relationship between the organization and its members? What competences does the organization have, and how far do they reach? Under what circumstances can international organization be held accountable by their member states? The questions are radically different.

Yet, for a long time, this dichotomy of two functionalisms was rendered invisible, perhaps because by the time international organizations came to prominence and the 'move to institutions' took off in earnest<sup>65</sup>, some of the more eye-catching organizations created already defied Reinsch's framework. The multi-purpose League of Nations does not fit the theory neatly; the ILO, with its tripartite structure, does not quite fit the mould, and neither does an entity such as Interpol, created not by governments but, initially, by police forces, while the International Federation of National Standardization Associations was set up in 1926 by national standardization organizations rather than governments. Most assuredly, few of these can realistically be considered a-political, and with Interpol and the Standardization Federation it would even be problematic to suggest they exercise tasks delegated to them by member states. Other organizations started to arise in order to protect particular interests, including the 1924-born International Vine and Wine Office – a far cry from serving a clearly articulated global public good.

In short, by the time Reinsch's functionalist theory had become settled, it was already being overtaken by events, and things were not helped by Frank Sayre's intervention. Sayre, the son in law of US President Woodrow Wilson, had authored a brief book in 1919 in which he, inadvertently, enormously expanded the notion of international organization.<sup>66</sup> If Reinsch had focused on entities that were somehow devoted to the global public good (however precisely defined), Sayre had included in his analysis all sorts of semi-imperialist ventures, including such entities as the Western river commissions set up in China to guarantee the smooth flow of commerce in China. This had little to do with the global public good; instead, such ventures served highly particular interests, and could only be 'marketed' as international organizations because they

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<sup>64</sup> David Mitrany, *A Working Peace System* (London: Royal Institute of International Affairs, 1943).

<sup>65</sup> David Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review*, 841-988. Kennedy locates the move to institutions in the years immediately following World War I.

<sup>66</sup> Francis B. Sayre, *Experiments in International Administration* (New York: Harper & Brothers, 1919).

represented international cooperation. Herewith, functionalism lost sight of the public purpose element justifying the special treatment of international organizations, and focused instead on cooperation: what characterized international organizations after Sayre was no longer that they embodied a global ideal, but merely that they embodied international cooperation. Small wonder then that Reinsch's functionalism came to be mistaken, in the public eye and the eyes of many international lawyers, for integration functionalism.<sup>67</sup> For the EU, this has implied that it could continue to be seen as a functionalist role model, but with the caveat that it can (perhaps) be so regarded for purposes of integration theory, rather than for purposes of the law of international organizations.

#### IV. Final Remarks

Future historians, as opposed to some working today<sup>68</sup>, will no doubt reach the conclusion that the EU has been of major political relevance. What is more, future intellectual historians will have to acknowledge that the EU has had a tremendous impact on our political imagination. The discovery of the state was a momentous occurrence; the discovery of the international organization composed of states was a momentous occurrence, and the EU, located somewhere in-between, is just as momentous an experiment in governance. It is so in form, but even in its actions: few political entities are as creative in their attempts to organize governance as is the EU. Some have heralded the EU phenomenon of mixed agreements as a uniquely European contribution to federalism theory and practice<sup>69</sup>; others have suggested, somewhat shrilly perhaps, that the EU's wide treaty practice calls for a separate regime governing treaties concluded by the EU<sup>70</sup>; and yet others have drawn attention to such innovations as the European Citizens' Consultations.<sup>71</sup>

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<sup>67</sup> A stark example is the probing analysis of A.A. Fatouros, 'On the Hegemonic Role of International Functional Organization', (1980) 3 *German Yearbook of International Law*, 9-36.

<sup>68</sup> It is baffling that the EU hardly gets a mention in the more than 700 page history of the twentieth century produced by Niall Ferguson, *The War of the World* (London: Penguin, 2007). Then again, neither does the UN: Ferguson's history is above all still a history of states and their interactions.

<sup>69</sup> Most prominently J.H.H. Weiler, 'The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle', reproduced in J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), 130-187. The seminal monograph is Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague: Martinus Nijhoff, 2001)

<sup>70</sup> Delano Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague: TMC Asser Press, 2004).

<sup>71</sup> For a brief overview, see Klaus Dingwerth and Patrizia Nanz, 'Participation', in Cogan et al. (eds.), *Oxford Handbook*, 1126-1145.

This paper has suggested that the EU has had a serious impact also on the way we think about international organizations (I hesitate to use the word 'theory' here, partly because the field of international organizations law is not particularly well-theorized to begin with<sup>72</sup>). It has demonstrated that the EU has paved the way, if not for organizations affecting individuals immediately (this occurred already well before the EU was created), then at least for a recognition that international organizations may come to do so. And it has demonstrated that the theory of functionalism, as developed by Paul Reinsch over a century ago, is in some need of re-consideration. The EU is, by general acclamation, the most evolved exemplar of international organization; it is at the very least curious that the leading theory on international organizations law has no place for it.

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<sup>72</sup> For an overview, see Jan Klabbers, 'Theorising International Organisations', in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 618-634.