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1. Introduction

With the prevalence and importance of international organizations within the international community on the rise since the mid-19th century,¹ it has become vital to the health of international law to accurately define the extent to which international organizations participate within the international legal order. International law has always been dominated by the idea of the sovereign nation state whose authority cannot be limited or curtailed without its express consent.² States drafted treaties, established customary rules and it was their actions that developed international law.

The creation of international organizations by states was born out of necessity, states needed these organizations in order to fulfil functions which they themselves could not effectively engage in. These organizations allowed the nation states to come together and assume burdens which no one state could realistically realize on their own, instead those objectives would be vested in institutions which could span multiple states. The powers of these organizations were set out in international agreements, but at the time of the first creation of international organizations, the legal landscape surrounding these newly founded institutions was incredibly bare. In fact, international law was not prepared, at the time of the significant influx of such organizations after 1945, for the impact international organizations might have on the development of international law.³ Jan Klabbbers, even in 2015, stated that ‘...*while international organizations have been around for roughly a century-and-a-half, few attempts have been made at theorizing.*’,⁴ this reflects the continued state of international law, which largely has failed to recognize the impact that international organizations have had in practice.

This oversight in international law has given rise to significant debate as to the powers and authority of international organizations. While the primary source of law for any international

¹ Malcolm N. Shaw, ‘International Law’, (2014), Seventh Edition, Cambridge University Press, pages 932-933.

² A principle that remains reflected in the Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980.

³ Gregory J. Kerwin, ‘The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts’, (1983), Duke Law Journal 876-899, p.879.

⁴ Jan Klabbbers, ‘An Introduction to International Organizations Law’, (2015), Third Edition, Cambridge University Press, p. 3.

organization is their constituting treaty, the problem of vague or general provisions in those treaties has allowed for the doctrine of implied powers to take over the debate concerning an international organization's competence. The application of implied powers to an organization's founding charter can cause unforeseen powers to be granted to the institutions as well as give rise to obligations not previously contemplated by the membership.⁵

Probably the most important and well known international organization, the United Nations, provided a prime example of this issue with the multitude of challenges relating to its authority and competence to operate on the international stage. In the '*Reparations for Injuries*'⁶ advisory opinion, the International Court of Justice (hereinafter 'ICJ') was required to state that the UN possessed a distinct international legal personality allowing it to be an international actor with its own rights and obligations under international law.⁷ While the UN Charter does not specifically provide the UN with such personality, the ICJ found that on the basis of the functions which were assigned to the UN, there could be no other intention than to empower the UN as an international actor. This decision provides a clear legal basis for the creation of powers derived from constituent treaties which might only be implicit in nature.

Despite this development, there remains a general rule that states will only be subject to obligations arising out of international agreements to which they have consented.⁸ While states might disapprove of implied powers as potentially broadening the scope of powers which an international organization can imply, there is no doubt that the doctrine has profoundly changed the manner in which constituent treaties are read.

Implied powers, while beneficial to international organizations in general, create certain difficulties when analyzing international law and seeking to determine the extent of an international organization's powers as well as the extent to which they might be capable of exercising their authority internationally. This paper is focused on analyzing the extent to which

⁵ Ian Hurd, 'International Organizations: Politics, Law, Practice', (2011), Cambridge University Press, p. 3.

⁶ Reparations for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174, (hereinafter 'Reparations Case').

⁷ Ibid, p. 179.

⁸ Hurd, 'International Organizations: Politics, Law, Practice', p. 9.

the European Union, as an international organization, is capable of influencing the development of international law. Much of the work exploring the law surrounding international organizations tends to focus on the impact of international law on the EU. The consolidated version of the Treaty on European Union (hereinafter the 'TEU') in Article 3(5) provides a very general and broad statement on the EU's commitment to respecting international law and the UN Charter in particular. Less time is spent on analyzing the effect that the EU itself may exert over international law.

It is particularly interesting to examine the EU's participation due to its nature which allows it to be set apart from many, if not all, other international organizations. The EU is a supranational institution as opposed to a mere intergovernmental one. Some of the key features which allow for this distinction to be drawn revolve around the EU's ability to bind its membership to its rules, even where not all members agree; the supremacy of EU law within the legal order; and the direct effect of some of its internal legislation and international agreements on the legal systems of the Member States.⁹ The EU is, at present, the only international organization that can truly boast a supranational character.¹⁰

The EU not only has powers which go beyond those of the vast majority of international organizations, it has also been endowed with several of the competences of its Member States and must act with an authority on the international scene that generally differs from the authority wielded by the bulk of international organizations. It is this aspect of the EU that makes it so important that the law surrounding the competence of international organizations in international law be analyzed and compared to the sovereignty of nation states as the original subjects of international law. The ICJ in the '*Reparations Case*' highlighted that while international organizations might be subjects of international law: '*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.*'.¹¹ While this statement pertains mostly to the limits imposed by

⁹ Klabbers, 'An Introduction to International Organizations Law', p. 26.

¹⁰ Ibid, see also Blokker, 'General Introduction', pages 5-6, in Roberto Virzo and Ivan Ingravallo (Ed.), 'Evolutions in the Law of International Organizations', Legal Aspects of International Organizations Volume 54, (2015), Brill Nijhof.

¹¹ Reparations Case, p. 178.

way of circumscribed competences delegated to the international organizations, the fact that international organizations are qualified subjects of international law bears investigating and the scope of their authority is worth analyzing.

In order to pursue the question, to what extent the EU can participate in the creation of international law, this paper will analyze the two main sources of law, as set out in Article 38 (1) of the Statute of the International Court of Justice (hereinafter ‘ICJ Statute’), and the effect the EU might have on their creation. These sources, international conventions¹² and international customary law will be individually analyzed in chapters 4 and 5 respectively. Before they can be thoroughly discussed, it is necessary to elaborate on the general position of international organizations in international law, as well as set out the EU’s competences, and in particular how they permit the EU to engage with international law.

The analysis on the international agreements of the EU will contain an additional look at the attribution of the obligations and rights which flow from such arrangements in relation to the Member States of the EU. Additionally, the responsibility for possible violations of the terms of those concluded agreements will also be examined. Concerning international customary law, it becomes more difficult to discern to what extent the EU is in fact responsible for its contribution. This chapter will instead focus on setting out the reasons why the EU should be able to contribute to the creation of such rules as well as provide examples from other international organizations.

¹² This paper will refer to ‘international conventions’ as ‘international agreements’ since the term agreements more accurately reflects the nature the instruments used for the creation of the binding commitments by the subjects of international law.

2. The Role of International Organizations in International Law

It is now, and has been for some time, well beyond any doubt that international organizations play an important role in the international scene and international law as a consequence. Their activities span a wide array of subjects from agriculture to human rights, trade to international peace and security. As Malcolm Shaw put it, *'Indeed, if there is one paramount characteristic of modern international law, it is the development and reach of international institutions, whether universal or global, regional or subregional.'*¹³

Despite the plethora of international organizations, international law has yet to settle on a universally applicable and agreeable definition of the type of institution that may qualify as such an organization. The ICJ, International Law Commission (hereinafter 'ILC'), international legal instruments and legal scholars have all tried their hand, in one way or another, at the creation of a universal definition but in most cases the exceptions remain numerous. As such the criteria so far established in international law can be seen more as guidelines to the identification of a fully-fledged international organization where not every criterion is necessarily a requirement for recognition.¹⁴

This chapter seeks to establish exactly what is referred to when an institution is called an international organization. An analysis of organizations in international law at the outset will provide a more solid foundation for the discussion that is to follow. While the EU may be considered a more novel organization, being a prime example of a supranational institution, the international law applicable to the more traditional international organizations remains applicable to the EU. The fact that the EU can be set apart from the other organizations in the international landscape makes it perhaps all the more important to establish how the rules apply in a more general sense to allow for the appropriate understanding of the framework within which the EU must operate as a subject of international law.

¹³ Shaw, 'International Law', p. 933.

¹⁴ Jan Klabbers, 'Advanced Introduction to the Law of International Organizations', (2015), Elgar Advanced Introductions, Edward Elgar Publishing, p. 8.

2.1. What Constitutes an International Organization under International Law?

The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (hereinafter ‘VCLT II’) defines an international organization as merely an ‘*intergovernmental organization*’.¹⁵ While perhaps apt at the time, such a basic equivalency is certainly no longer accurate in the international scene of today. Morgenson commented at the time of the drafting of the VCLT II that practice, even in 1986, might have indicated that the definition of intergovernmental alone was insufficient and that states were not the only ones capable of becoming members to international organizations.¹⁶ In 1974, the UN General Assembly permitted the entry of the European Economic Community and the Council for Mutual Economic Assistance as observers. Suy argued that due to the prevalence and status of non-state actors in international law, the idea that only nation states were going to participate in international law had to change.¹⁷

More recently international organizations frequently take part in other organizations, the extent of their participation varies. The EU for example is a full member of organizations such as the World Trade Organization, the Northwest Atlantic Fisheries Organization and the Food and Agriculture Organization, although it has not managed to obtain membership status in the UN despite its statement to respect the UN Charter in the TEU. This touches on a different issue, separate from the capacity of an international organization to join a different organization, rather it concerns the fact that the state members of an international organization can limit the membership to a region, sector or even subject of international law. The UN Charter for instance is limited to ‘peace-loving states’, excluding other subjects of international law.¹⁸

The ILC has provided a more recent definition for the identification of international organizations which is contained in its Articles on the Responsibility of International Organizations (hereinafter ‘ARIO’), where international organizations are defined as: ‘*an organization established by a treaty*

¹⁵ Article 2 (i), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, not yet in force as of the time of writing.

¹⁶ Morgenson, ‘Legal Problems of International Organizations’, p. 19.

¹⁷ Suy, E., ‘The Status of Observers in international organizations’, (1978), Volume 160, Collected Courses of the Hague Academy of International Law, Brill Nijhoff, Leiden, p.84.

¹⁸ Article 4 (1), Charter of the United Nations, United Nations, 24 October 1945, 1 UNTS XVI.

or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities'.¹⁹ This definition is far closer to the truth, and one that is usually adhered to by legal scholars.²⁰ The reason for it being preferred is clear since it offers a broader scope for the recognition of international organizations. That being said, it is not without its own difficulties.

The ILC's definition allows for international organizations to be comprised of entities that are not merely states, although, the definition can be interpreted as requiring at least one state to be a member. This interpretation is inaccurate since there are international organizations with other organizations among its membership as well as those that were created solely by other organizations. A prime example is the Joint Vienna Institute which was created by several financial institutions, all international organizations in their own right. While the Institute does boast the Republic of Austria as a member, a possibility provided for in Article XVI of the Agreement for the Establishment of the Joint Vienna Institute,²¹ its original members were all international financial institutions.²² As such, while the interpretation is possible, it is unlikely to be applied.

The definition also avoids limiting the manner by which an international organization can be created by referring to '*or other instrument governed by international law*' as opposed to merely treaties. While the term treaty may not necessarily signify a specific type of international agreement,²³ it does provide room for a limitation which is neither accurate in practice nor helpful to identify international organizations. The ILC recognizes that both resolutions of international

¹⁹ Article 2 (a), Articles on the Responsibility of International Organizations, Yearbook of the International Law Commission, (2011), vol. II, Part Two. It should be noted that it is the definition the VCLT II uses for the purpose of defining the scope of its own application, it is not a general definition.

²⁰ See for example, Shaw, 'International Law', p. 938; and Marie-Clotilde Runavot, 'The Intergovernmental Organization and the Institutionalization of International Relations: The Modelling of International Organization at Stake', p. 21, in Roberto Virzo and Ivan Ingravallo (Ed.), 'Evolutions in the Law of International Organizations', Legal Aspects of International Organizations Volume 54, (2015), Brill Nijhof.

²¹ Article XVI (1), Agreement for the Establishment of the Joint Vienna Institute, as amended May 1, (2003), found at: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2004_III_95/COO_2026_100_2_120235.pdf.

²² Article XII (1), Agreement for the Establishment of the Joint Vienna Institute, 19 Aug. (1994), UNTS 2029, 398–403. See also Klabbbers, 'Advanced Introduction to the Law of International Organizations', (2015), p. 8.

²³ Agreement, Treaty and Convention as terms are usually used interchangeably, see Schermers and Blokker, 'International Institutional Law: Unity within Diversity', (2011), Fifth Edition revised, Bill Nijhoff Publishers, p. 1121.

organizations²⁴ and conferences of states can result in the creation of an international organization. They identify the Pan American Institute of Geography and History as well as the Organization of the Petroleum Exporting Countries as examples of organizations that were not initially established by way of a treaty.²⁵ An international organization can also be established by way of a unilateral declaration, a prime example is the Nordic Council which was established by the parallel declarations of Denmark, Iceland, Norway and Sweden in 1952.²⁶

The issue with the ILC's definition is the requirement of '*possessing its own international legal personality*'. While it is a requirement for all international organizations, the problem here is the lack of further remarks on the manner in which that international legal personality must be expressed. It is unclear, from merely reading the definition, whether the ILC requires the legal personality to be explicit or whether it can be implied. It is almost certain that it can be implied following the ruling of the ICJ in the '*Reparations Case*' but nonetheless, this could have been reasonably provided for in the text.

Legal personality for international organizations is significant since it is a criterion that forms the very foundation of an international organization's ability to engage with the international community as an active participant. It entails the capacity to engage in activity which is not necessarily prescribed by the membership. This element is particularly important since it allows one to distinguish the organization as a separate legal entity from the nation states. Legal personality raises a host of issues in international law ranging from whether an organization possesses it in the first place, an example of which is the UN and the aforementioned '*Reparations Case*' where the ICJ needed to confirm the UN's legal personality; to whether the legal personality referred to is merely meant to extend to the domestic legal orders of the member states or also applies internationally.

²⁴ It should be noted that in the context of the resolutions of international organizations, they often only initiate the creation of an organization, conventions tend to be subsequently adopted to establish the organization. Whether resolutions actually establish international organizations is therefore questionable.

²⁵ Commentary to Article 2, para 4, ARIO.

²⁶ Runavot, 'The Intergovernmental Organization and the Institutionalization of International Relations: The Modelling of International Organization at Stake', p. 32, in Roberto Virzo and Ivan Ingravallo (Ed.), 'Evolutions in the Law of International Organizations'.

In particular this last issue, the objective or subjective nature of legal personality is pertinent in the current context. Where an organization is provided with legal personality in its constituent treaty, or it is implicit by virtue of the powers conferred on the organization,²⁷ the general rule of *pacta tertiis nec nocent nec prosunt* would provide that the personality is only binding with respect to the members to that treaty. A treaty is generally unable to impose rights or obligations on third parties.²⁸ Objective personality means that the organization is a distinct legal entity which does not rely upon the recognition of third states for its ability to engage with them. The ICJ by way of the ‘*Reparations Case*’ has recognized the objective personality of the UN by virtue of the majority of states, at the time, having both the power and the intention to create such a body.²⁹ Where an organization does not possess objective personality, it can possess subjective personality meaning its personality is recognized by its Member States as well as those states which decide to recognize the organization, either expressly or implicitly.

The position of the UN is a novel one in international law by virtue of the ICJ’s confirmation of its objective personality. The majority if not all other organizations, particularly those not of a universal character, do not boast this same standing and must settle for subjective personality, this includes the EU. Subjective legal personality does not in and of itself provide any limits to the capacity of an organization to act internationally, it only imposes restrictions where a state refuses to recognize the organization.³⁰ The ability to implicitly recognize an organization creates for a rather flexible method of the recognition of an organization’s personality and requires states to actively express their non-recognition to avoid accidentally implicitly recognizing an organization.³¹

²⁷ Gerhard Hafner, ‘The Amsterdam Treaty and the Treaty-making Powers of the European Union’, p. 259, found in ‘*Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of His 80th Birthday*’, Alfred Rest, Gerhard Hafner, Gerhard Loibl, Karl Zemanek and Lilly Sucharipa-Behrmann (ed.), (1998), Martinus Nijhoff Publishers.

²⁸ See Article 34 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. The UN Charter is an exception to this rule with many of its provisions being applicable even to non-members, see Article 2 (6) UN Charter for example.

²⁹ *Reparations Case*, p. 185.

³⁰ Schermers and Blokker, ‘International Institutional Law: Unity within Diversity’, pages 990-991.

³¹ Kirsten Schmalenbach, ‘International Organizations or Institutions, General Aspects’, paras 24 and 26. Found at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e499>, last visited on 20 August 2016.

To do complete justice to the topic of legal personality is beyond the scope of this paper and for the purposes of the EU does not serve any real purpose since the Treaty of Lisbon and the amendments made to the TEU have resulted in a clear Treaty basis for the EU's subjective legal personality.³² As such the debate surrounding legal personality should be noted but requires no further discussion in this paper, rather ones attention should turn to the capacity of international organizations to operate under international law.

2.2. The Legal Capacity of International Organizations.

The legal capacity of an international organization is inextricably linked to the competences delegated to it. These competences are generally found in the organization's constituting treaty and are bestowed by its founding members onto the organization. Due to the difficulty of drafting a constituting treaty where not all future requirements of an organization can be foreseen, it has been stated by the ICJ in the '*Certain Expenses of the United Nations Case*', that the international organization itself is the first authority responsible for the interpretation of its own powers.³³ Where such an interpretation results in a dispute amongst members and the organization, that dispute is an internal one and must principally be dealt with within the institutional structure of the organization itself.³⁴

Even though the international organization itself may possess some authority to define the extent of its powers, there are very real limits to that authority. It was best put by the Permanent Court of International Justice (hereinafter the 'PCIJ') in the '*Jurisdiction of the European Commission of the Danube Case*' where it was stated that the European Commission of the Danube was created for a specific purpose and it only had the capacity to act toward that purpose. However, as long as it acts in this capacity, it has the power to utilize its jurisdiction to the fullest extent, subject to limitations imposed by its treaty.³⁵

³² Article 47, Consolidated Version of the Treaty on European Union, 2012 O.J. C 326, 26/10/2012.

³³ '*Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 151, p. 168. See also Shaw '*International Law*', p. 945.

³⁴ *Ibid.*

³⁵ '*Jurisdiction of the European Commission of the Danube Between Galatz and Braila*', Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14 (Dec. 8), p. 64.

An international organization's legal capacity is set by its founding members but the question remains whether it is possible for an organization to interpret its delegated powers, over an internal issue, as including an external competence. Where an international organization is empowered to act on the international scene, it is clear that it has the authority to engage in those activities. There have been occasions where the interpretation by an organization of its powers, has seemingly extended the scope of its authority. The EU (and its previous iterations) has provided several of these examples, they will be dealt with in further detail in Chapter 3 but it is worth drawing attention to the *'Kramer and Others'*³⁶ decision of the Court of Justice of the European Union (hereinafter 'ECJ'). In the *'Kramer'* decision the ECJ stated that the powers of the Community flows from an interpretation of the entirety of Community law, not merely the substantive parts which expressly confer certain competences. It is possible for external powers to flow implicitly from the internal powers granted by the Treaty or other acts adopted by the Community.³⁷

It is clear that the interpretation adopted when an organization's powers are being considered, is vital to the scope of those powers. There are two main approaches to such interpretations, either doctrine of attributed or conferred powers is applied, or the implied powers doctrine is resorted to. Both doctrines approach the issue of an organization's powers from a different angle. The attributed powers doctrine takes the position that the intention of the drafters at the time the organization was created is the clearest expression of the powers of an organization. This can be found in the *'European Commission for the Danube Case'* with the PCIJ's statement that *'it only has the functions bestowed upon it by the Definitive Statute'*.³⁸ The idea behind attributed powers is rooted in the notion of the sovereignty of states and that international organizations cannot create competences broader than those that were given.³⁹ Klabbers argues this approach represents the first tentative steps of the international court where international organizations were still dealt with

³⁶ Joined Cases 3, 4 and 6/76, Cornelis Kramer and Others, (1976) ECR 1279, it should be noted that the statements in 'Kramer' first arose in the 'AETR' case which is discussed in Chapter 3.

³⁷ Ibid, paras 19-20. The ECJ in 'Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty', (1994) ECR I-5267, (hereinafter 'Opinion 1/94'), did limit this possibility by insisting on an 'inextricable link' between the competence and the implied power.

³⁸ Supra 35.

³⁹ Roberto Vizro, 'The Proliferation of Institutional Acts of International Organizations: A Proposal for their Classification', p. 302.

solely on the basis of their constituting treaties. It is not so much a doctrine as it is the application of the rules of interpretation.⁴⁰

The implied powers doctrine on the other hand approaches the issue from the perspective of the organization. Where an organization is tasked with certain functions it cannot reasonably be proposed that those functions should be impeded by a failure of the constituting treaty to contain provisions on all the necessary actions which an organization would need to take in the pursuance of that function. There are two approaches within the doctrine, one takes the provisions as the starting point and weighs the necessity of an implied power with the individual powers conferred, this is the more reserved approach and limits itself to giving proper effect to the provisions in the treaty. The second perspective takes the purpose of the organization as a whole as the basis and allows for a far broader consideration of necessity to be applied.⁴¹

Judge Hackworth in his dissenting opinion to the '*Reparations Case*' was a supporter of the more restrictive approach and in his dissenting opinion stated the following: '*Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted.*'.⁴² He did support the idea that implied powers could establish the legal personality of the UN, since they were a direct result of the provisions of the UN Charter.⁴³ However, the implications, upon which the Court relied in its judgment, to provide further powers based on their necessity in the performance of the Organization as a whole, went too far. Judge Hackworth specifically stated that the more reserved approach, which he advocated, was the '*proper application of the doctrine of implied powers.*'⁴⁴ Despite Judge Hackworth's best efforts, it appears as though the broader approach to implied powers is the dominant one.⁴⁵

The doctrine of implied powers has been instrumental in the extension of the powers of international organizations. The implied powers doctrine puts a great deal of power in the hands

⁴⁰ Klabbbers, 'An Introduction to International Organizations Law', pages 52-53.

⁴¹ Ibid, pages 56-60.

⁴² 'Reparations Case', Hackworth J, dissenting opinion, p.198.

⁴³ Ibid, pages 196-197.

⁴⁴ Ibid.

⁴⁵ Klabbbers, 'An Introduction to International Organizations Law', p. 58.

of the organization since it is the primary authority on the interpretation of the extent of its power. This may not sit well with all sovereign states and as such they may specifically opt to designate the notion of attributed or conferred powers in the treaties they agree to. This is the case with the EU where Article 7 of the Treaty on the Functioning of the European Union⁴⁶ (hereinafter ‘TFEU’) requires the EU to conform all its policies with the principle of the conferral of powers. As such the Member States of the EU have written the limits of the EU’s power, to a certain extent, into the Union’s primary treaties.

It is generally accepted that international organizations are capable of entering into international agreements with third parties. The ILC in 1962 recognized as much in its First Report on the law of treaties, it stated: ‘...[T]he Commission fully accepted that international organizations may possess treaty-making capacity and that international agreements concluded by international organizations possessing such capacity fall within the scope of the law of treaties.’⁴⁷ The limiting factor here is the capacity of the organization, and as expressed in Article 6 of the VCLT II, that capacity is governed by the rules of the organization. There can therefore be no doubt that international organizations do, subject to their own internal rules, have the capacity to engage in treaty-making under international law.⁴⁸

Having established the status of international organizations in international law in broad strokes, it is now time to delve into the intricacies of the EU and the manner through which it can engage with international law and act as an influence on the creation of law in the legal regime. As an international organization, albeit a supranational one, the EU remains limited in its capacity to the competences delegated to it by its Member States. As such it is vital to establish the fields in which the EU operates before engaging in an analysis of the EU’s practice in those fields.

⁴⁶ Consolidated Version of the Treaty of the Functioning of the European Union, 2012, C 326/47.

⁴⁷ First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Doc. A.CN.4/144, Yearbook of the ILC, (1962), Vol. II, p. 30, para 11.

⁴⁸ Schermers and Blokker, ‘International Institutional Law: Unity with Diversity’, p.1123 and Finn Seyersted, ‘Common Law of International Organizations’, (2008), Martinus Nijhoff Publishers, p. 405. Where he describes the capacity as being inherent to international organizations and part of international customary law.

3. The Competences of the European Union

The competences of the EU have developed rather significantly since the Community's inception. Both the range of powers granted to the Organization as well as the scope of the individual powers have been the product of extensive debate and ECJ jurisprudence. The most comprehensive and clear statement of the EU's competences can be found in the TFEU; its articles detail the variety of competences which have been conferred by the Member States on the Union.⁴⁹ The present look at the competences of the EU will be limited to a statement on the current situation, this paper will not delve significantly into the history behind the competences or their progressive development. It should also be borne in mind that this paper will refer to the EU as a term encompassing all the previous iterations of the Community. This is merely a choice made out of convenience and reflects the European Union's succession of the European Community.⁵⁰

The competences of the EU can generally be divided into three categories: exclusive competences, shared competences and the competence to carry out actions to support, coordinate or supplement the actions of the Member States.⁵¹ Each type of competence permits the EU to act with either greater or lesser authority vis-à-vis the Member States. The actions of the EU are not however solely dependent on the granting of the competence to act in a particular area. The EU treaties have established a number of considerations and principles which must be adhered to in all the actions of the Union.⁵² These include respecting human dignity, freedom, democracy, equality, the rule of law and human rights as prescribed by Article 2 of the TEU. Specific mention is made of the need for the EU to strictly observe the developments of international law and requires 'respecting' the principles of the UN Charter.⁵³

The Member States have learned a great deal over the course of the EU's history and they have inserted a number of clauses in an attempt to more clearly define the extent of the Union's powers. As discussed in Chapter 2 of this paper, the EU is governed by the principle of conferral, as set out

⁴⁹ Piet Eeckhout, 'EU External Relations Law', (2011), Second Edition, Oxford EU Law Library, Oxford University Press, p.181.

⁵⁰ Article 1, TEU.

⁵¹ Article 2 (1), (2) and (5), TFEU.

⁵² Article 3 (6), TEU.

⁵³ Article 2 (5), TEU.

in Article 5 TEU, and all powers not conferred by the members onto the EU, remain the prerogative of the states themselves.⁵⁴ In addition to conferral, the EU is also subject to the principles of ‘subsidiarity’ and ‘proportionality’. These too are reactions by some of the members who were hesitant to relinquish too much of their national sovereignty. They require the Union to only act upon its competences where they can be better achieved by way of Union action and prevent action where they are not ‘necessary’ to achieve the aims of the EU.

Despite the principle of conferral applying to the competences of the EU, implied powers have formed a part of the shaping of the capacity of the Union. In cases such as ‘*Kramer*’, ‘*AETR*’ and ‘*Opinion 1/76*’, the ECJ has consistently upheld the possibility of internal powers being extended to include external ones where it might otherwise render the internal power ineffective.⁵⁵ With the TFEU attempting to consolidate the extent of EU powers into one document, the Treaty has also provided for a certain scope to continue the implied powers doctrine accepted by the ECJ. Article 216 (1) TFEU is very reminiscent of the implied powers doctrine, permitting the Union to conclude agreements with third parties where the Treaties provides, or where it is ‘*necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.*’. The phrase does not extend quite so far as to be reminiscent of the broader approach to implied powers since it does require the implied power to arise out of the policies of the Union.

Where the EU engages in a legally binding act, or establishes a common policy, the members must respect this position and ‘*to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.*’⁵⁶

While coordination is a more generally applicable requirement within the EU framework, Article 5 of the TFEU highlights a number of areas that mandate coordination. The Member States must

⁵⁴ Article 4 (1), TEU.

⁵⁵ ‘*Kramer*’, page 1309, para 30-33; ‘*22/70 Commission v Council*’, (1971) ECR 263, para 27 (hereinafter ‘*AETR*’); and ‘*Opinion 1/76, Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels*, (1977) ECR 741, at para. 3.

⁵⁶ ‘*AETR*’, para 22.

coordinate with the Union in the following policy areas: economic policy; employment policy; and social policy. The Council is required to adopt broad policy guidelines for the Member States to adhere to.

It is now time to establish exactly what the different competences of the EU are. This paper will limit itself to a very general overview, the competences merely for the foundations of the EU's capacity to act in international law. As such it is less relevant to analyze the internal workings of the EU.

The exclusive competences of the EU are set out in Article 3 of the TFEU, they are:

- a) The customs union;
- b) The establishment of competition rules in the internal market;
- c) The monetary policy of the Member States whose currency is the euro;
- d) The conservation of marine biological resources under the common fisheries policy;
- e) The common commercial policy.

Article 3 (2) provides the EU with the exclusive competence to conclude international agreements where it is necessary to enable to Union to exercise its internal competence. This is a competence influenced by earlier ECJ jurisprudence and is a measure which ensure the effectiveness of an EU policy is not prevented by external forces.

The TEU provides the EU's definition of exclusivity of competence in Article 2 (1), it states '*only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.*'. As such, the Union has entirely subsumed the competences of the Member States in these areas.

The shared competences of the EU are included in Article 4 (2). They include: the internal market; social policy for the aspects defined in the TFEU; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European network; energy; area of freedom, security and justice; and the common safety concerns in public health matters, for the aspects defined in the

TFEU. The EU also has limited competences to act in the areas of research, technological development and space but the actual exercise of acts in those areas remains vested in the Member States.⁵⁷ Similarly, development cooperation and humanitarian aid allows EU involvement but is limited to carrying out a common policy, the Member States are the ones to act upon the policy.⁵⁸

Article 2 (2) TFEU defines the concept of shared competence within the context of the EU. It allows both the EU and the Member States to legislate or adopt legally binding acts in the areas. The Members are limited in their opportunity to pass such acts and cannot adopt legally binding acts once the EU has exercised its competence in the area. Only once the EU has ceased exercising its competence are the Member States once again entitled to exercise theirs. This idea can be found in the jurisprudence of the ECJ where, in '*AETR*', the ECJ stated that the Member States would not be permitted to act concurrent to the EU where such acts would be incompatible with the uniformity of Community law.⁵⁹

Article 6 of the TFEU establishes the areas that are included in the Union's competence to support, coordinate or supplement the actions of the Member States. They include: the protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation. The authority of the EU in these competence areas is set out in Article 2 (5) TFEU. EU acts in these areas do not supersede the power of the sovereign states, even if the EU adopts a legally binding act it does not require the Member States to harmonize their laws.

The EU's authority in the areas referred to above relates, at first instance, to the internal situation of the EU. They certainly have external components however, as discussed above, these have largely been created by way ECJ precedent, although they now form part of Union law. As such the range of activities which allow the EU to act internally also permit the EU, to a great extent, to engage in activities on the international scene.

⁵⁷ Article 4 (3), TFEU.

⁵⁸ Article 4 (4), TFEU.

⁵⁹ '*AETR Case*', p. 276, para 31.

3.1. The Common Foreign Security Policy.

Despite the EU competences set out in Articles 3-6 TFEU having external effect as well as internal ones, the main source of external action can be found in the Common Foreign and Security Policy (hereinafter 'CFSP') of the Union. The TEU is the primary treaty basis for the CFSP but the TFEU also contains provisions on it but the CFSP is not placed within the established structure of exclusive, shared or supplementary competence.⁶⁰ Article 2 (4) TFEU provides the EU with the authority to define and implement the CFSP, as well as framing the common defence policy, but does not provide insight as to the correct division of the capacity. The TEU provides slightly more information on its operation in Article 26 (3) by adding that the policy will be put in effect by the High Representative of the CFSP and the Member States. As Eeckhout states, the majority of the EU competences have been constitutionalized, there is no such constitutionalizing for the setting of the CFSP.⁶¹

An important aspect of the CFSP is that it operates, unlike the EU itself, in a manner more reminiscent of an intergovernmental organization. The main body within the structure is the Council, also referred to as the Council of Ministers. It is comprised of the 28 national ministers, one from each Member State, and it makes decisions, mostly, by way of unanimity.⁶² Article 24 TEU states that the CFSP covers all areas of foreign policy and Union's security. Additionally, it allows for the common defence policy to be framed as well. The scope of the CFSP's authority would seemingly conflict with the other EU institutions' authority to engage in their own competences since many of them overlap. This is why Article 40 TEU specifically provides that the CFSP shall not affect the competences of the EU as detailed in Articles 3-6 TFEU. As such there is room to distinguish the competences but this can be difficult due to the rather imprecise nature of the scope of the CFSP. This is an internal issue however and does not directly impact the foreign activity of the Union.

⁶⁰ Eeckhout, 'EU External Relations Law', (2011), pages 120 and 167.

⁶¹ Ibid, page 120.

⁶² Article 31 (1), TEU.

Article 23 TEU provides as follows: ‘*The Union's action on the international scene, pursuant to this Chapter [referring to the Chapter on the CFSP], shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1.*’. These general principles are those described above, they are a mainstay for the entire external operation of the Union. The main tasks undertaken within the CFSP are to establish guidelines and adopting decisions on actions, positions or the implementation thereof, as well as the strengthening of the cooperation between the Member States.⁶³ As such the institutional structure of the CFSP does not possess legislative authority. Actions to be taken by the EU are acts which require the Union to be the active participant, decisions on positions require the Member States to adhere to them and impose obligations on them.⁶⁴

The EU is permitted to enter into agreements with third parties⁶⁵ and third parties can be asked to associate themselves with the common positions of the Union, this does not impose any legal obligations on the third party.⁶⁶ As such there is certainly some room for the EU to not only act internationally but also to involve itself internationally with third states.

To conclude this very broad overview of the competences of the EU, it is worth noting that due to the competences of the EU containing both an internal and external component, the scope for the EU to engage in international activity is quite expansive. Eeckhout even described the competences of the EU by saying that: ‘*There appears to be virtually no significant areas of international law-making in which the EU cannot participate.*’⁶⁷. Due to the extensive number of competences the EU possesses with influence in the international landscape it becomes all the more important to analyze how the EU goes about acting upon those competences. As such the following chapters will analyze the EU’s ability to engage in international agreements and create international customary law. Not only will the EU’s ability to do so be assessed, also the extent of its influence in international law will be examined.

⁶³ Article 25, TEU.

⁶⁴ Article 29, TEU.

⁶⁵ Article 37, TEU.

⁶⁶ Vincent Kronenberger, ‘International Law Aspects of the Association of Third States with the Common Positions of the Council of the European Union’, pages 361-2, in Vincent Kronenberger (ed.) ‘The European Union and the International Legal Order: Discord or Harmony?’, (2001), T.M.C. Asser Press.

⁶⁷ Eeckhout, ‘EU External Relations Law’, (2011), p. 189.

4. The European Union and International Agreements.

Chapter 2 established the general requirements imposed by international law on an organization for it to be a subject of international law with the necessary capacity to engage with the international community and create legally binding agreements at an international level. Since international organizations are not equal to sovereign states as per the ICJ in the '*Reparations Case*',⁶⁸ meaning they do not possess the full complement of rights of a sovereign state, rather they are limited to the rights derived from the powers which have been delegated to them. It was necessary to set out the competences of the EU prior to exploring the manner in which the Union operates on an international level.

The TEU and the TFEU are the main sources of EU law and provide the basis for the competences of the Union. They provide both internal and external competences. Now it is time to examine the manner by which the EU engages in treaty making activity and the extent of its ability to participate in the creation of international law. This Chapter will additionally examine the limits of the EU's capacity to enter into international agreements, including its ability to accede and make reservations; and the nature of the EU's responsibility under international law.

4.1. The Treaty-making Capacity of the European Union.

This subchapter will begin by describing the main treaty basis for the EU's ability to engage in the conclusion of international agreements. It will also expand on the topic of conferred and implied powers with the specific focus on how the EU might be able to shape its own powers in order for it to obtain the necessary capacity to engage in international agreements in competences that are not explicitly provided for in the Treaties.

The EU's main provision on its treaty-making capacity is Article 216 TFEU, which, as highlighted in Chapter 3, has significant scope for the EU to imply the need for treaty-making competences, even where they are not strictly speaking provided for in the treaties. It does not refer to the term

⁶⁸ Reparations Case, p. 178.

treaty, rather it uses the more general ‘agreement’ since it does not imply any limitation to the Union’s capacity⁶⁹ and is more generally applicable to the EU’s international acts. ‘*Opinion 1/75*’ saw the ECJ support the use of the term ‘agreement’ by stating it was ‘*the expression in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.*’⁷⁰

Article 216 can be understood as providing two systems for the EU by way of which it can engage in an agreement-making capacity.⁷¹ Firstly, it can engage in the act where it is specifically provided for in the Treaties. Secondly, the agreement-making capacity can arise where it is ‘necessary’ to achieve one of the Union’s objectives referred to in the Treaties, it is provided for in a legally binding act of the EU or it may affect or alter the scope of the common rules.

In 2002, in his Opinion to the ‘*Open Skies Case*’,⁷² the then Advocate General, Mr. Tizzano reasoned that the phrase ‘necessary’ was to be defined by the Union itself by way of the current Article 352 TFEU procedure.⁷³ This article is also known as the flexibility clause and it allows the Council to, upon the request of the European Commission (hereinafter ‘Commission’) with the consent of the European Parliament (hereinafter ‘Parliament’), decide that a measure, not provided for in the Treaties, should nonetheless fall within the scope of the Union’s activities. This decision must be unanimous and it cannot pertain to the CFSP.⁷⁴ Despite requiring unanimity, the procedure remains a more effective tool to expand Union capacity by avoiding the need for the national parliaments of the Member States to weigh in on the decision.⁷⁵

⁶⁹ Francis G. Jacobs, ‘Direct Effect and Interpretation of International Agreements in Recent Case Law of the European Court of Justice’, p. 13, in Alan Dashwood and Marc Maresceau, ‘Law and Practice of EU External Relations: Salient Features of a Changing Landscape’, (2011), Cambridge University Press.

⁷⁰ Opinion 1/75, Opinion given pursuant to Article 228 (1) of the EEC Treaty, (1975), ECR 1355, p. 1360.

⁷¹ Eeckhout, ‘EU External Relations Law’, (2011), p. 122.

⁷² Judgments in Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany, (2002) ECR I-9427, (hereinafter ‘*Open Skies Case*’) Opinion of the Advocate General Tizzano, 31 January 2002.

⁷³ Ibid, paras 48-53.

⁷⁴ Article 352 (4), TFEU.

⁷⁵ The Commission is required to draw the attention of the national parliaments to such requests as per Article 352 (2), TFEU.

Advocate General Tizzano continued by arguing that, like Article 216 now suggests, it is not vital to the applicability of the Article to have an internal competence provided for by treaty or internal act. It is possible for the Union to derive new external powers which it does not as of yet have internally.⁷⁶ However, the authorization of a measure under Article 352 is not in and of itself sufficient to create an exclusive competence for the Union, an act by the EU on the basis of the authorization is required according to AG Tizzano.⁷⁷ It is based on the idea that, not until there has been ‘*an assumption of international obligation*’, can the possibility arise for Member State action to result in a risk to the objectives of the Union which the authorized measure identified as necessary.⁷⁸

The Advocate General highlighted the capacity extension capability of Article 352. There are generally two ways of developing the EU’s legal powers, including the external powers. The first method is parallelism while the second is the method prescribed in Article 352 TFEU.⁷⁹ Parallelism creates external powers for the Union on the basis of existing internal ones. It is most prominently demonstrated in the aforementioned ‘*AETR*’ and ‘*Kramer*’ cases as well as ‘*Opinion 1/76*’⁸⁰, and is based on the ‘*effet utile*’ principle.⁸¹ The Article 352 procedure however does not run into the issue of requiring a pre-existing internal competence, it is capable of creating new competences on the basis of its necessity to fulfill the objectives of the Union.⁸²

The jurisprudence on the application of Article 352 has sought to set at least some limits on the operation of the Article. ‘*Opinion 2/94*’ (hereinafter ‘*ECHR Case*’) initially confirms the application of now Article 352 as a means for the creation of competences not expressly set out in the Treaties, then the Court goes on to limit that possibility by stating: ‘*That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by*

⁷⁶ Open Skies Case, Opinion AG Tizzano, para 48. AG Tizzano draws upon the EU’s assumption of competences in the area of environmental protection as a basis of this occurring in practice.

⁷⁷ See also Opinion 1/94, (1994), paras 88-89.

⁷⁸ Open Skies Case, Opinion AG Tizzano, para 49.

⁷⁹ Viljam Engström, ‘Constructing the Powers of International Institutions’, (2012), Martinus Nijhoff Publishers, p. 50.

⁸⁰ Supra note 42.

⁸¹ Ibid, p. 53, see also Klabbers, ‘An Introduction to International Organizations Law’, p. 57.

⁸² Ibid, p. 52.

*the provisions of the Treaty as a whole and, in particular, by those which define the tasks and activities of the Community. On any view, Article 235 [now Article 352] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.’*⁸³

This passage could serve as the basis for rendering the Article 352 procedure almost entirely ineffective since strict adherence to the idea that the scope of the Union’s activities cannot be enlarged would defeat the possibility of authorizing new measures not expressly contained in the Treaties. The importance of this line of jurisprudence has been questioned in recent times. Engström suggests that the decision of the ECJ in the ‘ECHR Case’ might have been founded on a desire of the Court not to be bound by the European Court of Human Rights. As such the line of precedent may have been a result of a particular circumstance, Engström states that there has generally been no recognizable difference in the subsequent case law of the ECJ on measures adopted under Article 352 to reflect an adoption of a stricter test.⁸⁴

There has been a development as to the nature of the term ‘necessary’. Despite the initial authority to judge the necessity of a measure falling on the Commission and the Council, the ECJ is permitted to review, upon request, whether the judgment of the Union was correct. In ‘*Opinion 1/94*’⁸⁵, the ECJ was faced with the question whether the Union was better suited to engage in an international agreement for the purposes of concluding the Agreement on the Trade Related Aspects of Intellectual Property Rights as part of the World Trade Organization. The Commission argued it should have exclusive competence since it fell within the commercial policy of the Union. The ECJ disagreed however, taking a narrow view of the commercial policy, and stated that the EU was only capable of extending its competences where they are ‘*inextricably linked*’ to a competence which it already possesses.⁸⁶ The defining of ‘necessary’ as requiring an inextricable link to an existing competence provides some certainty as to the more limited nature of the Article 352 procedure. This qualification prevents the adoption of measures which are novel to the powers

⁸³ Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1996) ECR I-1759, para 30. (*clarification added*)

⁸⁴ Engström, ‘Constructing the Powers of International Institutions’, (2012), p. 62.

⁸⁵ Opinion 1/94, (1994).

⁸⁶ *Ibid*, para. 86.

of the Union and upholds the principles of conferral, subsidiarity and proportionality by preventing the Union from unduly intruding on the competences of the Member States.

The analysis of the application of Article 216 (and by extension Article 352) continues to uphold the statement of Eeckhout that there is virtually no room for the exclusion of EU treaty-making capacity in any of its competence areas, be they exclusive, shared or merely supplementary.⁸⁷ There is a limit to the creation of new competences, in addition to the previously mentioned inability to affect the CFSP, the principles of conferral, subsidiarity and proportionality will continue to apply and any new measure must be ‘inextricably linked’ to a competence the Union possesses.⁸⁸ Article 352 is therefore no longer a means for the creation of new competences on a unilateral basis and its flexibility has been somewhat curtailed.

4.2. Agreement Negotiation and Mixed Agreements.

Having established the EU’s capacity and scope for agreement-making powers, the next step must be to establish the manner in which such agreements are negotiated and concluded. The EU’s procedure for agreement negotiation is spelled out in great detail in Article 218 TFEU, it applies to all agreements of the EU with third parties. There are only minor differences between the Article 218 procedure with relation to the commercial policy of the Union⁸⁹ and agreements on the exchange-rate of the euro as set out in Article 219 TFEU.

Article 218 (2) identifies the Council as the main authority for the initiation, direction and conclusion of all the EU’s international agreements. A position which is not surprising due to its place within the Union as the main legislative body. The initiation of an international agreement will be performed by the Council on the basis of a recommendation by the Commission, or where the agreement either exclusively or principally relates to the CFSP by the High Representative of the Union for the Foreign Affairs and Security Council.⁹⁰ The Council will nominate the Union’s

⁸⁷ Eeckhout, ‘EU External Relations Law’, (2011), p. 123.

⁸⁸ Article 5, TEU.

⁸⁹ Article 207 (3), TFEU, specifically references the application of Article 218 subject only to the special rules set out in Article 207.

⁹⁰ Article 218 (3), TFEU.

negotiator, or the head of a team of negotiators and may issue directives for the negotiator to follow during the negotiations. The Council may also establish a special committee which consults on the manner in which the negotiations are to be conducted.⁹¹ While the choice of negotiator is technically left open to the Council, it is generally either the Commission or the High Representative that conducts the negotiations,⁹² depending on the nature of the agreement.

The Council will, on the recommendation of the negotiator, authorize the signing of the agreement by qualified majority,⁹³ and possibly authorize its provisional application. Before the Council can conclude an agreement it must consult⁹⁴ or seek the consent of the Parliament,⁹⁵ unless the agreement relates to the CFSP. The Parliament must be kept informed at all stages of the procedure, reflecting the desire for the parliament to have a voice in the external relations of the Union. Should either a Member State, the Parliament, the Council or the Commission believe an agreement to exceed the competences of the Union or be incompatible with the Treaties, they may seek an opinion from the ECJ on the issue. The ECJ's opinion in such cases, where it declares the agreement invalid, will frustrate the entry into force of that agreement.⁹⁶

This is the procedure followed for the creation of international agreements from the side of the EU. This is uncontroversial or causes little issue from the perspective of international law. The EU possesses international legal personality, it has the capacity to conclude agreements and the agreements concluded by the EU are binding both on it and the Member States.⁹⁷

The issue is not entirely resolved since despite Article 216 (2) stating the EU's institutions and the Member States are bound by the agreement, this is a provision applicable to the internal law of the Union. The question as to whether it is the EU or the Member States, or both, that are bound in international law remains unresolved. It is entirely within a third state's purview to request an international agreement with either the EU or the Member State of their choice. There is no

⁹¹ Article 218 (3) and (4), TFEU.

⁹² Eeckhout, 'EU External Relations Law', (2011), p. 196.

⁹³ Article 218 (8), TFEU. This is subject to the agreement not specifically requiring unanimity in accordance with the Treaties; relating to association or accession to the Union; or concerns the accession to the ECHR.

⁹⁴ Article 218 (6) (b), TFEU.

⁹⁵ Article 218 (6) (a), TFEU.

⁹⁶ Article 218 (11), TFEU.

⁹⁷ Article 216 (2), TFEU.

international norm forcing the non-member to engage with the organization. That being the case, the Member State approached by the non-member should refrain from engaging in an international act which would fall within the competences of the organization. Instead the Member State should direct the non-member to the organization, where that non-member refuses, it becomes an internal issue for the organization as to whether the Member might engage in an activity with the non-member. Where the Member State engages with non-members notwithstanding the competence being vested with the organization, it is possible for there to be ramifications for the Member within the organization's institutional system or legal order.

With respect to the EU, Article 2 (1) TFEU stresses that the Member States cannot act unilaterally to adopt legally binding acts in the exclusive competence areas of the Union. The ECJ in *'Commission v Greece'* confirmed this position within the EU legal order and added that the Member States were also unable to engage in activity which, while not itself creating a legally binding result, might indirectly result in a binding act with an effect on the Union.⁹⁸ In terms of shared competences, the ECJ in the *'Commission v Sweden'* case extended this inability to act on behalf of the Member States but only where the EU was in the process of engaging its own act, or had already acted on the competence.⁹⁹ As such, where the EU engages in an international act or has the exclusive competence to do so the Member State must by virtue of EU law refrain from acting in any manner incompatible with the Union's position. There remains no international rule prohibiting such action but the Member States have committed themselves to the limitation upon joining the EU. Where the EU possesses the competence to engage in an area of international activity, by virtue of those conferred competences, the EU becomes a fully-fledged party to those agreements.

The EU does not possess the competences necessary for it to enter into every imaginable international agreement, there may be times when the EU will need to enter into an international agreement with a third party alongside its Member States. These are agreements which are of such a scope that they encompass both EU as well as Member State competences. According to

⁹⁸ 'C-45/07, Commission of the European Communities v Hellenic Republic', (2009), ECR I-00701, paras 21-23.

⁹⁹ 'C-246/07, Commission v Sweden', (2010) ECR I-03317, paras 103-105.

Klabbers, this issue of mixed agreements is largely confined to the EU.¹⁰⁰ The problem that arises in relation to mixed agreements is that the EU and its members are responsible for different aspects of a single treaty. As such the agreement which the Union and its members engage in does not bind the EU in all aspects of that agreement and the question for the third parties is, who do they need to deal with, the EU or the Member States. There have been many agreements which can be classified as mixed agreements, most notably all association agreements and many development oriented agreements with developing countries tend to fall into this category.¹⁰¹

This question is particularly relevant since the competences of the EU are not always entirely clear to non-members and it is unreasonable to require third parties to familiarize themselves with internal Union law. Therefore, it is now common for the third parties to the agreement to request from the EU a definitive declaration on the division of competences as they pertain to the agreement.¹⁰² Such a declaration is important since it establishes the competent party that the other treaty members need to deal with in relation to all the different aspects of the agreement. Neuwahl has argued that where a third party to a mixed agreement with the EU does not request such a declaration, it may be possible that they are less likely to be shielded from possible negative consequences of the lack of clarity in the agreement.¹⁰³ It is therefore recommended that all third parties request a declaration on the division of competences in all mixed agreements with the EU. As has been noted by Klabbers, such declarations often involve rather vague phrases as to the division of the competences by leaving the possibility for change open to the EU as a unilateral action which may subsequently result in a change in circumstance for the other parties to the agreement.¹⁰⁴

¹⁰⁰ Klabbers, 'An Introduction to International Organizations Law', p. 281.

¹⁰¹ 'Opinion 1/78, Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - International Agreement on Natural Rubber', (1979), ECR 02871, para 2.

¹⁰² Schermers and Blokker, 'International Institutional Law: Unity with Diversity', p. 1133.

¹⁰³ Nanette A.E.M. Neuwahl, 'Legal Personality of the European Union – International and Institutional Aspects, p. 9, found in Vincent Kronenberger (ed.), 'The European Union and the International Legal Order: Discord or Harmony?', (2001), T.M.C. Asser Press.

¹⁰⁴ Klabbers, 'An Introduction to International Organizations Law', p. 282. He was referring to the EC declaration that was provided upon accession to the UNCLOS. Titled '*Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention*', found at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#European Community Declaration made upon formal confirmation. (last visited on 11 August 2016).

Irrespective of such a declaration, the ECJ has held on several occasions that where the subject matter of a treaty falls partly within EU competence and partly in that of the Member States, they have a duty to work in close cooperation for the purposes of the obligations arising out of that agreement. It is deemed an obligation that flows from the requirement of unity in international representation.¹⁰⁵ That obligation to cooperate is not predicated on the fact that the Union has exclusive competence and is not defeated by the Member States having their own responsibilities arising out of the agreement.¹⁰⁶ Additionally, where the EU has exerted its competence, irrespective of whether it is shared or otherwise, and there is a dispute between Member States that relates to the interpretation or scope of the agreement which has become part of EU law, that dispute must go to the ECJ not to any other court or tribunal.¹⁰⁷ This requirement is born out of the autonomy of the EU legal order¹⁰⁸ and demonstrates that despite the EU's primary Treaties containing provisions on observing international law, the EU is not willing to submit to it entirely.

The question arises whether it is possible for the EU to resort to a mixed agreement even though it possesses exclusive competence in the subject matter of the agreement.¹⁰⁹ While this may seem as the safest option, it is certainly preferred by those Member States that might wish to have a greater say in their external relations, even those delegated to the EU, the ECJ has not always taken well to this practice. In *'Opinion 1/76'*, the ECJ was asked whether the Union was permitted to conclude a mixed agreement where it was not required. Having weighed the positive and negative effects, it reached a negative conclusion. It stated that for the Union to engage in a mixed agreement where it possesses the competence to conclude it exclusively was *'...likely progressively to undo the work of the Community irreversibly...'*¹¹⁰ The position adopted by the Court in this Opinion was very negative and one shared by some legal authors who perceive it as

¹⁰⁵ 'C-25/94, Commission of the European Communities v Council of the European Union', (1996), ECR I-01469, para 48, see also 'C-266/03 Commission v Luxembourg', (2005) ECR I-4805, paragraph 58, 'C-433/03, Commission v Germany', (2005) ECR I-6985, paragraph 64 and 'C-246/07, Commission v Sweden', paras 71 and 73.

¹⁰⁶ Ibid.

¹⁰⁷ 'C-459/03, Commission v Ireland', (2006), ECR I-04635, paras 93 and 123. The empowerment of the Court can be found in Article 19 TEU and Articles 251-281 TFEU. It should be noted that Articles 275 and 276 TFEU limit the jurisdiction of the ECJ in areas relating to the CFSP and the law-enforcement of the Member States.

¹⁰⁸ Ibid, para 123.

¹⁰⁹ Eeckhout, 'EU External Relations Law', (2011), p. 214.

¹¹⁰ 'Opinion 1/76', p. 759, para 14.

a defeatist approach to the external relations of the EU since it demonstrates that the Union is less integrated than it might like to be.¹¹¹

In ‘*Opinion 1/78*’, the ECJ took a slightly different approach. After determining that the agreement to be negotiated fell within the exclusive competences of the EU, it continued to permit the Member States to participate in the negotiations. This conclusion was justified on the basis that the Member States were the ones that would be responsible for the costs of the agreement once it is concluded.¹¹² Subsequent ECJ Opinions and cases have not led to a solid adoption of the notion that the burden of an agreement’s costs will necessarily lead to a mixed agreement. In ‘*C-268/94*’, the Court returned to merely analyzing whether the competences required for an agreement were exclusively vested with the EU.¹¹³ Eeckhout suggests this is a return to a preference on behalf of the ECJ toward exclusive EU agreements.¹¹⁴

One final issue which is derived from the nature of a mixed agreement is the situation where not all Member States are party to the agreement. Also known as incomplete mixed agreements, they will either require provisions which relate to this incomplete representation of the EU of all its Members¹¹⁵ or it must allow for the EU to insert a reservation or statement into the agreement, qualifying its accession to only binding the EU and the non-contracting Member States to the extent of the Union’s competences.¹¹⁶ The EU must be permitted to make such a reservation in accordance with the rules of the agreement and it cannot violate the object and purpose of the agreement. This will not always be possible, in such a case, the EU will be unable to join the agreement.

Whether or not an agreement is a mixed agreement tends to be a concern for the internal order of the EU, it is uncommon for non-EU Member States to request a mixed or exclusive agreement.¹¹⁷ Nonetheless, the mixed nature of an agreement can have significant impact on with whom the third

¹¹¹ See for example Klabbers, ‘An Introduction to International Organizations Law’, p. 283.

¹¹² Opinion 1/78, pages 2920-1, Conclusion paras. 2 and 3.

¹¹³ ‘*C-268/94, Portuguese Republic v Council of the European Union*’, (1996), ECR I-06177.

¹¹⁴ Eeckhout, ‘EU External Relations Law’, (2011), p. 220.

¹¹⁵ Article 102, Consolidated Version of the Agreement Establishing the European Atomic Energy Agency, Official Journal, C 327, 26.10.2012.

¹¹⁶ Schermers and Blokker, ‘International Institutional Law: Unity with Diversity’, pages 1133-4.

¹¹⁷ Eeckhout, ‘EU External Relations Law’, (2011), pages 220-1.

party must engage under an international agreement and it would need to be taken into account when analyzing the EU's external activities.

4.3. Limitations Placed on the Participation in Treaty-Making by International Law.

Despite the EU being a new legal order as established in the '*van Gend & Loos*'¹¹⁸ decision, international law remains of great importance to the operation of all international organizations, including the Union. International law is generally considered to be founded on the basis of the consent of sovereign states,¹¹⁹ as such it is arguable whether international organizations can occupy a similar position in international law with the same international rights and obligations even within their defined competences. The ICJ in the '*Reparations Case*' highlighted this discrepancy in the capacity of international organizations as subjects of international law by stating that not all subjects were necessarily equal.¹²⁰ This subchapter will attempt to highlight possible limitations on the EU's agreement-making capacity in international law separate from the limitation imposed by its competences and Treaties.

It is established in international law that nation states are the principle subjects of in international law and possess the full complement of rights and obligations that arise out of that position.¹²¹ Many international conventions specifically refer only to states when setting out rules in international law as opposed to referring to the more general 'subject of international law'. This is why for instance the Vienna Convention on the Law of Treaties 1969 (hereinafter 'VCLT I') and the ILC's Draft Articles on State Responsibility 2001 have both required the drafting of new treaties which expand the scope of the agreements to include a wider range of international actors.¹²² This requirement, borne out of necessity since states are fundamentally different from other actors in international law and new rules must apply,¹²³ also highlights that a distinction is drawn between states and international organizations in terms of their ability to accede to

¹¹⁸ 'Case 26-62, Van Gend & Loos v Netherlands Inland Revenue Administration', (1963), ECR 1, p. 12.

¹¹⁹ Schermers and Blokker, 'International Institutional Law: Unity with Diversity', p. 996. See also Hurd, 'International Organizations: Politics, Law, Practice', p. 8.

¹²⁰ Reparations Case, pages 178 and 179.

¹²¹ Ibid, p. 180.

¹²² VCLT II and ARIIO being the two new treaties drafted to accommodate international organizations.

¹²³ Draft Articles on the Law of Treaties with Commentaries, (1996), Yearbook of the International Law Commission, 1996, vol. II, p. 187, Article 1, para 2.

international treaties or conventions. Rather than permitting organizations to opt out of certain clauses in existing agreements, entirely new agreements are required which only reinforces the divide between state actors and other subject of international law.¹²⁴ The creation of new conventions, specifically for the accommodation of other subjects of law, may also serve as a source of fragmentation in international law since not all states that acceded to the convention pertaining to states may either want to or be interested in signing and ratifying the new conventions. The VCLT I for instance has 114 states that have ratified the Convention,¹²⁵ while the VCLT II only has 31 states party to it.¹²⁶

The significance of this situation in international law for the purposes of the EU's treaty-making capacity means that the Union may not be capable of acting in a manner equal to states when concluding or deciding to participate in international treaties. This subchapter will generally be limited to multilateral international treaties. Considering agreements to which the EU was party from the outset, where they negotiated and drafted the agreement, is generally less significant due to the freedom of contract applying to the parties and they must have provided for the possibility of the EU becoming a member to the agreement.

As mentioned in the previous chapters, the capacity to enter into international agreements by international organizations is essentially no longer a topic for debate. However, there is some disagreement as to the legal basis for requiring an international organization to consent to agreements before being bound, as well as whether or not an organization is generally permitted to make reservations to international agreements. In many cases the argument all comes down to the nature of the of international organizations when compared to the supremacy of states as actors in international law.

¹²⁴ See Klabbers, 'An Introduction to International Organizations Law', p. 272. It is recognized that in many cases provisions will require altering to better reflect the situation international organizations find themselves in, even where a treaty is drafted with international organizations in mind, it can be difficult to suit the needs of all the varied types of organizations. See Jan Wouters and Jed Odermatt, 'Are all International Organizations Created Equal?', (2012), *International Organizations Law Review* 9, pages 11 and 12.

¹²⁵ According to the United Nations Treaty Service as of August 2016, found at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

¹²⁶ According to the United Nations Treaty Service as of August 2016, found at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en#1.

In terms of the consent of international organizations, this is less significant as a limitation in the capacity to fully enter into treaty-making, rather it affects the extent to which an organizations can choose to be bound by an international treaty. Schermers and Blokker provide a number of arguments which highlight the lesser position of organizations in international law and as such ought to correspond with lesser significance being attached to the ‘sovereignty’ (or lack thereof to be more precise) of the capacity of organizations when compared to the sovereignty of a nation state. They provide the argument that since international organizations are creatures that arise out of treaties concluded by states in international law, they cannot subsequently claim supremacy over international law.¹²⁷ Additionally, the mere fact that organizations have not always participated or do not always apply every rule, does not validate the assumption that international organizations are able to prevent the application of international rules by withholding consent.¹²⁸ While in theory an international organization is certainly dependent on its member states and its powers are usually mere extensions of the powers of its members, the EU is excluded from this since the exclusive competences have in essence replaced the competences of the Member States, in practice the situation appears to be different.

Despite not being in force, the VCLT II remains the only source on the law of treaties which applies to international organizations and as such can continue to offer an authoritative perspective on the procedure of treaty-making by organizations.¹²⁹ Its preamble recognizes the ‘*consensual nature of treaties*’ and the need to apply the ‘*principle of free consent*’ both of which seem to imply that consent remains of vital importance to the conclusion and binding nature of treaties, even where they include international organizations as participants. This is reinforced by the repeated reference to the consent of international organizations to be bound by the treaty which they are concluding.¹³⁰ Additionally, while less authoritative, the Administrative Committee on Co-ordination in its comments on the VCLT II, argued that it was ‘*essential...that no international organization be bound without its explicit consent by a convention incorporating the draft*

¹²⁷ Schermers and Blokker, ‘International Institutional Law: Unity with Diversity’, pages 996-7.

¹²⁸ Ibid.

¹²⁹ It has been cited in ECJ case law for instance, see ‘C-327/91, French Republic v Commission of the European Communities’, (1994), ECR I-03641, para 25. See also Klabbers, ‘An Introduction to International Organizations Law’, p. 317.

¹³⁰ VCLT II, Articles 1, 7, 11-15 and 34-35.

articles'.¹³¹ Schermers and Blokker however argue that since the VCLT II is not yet in force, this consent requirement to be bound does not yet actually apply to the relationship between international organizations and international law.¹³² While perhaps strictly true, with no actual operational legal basis in treaty law for the consent requirement for organizations, it is a position that in practice is so unsupported that the theory might be overridden on that basis.¹³³

In the practice of the EU, it is clear that the EU considers the agreements which it has concluded to be binding upon it, its institutions as well as its Member States. Additionally, the ECJ will only review EU law for incompatibility with international obligations where those obligations were assumed by the Union.¹³⁴ That being said, the EU is capable of giving some weight to international rules which it has not formally consented to by way of a formal confirmation of the relevant treaty. An example of which is the '*International Fruit Company*' decision where the ECJ held that the EU was bound by the General Agreement on Tariffs and Trade due to the Member States having all acceded to the Agreement and subsequently conferred the functions relating to the Agreement onto the Union.¹³⁵ This assumption of international obligations by way of their being binding on the Member States prior to the delegation of powers to the EU has not become general practice by the ECJ. In fact, quite the opposite has occurred but this will be discussed in further detail in the next subchapter where the EU's international responsibility will be discussed. The EU has assumed certain obligations to observe some international treaties to which it is not a party such as the ECHR and the UN Charter. They are contained in the EU's primary treaties and as such constitute a manner of consent to the international agreements by the EU and its Member States.

Furthermore, it should be borne in mind that an attempt to force international obligations on an international organization without its consent on the basis that it does not possess the authority to express its disagreement, would indirectly impose obligations on the members of the organization

¹³¹ See UN. Doc A/C.6/38/4, with Annex Decision 1938/11, Treaties Between States and International Organizations or Between International Organizations by the Administrative Committee on Co-ordination. See also Morgenstern, 'Legal Problems of International Organizations', p. 34.

¹³² Schermers and Blokker, 'International Institutional Law: Unity with Diversity', pages 997-998.

¹³³ Ibid, p. 997. See also Advocate General Darmon in his Opinion to C-374/87 where he commented that the European Convention on Human Rights is not strictly binding on the EU, the ECJ does apply it but adds its own interpretation and that interpretation is the more authoritative source. (see pages 3337-8 at para. 139)

¹³⁴ See Joined Cases 21/72 to 24/72 *International Fruit Company and Others*, (1972) ECR 1219, para. 7 and 'C-308/06, *Intertanko and Others v. Secretary of State for Transport*', (2008), ECR I-04057, paras 43 and 44.

¹³⁵ '*International Fruit Company*', paras 13-15.

without their consent. As such, as much as states cannot create international organizations to avoid international responsibility for acts which they have committed,¹³⁶ it should also not be possible for states to have obligations imposed on them merely for having either created or acceded to an international organization without their consent. The problem with following this approach to solve the issue of a consent requirement is that it risks detracting from the distinct legal personality which an international organization is supposed to possess before it can engage in treaty-making activities in the first place.

Turning to the issue of reservations to multilateral treaties, this area too offers some scope for the limitation of the capacity of international organizations to participate in international agreements. Shaw phrased the primary considerations behind the idea of reservations as follows: '*The capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty of states, whereby a state may refuse its consent to particular provisions so that they do not become binding upon it.*'¹³⁷ This statement very clearly connotes a relationship between consent to be bound by a treaty generally as well as consent to be bound by individual provisions. As such many of the issues raised in connection to the ability for international organizations to require that they consent to international agreements will also apply in the context of reservations.

Again, the VCLT II provides a look at what the ILC believed to be the correct answer as to whether an international organization had the power to make reservations to treaties. In Article 19 the Convention provides that an international organization may formulate a reservation, there are limits to the possibility but these are those that apply equally to states and as such do not serve to limit the capacity of an international organization beyond the norm. It should be pointed out that during the drafting of this article, the ILC had provided different solutions to the question of reservations,¹³⁸ some of which would have been more limiting with respect of international organizations. Article 19bis would have required international organizations to obtain authorization to make a reservation either from the treaty itself or from all the Contracting Parties

¹³⁶ Articles 15-17, ARIIO, see also Finn Seyfersted, 'Common Law of International Organizations', (2008), Martinus Nijhoff Publishers, p. 422.

¹³⁷ Shaw, 'International Law', p. 663.

¹³⁸ Morgenstern, 'Legal Problems of International Organizations', p. 17.

to the agreement.¹³⁹ This would prevent an organization from formulating an agreement which could be deemed objectionable by any party, including other international organizations. Despite the option being open to the General Assembly, the current version open for signature does not include this limitation and allows international organizations to formulate reservations.

The final issue to be discussed here is the issue of the entry into force of multilateral treaties. As Brölmann points out, the VCLT II accepts international organizations as full parties to international treaties say in the entry into force requirement where the VCLT II itself limits the number of ratifications required for its entry into force to state parties.¹⁴⁰ The number of ratifications by international organizations is not a factor for entry into force, it only relates to the applicability of the Convention. Firstly it should be pointed out that the VCLT II does not provide for an international organization's ability to ratify an agreement as such, rather it is termed an '*act of formal confirmation*'.¹⁴¹ In reality it has little impact on an international organization's ability to participate in the treaty-making or concluding process, it appears to merely be a linguistic choice to identify the different procedure by which the subjects provide their formal consent.¹⁴²

Second, this is not a standard which it holds applicable to all agreements that fall within the scope of the VCLT II. Article 24 is the provision on the entry into force of treaties and it allows the agreement itself to set out the requirements for its entry into force or, where it does not provide a guideline, it requires all negotiating parties to consent to the agreement. There is therefore no apparent rule that the ratification of an international organization will not be considered toward the entry into force of the agreement, it is regrettable that the main document which sets out these rules, does not follow suit and deems the confirmation by organizations as lesser to that of states.

There are a number of additional points that are worth noting with varying degrees of significance in terms of limiting an international organization's ability to participate in the creation of

¹³⁹ A/CN.4/SER.A/1976/Add.1 (Part 1), Yearbook of the International Law Commission, 1976, vol. II, Part One, pages 143-4.

¹⁴⁰ Article 85 (1), VCLT II. See also Catherine Brölmann, 'The Institutional Veil in Public International Law: International Organisations and the Law of Treaties', (2007), Oxford: Hart Publishing, p. 194.

¹⁴¹ Article 2 (b *bis*), VCLT II.

¹⁴² Johannes Wilhelmus Schneider, 'Treaty-making Power of International Organizations' (1959), Librairie Droz, p. 54. The lack of the term 'ratification' in the practice of organizations can be deduced from their lack of a position equal to a Head of State to perform the act.

international law. The VCLT II repeatedly distinguish between the parties that enter into agreements, be they states or organizations. The wording of the provisions notwithstanding, this distinction never results in a normative difference between the capacity of a state or organization to take part in the creation of treaties.¹⁴³

An actual limitation on the treaty-making capacity comes in the form of an organization's participation in other international organizations. This has no bearing on the capacity of the organization wishing to join another, it is entirely based on the constituent treaty of the second organization. Since there are generally no rules on the admission of subject of law, every constituent treaty will provide its own terms for possible participants.¹⁴⁴ A prime example is the UN which restricts its membership to states,¹⁴⁵ subjects of law that do not meet this requirement are restricted to becoming observers to the organization.¹⁴⁶ This is a very strict limitation placed on international organizations, including the EU which has sought member status in the UN but remains an observer within the organization.¹⁴⁷ It should be noted that where the EU cannot become a member, it can at the very least ask its Member States to join the organization in the interest of the EU.¹⁴⁸ It does not solve the problem but there is some scope to navigate the issue.

The limitation on the ability to become a member to all organizations not only poses problems for participation within the international community, it also affects the ability to create international law since organizations do not have an active role in the ILC or the Sixth Committee of the General Assembly.¹⁴⁹ While the EU can for instance submit comments to drafts proposed by the ILC, they cannot directly influence the drafting process of the organization, as such its ability to create law is relegated to a secondary position when it comes to the international treaties prepared by the ILC.

¹⁴³ Brölmann, 'The Institutional Veil in Public International Law: International Organisations and the Law of Treaties', p. 202.

¹⁴⁴ Klabbers, 'Advanced Introduction to the Law of International Organizations', p. 41.

¹⁴⁵ Article 4 (1), UN Charter.

¹⁴⁶ The power to do so evolved from practice and is set out in A/C.6/49/WG.3/CRP.1, 'Question of Criteria for the Granting of Observer Status in the General Assembly', (1994).

¹⁴⁷ It has however obtained an 'enhanced' position as an observer following General Assembly Resolution 65/276, 'Participation of the European Union in the work of the United Nations', 3 May 2011.

¹⁴⁸ Bruno de Witte, 'International Law as a Tool for the European Union', (2009) *European Constitutional Law Review*, 5: 265–283, p. 277.

¹⁴⁹ Brölmann, 'The Institutional Veil in Public International Law: International Organisations and the Law of Treaties', p 199.

As is evident from the discussion that has been put forward in this subchapter, the applicability of international rules which were originally limited in their applicability to nation states, to international organizations remains difficult to fully substantiate. The sovereignty of states has always played a central role in the creation of international law but also in the deference international law provides to other legal systems. It becomes very difficult to justify the same rules applying to international organizations which lack this sovereignty and subsequently the rights which states enjoy in a theoretical sense. Despite this shortcoming, it is abundantly clear that even without the definitive statement on the status of international organizations in international law, some continue to operate in practice as equal to states in their treaty-making capacity. This is particularly true of the EU which can be said to possess some authority due to its delegated exclusive competences but it is difficult to envisage a situation where states are capable of reducing their sovereignty in favor of international organizations and thereby creating entirely new subjects of law for other states to deal with.

The clearest example of the temporary nature of the delegation of competences, even exclusive ones, is the scenario where a state decides to leave an international organization. If a transfer of a state's sovereignty is complete and the organization is in fact completely in control of the competence delegated to it, then the sovereign state should not be able to withdraw from the organization and reclaim the competences delegated to the organization. It could be a political question as to the decision of an organization to relinquish the authority once given but in a legal sense, if one accepts that an international organization possesses a power equal to that of a state, then it should not be able to be compelled to give up that power. The TEU with respect to the EU provides in Article 50 for the procedure of withdrawal from the Union. This procedure places the decision to withdraw entirely in the hands of the state and, although it is very barebones and provides little to no actual provisions on the procedure to be followed, simply states that the Treaties, which set out the delegation of competences of the EU, will cease to apply to the state.¹⁵⁰

This provision would seem to imply that, since the state chooses to withdraw, the power to control where the competences are vested remains in actuality with the state. One could argue that the

¹⁵⁰ Article 50 (3), TEU.

provision reflects a conscious decision by the EU to permit the Member States to seek the return of the powers they bestowed upon the Union but again in that case it would also be entirely open to the EU to withdraw that offer or to block the return of powers delegated, and that is a scenario that is almost entirely unfathomable due to the likely outrage it would cause among the Member States. Although it is submitted that a situation unfathomable at one time is not equal too impossibility. This paper does not have the necessary scope to thoroughly engage in the exploration of the true nature of the delegation of state sovereignty in international organizations. Suffice it to say that, in practice, as discussed in this subchapter, it appears clear that states, in their relations with the EU, appear to allow the Union to act with a certain degree of sovereignty where it acts upon its competences.

This does raise certain issues which are necessary to establish the place of the EU in international law and its participation in its creation, namely the problem of international legal responsibility. This is the topic that will be explored more thoroughly in the next subchapter.

4.4. International Legal Responsibility and the European Union.

The issue of international organizations and their international responsibility arises in this context to allow for the proper attribution of acts to either the members of an organization or the organization itself. This has significant implications on whether an act can be considered to have been engaged in by the organization. Failing to identify the author of an agreement and the responsible organ would frustrate any attempt at analyzing the extent of the EU's participation in international law. For this reason, this subchapter will analyze the international rules on the responsibility of international organizations and consider their application to the EU.

The starting point should be the EU's recognition that its international agreements are binding on it and its Member States as set out in Article 216 (1) TFEU. In the '*Kupferberg*' decision, the ECJ stressed that EU agreements create international obligations and both the EU and the Member States must comply with those obligations.¹⁵¹ However, the binding nature of EU agreements on the Member States gives rise to a duty for the Members *visa vie* the EU, it does not create legal

¹⁵¹ 'C-104/81, Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.', (1982), ECR-03641.

obligations toward the third parties to the agreement concluded by the Union on behalf of the Member States.¹⁵² Of course, where the Member States conclude an agreement on their own behalf they do create international obligations for themselves. Furthermore, the TFEU in Article 351 ensures that the pre-existing (prior to 1 January 1958) international rights and obligations which the Member States have toward third parties will not be affected by the Treaties unless they are incompatible with the Treaties, in which case steps must be taken to eliminate those incompatibilities. This is the basis provided for by the EU in terms of its international responsibility.

The main source of international law on the responsibility of international organizations can be found in the ILC's ARIO. The Articles, as mentioned above, have not entered into force but remain the leading document on the responsibility of international organizations in international law. It is very closely based on the Articles on State Responsibility, a decision which has resulted in a significant amount of criticism,¹⁵³ even from the international organizations which it was designed to accommodate.¹⁵⁴ Two main critiques of the Draft are that it does not sufficiently take into account the variety among international organizations and that the practice, upon which the ILC is required to base its work, was too scarce to provide a well-supported codification of the law.¹⁵⁵

The aforementioned notwithstanding, the European Court of Human Rights in the '*Behrami and Saramati*'¹⁵⁶ Case referred to ARIO for the purpose of identifying the method of determining attribution of acts to an international organization as well as had reference to the 'effective control'

¹⁵² Ibid, para 13. See also Jan Willem van Rossem, 'Interaction Between EU Law and International Law in Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community', (2009), Netherlands Yearbook of International Law, Volume XL, pp. 183–227, p. 194.

¹⁵³ See Wouters and Odermatt, 'Are all International Organizations Created Equal?'; Daphna Shrager, 'The ILC Draft Articles on Responsibility of International Organizations: The Interplay Between the Practice and the Rule', in Proceedings of the Annual Meeting (American Society of International Law) Vol. 105, Harmony and Dissonance in International Law (2011), pp. 351-353, p. 353.

¹⁵⁴ For the last round of comments see: 'Comments and observations received from international organizations', (2007), A/CN.4/637', in particular the comments by the European Commission.

¹⁵⁵ See Klabbbers, 'An Introduction to International Organizations Law', pages 316-317. Shrager, 'The ILC Draft Articles on Responsibility of International Organizations: The Interplay Between the Practice and the Rule', p. 353, argues that the criticism of insufficient practice is misplaced and not the main issue of the ARIO.

¹⁵⁶ Decision of the Grand Chamber of the European Court of Human Rights as to Admissibility, applications no. 71412/01 '*Behrami and Behrami v. France*' and no. 78166/01 '*Saramati v. France, Germany and Norway*', (2007).

criterion which the Draft puts forward.¹⁵⁷ There has been no ICJ jurisprudence in relation to ARIО as of yet.¹⁵⁸

Article 3 ARIО provides that every internationally wrongful act of an organization will entail international responsibility for that organization. An obvious statement but important since it establishes that the organization itself is the responsible party and not merely the members of the organization. Naturally this relies heavily on the legal personality of the organization, a prerequisite for the application of the Draft to the organization.¹⁵⁹ Article 6-9 provide the means by which attribution of conduct can be established, an organization can have conduct attributed to it where it is engaged in by an organ or agent of the organization; by an organ or agent which is placed at the disposal of the organization; and conduct which is adopted by the organization as its own. Article 8 specifically provides that where an organ or agent acts in an ultra vires capacity, that conduct will continue to be attributable to the organization despite the ultra vires nature of the act. These articles provide a rather simple method of defining the attribution of conduct to an organization.

In addition to the rules on attribution, Articles 58-62 concern the responsibility of states notwithstanding the act being that of the international organization. It is important to highlight that the EU, when engaging in agreement-making activities, enters those agreements as a fully-fledged party to that agreement. Where the Member States of the Union were to be made responsible for every act of the EU it would be impossible to speak of the EU as a distinct actor. In the commentary to Article 62, the ILC clarifies that a member to an organization does not incur responsibility for the acts of the organization under normal circumstances.¹⁶⁰ Articles 58-62 each require the state to act in a certain manner or capacity to become responsible for the act of the organization, it is then the result of this act, not merely the act of the organization that gives rise to this responsibility.¹⁶¹ Where such an additional act is not perpetrated by the state, the normal rule applies to create

¹⁵⁷ Seyersted, 'Common Law of International Organizations', p. 425.

¹⁵⁸ Klabbers, 'An Introduction to International Organizations Law', p. 324.

¹⁵⁹ Article 1 and Article 2 (1), ARIО.

¹⁶⁰ Commentary to Article 62, ARIО, para 2.

¹⁶¹ The acts concerned involve aiding or assisting the organization; directing and controlling the organization; coercing the organization; utilizing the organization to circumvent the state's own obligations; and the assumption of responsibility by the state itself.

responsibility toward third parties only for the international organization, meaning the victim third parties must engage with the organization as per international law. Despite this separation of responsibility, Article 40 does require the membership to ensure the organization is capable of meeting the liabilities which might arise as a result of the organization's responsibility. This means that members may be required to contribute toward the reparations that are due to the victim. While this does not create responsibility on the part of the members, it does give rise to some liability with respect to the damage caused by the organization.

The Articles ensure the EU is responsible for the acts of its own institutions as well as any of the agents or organs which the Member states have placed at its disposal or acts which it assumes as its own, see for instance the EU's handling of claims within the WTO dispute settlement system which arise as a result of the action of the Union's Member States.¹⁶² There is a discrepancy here, since many of the acts which might attract the responsibility of the EU in a logical sense, may not do so under the criteria set out in ARIO.

The EU did make requests for a clearer and more applicable text concerning the articles on attribution.¹⁶³ It felt the articles did not accurately reflect the nature of the Union where the EU generally concludes agreements which are subsequently performed by the Member States. One could argue that these acts are acts of organs or agents 'at the disposal of' the EU but this is not the terminology adopted by the EU, nor does it reflect the realities of the situation within EU law where the Members act because they owe a duty toward the Union.¹⁶⁴ Regrettably, these changes do not appear to have been made. Some scholars have contended that it appears as though the ILC's methodology was still largely oriented toward the position of states with the comments provided by the states being given greater weight than those of the international organizations.¹⁶⁵

¹⁶² 'Comments and observations received from international organizations' Doc. A/CN.4/545, 25 June 2004, pages 28-32, p. 29, para 5.

¹⁶³ Ibid, pages 28-32.

¹⁶⁴ Ibid, p. 29, paras 2-3. See also Ramses A. Wessel, 'Division of International Responsibility Between the EU and its Member States in the Area of Foreign, Security and Defence Policy', (2011), Amsterdam Law Forum, Vol. 3, No. 3, p. 37.

¹⁶⁵ Wouters and Odermatt, 'Are All International Organizations Created Equal?', pages 13-14.

In terms of the EU's responsibility for obligations arising out of mixed agreements, an authoritative statement has already been provided on the matter. Advocate General Jacobs in his Opinion to 'C-316/91' argued that where both the EU and the Member States have entered into a mixed agreement they will be jointly liable, subject to the provisions of the treaty stating otherwise.¹⁶⁶ The ECJ found the same in that case holding both the EU and the Member States jointly liable for their obligations arising out of their agreements with the African Caribbean Pacific countries.¹⁶⁷

The question for the purposes of this paper will revolve around whether or not the EU is capable or required to assume obligations by virtue of an assumption of exclusive competences, which its Member States previously possessed but to which the EU has not explicitly consented. This could significantly impact on the EU's international obligations and would result in a very open approach to international law by the EU.

This possibility has some basis in EU law with the '*International Fruit Company*' decision of the ECJ deeming the GATT obligations to have been assumed by the Union upon the delegation of the competences for the common commercial policy.¹⁶⁸ The issue has been raised on several further occasions but the ECJ never again provided for an assumption of international obligations on behalf of the EU in this context.¹⁶⁹ The Court did however repeatedly insinuate that the possibility existed but deemed it inapplicable to the agreements it was considering due to the EU not having been delegated complete or exclusive competences over the subject matter of the agreement.

The most controversial case on the issue is the '*Kadi*' decision which dealt with the implementation of a UN Security Council Resolution by the EU's Member States. Two opposing views were expressed in the history of the case where the Court of First Instance (hereinafter 'CFI') adopted the position that, on foot of all EU Member States also being members to the UN and having an obligation to fulfil Security Council Resolutions, the EU must therefore also be bound to do the

¹⁶⁶ Opinion of Advocate General Jacob in C-316/91, delivered on 10 November 1993, I- 628, p. 646, para 69

¹⁶⁷ 'C-316/91, European Parliament v. Council of the European Union', (1994), ECR I-00625, para 29.

¹⁶⁸ '*International Fruit Company and Others*', para. 7.

¹⁶⁹ See 'C-379/92, Peralta' (1994), ECR I-3453, para. 16; '*Intertanko and Others*', para. 47; and 'C-188/07, Commune de Mesquer', (2008), ECR I-04501, para. 85.

same.¹⁷⁰ It also established the primacy of the UN Charter over all legal orders be they national or international, and consequently also EU law, by reference to international law principles as well as Article 103 of the UN Charter.¹⁷¹ There is some justification for this in the EU Treaties since the TEU requires the observance of the development of international law and the respecting of the principles of the UN Charter. The EU itself is not bound to the UN Charter however due to its inability to obtain membership status within the organization, nor has it made specific binding statements to the effect that it wishes to bind itself. The CFI did maintain its ability to judge UN Resolutions for their compatibility with jus cogens norms since they do not permit derogation.¹⁷²

The decision of the CFI was overturned on appeal and a different approach as adopted to the EU's relationship with the UN and as a result international law more generally. In the ECJ decision to the '*Kadi*' case, the Court did not deal with the issue of assumption of obligations in the same language as the CFI, rather they engaged the issue from the perspective of jus cogens. The ECJ stated that '*...an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system*'.¹⁷³ The nature and reasoning of this statement is not unwarranted since it would go well beyond the bounds of the principle of conferral for EU international agreements to possess the authority to amend the powers of the EU.

That being so, the more controversial part of the decision arises in the context of the EU's relationship toward the UN Charter. The ECJ held that even if the UN Charter can be said to bind the EU, the Court clearly refrains from stating that it does, then it would only enter into EU law between primary and secondary legislation giving it primacy over the latter but not the former.¹⁷⁴ This very clearly goes against Article 103 of the UN Charter. Some of the criticism in relation to this position adopted by the ECJ has focused on the EU using its inability to join certain

¹⁷⁰ 'T-315/01, Yassin Abdullah Kadi', (2005), ECR II-03649, para 193.

¹⁷¹ Ibid, paras 181-184.

¹⁷² Ibid, para 226.

¹⁷³ 'C-402/05, Kadi and Al Barakaat International Foundation v Council and Commission', (2008), ECR I-06351, para 282.

¹⁷⁴ Ibid, paras 307-308.

international agreements as a shield against international obligations. It does so by relying on the sovereignty of its Member States upon their drafting of the EU primary Treaties.¹⁷⁵

The ECJ in its decision does not really engage with the idea of the assumption of obligations by the EU which are incumbent on the Member States, but it does overturn the CFI decision which would have been a precedent in favor of the approach. As such it prevents the establishment of a clear authoritative statement which can confirm the possibility and all we are left with is the string of cases which have all hinted at, but never, since '*International Fruit Company*', actually confirmed the possibility that the EU might assume obligations by virtue of being delegated powers to which Member State obligations were tied.

There is room to argue against permitting this assumption of obligations by the EU, in addition to the possibility for the obligations to arise by unilateral delegation of power by the Member States without the EU necessarily consenting to each obligation in advance, there is also a principle in certain national legal systems, as highlighted by Seyersted, that one debtor cannot replace another debtor, although he recognizes that it does not apply to international law directly.¹⁷⁶ In essence, the issue is that a Member State might, where it can be released from its international obligations by way of a delegation of power, attempt to avoid responsibility and shield itself by way of an international organization. The issue again relates to the status of an international organizations legal personality, where a state is prevented from handing over responsibility in such a manner it might conflict with the established personality of the organization.¹⁷⁷

Seyersted does provide room to circumvent the problem without permitting states to simply ignore their international obligations while maintaining the integrity an international organizations legal personality. Doing so would require an international rule which prohibits the delegation of one's responsibility to another. Where such a rule is established, the EU could for instance assume international obligations which were created by its Members, jointly with those Members.¹⁷⁸ This

¹⁷⁵ Rossem, 'Interaction Between EU Law and International Law in Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but not the Community', pages 209-212.

¹⁷⁶ Seyersted, 'Common Law of International Organizations', pages 421-430.

¹⁷⁷ Ibid, pages 433-434.

¹⁷⁸ Ibid, p. 435.

rule would be a welcome addition to international law more generally although it is unclear whether it would have a significant impact on the EU. At present, even if an obligation is assumed by the EU, the Member State does not technically relieve itself of all obligations related thereto. Indeed, the Member would not deal with the third party directly, this would be within the scope of the EU's authority, but the EU would be able to hold the Member State accountable within the internal legal order of the Union.

In terms of the responsibility of the EU for its external activity, it is clear that the EU, from an internal perspective, considers both itself and its Member States bound by its actions. In terms of international responsibility, international law provides that the EU itself is the responsible party, distinct from the Member States. As such a third party, victim of an act attributable to the EU must bring a claim for reparations to the EU, the Member States are not separately liable. That being the case, the EU may require the Member States to contribute to the liabilities the EU might incur. This is an obligation which arises both by virtue of the EU internal legal order as well as under international law by virtue of Article 40 ARIO. Where the EU engages in a mixed agreement, the ECJ appears to consider the EU and the Member States jointly liable and a third party victim could engage either the EU or the Member States, subject to a specifically provided for regime being contained in the violated agreement. At present there appears no clear authority on the requirement that the EU assume pre-existing international obligations of the Member States by virtue of the delegation of exclusive competences. While perhaps not entirely satisfying, additional ECJ jurisprudence is required to confirm or deny the possibility.

5. The European Union and International Customary Law

Having established the EU's scope in terms of its participation in the creation of international agreements, it is now time to turn to the second source of international law, international customary law.¹⁷⁹ The focus of this Chapter, like the preceding one, will be limited to the manner by which the EU is able to participate in the creation of international customary law. The topic of international customary law is chosen with the specific intention in mind to eliminate the examination of possible internal custom the EU might create for itself. This paper will also not delve into a strict analysis of the intricacies of international customary law itself, rather it will base its discussion on the general definition of customary law, provided for in the ICJ Statute, which provides that customary rules are those rules which are '*evidence of a general practice accepted as law*'.

The definition found in the ICJ Statute allows for the setting out of two criteria generally recognized as being necessary for the identification of international customary law. The first being a general practice and the second being the acceptance of that practice as law, or more commonly known as '*opinio juris*'.¹⁸⁰ This *opinio juris* is a subjective element which, oddly, is also established by way of the practice of states but the practice in this sense differs from the first criterion to establish customary law in that the practice relates to the manner in which the legal act is perceived, not the actual performance of the act. This paper regrettably does not possess the scope to extensively engage in the type of acts which can constitute either form of practice.¹⁸¹

5.1. Who may Participate in the Creation of International Customary Law?

Despite the very limited definition of customary law, as provided in the ICJ Statute, not referring to the subjects of law that may participate in the creation of international custom, the language usually adopted in this context is that of 'state practice' or 'the practice of states'.¹⁸² As such, from

¹⁷⁹ Article 38 (1) (b), ICJ Statute.

¹⁸⁰ 'North Sea Continental Shelf', Judgment, ICJ. Reports 1969, p. 3, para 77.

¹⁸¹ The ILC has provided a non-exhaustive list relating to such acts however, see Second report on identification of customary international law, Michael Wood, Special Rapporteur, 22 May 2014, ILC, A/CN.4/672, pages 23-28.

¹⁸² See for instance: 'Continental Shelf (Libyan Arab Jamahiriya/Malta)', Judgment, ICJ Reports 1985, p. 29,

a very literal approach to the issue, it would at first appear as though the practice of international organizations might be excluded. This position is largely reinforced by the ICJ's statements in the 'Nicaragua'¹⁸³ Case as well as the 'Nuclear Weapons'¹⁸⁴ Opinion, where General Assembly Resolutions were considered not as practice but rather as contributions toward establishing the *opinio juris*.

This approach has since been reflected in the legal literature, Lowe for instance recognizes that *opinio juris* can be discerned from the discussion that takes place within the General Assembly but it relies on the general acceptance of states before any conclusions drawn from those debates can be deemed evidence of *opinio juris*.¹⁸⁵ As such the General Assembly has little actual input of its own, rather the states merely act within the organ to express their own values and practice. This seems to be contrary to the notion of the legal personality of international organizations, it seems to pierce the veil by attributing the resolutions provided by the General Assembly, not to the organ, but rather to the state members themselves. The International Law Association (hereinafter 'ILA') in its final report on the formation of customary law recognized this issue but reasoned that, for the purpose of establishing the true source of international customary law, there is little value in considering the voting on a resolution as an additional example of *opinio juris*.¹⁸⁶

This development notwithstanding, the ICJ jurisprudence did mention the resolutions of the General Assembly as coming from the Assembly itself and there is certainly scope for the assistance in the establishment of *opinio juris* by international organizations on this basis. Additionally, the critique levied against defining the resolutions of the General Assembly as practice of *opinio juris* on the part of the organization arises as a result of the manner in which those resolutions are created. They rely almost entirely on the input of the states and as such can reasonably be viewed as representing already existing *opinio juris* on behalf of the partaking states.

para. 27; 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion, ICJ Reports 1996, p. 226, para 64; Lowe, 'International Law', p. 36 and Shaw, 'International Law', p. 53.

¹⁸³ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. ICJ Reports 1986, p. 14, para 188.

¹⁸⁴ Nuclear Weapons opinion, para 70

¹⁸⁵ Lowe, 'International Law', pages 91-4.

¹⁸⁶ Final Report of the Committee, 'Statement of Principles Applicable to the Formation of General Customary International Law', International Law Association, London Conference, (2000), Section 11, p. 19, Commentary, para (b).

The issue is very different where the international organization, acting within the international community, expresses its own will separate from that of its members. In such a situation there would be no choice but to distinguish between the practice of the organization and the practice of the states that comprise its membership. The ILC in that same report also submits that ‘...quite a few of the relatively new customary rules...have been at least partly influenced by the existence of international organizations...’¹⁸⁷

The General Assembly is not the only organization that has contributed to the formation of custom. A great deal of international humanitarian law is based on the developments which have their roots in international organizations such as the International Committee of the Red Cross (hereinafter ‘ICRC’). Where the International Criminal Tribunal for the Former Yugoslavia (hereinafter the ‘ICTY’) in the ‘*Tadić*’ case identified the contributions made by the ICRC, it also stated as follows: ‘*The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.*’¹⁸⁸ This statement provides a clear indication that international organizations do not merely contribute to the establishing of *opinio juris* but reinforces the position that they can also assist in the first element of the test, general practice.

The ICTY is not the only international court to have identified general practice as arising on behalf of the organs of an international organization. The ICJ in the ‘*Reservations to the Genocide Convention*’ advisory opinion recognized the practice of the Secretary-General of the UN in his capacity as the depositary for the UN.¹⁸⁹ This highlights that there is some acceptance of a certain capacity for international organizations to participate in the actual creation of international customary law. The ILC in its draft on the identification of customary international law has also provided for the possibility of international organizations to contribute to the general practice

¹⁸⁷ Ibid, p. 3, para 3.

¹⁸⁸ ‘Prosecutor v Dusko Tadic a/k/a ‘Dule’, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, No. IT-94-AR72, para 109. See also ‘Assessment of Customary International Law’, Selection of State practice, para (v), International Committee of the Red Cross website, found at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#Fn_53_23, last visited on 16 August 2016.

¹⁸⁹ ‘Reservations to the Convention on Genocide’, Advisory Opinion: ICJ Reports 1951, p. 15, p. 25.

requirement of custom.¹⁹⁰ It would thus appear that where the organization is capable of engaging separately from its members and in fact exercise its own will, that it can contribute to ‘general practice’, this particular requirement has also been included in the ILC’s Final report on the subject.¹⁹¹ This may result in the questionable activity of looking past merely possessing international legal personality, as was the case with the General Assembly, in order to determine whether the act of the organization is in fact the act of the organization. While an understandable approach, as it would appear logical, it may be questionable on grounds that it would tamper with the notion of legal personality for international organizations.

Returning to the position presently advocated by the ILC in its draft conclusions, as previously mentioned, they provide for international organizations as subjects of law capable of contributing to the formation of international customary law. The main focus of the ILC’s work remains on the practice of states by virtue of their primary status as subjects of international law.¹⁹² Draft Conclusion 4 (5) concerns the requirement of practice, referring to the general practice requirement, which in its first paragraph identifies state practice as the primary contributing factor. In the second paragraph, the practice of international organizations is mentioned as capable of contributing to general practice but only in ‘*certain cases*’. These ‘*certain cases*’ are not elaborated upon in the text.

The Second and Third Reports by the Special Rapporteur shed some additional light on the topic. In the Second Report, the practice of an international organization is limited, quite naturally, to the fields in which they possess competences. Mention is also made of the operation activities of the organization.¹⁹³ They are highlighted by virtue of being acts which the organization perpetrates as a result of its own will, although the acts of states within organizations will continue to be given greater weight than those of the organization itself. The passing of resolutions which are the result of the opinions or practice of states continues to be attributed to the respective states rather than the organization.¹⁹⁴ The Third Report largely mirrors these limits on the acts of international

¹⁹⁰ Identification of Customary International Law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 30 May 2016, ILC, A/CN.4/L.872, p. 2, Draft Conclusion 4 (2).

¹⁹¹ ILC, Final Report, Section 11, p. 19, Commentary, para (a).

¹⁹² Second report on identification of customary international law, A/CN.4/672, p. 16, para 33.

¹⁹³ Ibid, pages 31-32, para 43.

¹⁹⁴ Ibid, p. 27, subsection (i).

organizations and refers to relevant acts of organizations as '*perhaps best exemplified in the acts of administrative or operational organs, and relates to operation activities of the organizations that are akin to the activities undertaken by States, ...*'.¹⁹⁵ It is therefore clear that the ILC considers international organizations capable of contributing to the general practice requirement of international customary law albeit in a reduced capacity.

In terms of contributions to *opinio juris*, the ILC in Draft Conclusion 10 (11) is less strict as to the limits on the subjects of law capable of partaking in the provision of evidence of *opinio juris*. Subsection 1 acknowledges the range of forms such evidence might take and the second subsection provides a non-exhaustive list of acts which are able to contribute. Many of those acts are limited to states but not all of them are and as such there remains scope for the participation of international organizations. The issue of international organization resolutions remains, with Draft Conclusion 12 (13) specifically stating that they cannot create customary rules of international law although they can assist in the establishment or development thereof. This continues the trend of viewing international organizations as secondary actors.

It should be noted that there has been some discussion on a slightly altered approach to the creation of international customary law, also known as 'instant custom'¹⁹⁶ or 'accelerated custom'.¹⁹⁷ It is a theory that in certain situations where practice is difficult to obtain, the element of general practice may prove not to be necessary.¹⁹⁸ This may, in part, be based on the ICJ's statement in the '*North Sea Continental Shelf*' case, where the limited passage of time or amount of state practice was not deemed a bar for the formation of international customary law.¹⁹⁹ Were such a situation might be acceptable, it would mean that even in the case where an organization has merely contributed to the *opinio juris* of a rule, that act might suffice to crystalize the norm into custom.

¹⁹⁵ Third report on identification of customary international law, Michael Wood, Special Rapporteur, 27 March 2015, ILC, A/CN.4/682, pages 52-53, para 76.

¹⁹⁶ Klabbers, 'An Introduction to International Organizations Law', p. 165.

¹⁹⁷ Michael P. Scharf, 'Accelerated Formation of Customary International Law', (2014), ILSA Journal of International & Comparative Law, Vol. 20:2, p. 306.

¹⁹⁸ Klabbers, 'An Introduction to International Organizations Law', p. 165.

¹⁹⁹ North Sea Continental Shelf, Judgment, ICJ. Reports 1969, p. 3, paras 73-74.

This idea of ‘accelerated custom’ has not found universal favor however and both the ILA and the ILC²⁰⁰ continue to require at least some amount of practice for the establishment of international customary law. The ILA, which has provided the more extensive text at present, acknowledges the ICJ judgment and the idea of rapidly established custom but nonetheless speaks of ‘dense practice’ without reference to no practice at all.²⁰¹ As such there appears to be a need for further development before this altered test for custom is truly established.

5.2. Can the EU Participate in the Creation of International Customary Law?

The preceding subchapter has established that there is scope for international organizations to participate in the creation of international customary law. This subchapter will briefly examine the extent to which the EU in particular is capable of participating, keeping in mind some of the limitations discussed above. The main limitation, as always, in the context of the EU, is its range of competences, but as established, by virtue of Article 216 and 352 TFEU, the EU is capable of acting within the international community throughout the range of its competences, not merely its exclusive ones.

Being in possession of legal personality and exclusive competences, the EU is also capable of overcoming the hurdle which was put on the General Assembly. The organs of the Union are more than capable of acting upon a will distinct, separate of that of the Member States.²⁰² It is generally accepted that all three of the branches of state, the executive, legislative and judicial branches, are all capable of contributing to the formation of custom.²⁰³ As such, the line is not too far to draw to also include the primary organs of the EU.

For the purposes of the EU it is important to once again reiterate that there is a distinction between general customary law and particular (regional or local) customary law.²⁰⁴ The EU likely engages

²⁰⁰ Identification of Customary International Law, ILC, A/CN.4/L.872, Draft Conclusion 8 (9).

²⁰¹ ILA, Final Report, Section 12, Commentary, paras (a)-(c).

²⁰² The only exception to this might be the Council which must act by unanimity although since it is supported by the High Representative for the Common Foreign and Security Policy, the EU could argue that it has an established voice in the organ to prevent any attempts at piercing the veil of legal personality with respect of the Council.

²⁰³ See ILA, Final Report, Section 9; and ‘Assessment of Customary International Law’, ICRC, Selection of State practice, para (ii).

²⁰⁴ See ILA, Final Report, Introduction, p. 5, para. 8

in a great deal of particular customary law as it attempts to integrate the Member States and provide more uniform rules to follow. Where the Member States are not amicable toward the establishment of regulations or directives on a given subject, the EU may attempt to utilize non-binding forms of practice which could result in the creation of *opinio juris* in the long run.²⁰⁵ Additionally, as an international organization, the EU should be capable of contributing to the rules specifically applicable to international organizations. This paper however is concerned with the EU's creation of general international customary law.

The ILC, despite its continued stance on international organizations as secondary participants in the creation of international customary law, has recognized that to generalize and classify all organizations as being of equal status would be unrealistic. The definition applied by the ILC of international organizations is the one contained in the VCLT II, merely an '*intergovernmental organization*'.²⁰⁶ That being the case, the Special Rapporteur did recognize that this would result in an unsatisfactory state of affairs where organizations were to go beyond this definition. He provided different rules for such organizations and stated as follows: '*The practice of those international organizations (such as the European Union) to which member States sometimes have transferred exclusive competences, may be equated with that of States, since in particular fields such organizations act in place of the member States. This applies to the actions of such organizations, whatever forms they take, whether executive, legislative or judicial. If one were not to equate the practice of such international organizations with that of States, it would in fact mean that, not only would the organization's practice not count for State practice, but its Member States would be deprived or reduced of their ability to contribute to State practice in cases where the Member States have conferred some of their public powers to the organization.*'²⁰⁷

This position, while not contained in the Draft Conclusions themselves, is repeated in subsequent publications by the ILC.²⁰⁸ It therefore appears that by virtue of the exclusive competences

²⁰⁵ Klabbers, 'An Introduction to International Organizations Law', p. 170. He names a number of acts, such as action programmes, guidelines and codes of conduct which can establish non-binding commitments which nonetheless need to be given some consideration.

²⁰⁶ Second report on identification of customary international law, A/CN.4/672, p. 6, para 18.

²⁰⁷ Ibid, p. 31, para 44.

²⁰⁸ Third report on identification of customary international law, A/CN.4/682, p. 53, para 77, and Fourth report on identification of customary international law, Michael Wood, Special Rapporteur, 8 March 2016, ILC, A/CN.4/695, p. 6, para 9.

conferred on the Union, when acting upon those competences, the EU is capable of participating in the formation of international customary law to the same extent as a state. This should also result in the activities which are listed in Draft Conclusion 10 (11) as acts which evidence *opinio juris* to also include the equivalent EU acts, not merely those of states which the Draft Conclusion specifically references. Where the EU acts on a competence which is not exclusive, the EU should fall within the normal rules as they pertain to international organizations. This is not specifically dealt with by the ILC, although it appears to be implied by virtue of the specific reference to exclusive competences. On the other hand, where the EU acts on a shared competence which leads to the inability of a Member State to act in violation thereof, due to the requirement of cooperation, it remains possible that the EU's acts in this field might also represent evidence of international customary law equal to that of states.

In that respect, the EU appears more than capable of participating in the creation of international customary law, at least when acting upon its exclusive competences. It is clear that the EU is capable of contributing both toward the practice, as well as the *opinio juris*, necessary to form international customary law.

5.3 Jus Cogens Norms and the European Union.

The issue of the applicability of jus cogens to the EU is worth a brief discussion. A jus cogens or peremptory norm is '*...a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.*'²⁰⁹ There exists no comprehensive list on which norms constitute peremptory norms but they have been highlighted in the jurisprudence of many different courts including the ICJ²¹⁰ and the ECJ. The CFI in the '*Kadi*' case recognized the authority of such norms as binding all subjects of international law, including the bodies of the UN.²¹¹ The ECJ itself has recognized that while such peremptory norms are applicable to all, it does not empower the Courts of the EU to review the acts of international actors for compatibility with those norms. They only have the authority to ensure EU acts fulfil the

²⁰⁹ Article 53, VCLT I and Article 53 in VCLT II.

²¹⁰ See for instance '*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*', (1986), Merits, Judgment. ICJ Reports p. 14.

²¹¹ '*Kadi*', CFI, (2005), para 226.

obligations imposed by peremptory norms.²¹² The applicability of peremptory norms is therefore beyond question within the EU legal order. EU acts must comply with such norms and the ECJ is capable of reviewing EU acts in light thereof.

The main question is whether or not the EU can contribute to the recognition of peremptory norms. Both the VCLT I and the VCLT II specifically refer to the ‘*international community of States*’ as the source of such norms. Peremptory norms are not generally created in a manner similar to treaties or custom, it is the recognition of a norm as possessing the qualities of a peremptory norm that is discussed here.²¹³ In his commentary to the VCLT II, Special Rapporteur Paul Reuter specifically stated that the terms used in both treaties was merely a unitary term and did not specifically require the inclusion of a reference to international organizations.²¹⁴

The ILC is presently working to identify the legal nature of jus cogens. The work is in the early stages and the results have not yet been achieved so as to permit their inclusion into this paper. That being the case, the ILC has provided a number of comments on the approach and methodology their research and reports are to follow, there are a number of conclusions which can provisionally be drawn from these statements. First of all, the ILC reiterates the statements regarding the source of jus cogens as being ‘*recognized by the international community of States*’ and recognizes that the will of states has a role to play in the creation of jus cogens norms.²¹⁵ The entirety of the First Report published by the ILC proceeds by reference only to the practice of States as recognizing jus cogens norms. This might lead to the conclusion that there is no scope for the participation of international organizations. The exact position which the ILC adopts in this regard will only be illuminated in the future Second Report.²¹⁶

That being said, similarly to the remarks raised with respect to the creation of international customary law by international organizations, the ILC may consider, where an organization has

²¹² ‘Kadi’, ECJ, (2008), para 287.

²¹³ Gennady M. Danilenko, ‘International *Jus Cogens*: Issues of Law-Making’, (1991), 2 EJIL 42, p. 49.

²¹⁴ Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, 9 March 1979, ILC, A/CN.4/319, Commentary to Article 53, pages 138-9.

²¹⁵ First report on jus cogens, Dire Tladi, Special Rapporteur, 8 March 2016, ILC, A/CN.4/693, pages 32 and 37, paras 52 and 61.

²¹⁶ Ibid, p. 37, para 62.

been delegated exclusive competences by its Member States, that the recognition of jus cogens applicable to the areas of exclusivity, might constitute evidence of equal value to the recognition by states. This consideration is similar to that provided under the heading of international customary law as not permitting such evidence would result in the loss of the ability to participate in the recognition of jus cogens on the part of the Member States of the organization, specifically in this case, the EU. There is a second alternative which would result in the acts of Member States being given weight over the acts of the EU despite those state acts having been grounded in the acts of the EU itself, i.e. the Member States acting to implement an exclusive competence of the EU. It would be possible to consider this conduct evidence of state practice but it would run into the same issue as the resolutions of the General Assembly where the acts of the states are merely reflections of the acts of the EU. As such this alternative would equally be undesirable and not reflect the true source of recognition in international law.

As such it would appear that the EU might be capable of contributing to the recognition of peremptory norms. This possibility is not confirmed and will need support from the Second Report of the ILC on jus cogens but on the basis of the previous work of the ILC, it is almost inconceivable that the EU would be prevented from participating in the recognition of jus cogens norms particularly in the areas of its exclusive competences.

6. Conclusion

The analysis provided in the preceding chapters has delved into the position of the EU within the international legal order. The extent to which the EU is able to participate has been considered and discussed and the particular nature of the EU has consistently been accounted for as a possible means of extending the EU's capacity under international law when compared to that of other organizations possessing lesser competences. The main questions which stood as the reason for the present paper concerned the EU's ability to participate in both the creation of international agreements and international customary law. Chapters 2 and 3 largely provided a foundation from which to start the analysis but also provided the scope of the EU's actions in international law which continued to serve as a limiting factor on the EU's participation in the international community.

Chapter 4 dealt with the substantive issue of the EU's agreement-making capacity. It is clear that the EU possesses the authority conferred by its Member States to engage in the making of international agreements.²¹⁷ The exact limits thereof are governed by the primary Treaties as well as the flexibility clause found in Article 352 TFEU. The limits of the flexibility clause were defined by the ECJ in '*Opinion I/94*' where any extension of competence would need to be inextricably linked to the competences already conferred. Additionally, the EU becomes a full party to the agreements it concludes under its exclusive competences. Where the EU engages in the making of mixed agreements, the EU's status as a party to the agreement is limited to the extent of its competences represented in the agreement. Clarity can be introduced to this issue by way of a declaration of competences although in many cases they remain rather imprecise and open to the possibility of unilateral change by the EU.²¹⁸

International practice appears to lend a great deal of authority to international organizations which was initially derived from the sovereignty of nation states. Despite the existence of criticism, the VCLT II appears to require the EU, and international organizations generally, to consent to international obligations before being bound by them. The VCLT II also permits the creation of

²¹⁷ Article 216, TFEU.

²¹⁸ Klabbers, 'An Introduction to International Organizations Law', p. 282.

reservations by organizations and provides a general rule that the formal confirmation of an organization contributes to the entry into force of an agreement.

The responsibility of the EU for its international activity is a particularly important aspect of this paper. The ILC's ARIO provided the most recent and robust analysis on the legal area as it pertains to international organizations. ARIO provides for a definition of attribution, and establishes several acts which could lead to the attribution of conduct to international organizations.²¹⁹ Despite the EU's comments that the Articles do not apply particularly well to the operations within the EU,²²⁰ the ARIO articles remain the main source of international law on the area. There is room to apply them to the EU, and doing so results in a clear basis for EU responsibility for the acts of the organization. Not only does it give rise to EU responsibility, that responsibility is also exclusively that of the Union. A third state victim of an EU unlawful act would not be able to demand compensation from any Member State directly. There is room for some liability on behalf of the Member States by virtue of Article 40 ARIO which requires members of organizations contribute to ensure the organization is capable of meeting its liabilities to pay reparations arising out of unlawful conduct.

In terms of the EU's responsibility for its mixed agreements, the ECJ has in 'C-316/19' stated that the EU and the Member States will be jointly liable for the liabilities which might arise as a result of the agreement. There is no clear international rule dedicated to this issue, largely due to the notion of mixed agreements being a problem for the EU more than any other international organization. Similarly, there appears to be little international law on the issue of the EU's need to assume the international obligations of its Member States which were attached to the exclusive competences conferred onto the Union. Schmalenbach argues that this lack of international provision is largely due to the approach to the EU which the international community has adopted. He describes it as follows: *'The international community, however, maintains a more pragmatic wait-and-see attitude by leaving the ongoing legal and political assessment of the EU's legal*

²¹⁹ Articles 6-9, ARIO.

²²⁰ Comments and observations received from international organizations, 25 June 2004, ILC, A/CN.4/545., pages 28-32, p. 29, para 5.

*character to its Member States.*²²¹ This is particularly true with regard to the rules concerning the extent of the transfer of exclusive competences of the Member States on the EU. It appears as though international law at present will treat the EU, when acting on its exclusive competences as an actor equal to a state. This is particularly true when it comes to the question of international customary law.

The ILC has provided a great deal of work on the question of international customary law and draws a clear distinction between the conduct of states and international organizations, placing the former in a more authoritative position. The EU however, by virtue of its exclusive competences, is put in an elevated position equal to that of states in the eyes of the ILC.²²² They base this status on the idea that not granting the EU this position would result in a loss of the Member States in their ability to contribute in the creation of international custom. As such, while the ILC only refers to the exclusive competences which the EU possesses, it might be possible to draw this authority to the shared competences of the EU where the Members are prevented from acting in a manner incompatible with the acts of the Union. While technically the Member States continue to be able to act upon their own initiative, their acts are restricted and as such the effect of the EU's action should continue to represent a factor in the international practice for the establishment of custom. Where the EU acts upon a competence that does not exclude the capacity for action on behalf of the Member States, it may continue to contribute to international customary law albeit at that secondary level along with the other international organizations.

Lastly some time was dedicated to the possibility for the participation of the EU in the recognition of norms with a peremptory character. The rules in international law in this area remain scarce although the ILC is working toward bringing some much needed clarity to the legal area. Despite the lack of international law, an analogy was drawn to the conclusions reached in the context of international customary law to show that the EU must be able to participate in the recognition of *jus cogens* norms despite the persistent reference to the recognition by the community of states only. Where the EU would be precluded from being able to contribute to the recognition of *jus*

²²¹ Schmalenbach, *International Organizations or Institutions, General Aspects*, para 19 at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e499>, last visited on 20 August 2016.

²²² See the Second, Third and Fourth Report on the identification of international customary law, ILC.

cogens norms, the Member States would either lose their ability to participate in the evidence toward jus cogens norms, or the practice of states would be considered evidence of recognition despite the actual source of that practice being the rules and agreements concluded by the EU. The latter in particular being an issue which the ILC attempted to avoid concerning the resolutions of the UN General Assembly. More international work is needed on the topic but there is some legal basis to argue the EU should be able to participate in the recognition of jus cogens norms in international law.

This concludes the examination of the application of international law on the external actions of the EU. The EU has significant room to act upon an authority similar to that of states, granted it acts within its exclusive or possibly shared competences. While the law on international organizations continues to evolve and progress, it appears as though there is certainly some recognition of the EU's particular status in international law granting it privileges which are not within the purview of the majority of international organizations. The EU most certainly has the capacity to engage in international agreements under both EU and international law and in terms of international customary law the EU might possess greater scope for participation than most organizations as a result of the exclusive competences conferred by its Member States. Several questions remain, in particular the extent of the EU's ability to recognize jus cogens norms but these questions will require the further development of international law.

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Abstract

The present Master thesis endeavors to provide clarity as to the legal relationship between the European Union and international law from the perspective of international law. The European legal order comprises a host of rules for the internal and international operations of the organization. The exact impact those rules have within the international community is entirely dependent on their reception in the international legal order. For this reason, the object of this paper is to identify the competence and capacity the European Union possesses to engage in the creation of international treaties as well as international customary law.

In order to establish the European Union's position in international law, it was necessary to analyze the extent to which the European Union is capable of entering into treaty-making relations with third states as well as the Union's legal capacity by reference to the rules provided by international law as they pertain to international organizations. The status of the European Union as a treaty party is considered as well as the relationship third States might have with the Member States of the Union under the agreements of the European Union. Particular attention is paid to the responsibility the European Union assumes by way of its international activity. In terms of international customary law, this paper analyzes whether the European Union is capable of contributing to both the general practice as well as the *opinio juris* requirements for the formation of new rules of international custom.

Reference is had to the Vienna Conventions on the Law of Treaties, as well as the International Law Commission's Articles on the Responsibility of International Organizations. The jurisprudence of the International Court of Justice is applied to shed additional light on the practical aspects of the activities of international organizations and the precedent of the Court of Justice of the European Union is referred to in order to demonstrate the internal developments of the Union in terms of the organization's external activity.

Zusammenfassung

Die vorliegende Masterarbeit bezweckt Klarheit über die rechtliche Beziehung zwischen der Europäischen Union und dem internationalen Recht zu schaffen, wobei dies aus der Perspektive des letzteren geschehen soll. Das europäische Rechtssystem umfasst eine Vielzahl von Normen zur Regelung EU-interner sowie internationaler Tätigkeiten der Organisation. Die genaue Auswirkung der europäischen Normen auf die internationale Gemeinschaft hängt jedoch gänzlich davon ab, in welcher Weise gegenständliche Normen in das internationale Rechtssystem übernommen werden. Das Ziel dieser Arbeit liegt darin, die Kompetenzen, die die Europäische Union zur Mitwirkung bei der Schaffung von Völkergewohnheitsrecht und der Gestaltung von internationalen Verträgen besitzt, zu ermitteln.

Um die Position der Europäischen Union im Völkerrecht zu etablieren, war es erforderlich, einerseits das Ausmaß, in welchem die Europäische Union Vertragsbeziehungen mit Drittstaaten begründen kann, und andererseits die rechtliche Eigenschaft der Europäische Union unter Bezug auf die auf internationale Organisationen anwendbaren Völkerrechtsregeln zu prüfen. Hierbei wird sowohl auf den Status der Europäischen Union selbst als Vertragspartei, als auch auf etwaige Vertragsbeziehungen der einzelnen Mitgliedstaaten mit Drittstaaten Bedacht genommen. Ein besonderes Augenmerk gilt der Verantwortlichkeit, die der Europäischen Union aus ihren internationalen Tätigkeiten erwächst. Bezüglich des internationalen Gewohnheitsrechts untersucht diese Arbeit die Fähigkeit der Europäischen Union, sowohl für „general practice“, als auch der „opinio juris“, Voraussetzungen zur Bildung neuer Normen im internationalen Gewohnheitsrecht, beizutragen.

Zur Beantwortung gegenständlicher Fragen wurde die Wiener Vertragsrechtskonvention, sowie Artikel über die Verantwortlichkeit internationaler Organisationen (ILC'S ARIIO) herangezogen. Des Weiteren wurde die Rechtsprechung des Internationalen Gerichtshofes angewendet, um zusätzlich Licht auf die praktischen Aspekte der Tätigkeiten internationaler Organisationen zu werfen. Zur Darstellung der internen Entwicklung der Union bezüglich ihrer externen Beziehungen wurde darüber hinaus auf die Entscheidungen des Gerichtshofs der Europäischen Union zurückgegriffen.