ARTICLES

THE AUTONOMY OF EU LAW, LEGAL THEORY AND EUROPEAN INTEGRATION

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THE SPHERE OF INTERVENTION: EU LAW SUPRANATIONALISM AND THE CONCEPT OF INTERNATIONAL TREATY

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TABLE OF CONTENTS: I. Introduction. – II. The law of integration. – II.1. The *summa divisio* of the modern law and the autonomous "sphere of intervention". – II.2. The concept of law-making treaty and the search for a European constitution. – II.3. Jürgen Habermas and the revision of Kant's cosmopolitan right. – III. The law of intervention. – III.1. Two faces. – III.2. The concept of intervention treaty. – III.3. Post-war Europe. – IV. Joseph Weiler and the political messianism in EU law. – V. Conclusion.

ABSTRACT: In this *Article*, the EU Treaties which establish a new and autonomous legal order are analysed through the lens of Pierre Pescatore's qualification of their operating sphere as "sphere of intervention". Combining Jürgen Habermas' revision of Kant's concept of cosmopolitan law and Joseph Weiler's thesis on the messianic impact of the European integration process, a concept of international treaty is presented that is suitable for a proper analysis of the transformative character of the EU Treaties and the Common Market as such a "sphere of intervention". Highlighting implications of the theory of international treaty, legal philosophy and messianism, the concept of the European autonomous legal order, endowed with direct effect and supremacy, shall be proven to be the historical answer to the aporias of classical international law and to the totalitarian abuse of the law in the fascist regimes in Europe in the first half of the 20th century – not only on a symbolical level but also on the level of the concrete legal structure of the European integration process. The general aim of this *Article* is therefore to contribute to the debate about the nature of the EU Treaties as constituting an autonomous legal order from an international law perspective by identifying a type of international treaty suitable to explain the special character of a legal order that is identical neither with international nor with domestic law, but rather constituting a realm in-between the former and showing an independent legal standing in itself.

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I. INTRODUCTION

In its landmark decisions *Van Gend en Loos* and *Costa v ENEL*,[1] the European Court of Justice (ECJ) introduced three principles to the legal order of the European Union (EU) that extended and deepened the already peculiar character of the Treaties of the European Union (then the Treaty of the European Economic Community). The three interrelated principles of autonomy, direct effect and supremacy are to be regarded as key elements of the supranational character of EU law. The most influential branch in EU legal theory, the theory of constitutionalisation, even considered them as cornerstones of the emerging constitutional order in EU law.[2] According to this theory, the ECJ has interpreted the originally international treaties in a manner similar to the way national constitutional courts interpret their respective constitutions and thus completed the assumption of constitutional features on the international level of EU law.[3]

Through the concept of autonomy, the ECJ emphasises the independence of EU law. The origin of the Treaties may be the will of the consenting Member States, the validity of the new legal order they established is nevertheless considered to be underived and autonomous from the domestic legal orders.[4] The claim that the EU legal order is an autonomous legal order on the international level is without doubt historically unique. Considering its entailments – the direct effect of EU law within the territory and to the citizens of the Member States and its supremacy over domestic law –, such a concept stands against the traditional principles of international law, above all the principle of non-intervention and the principle of the mediation of the individual.[5] International law is in the end that legal order that seeks not to limit sovereignty[6] but to coordinate actions of sovereign states and to protect their internal affairs – their territory and their citizens – against any form of intervention. Furthermore, according to the principle of the mediation of the individual (in

[1] Case C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1; case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66.

[2] For the theory of constitutionalisation see: A Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot 2001); E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) AJIL 1; JHH Weiler, 'The Transformation of Europe' (1991) YaleLJ 2403. For a critical account of the theory of constitutionalisation see A Somek, 'Constituent Power in National and Transnational Contexts' (2012) Transnational Legal Theory 31.

[3] See JHH Weiler, 'The Transformation of Europe' cit. 2407

[4] On the "autonomistic" account of EU law as the position of the ECJ see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 260

[5] On the non-intervention principle in international law see K Loewenstein, *Political Reconstruction* (Macmillan Company 1946).

[6] See on the so-called Lotus principle in Permanent Court of International Justice (PCIJ) *SS Lotus (France v Turkey)* [7 September 1927].

its classical form), the individuals cannot bear rights of international legal origin.[7] Their legal status is determined by the state (to which they belong) alone. Against the background of these main classical principles the question arises how the project of European integration may be conceptualised within the framework of international law.

Therefore, this *Article* aims to analyse the EU Treaties and their transformation through the jurisprudence of the ECJ in the light of basic principles of international law concerned with the protection of sovereignty. This perspective may be suitable to complement the narrative of constitutionalisation and to explain certain paradoxes in the European integration process and the relationships between its main players.

I will proceed in three steps. First, I will highlight certain aspects in Pierre Pescatore's *The Law of Integration*[8] that may allow taking his account as a starting point for thinking the project of European integration as something new in kind in the theory of polity. Since Pescatore was both – theorist and, as judge to the ECJ, influential practitioner –, his insights may offer a better understanding of the European integration process than many others. Therefore, his characterisation of the sphere the autonomous EU law relates to as the "the sphere of the Community's intervention"[9] appears to be a crucial qualification to start with.

The EU Treaties are often considered as progressive forms of law-making treaties. Law-making treaties in general establish a form of legislation on the international level.[10] Whereas classical law-making treaties address the states only,[11] the EU Treaties are said to establish a system similar to domestic constitutions, relating directly to individuals (and not only to states).[12] EU-law's claim that also the national citizens are legal subjects of the EU legal order reminds of the important paradigm change in the philosophy of international law that we find in Kant's concept of the cosmopolitan right.[13] In his critical revision and extension of this Kantian concept, Jürgen Habermas shows that the cosmopolitan right must be construed as breaking through the domains of national sovereignty and intervening in the realms formerly protected by international legal principles such as the non-intervention and the mediation principle.[14] I will show

[7] On the principle of the mediation of the individual see V Epping, 'Völkerrechtssubjekte' in K Ipsen, *Völkerrecht* (C.H. Beck 2018) 358.

[8] P Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, based on the Experience of the European Communities* (A.W. Sijthoff 1974) preface.

[9] *Ibid*. 28, 44.

[10] On the concept of law-making treaty see C Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in M Browman, D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 79.

[11] See H Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899).

[12] For an overview see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 229.

[13] I Kant, *Metaphysics of the Morals: The Philosophy of Law* (Delphi Classics 2017) para. 62.

[14] J Habermas: 'Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren' in J Habermas, *Die Einbeziehung des Anderen. Studien zur Politischen Theorie* (Suhrkamp 1996). On the international legal principles of non-intervention and mediatisation see A Arnauld, *Völkerrecht* (C.F. Müller 2016) 17, 151.

therefore that Pescatore's idea of an intervention sphere and Habermas' account of the interventionist character of the cosmopolitan right perfectly fit together: EU law is the most progressive form of a cosmopolitan design in international law today.[15] The EU, as Habermas argues, is a community of states on the one hand and citizens on the other.[16]

However, if the EU legal order indeed shows a highly interventionist character, doubts may arise concerning the traditional qualification of the EU Treaties as law-making treaties. According to Heinrich Triepel, who has decisively shaped the theory of the law-making treaty, this kind of treaty respects the boundary between the international and national legal orders as separate realms of law.[17] But since – as, *e.g.*, Pescatore emphasises – within the framework of EU law this boundary is – though not completely abolished – challenged, questioned and blurred, the traditional qualification of the EU Treaties as law-making treaties can be called into question. In the second step, I will therefore try to identify some reasons why the classical qualification cannot satisfactorily explain the nature of the Treaties. Furthermore, I will briefly present a model of international treaty that may be more suitable for the task of conceptualising the interventionist character of the EU Treaties within the framework of international treaty law.

The general aim of this *Article* in its three steps is to contribute to the debate about the nature of the EU Treaties as constituting an autonomous legal order from an international law perspective by identifying a type of international treaty suitable to explain the special character of a legal order that is identical neither with international nor with domestic law, but rather constituting a realm in-between the former and showing an independent legal standing in itself. However, the idea of EU law's independence and autonomy must be understood not only in the context of a purely legal analysis of the relation between the EU, its Member States and its citizens. Having emerged as a sphere of legal, economic, and political interaction during the Cold War period, the project of European unification can be understood also as the expression of the attempt of self-assertion against the newly dominating superpowers of the East and West. As Joseph Weiler put it: "[t]he *Schuman Declaration* is Europe's declaration of independence".[18] And regarding Europe's dark past, the integration process may be understood as the process of the realisation of a promise – the promise of an alternative future for Europe after the horrors of the first half of the 20th century and of an answer to the fascist regimes in several European countries in particular. According to Joseph Weiler, this promise shows a messianic impact.[19] In a third and last, conclusive step I will

[15] For a different account of a "progressive internationalism" see P Eleftheriadis, *A Union of Peoples. Europe as a Community of Principle* (Oxford University Press 2020).

[16] J Habermas, *Zur Verfassung Europas. Ein Essay* (Suhrkamp 2011) 67.

[17] H Triepel, *Völkerrecht und Landesrecht* cit. 7.

[18] JHH Weiler, 'In the Face of the Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) Journal of European Integration 833.

[19] JHH Weiler, 'In the Face of the Crisis' cit. 833.

present an interpretation of the legal character of the EU Treaties and the supranational principles that may be understood as the attempt to prove Weiler's thesis right that political messianism "explains not only the persistent mobilising force (especially among elites and youth), but also key structural and institutional choices made".[20]

II. The Law of integration

II.1. The *summa divisio* of the modern law and the autonomous "sphere of intervention"

The law as a normative standard for behaviour and means to shape the relationships between the legal subjects it constitutes is related to spheres to which it is applicable to. In the case of modern law two spheres can be distinguished that are related to the two subtypes of modern law. The main actor here is the modern state. On the one hand, there is the sphere subordinated to the state, the internal or national sphere; on the other, there is the sphere of the relations between the different states, the external or international sphere. The former is the sphere domestic law relates to, the latter the sphere international law relates to. According to the *summa divisio* of modern law, any legal rule is either a rule of international law or a rule of domestic law.[21] *Tertium non datur*. The relationship between the two spheres and their legal framework is regulated by the state alone. Its sovereignty over internal affairs is guarded by the classical principles of the mediation of the individual and non-intervention; on the international level, state sovereignty is guarded by the principle that any rule of international law must rely on the state's consent. Even in the context of intensified cooperation in international organisations, this structure is protected due to the principle of representativity.[22]

Considering the legal structure of the European integration process, legal thinking is confronted with something showing a "qualitative difference" compared to classical international law.[23] As Pierre Pescatore in his 1972 *The Law of Integration* sets out: "Anyone who tries to interpret these new realities in the light of the well-worn conceptions of international law runs the risk of missing the substance of this special type of relationship between states".[24] This "special relationship between states" cannot be analysed by means of traditional legal categories: "this new reality being born before our

[20] *Ibid*.

[21] Classic authors like Vattel or Anzilotti have shaped the understanding that the two spheres are strictly separated. On the theory of dualism see D Anzilotti, *Lehrbuch des Völkerrechts* (De Gruyter 2019) vol. 1; J Klabbers, *International Law* (Cambridge University Press 2013) 288; V Epping: 'Völkerrecht und staatliches Recht' in K Ipsen, *Völkerrecht* cit. 48; H Triepel, *Völkerrecht und Landesrecht* cit. For a recent "internationalist" and dualist account of EU law see P Eleftheriadis, *A Union of Peoples* cit.

[22] P Pescatore, *The Law of Integration* cit. 5.

[23] *Ibid*. preface.

[24] *Ibid*. preface.

eyes, the law of integration, has not been recognised for the original phenomenon that it is, so much so that it has not yet found its *locus standi* within the established co-ordinates of legal categories. Are we here in the zone of public law, are we in the zone of international law, or must these boundaries be revised so as to assign its true place to this new field of action and knowledge?".[25]

The law of integration is therefore a *tertium* to national and international law that cannot be conceptualised through the categories of the classical *summa divisio*. The sphere the law of integration relates to is neither a purely internal nor a purely external sphere but a third sphere, autonomous from both. And the institutional authority operating in this sphere is as well neither national nor international. It is, according to Pescatore, the supranational authority,[26] "a real and autonomous power placed at the service of objectives common to several states".[27] The law of integration is supranational law.

Due to the ascribed autonomy, EU-law may be conceived as independent from international law and Member States law, and underived from both regarding its validity and interpretation.[28] To give the concept of autonomy meaning and effectiveness, it is accompanied by the principles of direct effect and supremacy.[29] These three supranational principles change Europe's legal landscape in a fundamental way, for it seems to show a double face henceforth. On the one hand, Member State territory is still the territory of the traditional European nation states and the individuals are national citizens; on the other, the domestic territories form together the territory of the Common Market and the individuals are bearers of directly applicable rights of European legal origin. Furthermore, since 1992, national citizens have had the status of EU-citizens. A unilateral, sovereign change of the status of individuals who are European citizens does not seem to be legally possible any longer – at least as long as the state concerned is a Member State.[30]

This double status structure is clearly the result of a fundamental "refashioning" of national sovereignty to which Pescatore dedicates a long chapter. This refashioning consists of the transformation of national law to achieve the goals of European integration.[31] The Treaties aim to change and transform that sphere which was formerly protected by the principle of non-intervention – the classical *domaine reservé*. The latter is without doubt the core concept of classic international law. National sovereignty is built

[25] *Ibid*. 2.

[26] *Ibid*. 26, 35.

[27] *Ibid*. 51.

[28] A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 260.

[29] See case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49 paras 14-18.

[30] See case C-135/08 *Janko Rottmann v Freistaat Bayern* ECLI:EU:C:2010:104. For a critical discussion see A Somek, 'Pragmatism, Innovation and Prophecy: Conjectures Concerning the Grounds of Belief in an Inventive Court' in T Capeta, I Goldner Lang and T Persišin (eds), *The Changing European Union: A Critical View of the Role of Law and the Courts* (Hart Publishing 2020).

[31] P Pescatore, *The Law of Integration* cit. 19.

on the idea of the exclusive right to shape, rule and determine the relationship between the members of a national community on a certain territory (conceived as impermeable), organised as a political entity in the modern state.[32] This exclusiveness entails that the individual belonging to a certain state is mediated *vis-à-vis* any other political entity and the realm of international law as such. According to the classical principle of the mediation of the individual, an individual cannot bear rights or duties of international legal origin – it has no international legal subjectivity and international law's jurisdiction ends at the national boarder. Sovereignty is nothing else than this claim for exclusiveness. *Any* dictatorial interference within that sphere from without is to be regarded as an intervention into domestic affairs – the *domaine reservé*.[33] (Understood in this technical sense, the notion of intervention comprises both military and peaceful intervention, regardless whether it is carried out by right or without).[34]

It is therefore not surprising at all that Pierre Pescatore calls the sphere that results from the opening of the *domaine reservé* and to which supranational authority refers to the "sphere of the Community's intervention".[35] From the perspective of international law, the communities' actions are conventionally justified interventions. And the crucial question Pecatore rises is: "[i]t must be asked what is the nature and intensity of the powers the Community is called upon to exercise in the spheres open to its intervention".[36] The question is which legal concept is suitable to analyse the sphere of intervention and the means of its regulation properly. The difficulty is that, according to Pescatore, "we must bear in mind that we are experiencing the beginning of a process which undermines categories of thought which have been settled for centuries [...]. [We must] understand the future potential comprised in these new forms of international relationships".[37] What is the supranational law of integration and the sphere of intervention it relates to?[38] What is this new "special type of relationship between states"? What is the nature of the EU Treaties?

II.2 The concept of law-making treaty and the search for a European Constitution

Pescatore's most interesting thesis is the radical antithesis to the classical *summa divisio*'s *tertium non datur*. It is important to bear in mind, that according to Pescatore, the supranational law of integration and the sphere it relates to do not constitute a classical international system nor a state system in whatever federal form.[39] The transformation

[32] G Jellinek, *Allgemeine Staatslehre* (Wissenschaftliche Buchgesellschaft Darmstadt 1959) 394, 406.
[33] See H Lauterpacht, *International Law: A Treatise* (Longmans 1955) 305.
[34] *Ibid*.
[35] See P Pescatore, *The Law of Integration* cit. 28, 44.
[36] *Ibid*. 28.
[37] *Ibid*. 4.
[38] *Ibid*. 52.
[39] *Ibid*. 55.

the law of integration performs consists therefore not of the transformation of the relations between the Member States into internal domestic relations in the full sense of the term. On the other hand, the new quality of these relations is not of international legal character *stricto sensu* either. Theory faces therefore a paradoxical situation. Considered through the perspective of what the EU Treaties are, we have formally international treaties. Considered from the perspective of what they do, they do not establish rules of classical international law, for classical international law is the legal order that is built up to avoid such a transformation of domestic law (as intended by EU law) that is *de facto* an intervention into domestic affairs.

Consequently, the question arises, how this peculiar character of the EU Treaties may be conceptualised as international treaties. The answer of the classical narrative of the constitutionalisation theory consists of a combination of international and domestic legal concepts, namely the concept of law-making treaty and constitutional law.[40] In order to understand this solution, it seems to be expedient to take a closer look on what international treaties do – to analyse their function. Arnold McNair divided the concept of international treaty in his functional approach into four categories:[41] by asking what treaties do, he distinguished between *i)* treaties of conveyance, *ii)* contract treaties, *iii)* law-making treaties and *iv)* charters of international unions, whereby he considered the latter as a special form of law-making treaties. Law-making treaties serve the stabilisation of international relations.[42] They do so by establishing a systematic set of objective rules binding for the consenting states (and sometimes even for third states)[43] or by the creation of a new legal subject of international law, be it a fully sovereign state (*e.g.*, the first German nation state in 1867),[44] or an international organisation. It was Heinrich Triepel, who gave the concept of the law-making treaty its canonical shape.[45] In his 1899 *Völkerrecht und Landesrecht* ("International Law and Municipal Law"), Triepel continued the international legal research that had emerged in German legal scholarship in the time

[40] About the theory of constitutionalisation in international law in general, see S Kadelbach, T Kleinlein, 'Überstaatliches Verfassungsrecht. Zur Konstitutionalisierung im Völkerrecht' (2006) Archiv des Völkerrechts 235; J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2011).

[41] A McNair, 'The Functions and Differing Legal Character of Treaties' in A McNair, *The Law of Treaties* (Clarendon Press 1961) 739; DB Hollis, 'Defining Treaties' in DB Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press 2020).

[42] On the concept of law-making treaty see C Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in MJ Browman and D Kritsiotis, *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018); DB Hollis, 'Defining Treaties' in DB Hollis (ed.), *The Oxford Guide to Treaties* cit.; W Levi, 'Law-Making Treaties' (1944) Minnesota Law Review 247; A McNair, *The Law of Treaties* cit.

[43] A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 229.

[44] See H Triepel, *Völkerrecht und Landesrecht* cit. 50.

[45] H Lauterpacht, *Private Law Sources and Analogies of International Law (with the Special Reference to International Arbitration)* (Longmans, Green & Co. Ltd. 1927) 158.

after the foundation of the first German nation state in 1867 and 1871.[46] The question at stake was whether it is possible to establish binding rules on the international level. The traditional theory affirmed the capacity of any international treaty to do so. Contrary to this approach, Triepel insisted on the distinction between treaties that followed the pattern of a private law contract[47] and treaties that showed a different structure regarding the form of the will underlying the understanding and its outcome, leaving behind the contract treaty model. In the latter model, "the will of one party is different from that of the other, the contract being here a means for achieving different and opposing ends".[48] International law in the full sense of the term is considered by Triepel as not achievable by means of the mere contract treaty. However, 19th century[49] saw the emergence of a new international legal format that Triepel called *gesetzgebende Vereinbarung* ("law-making agreement") which was later called "law-making treaty".[50] "[T]he agreement serves the purpose of realising identical aims".[51] Whereas the mere contract shall help to fulfil opposite interests, the agreement shall satisfy common interests.[52] It is explained not by the analogy with the private law contract but by analogy with the public law concept of law-making or legislation.[53] By means of the agreement based on a collective will, the new-born order attains a certain autonomy from the state will overcoming the latter as the only source of law.[54] The emerged entity is the result of a collective act (*Gesamtakt*).[55] (The examples Triepel gives are the 1815 *Final Act* of the Congress of Vienna, the *Paris Declaration Respecting Maritime Law*, the 1864 *Geneva Convention* and many others).[56] Triepel emphasises that the two realms of international law and domestic law remain strictly separated. Or to put it correctly: only the distinction between the law-making treaty as instrument to make international law and the domestic legislative process establishes the separation.[57]

[46] H Triepel, *Völkerrecht und Landesrecht* cit. 50.

[47] *Ibid*. 72.

[48] H Lauterpacht, *Private Law Sources and Analogies of International Law* cit. 158.

[49] H Triepel, *Völkerrecht und Landesrecht* cit. 70.

[50] See A McNair, *The Law of Treaties* cit. 729. For an overview on the typologies see C Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' cit. 79.

[51] H Lauterpacht, *Private Law Sources and Analogies of International Law* cit. 158.

[52] H Triepel, *Völkerrecht und Landesrecht* cit. 53.

[53] *Ibid*. 73.

[54] *Ibid*. 32.

[55] On the notion of the *Gesamtakt* see J Kuntze, *Der Gesammtakt, ein neuer Rechtsbegriff* (Leipzig 1892). On the application of that notion to the context of European integration see HP Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr 1972) 58.

[56] H Triepel, *Völkerrecht und Landesrecht* cit. 70.

[57] As Lauterpacht has pointed out, the distinction between contract treaties and law-making treaties should not lead to the misunderstanding that the former lack of legal character – a misunderstanding Triepel is said to be captured in. Contract treaties as well are sources of international law in the sense of

Whereas the classical concept of the law-making treaty that we find in Heinrich Triepel remains within the framework of a dualist approach to international law in accordance with the *summa divisio*, international legal scholarship in the 20th century interpreted the densification of the international legal landscape and the limitation of sovereignty it is said to entail as the assumption of constitutional structures similar to domestic constitutional law.[58] And the EU Treaties are considered as the most progressive form of the transgression of the conceptual boundaries of classic international law. The EU Treaties are said to be law-making treaties, a "collective act of state integration power"[59] that establish a rule of law describable by the terms of domestic law, namely constitutional law, in a more advanced sense than any other international legal framework. The EU is said to be, in principle, an international organisation that is, however, at the same time shaped as though it were a state or at least showing a similar structure.[60] It resembles an international organisation due to its international legal foundations. But, as Jan Klabbers has pointed out, the EU is not established for a concrete function as it has been the case with classical international organisations, *e.g.*, the International Meteorological Organisation.[61] It cannot be said that the EU is simply exercising tasks delegated by the Member States – as an autonomous entity the EU exercises its rights independently.[62] Creating a Common Market for 27 countries and more than 400 million citizens, establishing a system of legislation the legislative output of which touches nearly any policy field is by no means a "concrete" a concrete function in the sense of the functionalist theory. Against this background and regarding the objectives of art. 1 and art. 3(1) TEU the EU can be conceived of as institutionalisation of (European) human community as such.

In 1958, Pescatore conceived of the Treaty of the European Economic Community as being at once an "international treaty, a national law and the constitution for the Community".[63] In *The Law of Integration*, Pescatore seems to consider the concept of law-making treaty as a kind of a precursor concept to the EU Treaties. The law-making treaty

art. 38 of the Statute of the International Court of Justice. Contract treaties cannot be seen as mere application of law. See H Lauterpacht, *Private Law Sources and Analogies of International Law* cit. 158.

[58] S Kadelbach and T Kleinlein, 'Überstaatliches Verfassungsrecht. Zur Konstitutionalisierung im Völkerrecht' (2006) Archiv des Völkerrechts 244.

[59] HP Ipsen, *Europäisches Gemeinschaftsrecht* cit. 58; A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 262.

[60] For an analysis of the constitutionalisation of the founding Treaties through the jurisprudence of the ECJ see JHH Weiler, 'The Transformation of Europe' cit. 2407.

[61] See J Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) EJIL 9, 30-33.

[62] According to Klabbers, functionalism stands and falls with the framework of delegation. See *Ibid*.

[63] P Pescatore, 'Les aspects fonctionnels de la Communauté Economicque européene, notamment les sources du droit' in Faculté de droit de l'université de Liège (ed.), *Les aspects juridiques du marché commun* (Faculté de droit de Liège 1958) 63.

is said to be the traditional way of establishing "common rules for several States, [creating] a community of law between [them]".[64] Traditional international organisations can be considered as the institutionalisation of such efforts, still acting in accordance with the principle of representativity. But then, Pescatore states against the qualification of the EU Treaties as classical law-making treaties that "the legislative system of the Communities far transcends the international precedents, both quantitatively and qualitatively".[65] Considering this transgression of the concept of law-making treaty, Pescatore suggests analysing the Treaty of Rome against the background of domestic legal concepts, constitutional concepts in particular.

So, in the end, the concept of law-making treaty is in a certain way rejected by Pescatore to render the analysis of the Treaties within a constitutional framework possible. Their international legal character is denied. Although having highlighted the special character of the law of integration as neither international nor national law at the outset, Pescatore now aims to apply constitutional categories to the Treaties. I think it is this point where critique should be applied. We remember: Pescatore highlighted the new, transgressive and progressive character of the Treaty of Rome. They were said to having left behind the classical *summa divisio* and they were said to be not categorisable within classical legal concepts that adhere to the *summa divisio*. But why then is constitutional terminology applied to them?

The rejection of the law-making treaty character of the EU Treaties is even more interesting considering the roots of the concept of law-making treaty in German legal scholarship in the late 19th century. Scholars like Bergbohm,[66] Binding[67] and Triepel[68] have created the concept of the collective act and the law-giving agreement to analyse the character of the foundation of the *Norddeutsche Bund* in 1867. This first German nation state was founded by an international agreement between the different German sovereign states.[69] By this agreement, the relations between these states were transformed from external relations between sovereign states into internal relations between constituent states (*Gliedstaaten*) of the new supreme federal state. The latter remained as the only entity endowed with international legal subjectivity in the full sense. Furthermore, the agreement explicitly referred to establishment a constitution for the new state.

Compared the foundation of the *Norddeutsche Bund* by means of international agreement, it is obvious that the EU Treaties do not at all exhaust the full scope of the capacity of international treaties. On the contrary, they remain far behind. They establish a new entity of international law, but neither do they transform the relations between

[64] P Pescatore, *The Law of Integration* cit. 56.
[65] *Ibid*. 57.
[66] C Bergbohm, *Staatsverträge als Quellen des Völkerrechts* (Dorpat 1876).
[67] K Binding, *Die Gründung des Norddeutschen Bundes* (Duncker & Humblot 1889).
[68] H Triepel, *Völkerrecht und Landesrecht* cit.
[69] For an overview over the literature see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 222.

the Member States into internal relations in the full sense nor do they shape *explicitly*[70] those relations in a constitutional mode. Though not going as far reaching in the transformation of the interstate relations as the 1867 treaty,[71] they are said to be nevertheless a constitution in itself. Considering the intensity of the integration power of the 1867 agreement, it seems therefore more likely to say that the EU Treaties have stopped halfway in the direction of the establishment of internal relations and a constitution. Against this background, the jurisprudence of the ECJ establishing the so-called "constitutional" principles of EU law appears to be nothing else than the attempt to subsequently complete a transformation that was originally not achieved or maybe not even intended at all. For where the ECJ alleged to having identified constitutional principles the Treaties themselves had remained loudly silent. Considered from the perspective of what law-making treaties actually *can* do the EU Treaties seem to be not a progressive successor but a rather weak example. Pescatore's rejection of this concept in the context of the analysis of the EU Treaties appears plausible only from this perspective. Yet is it comprehensible to call treaties of such ambiguous and undecided character a constitution?[72] Is something a constitution when it is necessary to *demonstrate* its constitutional character in a complex argument? As a consequence, the question arises: if the EU Treaties are international treaties but – according to Pescatore – not law-making treaties, what kind of treaty are they? If the EU Treaties do not transform international relations into domestic and constitutional relations *stricto sensu* – what is it these treaties are "doing"?

II.3. Jürgen Habermas and the revision of Kant's cosmopolitan right

a) The completion of public law in the cosmopolitan right

The EU Treaties obviously cannot be analysed exhaustively against the background of the classical categories of international treaty law. All of treaties discussed by McNair[73] remain within the framework of classical international law because any rule they establish is either a rule of international law or domestic law. (The most comprehensive form of the law-making treaty results in the establishment of a domestic constitutional order, whipping off the international legal character of formerly international relations completely). What the EU Treaties do cannot be achieved by neither of those types, for the latter remain formally and materially within the framework of the classical *summa divisio*. They are not about breaking through the *domaine reservé* to intervene into the domestic legal orders. They do not show an effective transformative function. But then

[70] M Cahill, 'European Integration and European Constitutionalism: Consonances and Dissonances' in D Augenstein (ed.), *'Integration through Law' Revisited: The Making of the European Polity* (Routledge 2011).

[71] For the opposite view see A Peters, *Elemente einer Theorie der Verfassung Europas* cit. 224.

[72] For a critical account of the theory of constitutionalisation see A Somek, 'Constituent Power in National and Transnational Contexts' cit.

[73] A McNair, 'The Functions and Differing Legal Character of Treaties' cit.; DB Hollis, 'Defining Treaties' cit.

the paradox of European integration is: The EU Treaties *are* international treaties and at the same time aim at the suspension of the classical *summa divisio* and therefore at the suspension of international law. How can this be possible?

Considering this paradox, the interventionist character of the EU Treaties appears to be crucial for their proper understanding. In order to achieve a suitable concept for what the EU Treaties do, it may be worth looking into the tradition of cosmopolitan thinking that takes Immanuel Kant's international legal conception as a starting point. By referring to Jürgen Habermas's 1995 paper on Kant's *Towards Perpetual Peace*,[74] my goal will be to demonstrate that the way Habermas reconstructs and refines Kant's conception of international law and the cosmopolitan right meets with Pescatore's notion of the sphere of the Community's intervention. For Habermas calls exactly for international legal rights that break through the *domaine reservé*.

According to Immanuel Kant, the precondition for a peaceful world order is the establishment of the rule of law on three levels.[75] On the level of a particular human community, it is necessary to establish a state and a constitution to overcome the state of nature between the individuals. On the level of the relations between the various political communities, an international legal order is indispensable to avoid war. This legal order seems to rest above all on the concept of international treaty. Kant seems to fully trust this instrument as suitable means to overcome the condition of the permanent threat of the outbreak of war in the inter-state domain. However, the rule of law must be completed in a cosmopolitan right the bearer of which are not the states but the individuals.[76]

Kant does not give much room for considerations on the implications of the legal quality of a cosmopolitan right as a right that is of international legal origin and – to make sense – must be observed by the states as a right individuals have against the state at the same time. Furthermore, it is a rather weak concept. As the right to visit any country and to offer contact, it follows from the fact that because men "are placed in [...] throughgoing relations of each other to all the rest, [...] they may claim to enter in intercourse with one another, and they have a right to make an attempt in this direction while a foreign nation would not be entitled to treat them on this account as enemies".[77] However, the simple fact that Kant conceives of the international legal order as imperfect as long as it does not grant individuals certain rights is worth dwelling on. And so does Jürgen Habermas. In his essay on Kant's Towards Perpetual Peace, Habermas argues that Kant's concept of the cosmopolitan right is to be revised and redefined to make it a tool of considerable relevance to the analysis of the current situation in international politics.[78] Having done important contributions to the theory of EU-law's constitutionalisation elsewhere,[79]

[74] J Habermas, 'Kants Idee des ewigen Friedens' cit.
[75] I Kant, *Metaphysics of the Morals* cit. para. 43.
[76] *Ibid*. 62.
[77] *Ibid*. para. 62.
[78] J Habermas, 'Kants Idee des ewigen Friedens' cit. 207.
[79] One for many, J Habermas, *Zur Verfassung Europas* cit.

Habermas concentrates in this context on questions about universal international law and critically reflects the United Nations-framework. However, since he suggests in his conclusion that a reform of the United Nations should take European institutions as a model, his principal and conceptual reflections that precede this conclusion seem to be applicable also to the realm of EU law and the question of its legal qualification.

b) Cosmopolitan right revisited

Similar to Pescatore, who had discussed the question of supranationality under the title of a "refashioning of sovereignty", Habermas starts his reflection on the revision of Kant's cosmopolitan right with the claim, that this conceptual revision concerns state sovereignty in in its two dimensions.[80] Furthermore, the developments of the 20th century regarding the "globalisation of risks" makes it necessary to reconceptualise the notion of peace as well.[81] What follows in Habermas's text then reads as if Habermas claimed to transfer the concept of the autonomous, directly effective and supreme rights that underlies the ECJ's jurisprudence on the European Fundamental Freedoms to the level of universal international law. Habermas shows that Kant's conception is not consistent. If the international federation relies on the respect of state sovereignty, then there is no room for an effective cosmopolitan right for it would be an obligation imposed on what is – in the strict sense of the term – unbound from any obligation.[82]

Contrary to Kant, Habermas claims that the "cosmopolitan right must be institutionalised in a way that binds the individual governments" and an effective mechanism of sanctions must be established. Only then the international state of nature will be overcome.[83] The consequence of such an institutionalisation would be the transformation of the former external relations between sovereign states into internal relations between organisation members that rely on a statute or constitution.[84]

According to Habermas, a nucleus of such a conception is realised in art. 2(4) of the United Nations Charter – the ban on war of aggression – in combination with the competence of the United Nations Security Council to take suitable military measures to react if there is a breach of the international peace according to Chapter VII of the Charter. But at the same time, the Charter prescribes the respect of national sovereignty and stipulates in art. 2(7) that nothing contained in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state". Contrary to this stipulation, Habermas calls for a structure that should explicitly allow to intervene into the domestic affairs by relating directly to the individuals.

[80] J Habermas, 'Kants Idee des ewigen Friedens' cit. 208.

[81] *Ibid*. 208. One could argue that it is exactly this re-conceptualisation of the meaning of peace that we find in the *Schuman declaration*: Peace means to "make war materially impossible".

[82] J Habermas, 'Kants Idee des ewigen Friedens' cit. 208.

[83] *Ibid*. 208.

[84] *Ibid*. 208.

(The model would be the international legislation process of the EU).[85] The cosmopolitan association must be designed not as an association of states only but of cosmopolitan citizens as well.[86] The barrier of national sovereignty ought to be pierced through. Kant's tripartite conception of the public law – state law, international law and cosmopolitan right – only makes sense if "the citizens' autonomy is not mediated by the sovereignty of the states they belong to".[87]

What Habermas formulates here is nothing else than the complete rejection of the two fundamental principles the concept of state sovereignty relies on: the principle of the mediation of the individual on the one hand and the prohibition of intervention (as the complementary concept of the former) on the other: "[t]he punch line of cosmopolitan right [...] consists in relating directly over the head of the collective subjects of international law to the status of the individual legal subjects and founding a non-mediated membership of free and equal world citizens for them".[88]

Habermas suggests therefore a right of international legal origin that breaks through the states' sovereignty, and he addresses this breakthrough as an intervention.[89] Since these interventions are tasked to secure the legal status of individuals, they may be seen as the expression of a *protective interventionism*.

c) The concept of intervention

The interventions already observable in the 20th century show – as conventional interventions under, *e.g.*, the Charter of the United Nations – a peculiar character. When Habermas discusses the example of the military intervention into Iraq in 1991 by Western Allies, he refers to a structure that ought to be considered in more detail. That intervention was justified by Security Council Resolution 688[90] because the situation in Iraq was considered to be a threat for the international security. According to Habermas, from a perspective de jure, the Allies *did not* intervene (because Iraq was party to the Charter and therefore subjected to the sanction mechanism); but from a perspective de facto, they *did*.[91] What is a process that is de jure no intervention but *de facto*? What is something that is – and is not?

Habermas conceives of today's international situation as a situation of transition.[92] This situation can be – regarding the legal quality and functioning of the most important international legal instruments – analysed by mixed treaty concepts that formally respect sovereignty and devalue it materially at the same time. To assess the progressiveness of such mixed concepts, the standard appears to be the degree to which this material

[85] *Ibid*. 219.
[86] *Ibid*. 210.
[87] *Ibid*. 210 my translation.
[88] *Ibid*. 210 my translation.
[89] *Ibid*. 216.
[90] Security Council, Resolution 688 of 5 April 1991, S/RES/688 (1991).
[91] J Habermas, 'Kants Idee des ewigen Friedens' cit. 213.
[92] *Ibid*. 209.

devaluation is achievable, *i.e.*, how far the right to a conventional intervention goes. In the context of his essay, Habermas addresses the topic of intervention not only regarding military interventions (and he does so in accordance with international law – an intervention is *any* dictatorial interference with domestic affairs). In fact, the concept of peace as such is to be changed in the light of the concept of intervention. Peace (Habermas refers to Dieter and Eva Senghaas) is to be considered as "a *process*, that runs in a nonviolent way, that aims not only at the prevention of violence, but also at the fulfilment of the preconditions for an easy cohabitation of groups and peoples".[93] Such policies will take any measure below the threshold of violence "to influence the inner conditions of formally sovereign states, aiming at facilitating a self-sustaining economy and bearable social conditions, democratic participation and cultural tolerance. Such strategies of non-violent intervention in favor of democratization processes factor in that the global interconnection has made meanwhile *all* states dependent on their environment and susceptible to the 'soft' power of indirect influence – up to explicitly imposed economic sanctions".[94]

It is certainly not necessary to wait for the explicit reference to the EU a few pages later to recognise what Habermas thinks to be the model for the concept of "peace as process pushed ahead by strategies of nonviolent intervention". And furthermore, it is obvious that Habermas means a deepening of the interventionist character of international law when he speaks of the "expansion of supranational action capacities".[95] In a footnote to the "strategies of nonviolent intervention", Habermas refers to an article by the German peace researcher Ernst-Otto Czempiel in an affirmative way. In this article it reads as follows: "[i]n the European Community there is a[n incomparable high] degree of intervention, [...] insofar as foreign citizens are authorised to participate to the decisions of a state. In some sections the sovereignty of the Member States has been transferred to the European Community, although the notion of integration is used only seldom. Whatever the term may be – it demonstrates intervention to be the rule".[96]

Czempiel – and so does obviously Habermas – conceives of the European integration project as an interventionist project. The EU Treaties establish a system of conventional intervention. Due to the transformative function of the European legislation, domestic law is changed and due to the doctrine of direct effect certain rights of the EU Treaties refer directly to the citizens of the member states. If a state does not comply with EU-law, the sanction mechanism of the infringement procedure will be applied and, apart from that, the domestic legal rule that contradicts directly applicable EU law is to be disapplied by the

[93] *Ibid*. 216.

[94] *Ibid*. 216 my translation.

[95] *Ibid*. 217.

[96] EO Czempiel, 'Das Phänomen der Intervention aus politikwissenschaftlicher Sicht' in EO Czempiel and W Link (eds), *Interventionsproblematik aus politikwissenschaftlicher, völkerrechtlicher und wirtschaftswissenschaftlicher Sicht* (Engel 1984) 7 my translation.

national public authorities and courts according to the concept of EU law's supremacy.[97] Since national citizens can rely on their European rights vis-à-vis national public authorities, the European legal order shows exactly the structure described by Habermas: Europe is a community that consists not only of states but also of individuals.[98] One may argue in one direction or the other[99] – the functioning of the European legal order shows an interventionist character to a degree that is historically unique.[100]

"Intervention" is a word that always has a kind of negative flavour when used in a political debate. But as a legal concept it is simply the term for a certain process that is not originally bad or good as such. Procedural law knows the concept of the intervenient as well. As a procedural tool, intervention is a means to realise rights. The assessment depends on the perspective. This can be learned from Habermas's approach when he discusses Carl Schmitt's basic insights in and objections against developments in international law in the 20th century, the ban on the war of aggression and the concept of a cosmopolitan polity in particular.[101] Schmitt criticised the paradigm changes in international law and the League of Nations.[102] According to Schmitt, it was to conceive as major error to abolish the classical concept of the restricted and non-discriminating war between states as a legitimate means in international politics which was achieved by the 1928 Briand-Kellogg Pact. The combination of Human Rights, the criminalisation of aggressive war, the personal liability of individuals on the grounds of international criminal law leads – according to Schmitt – to a dangerous remoralisation of international politics and international law.[103] Since the *ius ad bellum* beyond any need for justification is constitutive for modern sovereignty, its abolishment is a serious threat to sovereignty and the world order built upon it as core concept.[104]

Though Schmitt's conclusion and assessment of the new international legal instruments is completely opposed to Habermas's assessment, Habermas interestingly concedes that Schmitt had understood very well the consequences of the imposture of that international legal structure that may be extracted from Kant's ideas, *i.e.*, that any individual shows in a certain sense a double status being at the same time cosmopolitan and national citizen.[105] In the next Section, I will show that Schmitt's observations concern also changes in the concept of international treaty that entail the establishment of a similar double status structure. The main question will be whether these observations

[97] See case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66 para. 594.

[98] J Habermas, *Zur Verfassung Europas* cit. 62.

[99] EO Czempiel, 'Das Phänomen der Intervention' cit. 7 my translation.

[100] *Ibid*. 7.

[101] J Habermas, 'Kants Idee des ewigen Friedens' cit. 211 my translation.

[102] C Schmitt, 'Die Wendung zum diskriminierenden Kriegsbegriff' in C Schmitt, *Frieden oder Pazifismus. Arbeiten zum Völkerrecht und zur internationalen Politik 1924–1978* (Duncker & Humblot 2005) 518.

[103] J Habermas, 'Kants Idee des ewigen Friedens' cit. 232.

[104] *Ibid*. 227.

[105] See *ibid*. 211.

may be applicable to the EU Treaties as well. Similar to Habermas, I will try to show that, first, Schmitt's analysis gives certain insights in changes of the concept of international treaty and second that Schmitt is due to his ideological fanatism unwilling to recognize their suitability to progressive transformations if applied in a particular way.

III. The law of intervention

III.1. Two faces

As elaborated above, Habermas conceives of the international situation as a state of transition in which everything shows a double face. States are formally sovereign, but materially their sovereignty is devaluated. Individuals are national and (at least in the most progressive frameworks) international citizens at the same time. And so are the EU Member States, their territories, their citizens and their governments. The states are at the same time sovereign nation states and Member States that have given up parts of their sovereignty. Their territories are on the one hand still national territories but on the other they form together the territory of the Common Market. The citizens of the Member States are national citizens and EU citizens at once. And finally – the Members of the national governments are at the same time members of the Council of the EU and therefore part of the European legislative.[106] This is what was meant by Pescatore when he spoke about the "special relationship between states".

Regarding the transitional state, the notion of "constitutionalisation" is not completely wrong. What we can observe are indeed steps of a process that is routed in the hope to lead out of the international state of nature and to the state of the rule of law. We are in the midst of the "*exire e statu naturali*" in international law. In a state of transition, the interventions that happen are de jure no interventions but de facto. This is the paradox character of the legal situation of our time. Formally the *summa divisio* is intact, materially it is already overcome. The question then is how the concept of international treaty is affected by these developments and how its role is to be conceptualised. This question has been left open by Habermas and by Pescatore (the latter has even simply denied the international legal character of the EU Treaties). Is there a kind of international treaty that may be suitable to explain the paradox of the *de jure* and *de facto* intervention? Is there a treaty model for the conventional intervention? Are there "intervention treaties"?

[106] On the relation between EU law and domestic law see also P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' (2023) European Papers www.europeanpapers.eu 1255. See further J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328.

III.2. The concept of intervention treaty

The open question may be answered by analysing more of Schmitt's critical account of international law in the 20th century. As he pointed out, the new paradigm of imperialism and colonialism in the American era of international law in the 20th century is expressed in a new kind of treaty: the intervention treaty.[107] Schmitt shows further that the organisation of the United States colonial system is in important respects different from the European colonial system. The latter was built upon the distinction between the European territory (that was divided between sovereign states) on the one hand the non-European territory on the other. The non-European, colonised parts of the world were neither organised as (however dependent) states nor were they fully incorporated into the territory of the respective European colonial power. The conception of sovereignty was reserved for Europe alone.[108] Non-European territories have been often controlled by entities that were not a state but that were tasked with public authority (and sometimes even the right to declare war), the so-called chartered companies. Contrary to that, the United States did not intend to touch the sovereignty of the subjected countries. They rather used the concept of international treaty to establish and maintain a form of dependence that formally respected the subjected state's sovereignty. To achieve this was the task of the intervention treaty. The intervention treaty is a treaty that allows a state to intervene in the domestic affairs of another state subject to certain conditions.[109] Thereby a "special connection"[110] between the international and the domestic sphere was established,[111] for those treaties were not only treaties of international law but were also incorporated into the domestic legal orders of the participating national constitutional systems.[112] The intervention treaties left national sovereignty formally intact but suspended it as far as this was necessary to achieve the – primarily economic – goals of the United States' imperialism.[113] The subjected states had a government, international representation etc. but were subject to the effective control of the United States.[114] This control and domination "were based on interventions".[115] The classical principle of international law, the principle of non-intervention, became thus materially suspended. However, "[t]he controlling state's right of intervention was

[107] C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' in C Schmitt, *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik. 1924–1978* (Duncker & Humblot 2005); C Schmitt, *The Nomos of the Earth* (Telos Tress 2006) 140.

[108] *Ibid.* See also S Larsen, 'European Public Law after Empires' (2022) European Law Open 6.

[109] See C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' cit. 356.

[110] C Dupuis, *Le droit des gens et les rapports des grandes puissances avec les autres états avant le pacte de la Société des Nations* (Paris 1921).

[111] C Schmitt, 'Die Kernfrage des Völkerbundes' cit. 122.

[112] See C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' cit. 356.

[113] See *ibid*. 359 and C Schmitt, *The Nomos of the Earth* cit. 252.

[114] C Schmitt, 'Die USA und die völkerrechtlichen Formen des modernen Imperialismus' cit. 356.

[115] C Schmitt, *The Nomos of the Earth* cit. 252.

recognised in treaties and agreements, so that, in a strictly legal sense, it was possible to claim that this was no longer intervention".[116] Therefore: what was *de jure* no intervention was an intervention *de facto* – a structure that meets precisely with that identified by Habermas. The concept of conventional intervention through these treaties led to a situation in which "territorial sovereignty was transformed into an empty space for socio-economic processes. The external territorial form with its linear boundaries was guaranteed, but not its substance, i.e., not the social and economic content of territorial integrity. The space of economic power determined the sphere of international law".[117]

Schmitt points out that the sovereignty is rendered void and meaningless in such a situation. Its internal dimension, its autonomy, is restricted by the interventions of the international "partner" that interferes directly with the internal sphere. It is therefore important to see that the aim of an intervention treaty is to break through the classical *domaine reservé* and to establish a special connection between the national and the international sphere – to establish a "special type of relationship between states" (to put it in the words of Pescatore). As a consequence, the situation shows legally a double face, for the subjected states are from the perspective of constitutional law foreign countries, but from the perspective of international law rather an interior part.[118] The relations between the states are therefore neither purely internal nor purely external.

III.3. Post-war Europe

Was the practice of such treaties first restricted to the Western Hemisphere, after the end of World War Two the United States have used their hegemonial position to establish a system of international treaties with European states that show striking similarities to the intervention treaties. As Mike Wilkinson has analysed in detail,[119] the United States secured their economic and geopolitical interests by the establishment of international organisations like the North Atlantic Treaty Organisation or legal orders of a structure similar to that of international organisations, like the General Agreement on Tariffs and Trade or the European Recovery Program ("Marshall Plan"), implementing far-reaching means to control the European states. Under the legal regime of the Marshall Plan, as Karl Loewenstein put it, "the United States reserved for itself – and persistently exercised – the right to supervise, control, and veto the recipients state's use of the economic assistance. […] Economic co-operation thus led to the right and the power of the United States to exercise far-reaching controls over the domestic economies, without, however, granting them any reciprocal rights".[120]

[116] *Ibid*. 252.

[117] *Ibid*. 252.

[118] C Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Duncker & Humblot 2017) 15.

[119] MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 81.

[120] K Loewenstein, 'Sovereignty and International Co-operation' (1954) AJIL 222, 230.

Without doubt, the model of this new international legal framework were the intervention treaties. Similar to the case of the states of the Western Hemisphere, national sovereignty of the European states was to be limited to the extent necessary to secure the goals of capitalism and "[i]n fact, in many instances the abdication of internal or external autonomy necessitated by the intensity of the co-operative conduct pattern would have been characterised, by the previous standards of unabridged sovereignty, as intervention which no self-respecting sovereign state normally would have accepted".[121]

Obviously, after the end of World War Two intervention was the rule. It is this atmosphere in international law in which the first serious attempts to get the process of European integration started have been made.[122] It can hardly be a contingent coincidence that exactly at this time the old idea of European unification got realised in a way that leads to the same double face structure as the intervention treaties establish. The "sphere of the Community's intervention" (as Pescatore put it) is neither an internal nor an external relation between the Member States, it is a sphere of a special connection that emerges out of the suspension of national sovereignty and the opening of the *domaine reservé*. National sovereignty is suspended to the extent necessary to make transnational economic transactions in the guise of the Fundamental Freedoms possible. The sphere that emerges out of the suspension is the Common Market of the Member States.

The legal framework for the reconstruction of Europe under the aegis of the United States was the model of the intervention treaty, an instrument of colonial ruling.[123] Against the background of the interventionist character of the EU Treaties it may be possible to understand the legal framework of the EU as continuation of this new paradigm in international law. Whereas the Treaties themselves had left the question about the supremacy (*i.e.*, the question of hegemony between the European and the national level) open, it was the ECJ that solved this question through the establishment of the supranational principles of EU law. Therefore, within the framework of the EU Treaties, the sphere which was formerly protected by the principle of non-intervention has been henceforth subject to a deep going transformation and national sovereignty has been rendered materially void.

This analysis may be disturbing. However, where is indeed the difference between what Habermas has called "executive federalism",[124] the unrestricted power to rule without involvement of Member States Parliaments at a time when the European

[121] *Ibid*. 226. As Loewenstein points out, similar developments can be recognised within the group of the Warsaw Pact.

[122] For an analysis of the integration process in this context see MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* cit.

[123] On the similarity between colonial governance and international organisations see J Klabbers, 'Theorizing International Organizations' in A Orford and F Hoffmann and M Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2021) 625.

[124] J Habermas, *Zur Verfassung Europas* cit. 48.

Parliament was not part of the legislative procedure, on the one hand and the effective control in the United States colonial system on the other? Where is the difference between the latter and the activities of the Troika in Greece during the Euro-crisis? One may be convinced of the historical goodness and necessity of the project of European integration, but that there is also a darker side in the design of the EU cannot be neglected justifiably.[125] A democracy deficit is not mere cosmetic problem. Where democracy is missing, authoritarian structures fill the gap. The question therefore is how to democratise the system that was established by the Treaty of Rome. For there is still one important aspect about the EU Treaties, regarded as intervention treaties, to mention that should not be forgotten – an aspect that does not lead to their critical rejection (like Schmitt would have done presumably) but rather to awe and deep admiration. Outlining this aspect is now the task of the conclusive third and last part of this *Article*.

IV. Joseph Weiler and the political messianism in EU law

At first glance it may appear disturbing to compare the Treaty of Rome to the concept of the intervention treaty. It may be even more disturbing consulting the most problematic legal thinker of the 20th century. However, there is also a last important difference between the EU Treaties and the classical intervention treaties. Within the framework of the EU Treaties there is – at least regarding their basic concept – no hegemon like in the treaties controlled by the United States. Furthermore, intervening and intervened states are identical. Any state that is intervened is also intervenient – and the interventions are not led by a particular sovereign entity or state but by the community *on the consent of the Member States*. The EU Treaties may be understood as a progressive transformation of that concept, for they establish a system of mutual self-intervention under the rule of law with the goal of the transformation of Member State law in the light of the idea of anti-discrimination. Through this, the Treaties serve the historical goal of overcoming the aporias of the old international law (built upon the principle of non-intervention) and work for the promise of a different future. As Wolfgang Friedmann wrote in *The Changing Law of Nations*: "[T]he European Community movement is a possible precursor of a future universal integration of mankind".[126] The system of EU-law took over a concept of colonial suppression and turned it into a means of self-liberation also against Europe's dark past. They comprise the promise for a better future – they show, as Joseph Weiler put it, a messianic impact. [127]

[125] For recent accounts see M Wilkinson, *Authoritarian Liberalism* cit.; C Joerges and N-S Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing 2003).

[126] W Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) 19.

[127] JHH Weiler, 'In the Face of Crisis' cit. 825.

According to Weiler, this impact is only little explored, but nevertheless, "[political messianism is the] central legitimating feature of Europe".[128] This new legitimating feature is explained by Weiler in distinction to input and output legitimacy as a "Telos Legitimacy [...] whereby legitimacy is gained neither by process nor output but by promise, the promise of an attractive promised Land".[129] In order to explore the messianic substance of Europe's founding documents, Weiler focuses on the *Schuman Declaration* of 1950, in which he claims to have found the "messianic substance" of the European integration: "the substance itself is messianic: a compelling vision which has animated now at least three generations of European idealists where the 'ever closer union among the people of Europe', with peace and prosperity an icing on the cake, constitutes the beckoning promised land".[130]

The vision drawn by the *Schuman Declaration* as answer to World War Two was without doubt fundamentally different from the measures the Allied Powers had taken after the end of World War One. Instead of the "post-WWI Versailles version of peace [...] tak[ing] yesterday's enemy, diminish[ing] him and keep[ing] his neck under one's heels", Germany after World War Two was regarded 'as an equal'.[131] Governed by the idea of equality and a call for forgiveness, the *Schuman Declaration* evokes according to Weiler the "two most potent visions of the idyllic 'Kingdom' – the humanist and religious combined in one project".[132]

It cannot be doubted that an analysis of European integration must take into account the promise that was and still is connected to the idea of European unification. The EU was never a simple international organisation established to merely enhance international cooperation. The foundation of the EU shows a historical scope, marking a turning point in European history: it should (again according to the *Schuman Declaration*) make war in Europe materially impossible. It should not end this or that war but – in Kantian terms – war as such.[133] Therefore the *Schuman Declaration* is also the declaration of independence from the past – the declaration of the "Never again".

For sure, one should be careful when applying concepts like that of political messianism. As Weiler himself points out, the 20th century has seen many ideologies operating with a narrative of promises and telos legitimacy.[134] However, concerning the process of European integration, political messianism seems to be the "feature which explains not only the persistent mobilising force (especially among elites and youth), but also key structural and institutional choices made".[135] Considering this messianic element the question arises how

[128] *Ibid*. 826.
[129] *Ibid*. 828.
[130] *Ibid*. 834.
[131] *Ibid*. 834.
[132] *Ibid*. 835.
[133] See I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Suhrkamp 2011) 27.
[134] See JHH Weiler, 'In the Face of the Crisis' cit. 842.
[135] *Ibid*. 833.

to conceive of it in the context of European integration properly. What may be such a key structural choice? My suggestion would be that the most important structural choice, *i.e.*, the way in which the EU Treaties are structured, may be the best example.

The situation in Europe in the 20th century is (with regard to the concept of international treaty) not without precedent. History has seen once before the progressive transformation of an international legal means of suppression into a means of self-liberation. At the time when the Jewish Bible has been written in the first millennium BCE, the New-Assyrian Empire had established its sphere of influence (comparable to the United States and the Union of the Socialist Soviet Republics in the 20th century).[136] The Assyrian Empire was the hegemon of the ancient Near East and had subjected the whole Levantine. The conquest of the Levantine was also used for the spreading of the Assyrian religion, a form of polytheism with Assur as the god of king and empire at its centre. "[A]ll subjected people were required to recognise his predominance".[137] The subjected states and peoples were linked to the Assyrian empire by means of vassal treaties.[138] By these treaties they were obliged to accept the Assyrian king as a ruler and the primacy of the high god Assur.[139] The states of Israel and Judah were subjected in the 8th century BCE.

As scholars like Eckart Otto,[140] Moshe Weinfeld,[141] Robert Bellah[142] and Peter Zeillinger[143] have pointed out, the conception of Biblical texts in that time was influenced by the ancient Near Eastern ideologies of the first millennium BCE. Above all it has been suggested that "it was the Assyrian treaty model that had the decisive influence on Deuteronomy".[144] The writers took over the form of the New-Assyrian vassal treaties. However, it was an assumption that consisted of a critical transformation. As Robert Bellah pointed out, the "enormous creativity of Israelite religion [...] must be seen [...] as in part responses to the Assyrian challenge".[145] The Deuteronomists attempted to overcome the Assyrian power, its colonial subjection and religious suppression. The Jewish Bible is a document of political and intellectual resistance against heteronomous suppression. Furthermore, it should not be forgotten that the emergence of Jewish monotheism is one of the historical breakthroughs of rationality.[146] The Deuteronomists' strategy was to take

[136] R Bellah, *Religion in Human Evolution* (Harvard University Press 2001) 283.

[137] *Ibid*. 307.

[138] *Ibid*.

[139] *Ibid*.

[140] E Otto, *Das Deuteronomium: politische Theologie und Rechtsreform in Juda und Assysrien* (De Gruyter 1999).

[141] M Weinfeld, *Deuteronomy and the Deuteronomic School* (Oxford University Press 1972).

[142] R Bellah, *Religion in Human Evolution* cit.

[143] P Zeillinger, 'Repräsentation einer Leerstelle, oder: Auszug ins Reale. Zur politischen Bedeutung des biblischen Exodus, der historisch nicht stattgefunden hat' (2019) Interdisciplinary Journal for Religion and Transformation in Contemporary Society 212.

[144] R Bellah, *Religion in Human Evolution* cit. 306.

[145] *Ibid*. 307.

[146] K Jaspers, *Vom Ursprung und Ziel der Geschichte* (Muttenz/Basel 2017).

over and transform subversively the structure of these vassal treaties.[147] It were therefore "the vassal covenants that provided the basic structure of Deuteronomy and its central formulation of Israelite religion".[148] However, whereas the Assyrian covenants were between ruler and subject, "the Israelite covenants were between God and human beings".[149] The framework of the Israelite religion emerged out of the resistance against the colonial system of an international aggressor. And in its centre there was JHWH – the name for the promise of the covenant, the union with the Israeli people.

An instrument of colonial suppression was therefore subverted and used for self-liberation. Such vassal treaties defer in nothing essential from the modern intervention treaties and the gesture underlying the EU Treaties seems to operate in a similar way as the Deuteronomy has transformed the Assyrian vassal treaties. On top is not this or that national sovereign entity, but the idea of the "ever closer union". The *raison d'être* of the EU is, as the ECJ put it,[150] the integration in itself – the promise of the covenant, expressed in the directly applicable rights of European legal origin.[151] And exactly this, the formulation of *European* rights is the central feature of progress compared to the old international law. It is something different whether a right is a domestic right or a right grounded in the international agreement to cooperate for a common good. This is the reason why – to put in the words of Alon Harel – European law "matters".[152] The question by which institution a legal rule is pronounced is not negligible.[153] Being part of the European legal order means being part of the joint answer to the crimes of fascism in the first half of the 20th century. It means to be part of a legal framework that is structured by the progressive subversion of an international legal instrument, eliminating the concept of a fixed national identity on which sovereignty was built upon and to put the idea of the union in that position that decided formerly on the question between friend and enemy. The position of sovereignty is left open[154] and therefore the EU Treaties may show what Peter Zeillinger has described as a monotheistic structure in his account of the biblical Exodus-narrative: "the absence of an identifiable, sovereign instance of last resort [*Letztinstanz*]".[155] This monotheistic structure is manifest in an "intervention into the established order".[156]

[147] R Bellah, *Religion in Human Evolution* cit. 307.

[148] *Ibid*. 308.

[149] *Ibid*.

[150] Case C-294/83 *Parti ecologiste 'Les Verts' v European Parliament* ECLIEU:C:1986:166.

[151] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 172.

[152] A Harel, *Why Law Matters* (Oxford University Press 2014).

[153] *Ibid*. 148.

[154] That the question of sovereignty is left open in the European integration process is also the starting point of S Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2020), however, with a different outcome.

[155] P Zeillinger, 'Repräsentation einer Leerstelle' cit. 238 fn 64.

[156] *Ibid*. 220 fn 13.

Therefore, it may be possible to say, that unwittingly the European reply to the Nazi regime was to align itself with the legal structure of Judaism in order to lay the foundation of another Europe. If this is the case, this account meets with Pescatore's concept of the law of integration. As Julio Baquero Cruz set out: "the experience of war and barbarism at the heart of Europe was the fundamental explanation for the existence of the law of integration. Without it, integration and its law could never have come into existence and would not exist today. The Treaties should thus be seen not only as documents of civilisation, but also as documents of the barbarism which made them possible".[157]

V. Conclusion

The purpose of this *Article* was to contribute to the debate on the legal nature of the EU Treaties. These Treaties show a paradoxical structure. On the one hand, they are international treaties regarding their genesis; on the other, they far transcend international law regarding their content and suspend traditional international legal principles concerned with the protection of sovereignty because of their interventionist character. This interventionist character has been deepened through the jurisprudence of the ECJ. Whereas the so-called theory of constitutionalisation identifies the transformation of the Treaties through this jurisprudence as resulting in a constitution, I argued to take into account that the Treaties are a figure of transition. Their task is to lead out of the post-war situation in Europe and pave the way for the establishment of a European federation as it has been projected in the *Schuman Declaration*. However, while concerned with the precondition of a constitutional framework for Europe, the Treaties should not be considered as a constitution themselves. The first part of the paper brought to mind that the Treaties do not go as far as historical international treaties that indeed have established a new state and a new constitution. It seems that the function of the Treaties consists rather of the dismantling of the barriers erected by national sovereignty than constituting a new European identity. The Common Market is realised to the degree to which national sovereignty is dismantled by the Community's interventions. Against the background of Jürgen Habermas's account of Kant's cosmopolitan right, my aim was to show that the sphere of the Community's intervention may be the nucleus for a new, cosmopolitan order for Europe.

Since the Treaties are neither a constitution *stricto sensu* nor explainable through the canonical models of international treaty (above all the law-making treaty), the second part of the *Article* aimed to identify a model of international treaty suitable for the categorisation of the function of the Treaties. Taking the interventionist character of the Treaties as a starting point, the concept of the intervention treaty has been presented as such a model. Intervention treaties have been used as an instrument to stabilize the

[157] J Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018) 22.

hegemonial position of the United States in the first half of the 20th century in the Western Hemisphere and after World War II in Europe. The right to intervene has been shaped as a unilateral right. On the one hand, the EU Treaties seem to be understandable against the background of the concept of the intervention treaty, for the former establish a sphere of intervention, a special connection between states. On the other hand, the right to intervene that the treaties establish is not the unilateral right of a hegemon. European states grant each other a reciprocal right to intervene and task a joint organisation with its exertion. The result is a structure of self-intervention for the sake of the ever closer union. The intervention is therefore exercised for the realisation of the promise of a deeper covenant between the European states in order to overcome the aporias of classical international law. Joseph Weiler identified this promise structure as messianic. In the third and last part of the *Article*, I make a suggestion how this messianic feature may be understood. For this purpose, I have reconstructed the progressive transformation of the Assyrian vassal treaties by the authors of the Jewish Bible. In both the Jewish texts and in the Treaties of the EU we may observe the transformation of a hegemonial and unilateral power structure into a relation of reciprocity and trust. The position of the sovereign is replaced by the idea of the covenant respectively the idea of the ever-closer Union. Messianism as presented here is not to be confused with an irrational and undetermined desire for a better future. Messianism has been presented as a concept of a precise meaning and function: leading out of a unilateral relation of suppression into a condition of reciprocity and non-discrimination.