20. The EU’s relationship to international law: lessons from Brexit

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I. INTRODUCTION

In this chapter I outline some general thoughts on the relations between EU law, international law and domestic law. I have elsewhere defended the view that the EU is an international legal order whose position in a domestic jurisdiction is best described through dualism.¹ I have contrasted this ‘internationalist’ approach both to monism and to pluralism. Monism is the official theory of EU law as a sui generis legal system, as expressed for example by the Court of Justice. The Court has said that EU law enjoys ‘autonomy’ from international and domestic law, most recently in Opinion 2/13 on the ECHR.² Pluralism, on the other hand, is the directly opposite view, namely the view that EU law is sui generis in another sense, by not requiring any constitutional theory at all of its relations to domestic jurisdictions. What Neil MacCormick called ‘radical’ pluralism is the theory that there is no need for a general theory, since these relations are only a matter of political power.³ I have criticised monism and radical pluralism on the basis of constitutional principle.⁴ I have defended ‘dualism’, which is just another name for what MacCormick had called ‘pluralism’ under international law and which, for reasons of clarity, I will continue calling by its traditional name.

My argument in this chapter is somewhat different. It is descriptive rather than analytical. Here I discuss the practice of European Union law in one high-profile and politically sensitive area. I believe that the process of the United Kingdom’s withdrawal from the EU has highlighted important truths about the continuing dependence of EU law on international law. I believe that the process of Brexit shows the permanent international dimensions of EU law. I will discuss the Brexit arrangements as the most important recent illustration of this reality.

I will also look at the original deal agreed by the UK and the EU in February 2016 as part of David Cameron’s attempt to ‘reform’ the relationship between the UK and

² Opinion 2/13, On Accession to the ECHR, Court of Justice of the European Union (Grand Chamber) ECLI:EU:C:2014:2454.
the EU. It is not well understood that this agreement too was an international agreement under the Vienna Convention of the Law of Treaties. The referendum result has made the status of that agreement academic, but the whole episode shows that when the EU requires flexibility in order to accommodate its member states, it relies on public international law to achieve it. These episodes show that international law is, ultimately, the foundation of the EU Treaties. Of course, EU law is also dependent on domestic law and processes, as is also evident in the Brexit decision and negotiations. So the practical reality of EU law is far more complex than either monism or pluralism would have us believe. In the next two sections I discuss the two examples. In a concluding section I draw some theoretical conclusions about pluralism and the nature of EU law.

II. THE ILL-FATED NEGOTATION

On the way to holding a referendum on the European Union, the then British Prime Minister David Cameron proceeded to negotiate a new relationship between Britain and the EU. The other members made it clear to him that they were not willing to amend the EU Treaties in order to accommodate Britain’s aims. They were, however, willing to conclude a parallel agreement alongside the Treaties. Donald Tusk, the president of the European Council, prepared a set of proposals for the settlement between the EU and the United Kingdom in February 2016. These proposals were discussed and agreed at a meeting of the European Council on 18 and 19 February 2016.\footnote{European Council Meeting: Conclusions, 19 February 2016, EUCO 1/16, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/ .} As will become evident, this agreement is impossible to understand outside a framework of public international law.

It is important to understand the context. These negotiations were key in the United Kingdom’s internal process of settling its relationship with the EU. David Cameron’s first government had embarked on a ‘review of competences’ of the EU, which produced very valuable reports on the place of EU law in the UK.\footnote{For the overall Review of the Balance of Competences project see https://www.gov.uk/guidance/review-of-the-balance-of-competences.} It then announced an EU referendum and organised it on the basis of the European Union Referendum Act 2015, which received royal assent on 17 December 2015. The referendum was in principle advisory and was a departure from the preexisting European Union Act 2011, which required a referendum if a new EU Treaty was to be agreed. The 2015 Act introduced also detailed financial and campaigning restrictions, supplementing those of the Political Parties, Elections and Referendums Act 2000.

Following a recommendation of the Electoral Commission, the question of the referendum according to s. 1(4) was: ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’ The two alternative answers that appeared on the ballot papers were: ‘Remain a member of the European Union’ and ‘Leave the European Union’. The Electoral Commission put in place very strict rules on campaign finance and campaigning in general. There was to be a ten-week period of...
campaigning. If the vote was for ‘Remain’, the new settlement was to take effect between the UK and the EU immediately. If the vote was for ‘Leave’, the new settlement would lapse. It would not be on the cards again if the UK changed its mind.

The new settlement negotiated by David Cameron was presented as the reason why he was now campaigning for the UK to remain. In the past he had been very hostile to the European Union.\(^7\) As is well known, ‘Leave’ won by a small margin. David Cameron resigned and was replaced as Prime Minister by Theresa May, who embraced Brexit with aplomb, even though she had campaigned for ‘Remain’. After losing a judicial challenge to her power to handle the process of withdrawal without parliamentary control,\(^8\) the UK government passed the relevant legislation and finally triggered the Article 50 process on 29 March 2017.\(^9\)

### A. The Legal Nature of the Settlement

What exactly was negotiated by David Cameron? Given that the EU was not willing to amend the EU Treaties, it was at first unclear what kind of agreement the UK could have secured. The settlement was not an EU Treaty in the usual sense so it could not amend existing obligations. Or could it?

Under EU law the EU Treaties are constituent instruments of an international organisation, the European Union (which succeeded the European Communities). A feature of EU law is that its Treaties can only be changed according to Article 48 TEU. The Court has explicitly said that this is an exclusive procedure in Defrenne, where the Court said that ‘the Resolution of the Member States of 30 December 1961 was ineffective to make any valid modification of the time-limit fixed by the Treaty. In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236’.\(^10\) So when other Member States refused to amend the treaties under the procedures of Treaty amendment envisaged by Article 48 TEU in response to Mr Cameron’s demands, they effectively ended the prospect of a serious change in the UK’s position.

Nevertheless, the Treaties are subject to the general rules of international law.\(^11\) This is accepted not only by academic lawyers but also by the Court of Justice of the EU. A study by Pieter Jan Kuijper has calculated that between 1998 and 2010 there were about 40 cases in which the Court of Justice deployed public international law.\(^12\) It is

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\(^7\) One of the first decisions David Cameron took as leader was to remove the Conservative Party from the European People’s Party and to align it with the Eurosceptic European Conservatives and Reformists political grouping.

\(^8\) See \(R\) (on the application of Gina Miller & others) \(v\) Secretary of State for Exiting the European Union \([2017]\) UKSC, \([2017]\) WLR (D) 53.

\(^9\) The relevant law is the European Union (Notification of Withdrawal) Act 2017.

\(^10\) Case 43/75 Defrenne v SABENA (II) \([1976]\) ECR 456, at paras 57–8.


theoretically possible that an international agreement among the members of the EU (although not the EU itself) could be in some ways binding on all of them. This is what we need to examine with reference to the agreement struck on February 2016.

The ‘Agreement’ was termed a ‘Decision’ reached within the European Council. It was not, however, a decision of the European Council. If it were a decision of the European Council it would not have any legal effect whatsoever, because under the EU Treaties the European Council does not have ‘law-making powers’. Mr Tusk proposed, therefore, a very subtle international arrangement of the member states, essentially outside EU law, which aimed to satisfy both the UK government and the EU. His plan was for the member states to reach an agreement in their capacity as representatives of states and governments in international law, not in their collective identity as the European Council.

There is some precedent for this arrangement. It is similar to what happened with Denmark in 1992 and Ireland in 2009, when both countries held referendums that rejected the Maastricht and Lisbon Treaties respectively. Denmark and Ireland then proceeded to strike separate agreements allowing for some special arrangements in the process of ratification of the relevant treaties. The Danish arrangement was part of the process of ratification of the Maastricht Treaty by Denmark; similarly, the 2009 Decision on ‘the Concerns of the Irish People on the Treaty of Lisbon’ was related to the ratification of that Treaty by Ireland. Ireland’s concerns became part of the Treaties by way of a formal amendment at the same time as Croatia joined. Nevertheless, the Court of Justice has not recognised these Decisions as part of the EU Treaties. This is clearly correct, because they are not agreed and ratified in the standard way. The Court referred to the Denmark Decision in the Rottman case, where it said

13 In Case C-308/06 Intertanko [2009] ECR I-405, ECLI:EU:C:2008:312, which was about the enforceability of two agreements of the law of the sea, namely UNCLOS and Marpol 73/78, the Court of Justice ruled that an international agreement to which all the member states were parties but the EU was not was still something that the court would ‘take account’ of. At para 52 the court concluded: ‘In those circumstances, it is clear that the validity of Directive 2005/35 cannot be assessed in the light of Marpol 73/78, even though it binds the Member States. The latter fact is, however, liable to have consequences for the interpretation of, first, UNCLOS and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78.’
14 See Article 15(1) TEU.
16 European Council Conclusions, 10 July 2009, 11225/2/09.
that it ‘had to be taken into consideration’ as an instrument for the interpretation of the Treaty, but nothing more than that.\textsuperscript{18}

Reflecting this reality, the member states’ Decision of February 2016 stated that it was merely a ‘clarification’ which ‘will have to be taken into consideration as being an instrument for the interpretation of the Treaties’. It also noted that a future treaty amendment would incorporate the ‘substance’ of the section on economic governance, presumably following further intergovernmental negotiation. So it was always clear that this was not a formal amendment of the EU Treaties under the EU’s own legal order.

\textbf{B. The European Council’s Legal Opinion}

Is an agreement of this kind binding, and, if so, in what way? That it was so binding was the view taken by the Legal Counsel of the European Council, whose Opinion dated 8 February was released to the public domain by the House of Commons European Scrutiny Committee.\textsuperscript{19} The Opinion was a relatively short document without much detail, but it made clear the thinking behind Mr Tusk’s proposals.

The Legal Counsel’s Opinion concluded that the decision was ‘an instrument of international law by which the 28 Member States agreed on a joint interpretation of certain provisions of the EU Treaties and on principles and arrangements for action in related circumstances’ (para 4). It then stated that this was an agreement according to Article 31 of the Vienna Convention on the Law of Treaties (‘VCLT’), which provides certain principles of interpretation for treaties, namely that they are to be interpreted ‘in good faith, in accordance with the ordinary meaning to be given to the terms in their content and in the light of its object and purpose’.\textsuperscript{20}

The Opinion then referred to Article 11 VCLT, which determines that there is no particular form for creating binding treaties. The Opinion noted that the UK Decision requires no formality and that member states will be bound merely by their ‘common accord’. The Decision was thus taken to be ‘legally binding in international law for the Member States’. The Opinion then added that this legally binding agreement ‘does not amend the EU Treaties, which can be achieved only following the specific procedures provided for this purpose by the Treaties themselves’ (para 13). So for the Opinion the Decision was a treaty in international law, but one which did not amend the EU Treaties. This was not because of its contents but because of its method of coming into being.

The Opinion was unclear on two important points. The first was the distinction between two different senses of ‘agreement’ set out by the Vienna Convention, which the Opinion notes but does not use. The first and obvious sense of ‘agreement’ is that of a treaty, which is what Article 11 of the Vienna Convention addresses. A second

\textsuperscript{19} A copy of the opinion is available on the House of Commons European Scrutiny Committee website: http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-20151/news-story---tusk-proposal/.
\textsuperscript{20} Article 31 VCLT also provides that agreements at the time of a treaty’s conclusion regarding its interpretation are part of the relevant ‘context’ (para 2), and (in para 3) that subsequent agreements regarding interpretation are to be ‘taken into account’.

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sense, however, is of what we could call an interpretive agreement, which need not be a treaty in the strict sense. Declarations or conclusions reached in the context of various diplomatic conferences or meetings could well be such interpretive agreements. In that sense they are legally relevant, or even binding, in that they will assist in the interpretation of an existing treaty between the same parties. Article 31(3) VCLT makes that clear when it says that ‘(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ shall be taken into account alongside other matters and the relevant context’. By definition, such an interpretive agreement is not a new treaty between the parties on the same subject matter, because if it were, it would be amending the earlier treaty. So it is possible that an interpretive agreement may either be a treaty about a different subject matter that touches on the earlier treaty, or simply a new and informal agreement of the parties over some ambiguous issue of interpretation of the existing treaty, exhibiting no intention by those parties to be formally bound by it.

Why does this matter? Because it allows for a sense of ‘legally binding’ which falls short of being a treaty. This is the sense suggested, for example, by the Court of Justice when it mentioned the Denmark agreement in Rottman. The Legal Counsel’s Opinion gives the impression that there are only two possibilities: either that the agreement is a treaty and is legally binding, or that it is not a treaty and is not legally binding. It suggests that for it to be legally binding the draft Decision should be either an EU Treaty under Article 48 TEU or a public international law treaty under Article 11 VCLT. Under the Vienna Convention, however, there is a third possibility. The Decision may be an agreement which is not a treaty, but is legally binding in the sense of being relevant to the interpretation of a treaty under Article 31(3) as a subsequent agreement between the parties regarding interpretation (and obviously not under Article 31(2) in the ‘context’ of the conclusion of a treaty, for there is none here). Such agreements are admittedly rare events but are clearly possible. It is in this spirit, I think, that the Court of Justice considered the Denmark agreement in Rottman as merely relevant to interpretation, but not part of the treaties. Such an interpretive agreement does not amend, by definition, the rules it is aimed at interpreting.

The reason why this is so important has to do with the second obscure point in the Opinion. The Legal Counsel’s Opinion takes the view that a public international law treaty between the same parties over the same subject matter (for example, economic governance, sovereignty and free movement of workers) cannot change EU law, because EU law provides for a definitive process for its amendment (in Article 48 TEU). Yet again, the Vienna Convention gives a different answer. The process does not matter. Under Article 30(3) a new treaty amends an earlier one between the same parties over the same subject matter. It says: ‘When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty’. So, just like equal Acts of Parliament, the later one impliedly repeals the earlier one. It is a matter of the Vienna Convention, but also a matter of simple logic.

The Legal Counsel’s Opinion does not address this point. But if the Opinion is wrong about this, then whether the new agreement (the Decision) has amended the EU Treaties or not will be a matter of what it says. Everything will turn on whether what
it says is actually compatible with the EU Treaties. This opens the possibility that the EU Treaties will – under international law – be amended by the UK–EU agreement almost by accident, even if this was not what the parties intended. The only safeguard they seem to have put in place is a declaration to the effect that ‘the content of the Decision is fully compatible with the Treaties’. But this declaration is not in the text of the Decision, only in its interpretive ‘context’.

C. How Binding?

The possibilities for a ‘legally binding’ instrument regarding the UK settlement were not two, but four:

(i) EU Treaty;
(ii) Public International Law Treaty;
(iii) ‘Context’ Agreement under 31(2)(b) VCLT, which was made between all the parties ‘in connexion with the conclusion of a treaty’;
(iv) Subsequent Agreement under 31(3)(a) VCLT, which was made subsequently between the parties regarding the interpretation of the treaty.

The Ireland and Denmark precedents fell under (iii). They were ‘context’ agreements, because they were created at the time that an EU Treaty was being ratified. The UK agreement falls under (iv) as a ‘subsequent’ agreement, because no EU Treaty was under negotiation at the time. This is merely an interpretive agreement aimed at guiding interpretation about existing commitments, following the Ireland and Denmark examples. It was legally binding only in the sense that, as a matter of international law, it provided material that was relevant to the interpretation of existing treaties under Article 31 of the Vienna Convention.

Of course, these legal subtleties were irrelevant to the wider political context. The UK government gave no indication of these legal complexities. The Prime Minister referred to the settlement as follows: ‘These changes will be binding in international law, and will be deposited at the UN. They cannot be changed without the unanimous agreement of every EU country – and that includes Britain. So when I said I wanted change that is legally binding and irreversible, that is what I have got.”\(^{21}\) The Prime Minister said that this was a legally binding treaty, without question. There was no suggestion that it may be an agreement regarding the interpretation of preexisting treaties.

The reality was, however, that the status of the agreement was far from certain. If the Legal Counsel’s Opinion was accepted, then EU law would be considered to remain intact. This would have meant that the agreement had created two potential legal regimes regarding the issues covered. The new rules would apply between the parties in international law, but would not have amended EU law. The result would have been great legal insecurity. Whatever the correct answer to this, it is clear that the agreement

relied in one way or another on international law, and especially on the Vienna Convention on the Law of Treaties. In this sense, it was up to international law to resolve any disagreements between the UK and the other member states with regard to what exactly they had agreed.

III. THE LAW OF DISENGAGEMENT

All these issues of the UK–EU agreement are now academic. The result of the referendum means that the agreement has now lapsed. Nevertheless, the process of the UK’s final disengagement from the EU has highlighted yet further ways in which the European Union has to rely on international structures and institutions, and especially the VCLT. I will argue in this section that the process of exiting the Union is yet another illustration of its international nature.

A. Article 50 TEU

In the White Paper on Brexit, the policy paper which the United Kingdom government published at the start of February, it was made clear that the UK was seeking some form of ‘hard’ Brexit.22 There will be no membership in the single market or of the common customs area. In preparation for withdrawal the UK will enact the ‘Great Repeal Act’, which will provide for continuity by allowing EU law to continue having effect until it is withdrawn by the UK legislature. It is widely expected that the two sides will agree two separate agreements. One will be a withdrawal agreement (by enhanced majority voting, under Article 50). The other will be a trade agreement between the UK and the EU (which will almost certainly require the ratification of all member states as a mixed agreement – one that goes beyond the exclusive competence of the EU).

The legal basis for the process of exiting the Union is Article 50 TEU.23 The UK government quickly established, against the wishes of some politicians who advocated unilateral withdrawal on the basis of international law alone, that the UK should leave the EU through the process of Article 50. This process has three distinctive features. First, it is a process of EU law, which – paradoxically perhaps – will bind a member state even when it has left; second, it provides for a very short deadline for the conclusion of any withdrawal negotiations, just two years; third, it provides that the

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23 Article 50 says: ‘1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. 2. A Member State which decides to withdraw shall notify the European Council of its intention.’
The withdrawal agreement has a limited remit, in that it takes account of ‘the framework’ for the UK’s ‘future relationship’, but does not cover such future relationship.  

The process of Article 50 creates two possible scenarios: the first where the UK leaves by way of a withdrawal agreement; the second where it leaves without it. Both options create challenges for EU law. A withdrawal agreement can be reached with the increased majority of Article 218(3) and the approval of the European Parliament. One obvious question arises: what kind of agreement is the withdrawal agreement? Is it part of EU law, in the way of a regulation or a Directive, or is it an international treaty between the EU and a third country? The problem with the latter option is that the UK is not a third country. It is currently a member. But it is also obvious that it cannot be the former. If the agreement was a matter of EU law, it could not bind the United Kingdom after it had left.

This is clearly acknowledged by the most detailed document on Brexit produced by the EU thus far, the Negotiation Directives issued by the Council of the EU in May 2017. The Negotiation Directives note that the UK ‘will become a third country from the withdrawal date’ (para 8). The Negotiation Directives also suggest that the withdrawal agreement should have some international mechanism for dispute resolution arising out of the agreement (at para 17):

17. The Agreement should contain provisions relating to the overall governance of the Agreement. Such provisions must include effective enforcement and dispute settlement mechanisms that fully respect the autonomy of the Union and of its legal order, including the role of the Court of Justice of the European Union, in order to guarantee the effective implementation of the commitments under the Agreement, as well as appropriate institutional arrangements allowing for the adoption of measures to deal with unforeseen situations not covered by the agreement and for the incorporation of future amendments to Union law in the Agreement.

The paragraph is puzzling. The envisaged dispute settlement will not be a process of EU law, since the UK will not be an EU member after its conclusion and cannot be bound by it as an EU member. So it has to be an international agreement, binding the EU, the remaining member states and the UK. If so, it cannot be subject to the jurisdiction of the Court of Justice. How then can it accommodate the ‘autonomy’ of EU law?

The point is repeated in the final section of the ‘Negotiation Directives’ on the ‘Governance of the Agreement’. This section provides that the agreement ‘should set up an institutional structure to ensure an effective enforcement of the commitments under the Agreement, bearing in mind the Union’s interest in effectively protecting its

24 Article 50 states: ‘In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.’

autonomy and its legal order, including the role of the Court of Justice of the European Union’ (para 39). And immediately, this is further specified as covering the following matters in particular (para 41):

- continued application of Union law;
- citizens’ rights;
- application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations.

At para 42, the ‘Directives’ further state:

In these matters, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained. For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union.

It is clear, therefore, that the dispute resolution mechanism is aimed at replacing the Court of Justice as far as enforcement of the withdrawal agreement is concerned. If it is to offer ‘equivalent’ guarantees of independence and impartiality, it is not the Court of Justice. At the same time, this international dispute body will apply the agreement and defend the ‘autonomy’ of EU law. How it will do so will depend on the specifics that will be agreed by the ‘withdrawal’ agreement. The arrangement is bound to be one of international law, similar in nature perhaps to the WTO arrangements which bind the EU and third parties.

However, the situation is more interesting if the UK leaves the EU without a withdrawal agreement. According to Article 50, this is possible if, after two years of negotiations, no agreement has been reached and the deadline is not unanimously extended. If this happens, the treaties will immediately stop taking effect. This is where public international law becomes extremely important, since it tells us what happens to the financial obligations that the UK may have vis-à-vis the EU.

**B. Financial Obligations in the Absence of a Withdrawal Agreement**

The issue of the UK’s financial obligations to the EU after Brexit, if any, has been the subject of heated debate in the UK press. In a widening report, the House of Lords EU Financial Affairs Sub-Committee suggested that the UK may not be, strictly speaking, obliged to settle any ‘Brexit Bill’ with the remaining members. It said that such an obligation does not arise if the UK leaves the EU without a withdrawal agreement. It was a startling statement which, if true, would change the dynamics of the negotiation. The *Guardian* newspaper reported that according to the Lords’

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Committee, the ‘UK could quit EU without paying a penny’. The *Independent* reported that the EU was contesting these views very strongly and was considering taking the UK to the International Court of Justice over the disagreement. So the question is of great political significance.

Is the House of Lords Report correct that the UK can walk away without paying anything? And by what kind of law is this to be determined? Is it a matter of EU law or a matter of international law? Normally, a ‘Brexit bill’ detailing the outstanding financial obligations on the basis of the UK’s budgetary commitments would be agreed. However, as we have seen, under Article 50 withdrawal is also possible if, after two years from notification, there is no agreement (and no unanimous decision to extend the time for negotiations). Article 50 says that at the moment that happens, the Treaties ‘cease to apply to the state in question’. What happens to the outstanding financial obligations when the respective financial obligations have not been determined by consent? This is what the House of Lords looked at. The Committee concluded that the UK’s obligations are retrospectively wiped out.

In fact, the Report concerned two different issues. The first was enforcement. How could any legal obligations arising out of the divorce be enforced against the UK? As it happens, the government’s White Paper on Brexit says (para 2.3) that ‘We will of course continue to honour our international commitments and follow international law’. But what if the government should change its mind? One of the most distinctive features of the EU, which sets it apart from all other international legal regimes, is that the member states have agreed to comply with the judgments of an independent Court of Justice. The EU is a unique union of states under the rule of law, in a way that the international community is not. It is therefore true that if the UK left the EU without a withdrawal agreement (and the dispute resolution process provided for in the Negotiation Directives discussed above), there would be *no obvious process* for securing and executing a judgment against the UK. Once the UK was outside the EU, the jurisdiction of the Court of Justice would ‘cease to apply’ to it.

This, however, would be relatively unimportant. The other states (and even private parties) would have numerous other ways to force compliance, especially if they were highly motivated for domestic political reasons. Depending on the nature of the UK’s violation of the law, the remaining EU states could, for example, retaliate with sanctions against the UK and its companies under the rules for ‘state responsibility’ of public international law. Potentially they could also use the dispute settlement system under the WTO Agreement. It is hard to predict how this could turn out, but the EU could, for example, by refusing to certify the UK’s new trade schedules in the WTO. Some claims might find their way to domestic courts. Private parties will be able to rely on the precedent of Argentina, which private bondholders hounded in the US and UK courts after it defaulted. The modern doctrine of state immunity under international law is that states are immune from jurisdiction relating to their ‘public acts’ but not from jurisdiction for their ‘private acts’, including commercial activities.27 Finally, the remaining EU would be able to punish the UK very effectively by simply

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27 In 2011, for example, the UK Supreme Court found (in *NML Capital Ltd v Argentina* ([2011] UKSC 31) that Argentina was not entitled to immunity in proceedings for the recognition of a New York judgment against it. The issues will be entirely different (and novel)
blocking future trade agreements or starting a trade war. A blatant disregard for existing legal obligations is therefore entirely implausible.

The second issue discussed in the House of Lords Report was the content of a possible financial obligation. If one reads the report carefully, it is clear that it was not discussing enforcement at all, but only the content of any future obligations of the UK. It made the more ambitious claim that if Brexit happened without an agreement, there would be no financial obligations at all in law. It was not saying that the UK should ignore its legal obligations, only that there would not be any.

How did it reach this startling conclusion? The Report says that if the UK withdraws without an agreement, ‘it follows that in EU law, Article 50 TEU allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget or other financial instruments, unless a withdrawal agreement is concluded which resolves this issue’ (para 133). The argument is clarified in the legal opinion that accompanies the report, written by the Committee’s legal adviser, who concludes that the end of membership will bring an end to all EU obligations including ‘all of its legal obligations under the Own Resources Decision, the Multiannual Financial Framework, and the Annual Budget’ (para 22 of the Legal Opinion).

Can this be true? The Committee heard three expert witnesses. One expert witness, Dr María-Luisa Sánchez-Barrueco of the University of Deusto, Bilbao, took this view. However, two other expert witnesses, Professor Takis Tridimas of King’s College London and Rhodri Thompson QC, argued for the opposite conclusion. The issue dividing them, once again, concerns the application of the VCLT. The basis for the Committee’s conclusion was that Article 50 excludes the Vienna Convention’s normal application to Brexit.

Article 70 of the VCLT says: ‘Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) Releases the parties from any obligation further to perform the treaty; (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.’ So under the Vienna Convention, unless the EU Treaties provide for a different solution or there is an agreement to the contrary, the rights and obligations created while the UK was a member continue. The House of Lords Committee took the view that Article 50 ‘provides’ otherwise. It therefore prevents the application of Article 70. The silence of Article 50 on financial obligations means, for the Committee, that the UK’s obligations are retrospectively wiped out on Brexit.

This reading of Article 50 seems to me wholly implausible. Tridimas and Thompson, both eminent EU law experts and practitioners, have the better view. They explain that Article 50 provides for prospective withdrawal and nothing else. They conclude in their written evidence: ‘If anything, given that the EU treaties envisage a far more intense form of integration than other international agreements, the limitation on retroactive or immediate effect of termination, provided for by Article 70(1)(b) should apply a fortiori to the EU Treaties.’ It is surprising that the Committee rejected these clear submissions. When Article 50 provides that the treaty ‘ceases to apply’, it refers to new
obligations arising out of the treaty but not to vested rights that were created while the UK was a party, including its financial commitments. I think this interpretation of Article 50 is the most natural reading of it. The UK cannot escape its obligations merely by walking away.

In fact, the correct reading of Article 50 has another surprising and perhaps unwelcome result for the UK government. Since Article 70 VCLT does not distinguish between types of vested rights and obligations (as long as they exist between the parties, in this case the EU member states), the continuing legal effect under the treaties of ‘any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination’ should mean that, if the UK left without a withdrawal agreement, all its existing obligations towards the EU would remain unchanged. It is arguable that such obligations may include not only financial obligations but also the UK’s obligation to other EU member states to grant some residence rights to their citizens who are already in the UK (and, of course, vice versa). This will be a matter of binding EU law, which the European Court of Justice (ECJ) will have an obligation to interpret and apply. This is the opposite of what the House of Lords envisaged. The absence of an agreement will thus guarantee all vested rights as they stood at the time, not none.

Perhaps even less welcome for the government must be the realisation that the jurisdiction of the Court of Justice is inescapable, since Brexit is governed by Article 50. Although after Brexit the ECJ will not have jurisdiction over the UK in terms of enforcement of judgments, the legal issues that arise out of the application of Article 50 are issues of EU law, which international law merely supplements. With or without a withdrawal agreement, the interpretation and recognition of rights and obligations that arise out of the UK’s departure are both matters of EU law which will remain under the jurisdiction of the ECJ under Article 50. This is what the UK signed up for and what Parliament intended when it passed the European Union (Amendment) Act 2008, which marked the ratification and incorporation of the Lisbon Treaty, including Article 50.

IV. FURTHER REFLECTIONS ON PLURALISM

I believe it becomes evident that, both before and after the referendum, EU law has had to rely on the underlying structures and laws of public international law to accommodate political realities. This is not an entirely new phenomenon. In a widely discussed article a few years back, Tony Arnull argued that the strategy of ‘constitutionalisation’ of the Treaties that had been pursued by the Court of Justice of the European Union since the 1960s had created a different kind of adjustment, which he summarised as ‘fragmentation’. The process had in fact led to the ‘disintegration’ of EU law. Arnull observed that the member states had deployed strategies that aimed at containing the power of the Court either through treaty amendment or through their own constitutional doctrines. Arnull concluded that the Court was responsible for a largely unstable and ‘unhealthy’ relationship with the member states. Arnull concluded:

'It is hard to deny that this ad hoc legal disintegration is partly attributable to the record of the Court.' 29

My argument thus far is that the ‘disintegration’ of EU law has a limit set by public international law. Whatever steps the member states take to limit the Court’s ‘monism’ are cast in terms of public international law, which is the effective constitutional backstop for EU law. This is what I call the ‘wisdom’ of law: it is capable of accommodating the member states’ political choices with the required flexibility on the basis of public international law. So European Union law appears uniform, but in fact it is not. It permits a great deal of flexibility, as the above examples of deployment of international law show (or indeed the example of the ESM Treaty shows, in another context). This is how EU law has survived its many crises: by giving states the required flexibility on the basis of international law, not on the basis of standard EU law. In my view, therefore, the position of EU law is the opposite of that envisaged by the Court of Justice. It is not autonomous, but fully dependent on international law.

In its ‘Accession to the ECHR’ Opinion, the Court of Justice had said:

EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States … and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves … These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’. 30

The Court’s statement is, in my view, false. Both in theory and in practice, as we saw above, EU law is not an ‘independent’ source of law. It is always dependent, as we have seen, on domestic constitutional law as well as on public international law, and especially on the law of treaties. This is where both the member states and the EU institutions turn when political reality makes conventional EU law doctrines impossible. EU law is a form of international law. So the only credible ‘pluralist’ theories are those that postulate ‘pluralism under international law’ as outlined by MacCormick, who said that ‘the obligations of international law set conditions upon the validity of state and of Community constitutions and interpretations thereof, and hence impose a framework on the interactive but not hierarchical relations between systems’. 31 Of course, pluralism under international law is just another name for dualism.

This finding is, in my view, very important for the more extreme forms of pluralism. They show that radical pluralism misses the fact that the flexibility or ‘disintegration’ of EU law is a fully legal process. Radical pluralist theories have made the case for seeing the relations between national law and EU law in terms of an entirely new

29 Arnull, ‘Me and My Shadow’, 1208.
theoretical framework. Radical pluralist theories insist that EU law is entirely different from international law. The typical pluralist theory sees the problem that pluralism addresses as that of overlapping and therefore conflicting ‘legal systems’. The problem is effectively presented as one of a turf war fought by the various legal systems that claim exclusive authority over a territory. One of them must come out on top. Given that neither EU law nor constitutional law can do so while the EU remains in place, stalemate is a realistic solution.

This turf war, however, has never taken place. International law is not seeking to replace domestic law. The examples above show that international law has worked as a means for the flexible accommodation of states within the EU. The premise of a zero sum game was therefore false. In my view, ‘radical pluralist’ theories have been implicitly or explicitly inspired by the legal positivist view of law according to which a hierarchy of norms or rules, the ground of which is some significant event or fact – for example, a ‘rule of recognition’, as Hart argued in *The Concept of Law*. For law to exist, Hart argued, a special structure is necessary, which he called the ‘union’ of primary and secondary norms under a rule of recognition. The emergence of law depended, he thought, on a convergence in the attitudes and beliefs of officials and other relevant persons. The unity of the law depended on the clarity of the rule of recognition. If two rules of recognition existed at the same time, they would create a constitutional crisis.

A crisis occasionally happens, but it is a ‘substandard, abnormal case containing with it the threat that the legal system will dissolve’. Hart’s view on international law was that it does not meet these factual tests because ‘there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties’. A similar position is put forward by Joseph Raz. Raz takes the same view as Hart: that states have legal systems because a legal system requires a rule of recognition and consistent practices of officials, features that are evidently absent from international relations. In a discussion of the
institutional nature of law, Raz leaves open the possibility that international law may not be a proper legal system. 38

Starting from these or similar premises, some pluralist theories identify a conflict between the overlapping systems or their ‘rules of recognition’. 39 They conclude that transnational law has upset the unity or order of ‘rules of recognition’ and has created radical uncertainty about what law is. Some theorists welcome such uncertainty as something positive. Nico Krisch, for example, relying explicitly on Hart’s theory, interprets recent developments towards the strengthening of international and transnational legal structures as a challenge to law’s unity or ‘anchor’. 40 He advocates an alternative ‘pluralist’ theory which explicitly ‘eschews the hope of building one common, overarching legal framework that would integrate postnational governance, distribute powers, and provide for means of solving disputes between the various layers of law and politics’. 41 He believes that the division of labour between the different domains should be set by each domain by itself, without a ‘common legal point of reference to appeal to for resolving disagreement’. 42

It is very hard to place these arguments against a theory of international institutions. These arguments could entail, for example, that a stronger state could lawfully force a constitutional position on another state or a stronger court on a weaker court, without any legal redress. All such things contradict established ideas about international law. More generally, I cannot see how ‘fragmentation’ or, more appropriately, the incoherence of international law is to be welcomed and reconciled with legitimate institutions. But perhaps the most obvious flaw in Krisch’s arguments is its narrowness of scope. Krisch sees only two options for accounting for postnational or transnational law, one being the appropriation of constitutional architecture for the globe and the other the abandonment of any attempt at coherence. These are the two sets of theories that Krisch discusses in his book as, respectively, the ‘constitutional’ view and the ‘pluralist’ view. 43 The mistake is forced, in my view, by the theoretical framework he adopts from Hart and Raz. If you believe in a legal system with a rule of recognition, you note that it either exists or does not. But if one takes a more sophisticated account of law and of the division of labour between constitutional law and international law, then the paradox disappears.

Although not explicitly about pluralism, Ronald Dworkin’s view of international law searched for the grounds of international law not in any kind of ‘rule of recognition’,

40 Nico Krisch, Beyond Constitutionalism, 11.
41 Nico Krisch, Beyond Constitutionalism, 69.
42 Krisch, Beyond Constitutionalism, 69. Nick Barber similarly welcomes this kind of incoherence, suggesting that it is sustainable if the resulting conflicts remain unresolved indefinitely: ‘[I]nconsistent laws need not demand inconsistent action; the constitutional dilemma can remain unresolved, provided that each side exercises restraint”; Barber, The Constitutional State 170.
43 See Krisch, Beyond Constitutionalism, 23–4.
but in interpretations of political morality and in the exercise of practical judgment. Dworkin offers a glimpse of a much richer ideal of ‘democratic peace’ as the foundation of international law. Nicole Roughan, meanwhile, begins her own discussion by rejecting the legal positivist analysis of Raz and Tasioulas. She proposes the idea of ‘relative authority’ or relative claims to legitimacy, according to which ‘when there are multiple prima facie legitimate authorities in interacting or overlapping domains, and there is no outweighing reason to have just one singular authority, then those prima facie legitimate authorities can have only relative authority and must coordinate or cooperate or tolerate one another in order to be legitimate for their subjects’.

The distinctness of these nonpositivist arguments about law is that they seek the unity of law and the legal order not in a ‘rule of recognition’ or the creation of a positive ‘authority’ by some kind of fact, but in practical reasoning concerning international institutions. On the basis of this practical view of law, Roughan explains, for example, how relative authority ‘is simply a claim to have legitimate authority through appropriate relationships with other authorities’. Her argument is not about legal systems, but about ‘appropriateness’ or the substantive content of law as an attempt to meet the tests of justice and legitimacy while regulating social life.

Although I have not argued for this premise here, the same applies to EU law. At the foundation of the relations between the EU, international law and domestic law lies a theory of legitimacy of transnational institutions. For the positivist point of view, by contrast, an overlap or a pluralism of ‘legal systems’ is always an anomaly because it undermines the hierarchy and exclusivity that all law requires. The problem arises because, in their zeal to present law as a content-independent order of rules, legal positivists close their eyes to the specific moral substance of international laws and institutions.

V. CONCLUSION

Pluralism is correct in this sense: one cannot understand the EU as a state in the making or as a monist legal order. If the Court of Justice has occasionally said so, or implied that this analysis was true, it was wrong to do so. EU law is a creation of international law and international law is a legal order, meaning it provides standards of conduct for international actors and individuals within a systematic intellectual framework. State law, however, is more than a legal order. It is also a jurisdiction,
which creates a system of offices and institutions securing the comprehensive determination and enforcement of standards of conduct. Only jurisdictions claim sovereignty or ‘dominion’ in this way. International law does not. The relationship between international laws and domestic law can be understood as one of ‘dualism’, not monism. How they are to fit in a singular case is just another interpretive problem for legal reasoning.\(^{49}\) It is to be resolved according to the internal principles of constitutional law, international law and EU law. The task of reconciling domestic and EU law is just another doctrinal puzzle, whose answer is to be found through the ordinary work of legal argument.

\(^{49}\) I show how the English courts have been doing just this in Eleftheriadis, ‘Pluralism and Integrity’, 380–5.