

Amicum perdere est damnorum maximum

EFFECTS OF INTERNATIONAL CUSTOMARY LAW IN THE LEGAL ORDER OF THE EUROPEAN UNION

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INTRODUCTION – THE EUROPEAN UNION AND INTERNATIONAL LAW. GENERAL REMARKS

The international identity of the European Union (EU) as the international organization has been explicitly confirmed in the establishing treaty signed in Lisbon in 2009¹. On the basis hereof, the EU is a fully recognized subject of public international law. It is therefore committed to the observance of international obligations in the same degree as any other actor on international scene. The scope of the legal obligation is full and it encompasses international treaties, the custom and the binding decisions of international organizations (secondary international law deriving from the international agreements). The legal base is provided by the *pacta sunt servanda* principle, which constitutes a fundamental principle of any legal order, and in particular, international legal order. According to this principle, the international obligation is binding upon the parties and must be performed by them in good faith. A party may not invoke the provision of its internal law as justification for its failure to perform a treaty². The breach of international law brings with it the international responsibility.

As a subject of international law, the EU faces the same problems as the States in the process of interpretation and application of the international treaties, customs and decisions to ensure the effectivity of international obligations in the domestic legal system. It also contributes to the development of international law, since the practice of the EU itself may be equated with the practice of States³, though the EU is a rather unique

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¹ Art 47 of the Treaty establishing European Union. Consolidated versions of the EU Treaties – *Treaty on European Union* (TEU) and *Treaty on Functioning the European Union* (TFEU) as amended by the Treaty of Lisbon, Official Journal (OJ) C 326 (2012).

² Art. 26 of the *Vienna Conventions on the Law of Treaties* (VCLT), 1155 UNTS I-18232.

³ International Law Commission, ‘Third Report on Identification of Customary International Law’, UN Doc

international organization, and thus may not be exemplary of international organizations generally. The European Union itself asserted to the United Nations (UN) General Assembly's Sixth Committee (Legal) in 2014 that it is "[i]n areas in which, in accordance with the rules of the European Union treaties, only the Union could act, such as trade or fisheries matters" that the Union's practice should "be taken into account with regard to the formation of customary international law alongside the implementation by the member States of European Union legislation"⁴.

The problem therefore is if the EU legal system is more like the domestic legal order (own constitutional order of the EU) or it is in fact the new, *sui-generis* but still the part of the international legal order to which the legal regime of the EU is subordinated. It is important to point out the special nature of the EU as a supranational organization for better understanding and shaping the core concern of the EU law, namely the internal and external legal autonomy⁵. Like almost every concern, it is also subject to the limitations provided by law⁶.

The subordination of the European Community EC/EU to the public international legal order has been recognized by the Court of Justice of the European Union (CJEU) since the very early years of the functioning of the EC. The major problems of the international law were addressed in the one of the most important and famous rulings ever issued by the CJEU already in the year 1963⁷, stating that the Community was seen as "a new legal order of international law for the benefit of which, the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals"⁸. By this ruling, the CJEU affected the essential nature of the EC law and marked the key objectives in the development of the organization. It was the uniform application of the EC law in all the Member States, and the application of the principle of the international origin – the primacy over the conflicting national law – within the EC law. Thereafter the famous decisions of the CJEU in such cases as *Costa v ENEL*, *Simmenthal* and many others⁹

A/CN.4/682 (Mar 27, 2015) (prepared by Special Rapporteur Michael Wood) 53, para 77.

⁴ UN GAOR, 69th Sess., 25th mtg. at 13, para. 79, UN Doc. A/C.6/69/SR.25 (Nov. 28, 2014), statement of the European Union.

⁵ In the case-law of the CJEU see in particular: C-26/62 *Van Gend en Loos*, EU:C:1963:1; 6/64 *Costa v. ENEL*, EU:C:1994:66; Opinion 1/91 (*EEA Agreement*), EU:C:1991:490; Opinion 1/00 (*ECAA Agreement*), EU:C:2002:231; C-459/03 *Commission v. Ireland*, EU:C:2006:345; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461 (*Kadi*).

⁶ See J Czuczai, 'The Autonomy of the EU Legal Order and the Law-making Activities of International Organizations, Some Examples Regarding the Council's most Recent Practice' (2012) 31 Yearbook of European Law 452-472; JW Van Rossem, 'The Autonomy of the EU law: More is Less?' in RA Wessel, S. Blokman (eds.), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organizations* (2013) 1-9.

⁷ C-26/62 *Van Gend en Loos*.

⁸ C-26/62 *Van Gend en Loos* 3; *Costa v ENEL*, 1964.

⁹ *Opinion 1/91*; C-41/74 *Van Duyn*, EU:C:1974:133; C-244/80 *Foglia v Novello*, EU:C:1981:302; C-286/90 *Poulsen and Diva Navigation*, EU:C:1992:453; C-308/06 *Intertanko*, EU:C:2008:312.

(especially *Kadi* case)¹⁰, confirmed and strengthened the grounds and general directions in the development of the EC/EU law and its relation with the public international law, broadly discussed also in the doctrine¹¹. It is settled in the jurisprudence of the CJEU that the Union must respect international law in the exercise of its powers¹². A strong emphasis in the case-law of the CJEU was put to the main sources of international law i.e. international agreements¹³, recognized in the founding Treaty as a category of legal acts within the EU¹⁴. Likewise in the EU doctrine and in the jurisprudence, the international agreements are at the core of scientific

¹⁰ C-402/05P and C-415/05P *Kadi*, judgment of the Court (Grand Chamber) of 3 September 2008 has been recognized in the doctrine as the most important judgement to date on the subject of relationship between the EC/EU and the international legal order; see G de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2009) 51 *Harvard International Law Journal* 1.

¹¹ HF van Panhuys, 'Conflicts between the Law of the European Communities and Other Rules of International Law' (1965-66) 3 *Common Market Law Review* (CMLRev) 420-449; W Ganshof van der Meersch, 'L'ordre juridique des Communautés européennes et le droit international' (1975) 148 *Receuil des Cours* 1, 181-195; HG Schermers, 'Community law and international law', (1975) 12 *CMLRev* 77-90; A Bleckmann, 'Die Position des Völkerrechts im inneren Rechtsraum der Europäischen Gemeinschaften. Monismus oder Dualismus der Rechtsordnungen?' (1975), *Jahrbuch für Internationales Recht* 300-319; KM Meessen, 'The application of rules of public international law within Community law' (1976) 13 *CMLRev* 485-50; A Peters, 'The Position of International Law Within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9-77; C Timmermans, 'The EU and Public International Law' (1999) 4 *European Foreign Review* 181-194; O Elias, 'General International law in the European Court of Justice: from hypothesis to reality?' (2000) 31 *Netherlands Yearbook of International Law* 3-34; A Ott, 'Thirty years of case-law by the European Court of Justice on international law: a pragmatic approach towards its integration' in V Kronenberger (ed), *The EU and the International Legal Order: Discord or Harmony* (2001) 95-140; Ch Eckes, 'International law as law of the EU: the role of the European Court of Justice' (2010) 6 *Cleer Working Papers*, Centre for Law of EU External Relations; JW van Rossen, 'Interaction between EU Law and International Law in the light of *Intertanko* and *Kadi*: the dilemma of norms binding the Member States but not the Community' (2009) 4 *CLEER Working Papers*; G De Búrca (n 10) 1; J Etienne, 'Loyalty Towards International Law as a Constitutional Principle of European Union Law?' (2010) 2 *Jean Monnet Working Paper*, available online at <http://www.jeanmonnetprogram.org/papers/11/110301.html>; PJ Kuijper, "'It Shall Contribute to...the Strict Observance and development of International Law...'" The Role of the Court of Justice' in A Rosas, E Levits, Y Bot (eds), *The Court of Justice and Construction of Europe: Analyses and perspectives on Sixty Years of Case-law* (2013) 589-612.

¹² C-402/05P and C-415/05P *Kadi*, para 291; see C-308/06 *Intertanko*, para 51.

¹³ 22/70 *ERTA*, EU:C:1971:32; *opinion 1/03*, EU:C:2006:81; See cases: C-471/98 *Commission Belgium*, EU:C:2002:628; C-467/98 *Commission v Denmark*, EU:C:2002:625; C-472/98 *Commission v Luxembourg*, EU:C:2002:629; 468/98 *Commission v Sweden*, EU:C:2002:626 concerning infringement cases brought by the Commission against a number of Member States for having concluded bilateral air transport agreement with the United States.

¹⁴ The European Union has the power to conclude treaties by virtue of Article 216 TFEU and 37 TEU. Article 216 (2) provides that the international agreements concluded by the EU are binding upon its institutions and they prevail over acts of the EU; to this effect, see cases: C-61/94 *Commission v Germany*, EU:C:1996:313, para 52; C-311/04 *Algemene Scheeps Agentuur Dordrecht*, EU:C:2006:23, para 25; Case C-308/06 *Intertanko*, para 42; and C-402/05 P and C-415/05 P *Kadi*, para 307.

considerations¹⁵.

Conversely, the presented article is focused on the customary international law, the status of which differs from the significance of the treaties. Especially, as far as it is a part of international law, the customary provisions in EU law formally may take effect and be enforced within the domestic legal orders of the Member States and internal law of the international organizations. However, the substantive question is if and how the customary international law (in force) may be capable of creating individual rights (direct applicability) with a direct effect in national and EU courts. Also an informal relationship is observed, when the international law and EU law share the same values and may influence each other.

In consideration of the foregoing, the objective of this paper is to analyse the status of the rules in question within the legal regime of the EU (formal perspective), and especially their judicial application in the conditions of complexity and imprecision (substantive perspective). Therefore, the general legal problem concerns the relationship between the two legal systems in formal hierarchical terms relating to the position of customary international law in the EU law, but the essential purpose is to analyse the final legal effect given within the EU regime to the international customary law.

I. THE SOURCE AND THE JUSTIFICATION OF THE LEGAL OBLIGATION FOR THE EUROPEAN UNION TO BE COMMITTED TO INTERNATIONAL CUSTOMARY LAW

1. Monist/dualist approach

Article 38 (1)(b) of the Statute of the International Court of Justice (ICJ)¹⁶ defines international custom as “evidence of a general practice, accepted as law”¹⁷. It denotes a settled practice – a habitual act, something

¹⁵ See eg G Bebr, ‘Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg’ (1983) 20 CMLRev 35; M Cremona, ‘External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law’ in X Xenopoulos (ed), *External Relations of the EU and the Member State* (FIDE 2006 National Reports) (2006) 319; A Dashwood, ‘Preliminary Rulings on the Interpretation of Mixed Agreements’ in D O’Keeffe, A Bavaso (eds), *Liber Amicorum in Honour of Lord Slynn* (2000); G Gaja, ‘Trends in Judicial Activism and Judicial Self-Restraint Relating to Community Agreements’ in E Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002) 117; A Guzman, ‘The Design of International Agreements’ (2005) 16 European Journal of International Law 579; T Hartley, ‘International Agreements and the Community Legal System: Some Recent Developments’, (1983) 8 European Law Review 383; FG Jacobs, ‘The Internal Legal Effects of the EU’s International Agreements and the Protection of Individual Rights’, in A Arnulf et al (eds), *A Constitutional Order of States* (2011) 529; FG Jacobs, S Roberts, *The Effect of Treaties in Domestic Law* (1987); see also the chapter concerning the mixed agreements by A Cieśliński in this volume.

¹⁶ The Statute of the International Court of Justice of 26 June 1945 forms an integral part of the Charter of the United Nations, 1 UNTS XVI.

¹⁷ See, in particular, the judgments of the ICJ in the *North Sea Continental Shelf Cases* (*Germany v Netherlands and Germany v Denmark*), [1969] ICJ Rep 4, para 77; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of*

that is repeatedly done over time by the subject of international law, which is recognized as a rule of law. It gives a statutory definition of customary international law for the purposes of international law, but the problem of what are called the “elements of international custom”, that is, the conditions of its existence, and hence of the binding force of the corresponding customary rule, is the most important and controversial in the theory of customary international law¹⁸. As J. Crawford points out, the time is the magic ingredient of its formula, even a short time. Custom is the judgement of acceptability over time¹⁹, and the generality of practice does not necessarily demand the great number of states parties.

As all other sources of international law, the custom forms the integral part of EU law²⁰, and in logical consequence it does not need to be transformed into the secondary EU law to become automatically binding for the Union. Its relation in this context to EU law is like the general formal conception of international and domestic (internal, municipal) law of the monist and dualist systems. In the monism doctrine, the rules of international law and the municipal law are the part of the same legal order so the international law automatically enters into the domestic system, without transformation, implementation legislation or any other positive act on the part of the State. Provisions of international law are in consequence applied by domestic courts as such, and not as the provisions of municipal law²¹. Dualist doctrine assumes that the public international law is regarded as separated set of rules, with the distinct categories of the legal persons, subjects and principles, and spheres of application, that requires transposition to the domestic legal order before it becomes valid. Transposition in any form of appropriate constitutional procedure of implementation has the effect of incorporation of the international provision into the domestic system. It can then be directly applied by the domestic courts as any domestic provision.

With regard to the rules of the customary international law, the doctrine of monism with the requirement of the incorporation is accepted, also by dualist States. They consider these rules to be the part of domestic law automatically, unless they are inconsistent with the Acts of Parliament or authoritative judicial decisions or established usage²². This approach

America) [1986] ICJ Rep 14, para 183 and 184; For the cases in which the ICJ ascertained the existence of a customary international rule, see: K Wolfke, *Custom in Present International Law* (2nd ed 1993) 9ff.

¹⁸ K Wolfke (n 17) 1.

¹⁹ J Crawford, ‘The identification and development of customary international law’, Spring Conference of the ILA British Branch – *Foundations and Futures of International Law*, 2014; under the internet address:

<http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001>.

²⁰ C-415/05 *Kadi*; *opinion I/09*; K Lenaerts, ‘Droit international et monisme de l’ordre juridique de l’Union’ (2010) *Revue de la Faculté de droit de l’Université de Liège* 505; T Konstadinides, ‘When in Europe: Customary International Law and EU Competence in the Sphere of External Action’ (2011) 13 *German Law Journal* 1177-1201.

²¹ A Kaczorowska, *European Union Law* (3rd ed 2013) 303.

²² A Kaczorowska (n 21) 303; Lord Denning in the *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 554.

generally emphasises the principles of the priority of international law on the domestic legal system, the direct applicability and the direct effect. The preference of the monism to ensure the uniform application of the legal provisions derived from the different legal system in the domestic law by means of the abovementioned principles, makes its idea compatible with the spirit and objectives of the EU.

The monist approach towards the international customary law has been the predominant view in the case-law of the CJEU for decades²³. But it has changed with *Kadi I* decision, where the CJEU has restricted the effect of international law in the EU legal system, grounded on a dualist one²⁴. The legal comments on this decision of the Court highlight its meaning and suggest its most visible and interesting influence for the external relations of the EU in recent years²⁵, although points of criticism have been raised too²⁶. In this case, the Court of 1st Instance (General Court) upheld the general primacy of the EU Charter over the EU law, subject to *ius cogens* to which art. 103 is itself subordinated²⁷. This led the Court to decline judicial review of EU sanctions implementing binding sanctions of UN, with the exception of controlling whether the UN sanctions infringed *ius cogens* or peremptory international law, understood as higher rules of international law binding on all international subjects of international law, including the bodies of UN, and from which no derogation is possible²⁸. The UN Security Council is thus committed to *ius cogens* and certain of these rights have been recognized by the Court, such as the right to a fair hearing and the fight to respect for property. However, for these rights, the CJ held that they are not absolute, since derogations are provided by the virtue of international law. Finally, the Court did not rule on the matter of the classification of these rights as mandatory as it came to the conclusion that they have not been infringed in the present case²⁹. Consequently, the CJ decided the case with no regard to the primacy of the EU Charter and treated the EU legal system as autonomous in relation to the rest of international law³⁰.

On this point the Court has shared the opinion of the advocate general, Póitares Maduro, who held that, "although the Court takes great care to respect the obligations that are incumbent on the EU by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty³¹. Thus, it would be wrong to conclude

²³ C-286/90 *Poulsen*, para 9 and 10; Case C-405/92 *Mondiet*, EU:C:1993:906, para 13 to 15; and C-162/96 *Racke*, EU:C:1998, 293, para 45; C-308/06 *Intertanko*, para 51; see K Lenaerts (n 20) 505.

²⁴ C Eckes, 'International Law as the Law of the EU: the Role of the ECJ' in E Cannizzaro, P Palchetti, RA Wessel (eds), *International Law as the Law of the European Union* (2011); G De Búrca (n 10)1.

²⁵ J Kokott, Ch Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) *The European Journal of International Law* 1024.

²⁶ De Búrca (n 10) 44; W Czapliński, 'Glosa do wyroku TS z dn. 3 września 2008r., C-402/05 i C-415/05' (2010) 4 *Europejski Przegląd Sądowy* (EPS) 38-44.

²⁷ T-306/01 *Yusuf*, EU:T:2005:331, paras 223-224.

²⁸ *Ibidem*, para 276; see also Case T-315/01 *Kadi v Council*, EU:T:2005:332, para 277.

²⁹ See: W. Czapliński (n 26).

³⁰ C-402/05 and 415/05 P *Kadi*.

³¹ Opinion 2/94, EU:C:1996:140, para 30, 34,35.

that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community³². The Court of Justice ruled that “it follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty”³³.

Following the *Kadi* judgement, the constitutional principles at the top of the pyramid of rules are the reason they cannot be derogated by any other rule of law. These are the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union³⁴. Therefore, even if the CJEU is generally open to international law, it reserves the competence to determine how and under which circumstances the international law influences EU legal system. The commentators in the literature of the EU law call it an “international-law-friendly-approach”³⁵, which means the influence of the international law with the guarantee of the balance between the autonomy of the EU law and the commitment to respect international legal obligations. If this approach of the CJEU is right, then the next practical question is about the power of the EU to carry on with concluding and implementing international agreements that are contrary to the sources of international law, such as UN Charter or UN security Council resolutions? This question cannot be obviously conducive to stability and consistency of the legal framework³⁶.

Another problematic area which shall be pointed out in relation to the concepts of monism and dualism is the status of international law in relation to the Common Foreign and Security Policy of the Member States (CFSP) as well as the Common Security and Defence Policy (CSDP) and the division between the TEU and the TFEU³⁷. There are still different parts of the EU law and the monism/dualism approach may be less helpful for

³² Opinion of the advocate general in *Kadi* case, ECLI:EU:C:2008:11, para 24.

³³ C-402/05 P and C-415/05 P, *Kadi*, para 285.

³⁴ C-402/05 P and C-415/05 P, *Kadi*, para 303.

³⁵ PJ Kuijper, ‘Customary International Law, decisions of International Organizations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law’ in J Wouters, A, Nollkaemper, E De Wet (eds), *The Europeanisation of International Law* (2008) 29; R Uerpmann-Witzack, ‘The Constitutional Role of International Law’ in A von Bogdandy, J Bast (eds.), *Principles of European Constitutional Law* (2nd ed. 2010) 138,143.

³⁶ A Orakhelashvili, ‘Commentary to the art. 30 Convention of 1986’ in O Corten, P Klein, 1 *The Vienna Conventions on the Law of the Treaties: a commentary* (2011) 802.

³⁷ RA Wessel, ‘Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?’ in E Cannizzaro, P Palchetti, RA Wessel (eds.), *International Law as Law of the European Union* (2011).

understanding the internal effects of international obligations concluded by the EU because of the less developed nature of certain fields of integration within the EU. The jurisdiction of the CJEU, as well as the opinions of the advocates general (P. Maduro) demonstrate the evolving relationship between the EU and international law. However, when looking at the EU from the external perspective of international law, the international customary law shall be ranked above any domestic law (including internal legal regimes of the Member States and of the EU itself), regardless of the approach of the international entities towards international law.

Lastly, when deliberating the source of the legal obligation for the EU to be committed to international customary law, the issue of the democratic legitimacy should be also noted. It is a glaring problem with customary international law, an important category of international law, that a democratic deficit is built into its very definition³⁸ since it neglects democratic decision making with neither the participation of national parliaments nor of European Parliament. Nowadays it is rather derived by international courts and tribunals from non-binding international acts, such as conventions not sufficiently ratified to enter into force³⁹, declarations or resolutions⁴⁰. It is therefore based on the actual acts of States and evaluated at the level of judicial review, providing the evidence of a norm from the actual practice of the States. In this way, the legal effect given to the customary international law by the consensus of democratic States with possible participation of the EU, the democratic deficit of the customary international law is tempered. Besides, the doctrine of the autonomy of the EU law both in internal, in relation to the domestic legal systems of the Member States, as well as in external dimension, in relation to other States and international organizations⁴¹, constitutes the limitations for application of external legal sources within the EU. Throughout the decades, the set of consecutive rulings of the CJEU since the very early years of the functioning of the European Community⁴², contributed to the confirmation and to the reinforcement of the distinctive features of the EU law, in particular the supreme nature of the EU law, confirmed in the Kadi case.

2. Legal basis and the scope of customary rights and duties to be attributed to the European Union

Neither the establishing treaties of the EU, nor any other provision of the EU, refer specifically to the international custom⁴³ and do not therefore explicitly confirm the existence of the customary provisions within the EU

³⁸See JO McGinnis, 'The Comparative Disadvantage of Customary International Law' (2006) 30 Harvard Journal of Law and Public Policy 9.

³⁹C-286/90 *Poulsen* case in which the CJ ruled on customary law derived from UNCLOS, not yet has been concluded by the EU.

⁴⁰PJ Kuijper, 'The Case Law of the Court of Justice of the EU and the Allocation of External Relations Powers: Whither the Traditional Role of the Executive in the EU Foreign Relations?' in M Cremona, A Thies, *The European Court of Justice and the External Relations Law: Constitutional Challenges* (2014) 105.

⁴¹181/73 *Haegeman v Belgium*, EU:C:1974:41.

⁴²26/62 *Van Gen den Loos*.

⁴³For the international agreements, the *ius tractatum* of the EU is enshrined in the Art. 8 and 37 TEU and 216-219 TFEU.

legal order. The general legal obligation to respect the international law, so indirectly with regard to the international agreements and to the customary law, is expressed in the Article 3(5) and in Article 21 (1) first subparagraph⁴⁴ of the Treaty on the EU. Article 3(5) TEU provides that:

"In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

Pursuant to the abovementioned article, the provisions of the international law, and adequately of the customary law, are binding upon the EU institutions in relations with non-Member States as well as another subjects of international law. The doctrine of European law points out that this provision omits from its scope relations among the Member States, and this may imply that art. 3 TEU does not address the relationship of the Treaties with the custom. This relationship is left by the provision to international law, right where it belongs⁴⁵. And it is enough to find the solution since the Treaties establishing the EU are formally international agreements with a theoretically legally possible international judicial control on the legality of the Treaties, confirmed by the international judiciary, with a special consideration of European Court of Human Rights (ECtHR) in *Matthews*, *Bosphorus*, *Behrami* and *Saramati* decisions⁴⁶. Also the

⁴⁴ This provision stipulates that: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".

⁴⁵ A Gianelli, 'International Law as the Law of the European Union' in E Cannizzaro, P Palchetti, RA Wessel (eds) (n 37) 98.

⁴⁶ Decisions of the ECtHR on the responsibility of the Member States of international organizations under the European Convention on Human Rights (ECHR) in cases: *Matthews v United Kingdom*, App no. 24833/94; *Bosphorus v Ireland*, App no 45036/98; *Bahrami v France*, App. no 71412/01; *Saramati v France, Germany and Norway*, App no 78166/01. In *Matthews* decision, para 33, the Court has held that: "In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. The Council Decision and the 1976 Act (...), and the Maastricht Treaty, with its changes to the EEC Treaty, all constituted international instruments which were freely entered into by the United Kingdom. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No 1, for the consequences of that Treaty". The references to the judicial concept elaborated by the Inter-American Court

Commentary to the Draft Articles on the Law of Treaties for International Organizations (DALTIO) explains why organizations like the EU accept innovations such as those brought by cases *Mathews* and *Bosphorus*, by asserting that “it can happen that an organization will be bound by legal rules contained in a treaty without being a party to the treaty, either because the rules have a customary character in relation to the organization, or because the organization has committed itself by way of a unilateral declaration”⁴⁷. Consequently, it is not necessary for the international organization to provide the explicit commitment to the international customary law in the statutory treaty. The European Union is thus obliged to respect the customary rules under the international law itself.

The scope of this commitment was clarified in the jurisprudence of the CJEU, stating that the provisions of the international customary law are binding upon the EU institutions in the exercise of their powers⁴⁸. This approach was seen as a “generous and far reaching recognition of the relevance”⁴⁹ of the rules of the customary law. In every case where the provisions of the customary law were invoked in the proceedings, they were directly relevant to the powers of the EU (EC). In this connection the CJEU has ruled that the powers of the EU must be exercised in observance of international law, including provisions of international agreements in so far they codify customary rules of international law⁵⁰. The Court of Justice recognized the binding force of the customary international law particularly in the context of treaty law and the law of the sea⁵¹. In this respect, the Court has held, *inter alia*, that some of the provisions of the *Vienna*

of Human Rights in the decision *Velasquez Rodriguez v Honduras*, Series C No. 4, para. 172, are made in the literature of the EU law. In the latter the Court has held that: “An illegal act which violates human rights and which is initially not directly imputable to a State [...] can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.” F Korenica notes that it was not essentially the issue whether the attribution of responsibility should have been primarily placed upon the EU, but rather whether the EU Member States had taken the necessary steps to remove such violation from the EU Treaties for which they were liable before the Convention; F Korenica: *The EU Accession to the ECHR, Between Luxembourg’s Search for Autonomy and Strasbourg’s Credibility on Human Rights Protection* (2015) 54.

⁴⁷ *Draft Articles On the Law of Treaties Between States and International Organizations Or Between International Organizations With Commentaries 1982*. Text adopted by the International Law Commission at its thirty-fourth session, in 1982, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para 63). The report, which also contains commentaries on the draft articles, appears in (1982) II-2 YILC 20.

⁴⁸ C-286/90 *Poulsen*, para 9, C-162/96 *Racke*, para 45.

⁴⁹ C Timmermans, ‘The EU and the Public International Law’ (1999) 4 *European Foreign Affairs Review* 181-187.

⁵⁰ Cases: C-286/90 *Poulsen*, paras 9 and 10; C-405/92 *Mondiet*, paras 13-15; C-162/96 *Racke*, EU:C:1998:293, para 45; C-308/06 *Intertanko*, para 51.

⁵¹ See PJ Kuijper, ‘From Dyestuffs to Kosovo Wine: From Avoidance to Acceptance by the European Community Courts of Customary International Law as a Limit to Community Action’ in IF Dekker, HHG Post (eds), *On the foundation and sources of public international law On the Foundations and Sources of International Law* (2003) 151; A Rosas, ‘With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts’ (2005) 1 *The Global Community - Yearbook of International Law and Jurisprudence* 217-29.

Conventions on the Law of Treaties of 1969 and 1986 and of the 1958 *Geneva Conventions on the Law of the Sea*⁵², codify customary international law⁵³. It is thus binding for the EU, even if either the Union or all its Member States are both the parties of all these treaties.

They can be incorporated into the EU legal order as such as general principles of (international) law. In this purpose, it should be examined if the given principle is recognized as reflecting customary international law and be considered as a codification of existing customary law in the law of the treaties.

Examples of the principles recognized in the jurisprudence of the CJEU can be given as follows:

a) The principles of the law of the treaties:

- *pacta sunt servanda*;
- *rebus sic stantibus*⁵⁴;
- *pacta tertiis nec nocent nec prosunt*⁵⁵;
- good faith⁵⁶;
- legitimate expectations as expressed in the art 18 VCLT, concerning the obligation to refrain from acts which would defeat the object and purpose of the treaty before its entry into force⁵⁷;
- the rules concerning the termination and the suspension of treaty relations⁵⁸ by reason of a fundamental change of circumstances⁵⁹. Thus the International Court of Justice held that “[t]his principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of

⁵² The Geneva Conventions of 29 April 1958 *on the Territorial Sea and the Contiguous Zone*, 516 UNTS 205), *on the High Seas* 450 UNTS 11; *on Fishing and Conservation of the Living Resources of the High Seas* 559 UNTS 285; the United Nations Convention of 10 December 1982 *on the Law of the Sea*, concluded and approved on behalf of the EC by Council Decision 98/392/EC of 23 March 1998, OJ 1998 L 179 1; Third Conference of the United Nations on the Law of the Sea, (1984) XVII Official Documents, Document A/Conf. 62/122 and corrections. The latter has not entered into force, but it is considered to express in many of its provisions the current state of customary international maritime law; see: judgments of the International Court of Justice in *the Delimitation of the Maritime Boundary in the Gulf of Maine Region Case (Canada v United States of America)* [1984] ICJ Rep 294, para 94; *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 30, para 27; *Military and Paramilitary Activity in and against Nicaragua Case (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 111-112, paras 212 and 214.

⁵³ C-405/92 *Mondiet*, para 13; A Rosas, ‘The Future of Mixity, in Mixed Agreements Revisited: the EU and its Member States in the World’, in Ch Hilion, P Koutrakos, *Mixed Agreements Revisited: The EU and its Member States* (2010) 367, 371; more on the process of codification of the international law within the framework of United Nations, see K Wolfke, *Rozwój i kodyfikacja prawa międzynarodowego, Wybrane zagadnienia z praktyki ONZ* (1972).

⁵⁴ C-162/96 *Racke*.

⁵⁵ C-386/08 *Brita*, EU:C:2010:91, para 41.

⁵⁶ C-308/06 *Intertanko*.

⁵⁷ T-115/94 *Opel Austria*.

⁵⁸ C-162/96 *Racke*; C-366/10 *ATAA*, EU:C:2011:864.

⁵⁹ C-162/96 *Racke*, para 45, 46.

the termination of a treaty relationship on account of change of circumstances⁶⁰;

- rules of interpretation in the law of the treaties⁶¹, enshrined in particular in the Art. 31 of the VCLT of 1969;
- b) legal personality of States:
 - the scope of jurisdiction under international law⁶²;
 - rules of responsibility of the States or international organizations⁶³;
 - The rules of nationality (of persons and ships)⁶⁴;
 - International obligation of States to admit their own nationals to their territory⁶⁵;
 - The immunities under the international law⁶⁶;
- c) Principles of the international maritime⁶⁷ and air law⁶⁸:
 - no State may validly purport to subject any part of the high seas to its sovereignty;
 - freedom to fly over the high seas⁶⁹;
 - complete and exclusive sovereignty of every State over its airspace;
 - aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty;
- d) Protection of human rights:
 - International Bill of Rights: *Universal Declaration of Human Rights*; the *International Covenant on Civil and Political Rights*; the *International Covenant on Economic, Social and Cultural Rights*⁷⁰, binding not only

⁶⁰ Judgment of 2 February 1973, *Fisheries Jurisdiction (United Kingdom v Iceland)* [1973] ICJ Rep 3, para 36.

⁶¹ In case C-386/06 *Brita*, para 40 the CJ held that: "The international law of treaties was consolidated, essentially, in the Vienna Convention. Under Article 1 thereof, the Vienna Convention applies to treaties between States. However, under Article 3(b) of the Vienna Convention, the fact that the Vienna Convention does not apply to international agreements concluded between States and other subjects of international law is not to affect the application to them of any of the rules set forth in that convention to which they would be subject under international law independently of the convention".

⁶² Joined cases 89,104,114,116,117 and 125-129/85 *Ahlström Osakeyhtiö*, EU:C:1988:258; C-366/10 *ATAA*. C-63/09 *Axel Walz*, EU:C:2010:251 in reference to the Montreal Convention on the International Carriage by Air, OJ L 194 , 18/07/2001, p. 39 – 49.

⁶³ Draft Articles on the Responsibility of International Organisations of the International Law Commission, UN Doc A/66/10 para. 87, Yearbook of the International Law Commission 2011, Vol. II, part 2; MD Evans, P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (2013).

⁶⁴ C-200/02 *Chen*, EU:C:2004:639, para 37; C-135/08 *Janko Rottmann*, EU:C:2010:104, paras 39,48, 53.

⁶⁵ 42/74 *Van Duyn*, para 22.

⁶⁶ C-364/10 *Hungary v Slovakia*, EU:C:2012:630, para 44.

⁶⁷ Geneva Conventions; see also the judgment of the Permanent Court of International Justice of 7 September 1927 in *the Case of the S.S Lotus*, PCIJ 1927, Series A, No 10, 25.

⁶⁸ *Open Skies Agreement between Europe and the United States*, Decision 2007/339/EC, OJ L134 of 25.5.2007; judgment of the International Court of Justice of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*[1986] ICJ Rep 392, para 212.

⁶⁹ *Chicago Convention on International Civil Aviation*, Doc 730, ICAO.

⁷⁰ For their status of international customary law, see: H Lauterpacht, *International Bill of Rights of Man* (1945).

States, but on every individual and every organ of society⁷¹;

- The Court of Justice of the EU recognized the general principles of Union law as the legal source as far as fundamental rights are concerned⁷²;

- The ECHR expresses the rules of custom, applied within the EU law. The Court of Justice of the EU relies on the case law of the ECHR in the same way as it relies on its own rulings⁷³;

e) The general principles of law are applicable within the EU legal system where no special rules have been adopted. This is the lacunae filling in order to avoid a *non liquet*⁷⁴.

To close the considerations and the scope of customary rights and duties to be attributed to the EU, one more comment might be made about the limits to the recognition of customary law in EU law. That will be the rules of the customary international law, inconsistent with the constitutional foundations of the EU. In the light of the Kadi case, “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Treaties”⁷⁵ and they cannot form the part of the EU legal order. Especially, the rule of customary international law *inadimplenti non est adimplendum* can be indicated, as contrary to the loyalty clause enshrined in art. 4(3) TEU⁷⁶.

In conclusion - international law is binding for the EU in exercising its powers. The European Union must in this respect encompass provisions of the treaties to which it is not a party but which codify the custom⁷⁷, and custom that has not been codified⁷⁸. Once international law is binding within the EU legal order, it can be applicable: directly - as basis for validity review of legislative acts of the EU, and indirectly - interpretation of the EU law in consistency with international law.

II. SCOPE OF THE APPLICATION

1. Consistent interpretation of the customary international law and the EU law – indirect applicability

⁷¹ Preamble to the Universal Declaration on Human Rights, UN General Assembly Res. 217 A(III), 10.12.1948.

⁷² 29/69 *Stauder v City of Ulm*, 1969:57.

⁷³ More on this subject, see H Uerpmann-Witzack (n 35) 137ff.

⁷⁴ For literature on this matter, see: H Lauterpacht, *The Function of Law in International Community* (2011); S.C. Neff, ‘In Search of Clarity: Non Liqueur and International Law’ in KH Kaikobad, M Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice – Essays in Honour of Colin Warbrick* (2009) 63.

⁷⁵ C-402/05 P and C-415/05 P *Kadi*, para 285.

⁷⁶ Cases 232/78 *Commission v French Republic*, EU:C:1979:215; 325/82 *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:1984:60, para 11: “(...) a Member State cannot, in any circumstances, plead the principle of reciprocity and rely on a possible infringement of the treaty by another member state in order to justify its own default. Nor, therefore, can a Member State rely on the principle of reciprocity to contest the admissibility of an action brought against it for failure to fulfil its obligations”.

⁷⁷ C-162/96 *Racke*.

⁷⁸ C-286/90 *Poulsen*.

The rules of customary international law which are binding for the EU must be respected in the exercise of the powers of its institutions and they have primacy over the acts of the EU institutions. As was demonstrated by the CJEU in the Poulsen decision⁷⁹, the primacy of those rules means that provisions of the secondary EU legislation must be interpreted in a manner that is consistent with them, as far as it is possible⁸⁰, irrespective of whether the provisions in question expressly refer to the provisions of international law or not. Therefore, the Court of Justice of the EU is being confronted with the question of the consistency with the customary international law each time it is analysing the interplay between EU law and international law⁸¹, and each time the result envisaged by international law must be attained in EU law, directly or indirectly. This reasoning is also justified in relation to the provisions of customary law by the Article 216 (2) TFEU stipulating that international agreements are binding, although the principle of the priority is not expressly provided. In fact, the Court held that “the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, *so far as possible*, be interpreted in a manner that is consistent with those arguments”⁸². Also customary international law was referred to only with regard to the interpretation of acts adopted by EU institutions⁸³.

The consistent interpretation is the method to assure the automatic applicability of customary international law with the priority over the conflicting domestic (EU) provisions and by the medium of domestic provisions. This principle is the manner to avoid the possible conflict of laws and to designate the extent and the limits to which the EU legislation should be interpreted in conformity with the customary international law. These are thus the questions of the great practical importance, examined by the CJEU in the abovementioned C-286/90 *Poulsen* case in a preliminary ruling concerning the scope of application of the regulation (Council Regulation (EEC) No 3094/86 and its Article 6(1)(b)) providing technical measures for the conservation of fisheries resources. The Court of Justice held that the “Article 6 of the Geneva Convention of 29 April 1958 on *Fishing and Conservation of the Living Resources of the High Seas* recognizes the interest of coastal States in the living resources in the part of the high sea adjacent to the waters within their jurisdiction. In the light of the aims of the prohibition laid down in Article 6(1)(b) of the Regulation, this provision must be interpreted so as to give it the greatest practical

⁷⁹ C-286/90 *Poulsen*, para 9.

⁸⁰ C-286/90 *Poulsen*: “...the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 (...of the Regulation) must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea; C-402/05 P and C-415/05 P *Kadi*, para 291; and C-366/10 *ATAA*, para 123.

⁸¹ D Simon, ‘La panacée de l’interprétation conforme: injection homéopathique ou thérapie palliative?’ in *De Rome à Lisbonne: les juridictions de l’Union européenne à la croisée des chemins, Mélanges en l’honneur de P Mengozzi* (2013) 279, 280 and 285.

⁸² C-61/94 *Commission of the European Communities v Federal Republic of Germany*, EU:C:1996:313, para 52;

T-201/04 *Microsoft Corp. V Commission of the European Communities*, EU:T:2007:289, para 13;

⁸³ C-405/92 *Mondiet*, paras 11-16; C-286/90 *Poulsen*, para 11; C-386/08 *Brita*.

effect, within the limits of international law”⁸⁴. The Poulsen case is thus a firm confirmation that the customary international law may provide the rules of interpretation and the meaning for the EU provisions. However, the principle of consistent interpretation is applicable to the EU to the extent that the Union is an autonomous international organization with *sui-generis* legal order.

The above mentioned issue was considered by the CJEU in the *Aboubacar Diakité* case⁸⁵. This was the request of the Council of State in Belgium for a preliminary ruling on the interpretation of the directive⁸⁶ in proceedings between Mr Diakité and the Commissioner General for Refugees and Stateless Persons. The request concerned the decision of the Commissioner not to grant Mr Diakité the subsidiary protection. Mr Diakité was a Guinean national who applied twice for the refugee status or subsidiary protection in Belgium but in both cases he was refused. He then brought an appeal against that twofold decision before the *Conseil du contentieux des étrangers*, which upheld the refusal of the Commissioner General. The latter judgement was the subject of appeal in cassation of Mr Diakité before the Council of State of Belgium the definition of “armed conflict” used by the International Criminal Tribunal for the Former Yugoslavia (ICTFY) in order to find that the condition laid down in Belgian domestic law⁸⁷ – that there must be an armed conflict – has not been met. In that context, the referring court held that, it is possible that, as Mr Diakité asserts, the concept of “armed conflict” in EU law as referred to in the directive may have a different meaning and be interpreted independently from the concept of “armed conflict” in the interpretation of the ICTFY. In those circumstances, the Council of State decided to ask the CJEU for the preliminary ruling with questions whether the EU directive 2004/84 and especially the EU concept of “internal armed conflict” must be defined in consistency or independently of the international humanitarian law (four Geneva Conventions of 1949⁸⁸).

In his opinion to this case, advocate general Mengozzi⁸⁹ referred to the art. 3(5) TEU stipulating that the “Union shall contribute to the strict observance and the development of international law” and then recalled that although it is common ground that the EU is not party to the Geneva Conventions, the International Court of Justice (ICJ) has held that those acts

⁸⁴ C-286/90 *Poulsen*, para. 11.

⁸⁵ C-285/12 *Aboubacar Diakité*, EU:C:2014:39;

⁸⁶ Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 *on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, OJ 2004 L 304/12, and – corrigendum – OJ 2005 L 204/24.

⁸⁷ The Law of 15 December 1980 *on the admission, residence, establishment and repatriation of foreign nationals*.

⁸⁸ Geneva Conventions of 12 August 1949 (Convention (I) for the *Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*; Convention (II) for the *Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*; Convention (III) relative to the *Treatment of Prisoners of War*; and Convention (IV) relative to the *Protection of Civilian Persons in Time of War*).

⁸⁹ ECLI:EU:C:2013:500

express "intransgressible principles of international customary law"⁹⁰. As such, they bind the institutions, including the CJEU, which must guarantee a reading of EU law consistent with those principles⁹¹. However, finally the advocate general concluded that the concept of "internal armed conflict" is used in the directive for a different purpose than the "non-international armed conflict" as a notion of the international humanitarian law.

The reasoning of the advocate general was then followed by the CJEU. It held that international humanitarian law, on the one hand, and the subsidiary protection regime introduced by Directive 2004/83, on the other, pursue different aims and establish quite distinct protection mechanisms⁹². Since there is no definition of "internal armed conflict" in the EU law, it should be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part⁹³. This way the Court finally adopted a standpoint of the autonomous interpretation of the notion of internal armed conflict, independent and distinct from the international humanitarian law⁹⁴.

The general conclusion resulting from the Aboubacar Diakité case confirms the pluralist frame of the EU legal engagement within the different branches of international law. The determining factor in this case was the purpose was not common to the international and European law. Whereas the interaction between the legal regimes demands the commonality of purpose.

2. Direct applicability of the customary international law of the EU legislation

The European Union is obliged to respect international law in all its actions. Therefore, the validity of an act of the EU institution may be affected by its incompatibility with the rules of international law in general, and particularly with international customary law. The issue of the consistency with the customary international law of the EU legislation touches the question if the provisions of international customary law may be granted direct effect and set aside conflicting EU law (direct invocability of customary international law). The procedural consequences might be also be that the provisions of international customary law could be relied upon within the EU for the purposes of judicial review of the validity of acts of EU institutions by virtue of the Articles 263⁹⁵ and 267⁹⁶ TFEU. Legal

⁹⁰ ICJ, advisory opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para 79.

⁹¹ [1996] ICJ Rep 226, para 26.

⁹² C-285/12 *Aboubacar Diakité*, para 24.

⁹³ C-549/07 *Wallentin-Hermann*, EU:C:2008:771, para 17, C-119/12 *Probst*, EU:C:2012:748, para 20.

⁹⁴ C-285/12 *Aboubacar Diakité*, para 36.

⁹⁵ Review of the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

⁹⁶ Legal provisions governing this procedure: Articles 19(3)(b) TEU and 267 TFEU.

context of the preliminary ruling proceedings obliges the CJEU to examine the validity of acts of EU institutions and their compliance with a rule of international law⁹⁷. Legal provisions governing this procedure under EU Treaties can be found in the Articles 19(3)(b) TEU and 267 TFEU⁹⁸. In particular, the legal problem is to determine the terms and criteria, when the provisions of customary international law may confer on private parties - subjects to EU law the right to rely on the custom in legal proceedings, also in order to contest the validity of an act of EU law.

In principle, general international law may be directly applicable. However, for the the international customary law, it comes from its legal characteristics, that it is unwritten in form, addressed to States, and private parties are only the beneficiaries of these provisions. However, it is not precluded that international customary law was clear and precise enough to be self-executing - it is at least capable to direct effect - but usually it is vague and without a sufficient precision to create subjective rights that can be invoked before a national court⁹⁹. As the CJ ruled in *Racke* case: “(...) an individual relying in legal proceedings on rights which he derives directly from an agreement with a non-member country may not be denied the possibility of challenging the validity of a regulation which, by suspending the trade concessions granted by that agreement, prevents him from relying on it, and of invoking, in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations”¹⁰⁰. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.

The ATAA¹⁰¹ was another case, when the CJ was called upon to examine the validity of the European legislation. It concerned the EU’s approach to the problem of global warming and the aviation industry in the light of various international agreements, especially *Chicago Convention*¹⁰², *Kyoto Protocol*¹⁰³ and *Open Skies Agreement*¹⁰⁴ between the EU and the United States of America. In particular, it concerned the issue of the compatibility of the Directive 2008/101¹⁰⁵ with three principles of customary international law, such as: the principle that each State has complete and exclusive sovereignty over its airspace; the principle that no

⁹⁷ Joined Cases 21/72 to 24/72 *International Fruit Company and Others*, EU:C:1972:115, para 6; C-162/96 *Racke*.

⁹⁸ To this effect, see: C-308/06 *Intertanko*, para. 43.

⁹⁹ F Martines, ‘Direct Effect of International Agreements of the European Union’ (2014) 25 *European Journal of International Law* 144.

¹⁰⁰ C-162/96 *Racke*, para 51.

¹⁰¹ C-366/10 ATAA, EU:C:2011:864, paras 52-54

¹⁰² 15 UNTS 295.

¹⁰³ OJ 2002 L 130/4 (2303 UNTS 148).

¹⁰⁴ OJ 2007 L 134/ 4.

¹⁰⁵ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ 2009 L 8/3.

State may validly purport to subject any part of the high seas to its sovereignty; the principle of freedom to fly over the high seas. The case was very important for the development of the doctrine of the EU law, since, as advocate general Kokott noted in her opinion, the CJ was asked for the first time to determine the criteria for principles of customary international law to serve as a standard providing grounds for the judicial review of secondary EU law¹⁰⁶. In previous cases the customary international law was invoked before the CJEU in a view of interpretation of the EU law¹⁰⁷. In the opinion of the advocate general, principles such as these cannot be relied upon as a benchmark against which the validity of EU acts can be reviewed in legal proceedings brought by natural or legal persons. Such principles are, by their very nature and broad logic, by no means capable of having an effect on the legal status of individuals, unless two conditions are satisfied. First, there must exist a principle of customary international law that is binding on the European Union. Secondly, the nature and broad logic of that particular principle of customary international law must not preclude such a review of validity; the principle in question must also appear, as regards its content, to be unconditional and sufficiently precise¹⁰⁸ and with keeping in mind the exceptional position of certain rules of customary international humanitarian law¹⁰⁹.

The Court of Justice took, however, a different position in regard to the direct effect of the rules of the customary international law and set out the requirements. Firstly, the Court held that these rules may be relied upon by an individual for the purpose of the examination by the CJ of the validity of an act of the EU in so far as those principles are capable of calling into question the competence of the European Union to adopt that act¹¹⁰. This is the way to determine whether the EU has the competence to adopt an act in question or has acted *ultra vires*¹¹¹. Secondly, the act in question may be

¹⁰⁶ Opinion of advocate general Kokott in ATAA, para 109; In C-162/96 *Racke* case the claimant was incidentally challenging the validity of a Community regulation in order to rely upon rights which it derived directly from an agreement of the Community with a non-member country. Another example could be the *Opel Austria* case, paras 93 and 94, when the Court of First Instance applied the general principle of EU law of protection of legitimate expectations which is also the corollary of the principle of good faith under customary international law. However, ultimately the benchmark for the validity of the disputed EU act was an international agreement (the EEA Agreement) rather than a general principle of EU law or customary international law (*Opel Austria*, para. 95); for an extensive commentary on this case law, see J Wouters, D van Eeckhoutte, Giving Effect to Customary International Law, Institute for International Law, Working Paper No 25 – June, KU Leuven 2002, under the internet address: <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf>; see also K Lenaerts, ‘Direct applicability and direct effect of International Law in the EU legal order’ in I Govaere, E Lannon, P Van Elswege, S Adam (eds), *The European Union in the World, Essays in Honour of Marc Maresceau* (2014) 60.

¹⁰⁷ C-386/08 *Brita*, C-63/09 *Axel Walz*.

¹⁰⁸ Opinion, para 113.

¹⁰⁹ See also the opinion delivered by advocate general Jacobs in C-162/96 *Racke*, final sentence of point 84.

¹¹⁰ see Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö*, para 14 to 18, and C-405/92 *Mondiet*, paras 11 to 16.

¹¹¹ This focus on the EU’s practice only in areas of its exclusive competence suggests an emphasis solely on acts by the EU that are state-like in the Sixth Committee of the General

liable to affect rights which the individual derives from EU law or to create obligations under EU law in his regard¹¹²; it means the rule of international customary law must be linked with the legal position of the individual. Moreover, the CJ raised an argument that since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the EU made manifest errors of assessment concerning the conditions for applying those principles¹¹³. These considerations show that when the question of direct effect of the customary rule is posed, the CJEU posited that the level of precision of these rules is such that the main legislative institutions (Commission and Council) have in fact, a right to greater discretion in their acts than normally¹¹⁴. Especially, in comparison to the international agreements, since a principles of customary and treaty law do not have the same degree of precision, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the EU made manifest errors of assessment concerning the conditions for applying those principles¹¹⁵. This is the fundamental condition under which the rule of the customary international law may have a direct effect on individual rights. The mentioned condition differentiates the criteria of direct applicability and the direct effect of the international customary law and international agreements. For the latter, the direct applicability of an international agreement operates as a prerequisite for its provisions to produce direct effect¹¹⁶. It is therefore concluded that even though the international law forms an integral part of the EU, there is at the same time a selective approach within the EU law towards agreements and customary law. Ultimately, the CJEU is more cautious in granting direct effect of the customary international law, which makes the EU law not totally open to the international law. These shortcomings in the conditions of the EU legal regime seem to be compensated by the harmonious interpretation that very often can come very close to direct effect¹¹⁷.

FINAL CONCLUSIONS

Jurisdiction of the CJEU confirms that the EU, as the international organization, contributes to the observance and the development of international law. Consequently, every institution of the EU is bound by

Assembly in UN; For more details, see: SD Murphy, *The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission* (2015); A Megzari, *The Internal Justice of the United Nations: A Critical History 1945-2015* (2015) 431.

¹¹² C-366/10 ATAA, para 107.

¹¹³ C-366/10 ATAA, para 110.

¹¹⁴ C-162/96 *Racke*, paras 50-61; PJ Kuijper (n 40) 106.

¹¹⁵ C-366/10 ATAA, para 110; C-162/96 *Racke*, para 52.

¹¹⁶ K Lenaerts (n 106) 64.

¹¹⁷ C-89/99 *Schieving Nystad*, EU:C:2001:438.

international law in its entirety - including customary international law and in any action - also in the legislation and the application of European law. But first it must be bound by those rules (see cases: International Fruit Company and Intertanko).

The customary international law to which the EU is a party shall be called upon by the European judiciary in relation to the interpretation of provisions and principles of EU law in the light of customary international law (indirect effect). It may be also relied upon to examine the validity of an act of EU where the nature and the broad logic of the customary provision in question do not preclude this (direct effect). Finally, for the purpose of examining if the EU act is legal, not only the nature and the broad logic of the customary provision must permit it, but it is also necessary that the it should be unconditional and sufficiently precise as far as regards the content is regarded (see: Intertanko case, para 45).

Although the direct applicability of the customary international law is admissible from the theoretical and legal point of view, in practice it is very doubtful, because of its unwritten form and the lack of precision. Also, the lack of democratic legitimacy may prevent the customary international law from being assessed by the courts on the merits of the case. For this reason, it must be pointed out that the interpretation of EU law in conformity with international customary law – and not the judicial review of the validity of the EU secondary legislation - is the most frequent tool of effectivity of the customary international law within the framework of EU law. A further significant factor of the principle of consistent interpretation is that it can be considered as a method which enables the Court to avoid the question of the direct effect and the need to set aside the provision of EU law. It is therefore an extremely important tool in judicial protection and of development of the EU law with a possible consequence of *ultra vires* (see: Poulsen case). The customary international law can therefore serve also to define the limits of the CJEU jurisdiction and powers of the EU institutions.

Following the rulings of the CJEU, there is a clear confirmation that the key reference to the customary international law consists of providing the rules of interpretation and the meaning for the EU provisions. However, the principle of consistent interpretation of the EU law in the light of customary international law has limits. It is applicable to the EU to the extent that the Union is an autonomous international organization with *sui-generis* legal order. On this basis the CJEU reserves the exclusive competence to determine the scope of the influences of the international law on the EU legal system. It thus exercises the effective control over the process of the “internationalisation” of the EU. This is an ongoing two-way process consisting not only of reinforcing the role of (customary) international law within the EU, but also of the impact of the EU on international law by introducing the objectives and aims provided by EU treaties in external relations. So even if the CJEU is generally open to international law, it demonstrates at the same time the independence in relation to international law, as far as that the principal foundations of the EU legal regime can not be violated nor undermined, thereby safeguarding its autonomy. These are the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU.

Does it mean that the sought-after balance between the two legal systems expressed in legal obligation of the EU to “respect international law in the exercise of its powers” (see cases: *Kadi*, *Intertanko*) is not to be fulfilled? For sure not, as long as the Article 47 TEU stipulating that the EU shall have legal personality is in force and the legal personality of the international organizations is governed by the customary international law.

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