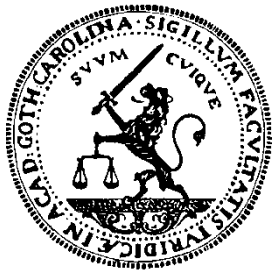

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"Like Ships in the Night"[1]

A thesis on the relationship between the EU and international law, and whether the implementation of UNSC Resolutions into the EU legal order has developed a rule of particular customary international law for the EU member states?

LAGF03 Essay in Legal Science

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[1] Opinion of AG Maduro in Joined cases C-402/05 P and C-415/05 P *Kadi* and *Al Bakaraat Int. Foundations* (2008), para. 22.

Contents

Summary

From an international legal perspective, the EU has a special character which makes it different from other international organizations. Most notably, the EU has a high degree of autonomy from both international law and the member states' domestic legal systems. In legal doctrine, it has been suggested that this creates a "complex triangular relationship" between domestic law, EU law and the international legal order.

This thesis focuses on normative conflicts which may arise between the UN Charter and primary EU legislation when the EU implements UNSC decisions made on the basis of Chapter VII UN Charter. I argue that the limitations set by the CJEU in the ground-breaking *Kadi Case* (C-402/05 P) upon Union measures implementing UNSC Resolutions, have led to the development of a rule of particular customary law within the EU. The content of this rule is that the EU member states may prioritize fundamental principles enshrined in the primary EU treaties over an UNSC Resolution found to infringe on said principles, and refuse to apply the Resolution within the EU. However, it is uncertain how this rule would be received in the international community, and whether the rule could legitimize the EU member states derogating from their obligations under the UN Charter.

When UNSC Resolutions are found to infringe on fundamental principles of EU law, the EU member states are put in a difficult position, as they have to choose whether to prioritize international or EU law. This highlights the complexity of the "triangular relationship" between the EU, its member states and binding international law.

Sammanfattning

Ur ett folkrättsligt perspektiv har EU en säregen karaktär, som gör att Unionen skiljer sig från andra internationella organisationer. Framför allt har EU åstadkommit en höggradig autonomi från såväl det internationella samfundet som medlemsstaternas nationella rättssystem. I doktrinen har anförts att detta skapar ett ”komplext triangulärt förhållande” mellan nationell rätt, EU-rätt och folkrätt.

Denna uppsats fokuserar på normkonflikter som kan uppstå mellan FN-stadgan och primärrättsliga EU-fördrag, när EU implementerar beslut som FN:s säkerhetsråd har fattat på basis av kapitel VII FN-stadgan. Min slutsats är att EU-domstolens banbrytande avgörande *Kadi* (C-402/05 P) kan sägas ha skapat en partikulär sedvanerättslig regel inom EU, som ger EU:s medlemsstater rätt att prioritera EU-rättens fundamentala principer, skyddade av primärfördragen, framför en resolution av FN:s säkerhetsråd som inkräktar på dessa principer, och därmed vägra att tillämpa resolutionen inom EU. Det är emellertid oklart om denna sedvanerättsliga regel skulle accepteras av det internationella samfundet som ett legitimt skäl för EU-staterna att åsidosätta sina skyldigheter enligt FN-stadgan.

När en resolution av säkerhetsrådet inkräktar på EU-rättens fundamentala principer så sätts medlemsstaterna i en svår sits, eftersom de måste välja om de ska prioritera sina folkrättsliga eller EU-rättsliga förpliktelser. Detta illustrerar komplexiteten i det ”triangulära förhållandet” mellan EU, dess medlemsstater och bindande folkrättsliga normer.

Abbreviations

AG	Advocate General
CFI	Court of First Instance (now General Court)
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
ICJ	International Court of Justice
ICJ St.	Statute of the International Court of Justice
i.e.	in effect
ILA	International Law Association
ILC	International Law Commission
N/A	Not Applicable
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Essay topic

Since its creation, the EU has claimed autonomy from the international legal order. In *Van Gend en Loos,* the CJEU determined that the Union formed "a new legal order of international law".[2] The EU has also claimed autonomy from its member states. In *Costa v ENEL,* the CJEU defined EU law as "an independent source of law" which held primacy over domestic law.[3]

That the EU claims autonomy from international law does not mean that is indifferent to international law. The CJEU has confirmed that international law form "an integral part of Community law"[4] and that the EU "must respect international law in the exercise of its powers"[5]. These statements have subsequently been codified in the primary treaties of the Union.[6]

By implementing international legal instruments in the EU legal order, the instruments become regulated by EU law. International legal scholars Nollkaemper, Wouters and de Wet argue that this has resulted in "a complicated triangular relationship", as the EU member states are bound by international law in their domestic legal relations, whilst also being bound by EU law and "Europeanised" international instruments.[7]

This thesis focuses on normative conflicts that may arise when binding UNSC Resolutions are implemented into the EU legal order. The UNSC's primary responsibility is to maintain international peace and security.[8] To fulfil this responsibility, the UNSC can make binding decisions on the basis of Chapter

[2] Case 26/62 *Van Gend en Loos* (1963), p. 12.
[3] Case 6/64, *Costa v. ENEL* (1964), p. 593.
[4] Case 181/73, *Haegeman* (1974), para. 5.
[5] C- 286/90, *Poulsen and Diva Navigation* (1992), para. 9. See also C-162/96 *Racke* (1998), para. 45.
[6] See section 2.2.
[7] Nollkaemper, Wouters & de Wet (eds.), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (The Hague: TMC Asser Press, 2008), p. 3 and 8-10.
[8] This follows from *Charter of the United Nations* (1945), UNTS N/A, art. 24(1).

VII UN Charter, which all UN member states have to respect and implement.[9] According to art. 103 UN Charter such decisions have "prevailing effect" over other international agreements. This means that in case of a normative conflict, the UN Charter holds primacy.[10]

When UNSC Resolutions are implemented in the EU, the content and effects of those resolutions may infringe on fundamental values of the EU legal order.[11] In such situations, the extent to which the Union must respect international law become a matter for interpretation by the CJEU, and the court has to take a stance on how far EU law should go to uphold the primacy UN Charter. Such an assessment has implications also for the international legal order. This is reflected in AG[12] Maduro's opinion to the *Kadi Case*[13], where he insisted that the Union's autonomy from international law did not mean that the EU and international legal orders "pass by each other like ships in the night."[14]

AG Maduro further considered that the CJEU's ruling would only have direct effect on the internal legal order of the EU. If the judgement would preclude the Union and its member states from implementing UNSC Resolutions "the legal consequences within the international legal order remain to be determined by the rules of public international law".[15]

1.2 Aim and purpose

The aim of this thesis is to analyse the impact of normative conflicts which may arise between the UN Charter and primary EU legislation when the EU implements UNSC decisions made on the basis of Chapter VII UN Charter.

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[9] This follows from art. 25 and 48(1) UN Charter.
[10] Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (3rd Edition, Oxford: Oxford University Press, 2012), p. 850-851.
[11] See section 2.2.
[12] Advocates Generals belong to the ECJ and their role is to present the court with an opinion on how to determine a case. Court of Justice of the European Union, "Court of Justice", *CURIA*, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/, accessed 12 December 2020.
[13] See section 2.4.
[14] Opinion of AG Maduro in *Kadi* and *Al Bakaraat Int. Foundation,* para. 22.
[15] Opinion of AG Maduro in *Kadi* and *Al Bakaraat Int. Foundation,* para. 39.

My purpose is to assess to what extent internal developments in the EU legal order have had external impact on international law, through the development of particular customary international law.[16]

1.3 Research questions

The main question that the thesis seeks to answer is to what extent the implementation of international legal instruments in the EU legal order, with a focus on binding decisions made by the UNSC on the basis of Chapter VII UN Charter, has led to the development of a rule of particular customary law within the realm of the EU legal order?

An answer to the main research question requires me first answering several interrelated questions:

1. What defines EU's special character as an international organization?
2. Which treaty-based obligations do the EU and its member states have when implementing UNSC decisions made on the basis of Chapter VII UN Charter?
3. How are decisions made on the basis of Chapter VII UN Charter implemented in the EU legal order?
4. According to CJEU case law, what is the relationship between primary EU law and Chapter VII UN Charter, in light of the implementation of Chapter VII-decisions through the adoption of secondary legislative acts?

1.4 Limitations

With regard to the implementation of "international legal instruments" into the EU legal order, I focus on the implementation of UNSC decisions made on the basis of Chapter VII UN Charter. However, when analysing the EU implementation of Chapter VII-decisions, I also have to assess to which

[16] See section 2.5.

extent the Union has "assumed competence"[17] over the UN Charter, as this affects to what extent the development of EU law may impact the development of international law.

When analysing the EU legal order, my focus is on primary EU law post-Lisbon. I have wanted to limit myself to the normative aspects of the research issue. I do not attempt to interpret secondary legislative acts in detail, as my focus is on questions of law and not matters of fact.

With regard to case law, my main focus is on the *Kadi Case* (C-402/05),[18] as it was in this case the CJEU assessed the relationship between EU law and Chapter VII of UN Charter. *Kadi* was joined with *Al Bakaraat Int. Foundation* (C-415/05), but it is only with regard to the former that I make a detailed assessment of the court's arguments. I focus on the relationship between EU law and the UN Charter and the limits of the CJEU's judicial review, but I do not assess whether the secondary legislation was made on the proper legal basis or constituted a *de facto* breach of fundamental rights.

1.5 Method and material

Generally, I use a legal dogmatic method with an international perspective. This means that I base my analysis on clearly defined research questions and apply generally accepted sources of international law to find the answers to said questions.[19] International legal sources have a specific hierarchy, described in art. 38(1) ICJ St., which I follow in my thesis. This means I use primary sources (i.e., international treaties, general principles and rules of general customary law)[20] as my starting point, while legal doctrine is used as "subsidiary means"[21] to further strengthen my analysis.

[17] "Assumed competence" was coined by the CJEU in the Joined Cases 21-24/72, *International Fruit Co.* (1972)*,* para. 14-15.
[18] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Bakaraat Int. Foundations*, 3 September 2008.
[19] Kleineman, "Rättsdogmatisk metod" in Nääv & Zamboni (eds.), *Juridisk Metodlära* (2nd Edition, Lund: Studentlitteratur, 2018), p. 21-23.
[20] *Statute of the International Court of Justice* (1945), UNTS N/A, art. 38(1)(a)-(c).
[21] Art. 38(1)(d) ICJ St.

As primary sources, I use treaty provisions UN Charter[22] and primary treaties of the EU, as well as rules of international customary law and general principles on the development of such rules. As for doctrine, I use the works of distinguished scholars within the fields of EU and international public law to strengthen the analytical parts of my thesis. I use their work to explain the EU's special character as an international organization, to assess the extent of the obligations arising under Chapter VII UN Charter, and to describe the concept of customary international law.

As a feature of my legal dogmatic method, I use an EU legal method to understand the specific characteristics of the EU legal order. My starting point is that the EU is a new, autonomous and multi-layered organization.[23] The CJEU holds a prominent role in shaping the EU legal order, especially when it comes to the protection of fundamental rights.[24] Therefore, I have considered CJEU case law extensively when writing my thesis.

I have a development perspective on the EU legal order, where I assess the development over time – and in light of CJEU case law – of the EU's character as an organization and its position in the international legal order.

1.6 Previous research

This thesis focuses on the relationship between the EU and international legal orders, and more specifically, on the possibility of EU law developing into a particular customary law, particular for EU member states.

Rather much has been written by EU jurists on the impact of the *Kadi Case* on the EU legal order,[25] and by international legal scholars on the Union's

[22] Specifically, I use provisions of Chapter VII UN Charter and procedural rules regulating to the implementation of Chapter VII decisions.
[23] Reichtel, "EU-rättslig metod", in Nääv & Zamboni (eds.), p. 109.
[24] Reichtel in Nääv & Zamboni (eds.), p. 118.
[25] See for instance Koutrakos, *EU International Relations Law* (2nd Edition, Oxford: Hart/ Bloomsbury Publishing, 2015), p. 212-216 and 219-226; and Wessel, *Close Encounters of the Third Kind: The Interface between the EU and International law after the Treaty of Lisbon* (Stockholm, Sieps, 2013:8), p. 22-35.

standing in the international legal order.[26] However, the relationship between EU law and international law have received comparatively little attention. Furthermore, not much has been written within international law on particular customary law and to what extent international organizations – such as the EU – may influence the development of customary law. More recently, the ILC have included these topics in their reports, [27] and some international legal scholars, most notably Karol Wolfke,[28] has written about particular customary law in their works.[29]

To summarize, I believe that extent to which the EU may impact the international legal order through the development of particular customary law, is an unexplored topic in both international and EU law. Hence, it is my view that this thesis will fill a theoretical gap within international law, as well as between EU law and international law.

1.7 Disposition

The dissertation part of my thesis is structured as follows: *firstly*, I describe the special character of the EU as an international organization, to explain the EU's role within the international legal order. *Secondly,* I give an overview of primary EU law regulating the relationship between EU law and international law. *Thirdly*, I outline the relevant rules UN Charter, to assess which obligations the EU and its member states have in relation to UNSC decisions made under Chapter VII UN Charter. *Fourthly,* I explain how such decisions are integrated into the EU legal order. *Fifthly,* I assess what impact the *Kadi Case* has had on the relationship between primary EU law and

[26] See for instance de Witte, "The Emergence of a European System of Public International Law: The EU and its Member States as Strange Subjects" in Nollkaemper, Wouters & de Wet (eds.), p. 39-54 and Tsagourias "Conceptualizing the Autonomy of the European Union" in Collins & White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (London: Routledge, 2011), p. 339-352.
[27] Its most extensive analysis can be found in ILC "Third report on identification of customary international law" (2015), A/CN.4/682, para. 68-84.
[28] Wolfke, *Custom in Present International Law* (2nd Edition, Dordrecht: Martinus Nijhoff Publishers, 1993), p. 88-90.
[29] See section 2.5.

binding international law. *Sixthly,* I describe the concept of particular customary law, i.e. what it is and how it is developed.

Upon my dissertation follows a discussion, where I analyse my observations to find an answer to my main research question. I then conclude my thesis.

2 Dissertation

2.1 The EU's special character as an international organization

Which type of organization the EU is has not been specified in the primary treaties of the Union,[30] but has instead been decided by the CJEU. In *Van Gend en Loos,* the court held that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields."[31] The EU has also made itself autonomous from its member states.[32] In *Costa v. ENEL,* the CJEU confirmed that the EEC Treaty had created a new legal order, integral to and yet independent from the domestic legal orders of the EU member states, and that EU law formed "an independent source of law" which had primacy over domestic law.[33]

At first glance, the EU seems to fit into the international legal definition of an international organization. The ILC defines an international organization as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality".[34] According to art. 47 TEU, the EU possesses legal personality.

Nevertheless, the EU has some qualities that makes it different from other international organizations. International legal scholar Jan Klabbers describe how international organizations usually are inter-governmental in their

[30] The member states have described the EU as a "communauté", see *Treaty establishing the European Coal and Steel Community* (ECSC Treaty, 1951), 11951K/TXT, article premier and *Treaty establishing the European Economic Community* (Treaty of Rome, 1957), 11957E/TXT, art. 1.; or a "union", see the *Treaty on European Union* (Maastrich Treaty, 1992), 11992M/TXT, art. 1 and the *Consolidated version of the Treaty on European Union* (TEU, 2016), OJ C 202, art. 1, without relating this to any potentially applicable definition within international law.
[31] Case 26/62 *Van Gend en Loos,* p. 12.
[32] Tsagourias in Collins & White (Eds.), p. 340.
[33] Case 6/64 *Costa v ENEL,* p. 593.
[34] ILC, "Draft Articles on the Responsibility of International Organizations" (2011), UN Doc. A/66/10, art. 2(a).

structure. Their main purpose is to facilitate cooperation between the member states without claiming any competence of their own. In light of this, the EU is something new. Klabbers defines the EU as a "supranational" international organization, as EU law has supremacy and direct effect in the Union's member states, which may result in member states being required to execute policies they directly oppose.[35] EU jurists instead acknowledge the EU's special character by describing the Union as an organization of *sui generis* (one of a kind) character.[36]

Arguably, the most distinguishing feature of the EU is the Union's high degree of autonomy. International legal scholar Nicholas Tsagourias argues that the EU through case law has transformed the principles enshrined in the constitutive treaties into fundamental norms, upon which to base the validation of the EU. Thereby the EU has made itself independent from international law.[37] This is a fascinating theory as it gives an explanation to *why* (and not only how) the EU is different from other international organizations.

2.2 Important provisions of the UN Charter and primary EU law

This section aims to clarify how the EU is connected to the UN legal order. First of all, only states can be members of the UN.[38] The EU is not bound directly by the UN Charter, but only insofar as the UN Charter forms an expression of general customary law binding upon all international actors.[39] Nevertheless, according to art. 21(1) and art. 3(5) TEU, the EU shall respect international law and the UN Charter in its international relations. However, equally important guiding principles for the Union are "fundamental rights"

[35] Klabbers, *An Introduction to International Organizations Law* (3rd Edition, Cambridge: Cambridge University Press, 2015), p. 26-27.
[36] See for instance Rosas "The European Court of Justice and International Law" in Nollkaemper, Wouters & de Wet (eds.), p. 40, and de Witte in the same publication, p. 71.
[37] Tsagourias in Collins and White (Eds.), p. 339-40.
[38] This follows from art. 4(1) UN Charter.
[39] This follows from art. 38(1)(b) ICJ St.

derived from the ECHR and common constitutional traditions of the EU member states, according to art. 6(3) TEU.

Most of the world's countries, including all EU member states, are members of the UN.[40] The EU member states are therefore bound directly by the UN Charter. They are required to respect and carry out UNSC decisions made on the basis of Chapter VII UN Charter, according to art. 25 and 48(1) UN Charter. This obligation extends to their actions in other international organizations, according to art. 48(2) UN Charter.[41]

Finally, art. 103 UN Charter (read in conjunction with art. 25 UN Charter) stipulates that, in the event of a normative conflict, the UN Charter prevails over every other international agreement concluded by the member states. In international legal doctrine it has been argued that the UN Charter holds primacy also over the primary EU treaties.[42]

However, it remains uncertain whether the UN Charter prevails over rules of customary law. International legal scholars Simma et al. explains that art. 103 UN Charter could be interpreted broadly or narrowly. A narrow interpretation means that the UN Charter holds primacy only over other international *agreements*, while a broad interpretation means it has prevailing effect also over rules of customary law.[43]

When a legal issue is attributable to both the EU and the UN legal orders, the question arises whether a member state to both organizations should prioritize the UN Charter or EU law? According to CJEU case law, EU law have primacy over domestic legislation on all matters where the member states

[40] UNGA, "Member states", *United Nations,* https://www.un.org/en/member-states/index.html, accessed 3 December 2020.
[41] The UN can therefore be said to have "an indirect approach" to influence over other international organizations, according to Simma et al (eds.), p. 1380-81.
[42] Simma et al. argue that the primary treaties are multilateral treaties concluded by member states of the UN, which has been registered with the UN in accordance with art. 102 UN Charter, thus indicating a common aspiration among EU member states to be bound by international law and art. 103 UN Charter. Simma et al (eds.), p. 851 and 2132.
[43] Simma et al (eds.), p. 1231-32.

have transferred powers to the Union.[44] If a member state would try to implement domestic legislation incompatible with primary EU law, the Commission can initiate an "infringement action" against that state.[45]

In this context, it is important to mention the procedural rule in art. 351 TFEU.[46] It provides that when the EU member states are bound by international agreements they concluded prior to accession into the EU, they are required by their EU membership to eliminate, as far as possible, any inconsistencies between the prior agreement and the primary treaties.

To summarize, the UN Charter and the primary treaties of the EU diverge on the matter of hierarchy. Whereas it is indisputable according to the UN Charter that binding UNSC Resolutions made on the basis of Chapter VII UN Charter takes precedence over other international agreements (although possibly not over customary international law), the primary EU treaties regards "the principles of the United Nations" as but one of several guiding principles for the EU legal order.

2.3 Implementation of UNSC Resolutions into the EU legal order

UNSC Resolutions have historically been implemented into the EU legal order through a dual process. First, the resolutions are adopted into the EU legal order through non-binding CFSP Common Positions. Then the positions are implemented through binding secondary regulation based on relevant provisions of the primary treaties.[47]

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[44] Case 6/64 *Costa v ENEL,* p. 593-4 and Case 11/70 *Internationale Handelsgesellschaft* (1970), para.3. See also "Primacy of EU Law", EUR-Lex, https://eur-lex.europa.eu/summary/glossary/primacy_of_eu_law.html, accessed 11 December 2020.
[45] This follows from art. 17(1) TEU and art. 258 TFEU. See also "Court of Justice", CURIA, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/, accessed 14 December 2020.
[46] *Consolidated version of the Treaty on the Functioning of the European Union* (TFEU, 2016), OJ C 202.
[47] Lavranos "UN Sanctions and Judicial Review" in Nollkaemper, Wouters & de Wet (eds.), p. 187.

However, in order to fully understand to what extent UNSC Resolutions may be binding for the EU, one has to take account of the possibility for the Union to assume competence over the UN Charter. It is settled case law that international treaties concluded by the Union rank higher in the EU legal hierarchy than secondary law.[48] Through the EU assuming competence over international agreements concluded or acceded by the EU member states, the agreements become binding for the Union itself. This requires two conditions to be fulfilled. Firstly, all EU member states have had to be bound by the treaty when acceding the Union. Secondly, the Union must have "assumed the functions inherent" in the treaty in question.[49]

The EU is also bound by international legal instruments expressing general customary law.[50] In this context, the CJEU has made *ad hoc* assessments of whether a certain rule or principle is reflected in customary law.[51]

2.4 The Kadi Case (C-402/05 P)

In the *Kadi Case*, the CJEU had to assess secondary legislative acts implementing UNSC Resolutions based on Chapter VII UN Charter, and take a stance on the relationship between primary EU law and binding provisions of the UN Charter.

From 1999 and onwards the UNSC adopted several resolutions[52] calling for targeted sanctions against all nations or persons providing the Afghan Taliban regime with financial resources.[53] Through dual procedures, the Council adopted CFSP Positions and EC Regulations to implement the UNSC Resolutions into the EU legal order.[54] In 2001, the applicant, Yassin Abdullah

[48] C-61/94 *International Dairy Arrangement* (1996), para. 52.
[49] Joint cases 21-24/72, *International Fruit Co.,* para. 14-15.
[50] Koutrakos, p. 226-28.
[51] This was first implied by the CJEU in Case 41/74 *Van Duyn v Home Office* (1974), para. 22, and then expressively stated in C-286/90 *Poulsen and Diva Navigation* (1992), para. 9.
[52] UNSC Res. 1267(1999), UN Doc. S/RES/1267; 1333(2000), UN Doc. S/RES/1333; 1390(2002), UN Doc. S/RES/1390; 1452(2002), UN Doc. S/RES/1452.
[53] UNSC Res. 1267, para. 4 (b).
[54] The first of these measures was Common Positions 1999/727/CFSP, OJ 1999 L 294, p. 1together with Regulation (EC) No 337/2000, OJ 2000 L 43, p. 1. These acts were followed

Kadi, was included in the Union's sanction measures.[55] This resulted in Kadi bringing a case before the CFI[56] and calling for annulment of the secondary legislative acts insofar as these related to himself.[57]

The CFI based its argumentation on international law and chose to uphold the principle of primacy UN Charter also over the EU legal order.[58] The court believed that UNSC Resolutions in principle was excluded from the CJEU's judicial review, except for the resolutions' compliance with fundamental norms of *jus cogens* character.[59] Interestingly though, the CFI also argued that the EU had assumed competence over the UN Charter.[60]

Upon appeal to the ECJ, four countries intervened in the proceedings and argued in favour of the contested EU legislation, thereby supporting an unconditional implementation of UNSC Resolutions into the EU.[61]

Contrary from the CFI, the ECJ used EU law as their starting point when assessing the relationship between the EU and UN legal orders. A key feature of the ECJ's judgement is that the court limited the scope of its jurisdiction to only cover the secondary legislative acts adopted to implement UNSC Resolutions. Through this, the court made a distinct separation between

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by several more, who are deemed to fall outside the scope of this essay. For a summary of all measures, see T-315/01 *Kadi* (2005), para. 12-36.

[55] This was made through Regulation (EC) No 2062/2001 amending Regulation (EC) No 467/2001 (OJ 2001 L 277, p. 25).

[56] The Court of Justice of the European Union (CJEU) comprises of two instances: the European Court of Justice (ECJ) and the General Court. CJEU, "The Institution", CURIA, https://curia.europa.eu/jcms/jcms/Jo2_6999/en/, accessed 12 December 2020. The General Court was formally known as the Court of First Instance (CFI). EU "General Court", EUR-Lex, https://eur-lex.europa.eu/summary/glossary/general_court.html?locale=en, accessed 12 december 2020.

[57] T-315/01 *Kadi,* para. 37.

[58] T-315/01 *Kadi,* para. 181-88, 190.

[59] T-315/01 *Kadi,* para. 225-226. According to *Vienna Convention on the Law of Treaties* (VCLT, 1969), UNTS 1155 (p.331), art. 53, a peremptory norm of *jus cogens* character is a norm which has achieved general acceptance within international legal order, and which is considered to be non-derogable (if not for the emergence of a new norm of *jus cogens* character).

[60] T-315/01 *Kadi,* para. 193-203.

[61] The countries were the UK, France, Spain and the Netherlands. C-402/05 P *Kadi,* para. 112-115.

international law and EU law. Hereby, the ECJ made a decisive overturning of the CFI's previous ruling on the case.

On the one hand, the court declared that the EU was founded on the rule of law and that no Union measure was excluded from judicial review by the CJEU.[62] The ECJ recalled that respect for fundamental rights formed "an integral part" of the general principles of EU law,[63] a condition for the lawfulness of Union measures, and a "constitutional guarantee" which no international agreement could overrule.[64] Therefore, the content and effect of the measures implementing a Chapter VII Resolution was not excluded from review at EU level.[65]

On the other hand, the ECJ confirmed that since the UNSC has the primary responsibility for maintaining international peace and security at global level,[66] it was not a matter for the CJEU to review the content of UNSC Resolutions, not even its compliance with peremptory norms of *jus cogens* character.[67] Furthermore, the court refused to challenge the primacy of UNSC Resolutions in international law.[68]

The ECJ acknowledged that art. 307 EC (now art. 351 TFEU) did create a possibility for the EU member states to prioritize compliance with UNSC Resolutions over primary law, but never over the fundamental principles of EU law.[69] The court clarified that even if the UN Charter had been binding upon the EU as an organization, the prevailing effect of the UN Charter would

[62] C-402/05 P *Kadi* para. 278-281.
[63] According to the CJEU, these fundamental principles springs from common constitutional traditions among the member states and from the ECHR, see C C-402/05 P *Kadi* para. 283. This is a is a recurring statement in CJEU case law, see for instance Case 11/70 *Internationale Handelsgesellschaft,* para. 4, and C-112/00 *Schmidberger* (2003), para. 71.
[64] C-402/05 P *Kadi,* para. 284-85 and 316. see also C-112/00 *Schmidberger,* para. 73. According to the ECJ, that there existed a procedure for review of UNSC's decisions at the UN level was not in itself a reason that community measures implementing such decisions should be exempted from the courts review, see C-402/05 P *Kadi,* para. 231.
[65] C-402/05 P *Kadi*, para. 299-300.
[66] This follows from art. 24 UN Charter, see C-402/05 P *Kadi*, para. 294.
[67] C-402/05 P *Kadi*, para. 286-287.
[68] C-402/05 P *Kadi,* para. 288.
[69] C-402/05 P *Kadi,* para. 301-304. See also AG Maduro's Opinion to the case, para. 30.

only extend to secondary legislation.[70] It would not, "at the level of Community law", extend to primary law and especially not to the general principles, including the respect for fundamental rights.[71]

2.5 Customary law

Customary law is accepted as a primary source of international law.[72] General customary law is derived from common state practice and the prevalence of *opinio juris*.[73] The ILC views customary law primarily as a product of state practice.[74] International legal scholar Anders Henriksen explains that state practice exists when a majority of the states concerned have acted in a similar way for a long enough time. [75]

According to the ILC, international organizations can affect the development of customary law mainly through reflecting and catalysing state practice.[76] However, the more powerful an organization is, the more important it becomes.[77] If the member states have "assigned State competence" to an international organization, its practice becomes equivalent to state practice.[78]

The other element to customary law, *opinio juris*, exists when states consider themselves bound in their international relations by a common notion of what is an acceptable and necessary behaviour.[79] In international legal doctrine, it has been suggested that it is important to distinguish between *opinio juris* at the time of creation of a customary rule and after that rule has already been established.[80]

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[70] C-402/05 P *Kadi*, para. 306-308. See also C-308/06 *Intertanko* (2008), para. 42.
[71] C-402/05 P *Kadi,* para. 308.
[72] This follows from art. 38(1)(b) ICJ St.
[73] ICJ, *North Sea Continental Shelf,* Judgement I.C.J Reports 1969, p. 3, para. 77.
[74] ILC (2015), para. 70.
[75] Henriksen, *International Law* (Oxford: Oxford University Press, 2017), p. 26.
[76] ILC (2015), para. 74-75.
[77] ILC (2015), para. 73.
[78] ICL (2015), para. 77.
[79] Henriksen, p. 24.
[80] ILA's Committee on Formation of (General) Customary Law, "Statement of Principles Applicable to the Formation of General Customary International Law" in International Law Association Report of the Sixty-Ninth Conference (London, 2000), p. 33.

The ILC have confirmed the existence of "rules of customary international law that are binding on certain States only".[81] According to the ILC, such rules have received general acceptance within international law.[82] The main difference between general and particular customary law is that for the latter, the constituting elements (i.e., state practice and *opinio juris*) need only be fulfilled by certain states.[83] The states concerned are often geographically adjacent and/or constituting "a community of interest".[84] Wolfke asserts that states may also be linked by for instance political and economic factors and "membership in organizations".[85] He further argues that no state single-handedly can change or withdraw from a customary rule of international law, but that the change has to be recognized by all other states bound by the rule.[86]

Henriksen explains that in normative conflicts between treaty-based and customary-based rules, one has to resign to general principles of conflict resolution. This means that peremptory norms of *jus cogens* character prevails over all other international obligations (*lex superior*); but else that one has to choose whether to prioritize the newer rule over the older (*lex posterior*), or the more detailed rule over the more general (*lex specialis*).[87]

[81] ILC (2015), para. 80. ILC generally refers to these rules as "rules of particular custom" (see para. 80 ff.), while other international jurists refer to "particular customary law", see for instance Wolfke, p. 88-90); "local custom", a term originally coined by the ICJ in ICJ, *Case concerning Right of Passage over Indian Territory* (Merits), Judgement of 12 April 1960: I.C.J. Reports 1960, p. 6, at p. 99, or "regional customary law", see for instance Forteau, "Regional International Law" (2006) in Max Planck Encyclopedia of International Law (Oxford, Oxford University Press, 2015), https://opil.ouplaw.com, accessed 2 December 2020.
[82] ILC (2015), para. 80.
[83] Henriksen, p. 25.
[84] ILC (2015), para. 81.
[85] Wolfke, p. 90.
[86] Wolfke, p. 65-66.
[87] Henriksen, p. 29.

3 Discussion

In the *Kadi Case,* the CJEU placed the fundamental principles of EU law higher than all other norms in the EU legal hierarchy and made a distinct separation between EU law and international law. The court claimed that any ruling would only have effect within the EU legal order, thus maintaining respect for the principle of prevailing effect UN Charter. Nevertheless, any UNSC Resolutions found to infringe on fundamental principles of EU law would be impossible to integrate into the EU legal order, and no member state would have a right by virtue of art. 351 TFEU to prioritize a UNSC Resolution over fundamental principles of EU law.

This puts the EU member states in a difficult position, as they have to choose whether to prioritize the UNSC Resolution or primary EU law in their domestic legal orders. According to the CJEU, the states have an obligation towards the Union to prioritize the general principles of EU law, but in doing so they may breach art. 103 UN Charter.

A possible justification for the EU member states derogating from art. 103 UN Charter could be to claim that the states are bound by a rule of particular customary law, created by the CJEU's judgement in the *Kadi Case*. The content of this rule would be that the EU member states may prioritize fundamental principles enshrined in the primary EU treaties over UNSC Resolutions found to infringe on such principles, and thus refuse to apply the UNSC Resolutions in the EU legal order.

The claim that such a rule would create an exception to the principle of prevailing effect of the UN Charter requires a narrow interpretation of art. 103 UN Charter, as a broad interpretation of this provision would suggest that the prevailing effect of the UN Charter extends to customary law. International law has yet to take a definitive stance on how to interpret the scope of art. 103 UN Charter. But as the prevailing effect of the UN Charter formally only apply to conflicting treaty obligations, a rule of particular

customary law could possibly legitimize the EU member states derogating from art. 103 UN Charter. As no evidence suggests that the principle of prevailing effect constitutes a peremptory norm of *jus cogens* character (thus claiming priority on the basis of *lex superior*) a rule of particular customary law derogating from art. 103 UN Charter could be motivated on the basis of *lex specialis.*

The idea that the EU – or, in fact, the CJEU – would have the capacity to directly influence customary international law can only be understood if one takes account of the EU's special character as an organization. According to the ILC, the more powerful an international organization becomes, the more influence it may have upon the development of customary law. The Union's high degree of autonomy from and influence over its member states speaks in favour of the EU being comparable with a state. In this context, it is relevant to assess whether the EU has assumed competence over the UN Charter. It cannot be assumed that the international legal term "assigned State competence" mean the same thing as the EU legal term "assumed competence". Nevertheless, had the EU indeed been found to have assumed competence over the UN Charter this would have implied that the EU member states could also be considered to have assigned competence to the Union. That the ECJ (as opposed to the CFI) in the *Kadi Case* found that the EU had not assumed competence over the UN Charter, implies conversely that the member states have not assigned state competence to the Union, with regard to their obligations under the UN Charter.

However, as CJEU's judgements have direct effect in the member states, the rulings may alter state practice and influence *opinio juris,* and hereby indirectly influence the development of customary international law. If one argues that the CJEU's conclusion in the *Kadi Case* – that the EU member states shall prioritize fundamental principles of the primary treaties over implementation of binding UNSC Resolutions – constitutes a rule of particular customary law, one could further argue that both state practice and *opinio juris* follow directly from the court's ruling in the case.

In the *Kadi Case,* the CJEU found that the EU cannot implement any UNSC Resolution infringing on the Union's fundamental principles, and that the member states cannot give priority to UNSC Resolutions on the basis of art. 351 TFEU. If a member state would try to implement an incompatible UNSC Resolution through national legislation, the Commission could initiate an infringement action against that state. The EU member states are bound by virtue of their membership to the Union to follow the CJEU's conclusions. This guarantees common state practice.

Furthermore, the CJEU's conclusions in the *Kadi Case*, would probably be enough to sustain an *opinio juris* among the EU member states that their disregard of UNSC Resolutions infringing on fundamental rights is a legal necessity. Because of the direct effect of the CJEU's judgements, the EU member states must consider themselves legally bound to respect the court's ruling. What is interesting is that this perceived necessity springs from the states' obligations towards the EU, not towards international law. The question whether this may disqualify the EU member states' perception of necessity from constituting *opinio juris* in the international legal sense, has not been explored in international legal doctrine.

Arguably, the fact that several states intervened in the proceedings of the *Kadi Case* and argued in favour of the principle of prevailing effect of the UN Charter, could point to an absence of *opinio juris.* However, here we have to distinguish between *opinio juris* when the presumed rule was born (i.e., in 2008 when the CJEU ruled on the *Kadi Case*) and now. No *opinio juris* in favour of a rule expressed by the CJEU in its ruling could have existed prior to the ruling. Hence, it is irrelevant that some states argued against the content of the proposed rule of customary law at its time of conception.

A specific requirement for rules of particular customary law is that the rules have to exist in a certain context, as all states must have some sort of common interest. Here it is indisputable that the EU member states have such a common interest, not only because of their membership to the Union, but also because of the legal, economic and political interests of upholding the EU

legal order. Consequently, it could be argued that all constituent elements of a rule of particular customary law does exist, in respect to the CJEU's conclusions in the *Kadi Case*.

Nevertheless, one has to wonder how such a rule would be received by the international community? It is not necessarily enough that an emerging rule of particular customary law gains acceptance by the EU member states. According to Wolfke, if the new rule diverges from a rule of general customary law, all states bound by the general rule must acknowledge the change, in order for the exception to gain acceptance as a new rule of particular customary law. It could be argued that art. 103 UN Charter in itself constitutes a rule of general customary law. The UN Charter has achieved nearly universal participation, and unilateral divergence from the principle of prevailing effect would be considered unacceptable in the international community. This is reflected in the *Kadi Case*, where the CJEU forced a separation of EU law from international law, as to not challenge the principle of prevailing effect of the UN Charter.

What this means is that in order for the new rule of particular customary law to gain acceptance in the international legal order, non-EU states would also be required to accept the internal development of EU law as a legitimate exception to the principle of prevailing effect of the UN Charter. This cannot be assured. Whereas non-EU states would probably respect the CJEU's judgement in respect to the internal legal order, it is unlikely that they would accept an EU-shaped exception to the general principle of prevailing effect of the UN Charter. Because if the EU member states are granted leave from adhering to the UN Charter, what is to say other states should not consider themselves entitled to the same?

4 Conclusion

According to CJEU case law, binding UNSC Resolutions incompatible with fundamental principles of EU law cannot be implemented in the EU legal order. Despite the CJEU's intentions, this conclusion have implications for the external relations of the Union as well as its member states.

I argue that the limitations set out in CJEU case law to the implementation of UNSC Resolutions into the EU legal order has led to the development of a rule of particular customary law within the EU. The content of this rule is that the EU member states may prioritize fundamental principles enshrined in the primary EU treaties over an UNSC Resolution made on the basis of Chapter VII UN Charter found to infringe on said principles, and refuse to apply the UNSC Resolution in the EU legal order. I believe all constituent elements of such a rule – state practice, *opinio juris* and a common interest among the states concerned – to be fulfilled by the EU member states.

However, it is uncertain whether the EU member states' perceived obligation to follow said rule could constitute *opinion juris* in the international legal sense, as the perception stems not from the states' adherence to international law, but to EU law.

Furthermore, at least two objections could be raised towards such a rule of particular customary law gaining acceptance in the international legal order. Firstly, it remains unclear whether art. 103 UN Charter have prevailing effect over customary law. If that is the case, no rule of particular customary law can legitimize the UN member states derogating from their obligations under the UN Charter. Secondly, I believe the principle of prevailing effect of the UN Charter in itself constitutes a general customary rule of international law. Arguably, this would mean that the new rule of regional customary law would have to gain acceptance among all states bound by the general rule, i.e., the international community as a whole. It is quite unlikely that non-EU states

would accept a right for EU member states diverging from the principle of primacy UN Charter without claiming the same right for themselves.

When the EU diverge from the obligations set out by the UN Charter, the member states are put in a difficult position, as they have to choose whether to prioritize EU law or binding international law. This highlights the complexity of the "triangular relationship" between the EU, its member states and the international legal order. From a human rights perspective, it is a good thing that the EU member states are required by their membership in the Union to prioritize the fundamental principles of the EU, including the respect for human rights, over an UNSC Resolution found to infringe on such principles. Nevertheless, as this conclusion inevitably challenges the principle of primacy of the UN Charter, it remains uncertain how the particular practice of the EU and its member states may be reconciled with the international legal order.

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