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When in Europe: Customary International Law and EU Competence in the Sphere of External Action

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A. Introduction: The Court of Justice of the European Union's Approach to International Law

European Union law must be interpreted and its scope delimited, to the extent possible, consistent with the relevant rules of international law. Article 3(5) of the Treaty on European Union (TEU) provides that "the EU shall uphold and promote . . . the strict observance and the development of international law."[1] A similar legal commitment can be found in the constitutions of most EU Member States, which in some cases is about delegation of powers, whilst in others it concerns the achievement of global objectives.[2] Article 3(5) of the TEU is also reminiscent of the judicial canon laid down by the United States Supreme Court in *Charming Betsy*[3] regarding the affirmation of international norms by the Congress. The *Charming Betsy* doctrine of statutory construction requires national legislation (an American statute) to be construed so as not to raise conflict with international law where possible.[4]

There is increasing scholarship on the *Europeanisation* of international law—or how EU law determines the application of international law in EU Member States.[5] Yet, the EU Treaties

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[1] Consolidated Version of the Treaty on European Union art. 3(5), Feb. 7, 1992, 2010 O.J. (C 83/01) [hereinafter TEU].

[2] For example, while Article 25 of the German Constitution refers to the transfer of sovereign powers vis-à-vis international law, Article 2 (2) of the Greek Constitution concerns adherence to the rule of international law as a means of strengthening peace and justice and enhancing the relations between citizens and states.

[3] Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

[4] For an analysis of this case, see Frederick C. Leiner, *The* Charming Betsy *and the Marshall Court*, 45 AM. J. LEGAL HIST. 1 (2001) and Curtis A. Bradley, *The* Charming Betsy *Canon, Separation of Powers and Customary International Law*, 121 HARV. L. REV. 1215 (2008).

[5] *See, e.g.,* INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION (Enzo Cannizzaro, Paolo Palchetti & Ramses Wessel eds., 2011); THE EUROPEANISATION OF INTERNATIONAL LAW: THE STATUS OF INTERNATIONAL LAW IN THE EU AND ITS MEMBER

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are neither explicit about the relationship between international law and EU law, nor do they provide an exhaustive account vis-à-vis the incorporation and effect of the former upon the latter. They merely highlight the binding character of international treaties[6] upon the Member States and charge them—or at least the founding Member States—with the task of taking the necessary steps to eliminate any incompatibilities between international agreements signed before 1958 and the EU Treaties.[7] That said, EU law contains certain specific references to international treaties. For instance, the Treaty of Lisbon is explicit about NATO's decision-making supremacy for the maintenance of international peace and security under the North Atlantic Treaty[8] and the prospective accession of the EU to the European Court of Human Rights (ECHR).[9]

In the absence of any particular guidelines in the Treaties about the incorporation and effect of international law within the EU, it seemed that Article 216 (2) TFEU projected a monist approach of the EU towards international law.[10] However, the difference in application and implementation of every international agreement has led the Court of Justice of the European Union (CJEU) to adopt a corrective approach in relation to the position of international agreements in EU law. It has established that when the Council concludes an agreement in accordance to the Treaty, it forms an integral part of EU law.[11] In *Haegeman*, decided in 1974, the CJEU not only held that an international agreement concluded by the then EC under the former EC Treaty formed an "integral part of Community law," but also stressed that such an agreement ranked between primary and secondary EU law.[12]

With reference to the private scope of international law, international agreements are only binding on individuals by means of EU acts. This is clearly a dualist approach to international law, which provides that international instruments are not self-executing. The

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STATES (Jan Wouters, Andre Nollkaemper & Erika De Wet eds., 2008); INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION (Martti Koskenniemi ed., 1998).

[6] Consolidated Version of the Treaty on the Functioning of the European Union arts. 216(2), 350, Dec. 13, 2007, 2010 O.J. (C 83/01) [hereinafter TFEU].

[7] *Id.* at art. 351.

[8] TEU, *supra* note 1, at arts. 42(2), 42(7).

[9] TEU, *supra* note 1, at art. 6.

[10] PIET EECKHOUT, EU EXTERNAL RELATIONS LAW 326 (2d ed. 2011).

[11] TFEU, *supra* note 6, at art. 216(2) (stating that treaties concluded by the EU are binding on EU institutions and its Member States and form an integral part of EU law).

[12] Case C-181/73, R. & V. Haegeman v. Belgian State, 1974 E.C.R. 449, para. 5.

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CJEU further clarified the symbiosis between EU and international law in *ERTA,* where the CJEU declared that the powers of the EU extend to relationships arising from international law.[13] In other words the EU may, in order to fulfill the aims of the Treaty, enter into international agreements. When it comes to litigation, the principle of *direct effect* has constituted the means by which the CJEU has decided the appropriate circumstances for employing international law provisions.[14] For instance, in *Hauptzollamt Mainz*, the CJEU held that since international agreements concluded by the EU "form an integral part of the EU legal system," Member States as well as EU institutions are bound by their provisions, and individual litigants may rely on the provisions of such international agreements before national courts in the EU.[15]

The above picture aside, one cannot overlook that the CJEU has often departed from the general culture of compliance towards international law, especially in cases involving the GATT and WTO treaties that establish a unique regulatory structure.[16] There, the CJEU appears reticent to attribute direct effect to the provisions of those treaties so that individuals can effectively rely on them in order to challenge EU law. Further, the CJEU has employed the constitutional language of "autonomy of EU law" to preserve the character of the EU as an independent legal order.[17] This again demonstrates a dualist approach of EU law towards international law. In theory at least, the CJEU has liberated EU law from international law through its incremental case law, and has managed to keep a safe distance from the latter's norms as standards of review. So whilst on the one hand the EU has exposed itself to international law's external review, on the other, the CJEU has minimized such possibility by making it hard for private parties to satisfy the relevant direct

[13] Case C-22/70, Comm'n v. Council, 1971 E.C.R. 263 [hereinafter *ERTA*].

[14] Joined Cases C-21, 22, 23, 24/72, Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*,* 1972 E.C.R. 1219 [hereinafter *International Fruit*].

[15] Case C-104/81, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG*,* 1982 E.C.R. 3641 (quoting Case C-6/64, Costa v. E.N.E.L., 1964 E.C.R. 1141).

[16] *See International Fruit*; Case C-280/93, Ger. v. Council*,* 1994 E.C.R. 4973; Case C-69/89, Nakajima All Precision Co. v. Council, 1991 E.C.R. I-02069.

[17] This refers to the language of "sa nature spécifique originale" first utilized by the CJEU in *Costa*. The language of autonomy has been relevant in defining the relationship between EU law and international law. This is most prominent in recent cases like Joined Cases C-402/05 and C-415/05, Kadi v. Council & Comm'n, 2008 E.C.R. I-6351 [hereinafter *Kadi*]. In *Kadi*, the international legal norms (i.e. UN Resolutions) from which EU law measures or regulations were derived from did not formally bind the EU. In such cases, the CJEU takes the view that such international legal norms do not form an integral part of EU law. *See also* Jam Willem Van Rossem, *The EU at Crossroads: A Constitutional Inquiry into the Way International Law Is Received Within the EU Legal Order*, *in* INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION 59, 63 (Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel eds., 2011).

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effect test, and therefore lowering individual standing before European courts.[18] Second, the CJEU has stressed EU law's autonomy and primacy over the Member States' legal orders, and has effectively established that the obligations imposed by international agreements cannot prejudice the constitutional principles of the EU Treaties. In this respect, the CJEU's jurisprudence has attracted intense academic commentary on the merits of the *Kadi*[19] and *FIAMM*[20] judgments, as well as the questions of the EU and international legal order divide and legal pluralism.

Aside from international agreements, Article 38 (1) of the Statute of the International Court of Justice (ICJ) explicitly declares that international law comprises international conventions, international custom, and the general principles of international law.[21] Nonetheless, in recent years, the CJEU's case law has mainly focused on the effect of international conventions upon the EU legal order. Little attention has been paid to the different constellations of customary international law and the general principles of international law, which international law considers equal in gravitas. The case law of the CJEU is somewhat cryptic on the relationship (*i.e.*, monist or dualist) between the EU legal order and custom or the general principles of international law. The EU's dualist approach to international law with reference to international treaties does not imply that the same occurs *ispo jure* with regard to customary international law. A glance at Article 3 (5) of the TEU and Article 218 of the TFEU suggests perhaps the opposite about customary international law—that the EU has adopted a monist approach. Furthermore, the CJEU's case law on the invocation of custom by private parties and its effect upon the exercise of EU external competence remains somewhat difficult to decipher.

This article will attempt to provide an insight into the constitutional role of customary international law within the EU legal order by focusing on the CJEU's relevant

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[18] *See* Judson Osterhoudt Berkey, *The European Court of Justice and Direct Effect for GATT: A Question Worth Revisiting*, 9 EUR. J. INT'L L. 626, 629 (1998) (criticizing the CJEU's doctrine).

[19] *Kadi* at 2. It is worth noting that the last decision of the "*Kadi* Saga" took place before the General Court in Case T-85/09, Kadi v. Comm'n, 2010 E.C.R. II-5177 (commonly called *Kadi II*). This decision has been appealed by the Commission, the Council, and the UK. *See* Case C-584/10 P, Kadi v. Comm'n, 2011 OJ C72/9 (appeal made by Commission); Case C-593/10 P, Kadi v. Comm'n, 2011 OJ C72/9-10 (appeal made by Council).

[20] Case T-69/00, FIAMM & FIAMM Techs., Inc. v. Council & Comm'n, 2005 E.C.R. II-5393 (discussing the possibility of non-contractual liability of the EU stemming from its breach of WTO obligations). *See also* Marco Dani, *Remedying European Legal Pluralism: The FIAMM and Fedon litigation and the Judicial Protection of International Trade Bystanders*, 21 EUR. J. INT'L L. 303 (2010) (commenting on the FIAMM case).

[21] Article 38(1)(d) also provides for a subsidiary source of international law, namely, "judicial decisions and the teachings of the most highly qualified publicists of the various nations." As it will be explained below, treaty and custom depend on the consent of states. On the other hand, general principles do not require state practice as a precondition to emerge. This means that courts can have recourse to them even though states have not given their express consent. *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th ed., 2003).

jurisprudence. It is divided in three parts. First, it examines into the interconnectivity between EU and customary international law and its applicability to EU external action. The second part explores the ways in which international custom can be invoked by private parties in order to review the legality of EU secondary law and, therefore, escape their EU law obligations. In light of the CJEU's recent controversial judgment in the *Emissions Trading Scheme*,[22] the third part of this article discusses the new conditions under which private parties must rely on customary international law to invoke it before the courts of the Member States to challenge the application of EU regulations to non-European airlines' activity outside the EU. By way of conclusion, this article will make some observations on the place of customary international law in the EU legal order as an effective standard of review of EU law and a useful tool to curtail EU external competence. This is significant in determining, for instance, the extraterritorial jurisdiction of the EU vis-à-vis the enactment and enforcement of EU legislation to tackle global problems.

B. The Interconnectivity Between EU and Customary International Law

This section will discuss the interconnectivity between EU and customary international law. This is the first parameter that we need to consider in order to determine whether custom can be successfully utilized to challenge the validity of EU measures. Before we do so, it is worthwhile to briefly explain what is meant by custom. Customary international law is defined in Article 38 (1) (b) of the Statute of the ICJ as "a general practice accepted as law."[23] It is the law resulting from "a general and consistent practice of states followed by them from a sense of legal obligation."[24] As such, rules of customary international law derive from practice (*usus*) and conviction, or what is accepted as law (*opinio juris*) by States themselves and are binding on them. Contrary to international conventions where signatory states must typically accede and/or ratify in order to be bound by their legal obligations, customary international law does not require the express consent of every state to a particular rule. In principle, it therefore binds all nations regardless of their individual consent, unless a State has opposed a rule of customary international law early in its existence, thus preventing it from becoming binding on it (the persistent objector rule).[25]

[22] Case C-366/10, Air Transport Ass'n of Am. v. Sec'y of State for Energy and Climate Change, 2011 E.C.R. 00 [hereinafter *ETS* judgment].

[23] Statute of the International Court of Justice, 3 Bevans 1179 (1945).

[24] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987).

[25] *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. YEARBOOK INT'L L. 1 (1985).

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According to the ICJ, rules of customary international law "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour."[26] Nonetheless, it is not always clear whether customary rules can be subject to a right of withdrawal.[27] Whilst certain rules, like the enjoyment of immunity from jurisdiction by a State which is party to a dispute (or waiver of sovereign immunity), may be subject to derogation,[28] customary rules belonging to the category of *jus cogens* (a body of higher rules of public international law from which no derogation is permitted) and cannot be subjected to unilateral derogations. Article 64 of the Vienna Convention provides for the emergence of new peremptory norms of international law (defined earlier in Article 53). This reflects a form of a hierarchy that stresses, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[29] For instance, mandatory provisions of universal human rights protection are "intrasgressible principles of customary international law," and cannot be subject to derogation by either Member States or international organizations, such as the EU or UN.[30] Yet, in the absence of a minimum catalogue as to which norms are peremptory, the constitutional effects of *jus cogens* remain somewhat ill-defined and subject to criticism.[31]

With reference to their nature, certain rules of customary international law are universally practiced and acknowledged as the law by many States so that there is little doubt that custom exists. Other rules, however, are not as widely recognized, and it is often unclear whether they comprise customary international law. Additionally, certain customs can be in conflict with each other—for instance the *rebus sic stantibus* doctrine ("the tacit condition recognized by international law as attending to all treaties that they shall cease to be obligatory so far as the state of facts upon which they were founded has substantially changed"[32]) constitutes an exception to the *pacta sunt servanda* principle, which provides

[26] N. Sea Continental Shelf (Ger. v. Den. & Neth.), 1969 I.C.J. 3, 38-39, para. 63 (Feb. 20).

[27] *See* William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. 169 (2010); HAZEL FOX, THE LAW OF STATE IMMUNITY (2d ed. 2008).

[28] *See* Case C-292/05, Lechouritou v. Dimosio tis Omospondiakis Dimokratias tis Germanias, 2007 E.C.R. I-01519.

[29] Vienna Convention on the Law of Treaties art. 64, May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 [hereinafter Vienna Convention].

[30] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

[31] *See* CARLO FOCARELLI, INTERNATIONAL LAW AS SOCIAL CONSTRUCT: THE STRUGGLE FOR GLOBAL JUSTICE 314 (2012); SABINE MICHALOWSKI, UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT: A LEGAL PERSPECTIVE 72–74 (2007).

[32] James W. Garner, *The Doctrine of* Rebus Sic Stantibus *and the Termination of Treaties*, 21 AM. J. INT'L L. 509 (1927) (quoting Kwang-Sheng Yang, *China Abrogating Unfair Treaties with the Powers*, 25 CURRENT HIST. 967, 968

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that States must abide by their commitments.[33] Furthermore, as mentioned above, there are superior rules of customary international law falling within the ambit of *jus cogens*, which can only be modified by norms of the same character, not by treaty provisions. Finally, there are rules of customary international law that overlap with treaty rules, even those inherent in the provisions of the EU Treaties. For instance, the CJEU has held that "the provisions of an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-[EU] relations,"[34] which is in line with Article 351 TFEU.[35] This is equally valid in regard to the rules of customary international law.[36]

The CJEU has explicitly ruled on a number of occasions that the rules of customary international law bind the EU and form part of its internal legal order, therefore recognizing their discreet identity from international treaties. For instance, in *Poulsen*, the CJEU held that the EU must respect international law in the exercise of its powers and, consequently, EU legislation must be interpreted in light of the relevant rules of international law, including custom.[37] Moreover, the CJEU has expressly acknowledged the applicability of customary international law to both EU internal and external action.[38] Because the EU has international legal personality under Article 47 TEU, it shall be bound by both international treaty and customary law and shall be held liable for its breaches.

What is apparent is that the EU shall be bound by the principles of customary international law even where such principles are codified in international agreements of which the EU is not a signatory. As such, the CJEU shall interpret the provisions of international

(1927)).

[33] Vienna Convention, *supra* note 29, at art. 26 (outlining the *pacta sunt servanda* principle).

[34] Joined Cases C-241 & 242/91, Radio Telefis Eireann (RTE) & Independent Television Publications Ltd (ITP) v. Comm'n, 1995 E.C.R., I-743, para. 84; *see also* Case C-301/08, Bogiatzi v. Deutscher Luftpool, 2009 E.C.R. I-10185, para. 19.

[35] This provision provides that, "the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."

[36] Case C-364/10, Hung. v. Slovk., 2012 E.C.R. _____ (opinion of Advocate General Bot), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0364:EN:HTML.

[37] Case C-286/90, Anklagemyndigheden v. Poulsen & Diva Navigation Corp., 1992 E.C.R., I-6019, para. 10 [hereinafter *Poulson*]; *see also* Case C-27/11, Vinkov v. Nachalnik Administrativno-nakazatelna deynost 2012 E.C.R. _____, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0027:EN:HTML, para. 33 (quoting *Poulsen*).

[38] *See* Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT'L L. 771, 778 (2006).

agreements where these form expressions of customary rules and therefore serve as a criterion for the validity of the activities of EU institutions.[39] For instance, the CJEU has held that, even though the Vienna Convention on the Law of Treaties does not bind either the EU or all its Member States, a series of provisions in that convention reflect the rules of customary international law, which, as such, are binding upon the EU institutions and form part of the EU legal order.[40] Along these lines, Advocate General Sharpston stressed:

> [The Vienna Convention] applies, under Article 1, to treaties between States (thus including the Accession Treaty) and, under Article 5, to any treaty which is the constituent instrument of an international organisation (thus including the various [EU] Treaties). A number of its provisions reflect rules of customary international law which, as such, form part of the [EU] legal order. Article 18 (which embodies the so-called "interim obligation") and Article 26 (which spells out the requirement of good faith) are generally considered to be among those provisions.[41]

The CJEU has further noted in its case law the *pacta sunt servanda* customary law principle, enshrined in Article 26 of the Vienna Convention.[42] This principle applies both between states and international organizations and between international organizations themselves.[43] What is more, it appears that the CJEU has taken stock of Article 31 of the Vienna Convention that introduces the *effet utile* or *ut res magis valeat quam pareat* principle—a fundamental interpretative norm of international law with customary status.[44] The adoption of this principle by the CJEU is crucial in the acceptance of customary international law in EU law and, despite being traced in the CJEU's old jurisprudence, reveals the indisputable connection between EU law and international law

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[39] *See* Case C-533/08, TNT Express Nederland BV v. AXA Versicherung AG, 2010 E.C.R. I-4104, para. 65 (opinion of Advocate General Kokott).

[40] *See, e.g.*, Case C-162/96, Racke GmbH & Co. v. Hauptzollamt Mainz, 1998 E.C.R. I-3655, paras. 24, 45, 46 [hereinafter *Racke*]; Case C-386/08, Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010 E.C.R. I-01289, para. 42; Case C-63/09, Walz v. Clickair SA, 2010 E.C.R. 2010 I-04239, para. 16 (opinion of Advocate General Mazak); Case C-118/07, Comm'n v. Fin., 2009 E.C.R. I-10889, para. 39.

[41] Case C-508/08, Comm'n v. Malta, 2010 E.C.R. I-10589, para. 4 (opinion of Advocate General Sharpston) [hereinafter *Malta* Sharpston opinion].

[42] *Racke*, at para. 49 (stressing of this point by CJEU).

[43] Case C-344/04, IATA & ELFAA v. Dep't Trans., 2006 E.C.R. I-403, para. 40; Case T-338/08, Stichting Natuur en Milieu & Pesticide Action Network Europe v. Comm'n, 2012 E.C.R. _____, para. 72, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008TJ0338:EN:HTML.

[44] Vienna Convention, *supra* note 29, at art. 31 (stating that a treaty is to be interpreted in good faith according to the ordinary meaning to be given to its terms in their context and in the light of its object and purpose).

(especially since EU Treaties are in principle international conventions). In line with the Vienna Convention example, the CJEU has concluded that the EU must take into account international conventions to which it is not party, such as the Geneva Conventions on the Territorial Sea and the Contiguous Zone (1958), "in so far as they codify general rules recognized by international custom."[45] This tactic reflects the European Court of Human Right's (ECtHR) approach in *Cudak* and *Sabeh* where the ECtHR recognized that the principle laid down in the New York Convention[46] on the waiver of sovereign immunity is binding in so far as it reflects customary international law.[47]

The CJEU has gone as far as accepting controversial norms of customary international law, such as the abovementioned *rebus sic stantibus* doctrine as justification for the unilateral and indefinite suspension of a trade cooperation agreement between the then EEC and Yugoslavia.[48] The difficulty to ascertain customary international law begs the following question: How can one predict with some degree of certainty all situations where EU law can rely on custom? Ten years ago, Wouters and Van Eeckhoutte produced a detailed study on the effect of customary international law in (what was then) EC law.[49] Not much has changed since then. Their taxonomy of potential situations where the CJEU may rely on custom is still valuable. In summary, the authors pointed out that the CJEU may use custom: (1) As a means of delineating the limits of EU jurisdiction,[50] (2) as a method of interpretation of international agreements,[51] and (3) as a gap filler in the absence of specific EU rules governing a certain aspect, on which the CJEU needed guidance in order

[45] *Poulsen*, at para. 10.

[46] *See* Convention on the Privileges and Immunities of the United Nations art. 11, Feb. 13, 1946, 1 U.N.T.S. 15, 90 U.N.T.S. 327.

[47] *See* Cudak v. Lithuania App. No. 15869/02 (Eur. Ct. H.R. Mar. 23, 2010), para. 60 (discussing the application of the State-immunity rule in a sexual harassment case); Sabeh El Leil v. France, No. 34869/05, (Eur. Ct. H.R. June 29, 2011), para. 52 (applying State-immunity in a suit for lost wages).

[48] *See Racke*, at paras. 45–46 ("concerning a customs debt arising on the importation into Germany of certain quantities of wine originating in the Socialist Federal Republic of Yugoslavia").

[49] Jan Wouters & Dries Van Eeckhoutte, *Giving Effect to Customary International Law Through European Community Law* 6–18 (Inst. for Int'l Law, Working Paper No 25 – June 2002), *available at* www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf [hereinafter Wouters].

[50] *See id.* at 7–11. *See, e.g.*, Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337, para. 22. In *Van Duyn*, the CJEU emphasized that under customary international law, a state is precluded from refusing its own nationals the right of entry and residence.

[51] *See* Wouters, *supra* note 49, at 11–14. *See, e.g.*, Case C-149/96, Portugal v. Council, 1999 E.C.R. I-8395, paras. 34–35. In *Portugal v. Council*, the CJEU highlighted the *pacta sunt servanda* principle as entailing bonafide performance of international agreements.

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to decide.[52] This taxonomy demonstrates that the CJEU's treatise of custom was initially intended for internal consumption and, apart from the use of custom as means of delineating the limits of EU jurisdiction (which contains the seeds of using custom as a standard of review), the CJEU did not provide for the external review of EU law—*i.e.*, utilizing customary international law as a means of reviewing the legality of EU acts. Yet, Wouters and Van Eeckhoutte speculated on the question of invocability of customary international law as a means of judicial review without adding a new category in their list of potential situations where the CJEU could rely on custom. In particular, they criticized the CJEU's inconsistent case law.[53]

Finally, we may tentatively add a fifth category to the Wouters' and Van Eeckhoutte's list: Customary international law as a caution to Member States vis-à-vis the exercise of national competence. In what may be the earliest EU case law reference to customary international law, Advocate General Darmon remarked that:

> [A]ccording to some writers, the development of customary international law leads to the emergence of certain specific limitations on the extraterritorial exercise of a State's jurisdiction. Thus, international law would prohibit the extraterritorial application of domestic law where it might give rise to conflicting obligations, or provoke conflicts of jurisdiction.[54]

For instance, the CJEU in *Rottmann* provided that each Member State shall determine under its own law who its nationals are, but reminded Member States that such exercise of national competence has to be consistent with international law, including custom.[55] Similarly, in *Commission v. Malta*, the Advocate General established that even though Malta is not party to the Vienna Convention, a number of its provisions, such as *pacta sunt servanda*, reflect rules of customary international law and are therefore part of EU law. Although these provisions are not binding on Malta, "it is useful to set them out as a formulation of what Malta accepts are the rules of customary international law applicable to it."[56]

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[52] *See* Wouters & Eeckhoutte, *supra* note 49, at 14–16. *See, e.g.*, Case C-135/08, Rottman v. Bayern, 2010 E.C.R. I-1449, para. 39. In *Rottman*, the CJEU, in line with its established case law, affirmed the principle under international law that Member States may lay down the conditions for their citizens' acquisition and loss of nationality (as long as the pay due regard to their EU law obligations).

[53] *See* Wouters, *supra* note 49, at 16–18.

[54] Joined Cases 89, 104, 114, 116, 117, 125, 126, 127, 128, 129/85, A. Ahlström Osakeyhtiö v. Comm'n, 1988 E.C.R. 5193, para. 49 (opinion of Advocate General Darmon).

[55] *See* Case C‑135/08, Rottmann, 2010 E.C.R. I-3655, at para. 18.

[56] *Malta* Sharpston opinion (noting that although Malta is not a party to the Vienna Convention it provides a guide of customary international law).

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C. Invocability of Customary International Law by Individuals

This section will discuss the invocability of customary international law by individuals as a ground of review of the legality of EU law. To put it differently, we will explore the question as to whether private parties can invoke international custom in order to review the legality of EU secondary law and, therefore, escape EU-derived obligations. Case law has established that the validity of an EU measure can be reviewed for compatibility with customary international law. Given that under Art. 3(5) TEU, "the Union shall uphold and promote . . . the strict observance and the development of international law,"[57] customary law can in principle be utilized to challenge the validity of EU acts. However, there is a stark contrast between theory and practice vis-à-vis the direct effect of customary international law in EU law.

For a while, the European courts sent contradictory messages as to whether custom can be utilized in order to challenge EU legislation. In *Opel Austria*, a successful challenge against the legality of a Council Regulation withdrawing tariff concessions granted to Austria, the Court of First Instance (now the General Court) suggested that customary international law applies within EU law only indirectly by way of transformation into a general principle of EU law. Accordingly, it was held that the customary international law principle of good faith, codified in Article 18 of the Vienna Convention, is the corollary of the principle of protection of legitimate expectations that forms part of the EU legal order.[58] *Opel Austria* was the first case to accept that customary international law is directly effective in EU law, and that the latter can be interpreted in light of custom. Whether by accident or design, calling custom a General Principle of EU law implied, at least in this case, an upgrade of the status of custom to primary EU law. However, this connection is not fully compatible with Article 38 of the Statute of the ICJ, which makes a clear distinction between custom and general principles of international law. The general principles of international law, like the general principles of EU law, derive from legal principles common to states and not general practice accepted as law.

In this instance, the General Court's connection between custom and general principles was not capable of generating a rule of interpretation of customary international law—*i.e.*,

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[57] TEU, *supra* note 1, at art. 3(5).

[58] *See* Case T-115/94, Opel Austria GmbH v. Council, 1997 E.C.R. II-0039, paras. 83, 90 & 93 (recognizing the principal of good faith and expectations in international agreements); *see also* Case C-372/97, Italy v. Comm'n, 2004 E.C.R. I-3679, paras. 116–18 (acknowledging that parties' expectations must be considered); Joined Cases C-74 & 75/00, Falck Spa. v. Comm'n, 2002 E.C.R. I-7869, para. 140 ("[I]n the absence of any provision in that regard, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers."); Case T-308/00, Salzgitter AG v. Comm'n, 2004 E.C.R. II-1933, para. 166 (noting that a participant must plead a legitimate expectation).

that all customs shall be treated as general principles. It makes more sense to argue that the customary principle of good faith was not the real ground for annulment of EU legislation in *Opel Austria*. The General Court had to refer to the long-established principle of protection of legitimate expectations by EU law in order to annul the contested EU measure. By doing this, the General Court did not subject EU law to the external review of public international law, but constrained its scrutiny to the internal checks and balances available in EU law. Custom was, therefore, a source of inspiration (*i.e.*, a means of identification of the applicable internal principle) that had to be "channelled" into an EU principle.[59] This example is the opposite of *Mangold*, where the CJEU professed that nondiscrimination on grounds of age can be traced in "various international instruments" and "constitutional traditions common to the Member States." [60] The problem was that there was no specific international instrument on age discrimination in *Mangold*. By contrast, there was a long-established principle of customary international law in *Opel Austria* prudently utilized by the CJEU to bring a general principle of EU law into play and, therefore, avoid creating one from scratch by using legally ungrounded justifications.

Despite the custom-friendly outcome of *Opel Austria*, European courts avoided the question of whether customary international law could produce direct effects within EU law. The General Court's decision in *Opel Austria* was thrown into sharp relief in *Racke*,[61] a case questioning whether the then EEC could rely on customary international law (specifically the contested notion of *rebus sic stantibus*) to unilaterally terminate, through a suspending regulation, a Cooperation Agreement with the Federal Republic of Yugoslavia due to a fundamental change of circumstances. The judgment is important for two reasons. First, the CJEU accepted that custom had a direct position in the EU legal order, therefore accepting that the relationship between the EU legal order and custom is a monist one.[62] Second, the CJEU attempted, albeit vaguely, to answer the question whether customary international law could produce direct effect within EU law by establishing that individuals may resort to custom to challenge the validity of the suspending EU regulation. But this was not enough to provide a well-defined answer to the question of direct effect. The CJEU reserved a certain margin of discretion in interpreting international custom by subjecting its invocability to review the legality of EU law to two restrictive conditions. Since, according to the CJEU, customs are less precise than treaty norms and do not per se create rights for individuals, it established that EU institutions can be found to violate them only when: (1) The rules of customary

[59] *See* Robert Schütze, *On "Middle Ground": The European Community and Public International Law*, *in* HIGHEST COURTS AND THE INTERNATIONALISATION OF LAW: CHALLENGES AND CHANGES 35, 44 (Sam Muller & Marc Louth eds., 2009).

[60] Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981, para. 74.

[61] *See Racke*.

[62] *Id.* at para. 46.

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international law invoked are "fundamental," and (2) by adopting the suspending act, the EU institution made a manifest error of assessment concerning the conditions for applying those rules.[63] But some questions remained unanswered. For instance, which rules of customary international law shall be considered "fundamental" and what EU action shall constitute "a manifest error"? It appeared that it all depends on the CJEU's subjective assessment of the case at hand.

Racke's broad guidelines tell us only half the story about the appropriate conditions that must be met before an individual can invoke customary international law to challenge the legality of the acts of EU institutions. Recent case law of the CJEU, specifically the *Emissions Trading Scheme (ETS)* case discussed in the next section,[64] prompts us to reconsider the relationship between EU law and customary international law vis-à-vis whether rules of custom are such as to create rights in favor of individuals. As it will be noted, in *ETS*, the CJEU did not overrule *Racke*, but updated and/or narrowed the *Racke* test of using custom as a standard of review of EU law. Evidence that the *Racke* decision is still valid law can be found in recent CJEU jurisprudence where the case is mentioned as authority in the examination of the validity of an EU regulation in the light of customary international law.[65] Likewise, the *ETS* judgment has been mentioned in the latest decisions as "settled case-law," implying that in cases when the EU adopts an act, it is bound to observe international law in its entirety, including customary international law.[66] It follows that the rules of secondary law must, where appropriate, be interpreted in the light of the rules of customary international law.[67] As it will be shown, the principles springing from *Racke* and *ETS* on utilizing customary international law as a standard of review of EU law dovetail neatly.

Prior to the *ETS* decision, scholars looked into two possible sources of inspiration in order to determine the effect of custom in the EU legal order, including: (1) The CJEU's own case

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[63] *Id.* at paras. 48–49, 52. *See also* Case T-338/08, Stichting Natuur en Milieu v. Comm'n, 2012 E.C.R. _____, para. 56, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008TJ0338:EN:HTML. In *Stichting Natuur en Milieu*, "[T]he Court examined the validity of a regulation in the light of customary international law in so far as it found that 'the individual concerned was invoking fundamental rules of customary international law against the disputed regulation, which had been taken pursuant to those rules and deprived that individual of the rights to preferential treatment granted to it by the Cooperation Agreement.'" *Id.*

[64] *See ETS judgment* (relying on customary international law in considering the inclusion of aviation activities in greenhouse gas emission schemes).

[65] *See* Case T-396/09, Vereniging Milieudefensie v. Comm'n, 2012 E.C.R. _____, para. 56, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008TJ0338:EN:HTML (citing *Racke*).

[66] *See ETS judgment* at para. 101.

[67] *See* Case C-154/11, Mahamdia v. Algeria, 2012 E.C.R. _____, para. 17 (opinion of Advocate General Mengozzi), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0154:EN:HTML.

law on direct effect of international agreements concluded by the EU, and (2) the effect of customary international within the Member States' legal orders.[68] As discussed in the next section, none of these examples are useful anymore. First, the CJEU currently addresses the issue of the conditions of reliance on custom to review the validity of EU legislative measures differently from its approach to international agreements. Second, it appears that national courts are more reluctant than the CJEU to apply provisions of customary international law as (to use a term from American scholarship) "federal common law."[69] The next section will discuss the establishment of the current conditions of reliance on customary international law to challenge the validity of EU law.

D. The Current Conditions Where Reliance on Customary International Law is Possible

The analysis that follows is largely based on the recent conflict between international aviation law and EU emissions law in the *ETS* judgment of the CJEU. This is because *ETS* is the first of its kind where the CJEU addressed directly the issue of the conditions of reliance on customary international law to challenge the validity of an EU legislative measure.

I. The EU Emissions Trading Scheme Dispute

In the *ETS* decision, the English High Court sought a preliminary ruling from the CJEU on the validity of Directive 2003/87/EC (as amended by Directive 2008/101/EC) establishing a scheme for greenhouse gas emission allowance trading within the EU.[70] Directive 2008/101/EC states that the purpose of the EU Emissions Trading Scheme (ETS) is "to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner."[71] To that end, the EU ETS originally imposed a cap on greenhouse gas emissions allowances from installations in the EU.[72] The 2008 Directive extended the application of the EU ETS to aviation activities. Most significantly, the new scheme was not

[68] *See Case Comment on* Racke, 117 INT'L L. REPORTS 399, 423 (2000).

[69] *See* Benedetto Conforti & Angelo Labella, *Invalidity and Termination of Treaties: The Role of National Courts*, 1 EUR. J. INT'L L. 44, 58, 65 (1990) (discussing the operation of treaties in conjunction with customary international law); *see also* Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 310–14 (1994) (providing an analysis of federal common law); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997) (discussing the role of customary international law in the United States).

[70] Council Directive 2003/87/EC, 2003 O.J. (L 275) 32; Council Directive 2008/101/EC, 2009 O.J. (L 8) 3.

[71] Council Directive 2008/101/EC, 2009 O.J. (L 8) 3.

[72] *See* Josephine van Zeben, *Respective Powers of the European Member State and Commission Regarding Emissions Trading and Allowance Allocation*, 12 ENVTL. L. REV. 216, 222–24 (2010) (discussing the impact of recent court decisions on the European energy market).

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only limited to emissions in the EU, but rather placed a cap on the total quantity of emissions allowances for flights that "depart from or arrive in an aerodrome situated in a Member State."[73] As such, the EU ETS not only affected EU airspace, but also affected aircrafts registered in third countries and flights over the high seas. This was despite the fact that there was no mutual agreement between the EU and the affected third countries as to the application of the EU ETS.

Numerous states and airlines reacted to their inclusion within the EU ETS of aircraft emissions over the high seas and over foreign territory. For example, a Joint Declaration on 30 September 2011 was adopted by states, including China and the United States, and stressed that the inclusion of international civil aviation in the EU ETS constitutes a unilateral measure contravening public international law.[74] More specifically, the Declaration called on the International Civil Aviation Organization (ICAO) to continue efforts to reduce aviation's contribution to climate change. Finally, the *ETS* case was brought by a group of leading United States airlines (including United, Continental and American Airlines) and trade associations (including the Air Transport Association of America (ATA)). The international norms invoked were a set of customs relating to extra-territorial jurisdiction, as well as numerous provisions stemming from three international agreements: Chicago Convention, Open Skies Agreement, and Kyoto Protocol.[75]

Specifically regarding customary international law, the claimants invoked four customs: (1) The exclusive jurisdiction of each State over its air space, (2) the impossibility for States to exercise jurisdiction on the high seas, (3) the freedom to fly over the high seas, and (4) the rule whereby an aircraft flying over the high seas is under the exclusive jurisdiction of the State of registration. All in all, the claimants argued that the inclusion of flight sections outside the EU airspace had created an extraterritorial rule that contravenes both the sovereign rights of third countries and the freedom of the high seas. At first glance, it does not take a detailed examination of these principles of customary law to establish that the

[73] Council Directive 2008/101/EC, 2009 O.J. (L 8) 17. To be more specific, the 2008 Directive imposed a cap on the total quantity of aviation emissions and required aircraft operators to surrender emissions allowances for the entirety of flights departing from or arriving in the EU. In certain circumstances, it required aircraft operators wishing to carry out aviation activities in excess of their free allocation to purchase allowances at auction. The 2008 Directive also provided for an excess penalty of €100 per ton of carbon dioxide to be imposed on aircraft operators that do not surrender sufficient allowances. It also introduced the possibility of an EU-wide operating ban on the aircraft operator concerned in the event an aircraft operator failed to comply with the requirements of the Directive.

[74] International Civil Aviation Organization, *Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme and Its Impact* 2 (Working Paper C-WP/13790, Oct. 17, 2011), *available at* http://www.greenaironline.com/photos/ICAO_C.194.WP.13790.EN.pdf (Examining "the issue of inclusion of international civil aviation in the European Union Emissions Trading Scheme (EU ETS) and its impact").

[75] For a more detailed analysis of this aspect of the judgment, see Burgess Salmon, Case Comment, *Air Transport Association of America v. Secretary of State for Energy and Climate Change* (C-366/10), 14 ENVTL. L. REV. 81 (2012).

claimants were right vis-à-vis the inconsistency of EU law with applicable international law. We will briefly explain why below by considering the principle of sovereignty and the freedom of the high seas.

With reference to the principle of sovereignty, it is accepted that a state has exclusive competence to regulate by legislative means the conduct that occurs within its territory. This includes the airspace above national territory. Public international law does not provide for any exception that could presumably justify the extra-territorial application of EU jurisdiction in respect of third country aircrafts. Accordingly, the EU ETS imposes legal obligations, creates financial costs and threatens penal action for activities taking place outside the EU, and, indeed, activities within the territory of third countries. It is therefore contrary to the principle of sovereignty because it does not respect the principle of non-intervention in the territorial jurisdiction of other states. This idea that the content of a treaty cannot compromise internal matters is enshrined in Article 2 (7) of the United Nations Charter, which provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [i.e. action with respect to threats to the peace, breaches of the peace and acts of aggression].[76]

As such, the claimants rightly argued that the EU had acted in violation of fundamental principles of customary international law as well as the Chicago Convention, which gives further effect to these principles.[77] The High Court asked the CJEU whether these rules of customary international law constitute a ground of review of the legality of EU legislation and, if so, whether the manner in which the EU ETS had been applied to aviation activities contravened any such principles of customary international law, therefore amounting to an impermissible form of extraterritorial legislative jurisdiction.

As regards the freedom of the high seas, it is a long-established principle of customary international law that no state may unilaterally subject any part of the high seas to its sovereignty since the open sea is not part of its territory. The principle of freedom of the high seas does not only cover enforcement acts, such as policing, taken on the high seas. Most significantly, it also applies to legislation purporting to apply over parts of the high

[76] U.N. Charter art. 1, para. 7.

[77] It should be noted that the Chicago Convention/ICAO is internationally recognized as the forum through which international aviation issues, including greenhouse gas emissions, should be regulated.

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seas. Apart from lack of territorial sovereignty over the high seas, every state of registration of an aircraft has exclusive jurisdiction over an aircraft when it is over the high seas. As such, the adoption of EU legislation applicable to the high seas is contrary to the customary international law principle of the freedom of the high seas.[78] The assumption is that the regulation of global environmental problems, including those concerning the high seas, can only legitimately be brought about by international cooperation and agreement, not by unilateral imposition of regional initiatives.

II. The New ETS Conditions of Reliance on Custom

In her opinion, Advocate General Kokott stressed that the claimants' allegation was "untenable" because it was based on "an erroneous and highly superficial reading of the provisions of Directive 2008/101."[79] She explained that the EU ETS calculation of emission allowances to the whole flight did not provide Directive 2008/101 with an extraterritorial effect. On the contrary, in the application of the EU emissions trading scheme, it was argued that the territoriality principle did not exclude parts of flights that take place outside the territory of the EU. Such an approach reflected "the nature as well as the spirit and purpose of environmental protection and climate change measures."[80] In the same vein, the Advocate General opined that the EU ETS posed no threat to the sovereignty of non-EU states since, contrary to the claimants allegations, Directive 2008/101 did not preclude third countries from bringing into effect or applying their own emissions trading schemes for aviation activities. Although such a system could encourage double regulation, this would not have an adverse effect upon the principles of customary international law, but would endure in the same manner that double taxation survives within the field of direct taxation.

In clarifying the basis on which customary international law may be relied upon in order to challenge the validity of an EU measure, the Advocate General adopted the same conditions that apply when a challenge is based on international conventions. She, therefore, followed the approach of the CJEU in *Intertanko*[81] which established that where the invalidity of secondary EU law is pleaded before a national court, the CJEU will review,

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[78] *See* U.N. Convention on the Law of the Sea art. 87, 89, 212, & 222, Dec. 10, 1982, 1833 U.N.T.S 397; U.N. Convention on the High Seas art. 2, Apr. 29, 1958, 13 U.S.T. 2313, 450 U.N.T.S. 82; Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, para. 50 (July 25).

[79] Case C-366/10, Air Transp. Ass'n of America v. Sec'y of State for Energy and Climate Change, 2011 E.C.R. _____, para. 144, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CC0366:EN:HTML (opinion of Advocate General Kokott) [hereinafter *ETS judgment* Kokott's opinion].

[80] *Id.* at para. 154.

[81] *See* Case C-308/06, Intertanko v. Sec'y of State for Trans., 2008 E.C.R. I-4057 (determining liability on the high seas).

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pursuant to Article 267 of the TFEU, the validity of the challenged measure in the light of all the rules of international law. These rules of international law are subject to certain conditions: (1) The EU must be bound by the rule of international law in question, (2) the nature and the broad logic of the rule of international law must not be such as to preclude such a review, and (3) the rule must appear, as regards its content, to be unconditional and sufficiently precise. This approach appeared to resolve the somewhat problematic hierarchy of customary international law in the EU legal order. Kokott was perhaps right in stretching the constitutional principles that govern the status of international treaties so that they apply to custom.

It can be argued, however, that Kokott's approach showed preference to the freedom and consequently the *locus standi* of economic operators, whose position is explicitly addressed in the international convention at hand, over the public interest of the consumer or civil society at large who may have an environmental concern vis-à-vis EU's compliance with international law. In that respect, the Advocate General's approach in *ETS* brings to mind the CJEU's *UPA* dicta on the limited scope of the standing of individuals under EU law to challenge EU measures.[82] In any case, Kokott concluded that the claimants could not rely on the invoked principles of customary international law—their common feature was (as with all customary law norms) that they determined the scope of sovereign states—and, therefore, limited their jurisdiction. According to the Advocate General, principles such as these were, by their "very nature and broad logic," incapable of having an effect on the legal status of individuals.[83]

The CJEU agreed with the Advocate General that extending the EU ETS to international aviation activities, under Directive 2008/101, does not breach public international law. It rebutted the extra-territoriality presumption, stressing that the Directive does not apply to flights carried out wholly over non-EU States or the high seas. In its judgment, the CJEU—in tune with Article 3 (5) of the TEU—accepted that the EU is obliged to observe international law in its entirety and that it is competent to review Directive 2008/101 in light of custom.[84] Accordingly, the CJEU recognized the existence of the first three invoked customs—*i.e.*, the principle of the sovereignty of States over their air space, the principle of the invalidity of claims of sovereignty over the high seas and on the freedom to fly over the high seas—and referred extensively to the case law of the ICJ and the treaty provisions that confirmed the existence of such customary norms.[85] As to the fourth principle (*i.e.*,

[82] *See* Case C-50/00 P, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6677 (determining whether an individual has standing).

[83] *See ETS judgment* Kokott's opinion at para. 134.

[84] *See ETS judgment* at para. 101.

[85] *See id.* at paras. 45, 104.

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the rule whereby an aircraft flying over the high seas is under the exclusive jurisdiction of the State of registration), the CJEU laconically noted that there was insufficient evidence that such principle, established regarding navigation on the high seas, would extend to aerial transportation.[86] The CJEU limited its review to the principles of exclusive state sovereignty over its airspace, the freedom to fly over the high seas and the impossibility to subject them to State sovereignty. Following the CJEU's judgment, the EU ETS extension entered into force as from 1 January 2012, whereby airlines are charged on GHG emissions created by flights to and from the twenty-seven EU Member States regardless of the operator's place of establishment.[87]

Although the CJEU's findings were in line with Kokott's opinion, the former did not agree with the Advocate General that individuals could not rely upon certain principles of customary international law as benchmarks for an EU legislative act. The CJEU emphasized that individuals may in all cases rely upon custom if certain conditions are satisfied. The CJEU, therefore, established a new test based upon two conditions regarding individual reliance on customary international law as a means of challenging the validity of EU legislation. The CJEU established that for a custom to affect the validity of an EU act it must be capable of calling into question the competence of the EU to adopt that act. Likewise, for an individual to be able to invoke international customary rules in the court of a Member State and compel a national judge to make a preliminary reference in accordance with Article 267 of the TFEU, the EU act in question must be "liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard."[88]

We should not, however, take for granted that a national court will refer all cases to the CJEU because: (1) The case at hand may be *Acte Claire* (which makes all more interesting the *ETS* judgment as the latest manifestation of how EU law relates to international custom), (2) the national court may not be clear whether, in accordance to Article 19 TEU, there is a strong presence of an EU law issue for the CJEU to adjudicate on, and (3) a national judge may decide that only national courts are competent to interpret and apply

[86] *See id.* at para. 106.

[87] Since this decision, under the auspices of ICAO, the *Moscow Joint Declaration* was issued providing that, "the EU and its Member States must cease application of the Directive 2008/101/EC to airlines/aircraft operators registered in third States." Joint Declaration of the Moscow Meeting on Inclusion of Civil Aviation in the EU-ETS, Feb. 21, 2012, *available at* http://www.bdl.aero/media/filer_public/2012/02/22/joint_declaration_of_the_moscow_meeting.pdf. The Declaration was signed by twenty-three states. *Id. See also* Robert Ireland, *The EU Aviation Emissions Policy and Border Tax Adjustments* 7 (World Customs Org. Policy Research Brief, July 2012), *available at* http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/research/26_EU_Aviation_Emissions_BTAs_EN.pdf.

[88] *ETS judgment* at para. 107.

custom and thus decide the case internally despite the presence of EU law. As such, it does not appear impossible for a national court to decide cases at home when EU legislation conflicts with customary international law. Obviously there are certain limitations and dangers to this approach. First, national judges will never be in a position to invalidate EU legal provisions and, second, they will add to the risk of divergences in judicial decisions within the EU. A further danger encompassed in the divergence of national judgments is that national judges may expose their Member States to *Köbler* state liability, which will leave them little choice other than to refer the substantive question to the CJEU.[89] Therefore, national courts of last instance shall aim at avoiding the risk of taking decisions in breach of EU law by asking the CJEU for a preliminary ruling.

According to the CJEU, a custom (typically governing inter-state relations) can only affect the rights of a private party if it challenges EU competence, or affects individuals' rights and creates obligations under EU law. Only then are private parties entitled to invoke custom to escape EU-derived obligations. However, the CJEU notes that customs are usually less precise than treaty norms, so EU institutions can be found to violate custom only when they make "manifest errors of assessment concerning the conditions for applying [them]."[90] This last remark was in tune with the CJEU's *Racke* dicta regarding the circumstances under which EU institutions can be found to violate custom. As such, the CJEU did not purport to overrule *Racke.* The CJEU's dicta in *Racke* is still, therefore, good law when it comes to the validity of a regulation in the light of customary international law. In so far as the CJEU establishes that "the individual concerned was invoking fundamental rules of customary international law against the disputed regulation, which had been taken pursuant to those rules and deprived that individual of the rights to preferential treatment granted to it by the Cooperation Agreement,"[91] that regulation can be reviewed. It can therefore be claimed that *ETS* complemented *Racke* on the invocability and reliance of custom by private parties, adding more requirements to an already restrictive test. This can be justified because the two cases were fundamentally different: *Racke* was about the invocation of the non-application of a Treaty (and therefore not of a custom per se but a rule of validity of a treaty), while *ETS* was about a general rule of behavior.

[89] *See* Case C-224/01, Köbler v. Austria, 2003 E.C.R. I-10239 (determining which courts have jurisdictions to hear cases that may be contrary to Community law).

[90] *See Racke* at para. 52.

[91] *Id.* at para. 48.

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E. Conclusions: When in Europe

This article discussed the historically binding status and incorporation of customary international law in EU law, as well as the way in which private parties may rely upon principles of customary international law for the purposes of examining the validity of EU secondary law. The focus was on the conditions under which reliance might be placed on customary international law for an individual to be able to invoke it in domestic courts and compel a national judge to seek formal interpretation of EU legislation by the CJEU. The purpose of this study was to demonstrate whether customary international law is capable of curtailing the EU institutions' discretion when exercising their competence in the sphere of external action. A set of clear guidelines regarding the invocation of customary international law is therefore important. This is because custom may provide individuals with an additional ground for challenging EU law directly under Article 263 of the TFEU, or indirectly by resorting to it domestically through national courts that may (or, as was discussed above, may not) refer the matter to the CJEU under Article 267 of the TFEU for a preliminary ruling. It is also important because such a development may potentially curtail the EU institutions' discretion or margin of assessment when evaluating complex economic and social matters. Successful reliance on custom may, therefore, influence the exercise of EU action at large in the sphere of external action (*e.g.*, aviation, the maritime sector) vis-à-vis its extraterritorial jurisdiction by rendering EU secondary law subject to external checks and balances. Such questions of jurisdiction are intimate to the allocation of competence in EU law.

Having studied the CJEU's jurisprudence, it can be argued that the obligation springing from EU law to respect customary international law in the exercise of its powers is not vigorous enough to curtail EU competence in the sphere of external action. The CJEU's early jurisprudence in landmark judgments such as *Poulsen* did not answer the question whether rules of customary international law can be invoked in order to review the legality of an EU act.[92] In this respect, the General Court and the CJEU had for some time adopted different approaches—the former indicated that custom applies within EU law only indirectly whilst the latter accorded custom a direct position in the EU legal order by acknowledging that individuals may invoke it in order to review the legality of EU legislative acts. However, as discussed, the CJEU in *Racke* restricted the application of custom only to "fundamental rules" and, because of the "complexity of the rules," it further constrained its review to cases of "manifest error" from the part of the EU institutions.[93] Our speculation is that although custom constitutes a useful source of inspiration for the CJEU, its role as a means of judicial review is still relatively small. The fact that *Opel Austria* remains the only successful case contesting the validity of an act of

[92] *See Poulsen* (interpreting certain technical measures for fishery resources).

[93] *See Racke* at paras. 48, 52.

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secondary EU law on the basis of a rule of customary law speaks for itself. Even in this case, it is questionable whether it was the obligations deriving from custom or the general principles of EU law that led to the successful outcome. The new restrictive conditions of reliance on customary international law after the *ETS* judgment also justify the assumption that the role of custom as a means of judicial review is weak. For the purpose of clarity, a private party may only be able to rely on customary international law in four circumstances.

First, the rules of customary international law invoked to challenge an EU legislative act must be fundamental (*Racke*). This aspect is not mentioned by the CJEU in the *ETS* judgment, but, in line with *Racke*, it probably implies fundamental norms of customary international law which protect states' fundamental interests.[94] This is likely meant to encompass scenarios foreshadowed in *Solange*[95] and *Honeywell*[96] where something drastic has occurred which has affected national constitutionally protected rights. On a different note, according to Kokott's opinion in *ETS*, whether the invoked custom is "fundamental" will depend on whether the governments of the large Member States, the Commission and other policy actors are firmly of the opinion that the principle of customary law invoked in a particular case exists.[97]

Second, in adopting the EU legislative act in question, the EU legislature has to make a manifest error of assessment concerning the conditions of applying the rules of customary international law invoked (*Racke*). This is similar to EU non-contractual liability in damages under Article 340 TFEU, where the applicant must establish a wrongful act on top of actual damage and causation.

Third, the principles of customary international law invoked are calling into question the competence of the EU to adopt the challenged EU legislative act (*ETS*). This is comparable to cases reviewing the legality of acts of the EU institutions under Article 263 TFEU, where one of the grounds for annulment is a lack of competence. What is not clear post-*ETS* is whether an individual would have to demonstrate that the EU legislature both erred in law (see above) and exceeded its competence vis-à-vis the invoked custom. Applicants may find it difficult to satisfy such a double onus.

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[94] *See id.* at para. 48.

[95] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 197/83, Oct. 22, 1986, 73 BVerfGE 339 (Ger.) (deciding to no longer examine Community laws for compatibility with German laws, entrusting that to the EU courts and lawmakers)*Re Honeywell,* Federal Constitutional Court (Second Chamber), 2011 1 C.M.L.R. 33.

[96] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2261/06 (Aug. 26, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html.

[97] *See ETS judgment* Kokott's opinion at para. 127.

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Finally, the EU legislative act challenged is liable to affect rights which the individual derives from EU law or creates obligations under EU law (*ETS*). This resembles Article 263 of the TFEU actions, where an act can be challenged if it is of direct concern to the non-privileged applicant.

Thus, an individual affected by an EU legislative act would be able, in the future, to rely on fundamental rules of customary international law in order to challenge its legality. The onus would be on her to prove that the EU legislature committed a manifest error or exceeded its competence attributed by the Treaty. This newly established test does not firmly exclude the *Intertanko* conditions of reliance to international conventions because it goes without saying that the custom invoked in each case shall be binding on the EU, the nature of the custom in question must not preclude such a review, and the custom must be unconditional and precise in order to produce direct effect. Despite the *ETS* test, the CJEU will still find a way (through interpretation) to bend the rules regarding the EU's obligations under international law. In the *ETS* judgment, the requirement that flights must either depart from or land at an airport located in the EU constituted a sufficient territorial link for the CJEU to confirm the EU's jurisdiction to prescribe. This can be seen as an effort by the CJEU to arrive at a rule of interpretation that EU law complied with customary international law. After affirmation of its competence to adopt Directive 2008/101/EC, which enabled it to unilaterally impose its own solution to a global environmental problem, the EU adopted a qualified approach to international law and paved the way for further EU action as regards spreading the EU Emissions Trading rules globally (for example, into the maritime sector).[98]

The approach of the CJEU's in *ETS* is similar to the General Court's rhetoric on the status of WTO obligations in *FIAMM* vis-à-vis EU liability in damages even in the absence of lawful conduct. Like *ETS* and *Racke* before it, the *FIAMM* judgment suggested that abiding to the international rule of law entails two parameters. The first is related to compliance of EU Institutions to international law, and the second encompasses the possibility of individuals to raise international law in order to defend their interests. Whilst the first parameter appears relatively unproblematic, the latter has conflicted with the CJEU's efforts to insulate the EU legal order from the impact of external or imported legal norms as a means of judicial review of EU secondary legislation.[99] Hence, the CJEU has been diligent in

[98] For a discussion on whether the shipping industry could be included in the European Emissions Trading Scheme to reduce greenhouse gas emissions, see Mariella Kremlis, *The Inclusion of the Shipping Industry in the EU ETS*, 19 EUR. ENERGY & ENVTL. L. REV. 145 (2010). On the issue of extraterritoriality, see parallels in the Appellate Body Report, *US-Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R (Oct. 12, 1998).

[99] Interestingly, Danni argues that, "if the Court of Justice wishes to take seriously *pacta sunt servanda*, it should enforce those findings [i.e. that WTO-inconsistent measures infringe primary and secondary international trade obligations] in the [EU] legal order and, notably, it should rule that also for [EU] purposes the Commission and Council acted illegally." Dani, *supra* note 20, at 325.

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formulating rules that need to be satisfied by individuals in order to surrender EU legislation to review by international law rules (albeit treaty or custom). On the bright side, putting together a test is instrumental because it enlightens individuals regarding their possibilities of challenging EU legislation. But on the downside, one might ask: How useful is a test that cannot be satisfied? In *FIAMM*, for instance, the General Court created a new EU liability test only to say that it cannot be invoked.[100] Additionally, as observed, the *ETS* test is a tough nut to crack. It therefore appears that whilst the CJEU has been willing to consider the impact of international law upon EU competence—*i.e.*, employ customary international law in order to entertain individual *ultra vires* claims—it has been hesitant to expose the EU legal order to unprecedented judicial review. There is little doubt that ascertaining EU competence at all costs is detrimental to individual judicial protection. There is, however, a conviction that the *ETS* judgment will signal the beginning of a new breed of litigation invoking custom in cases affecting individual interests.

The position of customary international law in the EU legal order remains contested. EU legislation is silent on most questions and the case law of the two European courts remains fragmented. In these circumstances, it can be argued that the invocability of customary international law arguably compels a national judge to make a preliminary reference in accordance with Article 267 of the TFEU. Yet, as already discussed, national courts may assume responsibility to interpret custom internally without making a reference to the CJEU regardless of any state liability implications. It is often the case, however, that even when a preliminary reference is made under Article 267 of the TFEU, it is the CJEU that has the last word when it comes to the incorporation and effect of international law within the EU. This practice has caused little dispute between the CJEU and national courts, and it is most likely to continue in regard to the post-*ETS* test for reliance on custom. In most cases, private parties will neither be able to escape EU derived-obligations nor challenge successfully EU external competence because customary international law is considered too vague to produce direct effect (as it has been the case with most GATT and WTO provisions). Such challenges are, therefore, deemed to remain unsuccessful. As a result, private parties would have to reach for new mechanisms of challenging EU legislation with external effects. For example, this is important in post-EU ETS cases where, like *FIAMM*, individual airlines seek compensation for damages caused by retaliatory measures adopted by EU ETS opponent states like the U.S.

A possible international adjudicative mechanism could be the WTO dispute settlement system, where private parties could fight to the bitter end against the discriminatory

[100] *See* Case T-69/00, FIAMM v. Council, 2005 E.C.R. II-5393, para. 21. The General Court concluded that the conditions governing such no-fault liability were not satisfied because the damage suffered by the applicants was not "unusual and special in nature." *Id.* at para. 155. For a critique of the *FIAMM* test, see Alberto Alemanno, *The Fiamm Judgment or "Going Bananas"! A Missed Opportunity to Distribute the Costs of European Community's Non-compliance with WTO Rulings Across Society*, *in* THE ECJ UNDER SIEGE: NEW CONSTITUTIONAL CHALLENGES FOR THE ECJ 208, 213 (Giuseppe Martinico & Filippo Fontanelli eds., 2009).

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effects of EU legislation similarly to how states have objected to all-encompassing U.S. legislation.[101] Such a development will make the submission of EU law to customary law in cases similar to *ETS* on unilateral climate action[102] subject to external judicial scrutiny—which is different to the current internal scrutiny of the CJEU using external norms of international law. It will also challenge the EU's extraterritorial jurisdiction to prescribe, and will presumably reduce the CJEU's teleology to cases that fall strictly within the scope of EU law. New adjudicative mechanisms will not, however, resolve the constitutional ambiguity in EU law that we examined so far in this article, namely the vague hierarchy that customary international law enjoys in the EU legal order.

[101] *See* Lorand Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, 23 EUR. J. INT'L L. 429 (2012); Alberto Alemanno, *Judicial Enforcement of the WTO Hormones Ruling Within the European Community: Toward EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions?*, 45 HARVARD INT'L L.J. 547 (2004) ("By demonstrating the opportunity to introduce a minimal standard of direct effect into the world trading system, the recognition of the invocability of WTO rulings, embryonically developed by the ECJ in the *Biret* case, may lay the groundwork for a new role for private parties in the dispute settlement system.").

[102] Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism*, 23 EUR. J. INT'L L. 469 (2012).

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