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# Loyalty Towards International Law as a Constitutional Principle of EU Law?

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# LOYALTY TOWARDS INTERNATIONAL LAW AS A CONSTITUTIONAL PRINCIPLE OF EU LAW?

By Judicaël Etienne[1]

## Abstract

Over the past decade, the relationship between European and international law has largely been commented through the prism of the autonomy, recent decisions issued by the Court of Justice of the European Union having emphasized the integrity of the EU legal system. Yet by committing the EU to contribute "to the strict observance and the development of international law", the Lisbon Treaty provides for a slightly different approach in primary law. Article 3 (5) of the Treaty on European Union (TEU) traduces a deferent attitude that can be designated as one of loyalty towards international law. Beyond a general objective of the EU, the notion of loyalty may be viewed as a concept, explaining that EU law and international law interact in a subtle equilibrium between loyalty and autonomy. In addition to a conceptual interest, loyalty could be acknowledged as a metaconstitutional principle of EU law that would allow reconsidering the effects of international law in the European legal system.

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## INTRODUCTION

Unsurprisingly, international law and European law converge on the principle according to which the EU is required to act in conformity with international law. As a subject of the international legal system, the EU has to observe general international law as well as treaties binding upon it. Henceforth this principle seems to be enshrined in the Lisbon Treaty, among the objectives set up to the Union in Article 3 TEU: the EU shall contribute "to the strict observance and the development of international law". The provision echoes a common finding of the European Court of Justice (ECJ) that has repeatedly and explicitly stated that the EU has to exercise its powers in accordance with international law, the latter being a part of EU law. International law and European law therefore join together so that the former is performed *by* and *in* the latter.

Nevertheless, this apparently limpid correlation masks the complexity that connection between legal systems is imbued with. If closer look is shed at another range of ECJ decisions, it flows that compliance with international law does not systematically correspond to legal review of EU law in the light of international norms binding on the EU. As a result, the extreme hypothesis of the EU enacting legislation that would conflict with international law cannot theoretically be excluded. As a whole then, the Court case-law reflects the balanced relationship between international law and EU law that looks more like an impressionist scene than a black and white picture.

In that context, Article 3 (5) TEU along with other primary law provisions emphasizes respect for international law, expressing a deferent attitude towards the international legal system. By its wording and position on top of EU constitutional fundamentals, it is suggested that the new provision may be considered as the expression of a *notion*, one of *loyalty* of the EU legal system towards international law. This notion of loyalty would be likely to have a twofold implication, on two different levels of reflection. As a *concept*, loyalty would provide a theoretical framework explaining that the relationship between EU and international law is made up of a balance, autonomy and loyalty not being contradictory but complementary. In a narrower sense and from a practical point of view, loyalty may be seen as a *principle* with possible legal effects, questioning the

correspondence between obligatory effect of international law and legal review in the light of it.

First of all, indications of a principle providing for loyalty are collected, as its existence in positive EU law is question marked (I. – Signs). Possible effects of loyalty are then examined, with a suggested double scope of application, as a concept or a metaconstitutional principle (II. – Use).

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## I. – SIGNS OF LOYALTY

The way a legal system relates to international law is first and foremost a matter for the law of that legal system. Why this is so is better explained by international law, which leaves to domestic legal orders the choice and the degree of hermetism or openness towards international law (1). In that regard, EU law has opted for an approach that is resolutely pleading for loyalty towards international law (2).

### 1. – Flexibility in international law

As a matter of principle, international law proclaims its own obligatory effect without much elaborating on the consequences pertained to it. States and international organizations have then a broad margin of flexibility as to the means to comply with their commitments flowing from international law, be that treaties or general international law.

According to their very definition, treaties have obligatory effect for the subjects that have agreed to enter into international conventional commitments. Article 26 of the Vienna Convention on the Law of Treaties (VCLT) states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". The provision codifies one of the founding principles conferring to international law its legal character[2]. Despite its fundamental nature, the rule *pacta sunt servanda* is not very elaborated as to its precise scope. It merely states that a treaty must be executed by the parties, what resembles an obligation to achieve a result. International law leaves then to its subjects the choice of the appropriate means to perform their conventional obligations, provided that they *are* performed. This margin of appreciation means that domestic laws are called to play a role in international law, this role being in fact a twofold one. On the one hand, the law of the parties must ensure that obligations

[2] See the preamble of the Vienna Convention, according to which *pacta sunt servanda* is a universally recognized rule. For an early discussion on the nature of the *pacta sunt servanda* rule, see the comment on Article 20, "Draft Convention on the Law of Treaties", *A.J.I.L.*, Vol. 29, Suppl.: Research in International Law, 1935, p. 986-989. The *pacta sunt servanda* principle would rank among the "preconditions" of international law, characterized by J. CRAWFORD, *The Creation of States in International Law*, 2nd ed., Oxford, Clarendon Press, 2006, p. 101, as structural rules of international law opposed to material norms.

flowing from international law will be duly executed. On the other hand and at the same time, domestic laws cannot serve as an excuse for non-compliance with a treaty, as provided for in Article 27 VCLT. Put differently, the law of the parties must facilitate the performance of international commitments, not obstruct it.

What is said about treaties should not be different regarding the obligatory effect of general international law. Without entering into considerations related to protest or evolution, customary law is binding upon all subjects of international law[3], as general principles are, provided that the latter can be identified and considered as a proper source of international law.

In international law and from the perspective of domestic legal systems, the relationship between the one and the others is then one of flexibility: while international law sets a result to be achieved by its subjects, the latter will have to choose the means to perform their international obligations[4]. In domestic law now, this margin of flexibility results in a choice on how to relate to the international legal order. In that regard, EU law has determinedly opted for openness.

## 2. – Choice in EU law

Early on the new legal order founded by the European Economic Community Treaty has had to define its own identity by determining its main features. In doing so it has

[3] As M. SHAW, *International Law*, 6th ed., Cambridge, CUP, 2008, p. 91, puts it, "customary rules are binding upon all states except for such states as have dissented from the start of that custom".

[4] This principle is expressed by the International Court of Justice (ICJ) in the *Avena* case where the Court was requested to interpret the effects of its own decision in domestic law. Execution of the Court's judgment "is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it [...] to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law". See ICJ, *Request for Interpretation of the Judgment of 31 March 2004 in the* Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), *Mexico v. United States of America*, Judgment, 19.01.2009, para. 44. For E. DENZA, "The Relationship between International and National Law", in M. EVANS (ed.), *International Law*, 3rd ed., Oxford, OUP, 2010, p. 411, "international law does not itself prescribe how it should be applied or enforced at the national level. It asserts its own primacy over national laws, but without invalidating those laws or intruding into national legal systems, requiring a result rather than a method of implementation. National constitutions are therefore free to choose how they give effect to treaties and to customary international law".

asserted its specificity in comparison with the legal systems from which it emanated, namely the legal systems of the member states and international law[5]. Otherness implies saying what one is not (anymore) and declaring what one is (henceforth). The European integration process could then have resulted in a legal order impermeable to the laws from which it stems. On the contrary, EU law integrates both international law and the law of the members all the while asserting its unique character. This double trend is accurately reflected in the way the EU conceives its approach to international law. On the one hand, international law "forms an integral part" of EU law[6], be that treaties concluded by the EU or norms of general international law. On the other hand though, the EU legal system "is not to be prejudiced by" international law[7]. What at first sight may be perceived as contradictory is in fact complementary, the relationship between EU and international law corresponding to the image of a hinge allowing in the same time for opening and closing. The result is then necessarily a balanced one. While international law is truly incorporated *as* the law of the land in the EU legal system (2.1), this incorporation is nevertheless to be considered as taking place *according to* the law of the land (2.2). This is how the EU has made use of the flexibility left by international law, in an approach which is on the whole one of loyalty towards international law (2.3).

### 2.1. – International law is the law of the land

The founding member states have omitted to make in the treaties explicit and general provision for the relationship with international law. This has accordingly left room to the judiciary, the Court having elaborated a set of principles on the effects of treaties and general international law in domestic law. In a dozen of key decisions the ECJ has made up a consistent body of rules on the *reception* of international law in the EU legal system, its obligatory *effect* and its position in the *hierarchy* of norms.

[5] On the images of the genetic code or the birth certificate of international law nature transforming into a constitutional order, see R. SCHÜTZE, "On 'Federal' Ground: The European Union as an (Inter)National Phenomenon", *C.M.L.Rev.*, 2009, p. 1076 and 1079.
[6] ECJ, Case 181/73, *Haegeman*, 30.04.1974, para. 5.
[7] ECJ, Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat v. Council*, 03.09.2008, para. 316.

The Court of Justice has adopted the elementary view according to which international law immediately penetrates the EU legal system. The immediate application of international law flows from early case law on the effect of treaties while it has been ruled later on the status of customary norms.

The landmark decision on the reception of treaties is the case *Haegeman*, where the Court was requested to interpret provisions of an association agreement concluded by the Community with a third state. For the Court, "the provisions of the agreement, from the entry into force thereof, *form an integral part of Community law*"[8]. This immediate reception of a treaty in the EU legal order is based on the consideration that the agreement is concluded by the EU institutions, under current Article 218 TFEU. Both considerations – conclusion in the form of an act of the institutions and according to the procedural provision – lead to the competence of the Court to interpret the agreement. This finding is commonly seen as expressing a monist approach in EU law[9]: the reception of a treaty is being acknowledged with the mere entry into force of the agreement, without any specific form of internal transformation being required. Without any apparent ambiguity then, the Court of Justice has opted for the reception of treaties in the way of an immediate application: once entered into force, they are incorporated within the EU legal system so that they are fully part of it and likely to have obligatory effect in EU law. Reception in the form of *direct* immediate application – that is to say the conclusion of a treaty by the EU as a party – is however supplemented by two specific hypotheses of *indirect* immediate application, by way of subrogation[10] or delegation[11].

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[8] ECJ, Case 181/73, *Haegeman*, 30.04.1974, para. 5.

[9] C. KADDOUS, "Effects of International Agreements in the EU Legal Order", in M. CREMONA and B. DE WITTE (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford, Hart, 2008, p. 293. However, this is to be considered as balanced with the fact that reception proceeds because the agreement is an act of the EU institutions. See below, 2.2.

[10] The notion refers to the case where the EU takes over the conventional commitments originally entered into by the member states after a transfer of power to and exercise of competences by the EU in the field of a treaty to which the member states are parties. As the effects *in* international law are questionable, subrogation is preferred to the formal notion of succession. Subrogation has proceeded in the field of the GATT (see ECJ, Joint Cases 21 to 24/72, *International Fruit Company*, 12.12.1972, paras. 14-18) but has not been acknowledged by the Court where the competence of the Union does not cover the full extent of the agreement concluded by the member states. For a recent decision see ECJ, Case C-301/08, *Bogiatzi*

The reception of customary norms of international law has not always been expressed by the Court with the same clarity as it did for treaties. However, a similar principle of immediate application can be deduced from a first set of decisions. They mostly relate to customary principles of treaty law[12]; and principles linked to the attributes of territorial sovereignty including the law of the sea[13]. By ruling that principles of customary international law form part of the EU legal order, the Court has then opted for reception without any need of transformation for international law to integrate the domestic legal system and therefore having obligatory effect within the latter.

The reception of international law in the EU legal system has for consequence that treaties and general international law become – without any formal transformation – an integral part of the domestic legal system. As norms of EU law, they have accordingly obligatory effect.

In line with the principle governing the reception of treaties, Article 216 (2) TFEU states that "agreements concluded by the Union are binding upon the institutions of the Union and on its Member States". In addition to a link with the reception of treaties concluded by the EU, this key provision of primary law has the function of enouncing the obligatory effect of treaties that form an integral part of EU law. Article 216 (2) TFEU

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*ép. Ventouras*, 22.10.2009, para. 32-33, on the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929.

[11] For institutional reasons, the EU may be prevented from concluding treaties whose subject-matter falls within EU competences when membership is not open to international organizations. In that case, the member states may act jointly in the Union's interest and conclude an agreement that will be receptioned in EU law. See ECJ, Case C-45/07, *Commission v. Hellenic Republic*, 12.02.2009, paras. 30-31. On the so-called "*actio pro comunitate*", see E. NEFRAMI, *L'action extérieure de l'Union européenne*, Paris, L.G.D.J., 2010, p. 128-131.

[12] The EU is not a party to the 1969 Vienna Convention on the Law of Treaties which does not apply to agreements concluded between states and international organizations. Nevertheless, the ECJ "has held that, even though the Vienna convention does not bind either the Community 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 Community institutions and form part of the Community legal order". See ECJ, Case C-386/08, *Brita GmbH*, 25.02.2010, para. 42.

[13] The Court relies on conventions on the law of the sea to which the EU is not a party or not entered into force yet with regard to the EU "in so far as they codify general rules recognized by international custom" or in consideration of the fact that their "provisions are considered to express the current state of customary international maritime law". See ECJ, Case C-286/90, *Poulsen and Diva Navigation*, 24.11.1992, para. 10.

may in this regard be seen as the domestic expression of *pacta sunt servanda*: parties to an agreement are bound by its provisions and must perform them. The principle is obvious regarding the institutions of the Union that have contributed to the conclusion of a treaty under Article 218 TFEU. On the other hand, the binding effect of a treaty concluded by the EU upon the member states has aroused doubts as to the logical parallelism of *pacta sunt servanda* in international law and in EU law. This mention is to be read as not intending to create binding effect upon the member states in international law but implying that in the EU legal order the member states are bound by a treaty concluded by the EU as they are obliged by any EU legal act addressed to them. Therefore, the conclusion and reception of an agreement bind the EU in international law and in the EU legal system. The institutions have in this regard the *primary obligation* to perform agreements. For their part, member states have, in EU law, a *secondary duty* to contribute to the performance of the treaty that however does not create for them an obligation in international law[14].

In a wording that will be repeated in numerous later cases, the Court has ruled in the *Poulsen* case that the EU "must respect international law in the exercise of its powers"[15]. It flows from the judgment that this very broad formula regarded customary rules in the field of maritime law, and that the binding character of these norms was carefully defined by the Court. Nevertheless, it clearly enounces that the obligatory effect of international law in EU law has for consequence that the EU has to exercise its powers in accordance with international norms binding upon it. This covers the external action of the EU as well as the adoption of legal acts in the internal plane. Thus norms of international law integrated in EU law have obligatory effect in the domestic legal order, where they are conferred with a specific status in the hierarchy of norms.

[14] With some ambiguity the Court had held in its *Kupferberg* judgment that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only *in relation to the non-member country concerned* but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement" (ECJ, Case 104/81, *Kupferberg*, 26.10.1982, para. 13). The *Demirel* judgment makes clear that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfill, *within the Community system, an obligation in relation to the Community*" (ECJ, Case 12/86, *Demirel*, 30.09.1987, para. 11).

[15] ECJ, Case C-286/90, *Poulsen and Diva Navigation*, 24.11.1992, para. 9.

Norms of international law forming part of EU law have obligatory effect in the domestic legal system which implies that they are likely to interact with other norms of EU law. The Court of Justice has deduced from reception and obligatory effect of treaties concluded by the EU an explicit pyramidal hierarchy that has so far not been expressed with the same clarity for general international law.

After having issued several decisions from which a hierarchy of norms could be inferred, the Court has expressly mentioned "the primacy of international agreements concluded by the [EU] over provisions of secondary [EU] legislation"[16] without any further indication on the grounds for precedence. In recent decisions, the Court has presented the primacy of treaties over secondary law as a result of a convincing syllogism founded on Article 216 (2) TFEU. Agreements concluded by the EU institutions according to procedural primary law provisions are thus integrated in the EU legal system as a part of EU law. These conventions are binding upon the institutions "and, *consequently*, [they] have primacy over secondary [EU] legislation"[17]. This three-step reasoning therefore links together reception, obligatory effect and position of treaties, resulting in an express hierarchy of norms. Worth mentioning is that the Court has not limited the primacy of external agreements in terms of chronology: treaties concluded by the EU trump anterior as well as posterior legislation conflicting with conventional commitments entered into by the institutions.

Norms of general international law which form part of EU law have not been conferred with explicit primacy over secondary legislation as the Court did with regard to conventional law. It is therefore principally with scattered indications that the hierarchical position of general international law can be perceived. It follows from the *Racke* decision – *a contrario* though – that the validity of a regulation may be affected, should the secondary act be considered as contrary to a norm of customary international

[16] ECJ, Case C-61/94, *Commission v. Germany*, 10.09.1996, para. 52.
[17] For two recent instances, see ECJ, Case C-173/07, *Emirates Airlines v. D. Schenkel*, 10.07.2008, para. 43 and ECJ, Case C-549/07, *F. Wallentin-Hermann v. Alitalia*, 22.12.2008, para. 28.

law[18]. Since the *Racke* case there is then no reason to exclude that general international law, along with treaties concluded by the EU, has actual primacy over secondary legislation.

Mostly jurisprudential, the principles governing the relationship between international and European law has been shaped by the Court of Justice with the result of a full integration of the former in the latter. Article 216 (2) TFUE is the key primary law provision in that regard, the Court having defined its scope as covering reception, effect and hierarchy of treaties in EU law. External agreements rank above secondary legislation and therefore trump legal acts that would appear to conflict with commitments entered into by the EU. The integration of general international law has largely built on the principles developed with regard to conventional law, although not with the same clarity. Nevertheless, it can be considered that general international law is a part of EU law, with obligatory effect and logically primacy over secondary legislation. This relative cautiousness regarding general international law, that may be explained by the fact that these norms do not have the EU pattern as it is the case for external agreements, does not contradict the principle according to which international law is, in EU law, the law of the land. However, this principle must be carefully sharpened in the light of a bunch of other decisions implying that international law is truly the law of the land, yet according to the law of the land.

### 2.2. – According to the law of the land

EU law considers international law as a part of it, *integration* being thus a first link connecting the EU legal system to international law. This may however be misleading if account is not being taken of another trend that is one of *preservation*. Complementing rather than contradicting the integration principle, preservation refers to the aim at

[18] ECJ, Case C-162/96, *Racke*, 16.06.1998, paras. 26, 27, 45, 46 and 60. The Court repeats that its jurisdiction under the preliminary ruling procedure is not limited as to the grounds on which the validity of an EU legal act may be assessed, including rules of international law (see paras. 26-27). Furthermore, rules of customary international law in the field of the law of treaties form an integral part of the EU legal order. The validity of a regulation suspending the application of a bilateral cooperation agreement may thus be challenged in the light of customary principles on the suspension of a treaty by reason of a fundamental change of circumstances (paras. 45-46).

protecting the integrity of the EU legal *acquis*. The latter cannot be affected by alien law, the one of the member states or international norms. While integrating international law as the law of the land, EU law ensures that treaties or norms of general international law will not defeat the objectives pursued and settled by the EU legislature. The need of protection results in a range of principles subtly counterbalancing the complete integration of international law within the domestic legal system. In this sense, international law is the law of the land, however within the limits set by the law of the land. This is the case at the three stages of reception, devolution of effects and hierarchical position.

The immediate application of international law in EU law is put in perspective by the principles according to which treaties or norms of general international law are integrated in the EU legal system.

If the integration of agreements concluded by the EU does not require any specific form of reception, it is nevertheless in consideration that the treaty is concluded by the institutions adopting a legal act to that effect. It is therefore this act of conclusion – in principle a decision of the Council – that allows for reception of a treaty[19]. In the framework of proceedings, the Court will then formally exercise its jurisdiction over an act of the EU. As a result, immediate application of external agreements proceeds through the medium of an internal legal act[20].

The reception of general international law can hardly be considered as settled so far. It is not that immediate application is balanced by other principles. Much more, the European judiciary has issued decisions from which immediate application of customary law cannot be inferred. Shortly before the Court of Justice had rendered its

[19] ECJ, Case 181/73, *Haegeman*, 30.04.1974. Paras. 4 and 5 of the decision clearly express the two-step process of the reception: the external agreement is an act of the institutions, therefore allowing for reception, after which "the provisions of the agreement" form an integral part of EU law.
[20] I. CHEYNE, "International Instruments as a Source of Community Law", in A. DASHWOOD and C. HILLION (eds.), *The General Law of E.C. External Relations*, London, Sweet & Maxwell, 2000, p. 256-257, points out the relative contradiction of the immediate reception and the jurisdiction exercised over an internal act of the institutions.

*Racke* decision, the Court of First Instance (CFI) had ruled in the *Opel Austria* case that the principle of good faith, which is a norm of customary international law, was indeed binding on the Union. But it added that it was "the corollary in public international law of the principle of legitimate expectations which, according to the case law, forms part of the [EU] legal order"[21]. In a more recent case, the CFI has not departed from the ambiguous formal source of general international law in EU law[22]. On appeal, the Court of Justice has however mentioned solely "the customary principle of good faith, which forms part of general international law", without linking it to a corresponding norm of EU law[23]. The reception of general international law therefore oscillates between immediate reception as norms of international law and integration by the intermediary of domestic norms substantially corresponding to principles of international law. Nevertheless, general international law as well as treaties have obligatory effect in EU law.

The obligatory effect of international law in EU law is expressed by two general principles whose scope has however been carefully limited by the Court. While treaties concluded by the EU are *binding upon* it and the institutions have to exercise their powers *in accordance with* general international law, both principles have to be considered in the light of the conditions under which the binding character of international law actually produces constraining effects. These conditions have been set and are of relevance in the framework of proceedings, when legal acts are challenged on the grounds of an alleged infringement of international law binding on the Union.

Reception and obligatory effect of treaties in EU law have been dealt with by the Court as it had to rule on the legality or the validity of legal acts in the light of external agreements entered into by the EU. In such instances, the Court has set the principles of immediate reception and binding effect flowing from Article 216 (2) TFUE. It is in these

[21] CFI, Case T-115/94, *Opel Austria v. Council*, 22.01.1997, paras. 90 and 93.
[22] CFI, Case T-231/04, *Hellenic Republic v. Commission*, 17.01.2007, paras 85 and 87. Building on its case *Opel Austria*, the CFI takes into consideration the principle of good faith in international law that has its correspondent principle in EU law.
[23] ECJ, Case C-203/07 P, *Hellenic Republic v. Commission*, 06.11.2008, para. 64.

instances too that the Court has had to pronounce on the consequences flowing from reception and obligatory effect. At stake was whether institutions, member states or individuals could rely on an external agreement in order to dispute the legality or validity of secondary law. In that regard, the Court has set three conditions under which it would exercise its jurisdiction. They have been reminded, summarized and applied with specific clarity in the *Intertanko* decision[24]. First of all, the Court has jurisdiction over treaties that are binding on the EU. The first condition is met with regard to external agreements formally concluded by EU institutions that are immediately applicable in the domestic legal order. Treaties integrated by way of subrogation or delegation – the figure of indirect immediate application – meet the first condition as well. In addition to the first formal requirement, two further conditions have been set regarding the substance of an agreement invoked before the Court. Firstly, its nature and broad logic must be so that they do not preclude a review of legality of EU legislation in the light of that agreement. Secondly, the provisions on which it is relied must appear to be, as regards their content, unconditional and sufficiently precise.

These two substantial conditions – the last one being largely inspired by the case-law on direct effect of EU law – have been repeated and applied by the Court so that they differentiate from the concept of direct effect to apply to the autonomous notion of *invocability*. The latter refers to "the possibility of relying on international agreements", irrespective of whether the action is brought before national or EU courts, the nature of the action and the status of the applicant[25]. In that sense, external agreements may have obligatory effect in EU law but they have nevertheless to meet specific conditions in order to be endowed with the quality of legal norms in the light of which legality or validity of EU law can be reviewed[26].

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[24] ECJ, Case C-308/06, *Intertanko*, 03.06.2008, paras. 44-45.
[25] ECJ, Joint Cases C-120 and 121/06, *FIAMM v. Council and Commission*, 09.09.2008, Opinion AG M. Poiares Maduro, paras. 28 and 31. In her opinion delivered in the case *Air Transport Association of America (ATAA)*, AG J. Kokott refers to the possibility to rely upon norms of international law "as a benchmark against which the lawfulness of EU acts can be reviewed" (Pending Case C-366/10, *ATAA*, Opinion AG J. Kokott, 06.10.2011, see e.g. at para. 45).
[26] AG M. Poiares Maduro (ECJ, Joint Cases C-120 and 121/06, *FIAMM v. Council and Commission*, 09.09.2008, Opinion, para. 24) points to this gap between obligatory effect and invocability which "may appear contradictory".

The invocability of norms of general international law has not been explicitly submitted to specific conditions so far. If their reception in EU law proceeds by means of corresponding general principles of domestic law then norms of international law are transformed into norms of EU law and have the obligatory effect that the latter have. On the other hand, should general international law be immediately applicable in EU law, then the possibility to rely on it does not seem to be settled yet. The *Racke* decision is not of much help in that regard. In this case, an individual was entitled to rely directly on a customary principle of treaty law, but in consideration that the individual sought the protection of rights that he derived directly from provisions of an external agreement having direct effect[27]. For the time being, it is therefore not clear whether general international law, as a part of EU law, is submitted to specific conditions in order to have actual obligatory effect in the framework of proceedings[28]. This uncertainty, along with the conditions required for external agreements concluded by the EU, might be regarded as putting the hierarchical position of international law in EU law into question.

Although norms of international law are part of EU law with obligatory effect and accordingly primacy over secondary law, their hierarchical status is limited in two ways. Firstly, the precedence over EU law does not extend to primary law. Secondly, the very scope of primacy over secondary law has been carefully defined by the Court of Justice.

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[27] ECJ, Case C-162/96, *Racke*, 16.06.1998, paras. 34, 47 and 51. The Court even excludes that the case may concern the direct effect of customary international law: the plaintiff challenges the validity of a regulation suspending an agreement in the light of international law, in order to protect rights that he derives from the agreement.

[28] In her conclusions in the case *ATAA*, AG J. Kokott suggests to submit the invocability of customary international law to the conditions applicable to external agreements. After stating that "the case-law of the Courts of the European Union has not given rise to any clear criteria for the determination of whether and to what extent a principle of customary international law can serve as a benchmark against which the validity of EU legislation can be reviewed", AG J. Kokott suggests "that the Court of Justice should not recognise principles of customary international law as a benchmark against which the lawfulness of EU acts can be reviewed unless two conditions are satisfied. First, there must exist a principle of customary international law that is binding on the European Union. Secondly, the nature and broad logic of that particular principle of customary international law must not preclude such a review of validity; the principle in question must also appear, as regards its content, to be unconditional and sufficiently precise". See Pending Case C-366/10, *ATAA*, Opinion AG J. Kokott, 28.10.2011, paras. 109 and 113.

First of all, the primacy of international law over secondary EU law is only a part of the hierarchical position that is conferred to external agreements and general international law. The precedence of treaties over acts adopted unilaterally by the EU institutions is explained by the obligatory effect of external agreements in EU law, the institutions being prevented from defeating internally what they agreed on the international plane. In the same way, it would not be acceptable that the EU institutions enter into international commitments that would contradict the domestic fundaments from which their powers flow. External agreements are thus subordinated to EU primary law, the principle being suggested in Article 218 (11) TFEU[29]. More explicitly, the Court has characterized primary law as forming "an autonomous legal system which is not to be prejudiced by an international agreement"[30]. The relationship between EU primary law and general international law is even more delicate to envisage, depending on the perspective from which it is considered. From the point of view of a domestic legal system integrating norms of international law, it seems coherent to protect the integrity of the constitutional basis allowing for the reception of international law[31]. From the perspective of international law though, EU primary law is a treaty whose integrity is not guaranteed. Nevertheless, the EU legal system consistently integrates international law as a part of it but with a constitutional reservation.

With a hierarchical position between primary and secondary law, international law trumps legal acts adopted by the institutions. The primacy of external agreements and general international law would then in principle imply that EU legislation has to

[29] The provision provides for a preliminary opinion procedure on the compatibility with the EU treaties of an envisaged external agreement. If the Court decides that the agreement is not compatible with primary law, the agreement must be amended or the treaties have to be modified before the entry into force of the former.

[30] ECJ, Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat v. Council*, 03.09.2008, para. 316. Although the agreement in question was not formally binding on the EU as a party to it and the specific obligatory effect of the UN Charter distinguishes it from other treaties, the finding can be considered as the general expression of the primacy of primary law over external agreements. See as well ECJ, Case C-459/03, *Commission v. Ireland*, 30.05.2006. para. 123: "an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the [EU] legal system".

[31] In that regard, para. 316 of the *Kadi* decision (ECJ, Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat v. Council*, 03.09.2008) may be considered as expressing in general the superiority of EU primary law over international law as a whole.

comply with international law binding on the EU and that EU procedural law has to allow for legal review of its compatibility with international law. In other words, primacy would necessarily result in invalidity or annulment of regulations, directives or decisions contrary to international law. This is however not what a survey of the case-law reveals, the primacy of international law not resulting in a mechanical annulment or declaration of invalidity of secondary EU law. On the one hand, international law has to meet the conditions set to its invocability before EU courts that therefore depends on judiciary interpretation. On the other hand, primacy has milder consequences than a mere superiority leading to annulation or invalidity in case of conflict. Both considerations are at the very crux of the relationship between EU and international law as they express the precise extent to which the Union legal system integrates international law beyond the principle of reception as a part of domestic law.

The primacy of external agreements concluded by the EU can be summarized with a distinction between three main types of treaties whose invocability has been assessed differently by the Court of Justice. First of all, agreements concluded within the World Trade Organization (WTO) and decisions adopted by its organs have been denied invocability on the grounds of their nature and broad logic. As a matter of principle, "the WTO agreements are not [...] among the rules in the light of which [...] the legality of measures adopted by the [EU] institutions" is reviewed[32]. Justified by the specific nature of WTO agreements[33], the abundant case-law on their non-invocability make up a notable exception compared to other agreements concluded by the EU[34]. At the opposite, material provisions of agreements setting up a comprehensive or sectorial

[32] ECJ, Case C-149/06, *Portugal v. Council*, 23.11.1999, para. 47. In a narrower scope, the Court had already ruled in its early *International Fruit Company* decision (ECJ, Joined Cases 21 to 24/72, 12.12.1972, paras. 27-28) regarding the General Agreement on Tariffs and Trade (GATT) that its provisions did not "confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure". On the invocability of a decision issued by the Dispute Settlement Body, see CFI, Case T-69/00, *FIAMM v. Council and Commission*, 14.12.2005, paras. 129 to 132, confirmed by the Court, ECJ, Joined Cases C-120 and 121/06 P, *FIAMM v. Council and Commission*, 09.09.2008, paras. 101 to 103.

[33] See ECJ, Case C-149/06, *Portugal v. Council*, 23.11.1999, paras. 36 to 47, for an exhaustive explanation and justification of the non-invocability of WTO agreements.

[34] In that regard, K. LENAERTS and T. CORTHAUT, "Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law", *E.L.Rev.*, 2006, p. 299, point out the fact that it is the nature of the WTO agreements that is an exception rather than the case law on their non-invocability.

partnership with foreign countries are generally recognized direct effect[35]. In the intermediate of these two types of agreements come a range of treaties setting up a sectorial legislative framework. It is with regard to this third category of multilateral law-making treaties that the invocability in EU law raises questions as to their actual primacy in the domestic legal system. The possibility to rely on the UN Convention on the Law of the Sea (UNCLOS) has highlighted the way the Court would consider the invocability of a general treaty, concluded multilaterally, in another field than trade. In its *Intertanko* judgment, the Court has held that "the nature and broad logic of UNCLOS prevent the Court from being able to assess the validity of [an EU] measure in the light of that Convention". The invocability of UNCLOS thus comes up against the first substantial condition but in consideration that the convention "does not establish rules intended to apply directly and immediately to individuals"[36]. The *Intertanko* decision has raised critical comments, pointing out the formalist reasoning of the Court[37] or suggesting that the restrictive case law on WTO agreements would have been extended to the invocability of law-making treaties[38]. Whether *Intertanko* marks a new approach on the invocability of external agreements or is rather an isolated decision has still to be confirmed. In that regard, it has to be noted that the ECJ has admitted the invocability of other law-making treaties in very similar instances without entering into in-depth analysis of their broad logic or the conditionality of their provisions[39].

[35] In its *Portugal v. Council* decision (ECJ, Case C-149/06, 23.11.1999, paras. 42 and 45), the Court insists on the distinction between WTO agreements on the one hand and "agreements concluded between the [EU] and non-member countries which introduce a certain asymetry of obligations, or create special relations of integration with the [Union]". It should however be noted that the invocability of these bilateral partnership agreements generally arises in the framework of preliminary rulings on their interpretation in relation to the application of domestic law of the member states more than to their compatibility with EU secondary legislation.

[36] ECJ, Case C-308/06, *Intertanko*, 03.06.2008, paras. 64-65.

[37] P. EECKHOUT, Annotation, ECJ, Case C-308/06, *Intertanko*, 03.06.2008, *C.M.L.Rev.*, 2009, p. 2054-2055.

[38] S. BOELAERT-SUOMINEN, "The European Community, the European Court of Justice and the Law of the Sea", *I.J.M.C.L.*, 2008, p. 705-707.

[39] ECJ, Case C-344/04, *IATA and ELFAA*, 10.01.2006, para. 39. The case regarded the invocability of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, whose provisions "are among the rules in the light of which the Court reviews the legality of acts of the [EU] institutions".

Where the primacy of international law over EU secondary law does not result in annulment or invalidity of the latter conflicting with the former, the Court of Justice has elaborated a series of principles that may be considered as substitutes for or milder effects of primacy. In several instances, international law will indeed have an effect on acts adopted by the institutions that is milder than a mechanical relationship of hierarchy. Besides specific exceptions to the non-invocability of WTO law in EU law[40], the Court has thus developed a duty of *consistent interpretation* and shown a tendency to *conciliatory interpretation*. In the first case, the obligatory effect of international law in EU law imposes to interpret domestic law in a way that is consistent with international rules binding on the EU[41]. For its part, the conciliatory interpretation refers to instances where the Court voluntarily relies on international norms in order to establish its own reasoning[42].

Although the *Intertanko* decision may be seen as isolated and the milder effects of international law somehow compensate the possible non-invocability of international law, the impossibility to rely on a convention such as UNCLOS raises questions that are *not* isolated. On the contrary, the legal review of EU law in the light of international law is at the core of the relationship between these two legal systems. Insofar as the EU increasingly legislates in fields where parallel global regulation develops, the invocability of international law against corresponding EU legislation is likely to appear with even more accuracy. In that regard, the pending case *ATAA* is symptomatic as the

[40] See ECJ, Case 70/87, *FEDIOL v. Commission*, 22.06.1989, para. 19, and ECJ, Case C-69/89, *Nakajima v. Council,* 07.05.1991, para. 31, where control of legality of EU law in the light of WTO law has been acknowledged respectively when a legal act refers to WTO law or intends to implement it.

[41] The duty of consistent interpretation has firstly been enunciated by the Court with regard to general international law in the light of which secondary law must be interpreted "so as to give it the greatest practical effect" (ECJ, Case C-286/90, *Poulsen*, 26.11.1992, para. 11). In its decision on *Dairy Products* (ECJ, Case C-61/94, *Commission v. Germany*, 10.09.1996, para. 52), the Court has held that "the primacy of international agreements concluded by the [Union] over provisions of secondary [EU] legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements". R. HOLDGAARD, *External Relations Law of the European Community*, Den Haag, Kluwer, 2008, p. 305-306, speaks of "indirect effect" of international law by way of "constructive interpretation".

[42] As a matter of principle, the Court is not reluctant to draw on international law in order to reinforce its line of argument. Among numerous instances, see ECJ, Case C-364/92, *SAT Fluggesellschaft*, 19.01.1994, para. 20, where the Court refers to the Chicago Convention on International Civil Aviation not formally binding on the EU as a party.

validity of EU Directive is challenged exclusively on the grounds of its compatibility with norms of international law[43].

The outcome of such a dispute is hardly predictable as it is shown with the two-step survey of the relationship between EU and international law. The EU legal system fully integrates international law as an integral part of it, with consistent principles providing for its reception, obligatory effect and hierarchical status. Nevertheless, these principles are to be combined with other principles of EU law, so that the primacy of international law in European law does not imply a mathematical relationship of superior norms necessarily trumping inferior norms. Much more subtle, the relationship between international law and EU law as shaped mainly by the judiciary leaves a margin of flexibility with the notion of invocability as a key issue. This is assessed in the light of international law as well as principles of EU law, with the conclusion that EU law opens its legal system to international law with an approach of loyalty towards the latter.

### 2.3. – In loyalty towards international law

The combination of integration and preservation aims has for consequence that the EU legal system integrates international law as a part of it but protects its own integrity by conditioning the effects produced by international law in the domestic legal order. Affirming the primacy of international law over EU secondary legislation all the while refusing in specific cases to review the legality of the latter in the light of the former then reflects the broader conception of the relationship between EU and international law. Nonetheless, cases of non-invocability of norms having primacy may be seen, if not contradictory, at least as rendering the prevalence ineffective. This apparent gap between a principle and another is examined in the light of international law, revealing that possible non-invocability is not necessarily inconsistent. On the other hand and in turn, in EU law, it could be argued that international law has perhaps been integrated even beyond what is requested by international law, suggesting another reading of the invocability in the light of the notion of loyalty.

[43] Pending Case C-366/10, *O.J.*, 2010, C 260, p. 9.

International law leaves to its subjects a broad margin of flexibility as to the means by which they perform their international obligations. With the mere obligation of result to comply with treaties or general international law, states and international organizations are then free to determine how their domestic legal order will interact with international law. EU law has in that regard made a balanced choice, expressed as a combination of integration and preservation. This choice is now assessed with the aim to evaluate whether instances of non-invocability of international law in EU law are in line with the margin of flexibility offered by international law. A decision like the *Intertanko* judgment raises in that regard two specific questions. Firstly, the non-invocability of a treaty may be seen as conflicting with *pacta sunt servanda*. Secondly, the possibility to rely on norms of international law could be linked to a duty of good faith.

The outcome of a case like *Intertanko* may be that provisions of EU legislation are in breach with a treaty yet binding on the EU and therefore endowed with primacy over that legislative act. Not surprisingly, the decision has been largely commented as it has accurately shed light on the issue of the invocability of international law. A first reading of the judgment could be that the EU, adopting legislation that possibly contradicts its international obligations, and not systematically permitting the legal review of that legislation, may be in breach with international law. Against that reading, at least two elements should be borne in mind. First of all, there is a slight difference between the legislature adopting an act overlapping a treaty and the judiciary setting conditions to the review of the one in the light of the other[44]. Secondly and most importantly, the non-invocability of international law does not necessarily result in a breach of the latter. It is only on a case-by-case basis that a violation of a treaty can be assessed, taking into account the nature of the agreement and the precise scope of its provisions. In that regard, the *Intertanko* case shows the difficulty to confront two legal texts and to conclude on their compatibility[45]. Along with similar proceedings such as *IATA*[46] and

[44] In that regard, B. DE WITTE, "Retour à 'Costa' – La primauté du droit communautaire à la lumière du droit international", *R.T.D.E.*, 1984, p. 431-432, insists on the fact that liability for an international wrongful act would occur only if the non-respect of the primacy rule in domestic law is non-reversible.
[45] In her Opinion, Advocate General J. Kokott, having estimated that UNCLOS was invocable, went into in-depth considerations on the compatibility of EU Directive on ship-source pollution (EC Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, *O.J.*, 2005, L

*ATAA*[47], the case *Intertanko* regards EU legislation deepening at a regional level a general objective that is shared and pursued at the same time in a multilateral framework. It is therefore questionable whether the international community as a whole does not have a common interest in regulations one step ahead of what it has not (yet) been able to regulate at a global level. In other words, it is not self-evident to consider a more favourable compensation scheme for damages by passengers, the inclusion of aviation emissions in a carbon trading scheme or a stricter liability regime for maritime discharges as not compatible with norms of international transport, fight against climate change or environmental law because the latter have not reached the same degree of regulation.

While it is unlikely to consider the non-invocability of a treaty binding on the EU as an automatic and necessary breach of *pacta sunt servanda*, it could furthermore be argued that the impossibility to review the legality of domestic law in the light of a binding international agreement would at least be contrary to a duty of good faith that would complement *pacta sunt servanda*. Indeed, it has been argued that *pacta sunt servanda* would imply additional and autonomous obligations under a general duty of good faith. Parties to a treaty would thus have an obligation to cooperate with other parties, an obligation to preserve the substance of a treaty and an obligation of integrity and maximal performance[48]. Regarding the second duty, it could be advanced that the non-invocability of a treaty before domestic courts would confer domestic law with a form of immunity which is likely to defeat the object and purpose of the treaty, should domestic

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255, p. 11) with UNCLOS and by reference with the International Convention for the Prevention of Pollution from Ships (Marpol). The parties in the main proceedings claimed that EU Directive had set a stricter liability regime for discharge in the various marine areas than allowed under UNCLOS with reference to international standards laid down in the Marpol Convention. According to AG J. Kokott, EU Directive could be interpreted consistently with the Marpol Convention and UNCLOS so that EU legislation would not infringe international law (ECJ, Case C-308/06, *Intertanko*, 03.06.2008, Opinion AG J. Kokott, paras. 111-112 and 136-138).

[46] ECJ, Case C-344/04, *IATA and ELFAA*, 10.01.2006. The case regarded the validity of the EC Regulation 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, *O.J.*, 2004, L 46, p. 1.

[47] Pending Case C-366/10, *O.J.*, 2010, C 260, p. 9. The applicants in the main proceedings challenge the validity of EC Directive 2008/101 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *O.J.*, 2009, L 8, p. 3.

[48] See R. KOLB, *La bonne foi en droit international public*, Paris, P.U.F., 2000, p. 278-296.

law be contrary to it. It is nevertheless doubtful whether there is in international law a proper duty of good faith that would imply autonomous obligations at the stage of the execution of a treaty. According to the International Court of Justice, Article 26 CVDT "combines two elements, which are of equal importance". Along with *pacta sunt servanda*, "the principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized"[49]. This wording seems to indicate the very scope of *pacta sunt servanda* more than it is adding an independent obligation to the principle: should the parties to a treaty apply it in an unreasonable way or in such a manner that its purpose cannot be realized, then the parties would violate the treaty. That refers to the delicate assessment of a violation of *pacta sunt servanda*, whose difficulties have already been pointed out.

Although the combination of primacy and non-invocability of international law may be perceived as inconsistent, international law does not seem to require a necessary correlation between its obligatory effect and its invocability before domestic courts. On the contrary, the conditions to which the ECJ has submitted the possibility to rely on international law are a part of the flexibility left to the domestic legal systems. As the Court of Justice has already put it itself in its *Kupferberg* judgment, "[EU] institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the [EU]". Moreover, "according to the general rules of international law there must be *bona fide* performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement,

[49] ICJ, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports*, 1997, p. 7, para. 142.

interpreted in the light of its subject-matter and purpose, itself specifies those means"[50]. With the Court, it can therefore be considered that the conditions to the invocability are in line with international law and the flexibility that it leaves to its subjects. Provided though that the non-invocability does not mask an incompatibility in which case the compliance with international law would be suspended to action by the legislature in order to bring secondary law in conformity with international law.

From the perspective of EU law and in EU law, the invocability of international law does not appear at first sight less contradictory than it is in international law. It could even be argued that EU law does not leave the same margin of flexibility as to the effect of international norms in the domestic legal order. Admittedly EU law has generously committed itself to integrate international law as the law of the land. Admittedly too, EU law has conferred international law with primacy over the law of the land. In turn, the EU legal system aims at the integrity of its legal *acquis*, what is however not precluded by international law. Nevertheless, several elements lead to the question whether EU law has not committed itself to fidelity towards international law that would go beyond the flexibility that the latter offers. In the light of this self-commitment, the non-invocability of international law may be seen as not satisfactory consistent.

Firstly, the European Court of Justice has shaped the relationship between the EU legal system and international law in a way that is resolutely open to international law[51]. The reception of international law as the law of the land obviously participates to this openness. The repeated commitment to exercise the powers of the EU in accordance with international law is another mark of the integration principle. As for the prevalence of international law over secondary EU law, it could be argued that the EU legal system provides a primacy rule that is not even expressed in international law[52]. The fact remains that EU law provides for an explicit primacy rule that has to exist in

[50] ECJ, Case 104/81, *Kupferberg*, 26.10.1982, paras. 17 and 18.
[51] For E. CANNIZZARO, "Neo-monism of the European Legal Order", in E. CANNIZZARO, P. PALCHETTI and R. A. WESSEL (eds), *International Law as Law of the European Union*, Leiden, Martinus Nijhoff, 2011, p. 57, "the European Union is among the *völkerrechtsfreundlichsten* contemporary legal orders".
[52] See P. D'ARGENT, "Connecting Different Legal Orders", Paper presented in the Grotius Centre, Den Haag, 19.10.2009, p. 5.

international law as well, even if grudgingly enounced[53]. More noteworthy is the notably broad scope of the primacy rule that extends to prior as well as posterior EU legislation. Lastly, the unlimited jurisdiction regarding the grounds on which the validity of EU law may be contested[54] also draws on this openness, with the Court having conferred numerous external agreements with direct effect.

Secondly and perhaps most importantly, the approach towards international law as shaped by the judiciary is reinforced in the Lisbon drafting of EU primary law. According to Article 3 (5) TEU, the Union "shall contribute [...] to the strict observance and the development of international law". The provision comes along with several articles committing the EU to develop policies consistent with global regulations or fully involving the EU in multilateralism.

Put together, case-law and constitutional law of the EU consistently converge so as to make up a link between two legal systems whose intensity is not plainly rendered by the notion of openness. The *notion* of loyalty is therefore suggested to express the fact that EU law has integrated international law in a way that goes beyond what is required by the latter, namely meeting an obligation of result. In this sense, the loyalty of the EU towards international law bridges both legal systems and provides a new *conceptual* framework likely to grasp the subtlety of their interaction. As a *principle* of EU constitutional law, loyalty may furthermore help overcoming the apparent inconsistency

[53] In its advisory opinion on the *United Nations Headquarters Agreement*, the International Court of Justice (ICJ) has recalled "the fundamental principle of international law that international law prevails over domestic law" (see ICJ, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 26.04.1988, para. 57). The Court was quoting the Permanent Court of International Justice (PCIJ), the latter having referred to a primacy principle but *a contrario*. Indeed, in both its opinions on the *Greco-Bulgarian "Communities"* and the *Treatment of Polish Nationals in Danzig* the PCIJ was concerned with domestic laws not prevailing over treaties rather than the effect of treaties in domestic laws. See PCIJ, *The Greco-Bulgarian "Communities"*, Advisory Opinion, 31.07.1930, p. 32: "it is a generally accepted principle of international law that in the relations between the Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty"; PCIJ, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 04.02.1932, p. 24: "while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".

[54] ECJ, Joined Cases 21 to 24/72, *International Fruit Company*, 12.12.1972, para. 5.

in integrating international law all the while in some cases restricting its invocability in the control of legality.

## II. – USE OF LOYALTY

Relying on the jurisprudential *acquis* and elements of primary law, the idea of a notion of loyalty from the part of the EU legal system towards international law is conceived at two levels of reflection. Firstly, loyalty would correspond to a general *concept* describing and explaining how the EU has chosen to relate to international law (1). In addition to this conceptual interest, it is suggested that loyalty could be a *principle* of EU law with possible specific effects notably in procedural law (2).

### 1. – Loyalty as a concept

Any attempt to describe the relationship between EU law and international law would refer to the case *Haegeman*, to point out the ambiguity of the Court finding with regard to the reception of international law in EU law. If it is analyzed with recourse to the classical notions of monism opposed to dualism, the immediate reception of international norms through an internal legal act of the institutions cannot be consistently explained. Whereas such an analysis may appear to be barren, the idea behind the concept of loyalty is that the link between legal systems can be conceptualized through the prism of other notions that systematize legal principles without neglecting the judiciary pragmatism from which they originate [55]. The relationship between the EU legal order and international law has then been characterized as one of loyalty from the former towards the latter, taking into account a certain degree of autonomy that protects the main features of the European Union. Both concepts rest on an abundant jurisprudential *acquis*, yet loyalty being henceforth anchored in primary law.

[55] As J. KLABBERS, "International Law in Community Law: The Law and Politics of Direct Effect", *Y.E.L.*, 2002, p. 294, puts it, "the Court has had a hard time making up its mind as to what to do with international law, vacillating between monist ideas and dualist ideas". Therefore, "categories of monism and dualism are not terribly helpful".

Until the entry into force of the Lisbon Treaty, the Union had among other objectives "to assert its identity on the international scene"[56]. As a general common provision of primary law, it expressed a rather assertive attitude of the Union towards the international community. That political approach of the Union external action did however not correspond to the legal conception of relations between norms as the Court had already ruled on reception, effect and primacy of international law, traducing a much more deferent position.

From a formal point of view, the Lisbon Treaty has considerably elaborated the Union's objectives, with an entire paragraph dedicated to the relation of the EU with the wider world. In addition, the provisions on EU external action have been supplemented, merged and re-framed in a Title V in TEU and a Part V of the TFEU. Substantially, the political affirmation of the Union identity still ranks among the objectives in the Lisbon Treaty, yet with a slightly milder expression[57]. Above all, the Lisbon Treaty integrates the normative facet of the EU external action, with a drafting that reminds of the jurisprudence on the obligatory effect of international law. From now on then, the relationship between European and international law is expressed in the treaties with certain deference, with the Union that "shall contribute to [...] the strict observance and the development of international law". Together with other provisions, Article 3 (5) TEU makes up a consistent body of elements echoing in primary law the loyalty that already followed from the case law.

Article 3 (5) TEU may be seen as the flag Article of a series of provisions expressing in general or in a narrower context the respect for international law and the commitment to multilateralism. Enounced as a general objective of the Union, the respect for international law is specifically reaffirmed among the objectives of the EU external

[56] Article 2 of the Treaty on European Union. In that sense too, the Common Foreign and Security Policy (CFSP) had for objective "to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter" (see Article 11 (1) TEU).

[57] According to Article 3 (5) TEU, "in its relations with the wider world, the Union shall uphold and promote its values". In the field of external action, the EU still has to "safeguard its values, fundamental interests, security, independence and integrity" (see Article 21 (2) a) TEU).

action in Article 21 TEU, with two different applications. On the one hand, the action of the EU on the international scene has to be guided by the "respect for the principles of the United Nations Charter and international law", which means that the EU pursues the objective to act as a responsible actor of the international community and to carry away its partners to do so. In turn, the EU commits to respect international law in the development and implementation of the Union external action in the strict sense and of the external aspects of its internal policies. According to these general objectives, several sectoral provisions on internal or external policies recall the commitment to act in accordance with specific international norms[58]. In that regard but on a technical level, Article 216 (2) TFEU as interpreted by the Court provides for the key principles on reception, effect and primacy of treaties in EU law. Another mark of the loyalty expressed in the treaties is this call to multilateralism, simultaneously objective and commitment of the EU, which consists in finding "multilateral solutions to common problems". In pursuing its policies, the EU shall then "promote an international system based on stronger multilateral cooperation and good global governance"[59]. In that regard, Article 220 TFEU is specifically dedicated to the technical means of cooperation with other international organizations.

By its newness and the shift of perspective that it entails in primary law, it is suggested that Article 3 (5) TEU embodies the general wording of a notion that is, in a broad sense, conceived as a concept of loyalty. According to a first definition, loyalty of the Union towards international law would be the *legal phenomenon according to which the European Union works towards the structuration of the international legal order, in a positive approach of full acceptance of the constitutional and material principles of the international community as well as in refraining from jeopardizing that aim*. Loyalty is designated as a *phenomenon* rather than as a principle so as to insist on the descriptive function it has in its first understanding. It is nevertheless a *legal* phenomenon in the sense that it describes how two legal systems interact. In terms of

[58] Among other examples see Article 191 (1) TFEU in the field of environment and Article 208 (2) TFEU on development cooperation.
[59] Article 21 (1) and (2), b) and h) TEU.

terminology, loyalty is preferred to other expressions such as openness [60] or friendliness[61], both expressing a positive aim beyond which loyalty reaches. Combined to the commitment to develop international law through multilateral action, it traduces an approach that is more than merely neutral respect for international obligations. Loyalty is therefore deemed to express that the EU legal system fully integrates international law as the law of the land, with three simple and linked principles on immediate reception, obligatory effect and primacy, the latter having a particularly broad scope.

In integrating international law as the law of the land, the European legal system nevertheless makes sure that its own features are not harmed. In this sense, the relationship between international and European law is made of a delicate balance between loyalty and *autonomy*. The latter refers to *a series of principles preserving the EU legal order from affectations that would compromise the balance of institutional functions and the integrity of the legal acquis*. As a secondary or derivated legal system, the EU has necessarily to ensure that it is not affected with the risk of being dissolved. Therefore international law is integrated as the law of the land but taking into account a constitutional reservation that has been set by the Court of Justice in a dozen of cases. In line with several opinions issued by the Court [62], the *Sellafield* judgment has

[60] G. DE BURCA, "The European Court of Justice and the International Legal Order after Kadi", Jean Monnet Working Paper, New York, 2009, p. 26. The author mentions as well "Europe's distinctive fidelity to international law and institutions".

[61] P.-J. KUIJPER, "Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law", in J. WOUTERS, A. NOLLKAEMPER and E. DE WET (eds), *The Europeanisation of International Law*, Den Haag, Asser, 2008, p. 29, points out this "international-law-friendly approach" towards international law. R. UERPMANN-WITTZACK, "The Constitutional Role of International Law", in A. VON BOGDANDY and J. BAST (eds), *Principles of European Constitutional Law*, 2nd ed., Hart & Beck, Oxford and München, 2010, p. 138 and 143, insists on primary law provisions and case-law "particularly friendly towards international law".

[62] These opinions concerned the conclusion of agreements setting up a *collateral institutional framework* whose powers may have overlapped and affected the competences of the EU institutions, notably the jurisdiction of the Court. See ECJ, Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, 26.04.1977, para. 12; ECJ, Opinion 1/91, *Draft Agreement relating to the creation of the European Economic Area*, 14.12.1991, para. 35; Opinion 1/00, *Proposed Agreement on the establishment of a European Common Aviation Area*, 18.04.2002, paras. 12-13. In Opinion 1/09, *Draft Agreement on the European and Community Patent Courts*, 08.03.2011, para. 89, it is question of "the essential character of the powers which the Treaties confer on the institutions of the European Union

emphasized that "an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the [EU] legal system"[63]. The case regarded the institutional aspect of the autonomy, the member states being prevented from having recourse to proceedings outside the exclusive jurisdiction of the Court according to Article 344 TFEU. The jurisdiction of the Court was at stake in the *Kadi* case again, where the Court insisted on the autonomy of the constitutional structure[64].

Loyalty as a legal phenomenon allows for explaining how the EU relates to international law. Combined with the notion of autonomy, it describes the relationship between two legal systems and overcomes the difficulty to explain it through the dialectic of monism and dualism that does not match the balanced equilibrium between integration on the one hand and preservation on the other hand. With these concepts and from an observational standpoint, it is then possible to understand the logic underlying the principles governing reception, effects and primacy of international law in EU law. In the absence of specific provisions in the treaties, the Court has had to set principles as it faced specific questions related to external agreements or general international law. Most likely, the Court has not intended to conceptualize the relationships between legal systems but with pragmatism it has opened the doors when international law commanded so and in turn it has closed them when the integrity of essential EU *acquis* was at stake. Seen from that perspective, the immediate reception of international law but through the medium of a domestic norm or act and the primacy not necessarily corresponding to invocability are not contradictory principles. They are the result of a pragmatic approach to the relation between norms, oscillating between the concepts of loyalty and autonomy. In a narrower sense though and as a principle with legal effects, loyalty may help reconsidering this balance between one concept and another.

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and on the Member States and which are indispensable to the preservation of the very nature of European Union law".

[63] ECJ, Case C-459/03, *Commission v. Ireland*, 30.05.2006. para. 123.

[64] ECJ, Joined Cases C-402 and 415/05 P, *Kadi and Al Barakaat v. Council*, 03.09.2008, paras. 316-317.

### 2. – Loyalty as a principle

In its narrower sense, it is suggested that loyalty towards international law as expressed in Article 3 (5) TEU may be considered as a legal principle of EU law, entailing the three rules on reception, obligatory effect and primacy of international law over EU law. While loyalty as a general concept is a tool for describing how the EU relates to the international legal system, loyalty as a principle legally justifies that international law is integrated as the law of the land, with obligatory effect and primacy over secondary legislation[65]. With the specific status that it would have in EU law, the principle of loyalty would question again the logical link between reception, obligatory effect, primacy and invocability of international law.

The suggestion of a principle in EU law providing for loyalty towards international law presupposes its quality of source of law failing which it would be devoid of legal effect. In that regard, loyalty would have *a minima* an *interpretative function*. It is furthermore argued that it would rank among this core of *metaconstitutional principles* of the EU legal order.

From a formal point of view, a principle of loyalty resting on Article 3 (5) TEU ranks among the general objectives set to the EU and is not conferred with the explicit constitutionality that principles such as the conferral of competences or the subsidiarity have. Yet even as a mere objective of the EU, loyalty could have an interpretative function. Indeed, the Court has not hesitated to read treaty provisions in the light of corresponding general objectives at the top of primary law. Objectives are in this sense a tool for interpretation of primary or secondary law in the light of the logic of the treaties[66]. In principle, parties to a dispute before the Court of Justice would then not be prevented from relying on Article 3 (5) TEU in support of a main argument based on international law.

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[65] In that regard, it is worth noting that AG J. Kokott links together the obligatory effect of international law in EU law and the commitment to ensure the strict observance of international law in Article 3 (5) TEU. See Pending Case C-366/10, *ATAA*, Opinion AG J. Kokott, 28.10.2011, paras. 43, 75 and 108.

[66] K. LENAERTS and P. VAN NUFFEL, *European Union Law*, 3rd ed., London, Sweet & Maxwell, 2011, p. 111.

In spite of its lack of explicit constitutionality, loyalty could furthermore be considered as an autonomous principle with proper legal effects. Indeed, the Court has already in the past "discovered" principles with constitutional rank, either by naming a principle explicitly enounced in primary law as it has been the case for the principle of sincere cooperation, or by finding out a principle based on indications scattered in the treaties like the institutional balance. Building on the same model, a principle of loyalty could be identified on the basis of Article 3 (5) TEU and other provisions of primary law related to the compliance with international law.

Anchored in primary law, loyalty would necessarily have the rank of a constitutional principle. It could even be argued that loyalty, along with other principles essential to the very fundaments of the European Union, would count among a nucleus of *metaconstitutional* principles of EU law. Formally, provisions of the treaties are at the top of the hierarchy of norms, without any sub-hierarchy in primary law. Nevertheless, it is obvious and common sense that Articles on the basic functioning of the Union do not have the same scope that material provisions on the Union policies have. The Treaty establishing a Constitution for Europe had introduced such a distinction in primary law, with material provisions merged in a separate Part III while Parts I and II could be seen as the constitutional essence of the Union[67]. Although this layout has been abandoned, the Lisbon Treaty has to a certain extent integrated a formal and legal differentiation among provisions of primary law. On the one hand, the articulation between the Treaty on European Union and the Treaty on the Functioning of the European Union shows that there is a set of basic principles whose essential nature distinguishes them from material provisions on the Union policies and specific institutional provisions even if both treaties stress that they have equal legal value[68]. On the other hand, the Lisbon Treaty adds a legal differentiation to this formal distinction, with provisions on Union policies submitted to a simplified revision procedure[69].

[67] Treaty establishing a Constitution for Europe, *O.J.*, C 310, 16.12.2004.
[68] Article 1 TEU and Article 1 (2) TFEU.
[69] See Article 48 (6) TEU.

There are therefore not only formal but even legal arguments to consider in primary law a core of principles that can be designated as metaconstitutional. They refer to the *rules inherent to the fundaments of the European Union, providing for the essential values on which it is founded, the general principles on its institutional framework and on its relationships with the member states and the international legal system*. While the label of *supra*-constitutional principles would imply a hierarchical differentiation of norms, *meta*-constitutional rules would relate to these general principles *on* principles of primary law, simultaneously overarching and providing the European Union with the essence of its constitutional structure. With a metaconstitutional principle of loyalty, the integration of international law in EU law is fully justified, at the three stages of reception, effect and primacy. In turn, loyalty can serve re-reading the logic behind the sequence of these principles and apparent inconsistencies that they encompass.

Although it could appear at first sight to be contradictory, it has been put forward that the integration of international law in the domestic legal system does not necessarily have to result in the automatic invocability of international norms before EU courts. On the one hand, the conditions to which invocability is submitted are part of the flexibility left by international law to the domestic legal systems[70]. On the other hand, the possible non-invocability of international norms is, in EU law, explained and justified by the concept of autonomy[71]. Nevertheless, a metaconstitutional principle of loyalty is likely to put the conditions of invocability into question, with several arguments pleading for a control of legality in the light of international law. In turn, it could be seen that there are grounds for refusing to assimilate primacy of international law with its invocability.

The consistency of the principle linked to the invocability of international law in EU law may be assessed in examining closer each one of the three conditions to which the Court has submitted the possibility to rely on a norm of conventional international law[72]. In that regard, the two first conditions seem to be perfectly consistent while the coherence of the third requirement may be discussed. Obviously, a norm of international law must

[70] See above, 2.3.
[71] See above, 2.3.
[72] See above, 2.2.

be *binding on* the EU in order to have the quality of norm in the EU legal system and consequently to be invocable. As for the two material conditions, the Court does not in all cases distinguish between their respective scope. Nevertheless, they have their proper *rationale* and function.

Firstly, the Court examines whether the *nature and broad logic* of the external agreement binding on the EU does not preclude its invocavility. The condition relates to the interpretation of a treaty with the aim to determine the degree of obligatory effect to which the parties have agreed to commit themselves. Indeed, if the effects in the domestic legal orders have not been set in the treaty, it is for the judiciary to discover the intent of the parties and specifically the intensity of the treaty obligations. It seems consistent in that regard to admit invocability where firm obligations have been entered into and to refuse it in case of merely programmatory declaration of intentions not aimed at having immediate legal effects in the domestic systems. The low degree of obligatory effect that such treaty provisions have justifies that in domestic law they are not to be legal norms in the light of which legal review can proceed.

Secondly, the Court will have regard to specific provisions on which it is relied, their *content* having to be *unconditional and sufficiently precise*. This last requirement, largely inspired by the conditions to which the direct effect of EU law is submitted, is less convincing. Its *rationale*, with regard to the EU treaties or secondary legislation, lays in the possibility for an individual to rely on a subjective right with which he would be conferred in a provision not necessarily having individuals as primary addressees. If it is reminded that the notion of invocability develops to become an autonomous concept linked to the status of international law in EU proceedings, then the third condition is somewhat at variance with the definition of invocability. Indeed, according to AG M. Poiares Maduro, invocability refers to the possibility to rely on a norm of international law before EU courts, irrespective of the type of proceeding and the quality of the applicants[73]. If this understanding of the invocability is acknowledged – and the

[73] ECJ, Joint Cases C-120 and 121/06, *FIAMM v. Council and Commission*, 09.09.2008, Opinion AG M. Poiares Maduro, paras. 28 and 31.

case law indicates so – then it does not immediately appear to be self-evident that a provision has to be unconditional and sufficiently precise in order to be the norm of reference for legal review. It is first of all so when institutions or member states challenge the legality of EU legislation. They do not rely on a right that would derive from international law but they act more generally as defenders of the legality in the EU legal system. Should individuals challenge the legality or validity of EU law in the light of international law, then the pertinence of the third condition is not much more obvious. The clarity and unconditionality of a provision was already mentioned in the founding case *Van Gend & Loos*, where the Court ruled that individuals could directly rely on a provision of primary law containing "a clear and unconditional prohibition"[74] addressed to the member states and corresponding to a right for individuals whom they can invoke in a dispute against state authorities. By contrast with that context, cases such as *Intertanko* do not concern individuals relying on a proper subjective right. Admittedly private persons in these instances are affected in their interests that they try to preserve by challenging the legality of EU legislation. Among other arguments they invoke an incompatibility with international law without necessarily relying on a specific right that they would derive from international law. If there is any subjective right that is to be identified in such instances then it would be a right to sue an *act* because that act would be illegal or invalid. In the framework of such an objective control of legality[75], the third condition of precision and unconditionality is therefore not served by the same *rationale* as it is regarding the direct effect of EU law.

While the conditions of invocability raise some doubts as to their pertinence, there are in turn considerations proper to EU law putting into question that reception, obligatory effect, primacy and invocability should necessarily go hand in hand. Be that arguments of institutional policy, procedural law or legitimacy, it is indeed questionable that international law has to be in all instances invocable in the view to challenge the legality of EU legislation.

[74] ECJ, Case 26/62, *Van Gend & Loos*, 05.02.1963, p. 13.
[75] In this sense, F. DOPAGNE, "Arrêt Intertanko: l'appréciation de la validité d'actes communautaires au regard de conventions internationales (Marpol 73/78, Montego Bay)", *J.D.E.*, 2008, p. 242.

The first argument of institutional policy goes far beyond the specific issue of invocability of international law but is even more relevant when compliance with international norms is at stake. In this case the Court has to interpret EU legislation and in addition international commitments entered into by the institutions. This perspective is likely to explain that the Court may be reluctant to exercise what can be seen as a double constitutional review.

From a procedural point of view, the legal review of EU law in the light of international norms is likely to proceed by means of a direct action for annulment, an action for damages, a request for a preliminary ruling or indirectly by way of exception of illegality. Of specific interest is the case where the validity of general legislation in the light of international law is brought before the Court indirectly by individuals in the form of a request for a preliminary ruling. As a matter of principle, EU procedural law prevents private parties from challenging directly general legislation[76]. As a result, natural or legal persons do not have direct access to the Court jurisdiction for a constitutional control of general EU law. Indirectly though, the validity of EU secondary legislation may be deferred to the Court by a domestic court ruling in main proceedings involving individuals. In that regard, it cannot be argued that a case such as *Intertanko* is the result of misuse of EU procedural law. Nevertheless, a preliminary question on the validity of EU legislation in the light of international law could, again, give rise to certain reluctance from the part of the Court facing a constitutional control that would be in other proceedings not admissible.

Linked with these two considerations, the last argument is one of legitimacy and concerns the legal means in the light of which the Court is requested to review the legality of EU law. The invocability of international law raises the question whether it is desirable that individuals have standing in the issue of compliance with international law. More generally and in the same way, it could be argued that principles not originally intended to confer individuals with specific rights should not be invocable in

[76] See Article 263 (4) TFEU.

proceedings involving natural or legal persons. In that regard, arguments based on principles such as subsidiarity or institutional balance have led to contrasted decisions. According to Article 5 (3) TEU, the principle of subsidiarity is meant to regulate the use of competences conferred to the Union and its value compared to action which could be taken by the member states. Although this constitutional principle governs the relationship between the EU and the member states, a plea brought by individuals and based on the subsidiarity is admissible[77]. Not expressly enounced in the treaties, the principle of institutional balance refers to the "system for distributing powers among the different [EU] institutions, assigning to each institution its own role in the institutional structure of the [EU] and the accomplishment of the tasks entrusted to the [EU]". As a legal principle, it "means that each of the institutions must exercise its powers with due regard for the powers of the other institutions"[78]. Unlike in its case law on the subsidiarity, the Court has held that the principle of institutional balance "is intended to apply only to relations between [EU] institutions and bodies" and is therefore not invocable by individuals[79]. The examples of subsidiarity and institutional balance show that the invocability of principles not directly protecting individuals is not straightforward. EU law offers to individuals a broad range of proceedings allowing them to challenge the validity or legality of acts adopted by the institutions. In terms of legitimacy it is nevertheless suggested that the Court's jurisdiction may be limited where individuals are not concerned with principles coming within the EU constitutional structure.

All in all, there are therefore as much arguments in favor of general invocability of international law as there are grounds for accepting that integration of international law with supremacy does not necessarily have to result in its invocability. The suggestion of a principle providing for loyalty towards international law – in its narrower sense – would precisely have the effect of overcoming the diverging interests that have been

[77] See ECJ, Case C-58/08, *Vodafone*, 08.06.2010, paras. 72-79; ECJ, Case C-491/01, *British American Tobacco*, 10.12.2002, paras. 180-183.
[78] ECJ, Case C-70/88, *Parliament v. Council*, 22.05.1990, paras. 21 and 22.
[79] ECJ, Case C-301/02 P, *Tralli v. ECB*, 26.05.2005, para. 46.

mentioned, so as to consider the invocability of international law with another perspective.

The uneasiness linked to the invocability of international norms in EU law does perhaps not lie as much in the outcome of the case-law. It is indeed legitimate that the Court is willing to keep a margin of discretion so as not to interfere with political choices made by the legislator. On the other hand, it is probably much more the reasoning justifying the non-invocability of certain international norms that might not be shared. While the notions of direct effect and then invocability have been a useful tool for the Court to generously open or close the domestic legal system[80], it could be seen that direct effect is maybe not the right conceptual framework that could have been used by the Court. In that regard, loyalty could require the invocability of international norms as soon as they have primacy over secondary legislation. Not so much because these norms are invocable *in casu*. Much more so because the legal review of secondary legislation in the light of international law is an objective control of legality where there is no actual question of invocability. In doing so, the Court could nevertheless strictly limit its control to a marginal review of legality, therefore not interfering with the political choices made by the legislator. In saying what it is actually doing and how it is doing that way, the Court's legal reasoning would then be shared as to the result as well as to the means.

## ELEMENTS OF CONCLUSION

The relationship between the European and international legal systems has been shaped mostly by the judiciary. Yet the Lisbon Treaty has enshrined in primary law certain deference towards international law that followed from the Court's case-law. According to the margin of flexibility that international law leaves to domestic legal systems, the European Union has made choices on how to relate to the international community. On the whole, the EU shows an approach of loyalty towards international law, as long as the

[80] See J. KLABBERS, "International Law in Community Law: The Law and Politics of Direct Effect", *Y.E.L.*, 2002, p. 295-296, with direct effect corresponding to the image of a double-edged sword or a gatekeeper of the EU legal system.

latter does not compromise the integrity of the domestic legal order. The balance between loyalty and autonomy explains that international norms are immediately integrated in EU law, yet through the medium of an internal act. With their obligatory effect, norms of international law have in principle primacy over secondary legislation while being submitted to primary law. This primacy may result in a control of legality in the light of international norms, provided though that the latter are invocable before the Court. As a concept, the notion of loyalty – necessarily combined with the autonomy – explains this sequence of principles and the equilibrium between them. As a metaconstitutional principle of EU law, loyalty may be a tool for another approach of this sequence of reception, effect, primacy and invocability. In that context, it is suggested that loyalty could imply a control of legality in the light of binding international norms without having regard to their direct effect, yet the Court proceeding to a marginal review of legality. This would reconcile the logic behind the principles with the necessary margin of appreciation that the legislator has to preserve.