

## Customary International Law as a Source of EU Law: A Two-Way Fertilisation Route?

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### 1. Introduction

The EU is bound by international law, in that when it adopts an act it shall observe international law ‘in its entirety, including customary international law, which is binding upon the institutions of the European union’.<sup>1</sup> This commitment is expressed in Article 3(5) TEU, which provides that ‘the EU shall uphold and promote...the strict observance and the development of international law’. Yet, despite the periodic treaty revision, EU law is still not explicit about the relationship between international law and EU law. It also omits to provide an account regarding the incorporation and effect of international law upon the EU legal order. The EU Treaties merely highlight the binding character of international treaties upon the Member States,<sup>2</sup> and charge them (or at least the founding Member States) with the task of taking the necessary steps to eliminate any incompatibilities between international agreements signed before 1958 and the EU Treaties.<sup>3</sup> In recent years, the CJEU has clarified the effect of international treaties upon the EU legal order and has adopted a dualist approach. While forming an integral part of EU law, international agreements are only binding on private individuals by virtue of an act of an EU institution (i.e. a decision or regulation formally concluding the agreement in question).<sup>4</sup>

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<sup>1</sup> See Opinion of Advocate General Kokott in Case C-398/13 P *Inuit Tapiriit Kanatami v Commission*, 19 March 2015, Celex No. 613CC0398, para 86. The EU’s commitment under Article 3 (5) TEU (also confirmed in C-286/90 *Poulsen*, para 9) implies that the CJEU in non-CFSP areas (except individual sanctions) has jurisdiction to apply custom to EU organs and not only the Member States. The CJEU has already set the conditions for relying on international agreements in actions for annulment. See *Intertanko* (2008); *FIAMM* (2008).

<sup>2</sup> Art. 216 (2) TFEU and Art. 350 TFEU.

<sup>3</sup> Art. 351 TFEU.

<sup>4</sup> F Martines, ‘Direct effect of international agreements of the European Union’ (2014) 25 (1) *European Journal of International Law* 129.

Apart from international agreements, Article 38(1) of the Statute of the International Court of Justice (ICJ)<sup>5</sup> makes it explicit that international law also comprises international custom – a general practice accepted as law.<sup>6</sup> But for the principle of *jus cogens*, which was key in the *Kadi* litigation,<sup>7</sup> EU lawyers have paid little attention to international custom – perhaps due to the fact that it is generally held to be trumped by treaty provisions (the *lex specialis* rule), as treaties are a more ‘specific’ (express) form of legislation.<sup>8</sup> By contrast to its case law on international treaties, the relevant judgments of the CJEU are somewhat harder to decode viz. the relationship (monist or dualist) between the EU legal order and custom. For instance, the EU’s dualist approach to international law with reference to international treaties does not imply that the same occurs *ipso jure* with regard to customary international law. Article 3(5) TEU and Article 218 TFEU suggest that the EU has adopted a monist approach to custom. At the same time, the CJEU’s case law on custom, as the next sections will show, remains somewhat fragmented.

But why study the EU - customary law interaction when examining the place of public international law rules within the hierarchy of sources of EU law or, put simply, the interplay between EU law and public international law (the subject matter of this Special Issue)?<sup>9</sup> The answer is because custom (a general and consistent practice of states followed as legal obligation) may influence the law and policy of EU external relations. It may also be relied upon by third parties (Member States and individuals) before the CJEU to challenge the validity of EU law. Lastly, because EU Law may

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<sup>5</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946, Available at: <<http://www.refworld.org/docid/3deb4b9c0.html>> (accessed 7 June 2016)

<sup>6</sup> For more on international custom, see O Sender and M Wood, ‘The emergence of customary international law’ in C Brölmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham: Edward Elgar, 2016); RB Baker, ‘Customary international law in the 21st century: old challenges and new debates’ (2010) 21(1) *European Journal of International Law* 173; BD Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010); MP Scharf, ‘Customary International Law in Times of Fundamental Change: Recognising Grotian Moments’ (Cambridge: Cambridge University Press, 2013); K Wolfke, *Custom in Present International Law* (Martinus Nijhoff Publishers, 1993); M Akehurst ‘Custom as a Source of International Law 1975) 47 (1) *British Yearbook of International Law* 1.

<sup>7</sup> A category of rules of custom has achieved the high status of *jus cogens* (peremptory norms) which have the effect of invalidating conflicting rules of international law as established by treaties. Article 64 of the Vienna Convention provides that: ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates’. On the debate of what counts as *jus cogens*, see A D’Amato, ‘Its a bird, it’s a plane, it’s *jus cogens*’ (1990) *Connecticut Journal of International Law* 1. See, with reference to EU law, Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, para 226-227, analysed in the last section of this contribution.

<sup>8</sup> J. Wouters and D. Van Eeckhoutte, ‘Giving Effect to Customary International law Through European Community Law’, Working Paper No 25 - June 2002, available at: <[www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf](http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf)>; T Ahmed and I de Jesus Butler, ‘The European Union and Human Rights: An International Law Perspective’ (2006) 17 (4) *The European Journal of International Law* 771; T Konstadinides, ‘When in Europe: Customary International Law and EU Competence in the Sphere of External Action’ (2012) 13 (11) *German Law Journal* 1177.

<sup>9</sup> See the introduction by P Gragl and V Moreno-Lax.

actually influence or even generate custom. As a source of EU law, custom is crucial. Although treaty provisions may generate custom (e.g. the Vienna Convention on the Law of Treaties), custom acts as a ‘gap-filler’ in treaty regimes.<sup>10</sup> Custom supplements, not displaces. The object of this article is, therefore, to shed light on the extent to which custom constitutes a source of EU law, which binds the EU Institutions in their executive, legislative and judicial capacity. It is argued that custom can be a source of EU law to the extent that the EU Treaties do not address a particular issue. Custom (if applicable) may also be invoked before the CJEU to regulate a specific point.

Still, however, there is an open question with regard to custom’s application: Are international organisations bound by custom in general? The answer is that they may be so, since international organisations, such as the EU that is the subject of this article, may be responsible for internationally wrongful acts.<sup>11</sup> This is a nascent issue, which will be further discussed in this contribution. We will commence by discussing custom as a gap-filler. We will then move on to examine whether Member States and individuals can rely on custom in order to challenge EU law. Since custom may be geographically ‘universal’ (global) or ‘regional’ in scope, we will conclude by discussing whether EU law can generate custom – hence establishing, as our title suggests, a two-way fertilisation route.

The above will lead us to conclude that first, it is indeed difficult to decipher how the EU legal order implements custom and where it ranks it with regard to other sources of EU law; second, and much related to the first point, the grounds for reviewing EU legislation by resorting to custom are so rigid that discourage applicants (whether that is an individual or a Member State) from bringing custom forward in challenges against EU legislation. Last but not least, while it is acknowledged that the EU can generate custom (contrary to the criterion for custom being *State* practice) its willingness to do so is not yet manifest in its practice. This demonstrates that the co-implication, embeddedness, and interdependency between public international law and EU law is an evolutionary process.

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<sup>10</sup> See the Analytical study of the Study Group of the International Law Commission on Fragmentation of international law: difficulties arising from the diversification and expansion of international law, 13 April 2006, available from: <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/CN.4/L.682](http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.682)> (accessed 7 June 2016)

<sup>11</sup> See the ILC Articles; Fernando Lusa Bordin, ‘Reflections of customary international law: the authority of codification conventions and ILC draft articles in international law’ (2014) 63 (3) *International & Comparative Law Quarterly* 535.

## 2. The place of international custom in the EU legal order

As mentioned, international custom is defined in Article 38(1)(b) of the Statute of the ICJ as ‘a general practice accepted as law’. It is the law resulting from ‘a general and consistent practice of states followed by them from a sense of legal obligation’. Accordingly, rules of customary international law derive from practice (*usus*) and conviction / or what is accepted as law (*opinio juris*) by States themselves and are binding on them.<sup>12</sup> Contrary to international conventions that signatory states must typically accede to and/or ratify in order to be bound by the legal obligations springing out of them, customary international law does not require the express consent of every state to a particular rule. It binds all nations regardless of their individual consent, unless of course a State has opposed a rule of custom early in its existence, preventing it therefore from becoming binding on it (the so-called persistent objector rule).<sup>13</sup> Having said that, customary rules belonging to the category of *jus cogens* (a body of higher rules of public international law from which no derogation is permitted) cannot be subjected to unilateral derogations.<sup>14</sup>

But how does the EU perceive custom? The CJEU has explicitly ruled on a number of occasions that the rules of customary international law bind the EU and form part of its internal legal order, therefore recognising their discreet identity from international treaties. More specifically, in *Poulsen*, considered to be a landmark case in the law of EU external relations, the CJEU held that the EU must respect international law in the exercise of its powers and that EU legislation must be interpreted in the light of the relevant rules of international law, including custom.<sup>15</sup> Moreover, the CJEU has expressly acknowledged the applicability of custom to both EU internal and external action.<sup>16</sup> The main credo is that, since the EU has international legal personality under Article 47 TEU, it shall be bound by both international treaty and customary law and shall be held liable for its

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<sup>12</sup> See *Lotus case (France v. Turkey)*, 7 September 1927, PCIJ Ser. A, No. 10.

<sup>13</sup> *North Sea Continental Shelf, Judgment*, International Court of Justice Reports 1969, pp. 38-39, para. 63.

<sup>14</sup> Article 64 of the Vienna Convention on the Law of Treaties provides for the emergence of new peremptory norms (defined earlier in Article 53) of international law. This reflects a form of a hierarchy which stresses that ‘if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’ See also C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford, Oxford University Press, 2012), p.314.

<sup>15</sup> Case C-286/90, *Poulsen and Diva Navigation Corp* [1992] ECR I-6019, para 10. *Poulsen* was most recently quoted in Case C-27/11, *Vinkov*, Judgment of the Court, 7 June 2012, para 33 and Case C-292/14, *Elliniko Dimosio v Stroumpoulis and others*, 25 February 2016, ECLI:EU:C:2016:116.

<sup>16</sup> The CJEU has gone as far as accepting controversial norms of customary international law, such as the *rebus sic stantibus* doctrine as justification for the unilateral suspension of a trade Co-operation agreement between the then EEC and Yugoslavia concluded for an indefinite period. See Case C-162/96, *Racke GmbH* [1998] ECR I-3655, paras 45 and 46

breaches. Having said that, the CJEU has limited the scope of custom when it overlaps with EU Treaty provisions, but only in very specific situations. For instance, in line with Article 351 TFEU,<sup>17</sup> the CJEU has held that the provisions of an international agreement concluded prior to the entry into force of the EU Treaty or prior to a Member State's accession to the EU cannot be relied on in intra-EU relations.<sup>18</sup> Advocate General Bot applied the same logic with reference to custom.<sup>19</sup>

Despite the above exception to the application of custom in the EU legal order, it is generally accepted that 'when the EU and its Member States enter into international agreements, whether these are mixed or not, they must comply with international law, as codified, with regard to the customary rules of the law of treaties, by the Vienna Conventions of 1969 and 1986'.<sup>20</sup> The EU shall also be bound by custom even where such principles are codified in international agreements to which the EU is not a signatory. As such, the CJEU interprets the provisions of international agreements where these form expressions of customary rules and therefore serve as criteria for the validity of the acts of EU Institutions.<sup>21</sup> For instance, the CJEU has held that, although the Vienna Convention on the Law of Treaties is not binding upon the EU nor all its Member States, it contains provisions which reflect custom.<sup>22</sup> These provisions are, therefore, binding upon the EU Institutions and form part of the EU legal order.<sup>23</sup>

To give an example, in line with the Vienna Convention on the Law of Treaties, the CJEU has concluded that the EU must take into account international conventions to which it is not party,

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<sup>17</sup> 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'.

<sup>18</sup> See Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743, para 84; Case C-301/08 *Bogiatzi* [2009] ECR I-10185, para 19.

<sup>19</sup> Opinion of Advocate General Bot in Case C-364/10, *Hungary v. Slovak Republic*, delivered on 6 March 2012, ECLI:EU:C:2012:124.

<sup>20</sup> Opinion of Advocate General Mengozzi delivered on 29 January 2015 in Case C-28/12, *Commission v Council*, 29 January 2015, Celex No. 612CC0028 para 65.

<sup>21</sup> Opinion of Advocate General Kokott in *TNT Express Nederland BV* delivered on 28 January 2010, ECLI:EU:C:2010:50, para 65.

<sup>22</sup> See for a list of signatories: [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en) (accessed 7 June 2016)

<sup>23</sup> Opinion of Advocate General Sharpston in Case C-508/08, *European Commission v. Malta*, 1 July 2010, ECLI:EU:C:2010:392, para 4. '...A number of [the] provisions [of the Vienna Convention on the Law of Treaties] reflect rules of customary international law which, as such, form part of the [EU] legal order. Article 18 (which embodies the so-called 'interim obligation') and Article 26 (which spells out the requirement of good faith) are generally considered to be among those provisions.'

such as the Geneva Conventions on the Territorial Sea and the Contiguous Zone (1958),<sup>24</sup> in so far as they codify general rules recognised by international custom. Last, in *Commission v. Malta*, Advocate General Sharpston established that although Malta is not party to the Vienna Convention, a number of its provisions, such as *pacta sunt servanda*, reflect rules of customary international law (and therefore part of EU law) and, although they are not binding on Malta *qua* treaty law, ‘it is useful to set them out as a formulation of what Malta accepts are the rules of customary international law applicable to it’.<sup>25</sup>

Having established that the EU is bound by custom, it is important to define the ways in which it is applicable in EU law. Wouters and Van Eeckhoutte’s categorisation is most relevant in this respect.<sup>26</sup> The CJEU may thus resort to custom i) as a means of delineating the limits of EU jurisdiction (for instance, regarding the demarcation of sea zones for the purpose of the common fisheries policy); ii) as a method of interpretation of international agreements (for instance, provisions of the Convention on the Law of the Sea may be constituting an expression of custom);<sup>27</sup> and iii) as a gap-filler in the absence of specific EU rules governing a certain aspect on which the CJEU needed guidance in order to decide (for instance, in *Factortame*,<sup>28</sup> in relation to vessel registration).<sup>29</sup>

With reference to resort to custom as a gap-filler, in *Rottmann*, for example, although the CJEU confirmed that Member States shall determine under their domestic legislation who qualify as their

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<sup>24</sup> Geneva, 29 April 1958. Entered into force on 10 September 1964. United Nations, Treaty Series, vol. 516, p. 205.

<sup>25</sup> Opinion of Advocate General Sharpston in Case C-508/08, *European Commission v. Malta*, 1 July 2010. ECLI:EU:C:2010:392. The European Courts have highlighted the *pacta sunt servanda* customary law principle (Article 26 of the Vienna Convention on the Law of Treaties) in a number of judgments. See Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para 40; Case T-338/08, *Stichting Natuur en Milieu*, Judgment of the General Court, 14 June 2012, CLI:EU:T:2012:300, para 72; Case T-465/08, *Czech Republic v Commission*, 15 April 2011, ECLI:EU:T:2011:186; Case C-118/07, *Commission v Finland* EU:C:2009:715, para 39.

<sup>26</sup> J Wouters and D Van Eeckhoutte, ‘Giving Effect to Customary International law Through European Community Law’, Working Paper No 25 - June 2002, See in particular p.6-18, available at: <[www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf](http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP25e.pdf)>.

<sup>27</sup> UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at: <<http://www.refworld.org/docid/3dd8fd1b4.html>> (accessed 7 June 2016)

<sup>28</sup> Case C-221/89 *Factortame* [1991] ECR I-3905.

<sup>29</sup> See accordingly: Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, para 22. In this case the CJEU emphasized that under customary international law a State is precluded from refusing its own nationals the right of entry and residence; Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, paras 34-35. In this case the CJEU highlighted the *pacta sunt servanda* principle as entailing *bona fide* performance of international agreements; Case C-135/08 *Rottmann* [2010] ECR I-1449, para 39. In this case the CJEU, in line with its established case law affirmed the principle under international law that it is for the Member States to lay down the conditions for their citizens’ acquisition and loss of nationality (as long as the pay due regard to their EU law obligations).

nationals, it noted that such exercise of national competence has to be consistent with international law, including custom.<sup>30</sup> Likewise, in an interstate dispute between Hungary and Slovakia, the CJEU concluded that ‘special treatment afforded by international law to Heads of State is derived largely from international custom and, to a lesser extent, concerning certain particular aspects, from international conventions’.<sup>31</sup> That special treatment concerns the protection, facilities, privileges and immunity accorded them. In some cases, the CJEU even approximates custom translating it into a general principle of EU law. For instance, in *Opel Austria*, the principle of good faith was compared with the principle of legitimate expectations.<sup>32</sup> This is an old trick also used by national courts. Bjorge refers to the UK courts stressing that, according to established jurisprudence, custom does not form part of the common law:

...rather it is a source of UK law on which the courts may draw upon as required. What the courts apply is not the rule of customary international law as such: they apply the rule of English law whose source lies in international law.<sup>33</sup>

We may also add two more uses of custom viz. the external review of EU law – i.e. iv) using custom as a means of reviewing the legality of EU acts; and v) using custom as a specific limitation on the extraterritorial exercise of a Member State’s jurisdiction.<sup>34</sup> We will hereafter focus on the reliance of third parties upon custom against EU acts and appraise the compatibility of EU law with customary international law.

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<sup>30</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449. See A Berry, ‘Deprivation of nationality and citizenship - the role of EU law’ (2014) 28 (4) *Journal of Immigration, Asylum and Nationality Law* 355.

<sup>31</sup> See Case C-364/10 *Hungary v Slovak Republic*, 6 March 2012, ECLI:EU:C:2012:124, para 56.

<sup>32</sup> Case T-115/94, *Opel Austria GmbH v. Council* [1997] ECR II-39

<sup>33</sup> E Bjorge, ‘The Vienna rules on treaty interpretation before domestic courts’ (2015) 131 *Law Quarterly Review* 78, p. 84.

<sup>34</sup> ‘[I]nternational law would prohibit the extraterritorial application of domestic law where it might give rise to conflicting obligations, or provoke conflicts of jurisdiction.’ Opinion of Mr Advocate General Darmon in Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v. Commission* delivered on 25 May 1988, [1988] ECR 05193, para 49. For examples of the opposite trend, see V Moreno-Lax and C Costello, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’, in S Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014).

### 3. Reliance on international custom by third parties

#### 3.1 Reliance on international custom by individuals against EU Law

Having explored the place of custom in the EU legal order, we will now turn to examine whether the rules of custom are capable of having an effect on the legal status of individuals and whether they can be relied upon in order to review the legality of EU acts. In our examination we will also observe how national courts are compelled to refer cases to the CJEU under the preliminary reference procedure (Article 267 TFEU) involving the invocation of custom by private parties with a view to reviewing the legality of EU secondary law.

Since under Article 3(5) TEU ‘the Union shall uphold and promote...the strict observance and the development of international law’, customary law can, in principle, be utilised to challenge the validity of EU acts. However, there is a stark contrast between theory and practice viz. the direct effect of custom in EU law.<sup>35</sup> We have provided elsewhere a detailed account of the contradictory messages sent by the European Courts as to whether custom can be utilised in order to challenge EU legislation.<sup>36</sup> Suffice to say here that initially the European Courts, and particularly the General Court, entertained the idea that customary international law applies within EU law only indirectly, by way of transformation into a general principle of EU law.<sup>37</sup>

Since the general principles of EU law, as developed by the CJEU, rank high in the EU hierarchy of norms, the approach taken in relation to rules of custom (i.e. conversion to EU general principles) provided them with an incidental upgrade to that of primary EU law.<sup>38</sup> The General Court’s connection between custom and general principles was unhelpful, since it could not generate a rule of interpretation of international custom – i.e. that all rules of custom shall be equated to, and

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<sup>35</sup> Eckes argues that ‘whether customary law is also directly effective has not yet been fully clarified. However, as a matter of fact individuals can challenge Union law in the light of customary international law [the subject matter of the following section of this article] – at least as to the effects, this equals direct effect.’ See, C Eckes, ‘International law as law of the EU: The role of the Court of Justice’ CLEER Working Paper 2010/6, p.10

<sup>36</sup> T Konstadinides, ‘When in Europe: Customary International Law and EU Competence in the Sphere of External Action’ (2012) 13 (11) *German Law Journal* 1177.

<sup>37</sup> Case T-115/94, *Opel Austria GmbH v. Council* [1997] ECR II-39, paras 83, 90, 93. See also Case C-372/97, *Italy v. Commission* [2004] ECR I-3679, paras 116 to 118, Joined Cases C-74/00 P and C-75/00, *P Falck and Acciaierie di Bolzano v. Commission* [2002] ECR I-7869, para 140; Case T-308/00, *Saltzgitter v. Commission* [2004] ECR II-01933, para 166.

<sup>38</sup> See on general principles of EU law: T Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2006); U Bernitz et al (eds.) *General Principles of EC Law in a Process of Development* (The Hague: Kluwer, 2008).

therefore treated as, general principles of EU law in litigation. Under these circumstances, custom comprised more of a source of inspiration, which had to be ‘channelled’ into an EU principle in a case at hand. Being such a light-weight source, custom did not produce direct effect within EU law – or at least European Courts avoided for some time to provide a well-defined answer to the question of whether customary international law could generate such a quality.

Since custom is less precise than Treaty norms, the CJEU reserved a certain margin of discretion in interpreting international custom by subjecting review of the legality of EU law to two conditions.<sup>39</sup> EU institutions could therefore be found to violate custom only when the rules of custom invoked are ‘fundamental’ and, by adopting the suspending act, the EU institution made a manifest error of assessment concerning the conditions for applying those rules. These conditions created ambiguity, as to the circumstances under which rules of custom are such as to create rights in favour of individuals. Hence, one had to look into the CJEU’s own case law on direct effect of international agreements concluded by the EU or the effect of customary international law within the Member States’ legal orders in order to utilise custom as a standard of review of EU legislation. But still, this approach fell short of providing useful answers because the CJEU addressed the issue of the conditions of reliance on custom to review the validity of EU legislative measures differently from international agreements. What is more, national courts were more reluctant than the CJEU to apply provisions of custom as overarching norms in order to provide a model for the EU.<sup>40</sup>

While the CJEU’s case law said a lot about when EU institutions were found to violate custom, it added very little about the conditions of reliance on custom. The question regarding the basis on which customary international law may be relied upon in order to challenge the validity of an EU measure was somewhat clarified five years ago in a conflict between international aviation law and EU emissions law, which concerned the extension of the EU Emissions Trading Scheme (ETS) to international aviation via Directive 2008/101.<sup>41</sup> Accordingly, airlines were to be charged under the EU ETS on greenhouse gas (GHG) emissions created by flights to and from the then 27 EU Member States, regardless of the operator’s place of establishment. This was the first case in which

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<sup>39</sup> Case C-162/96, *Racke GmbH* [1998] ECR I-3655.

<sup>40</sup> See B Conforti and A Labella, ‘Invalidity and Termination of Treaties: The Role of National Courts’ (1990) *European Journal of International Law* 44; P Capps, ‘The Court as Gatekeeper: Customary International Law in British Courts’ (2007) 70 *Modern Law Review* 458.

<sup>41</sup> Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*. The rules of custom in question were related to: sovereignty (exclusive jurisdiction) of states over their air space; the impossibility of states to exercise jurisdiction over high seas; the freedom to fly over the high seas and the rule that aircrafts flying over high seas are under exclusive jurisdiction of state of registration.

the CJEU addressed the issue of conditions of reliance upon custom to review the legality of EU law. Indeed the CJEU acknowledged that, in line with Article 3(5) TEU, the EU is obliged to observe international law in its entirety and that it is competent to review Directive 2008/101 in light of custom. Yet, in the case at hand, the CJEU held that extending the EU ETS to international aviation activities, under Directive 2008/101, did not breach public international law. As such, the CJEU established that the EU had jurisdiction to prescribe and adopt the contested Directive.

According to the CJEU in *ETS*, the principles of customary international law invoked must call into question the competence of the EU to adopt the challenged EU legislative act. What is more, the EU legislative act challenged must be liable to affect rights, which the individual derives from EU law or creates obligations under EU law. It is important to note that the CJEU did not purport to overrule its past case law when it comes to the validity of a regulation in the light of custom. As such, the rules of custom invoked to challenge an EU legislative act must also be fundamental. Furthermore, in adopting the EU legislative act in question, the EU legislature still has to make a manifest error of assessment concerning the conditions of applying the rules of customary international law invoked. It can therefore be claimed that the *ETS* judgment complemented the CJEU's previous case law on the invocability and reliance of custom by private parties, adding up more requirements to an already restrictive test. For instance, post-*ETS* an individual has to demonstrate that the EU legislature both erred in law and exceeded its competence vis-à-vis the invoked custom. Applicants may, therefore, find it difficult to satisfy such a double onus.

Apart from the particulars of using custom to review EU acts, the *ETS* case carries a lot of symbolism viz. the EU's qualified approach to international law and future EU action as regards spreading its own rules globally.<sup>42</sup> As it is to be expected, the post-*ETS* case law has been relatively modest. Custom has been used, almost exclusively, in the context of the Vienna Convention on the Law of Treaties. This seems to be the case regarding the interpretation of international agreements binding on the EU and/or its Member States. Reliance on the Vienna Convention rules for the interpretation of *internal* EU law norms appears to be far less systematic.<sup>43</sup> In particular, recent judgments have established that the notion of being subject to the legislation of a Member State (in Regulation 1408/71<sup>44</sup>) ought to be interpreted in the light of the relevant rules of custom, namely

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<sup>42</sup> See Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*, 6 October 2015, ECLI:EU:C:2015:650.

<sup>43</sup> On this point, see Gunnar Beck's contribution to this Special Issue.

<sup>44</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/0002.

the Vienna Convention.<sup>45</sup> Moreover, other cases have established that Article 31 of Vienna Convention expresses general custom viz. the legal maxim that a treaty should be interpreted in good faith (*pacta sent servanda*).<sup>46</sup>

It, therefore, transpires that while in *ETS* the CJEU judges provided, although intricately, certain rigid guidelines regarding the odd occurrence where private parties may resort to custom against the EU Institutions, subsequent cases only reiterated the rules of customary international law codified in the Vienna Convention on the Law of Treaties. They did not, therefore, address further questions pertaining, for instance, to EU liability under customary international law or the relationship between treaty and custom. We will hereafter look into whether Member States have received a better response from the CJEU in relying upon custom as a means of challenging EU acts.

### 3.2 *Reliance on international custom by Member States against EU Law*

The obligation springing from EU law to respect custom in the exercise of its powers is not very vigorous to curtail EU competence in the sphere of external action. Especially after the *ETS* judgment, the role of custom as a robust means of judicial review has become rather trivial. This approach has been further reinforced in cases where Member States have attempted to rely on custom against the acts of the EU Institutions. So far, only the UK seems to have unsuccessfully relied on custom twice as a means of reviewing EU legislation. Again, as with private parties, the CJEU has been somewhat reticent to encourage resort to custom. It does not accept that Member States can invoke competences, which they have under custom, to unilaterally modify their EU law obligations.<sup>47</sup>

As mentioned, the UK has challenged EU legislation twice on, amongst other grounds, violation of custom. Both challenges discussed below were targeted against EU regulatory measures aimed at avoiding future financial crises. In particular, the objective of these challenges was to impose limits upon EU extraterritorial financial regulation. First, the UK brought an action to annul Decision

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<sup>45</sup> Case C-179/13, *Evans*, 15 January 2015, ECLI:EU:C:2015:12.

<sup>46</sup> Case C-404/12 P & C-405/12 P *Pesticide Action Network (Aarhus)*, 13 January 2015, ECLI:EU:C:2015:5; Case C-221/11, *Demircan (EU-Turkey Association Agreement)* 8 November 2013, ECLI:EU:C:2013:583. See on *pacta sunt servanda* D Davison-Vecchione, 'Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty' (2015) 16 (5) *German Law Journal* 1163.

<sup>47</sup> C-146/89 *Commission v UK* [1991] ECR I-03533.

2013/52/EU,<sup>48</sup> authorising eleven Member States to establish enhanced cooperation between themselves in the area of the establishment of a financial transaction tax (FFT).<sup>49</sup> Inter alia, the object of this Decision was to tax the trading activities of financial institutions resident in the EU, even if such transactions are carried out in third countries' jurisdictions. Hence, financial institutions would make a contribution to the costs of the financial crisis. The UK argued that the Decision is far-reaching, because it allows for the adoption of a transaction tax with extraterritorial effect, which would be contrary to customary international law and would also impose costs on non-participating Member States.<sup>50</sup>

The CJEU dismissed the action brought by the UK, distinguishing between the main issue of the case being the authorisation to establish enhanced cooperation and the elements of a future tax which were irrelevant (at least, in the context of this challenge). Hence, the CJEU held that the elements of a potential FFT challenged by the UK were not constituent elements of the contested Decision. By declaring that the UK's action was premature, the CJEU avoided altogether to discuss the UK's question based on custom – particularly whether 'the counterparty principle' (i.e. taxing non-residents) and 'the issuance principle' (i.e. taxing even when both counterparties are outside the scope of EU law, but the traded securities originate from within) introduced by the FFT produced extraterritorial effects which were incompatible with custom. Perhaps the UK's argument was ambitious because, after all, even under the territoriality principle, custom is concerned with the existence of a territorial link between the transaction and the taxing state and not the taxation of financial transactions (capital movements) as such, which falls under the territorial scope of Article 63 TFEU (free movement of capital between Member states or between them and a third country).

In its second challenge, the UK challenged the EU institutions' acts regarding the regulation and stability of financial institutions. Once again, the UK attempted to use the principle of territoriality found in customary international law to attack the EU Capital Requirements legislative package adopted in 2013 by the Council and the Parliament (the CRD IV Package which consists of a

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<sup>48</sup> Council Decision 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax [2013] OJL 22/11)

<sup>49</sup> Enhanced cooperation (Article 329 (1) TFEU) was used following the difficulty of all Member States (especially the Czech Republic, Luxemburg, Malta and the UK) to reach consensus in adopting the FFT on the basis of Article 113 TFEU (which requires unanimity in the Council).

<sup>50</sup> In Case C-209/13 *UK v Council* 30 April 2014, ECLI:EU:C:2014:283 the UK argued that the Financial Transaction Tax Decision 2013/52 produced extraterritorial effects which were contrary to Article 327 TFEU and international custom.

Directive and a Regulation).<sup>51</sup> The ‘Package’ applied to group, parent company and subsidiary entities established outside the EU entirely and its purpose was to put a ‘cap’ on bankers’ bonuses, which was considered to be a major contributor to the financial crisis.<sup>52</sup> Against the UK’s claim, Advocate General Advocate General Jääskinen suggested that the UK’s pleas should be rejected and that the CJEU dismiss the action. He opined that the imposition of a fixed ratio for bonuses in relation to the bankers’ basic salary did not limit the total amount of pay. He quoted from the *ETS* judgment to reiterate that

...since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made *manifest errors of assessment* concerning the conditions for applying those principles.<sup>53</sup>

Having considered whether the principle of territoriality was manifestly infringed, the Advocate General supported that the UK would have been mistaken to claim that only territorial jurisdiction to legislate is permitted under international law.<sup>54</sup> He added that a claim of universal jurisdiction (which needs to be based on a positive rule of international law) was not sought by the relevant provisions of the CRD IV Directive. Hence, the contested ‘Package’ only concerned the subjection of foreign group companies of EU financial institutions to the EU regulatory framework. The Advocate General concluded by claiming that there can also be no violation of Article 3(5) TEU, because no such principle of international law against extraterritoriality, as described in the UK’s challenge, exists.<sup>55</sup>

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<sup>51</sup> Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJL 176/338; Regulation 575/2013 on prudential requirements for credit institutions and investment firms [2013] OJL 176/1.

<sup>52</sup> Opinion of Advocate General Jääskinen delivered in Case C-507/13 *United Kingdom v European Parliament and Council*, 20 November 2014, ECLI:EU:C:2014:2394, para 24-41. The CRD IV Directive also conferred the power on the European Banking Authority (EBA) to draft regulatory technical standards specifying the criteria used to identify individuals who would fall within the scope of the directive.

<sup>53</sup> *Ibid*, para 29. The idea that ‘treaty law offers the benefit of greater clarity and precision in the articulation of the legal obligations’ has been contested by MP Scharf, ‘Accelerated Formation of Customary International Law’ (2014) 20 (2) *ILSA Journal of International & Comparative Law* 305, p.310.

<sup>54</sup> *Ibid*, para 37.

<sup>55</sup> Mapping out other examples of extraterritorial regulatory action by the EU in different fields and their consequences with particular focus on fundamental rights, see V Moreno-Lax and C Costello, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’, in S Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014) 1657.

The above cases confirm that the EU has pushed for a uniform regulatory framework that cannot be better achieved by national governments. In doing so, the EU has taken a pragmatic approach to national divergent policy considerations and the application of custom which, in the context of extraterritorial financial regulation, does not appear to be placing robust limitations upon supranational activity. The main purpose of the EU institutions is to strengthen the efficiency and stability of the EU financial market vis-a-vis risky financial transactions which may produce a destabilising effect upon the EU legal order. Having said that, the adequacy of EU harmonising measures targeting speculative transactions with high profit margins may not always produce the desired result viz. ensuring the proper functioning of financial markets and avoiding future financial crises. More litigation is inevitable, since there are unanswered questions regarding, for instance, the status of non-participating Member States' access to the markets of FFT participant countries as well as the FFT compatibility with the free movement of capital. These are questions which raise inevitable parallels with two current debates concerning the inclusion in the European Monetary Union (EMU) governance of non-EMU EU members and the capacity of the EU to act internationally.<sup>56</sup>

The cases between the UK and the EU Institutions are indicative of the general attitude of the CJEU towards claims invoking custom in order to challenge the acts of the EU legislature. The CJEU has treaded very carefully: on the one hand through its *ETS* liability it has provided some general requirements that create a window of opportunity vis-à-vis making reliance to custom possible. This gesture has been appraised since the EU legal order appears receptive to criticism and open towards an external ground of review of its legislation. On the other hand, however, the CJEU does not appear confident in exposing the EU to uncontrolled liability – even more so through a new means of weaponry that can prove dangerous in the hands of the Member States and the individuals. As such, the CJEU has demonstrated a blanket intolerance towards claims based on international custom - it does not express any preference towards Member States' claims as opposed to individual ones.

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<sup>56</sup> See further PJ Malli, 'Taxation of the Financial Sector' in K Spies and R Petrucci (eds.) *Tax Policy Challenges in the 21st Century* (Linde Verlag, 2014), 163.

#### 4. EU Law as international custom

In this final section we will discuss whether EU action can be labelled as relevant international practice and may, therefore, be in a position to *itself* generate custom.<sup>57</sup> Since the criterion for custom is *State* practice, *sensu stricto* the EU does not generate custom. But still it can be acknowledged that EU law can express a general, consistent and uniform practice (which is equivalent to state practice), and a sense of legal obligation (*opinio juris sive necessitatis*). This is also reinforced by the fact that, in general, international organisations have international legal personality and can participate in international relations in their own capacity, independently of their Member States.<sup>58</sup> In this respect, their practice, as autonomous legal subjects in the international arena, can, in principle, contribute to the formation of customary international law irrespective of the fact that the main criterion for custom is *State* practice.

Furthermore, Scharf notes that apart from state practice and conviction that the practice is required by international law, fundamental change can trigger customary international law to form rapidly and with less State practice than is normally required.<sup>59</sup> This does not necessarily imply that the practice in question has to be globally communicated, but – for instance, in the case of the EU – it should be transmitted to a Member State or a counterpart international organisation. For instance, Hillion notes that in the context of EU membership conditions ‘[w]ith the blessing of the Member States, the Commission has thus elaborated the content of Article 2 TEU [inclusive of respect to the rule of law], substantively and normatively. These conditions have become part of EU customary law on membership [emphasis added].’<sup>60</sup> In short, we can, therefore, provisionally agree that the EU is capable of generating custom, but, in order to do so, we need to detach ourselves from the dominant idea that custom only emanates from state practice and that the crystallisation of new rules of international custom constitutes a lasting process which needs a great deal of time to

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<sup>57</sup> The reader is invited to further refer to Ramses A. Wessels’ contribution to this Special Issue for a detailed analysis on this question.

<sup>58</sup> Further on this point, refer to Niels Blokker’s contribution to this Special Issue, regarding the *international* legal personality of the EU.

<sup>59</sup> MP Scharf, ‘Accelerated Formation of Customary International Law’ (2014) 20 (2) *ILSA Journal of International & Comparative Law* 305.

<sup>60</sup> C Hillion, ‘Overseeing the rule of law in the European Union Legal mandate and means’, Swedish Institute for European Policy Studies (SIEPS), European Policy Analysis, Issue 2016:1epa, p.2

complete. In other words, we have to recognise that the ascertainment of new customary international law is ‘a normative exercise rather than an empirical one’.<sup>61</sup>

The above arguments aside, it has to be acknowledged that the formation of ‘new custom’ may diminish the authoritative force and persuasiveness of ‘old custom’ as a source of law. In turn, the diminution of custom may have a knock-on effect on the gravitas of international law. With this in mind, if we adopt the general approach adopted by the International Law Commission and apply it to the question of whether EU law can be perceived as generating custom, then we go back to square one – i.e. that it is only State practice that generates custom.<sup>62</sup> The ‘two element approach’ on how customary norms emerge – i.e. that the identification of a rule of custom requires an assessment of both general practice and acceptance of that practice as law, is still dominant.<sup>63</sup> At the same time, however, it is arguable that the practice of international organisations should also be relevant, so long as the international organisation in question has international legal personality. Likewise, a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect.

Indeed, large international organisations can exert influence on the development of custom through their administrative and other practices. For example, it can be submitted that Article 4 of the Vienna Convention on Succession of States (VCSS) to Treaties,<sup>64</sup> regarding the question of succession to membership in international organisations, has been influenced by UN Secretariat practice.<sup>65</sup> Although this may be true, Article 4 of the VCSS is not a rule but merely a statement of fact. It simply shifts the regulatory burden from the VCSS to the respective constituent instruments of the organisations; so the high level of acceptance of Article 4 does not help us much, as it actually has almost nothing incisive to say.<sup>66</sup> In addition, one may contend that official International

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<sup>61</sup> O Sender and M. Wood, ‘The emergence of customary international law’ in C Brölmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham: Edward Elgar, 2016) p. 143.

<sup>62</sup> International Law Commission, Sixty-sixth session, Second report on identification of customary international law by M Wood, Special Rapporteur, Geneva, 5 May-6 June and 7 July-8 August 2014, available from: <[http://legal.un.org/ilc/documentation/english/a\\_cn4\\_672.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_672.pdf)>.

<sup>63</sup> *Ibid.*, p. 2.

<sup>64</sup> UN General Assembly, *Vienna Convention on Succession of States in respect of Treaties*, 6 November 1978, available at: <http://www.refworld.org/docid/3ae6b38518.html> [accessed 7 June 2016]

<sup>65</sup> There are a few exceptions to the general practice (e.g. the World Bank) and Kosovo is an example of a ‘proto-State’ that has exploited those exceptions to further its recognition cause.

<sup>66</sup> For example, Article 4 of the VCSS was not mentioned in Crawford and Boyle’s opinion on independence for Scotland regarding EU membership (J Crawford and A Boyle, Opinion: Referendum on the Independence of Scotland – International Law Aspects, Opinion, Annex to the UK Government’s ‘Report on ‘Devolution and the Implications of

Committee of the Red Cross (ICRC) statements, such as memoranda on respect for international humanitarian law (IHL), have been included as relevant practice because the ICRC has international legal personality. Still, however, the ‘special status’ of the ICRC under the Geneva Conventions as the ‘guardian’ of IHL does lend its views (particularly as it is ‘politically neutral’ towards States) a certain weight. So indirectly - as, indeed, with the UN Secretariat practice on succession to membership in international organisations - the ICRC contributes to the *identification* of custom. Its studies and documents have an added declaratory value, though they cannot by themselves form the basis for a customary rule, independent of the underlying *State* practice.<sup>67</sup>

But does EU practice count towards the formation of custom? As it is well-known, in *Kadi I*,<sup>68</sup> the General Court exercised judicial review in connection with an action for annulment of an EU act adopted with a view to putting into effect a UN Security Council Resolution. The General Court established that respect for property and the principle of proportionality pursue ‘an objective of fundamental public interest for the international community’.<sup>69</sup> It also acknowledged that international law is bound by the fundamental provision of *jus cogens* and stressed that the obligation to protect fundamental rights (broadly construed) formed such a superior rule of customary international law.<sup>70</sup> As such, it follows from the General Court’s analysis that the UN Security Council Resolutions in question (as well as EU acts implementing them into the EU legal order) were to be subjected to review and could be declared void as a matter of international law in case they were found to be in breach of fundamental rights.<sup>71</sup> Of course, the General Court found

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Scottish Independence’, Cm 8554, February 2013. See further K Buhler, *State Succession and Membership in International Organizations: Legal Theories Versus Political Pragmatism* (Martinus Nijhoff Publishers, 2001).

<sup>67</sup> This came up with particular force in the ICRC Customary International Humanitarian Law study, which can be criticised for overstepping the mark in terms of ‘pushing the boundaries’ of IHL by declaring certain rules based upon the Additional Protocols to the Geneva Conventions (to which the USA is not party for instance, though a large majority of States are party) to be reflective of custom due to affirmative State practice *subsequent to* the adoption of the treaty rule (in other words, the treaty rule *itself* does not generate custom, rather the subsequent acceptance of it by States in practice does). See JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, Vol I: Rules (Cambridge: Cambridge University Press, 2009), Introduction, p.42; 106; 288.

<sup>68</sup> Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649. For a case analysis, see C Eckes, ‘Judicial Review of European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance’ (2008) *European Law Journal* 74.

<sup>69</sup> *Ibid.*, para. 247.

<sup>70</sup> *Ibid.*, para. 231.

<sup>71</sup> At para. 277, the Court stressed that it is ‘empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible’. Of course, we need to take the General Court’s judgment with a ‘pinch of salt’, as the CJEU corrected the object of its review in its subsequent decision – i.e. it demarcated its competence to review the EU act implementing the

that the contested smart sanctions were not infringing the applicants' fundamental rights in this case. But had its decision been different, it would have had serious ramifications for the Member States' UN obligations. The same, of course, can be argued about the CJEU's subsequent decision in *Kadi*, but there at least the CJEU did not check the lawfulness of the UN Security Council Resolution against *jus cogens* – it was only preoccupied with ascertaining the *internal* lawfulness of the contested Regulation that gave effect to the Resolution, in order to ultimately decide that the applicants' right to be heard was violated by the Regulation in question.<sup>72</sup> As such, the CJEU did not have to get into the trouble of clarifying whether or not the right to be heard qualified as *jus cogens* for the purpose of international law. As Craig notes,

[t]his was a contentious issue. The existence of international human rights law is well established, but which rights fall within *jus cogens*, and the interpretation of any such right on the facts of the case, can be considerably more contentious.<sup>73</sup>

As far as custom formation is concerned, the General Court's abstract assessment raised the question of which fundamental rights should be considered as *jus cogens* (respect for the right to property, the right to be heard, or perhaps both?).<sup>74</sup> The approach of the General Court in this regard was not illuminating, other than providing that fundamental rights form an integral part of the general principles of EU law. The General Court failed to analyse custom in order to determine whether the violated rights in *Kadi* were 'accepted and recognised by the international community of States' as peremptory norms.<sup>75</sup> It simply stated that the rights in question were *jus cogens*, merely because they featured in the Universal Declaration of Human Rights<sup>76</sup> and the International Covenant on Civil and Political Rights,<sup>77</sup> while it did not mention the (more familiar and proximate

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UN Security Council Resolution and not the Resolution itself. See Joined Cases C-402/05 P & C-415/05 P *Kadi* [2008] ECR I-6351.

<sup>72</sup> Joined Cases C-402/05 P & C-415/05 P *Kadi* [2008] ECR I-6351.

<sup>73</sup> P Craig, *UK, EU and Global Administrative Law*, (Cambridge: Cambridge University Press, 2015), p. 63.

<sup>74</sup> T. Ahmed and I. de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 (4) *The European Journal of International Law* 771. With regard to the question whether the right to be heard constitutes *jus cogens*, See: Joined Cases C-402/05 P & C-415/05 P *Kadi* [2008] ECR I-6351, paras 265-266. According to France, the Netherlands and the UK 'a norm may be classified as *jus cogens* only when no derogation from it is possible. The rights invoked in the cases in point – the right to a fair hearing and the right to respect for property – are, however, subject to limitations and exceptions'.

<sup>75</sup> Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, para. 227.

<sup>76</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <<http://www.refworld.org/docid/3ae6b3712c.html>> (accessed 7 June 2016)

<sup>77</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <<http://www.refworld.org/docid/3ae6b3aa0.html>> (accessed 7 June 2016)

to the EU Member States) European Convention on Human Rights.<sup>78</sup> Understandably, the General Court's assessment of custom has been described as 'tantalizing for some human rights lawyers'.<sup>79</sup> At the same time, however, the General Court seems to have made an attempt to contribute to custom taxonomy (rather than formation), albeit arriving to a generic conclusion that all human rights featuring in international instruments can be classed as rules of *jus cogens*.<sup>80</sup>

Indeed, outside the contours of the much-commented *Kadi* saga, it can be argued that recent jurisprudence of the CJEU has contributed to the formation of post-national standard-setting, but this would not include custom. Craig's analysis of regional and global administrative law pays tribute to the external judicial oversight role of European Courts, viz. international organisations.<sup>81</sup> Having said that, we need to be conscious of the present orthodoxy, which stipulates that international practices are not directly relevant to generating custom. It is, therefore, arguable that they should be, especially since international organisations, such as the EU, are bound by custom.<sup>82</sup> Yet, we know from other areas of international law, participation in the creation of law is not a requirement to be bound by that law. For example, in international humanitarian or criminal law, individuals are bound by law that is entirely State-created.

The above analysis leads us to conclude that the EU has not been a strong *jus generative* force of international custom. Having said that, it can be argued that although the EU's practice alone has not generated by itself any new custom yet (at least one that may transcend the regional level), it has reinforced and consolidated some otherwise *emerging* international customary rules. For instance, one could argue that the principle of legitimate expectations and the strength with which it is affirmed in the EU legal context and the protection it gives rise to may have contributed to raise it to the level of custom in the international sphere (added to parallel practice by other actors). This argument can be challenged, however, if we take the view that the customary international law

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<sup>78</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> (accessed 7 June 2016)

<sup>79</sup> T. Ahmed and I. de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 (4) *The European Journal of International Law* 771, p. 781.

<sup>80</sup> It can be argued that the General Court's decision in *Kadi* is reminiscent of the ICJ's *Barcelona Traction* old authority on obligations *erga omnes* viz. arriving at an over-reaching conclusion. See *Belgium v. Spain* [1970] ICJ Rep. 3. See for case analysis: C Tams and A Tzanakopoulos, 'Barcelona Traction at 40: the ICJ as an agent of legal development'. (2010) 23 (4) *Leiden Journal of International Law* 781.

<sup>81</sup> P Craig, *UK, EU and Global Administrative Law*, (Cambridge: Cambridge University Press, 2015), Craig explains that 'global' includes 'bodies and practices not normally encompassed within the rubric of international law', at p. 635.

<sup>82</sup> See Wessel's contribution in this Special Issue.

principle of good faith, codified in Article 18 of the Vienna Convention on the Law of Treaties, is the precursor to the principle of protection of legitimate expectations which forms part of the EU legal order.<sup>83</sup> Whichever side of the argument we may adopt in this regard, the capacity of the EU to generate custom remains undisputed despite the EU's wishes to remain rather idle in this domain – being more of a reticent 'recipient' and less of an active 'contributor'.<sup>84</sup>

## 5. Conclusion

The EU's profile as an independent legal order does not provide a fertile ground for learning how its legal order implements custom and where it ranks it viz. other sources of EU law.<sup>85</sup> In this contribution we established that the European Courts have occasionally given effect to customary international law through the 'back door'.<sup>86</sup> As such, customary international law is, in theory, capable of curtailing the EU institutions' discretion when exercising their competence in the sphere of external action. Yet, as discussed above, unless there is a case involving *jus cogens* norms, the EU may be at freedom to deviate from international law.<sup>87</sup> For instance, as established by the General Court in *Kadi*, any rule created through the EU which conflicts with rules that are classed as *jus cogens* will be void. Like in international law, these norms have been adopted by EU law through the practice of European Courts. Still, however, the CJEU is yet to clarify the position on custom and fundamental rights vis-à-vis its *erga omnes* effects which are non-derogable and, therefore, crucial for the enforcement of international law.<sup>88</sup>

In this article we reflected on the conditions under which reliance might be placed on customary international law for a third party (either an individual or a Member State) to be able to invoke custom in domestic courts and compel a national judge to seek formal interpretation of EU

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<sup>83</sup> Case T-115/94, *Opel Austria GmbH v. Council* [1997] ECR II-39, paras 83, 90, 93. See also Case C-372/97, *Italy v. Commission* [2004] ECR I-3679, paras 116 to 118, Joined Cases C-74/00 P and C-75/00, *P Falck and Acciaierie di Bolzano v. Commission* [2002] ECR I-7869, para 140; Case T-308/00, *Saltzitter v. Commission* [2004] ECR II-01933, para 166.

<sup>84</sup> See Wessel's contribution in this Special Issue.

<sup>85</sup> A Gianelli, 'Customary International Law in the European Union' in E Cannizzaro et al (eds.) *International Law as Law of the European Union* (Leiden: M Nijhoff Publishers, 2012), p.101.

<sup>86</sup> See Case T-115/94, *Opel Austria GmbH v. Council* [1997] ECR II-39; Case C-162/96, *Racke GmbH* [1998] ECR I-3655; J Klabbers, 'International Law and Community Law: The Law and Politics of Direct Effect' (2002) 21 *Yearbook of European Law* 263, p. 289.

<sup>87</sup> See examples from case law in B Van Vooren and R Wessel, *EU External Relations Law: Text, Cases and Materials, EU law and International Law*, p. 235.

<sup>88</sup> MC Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 (4) *Law and Contemporary Problems* 63.

legislation by the CJEU. Having looked into the level of complexity of the grounds to review EU legislation by using custom, it is argued that a set of clear guidelines regarding the invocation of customary international law would be desirable. This is because custom may provide individuals with an additional ground for challenging EU law directly under Article 263 TFEU or indirectly by resorting to it domestically, through national courts that may refer the matter to the CJEU under Article 267 TFEU for a preliminary ruling. Likewise, successful reliance on custom may, therefore, influence the exercise of EU action at large in the sphere of external action (e.g. aviation, the maritime sector) vis-à-vis its extraterritorial jurisdiction, by rendering EU secondary law subject to external checks and balances. Such questions of jurisdiction are intimate to the allocation of competence in EU law.

We may afford some final remarks on the role of customary international law as a source of EU Law. This is an evolving issue which is important from the perspective of the constantly adjusting nature of the relationship between EU law and public international law examined in this Special Issue. Having said that, the question of who is bound by particular rules of custom (States, international organisations, other subjects of international law) appears to be more straightforward compared to the methodological question of the identification of customary international law and the contribution of the EU to its formation. Cross-fertilisation (a key theme of this Special Issue)<sup>89</sup> is indeed a difficult topic and one that is still nascent but, nonetheless, increasingly relevant, as the EU is growing ever more active. We cannot assume easily that the EU-custom osmosis works. As observed in the latter part of this article, there are both methodological and jurisprudential problems in international law, not only with respect to the EU, but also to international organisations in general. These issues are left undetermined, but may indeed be resolved in future depending on priority and willpower.

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<sup>89</sup> See the introduction by P Gragl and V Moreno-Lax.