THE COURT OF JUSTICE OF THE EUROPEAN UNION AND INTERNATIONAL LEGAL ORDER

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The author discusses the relationship between two legal orders: international law and European Union (EU) law. The main provisions of this relationship have been established through the precedential practice of the Court of Justice of the European Union – the EU's main judicial body.

This kind of research seems important because of the gap in the theory of international law caused by the immutable dogma of the supremacy of international law. However, modern legal practice demonstrates a certain fragmentation of the international legal order because of the impact of the existence and development of regional supranational legal orders. The EU legal order, with its own special nature (sui generis), is undoubtedly one of the most developed among them.

The Court of Justice of the European Union performs a crucial role in the EU legal system concerning application and interpretation of EU law. It provides a uniform interpretation of this law for the purposes of development of supranational integration. In this context the Court of Justice the European Union establishes the status of European law and its relationship with the national legal systems and international law. The Court acts as protector of the EU legal order against the influence of other legal orders.

The Court's precedential practice reveals EU law's tendency towards its constitutionalization and the development of its autonomy. The latest practice indicates the Court's powers to review the EU institutions' acts in relation to the implementation of UN Security Council resolutions. This proves the Court's ability to establish indirect control even over UN acts.

Keywords: Court of Justice of the European Union; hierarchy of international law norms; European Union; EU law constitutionalization.

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Introduction

The current status of European Union (hereinafter – EU) law theory confirms that the issues of the relationship between the EU legal order and the international legal order, as well as the issues of the Court of Justice of the European Union (hereinafter – CJEU, Court) practice concerning this problem, are clearly undervalued and have not been researched yet because of the immutable dogma concerning the supremacy of international law.

Fragmentation has recently become a clear and ever stronger tendency within current international law. This was especially evident with the emergence and further development of a powerful new entity, the EU, which has established its own legal system dissimilar to both the international legal order and the national legal order. The CJEU has had a significant role in the development of EU law's autonomous status. It is the CJEU that occupies the central position in the application and interpretation of EU law. The Court provides a uniform interpretation of this law to promote integration. The CJEU established the status of EU law and its relationship with national and international law. In this respect, there arises an urgent need to analyze the new stage of the EU court practice development concerning these issues. Systematization of the CJEU practice enables to analyze the basic trends in relations between multiple levels of legal orders, although it is too early to expect a solution to all problem areas.

1. Constitutionalization of EU Law

The first CJEU judgment that defined the status of the Communities' new legal system was the decision in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*[1] (hereinafter – *van Gend & Loos v. Netherlands*), which declared:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals.

This decision became fundamental in the subsequent practice of the Court. It should be noted that though the Court defined the law of the Community as a new type of legal order, but nevertheless – as a part of international legal order. At that stage of development of the integration the Court paid attention to the separation of the European legal order from legal orders of the members states and to the establishment of its absolute supremacy, while not emphasizing its autonomy from the international legal order.

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[1] Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1.

Later on, with the speed of integration increasing, the Court began developing the concept of this legal order increasing autonomy from international law, it developed its *sui generis* nature. As early as 1964, in its decision in *Costa v. E.N.E.L.*,[2] the Court stated:

> As opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order which was integrated with the national order of the member-States the moment the Treaty came into force; as such, it is binding upon them.

Thus, CJEU practice emphasizes the uniqueness of the nature of the integrational law and its difference from both national legal orders and international legal order. At the present stage of EU development, the Court notes that EU Founding Treaties (hereinafter – Founding Treaties) constitute a "basic constitutional charter based on the rule of law"[3] or even an "internal constitution."[4]

It is obvious that, with the deepening of the European integration, the Court started constitutionalizing EU law which is understood as a process in which the Founding Treaties evolved from a set of arrangements, only binding for the member states, to the Founding Treaties which provide a basis for a unique legal regime. This regime grants rights and assigns duties to all public persons and individuals in on the territory of the EU because norms of the Founding Treaties have a direct effect and absolute supremacy, and they form a peculiar integrational legal system. Thus, this legal regime acquired the features of a constitution.

When speaking about the CJEU's influence on the EU legal order, the key thing to mention is the development of EU law principles that enabled it to acquire the features of a constitution. The said principles also explain the uniqueness of EU law and its legal order and its distinctiveness from all other legal systems. These issues are extremely important when it comes to dealing with the problem of relations between international and EU law.

Alongside the EU legal system, there exist the member states' national legal systems. For this reason, the CJEU formulated and rationalized the principles of the supremacy of European Community (hereinafter – Community) law over the member states' national law and approved it as the highest principle that regulates the relations between the Community law and the national legal systems. With the entering into force of the Lisbon Treaty, this principle became applicable to EU law. Furthermore, it is important to note that all member states, while drafting the Lisbon

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[2] Case 6/64 *Flamino Costa v. E.N.E.L.*, [1964] E.C.R. 585.

[3] Case 294/83 *Parti écologiste "Les Verts" v. European Parliament*, [1986] E.C.R. 1339.

[4] Opinion 1/76 *Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels*, [1977] E.C.R. 741.

Treaty, signed Declaration 17 on the highest legal validity, where the principle of the supremacy of EU law over the laws the member states became entrenched. The supremacy principle was embodied in the Declaration exactly in the wording that had been formulated in CJEU practice. This fact clearly emphasizes the CJEU's role in the development of supranational law.

The principle of the supremacy of Community law was initially absent in the Founding Treaties and that was a problem because the legal systems of some of member states lacked any provision for the supremacy of European or international law and, therefore, they could theoretically cancel, for example, some provisions of the Founding Treaties by adopting a later national act. In response to this threat, in 1964, the Court adopted the decision in *Costa v. E.N.E.L.*, already mentioned above, which stated:

> The transfer by the states from their domestic legal system to the Community legal system of their rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[5]

The subsequent CJEU practice resulted in the introduction of fundamental supranational law supremacy principle into permanent use by the member states as the one based on the nature of the Community law. In the decision in *Amministrazione delle Finanze v. Simmenthal SpA*[6] (hereinafter – *Simmental*), the Court once again, but in a bolder manner, established the supremacy of Community law. The decision stated:

> Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but… also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

The Court established that incompatibility between the national law and the Community law has to lead not only to the automatic non-application of the former, but should also prevent the adoption of any new national legal norms which do not meet the standards of supranational law. Such conclusions, undoubtedly, have

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[5] *Flamino Costa v. E.N.E.L.*, *supra* note 2.

[6] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] E.C.R. 629.

promoted the efficiency of the entire EU legal system and helped the member states fulfill their obligations within the European Union.

It is very important that the decision in *Simmental* established the supremacy of integrational law, even over the member states' constitutions. The CJEU once again emphasized that no national legal act can be opposed to the Community law, which is autonomous in its nature. The principle of the supremacy of Community law also applies to the national constitutions, otherwise the legal basis of integrational law and legal order could be called into question. Dealing with the Community law, the Court did not limit it to the Founding Treaties only, but also includes in it the secondary law, i.e. institutional acts or agreements with third parties, irrespective of when they were signed: before or after the national regulation adoption. For example, in 1996, the Belgian Council of State (the Supreme Administrative Court of Belgium) recognized the supremacy of the Community act over the national Constitution. The same occurred in Austria in 1999.

The CJEU practice has developed a norm under which the supremacy of the EU law does not mean automatic cancellation of the national norms which do not correspond to EU law, such norms just cannot be applied (they are null and void). The reason is that the CJEU has no powers to interpret or repeal the member states' national legislation and, consequently, the duty to cancel such norms is assigned to the state which adopted them. It is worth mentioning that, despite the fact that it was an innovative and unknown principle, all EU member states have now recognized the supremacy of Community law. Nowadays it is generally accepted despite attempts to protect national autonomy.

The next fundamental tenet developed by the CJEU is the EU law direct effect principle that was initially related to the Community law and was then extended to EU law. This principle means that this law applies to the entire territory of the EU and all its subjects, i.e., member states and EU institutions, and, most importantly, it grants rights to individuals and legal entities without any implementation on the national level. It is well-known that the direct effect of norms is not inherent in public international law because, as was decided by the UN International Court of Justice, the parties to international treaties can decide to allocate some of their provisions with direct effect,[7] but such instances are the exceptions to the rule. In integrational European law, this provision became a fundamental principle and demonstrates the uniqueness of the EU law system.

The principle of the direct effect of EU law is absent in the Founding Treaties (Art. 288 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) states that only regulations have a direct effect) and its existence is the CJEU's

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[7] Permanent Court of International Justice. International Court of Justice Permanent Court of Arbitration. Compétence Des Tribunaux De Dantzig (Réclamations Pécuniaires Des Fonctionnaires Ferroviaries Dantzikois Passés an Service Polonais Contre l'Administration Polonaise Des Chemins De Fer) [Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, against the Polish Railways Administration)] (Leyde: Société d'éditions A.W. Sijthoff, 1928).

unquestionable achievement. The Court's first rationalization of the direct effect principle was fixed in the decision in *van Gend & Loos v. Netherlands*:

> Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to center upon them rights which come [*sic*] part of their national heritage.[8]

The case concerned a direct effect of the Founding Treaty provision, but did not have any effect on the application of secondary law. The subsequent CJEU practice in the 1970s resulted in a broad interpretation of this principle to promote EU law efficiency and extended it to the acts of the institutions which had initially not been allocated the direct effect status provided they met a number of requirements. Such requirements provide that: the norm granting the rights shall be obvious and unambiguous (i.e. having a precise nature and clear assignment), it shall be unconditional and its application shall not depend on the adoption of any other EU or member states' norms. But the Court added that it was necessary to treat the precise nature criterion with due care as the need to explain the norm by judicial interpretation cannot prevent its direct effect.

Therefore, the direct effect principle can be extended not only to the regulations and certain provisions of the Founding Treaties but, in part, to other EU acts as well. As regards the direct effect of directives, the CJEU specified that a directive can have a direct effect only if the state did not fulfill the obligation to implement it and only after the end of the period established for the implementation of the directive into the national legal orders. If a member state neglects the directive implementation obligation within the established period, then, according to the CJEU, it is possible to refer to a provision of such directive before a domestic court, despite the rules of the national law.[9] This is another indication of the uniqueness of the EU legal order since individuals cannot be deprived of their rights protection mechanisms only because the member state did not fulfill its obligation on directive implementation. This is the confirmation of the fact that the EU is not a mere association of states, but a union of European peoples. It is possible to state with complete confidence that the EU legal mechanisms are orientated on individuals and that is not inherent to international law and its legal order.

It should be noted that, even with a considerable amount of CJEU judgments concerning the direct effect of directives, this issue has caused a set of doctrinal discussions, especially regarding the horizontal effect of directives (meaning that individuals cannot refer to the provisions of the directive in their relations with other individuals, but only concerning their relations with the state, i.e., the direct effect is used only in vertical relations because of the directives being oriented towards the

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8 *Van Gend & Loos v. Netherlands*, *supra* note 1.

9 Case 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt*, [1982] E.C.R. 53.

states and not towards individuals). There is no doubt that the extension of the direct effect principle to the directives is probably an exception as otherwise the obligation of the states to carry out the measures to implement the directives would be nullified.

The principle of the direct effect of EU law norms also means that, except when granting rights directly to individuals, the EU's bodies' acts do not need the member states' parliaments' approval. These acts can oblige member states to carry out certain actions and domestic courts to apply these acts irrespective of any contradictions with the national laws. The value of the direct effect principle is that EU law can act even when the state has not fulfilled its obligation on EU law implementation, as was confirmed in *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*[10] (hereinafter – *Francovich*). This principle establishes the most profitable interaction between the member states' national and supranational European law which helps to achieve the EU goals.

The principles of EU law supremacy and its direct effect may be viewed as the two fundamental pillars of the entire EU legal system. By allotting the supremacy and direct effect to EU law, the CJEU in fact began the process of integrational law constitutionalization. At the same time, it is important to emphasize that EU law constitutionalization enabled the use of its norms – primary or secondary – directly in the member states' national legal orders, as well as by individuals. Unprecedentedly for the international community, EU law constitutionalization resulted in the domestic courts' effective EU law application (sometimes even in the absence of the relevant national norms), and this, in turn, changed the national court practice which started adapting itself to EU law basic principles. Moreover, individuals began playing an active role in this law implementation within the framework of the national legal systems, which is extremely unusual for regular international organizations.

Another important aspect of EU law constitutionalization is the doctrine of responsibility for violations of EU law reflected in the *Francovich* decision.[11] This doctrine is based on the *ubi jus ibi remedium* principle according to which the state shall pay the damages caused to individuals because of an EU law violation. In such cases, domestic courts can rule that the state must pay compensation for harm done to individuals as a result of a violation of EU law. This doctrine is an important element of the efficiency of the EU legal order since not all of its norms have a direct effect, so individuals in domestic courts cannot use all of them for the protection of their rights. For example, directives have no direct horizontal effect, therefore, the doctrine of responsibility for EU law violation (including the directives provisions) is extremely important for providing individuals with effective protection mechanisms.

In the context of constitutionalization of EU law, in a number of its decisions, the CJEU formulated three conditions required for responsibility for a violation of EU

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[10] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, [1991] E.C.R. I-05357.

[11] *Id.*

law: 1) EU acts shall grant rights to individuals; 2) the violation of these rights by the state shall be rather serious; 3) there shall be a direct link between the losses and violation.[12] At the same time, what is extremely important is that the responsibility falls on the state in case of any EU norm violations, irrespective of whether it is a direct action norm or not.

The Court adopted a unitary approach concerning the state-violator, i.e., the responsibility is placed on the state irrespective of the branch of power that committed the violations. The Court's interpretation of executive power is broad since it includes both the traditional departments of central power and municipal authorities, and constitutionally independent bodies to which the obligation to keep public order and safety is assigned, etc.[13]

As regards the second condition (the seriousness of a violation by a member state), serious violations include failure to apply an EU act, a delay in its implementation, and interpretation of national law contrary to EU law or CJEU case law. The degree of seriousness issue has been ascribed to the domestic courts' discretion, though some researchers indicate the need for the CJEU's centralized control over national courts in this sphere. The CJEU has not offered any consolidated provisions in this respect, but many such provisions are contained in CJEU practice. For example, if the state attempted to implement the act within the terms indicated in it, then this case does not meet the seriousness requirement, and the state will not be liable for the damages inflicted on the individuals. It happened in *The Queen v. H.M. Treasury, ex parte British Telecommunications plc.*,[14] which concerned Directive 90/351 on the procedure for acquisition of the telecommunications sector organization. This Directive was implemented by Great Britain on time, but in the wrong manner. The CJEU came to the conclusion that, because the Directive's formulation was not sufficiently clear, its interpretation in the process of its implementation could not be regarded as a violation serious enough to justify the state's compensation of British Telecommunications.

The compensation shall generally correspond to the loss which was caused by the state's misconduct. In the absence of supranational norms concerning the amount of damage compensation by member states, it is necessary to develop precise criteria for the determination of those amounts. Such criteria shall be as favorable as those concerning similar claims based on national norms and shall correspond to the principles of equivalence and efficiency.

The CJEU noted that the states' responsibility doctrine and their obligations to compensate losses to individuals for their violations despite the fact that it is not mentioned in the Founding Treaties, constitute an integral part of them because it guarantees the exercise of individuals' rights. The Court thereby declared the functional integrity of the rights and the means of their protection.

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12 Case 103/88 *Fratelli Costanzo SpA v. Comune di Milano*, [1989] E.C.R. 1839.

13 Case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] E.C.R. 1651.

14 Case C-392/93 *The Queen v. H.M. Treasury, ex parte British Telecommunications plc.*, [1996] E.C.R. I-01631.

Thanks to the developed concepts of EU law supremacy and its direct effect, as well as the possibility of holding member states responsible in case of non-compliance with the integration law (through the CJEU's centralized procedure or the domestic courts' decentralized system), the process of the EU law constitutionalization becomes more effective. The CJEU thereby maintains the main idea of Europe, a strong union between the peoples which is, in many respects, provided for by authority of supranational law.

2. The Position of International Law in the Hierarchy of Sources of EU Law

Taking into account the development and uniqueness of EU law, there naturally arises the issue of its relationship with international law, which, at the current stage of the European Union's development, is extremely important.

The Court first expressed its opinion on the position of international law in EU law in its judgment in the *Haegeman v. Belgium* case,[15] stating that international agreements ratified by Community institutions are part of the Community law (now EU law). The CJEU is responsible for a unified interpretation of these agreements and the interpretation of EU law in light thereof in order to effectively implement the provisions of these international agreements.[16]

The Founding Treaties, in turn, establish that the EU and its institutions facilitate the strict observance of international law, including respect for the principles of the UN Charter (Arts. 3(5) and 21(1) of the Treaty on European Union (hereinafter – TEU)). The CJEU is obliged to comply with international law in its practice and in its control over other EU institutions but, formally, none of the Founding Treaties' provisions discloses the place that international law occupies in EU law hierarchy.

2.1. International Agreements to Which the EU is a Party

In the context of this research, there is an important problem regarding the place international agreements occupy in the hierarchy of sources of EU law. As regards the international agreements to which the European Union is a party, Art. 216(2) of the TFEU includes them in sources of EU law which are binding on EU institutions and member states. Taking into account the procedure for granting consent to such agreements, they are lower than the Founding Treaties but higher than secondary EU legislation. This is proven by the fact that, in the negotiation and conclusion of such international agreements, a member state, the European Parliament (hereinafter – Parliament), the European Council (hereinafter – Council) or the European Commission (hereinafter – Commission) may obtain the opinion

[15] Case 181/73 *R. & V. Haegeman v. Belgian State*, [1974] E.C.R. 00449.

[16] Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, [1982] E.C.R. 03641.

of the Court as to whether an agreement is compatible with the Founding Treaties (Art. 218(11) of the TFEU). Where the opinion of the Court is that it is not compatible, the agreement envisaged may not enter into force unless it is amended or the Founding Treaties are revised. Otherwise it will be considered that the Founding Treaties have primacy over international agreements entered into by the EU.

It is interesting that the practice of using TFEU Art. 218(11) confirms that EU institutions rarely choose the option of amending the Founding Treaties, and usually make changes to international agreements. This fact also indirectly indicates the appropriate hierarchy of these sources of law. In this way the respect to EU law basics, the so-called *acquis communautaire*, is confirmed. This seems logical since the Founding Treaties have a different, more constitutional character, than typical international agreements because the majority of the Founding Treaties' norms have a direct effect and concern the rights of individuals. Therefore, because of their characteristics, they cannot be changed frequently. These differences were highlighted by the Court itself in its *Opinion on an Agreement between the Community and the Countries Forming the European Free Trade Association*.[17] The Court pointed out that the agreement on the European Economic Area is a classic international agreement that does not involve the transfer of the member states' sovereign rights to intergovernmental bodies. In contrast, the Founding Treaties, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of the Community based on the rule of law.

There are only a few cases where the Founding Treaties were amended because of incompatibilities with international agreements. One example is the case of the EU's accession to the World Trade Organization and to the Convention for the Protection of Human Rights and Fundamental Freedoms (when the TFEU was amended by Protocol (No. 8) relating to Art. 6(2) of the TEU on the accession to the Convention for the Protection of Human Rights and Fundamental Freedoms).[18]

Indirectly, Art. 351 of the TFEU also indicates the primacy of the Founding Treaties over international agreements. It stipulates that, to the extent that such agreements are not compatible with the Founding Treaties, the member state or states concerned shall take all appropriate steps to eliminate the incompatibilities established. This provision allows the Court to effectively protect the EU's legal order from the undesirable effects of international law, thereby strengthening its autonomy. Because of this, there is no doubt that Art. 351 of the TFEU has constitutional significance.

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[17] Opinion 1/91 delivered pursuant to the second subparagraph of Article 228(1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] E.C.R. I-06079.

[18] Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228(6) of the EC Treaty, [1994] E.C.R. I-05267; Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] E.C.R. I-01759.

It should be noted that, in practice, Art. 351 of the TFEU has not often been used[19] but the CJEU's practice set certain trends. This practice shows that, in cases where this article applies, the Court is inclined to unquestioningly protect EU law. The doctrine even witnessed the emergence of the view that the CJEU began formulating a new approach to the assessment of agreements concluded by member states with third countries.[20]

If, previously, the Court could recognize an international agreement concluded by member states as incompatible with EU law, the new approach shows that it can do so even in the case of "hypothetical incompatibility." Examples of this can be found in the decisions in *Commission v. Republic of Austria*,[21] *Commission v. Kingdom of Sweden*,[22] *Commission v. Republic of Finland*.[23] The cases concerned a large number of bilateral investment agreements of Austria, Sweden and Finland, which had been concluded before their accession to the EU. There were no actual contradictions between these agreements and the Founding Treaties but, in the Commission's and the CJEU's opinion, under certain conditions, contradictions may occur in the future. Therefore, according to Arts. 64(2), 66 and 75(1) of the TFEU (which have similar wording to that of Arts. 57(2), 59 and 60(1) of the TEU), the Parliament and the Council may adopt measures on the movement of capital to or from third countries involving direct investment, including investments in real estate, concerning the establishment, provision of financial services or the admission of securities to capital markets. Bilateral investment agreements, in turn, included provisions on the freedom of payment transfers related to investments, without delay and in freely convertible currency. According to the CJEU, this constituted potential or hypothetical incompatibility with the Founding Treaties, despite the fact that the Parliament and the Council have never implemented its powers in that sphere.

The Court focused on whether the potential conflicts could be a sufficient ground for recognizing the agreements as incompatible with EU law and the Court concluded

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19 Cases C-812/79 *Attorney-General v. Burgoa*, [1980] E.C.R. 02787; C-84/98 *Commission v. Portugal*, [2000] E.C.R. I-05215; C-62/98 *Commission v. Portugal*, [2000] E.C.R. I-05171; C-307/99 *OFT Fruchthandelsgesellschaft*, [2001] E.C.R. I-03159; T-2/99 *T. Port v. Council*, [2001] E.C.R. II-02093; T-3/99 *Banatrading v. Council*, [2001] E.C.R. II-02123; C-203/03 *Commission v. Austria*, [2005] E.C.R. I-00935; C-216/01 *Budvar*, [2003] E.C.R. I-13617; Joined cases C-466, 467, 468, 469, 471, 472, 475 and 476/98 *Commission v. UK, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria and Germany (Open skies)*, [2002] E.C.R. I-09519.

20 *See* Nikolaos Lavranos, *Protecting European Law from International Law*, 15(2) European Foreign Affairs Review 265 (2010); Исполинов А.С., Ануфриева А.А. Право ЕС и международное право: последствия нового подхода Суда ЕС к договорам, заключенным государствами-членами с третьими странами, 3(34) Евразийский юридический журнал 66 (2011) [Alexey S. Ispolinov, Alexandra A. Anufrieva, *The EU Law and International Law: Consequences of the EU Court's New Approach to Agreements, Concluded by Member States with the Third States*, 3(34) Eurasian Law Journal 66 (2011)]; Allan Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, 34(5) Fordham International Law Journal 1304 (2011).

21 Case C-205/06 *Commission v. Republic of Austria*, [2009] E.C.R. I-01301.

22 Case C-249/06 *Commission v. Kingdom of Sweden*, [2009] E.C.R. I-01335.

23 Case C-118/07 *Commission v. Republic of Finland*, [2009] E.C.R. I-10889.

that, in order to ensure the effectiveness of the provisions of Arts. 64(2), 66 and 75(1) of the TFEU, the Council and Parliament should be able to immediately apply the measures that restrict the movement of capital, and investment agreements may prevent this. Therefore, Art. 351 of the TFEU can be used for the recognition of investment agreements as being in conflict with EU law. On the basis of the Court's judgments, three respondent states were found to have violated EU law.[24] Researchers point out that the CJEU received preventive powers to preserve the unity and uniform application of EU law. Other researchers have reacted negatively to the Court's position, because, in their opinion, it violates the principle of proportionality.[25]

In any case, Art. 351(2) of the TFEU establishes the obligation of member states to take appropriate measures to remove all incompatibilities with the Founding Treaties in such agreements. Member states shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. Any action can be recognized as appropriate provided it eliminates the existing contradictions, including the denunciation of international agreements by the member state.

The CJEU indicates that if the member states do not take appropriate steps, they lose the opportunity to refer to Art. 351(1) of the TFEU, which states that the Founding Treaties do not affect their rights and obligations under the agreements concluded before those states joined the EU.[26]

Special attention should be paid to the point that, as acts of a constitutional nature, the Founding Treaties can be only interpreted by the CJEU. This means that the existence of other judicial mechanisms established by international agreements adopted by the EU cannot influence this monopoly. Moreover, Art. 344 of the TFEU is intended to protect this monopoly:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

This Article was first applied in the *MOX Plant* case.[27] The main issues of the case concerned the following. Ireland had commenced proceedings against the United Kingdom in the Arbitral Tribunal provided for by the United Nations Convention on the Law of the Sea to settle a dispute relating to the MOX nuclear fuels reprocessing plant at Sellafield on the coast of the Irish Sea. The Court ruled that Ireland had

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[24] For more detail about the procedure of enforcement actions against member states, *see* Комарова Т.В. Припинення невиконання зобов'язання державами – членами ЄС, 91 Проблеми законності 173 (2007) [Tetyana V. Komarova, *Cessation of Failure to Fulfill Obligations by the EU Member States*, 91 Problems of Legality 173 (2007)].

[25] Lavranos 2010, at 280.

[26] *Commission v. Austria*, *supra* note 19.

[27] Case C-459/03 *Commission v. Ireland*, [2006] E.C.R. I-04635.

disregarded its exclusive jurisdiction. Ireland breached the treaty by failing to respect the exclusive jurisdiction of the Court to resolve disputes concerning the interpretation and application of the Community law provisions. Moreover, the Court held that Ireland had breached ex-Art. 10 of the Treaty by bringing proceedings in the Arbitral Tribunal without having first informed and consulted the competent Community institutions.

Another example is CJEU Opinion 1/09[28] on the establishment of the European Patent Court, in which the Court noted that an international agreement on the appropriate procedure for establishing such court would contradict EU law because the newly created court will have jurisdiction to interpret not only the agreement but also the provisions of EU law concerning European patents. In addition, the European Patent Court could take the power of preliminary references from the member states' national courts and tribunals to the CJEU in matters of patent law, and this directly affects the rights of individuals. The CJEU's preliminary ruling procedure is the achievement of the European Union and is a system of relations between the judicial systems of two levels, which ensures a uniform interpretation and proper application of EU law. Changing these relationships can affect the nature of EU law. But the Patent Court decision will not be subject to appeal procedures in the CJEU and this, in the Court's opinion, is also a threat to the rights of individuals. Therefore, the CJEU decided that the Agreement on the establishment of the European Patent Court is contrary to the Founding Treaties of the EU.

A classic and quite illustrative example of such situation is the long process of the accession of the EU to the ECHR. In its second Opinion 2/13 on EU accession to the ECHR, the CJEU[29] noted that the draft agreement on the accession contradicts Art. 344 of the TFEU, since the CJEU has exclusive jurisdiction over any dispute between member states and the EU concerning the compliance of the Convention. According to the draft agreement, there is a possibility that the EU or member states may complain to the ECHR concerning the alleged violations of the Convention by an EU member state or by the EU. This possibility is completely contrary to the provisions of the TFEU in the context of EU law. The project could insert the exclusion from the ECHR's jurisdiction of disputes between the member states or between the latter and the EU itself concerning the application of the ECHR in the context of EU law, but these provisions were not included in it.

In addition, the CJEU noted that Protocol 16 of the ECHR, signed on 2 October 2013 (but not yet in force), allows higher courts and tribunals of the member states

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[28] Opinion 1/09 delivered pursuant to Article 218(11) TFEU – Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties, [2011] E.C.R. I-01137.

[29] Opinion 2/13 pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, 18 December 2014 (Jun. 25, 2017), available at http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002&lang1=en&type=TXT&ancre=.

to ask the European Court of Human Rights (hereinafter – ECtHR) to provide advisory opinions on the fundamental issues relating to the interpretation or exercising the rights and freedoms guaranteed by the ECHR and its Protocols. This situation could affect the autonomy and efficiency of the CJEU's preliminary rulings procedure in cases when the rights protected by the EU Charter on Fundamental Rights correspond to the rights provided for by the ECHR.

Therefore, the signing of the Agreement did not take place because of its incompatibility with integrational law, including the dispute settlement procedures. It was this opinion that caused the indignation of many researchers.[30] Their position is very tough because of the fact that the CJEU ignored the strengthening of human rights and justified this with rather dubious concerns about the autonomy of EU law. They accused the Court of "selfish concern" with preserving its own power.[31] However, it should be noted that it was the uniform interpretation of EU law that allowed the EU to achieve its level of development.

The Court's practice also provides examples of international agreements already in force being recognized void when member states or other institutions challenged the acts of the institutions that provided consent to them. For example, by the decision on joint cases C-317/04, C-318/04[32] the CJEU annulled the Council decision on the Community's agreement on the processing and transfer of personal data between the Community and the United States because the Community does not have competence in that sphere. This violates the redistribution of competence between the Community and the member states established in the Founding Treaties. A similarly well-known case is the "banana decision" regarding the cancellation of the results of the Uruguay Round.[33]

Though cancellation by the EU of the implementation of international agreements may look like a violation of international obligations, the CJEU does respect international law and the *pacta sunt servanda* principle. In its decision on joint cases C-317/04 and C-318/04, the CJEU pointed out that, in light of the fact that international obligations have already arisen for the EU under the international agreement and the fact that the EU considers itself a *bona fide* subject of international law, it made the Council decision cease to apply within ninety days of its termination in order to avoid serious losses of contractors due to the termination of the agreement. The CJEU gave such term to parties to reach a new agreement. Or, if a member state is a party to a multilateral Convention which is contrary to EU law, the state must

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30 Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU Law Analysis, 18 December 2014 (Jun. 25, 2017), available at http://eulawanalysis.blogspot.ru/2014/12/the-cjeu-and-eus-accession-to-echr.html.

31 Christoph Krenn, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13*, 16(1) German Law Journal 147 (2015).

32 Joined cases C-317/04 and C-318/04 *Parliament v. Council and Parliament v. Commission*, [2006] E.C.R. I-04721.

33 Case C-122/95 *Germany v. Council*, [1998] E.C.R. I-00973.

denounce it in accordance with Art. 351 of the TFEU, but if the Convention provides for certain procedures of denunciation or withdrawal (e.g., every 10 years), the state must respect and adhere to these procedures.[34]

All the above cases are related to the collisions between international agreements and primary EU law. As for secondary law, the position of the CJEU is univocal – the primacy of international law.[35] The Court stressed that the principle of good faith is a principle of customary international law, the existence of which has been repeatedly declared by the UN International Court of Justice and which is codified in Art. 18 of the Vienna Convention on Law of Treaties[36] and that is why such principle is binding on the EU.

2.2. International Agreements to Which the EU is Not a Party

Special attention should be paid to the issues concerning the legal power of international agreements to which the EU is not a party. The CJEU demonstrates respect to international law in cases where all member states are parties to an international agreement but the EU itself is not. In *Intertanko et al. v. Secretary of State for Transport*[37] the Court took into account the fact that all member states, without exception, are parties to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), and this Convention is also mentioned in the EU Directive on pollution from ships. That is why the CJEU decided to use the Convention for the interpretation of EU law in its light. Two principles formed the legal basis of such use: a general principle of good faith and the principle of sincere cooperation, indicated in Art. 4(3) of the TEU:

> Pursuant to the principle of sincere cooperation, the European Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Therefore, the CJEU used the provisions of MARPOL 73/78 in its interpretation of the EU Directive. This should not be confused with giving direct effect to the rules of MARPOL 73/78 because the Court specifically only referred to "the opportunity to take it into consideration."

The CJEU has treated the possibility of using international agreements to which the EU is not a party with care and applies them only when all member states are parties to the agreement. Let us take, for example, at the decision in *Commune*

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[34] *Commission v. Austria*, *supra* note 19.

[35] Cases C-61/94 *Commission v. Germany*, [1996] E.C.R. I-03989; C-311/04 *Algemene Scheeps Agentuur Dordreht BV v. Inspecteur der Belastingdienst*, [2006] E.C.R. I-00609; C-344/04 *The Queen ex parte IATA and ELFAA v. Department of Transport*, [2006] E.C.R. I-00403.

[36] Case T-115/94 *Opel Austria v. Council*, [1997] E.C.R. II-00039, paras. 90, 91.

[37] Case C-308/06 *Intertanko et al. v. Secretary of State for Transport*, [2009] E.C.R. I-04057.

de Mesquer v. Total France SA and Total International Ltd.,[38] which concerned the interpretation of the Community Directive on Waste. In this case, an incident with a tanker resulted in an oil spill which caused the pollution of the coast of France. The question arose regarding the use of the International Convention on Civil Liability for Oil Pollution Damage, to which the majority of the EU member states, but not the European Union itself, are parties. The Court did not use the provisions of the Convention because the Convention is not binding on all member states and, therefore, logically its use would violate the principle of good faith. In addition, the Community Directive on Waste does not mention this international source, so it does not enter into the legal system of the EU.

Returning to the aforementioned possibility of giving direct effect to the norms of international agreements, the Court's practice in this regard is also interesting in the light of our research topic. However, such practice applies to agreements concluded directly by the EU. In EU law, this issue is of particular importance because individuals are its direct actors. The decisive case regarding this issue was *Meryem Demirel v. Stadt Schwäbisch Gmünd*,[39] where the Court ruled that the provisions of international agreements concluded by the Community can have a direct effect.

The process of drafting an agreement, its nature and purpose should be taken into account. The direct effect of such an agreement may be present if it includes clear and specific obligations which do not require additional approval decisions or additional measures to be taken for its implementation.[40] So the criteria for the direct effect of international agreement norms are similar to those that apply to EU law. The rules must be clear, precise and unconditional. Therefore, the Court ruled that the rules of the Convention on the Law of the Sea had not passed this test, and that, therefore, they cannot have a direct effect on the legal order of the EU.[41] Having analyzed the Convention provisions, the Court concluded that individuals can be granted some rights on its basis only after specific steps made by the member states. For example, individuals can take advantage of the freedom of navigation, but only if their ship is flying the flag of a state. It is the state that establishes the conditions for granting its nationality to ships, for their entry into its register of ships and for flying its flag. This intermediate link, based on the national legislation of individual states, excludes the existence of a direct effect of the Convention norms.

Under these criteria, it is clear that it is more difficult to speak about the direct effect of international customary law than that of international agreements, since the former is often less specific than agreements. That is why it is very difficult to imagine individuals' direct application of international customary law.

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38 Case C-188/07 *Commune de Mesquer v. Total France SA and Total International Ltd.*, [2008] E.C.R. I-04501.

39 Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] E.C.R. I-03719.

40 *Id.*

41 *Intertanko et al. v. Secretary of State for Transport*, *supra* note 37.

It is worth mentioning some situations where the Founding Treaties contain a reference to other international agreements to which the EU is not a party. Art. 52(3) of the Charter of Fundamental Rights of the EU (hereinafter – Charter) states:

> In so far as this Charter contains rights which correspond to the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Indeed, in the late 1960s, the Court of Justice underlined that the protection of fundamental human rights is a constant concern of the Communities. Since then, the Court has repeatedly referred to the ECHR, stressing that it is of particular importance in determining the general principles of EU human rights law.[42] Since the 1990s, when it can be confidently said that the Communities got engaged not in purely economic issues but started effectively dealing with human rights, the Court began using the practice of the ECtHR. The Founding Treaties show that the ECHR is the document that inspired the EU's concern for human rights. Art. 6(3) of the TEU states that fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the member states, shall constitute the general principles of the European Union's law.

This does not mean that direct effect is given to ECHR norms, because Art. 52(3) of the Charter establishes the possibility of the European Union providing more extensive protection of rights than the ECHR does. Incidentally, according to the research, the CJEU's interpretation of rights and freedoms sometimes differs from that of the ECtHR. The areas in which these divergences can be seen are: the Common European Asylum System based on the Dublin Regulation; EU practice in using the European arrest warrant, which is claimed as significantly divergent from the standard ECtHR practice on the application of Arts. 3 and 6 of the ECHR, and EU anti-monopoly practice, with its extremely high fines and the sometimes unjustified extensive powers of the European Commission to investigate violations and impose of fines.[43]

Art. 78(1) of the TFEU provides that a common policy on asylum must comply with the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol and other agreements in this area. Accordingly, the EU Qualification Directive (Directive 2011/95/EU), which creates a single system for asylum in member states, specifies and develops the provisions of the aforementioned international acts. In

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[42] Cases 29/69 *Erich Stauder v. City of Ulm – Sozialamt*, [1969] E.C.R. 00419; 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] E.C.R. 01125.

[43] Исполинов А.С. Практика ЕСПЧ в отношении Европейского Союза: некоторые уроки для ЕврАзЭС, 3 Журнал зарубежного законодательства и сравнительного правоведения 108, 112–114 (2012) [Alexey S. Ispolinov, *The ECtHR Practice Concerning the European Union: Some Lessons for EurAsEC*, 3 Journal of Foreign Legislation and Comparative Law 108, 112–114 (2012)].

several cases, when interpreting the Qualification Directive, the CJEU referred directly to the 1951 Geneva Convention interpreting EU Law on the basis thereof.[44]

It should be noted that the CJEU pointed out that the guidelines which should be used to determine fundamental rights as general principles of EU law can be found in international agreements on human rights, which have been signed by the member states.[45] Accordingly, the CJEU used the Universal Declaration of Human Rights of 1948, the European Social Charter of 1961,[46] the International Covenant on Economic, Social and Cultural Rights of 1966, the International Covenant on Civil and Political Rights of 1966, the Convention on the Rights of Child of 1989 and so on.[47] The Founding Treaties stress the strict compliance with the principles of the UN Charter several times (Arts. 3(5) and 21 of the TEU).

2.3. International Customary Law

The application of customary law, which is one of the most important parts of international law, has always had a lot of nuances. EU law is not an exception in this regard. Based on the case law of the CJEU, it is clear that, in the EU, member states' relations the norms of international customary law are displaced by the norms of the Founding Treaties, particularly in the areas of the EU's exclusive competence, which is precisely regulated at the EU level. Pieter Jan Kuijper gives a good example of the impossibility of using classical international legal remedies for the breach of international agreements, such as unilateral sanctions in the form of suspension of other agreement obligations or other countermeasures, since the EU has its own perfect mechanism. This is a judicial procedure of enforcement actions against member states based on Arts. 258–260 of the TFEU, which is comprehensive and effective.

Regarding the EU's relations with countries outside the EU, the CJEU often uses customary international law. For example, the Court uses customary rules for the interpretation of international agreements listed in Arts. 31–33 of the Vienna Convention on the Law of Treaties of 1969.[48] A classic example of use of customary international law by the CJEU is its judgment in *Anklagemyndigheden v. Poulsen and Diva Navigation Corporation*[49] concerning the prohibition on salmon fishing in the North Atlantic high

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[44] Joined cases C-175-179/08 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, [2010] E.C.R. I-01493; Case C-31/09 *Nawras Bolbol. v. Bevándorlási és Állampolgársági Hivatal*, [2010] E.C.R. I-05539.

[45] Case 4/73 *Nold v. Commission*, [1974] E.C.R. 00491.

[46] Cases C-540/03 *Parliament v. Council*, [2006] E.C.R. I-5769; C-438/05 *Viking*, [2007] E.C.R. I-10779.

[47] Concerning the binding force of international agreements on human rights to the EU, *see* Israel de Jesus Butler & Olivier De Schutter, *Binding the EU to International Human Rights Law*, 27 Yearbook of European Law 277, 293–298 (2009).

[48] Case C-386/08 *Brita v. Hauptzollamt Hamburg-Hafen*, [2010] ECR I-01289. *See also* Pieter Jan Kuijper, *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, 25(1) Legal Issues of European Integration 1 (1998).

[49] Case C-286/90 *Anklagemyndigheden v. Poulsen and Diva Navigation Corporation*, [1992] E.C.R. I-06019.

seas. The Court relied on the norm of custom contained in the Geneva Conventions on the High Seas of 1958 and the UN Convention on the Law of the Sea of 1982 on the nationality of the ship, its crew and about various marine zones.

When postponing the entry into force of the Agreement on Cooperation with Yugoslavia, which contradicted the terms provided in the Agreement, the CJEU referred to the customary rule that allows such actions in case of a substantial change of circumstances, namely, the civil war in the country.[50] This customary rule of international law was mentioned earlier in the Judgment of the International Court of Justice in *Gabčíkovo-Nagymaros*.[51]

Therefore, though the CJEU is not officially bound by the agreements to which EU is not a party, it is bound by customary international law and that is why such international agreements (of general codification) are an important proof of the existence such customary rules.

In CJEU practice, we cannot find the use of customary law norms that had not been codified or confirmed by the decisions of other courts. In this respect, scholars rightly point out that the Court has positioned itself as a "modern" entity that seeks evidence of existence of customs exclusively in declarations or conventions which have not yet come into force, as opposed to adopting a traditional approach based on the search of international custom in the durable state practice and the *opinio juris*.

3. The *Kadi* Case as a Symptom of the Contemporary Autonomy of EU Law

In the context of the problems under consideration, the correlation of the EU legal order with international law, especially with that of the United Nations (hereinafter – UN), seems to be of special importance. The CJEU raised this issue in *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*[52] (hereinafter – *Kadi*), a case which is quite different from the Court's regular practice. This is a high-profile case that demonstrate the CJEU's position on the hierarchy of, and the relationship between, EU law and international law.

The issue of the hierarchy of EU and UN law has not been sufficiently researched because the subjects of these two systems are quite different. Usually, individuals are outside the UN's scope of interests and actions because it focuses mainly on the classical subjects of international law, i.e., states, unlike the EU, which has proclaimed itself a union of European peoples functioning for the EU citizens. The UN has only started directing its law at individuals in recent years, and this is carried out indirectly through states. We are talking about anti-terrorist actions and the UN Security Council sanctions mechanism against individuals.

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[50] Case C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] E.C.R. I-03655.

[51] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I.C.J. Rep. 1997, p. 7.

[52] Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005] E.C.R. II-03649.

The *Kadi* decision was significant not only for understanding of the relationship between EU law and the UN law, but it also caused a huge amount of doctrinal debates. The judgment resulted a huge number of emotive debates comparable to very few preceding CJEU decisions. The main issues of this case are as follows: a citizen of Saudi Arabia, Yassin Abdullah Kadi, who had very significant business interests in the EU, brought a direct action to the Court of the First Instance (hereinafter – CFI) to annul Council Regulation EC 2580/2001,[53] which concerned persons suspected of supporting terrorism. The Annex to this Regulation contained a list of persons and organizations suspected of supporting terrorism and among them there was Yassin Abdullah Kadi. The aim of the Regulation was to freeze, in the EU, all funds of the persons listed in the Annex. The Regulation was adopted for the implementation of several UN Security Council resolutions concerning the fight against terrorism which were adopted on the basis of Part VII of the UN Charter.[54] The resolutions required all UN member states to take appropriate steps to freeze the accounts and assets of the individuals and organizations that, according to the opinion of the UN Committee on Sanctions, had links with Osama bin Laden, the Al-Qaida network and the Taliban. The list of such persons and organizations was prepared by the UN Committee on Sanctions in 2001 and was expanded several times. Later, the UN Security Council resolution allowed some softening on the freezing of funds of suspected persons and allowed such funds to be used for humanitarian purposes with the consent of the UN Committee on Sanctions. The EU, in turn, also changed the Council regulation in accordance with the UN resolution's additions and allowed the suspected persons to use the funds for food, for medical purposes and for the payment of taxes.

In his CFI action, the plaintiff, Yassin Abdullah Kadi, insisted that he was the victim of a serious breach of justice because he had never supported terrorist activities, and thus his name was unreasonably entered into the list. He referred to the fact that the council regulation violated his fundamental rights such as the right to property guaranteed by Art. 1 of Protocol 1 of the ECHR, the right to a fair trial under Art. 6 of the ECHR and the right to a fair hearing which is established by the practice of the CJEU.

The plaintiff explained his position that, first, he had not been notified about being listed as a person suspected of terrorism, and, therefore, he was unable to conduct his defense. Second, there were no grounds in the regulation for including the plaintiff in this list and this fact also affects the efficiency of judicial protection since the plaintiff could not effectively defend himself without clearly understanding the grounds of the accusation. The plaintiff relied on the practice of the CJEU which stated that fundamental

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[53] Regulation (EC) No. 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism, OJ L 344, 28 December 2001, p. 70.

[54] S.C. Res. 1390 (2002) of 16 January 2002 (Jun. 25, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1390(2002); S.C. Res. 1267 (1999) of 15 October 1999 (Jun. 25, 2017), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267%281999%29; S.C. Res. 1333 (2000) of 19 December 2000 (Jun. 25, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1333(2000).

rights recognized and guaranteed by the constitutions of the member states, especially those enshrined in the ECHR, form an integral part of the legal order of the EU.

In its judgment, the CFI noted that, under customary international law and Art. 103 of the UN Charter, the obligations of member states under the UN Charter must prevail over all other obligations or national law, or international law, or EU law.[55] The obligations under the UN Charter include the obligations imposed by the binding acts of the Security Council. The CFI said that the EU had complied with such obligations, even despite the fact that it is not directly bound by the UN Charter provisions, because the EU is not a party thereto. The CFI underlined that the EU is not only forbidden to violate the obligations under the UN Charter, but also has a duty to do its best to facilitate the implementation of these commitments by its member states. Therefore, the CFI completely denied the plaintiff's argument that the EU legal order is independent of the UN legal order and governed by its own rules of law, and it emphasized the duty of the EU to obey the UN Charter norms, which set standards for its member states. The CFI added that, under international law and EU law, it would be unfair to verify the binding acts of the Security Council on their compliance with the human rights standards recognized by the EU. Therefore, the review of the UN Security Council resolution, even indirectly, is unacceptable on the part of the EU judicial authorities.

It would seem that the CFI's decision is fully consistent with the unitary concept of international law and the classical idea about the EU. But the CFI added that, in spite of the above, it has the power to review Security Council resolutions for compliance with *jus cogens*. This change in the CFI's argument was unexpected. Indeed, the norms of *jus cogens* are binding on all subjects of international law, including the UN Security Council. As Peter Hilpold appropriately notes, norms of *jus cogens* in relation to UN activities have a dual purpose: they extend the powers of the Security Council, since they are related to the needs of guaranteeing peace and security, but they also serve as the limit beyond which the Security Council cannot go to avoid an *ultra vires* act.[56] This argument is contained in a separate opinion of *ad hoc* Judge of the UN International Court of Justice, Elihu Lauterpacht, in the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, who emphasized that the concept of *jus cogens* is higher than customary international law and treaties. Art. 103 of the UN Charter (which provides that, in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail) cannot be applied in case of contradiction of Security Council resolutions with the norms of *jus cogens*.[57]

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55 *Kadi*, *supra* note 52.

56 Peter Hilpold, *EU Law and UN Law in Conflict*: *The Kadi Case*, 13 Max Planck Yearbook of United Nations Law 141, 171 (2009).

57 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 8 April 1993, Provisional Measures, Separate Opinion of Judge Lauterpacht, I.C.J. Rep. 1993, p. 440, para. 100.

The question is whether the judicial authority of another international organization can verify the legitimacy of the decisions of the Security Council and precisely this question seems very controversial. The CFI has concluded that it is empowered with such competence. In addition, the CFI noted that the right to property is the norm of *jus cogens*. By definition, *jus cogens* are peremptory principles or norms from which no derogation or limitation are permitted. However, the right to property and the right to a fair trial mentioned by the plaintiff do not enjoy absolute protection. In themselves, they are not absolute. In the interests of the society, and especially of the international community, they may be limited, so it is impossible to qualify them as *jus cogens*. Some member states, France, the Netherlands and the United Kingdom among them, objected to such qualification in the CFI's decision. Moreover, it became a ground for scientific criticism.[58]

Having analyzed the resolution, the CFI concluded that, since the UN Security Council resolution provided humanitarian exceptions and the states could appeal the resolution to the Committee on Sanctions, the freezing of Kadi's funds did not constitute a violation of *jus cogens*. Similarly, the CFI found no violation of the right to a fair hearing and the right to a fair trial under *jus cogens*. Therefore, it can be concluded that the main provisions of the CFI's decision are as follows: 1) the CFI denied the dualist concept concerning the EU's position in the international legal order and categorically subjected the EU to the UN decisions; 2) despite such subordination, the CFI reserved for itself a possibility to review the Security Council's acts on their compliance with the peremptory norms of international law, not just the norms on the protection of human rights recognized by the EU; 3) the CFI defined the position of the EU as a subordinated to the UN, but with its own control mechanisms that will be implemented on behalf of the international community.

The CFI decision was appealed by the plaintiff to the European Court of Justice (predecessor of the CJEU; hereinafter – ECJ) and, as a result, it was canceled on the ground that the Council regulation significantly limited the fundamental rights of the plaintiff and the regulation was annulled. The Court noted that it annulled the relevant EU rules, but extends their action for the following three months to provide time for the Council to adopt a new act and appropriate legal mechanisms for its implementation.

The analysis of *Kadi* confirms that it is fully consistent with the concept which the Court formulated concerning the uniqueness and autonomy of the EU legal order. This concept established the EU as a supranational, integrative organization that is significantly different from classical intergovernmental organizations. Thus, the Court continued the development of the dualistic model of the relationship between international and EU law. The Court had been developing the constitutional characteristics of the Founding Treaties for too long to deny it in one decision. The Advocate General Poiares Maduro, appointed in this case, also emphasized the idea

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[58] Piet Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit*, 3(2) European Constitutional Law Review 183 (2007); Christian Tomuschat, *Case Note on Kadi v. Council*, 43(2) Common Market Law Review 537 (2005).

that provisions of international agreements cannot restrict the constitutional principles of the Founding Treaties. And actually, this decision stressed that the Founding Treaties' provisions shall have primacy over the norms of international law because of the EU's uniqueness. In addition, the Court stated that it did not cancel or review the norms of the Security Council resolution or of the UN Charter, but the internal EU regulation, which implemented the resolution, i.e., the Council regulation. The Court stressed that international agreements cannot affect the distribution of powers provided by the Founding Treaties, or the autonomy of the EU's legal system. Therefore, the obligations imposed by international agreements cannot be more important than the EU's constitutional principles. At the same time, the Court found that EU law must respect international law and all EU measures must be interpreted in the light of international law and particular attention should be paid to the application of UN resolutions based on Chapter VII of the UN Charter. But this does not affect the status of international law – it remains a parallel system that cannot change the power and primacy of the fundamental EU law principles. Therefore, the Court stated that, even if the rules established by the Security Council resolution could be classified as part of EU law, their position would be higher than secondary EU law, but lower than general principles of the Founding Treaties and EU law, which include fundamental rights.

The position of the Court in *Kadi* was criticized by scientists. Moreover, the Court was accused of doing injustice to international law[59] and even of the revival of the idea of nationalism.[60] Grainne de Burca, while analyzing the decision, concluded that, by adopting this very decision, the Court "proclaimed the primacy of its internal constitutional values over the norms of international law" and adopted "a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international domain."[61] He suggested that instead of seeking compromise and doctrinally building a hierarchy between the sources of international and EU law, the Court demonstrated to all subjects that international law can be conquered by the constitutional principles of EU law.

But other authors supported the Court's position which was based on the primacy of the principles of protection of human rights.[62] Some researchers have pointed out that the Court was forced to take this decision because the UN's human rights protection mechanisms are far from perfect.[63]

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59 Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 51(1) Harvard International Law Journal 1, 44 (2010).

60 Christian Tomuschat, *The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?*, 28(1) Yearbook of European Law 654, 658, 663 (2009).

61 De Burca 2010, at 49.

62 Juliane Kokott & Christoph Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, 23(4) European Journal of International Law 1015 (2012).

63 Martin Scheinin, *Is the ECJ Ruling in Kadi Incompatible with International Law?*, 28(1) Yearbook of European Law 637 (2009).

The situation with *Kadi* is very similar to the one which the European Community (hereinafter – EC) faced in the 1970s when the German Federal Constitutional Court questioned the supremacy of EC law because it did not establish the proper level of human rights protection which is required in legitimate and democratic constitutional systems. A comparison of the human rights system of the EC and Germany demonstrated the weakness of the former (like the weakness of the UN mechanisms compared to the EU mechanisms in *Kadi*). Then the German Federal Constitutional Court took the well-known decision in *Solange I*,[64] according to which Germany could review the Community acts on their compliance with national standards of human rights. Only in 1984, the decision in *Solange II*[65] concluded that the level of human rights protection in the Community had reached an adequate level, so the need for reviewing control no longer existed.

In 1998 the ECtHR declared the existence of a developed mechanism for human rights protection in the EU. This was in *Bosphorus Airways v. Ireland*,[66] the circumstances of which were as follows: Bosphorus Turkish Airlines rented an aircraft, which belonged to the Republic of Yugoslavia, and transferred it to Ireland. Irish authorities confiscated the plane on the basis of Regulation 990/93, which implemented sanctions against Yugoslavia. Bosphorus Airlines challenged the confiscation of the aircraft at the Court of Justice on the ground of a violation of the right to property, but the Court rejected the application. Then the airline addressed a complaint to the ECtHR that, in its decision, adopted the concept of "equivalent protection" – the presumption that the EU has high standards of human rights. Without having the competence to review EU acts, the ECtHR made a presumption that they met the ECHR standards. This presumption holds good until evidence of any control mechanism dysfunctions or shortcomings in the protection of human rights emerge. Incidentally, the ECtHR focused on the fact that all EU institutions observe the general principles of Community law, which also include the provisions of the ECHR.[67]

It is important to remember that, in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,[68] the ECtHR did not extend the equivalent protection doctrine to the UN legal order but, at the same time, recognized the lack of jurisdiction to review the acts of the Security Council on their compliance with the ECHR. The ECtHR, unlike the CJEU, did not engage in an open legal conflict with the UN.

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64 BVerfGE 37, 271 [1974] (*Solange I*).

65 BVerfGE 73, 339 [1986] (*Solange II*).

66 *Bosphorus Airways v. Ireland, no. 45036/98, 30 June 2005, ECHR 2005-VI*.

67 In this regard, I would like to recall the opinion of the Advocate General Walter *Van* Gerven in *S.P.U.C. v. Grogan*, where he said that despite the fact that precedential practice does not give direct effect to international agreements in the Community's legal order, some international agreements, together with constitutional traditions common to all Member States, help to define the general principles of Community law (Case C-159/90 *S.P.U.C. v. Grogan*, [1991] E.C.R. I-04685, AG Van Gerven's Opinion, para. 30).

68 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos. 71412/01 and 78166/01, 2 May 2007, [2007] 45 EHRR SE10.

The Security Council took into account the ECJ's position and adopted a new Resolution[69] which took into consideration the gaps in human rights standards the Court had pointed out. The Security Council found that the lists of persons and organizations suspected of terrorism should be openly published in every state and each person or organization on the lists should be informed personally about it. This indirectly supported the ECJ's position in *Kadi*. Moreover, the resolution bound the UN Committee on Sanctions to argue its suspicions on the involvement of individuals and organizations in terrorist activities. In 2010, within the UN Committee on Sanctions an independent institution of Ombudsperson was introduced.[70] The Ombudsperson is empowered to examine requests from individuals, groups, businesses or entities seeking to be removed from the Security Council's ISIL and Al-Qaida sanction list.[71] Since that time, the Ombudsperson has gained considerable political influence, despite the fact that his/her reports have no binding power. A considerable amount of the Ombudsperson's procedural rules were borrowed from the ECJ decision in *Kadi*. At present, 70 cases initiated by the Ombudsperson have been completed and 8 more delisting requests are being considered by the Ombudsperson.[72]

It should also be emphasized that there have been no political statements or positions on the part of the UN, which would prove the protest against the Court's position. Moreover, the individual sanctions regime has been constantly criticized for violations of the presumption of innocence and the right to a fair trial,[73] etc., because even the UN Committee on Sanctions' meetings were closed. It could be concluded that the ECJ decision contributed to the improvement of the UN mechanisms. Therefore, the commitment of the ECJ to human rights issues has made an impact on international law and UN decision-making activities.

In this regard, Grainne de Burca rightly pointed out that the challenges encountered in *Kadi* are indicators of the growing complexity of the international legal environment.[74,75] Indeed, it is quite difficult to talk about the prevalence of the

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69 S.C. Res. 1822 (2008) of 30 June 2008 (Jun. 25, 2017), available at http://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/404/90/PDF/N0840490.pdf?OpenElement.

70 S.C. Res. 1904 (2009) of 17 December 2009 and its Annex II (Jun. 25, 2017), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904%20%282009%29.

71 Concerning legal analysis of this institution, *see* Adele J. Kirschner, *Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?*, 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 585 (2010).

72 After the reforms, in 2008 the Committee on sanctions gave Yassin Abdullah Kadi the opportunity to present his comments on the accusation. After researching his comments, the Committee concluded that it has reason to include Yassin Abdullah Kadi in the list of suspected persons.

73 Enzo Cannizzaro, *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3(2) International Organizations Law Review 189 (2006); Jessica Almquist, *A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions*, 57(2) International and Comparative Law Quarterly 303 (2008).

74 De Burca 2010, at 8.

75 The UN also drew the attention on this. In this regard, in 2002 the International Law Commission established the Study Group on researching the fragmentation of international law and, in 2006, as

constitutional approach concerning international law, which coincides with the monistic approach.[76] With the emergence of powerful integrative players in the international arena, the EU being one of the most successful ones, we cannot talk about the homogeneity of international law and the existence of a uniform world system with unified standards of legal relations. On the contrary, there is a regional constitutionalization, for example, within the EU, with its own principles of primacy in its unique legal system – *sui generis*.[77]

The CJEU upheld the pluralistic concept of international legal order, distinguishing the EU and the international law systems with their own hierarchies of norms. The Court offered a world regime model with horizontal, non-hierarchical, separate orders. The EU competence does not extend to review the rules of the parallel order, but may concern its own legal acts that implement those rules. By its decision in *Kadi*, the Court continued its systemic work to establish the concept of the autonomous EU legal order. The Court has shown itself as guarantor of the EU constitutional system and it could not help provoking a strong reaction on the part of international law researchers who accused the Court of a selective attitude to international norms and of giving preference to EU values.

The said EU constitutional values are the cornerstone of the EU constitutional system which actually originate in international law and can never be deviated from. In this regard, I would like to note that the concept of "general principles of EU law," which, since the Lisbon Treaty came into force, have been called "common values of EU law," is a concept which has entirely been developed by the CJEU. It includes a rather wide range of rules which are common to the constitutional traditions of all member states, international agreements on human rights and the ECHR. The Court has always put this category of rules on the top of the legal norms hierarchy. The CJEU claims that the aim of the EU is to protect the value of its own constitutional order including European standards of human rights, regardless of whether it results in an indirect refusal to follow the Security Council instructions. The essential thing here is that, in identifying the source of human rights, the Court does not rely on

a result of its work, it presented to the General Assembly the Report "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (Jun. 25, 2017), available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[76] *See* Erica de Wet, *The International Constitutional Order*, 55(1) International and Comparative Law Quarterly 51 (2006); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36(3) Columbia Journal of Transnational Law 529 (1998); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19(3) Leiden Journal of International Law 579 (2006); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Collected Courses of the Hague Academy of International Law 217 (1994); Armin von Bogdandy, *Constitutionalism in International Law: Comments on a Proposal from Germany*, 47(1) Harvard International Law Journal 223 (2006).

[77] *See* Комарова Т. Влияние Суда ЕС на конституционализацию права Европейского Союза, 3 Право Украины 64 (2013) [Tetyana Komarova, *The Influence of the CJEU on Constitutionalization of the European Union Law*, 3 Law of Ukraine 64 (2013)].

the internal rules of the EU, but on the International Bill of Rights, which is binding on all parties, including the UN Security Council.

Conclusion

The international legal order is in the process of constant evolution, but its current status indicates its fragmentation and lack of homogeneity. It is impossible to talk about the existence of a supreme legal order and secondary ones. Therefore, the EU legal order, which started its development as a purely highly specialized one, cannot, for example, currently be viewed as subordinated to the UN. This legal order has developed its own principles which, though they respect the basic principles of general international law, have their own specific character.

The CJEU continues its systemic work on strengthening the autonomy of the EU legal order. The Court's case law shows that the EU will not deviate from their constitutional principles such as the principles of EU law supremacy and respect for human rights. At the same time, we should pay tribute to the EU for its great respect towards general international law. The CJEU indicates the place of international law in the hierarchy of sources of EU law – in all cases it is lower than the Founding Treaties because, otherwise, the EU would be deprived of its indispensable autonomy.

The decisions in *Kadi* open a new era in relations between EU law and international law because these decisions repeat the dogma of respect for international law provided there are no violations of the general principles of EU law, including respect for human rights, which transforms the EU from a union of states into a union of peoples and citizens.

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