

Beyond Pluralism and Autonomy: Systemic Harmonisation as a Paradigm for the Interaction of EU Law and International Law

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1. Introduction

The EU's relationship with international law as interpreted by the Court of Justice of the EU (CJEU) has taken a sharp constitutional turn in *Opinion 2/13* which emphasised the autonomy of the EU legal order. *Opinion 2/13*¹ is, thus far, the

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¹ *Opinion 2/13* [2014] ECR I-(nyr), ECLI:EU:C:2014:2454.

culmination of a trend which stresses the autonomy of the EU legal order not just from its Member States, but also from other international legal orders, *in casu* the European Convention on Human Rights (ECHR).² The position taken by the CJEU has been compared to states' invoking sovereignty, and considered as even more demanding than that.³ The 'victims' are the ECHR, or more precisely the accession process of the EU to the Convention, and international law more generally. The target, however, was neither of them, but the very component parts of the EU, its own Member States, the distrust of which runs like a thread through *Opinion 2/13*. It reflects the power struggle between the EU and its Member State which is even heightened in the CJEU's case law in the context of external relations.

Whether the CJEU just responded to an actual or perceived threat to the integration process or overstepped its mark, only posterity will be able to put into perspective. Integration theorists of the future might view this approach as an advance or overstretching of the constitutional paradigm. Whether and where it feeds in the metaphor of constitutional or intergovernmental waves and backlashes of European integration will depend on the consequences and the still evolving bigger picture. Regardless of how much the European integration process is considered to be under threat today, there would be in any case good reasons to reconsider the aggressive formalistic constitutional paradigm which at present seems to simply copy (and perhaps take to new extremes) states' historical approaches to international law in an unimaginative way. An alternative paradigm built on the openness and interaction of legal orders would not necessarily mean less substantive constitutionalism or integration, but could pave a way to a more harmonious justification avoiding the 'collateral damage' to the ECHR and general international law.

Against the background of an analysis that the CJEU adopted an increasingly restrictive and closed approach to international law, which culminated in elevating autonomy to something akin to a constitutional principle, the paper seeks to explore

² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 5 ETS and ETS 155 (after Protocol 11).

³ Christian Tomuschat, 'The Relationship between EU Law and International Law in the Field of Human Rights' (2016) 35 Yearbook of European Law, in this issue, text at n 76. See also in detail Katja S Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Human Rights Law* (Edward Elgar 2016 forthcoming), following notes 117 ff, esp, notes 148 ff. (available as University of Leicester School of Law Research Paper No. 15-25 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665725text).

an alternative to the EU's approach to international law, which could be an old new paradigm for the interaction of EU law and international law. It will examine how and in how far the mechanisms of interpretation can be used as a tool to facilitate a more open and harmonious relationship between the EU and international legal order. Particular regard will be paid to the interpretive method of systemic integration – or 'systemic harmonisation', as the European Court of Human Rights has recently called it:⁴ the duty to take 'into account, together with the context of a norm', other rules of international law, as reflected in Art 31(3) (c) of the Vienna Convention on the Law of Treaties (VCLT).⁵

It argues that a procedural requirement to engage openly can avoid conflicts between legal orders, such as the EU and the international legal order. The principle of 'systemic integration' provides the legal basis for this interpretative method. Against the backdrop of a fundamentally open approach, not all divergence or conflict is negative; on the contrary, it can be the source of mutual influence, enrichment and cross-fertilisation, and re-affirmation of international law as a coherent legal system. It could be of benefit to help to develop the EU legal order and derive legitimacy for such developments from the openness and interaction. Systemic integration thus is the antipode of invoking 'autonomy' of a legal order.

2. The Relationship of EU Law with International Law

This section will give a brief overview of the EU's relationship with and the current trajectory of the CJEU's approach to international law by outlining three forms of interaction: direct effect, interpretation in conformity with international law and 'substantive borrowing'.⁶ Their specific application in a more open or more closed manner is reflected in three paradigms of the EU's relationship with international law: embeddedness, distinctiveness and autonomy of the EU legal order vis-à-vis

⁴ *Al-Dulimi and Montana Management Inc. v Switzerland* Appl no 5809/08 (GC) 21 June 2016, para 140.

⁵ Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.

⁶ See in more detail Katja S Ziegler, 'International Law and EU law: Between Asymmetric Constitutionalisation and Fragmentation' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 268, 292, 298 ff.

international law. A few fundamental features may be recalled before considering the forms and paradigms of interaction.

a) Fundamentals of the EU's Relationship with International Law

Firstly, the EU's approach to international law concerns predominantly the application and status of international law within the EU legal order, i.e. it takes an internal/constitutional perspective. This needs to be distinguished from the question of the binding nature of international obligations at international level. The EU is bound by international law and considers itself to be bound. This is not debated even though the precise scope of the obligations under international law may at times be called into question, in particular in regard to treaties to which the EU is not a party.⁷

Secondly, international law does not require a specific internal approach to international law in the domestic legal order⁸ as long as the international obligation is complied with. This principle may also apply to constitutionalised international organisations such as the EU. States would be free to shape the interaction of a treaty organisation with the same freedom they enjoy for their domestic legal order (as states have not actually done so explicitly, this may be under a fiction). Whether there is a stronger case for international organisations to be more open with regard to its interaction with international law in its internal legal order than a state is a separate question to be elaborated upon below.⁹

Thirdly, the EU is constitutionally open in principle towards international law, as reflected in Art 3(5) TEU.¹⁰ The treaty framework is, however, silent on a specific interaction. Article 3(5) TEU provides a starting point for the EU's relationship with the wider world and international law in that it is both programmatic and reflection of the self-understanding of the EU, as expressed by the Member States when drafting

⁷ On the of the EU's international obligations see *ibid*, 283 ff, esp. 288-90 on the issue of succession into Member States treaty obligations.

⁸ Cf however, Gerrit Betlem and André Nollkaemper, 'Giving Effect to Public International Law' (2003) 14 *European Journal of International Law* 569, 573 who argue that international law is not completely neutral as to how it is implemented at national level.

⁹ See below text at n 115.

¹⁰ Consolidated Version of the Treaty of the European Union [2010] OJ C83/01.

the provision inserted by the Lisbon Treaty.¹¹ The TEU thus reflects the EU to be open and embedded in the international legal order:

‘In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. *It shall contribute* to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, *as well as to the strict observance and the development of international law*, including respect for the principles of the United Nations Charter.’ (emphasis added).

Fourthly, such openness and embeddedness may also be considered to be reflected in the constant jurisprudence of the CJEU according to which international law is ‘integral part’ of EU law.¹² Being an integral part, however, does not necessarily tell us much about how open the EU legal order is from a technical and practical perspective. The CJEU has chiselled out some rules, but on the whole, they are handled flexibly. The internal effect of international law in the EU legal order is not governed by a principled approach but is largely dealt with in an ad-hoc manner. The point of departure of the CJEU in determining the interaction between international law and EU law is, however, a constitutional one. The EU’s conceptualisation of the relationship as constitutional is understandable and resembles the approach taken by domestic legal orders of states. In fact, on occasion the CEJU has shown itself to be more open towards international law than many legal orders of the member states. However, not infrequently there is a tensions between the declared constitutional openness as reflected in Art 3(5) TEU as a principle and the interaction of the EU legal order with international law in specific cases. The CJEU has been criticised for ‘using’ international law as a tool to promote its own ends – implementing it where it increases the power of the EU, in particular over the Member States, but approaching it reluctantly where it would operate as a check on

¹¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1.

¹² Case 181/73 *Haegeman v Belgium* [1974] ECR 449, para 5; 104/81 *Kupferberg v Hauptzollamt Mainz* [1982] ECR 3641, para 13; C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3633, para 55; C-308/06 *Intertanko et al. v Secretary of State for Transport* [2008] ECR I-4057, para 38; C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-13755 (GC), paras 73, 101 (‘ATAA’).

the EU's own powers. It is accused of fragmenting or even breaching international law. This means the adjudication over the relationship is inherently political.¹³

However, the political dimension of the interaction and hence its being prone to ad hoc approaches, cannot be a justification for arbitrariness. The law needs to provide a framework, and a more principled approach should be adopted by the CJEU. Such a principled approach is not one of blindly following the international legal order in terms of the substance of the rules, but an approach that is characterised by at least two bases: the presumption of complying with international law should inform the interpretation of domestic and international law; and an engagement with the international legal order and the ways and procedures in which its rules are made. These principles should pervade and supplement the interpretation of the forms of interaction.

b) Forms of Interaction

Three forms of interaction between the EU and international legal orders may be distinguished: direct effect, interpretation in conformity with international law and 'substantive borrowing'.¹⁴ The main difference between these forms is the degree of formality of the mechanisms or instruments of interaction. Courts are the gatekeepers of all forms of interaction, but the criteria vary in their degree of flexibility. Whereas direct effect is the most formal approach, and in a formal sense, the strongest form of interaction with another legal order, less formal interactions such as interpretation, or even more so, substantive borrowing, may not lead to weaker results, and even have the potential for greater substantive interaction and cross-fertilisation. Because they are less clearly defined, they have more potential but also carry more risks: they are less 'controllable' and foreseeable and more prone to selective application, and thus may raise issues about legal certainty.

In the following the forms of interaction will be briefly outlined in relation to their advantages and disadvantages for the interaction of EU law and international law. The paper will then return to emphasise the special significance of interpretation

¹³ André Nollkaemper, 'The Duality of Direct Effect in International Law' (2014) 25 *European Journal of International Law* 105.

¹⁴ See in more detail Ziegler, 'Asymmetric Constitutionalisation' (n 4), 292, 298 ff.

in shaping the interaction between the two legal orders in activating the ‘duty to engage’ in Art 31 (3) lit c) VCLT.

(1) Direct Effect

Direct effect is a concept of domestic constitutional law, and by extension, EU law,¹⁵ by which international norms are fully given effect in the national legal order. The content and meaning of the international norm is determined at international level, potentially by an international judicial organ, such as the CJEU or the ECtHR. It is most known in the relationship between EU law and the law of its Member States, but is, under different labels, a common way of national legal orders to regulate their interaction with the international one, as is the case with the doctrine of (automatic) transformation in the UK by which customary international law applies in the domestic legal order.¹⁶

Direct effect is the most far-reaching formal way of a legal order opening to public international law, reflecting a monist approach to international law in this aspect. International law applies in EU law, is part of the law applied by courts and the administrative branch. Direct effect intrinsically helps to avoid breaches of international obligations by the EU and conflicts between obligations for the Member States. When international law is applied in an EU context, it benefits from the status of directly effective EU law in the Member States’ legal orders where it may not be directly effective otherwise. This reduces the potential of Member States being subject to conflicting obligations under EU law and international law.

Direct effect thus is frequently seen as a ‘friendly’ and open engagement with public international law. It is an important indicator of a constitutional and institutional self-understanding of openness as part of the identity of a state (or the EU). It is considered to enhance legitimacy. Direct effect gives rise to relatively structured approach that is controllable, and not to the same extent malleable as

¹⁵ Although the dividing line between domestic and international law is eroding, see Betlem and Nollkaemper, ‘Giving Effect to Public International Law’ (n 8), 273.

¹⁶ See e.g. for the UK *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529; for the EU *Intertanko* (n 12). For an overview, also of other jurisdictions see Eileen Denza, ‘The Relationship between International and National Law’ in Malcolm D. Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 412, 418 ff, 426 ff.

techniques of interpretation. If widely applied, it means that there is no normative gap, in particular where individual rights are concerned.

However, direct effect alone is not a guarantee of openness. Key to the question in how far direct effect correlates with the openness of a legal order are the conditions which trigger it.¹⁷ Courts act as gatekeepers in determining when an international norm is directly applicable. Direct effect can ‘cut both ways’. It is characterised by a functional duality and can be used as a ‘sword and shield’,¹⁸ a ‘sword’ that ‘opens’ and a ‘shield’ that ‘closes’ the passage between international and EU law. The CJEU controls the door not just by having the final say about the interaction, but also in shaping the conditions of direct effect. A general opening to at least an entire source of international law, e.g. customary international law, means that the gate-keeping criteria are kept wide open; however, they may be closed more by attaching additional conditions, such as whether the norm in question confers individual rights.¹⁹ Although direct effect as a formal mechanism may reduce the complexity of the integration process of international law in domestic or EU law, it does not explain *why* judges adopt such countervailing practices when they occur.²⁰

Furthermore from a substantive perspective, even though in theory the content of the international norm is determined at international level, this must be qualified. Direct effect is not independent from interpretation of the international norm at national (EU) level.²¹ Once an international norm applies within the EU legal order, it is inevitable that its content is determined only in a further step, that of interpretation by the EU. In fact this reflects the reality of decentralised interpretation and enforcement of international law.²²

While direct effect undoubtedly helps to avoid breaches of international law, its ability and suitability to avoid conflicts between areas of international law in a

¹⁷ See for more detailed analysis Ziegler, ‘Asymmetric Constitutionalisation’ (n 4), 292, 298-303.

¹⁸ Nollkaemper, ‘Duality of Direct Effect’ (n 13), 109 and 111 ff.

¹⁹ As was the case in *Intertanko* (n 12). However, international law is also able, at least over time in a dialectic process, to influence the preconditions on which direct effect hinges (for example by creating individual rights that are clear and unconditional/self-executing).

²⁰ Nollkaemper, ‘Duality of Direct Effect’ (n 13), 112.

²¹ For the far-reaching way in which international norms have been interpreted in other legal orders see below, section 4.c)(1).

²² This also gave rise to the converse concern that such increased decentralised practice of national courts applying international law may threaten its uniform application: Karen Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 31 New York University Journal of International Law and Politics 501, 505.

general way²³ is doubtful. It does not automatically provide a self-sufficient *formal mechanism* to resolve conflicts of obligations or conflicts of norms within a legal order. Other principles and mechanisms are needed, such as that of consistent interpretation or rules of hierarchy.

Furthermore, direct effect does not automatically determine the place of the international norm in the normative hierarchy of a legal order. Whereas international law benefits in EU law from the supremacy of EU law in the legal orders of the Member States, the status within the EU legal order is a separate question. Nevertheless, the EU adopts a ‘friendly’ approach to the hierarchy issue in that international law ranks more highly than EU secondary legislation. International law ranks at Treaty level but not higher than fundamental constitutional values of the EU (*Kadi I*).²⁴

Conversely, direct effect may give rise to the concern that it might threaten potentially more advanced values and rights, such as fundamental rights or environmental protection in the EU legal order, whereas the international legal order is more rudimentary, e.g. in relation to the rule of law. In how far this concern is relevant will depend on hierarchies and interpretation in the domestic/EU legal order.

It may therefore, be concluded that, while direct effect is *prima facie* a more open way of engagement and interaction of EU law and international law and thus, a good basis to start from, but it is not a panacea for openness or to resolve all conflicts. It is not a sufficient mechanism to ensure openness of a legal order to PIL. The question of formal hierarchy is important and in particular, the way in which the international rules are interpreted in the national legal order. Conversely, it does not open the floodgates. There are several further control valves.

²³ I.e. beyond the specific dimension of international law applied in the Member States as part of EU law.

²⁴ Joined Cases C-402&415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union* [2008] ECR I-6351 (*Kadi I*).

(2) Interpretation in Conformity with International Law

Although the exact boundaries between the different forms of interaction are fluid,²⁵ interpretation in conformity with international law ‘as far as possible’ is a less strong form of interaction than direct effect when looked at in a formal perspective.²⁶ It gives the domestic/EU level considerable control over the ‘external’ norms as to their content and influence over the domestic norms. Interpretation in conformity is less clearly defined in terms of methods of interpretation, apart from some limits, which are, in principle, still defined by the domestic/constitutional legal order. The EU claims this power of interpretation for itself in its relationship with international law, even though it goes beyond this in its own relationship with its Member States’ legal order, where the limits of interpretation are determined by EU law.²⁷ Interpretation in conformity with international law ‘as far as possible’ is mainly subject to textual limits, in particular that interpretation should not be ‘*contra legem*’.²⁸

However, even if less strong, less defined and softer in a formal sense, these characteristics of interpretation cut both ways. The pros and cons of interpretation in conformity are thus flip sides of the same coin. Interpretation in conformity opens up flexibility in the substantive solutions, which may go beyond the formal interaction via direct effect, and thus provide opportunities to open – or close – the legal order, which allows for a casuistic (ad hoc) control of those who apply the law, in particular judges. Specifically in the context of EU law, the duty to interpret in conformity with international law extends beyond the international rules, which are binding on the Member States, but not formally binding on the EU.²⁹ The principle of sincere

²⁵ See for example C-364/10 *Hungary v Slovakia* [2012] ECR I-(nyr), para 44 where limitations on EU citizenship are fleshed out by reference to the status of heads of states under the customary international law – direct effect or interpretation?

²⁶ In more detail see Ziegler, ‘Asymmetric Constitutionalisation’ (n 4), 292, 304-308 and Katja S Ziegler, ‘The Relationship between EU Law and International Law’ in Dennis Patterson and Anna Södersten (eds), *A Companion to EU Law and International Law* (John Wiley & Sons 2016) 42, 49-51.

²⁷ Even though the fiction may be maintained that the Member States authorised this approach of the EU by consenting to the treaties.

²⁸ Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998] ECR I-3603, para 28; Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52 (“International Dairy Arrangement”).

²⁹ See, for example, *Kadi I* (24), para 296 f; Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communication and Others* [1996] ECR I-3953, para 13 ff; Pieter Jan Kuijper, ‘Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law’ in Jan Wouters, André Nollkaemper and Erika de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (Asser Press 2008) 87, 100; see also Jean d’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts: Domestic Courts as

cooperation (Art 4(3) TEU) requires the EU to avoid interpretations, which create conflicting obligations for the Member States.³⁰ Treaties in the area of human rights have enjoyed a relatively strong role within EU law, either by interpretation³¹ or even more so by linking them to general principles of law. General principles of law allow the Court to import standards to which the EU is not formally related.³² This has been most notably the case in regard to the ECHR.

Whether interpretation in conformity occurs in the first place is crucial for its potential to open a legal order to international law.³³ As it is more flexible, it is likely to be treated more selectively than reference to direct effect. Making full use of interpretation is a tool to avoid conflict. It may not just benefit a harmonious and more coherent relationship between EU and international law, but also, as a process of engagement, contribute to the development of international law. It may even be required by international law: the widespread state practice of interpreting national

Architects of the Consistency of the International Legal Order' in O K Fauchald and A Nollkaemper (eds), *The Practice of International and National Courts and the De-Fragmentation of International Law* (Hart 2012) 141, 156.

³⁰ For an example to the contrary, see however Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ECR I-4107 (GC), para 56, in respect of the Geneva Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956, 399 UNTS 5742.

³¹ See for the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, and the Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3: Case C-244/06 *Dynamic Medien v Avides Media* [2008] ECR I-505, paras 39-41; Case C-540/03 *Parliament v Council (Family Reunification Directive)* [2006] ECR I-5769, para 37; for the 1951 Refugee Convention, 28 July 1951, 189 UNTS 150: Joined Cases C-175, 176, 178 & 179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, para 52 ff; Case C-31/09 *Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010] ECR I-5539 (GC), para 38; for the European Convention on Nationality, 6 November 1997, ETS 166, the Convention on the Reduction of Statelessness (Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, 19 May 2006, ETS 200) and the Universal Declaration of Human Rights, 10 December 1948, UN GA Res 217A(III) see C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449 (GC), para 52 ff; for the International Covenant on Economic, Social and Cultural Rights, 16 December 1966 993 UNTS 3, see Case C-73/08 *Bressol and Others v Gouvernement de la Communauté française* [2010] ECR I-2735 (GC), paras 85 ff; see in detail Opinion of AG Sharpston, paras 135 ff; Marco Bronckers, 'The Relationship of the EC Courts with Other International Tribunals: Non-committal, Respectful or Submissive?' (2007) 44 Common Market Law Review 610, 602.

³² See, for example for the Chicago Convention (Convention on Civil Aviation, 7 December 1944, 15 UNTS 295: *ATAA* (n 12), paras 90 ff, esp. 104; further details in Ziegler, 'Asymmetric Constitutionalisation' (n 4), 305 ff.

³³ For an example where the CJEU did not even attempt interpretation in conformity, see C-481/13 *Mohammad Ferooz Qurbani* [2014] ECR-I (nir), paras 22-24; and previously, *Intertanko* (n 12), para 51; in contrast to Opinion of Advocate General Kokott in *Intertanko*, paras 80 ff, esp 93, 96, 101, 111; critically as 'excessively charitable towards the drafting of the Directive,' Eileen Denza, 'A Note on Intertanko' (2008) 33 European Law Review 870, 874; Piet Eeckhout, 'Case note on C-308/06, *The Queen on the application of Intertanko and Others v Secretary of State for Transport*, judgment of the Court of Justice (Grand Chamber) of 3 June 2008' (2009) 46 Common Market Law Review 2041, 2056.

law in conformity with international law, may be mounting evidence that today a rule of customary international law may be said to exist.³⁴

Like with direct effect, the actual scope for interpretation depends not only on the criteria allowing or limiting it but also on the hierarchical status of the international norm which is used to interpret EU law,³⁵ and the interpretation not just of the domestic but also of the international norm in this process. Conversely, where interpretation is too far-reaching, legal certainty might be affected.

(3) Substantive Borrowing

Substantive borrowing describes the use of international or foreign³⁶ law outside of a formal relationship within a legal order. Other legal orders may be referred to as inspiring an approach of a domestic law-interpreter, for example, where there are gaps, to enhance persuasive authority and legitimacy and to accelerate change in a legal order.³⁷ In the EU context it has been most widely used to feed substance into a formal source of EU law such as general principles of (EU) law.³⁸

³⁴ Betlem and Nollkaemper, 'Giving Effect to Public International Law' (n 8), 274.

³⁵ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission et al v Yassin Abdullah Kadi* [2013] ECR I-(nyr), ECLI:EU:C:2013:518 (*Kadi II*); see also already *Kadi I* (n 24), para 303, see also paras 282 ff, 304 ff. Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights' (2009) 9 Human Rights Law Review 288, 297. Case T-201/04 *Microsoft* [2007] ECR II-3601; Violeta Moreno-Lax, 'Of Autonomy, Autarky, Purposiveness and Fragmentation. The Relationship between EU Asylum Law and International Humanitarian Law' in David James Cantor and Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 295 319.

³⁶ See also Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örüçü and David Nelken (eds), *Comparative Law Handbook* (Hart Publishing 2007) 371, 380 for examples and critique; Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993). For an overview see John W Cairns, 'Watson, Walton, and the History of Legal Transplants' (2013) 41 Georgia Journal of International and Comparative Law 637.

³⁷ Cf generally regarding the comparative method Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001).

³⁸ It is well known that EU human rights norms were entirely developed in this way by the Court, see Andrew Williams, *EU Human Rights Policies. A Study in Irony* (Oxford University Press 2004), 145-157; Philip Alston (ed) *The EU and Human Rights* (Oxford University Press 1999); Bruno de Witte, 'International Law as a Tool for the European Union' (2009) 5 European Constitutional Law Review 265-283; Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2010) 3 Vienna Online Journal on International Constitutional Law 170-198.

By its nature substantive borrowing occurs largely in an unstructured and selective way, or via a broad formal anchor point, such as general principles of law, which may formally recognise external material sources of law within legal hierarchies.³⁹ It is facilitated by common anchor points such as shared values, as expressed in meta-rights (such as dignity) or umbrella rights (such as privacy), which provide gateways for cross-fertilization of legal orders.⁴⁰

Where used, substantive borrowing entails significant benefits in that it may open the EU legal order towards other legal orders, including the international legal order and thus foster coherence.⁴¹ The mechanism has proven to be useful to create and develop the law in both directions (international to EU, and national/EU to international law) and thus cross-fertilise legal orders. Article 38 of the Statute of the International Court of Justice gives national law (constitutional traditions of states) even the status of a formal source of international law. The law has travelled in both directions in the area of EU human rights where the ECHR (as an international treaty) was heavily relied on to provide substance to general principles of EU law, and national constitutional traditions of the Member States fed into EU human rights.⁴² EU human rights also informed the interpretation of ECHR rights.⁴³ In addition to enhancing coherence, openness and opportunity for cross-fertilisation which may accelerate change in the law,⁴⁴ other advantages of substantive borrowing are that it is a flexible form of the interaction and facilitates dialogue (judicial or otherwise) across jurisdictions and legal orders which results from considering material for other legal orders and from building it into legal reasoning.⁴⁵

³⁹ For analogies see Jonathan B Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 *Ecology Law Quarterly* 1295.

⁴⁰ Liora Lazarus and others, *The evolution of fundamental rights charters and case law: a comparison of the European and the United Nations systems* (European Parliament, Directorate General for Internal Policies, 2011), 22, 39, 124, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/432755/IPOL-AFCO_ET%282011%29432755_EN.pdf.

⁴¹ See in more detail Ziegler, 'Asymmetric Constitutionalisation' (n 4), 308 f.

⁴² Cf Robert Kolb, *Interprétation et création du droit international: Esquisses d'une herméneutique juridique moderne ou le droit international public* (Bruylant 2006); Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57.

⁴³ See, eg *DH v Czech Republic*, Appl no 57325/00, [2007] ECHR 922, for the migration of the notion of indirect discrimination from EU law to the ECHR.

⁴⁴ Cf Watson, *Society and Legal Change* (n 37).

⁴⁵ Francis G. Jacobs, 'Judicial Dialogue and the Cross-fertilization of Legal Systems: The European Court of Justice' (2003) 38 *Texas International Law Journal* 547; Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43

In contrast the very flexible, formally unstructured and selective nature of substantive borrowing also may raise questions of legal certainty, crossing the line of judicial law-making and democratic accountability of such law-making.⁴⁶ In a technical perspective legal transplants⁴⁷ if not adjusted to the specific legal order may be problematic.⁴⁸

Substantive borrowing as a mechanism of interaction must be considered to be subject to at least some of the formal limits as apply to interpretation, but their contours are hard defined in jurisprudence. Such limits are not likely to be practically relevant, because in cases of clash with domestic norms, substantive borrowing is less likely to be used in the first place. However, a clearer methodology and conceptualisation of substantive borrowing would be desirable to be able to reap its benefits which may lie in a possible impulse for change, while limiting the concerns mentioned above. As will be argued below⁴⁹ the guidance given by the Vienna Convention on the Law of Treaties for systemic integration may serve as a way towards rationalising substantive borrowing and judicial reasoning.

The three forms of interaction provide the more technical backdrop to the question how open the EU legal order is to international law. As has been shown, interpretation of the forms of interaction and their criteria is key to the degree of openness of the EU legal order. To the requirement of interpretation we shall return.⁵⁰ For now, we shall look at how the forms of interaction have given rise to three paradigms of interaction which have characterised the EU's relationship with international law.

Common Market Law Review 629; Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversation on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499.

⁴⁶ Likewise Moreno-Lax, 'Autonomy' (n 35), 322.

⁴⁷ See Watson, *Legal Transplants: An Approach to Comparative Law* (n 36).

⁴⁸ Kahn-Freund, 'On Uses and Misuses of Comparative Law' (n 36).

⁴⁹ See below, section 4.

⁵⁰ Below, section 4.

c) Paradigms of Interaction

The three forms of interaction: direct effect, interpretation in conformity with international law and ‘substantive borrowing’,⁵¹ do not in themselves determine the extent to which international law is embedded in EU law, or to which the EU legal order is open to international law. This does not depend as much on the forms of interaction used, but on the absence or presence and detailed operation of each of them. It is contingent on the formal criteria which trigger/allow for each form interaction (in particular, for direct effect, interpretation in conformity), the scope and limits of substantive interaction and the extent to which the interaction is used (especially, substantive borrowing). It also depends on the significance, substantively, of the norms at issues (in relation to all forms of interaction). The question of the openness of the EU legal order has been analysed extensively elsewhere⁵² and only will be summarised briefly here. The CJEU’s approach to international law seems to have become more restrictive in relation to all forms of interaction in recent years. While the EU is formally and in its foundations deeply embedded in international law, and while this has been expressed in the CJEU’s earlier case law, the Court has more recently turned to stressing the distinctiveness of the EU legal order from international law, with the climax, so far, in its turn to an enhanced version of the notion of autonomy in *Opinion 2/13*.⁵³ This thread runs through all forms of interaction, i.e. a more restrictive approach is visible in regard to direct effect (tightening the gate keeping criteria), to interpretation in conformity with international law and to ‘substantive borrowing’.

(1) Embeddedness: International Law as a Source of Legitimacy of EU Law

Looking at the foundations of the EU and its treaties, the EU is embedded in international law in numerous ways both in a formal and from a substantive perspective: it is formally an international organisation based on treaties with only derived legal personality (Article 47 TEU), and hence has law-making competences

⁵¹ See in more detail Ziegler, ‘Asymmetric Constitutionalisation’ (n 4), 292, 298 ff and Ziegler, ‘EU Law and International Law’, 45.

⁵² Ziegler, ‘Asymmetric Constitutionalisation’ (n 4); Ziegler, ‘EU Law and International Law’; and most recently Ziegler, ‘Autonomy’ (n 3).

⁵³ *Opinion 2/13* (n 1).

only on the basis of conferral by the treaties (Article 249 TFEU⁵⁴). The Member States retain their sovereignty as evidenced by the power to amend the treaties and to exit for the Union (Article 48, 50 TEU). As a subject of international law the EU is both norm-generator and norm-recipient. It can make international customary and treaty law (Article 216(1) TFEU, Article 37 TEU) and is party to treaties.⁵⁵ It is responsible under international law for breaches. EU law makes reference to concepts of international law (for example, nationality) and acts as a gap-filler.⁵⁶ And the reference in the Court's jurisprudence to international law being an 'integral part' of EU law contributed to a presumption that international law is directly applicable within the EU legal order.⁵⁷

The validity of EU secondary legislation may be reviewed on grounds of (directly applicable) international law, because once directly applicable in the EU legal order it ranks above EU secondary legislation in the hierarchy of norms.⁵⁸ International law thus is directly underpinning EU law and a procedural and

⁵⁴ Consolidated Version of the Treaty of the Functioning of the European Union, [2010] OJ C83/01.

⁵⁵ For the EU's treaty-making powers and practice see Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) 71 ff. For mixed agreements see Eleftheria Neframi, 'Mixed Agreements as a Source of European Union Law' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2011) 325; Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010); Mario Méndez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press 2013).

⁵⁶ Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, 505 f; Bruno de Witte, 'European Union Law: How Autonomous is its Legal Order' (2010) 65 *Zeitschrift für Öffentliches Recht* 141, 146; cf also Alain Pellet, 'Les fondements juridiques internationaux du droit communautaire' (1994) V-2 *Collected Courses of the Academy of European Law* 193, 203 f, who distinguishes different degrees of radicalism in regard to the relationship between international and EU law.

⁵⁷ Thus seems to be the prevailing opinion following the Court's judgments in *Haegeman* and *Kupferberg*, above (n); see also C-213/03 *Pêcheurs de L'Étang de Berre v EDF* [2004] ECR I-7357 C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union (Directive on Biotechnological Inventions)* [2001] ECR I-7079; C-213/03 *Syndicat Professionnel Coordination des Pêcheurs de L'Étang de Berre v EDF* [2004] ECR I-7357; C-344/04 *Air Transport Association and European Low Fares Airline Association v Department for Transport (IATA)* [2006] ECR I-403; Christian Tomuschat, 'Artikel 281 EGV: Rechtspersönlichkeit der Gemeinschaft' in Hans von der Groeben and Jürgen Schwarze (eds), *Kommentar zum EU-/EG-Vertrag* (6th edn, Nomos 2003), para 48; Christine Kaddous, 'Effects of International Agreements in the EU Legal Order' in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law Constitutional Fundamentals* (Hart Publishing 2008) 291, 293 and n 11, 311; Anne Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 *German YIL* 9, 21 ff, esp 34 f; recently: Méndez 63, 268.

⁵⁸ Case *Racke* (n 12), para 55; *ATAA* (n 12), para 50; Joint Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation* [2013] ECR I-(nyr), para 28; C-363/12 *Z v A Government department, The Board of management of a community school* [2014] ECR I-(nyr) (GC), paras 71, 84.

substantive source of legitimacy of the EU legal order. This is nowhere more obvious than in two contexts: when justifying the crucial principle of supremacy of EU law and when developing a body of EU human rights law. International law has conferred legitimacy to the EU's claim of being a 'new legal order of international law'⁵⁹ from which it derived the fundamental hierarchy of the EU legal order in relation to its Member States, by using it as a basis for the twin-concepts of supremacy and direct effect. International law was the basis to support an interpretation to make EU law, as a type of international law, effective.

Furthermore, the EU's approach to international human rights initially reflected much more the paradigm of embeddedness and of being an integral part of the EU legal order, rather than that of distinctiveness, resembling a monist construction of the relationship. After an initial reluctance to bind the EU law formally by human rights,⁶⁰ human rights became a necessity as a number of national constitutional courts famously challenged the EU on the basis of the absence of a fundamental rights protection against the EU. As a result, EU law opened substantively to international human rights (in particular the ECHR) and 'borrowed' almost completely all human rights in the EU from international law sources, developed via general principles of EU law. Even though the EU was not a party, the ECHR enjoyed 'special significance' in the EU legal order. Strasbourg case law had to be 'taken into consideration in interpreting that scope of that right in the Community legal order'.⁶¹

(2) Distinctiveness from General International Law: Reinforcing EU Constitutionalism

The CJEU's approach to international law has taken a more restrictive turn around 2008/9 in regard to both general international law and international human rights law.

⁵⁹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I; 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585; see de Witte, 'European Union Law: How Autonomous is its Legal Order' (n 56), 147 for an argument that the textual variation in *Costa* (dropping the reference to international law) did not reflect a change in approach of the CJEU regarding the embeddedness of the EU legal order in the international one.

⁶⁰ Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 AJIL 649, 653 ff.

⁶¹ C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 28.

In the context of the ECHR, this change has been reinforced⁶² with the entry into force of the Lisbon Treaty,⁶³ and with it, of the EU Charter of Fundamental Rights (EUCFR),⁶⁴ but the CJEU's lack of engagement with international human rights had been criticised even prior to the Charter era.⁶⁵ In its wake substantive borrowing from the ECHR and other international human rights all but stopped.⁶⁶ Only slightly earlier, three decisions of 2008 (*Kadi I*, *Intertanko* and *FIAMM and Fedon*)⁶⁷ started a more general restrictive trend.⁶⁸ This trend has since continued,⁶⁹ in particular with decisions in the context of the Kyoto Protocol,⁷⁰ the Aarhus Convention,⁷¹ investment treaties⁷² and the UN Disability Convention.⁷³ This case law saw the Court emphasise

⁶² See e.g. Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168, 173 f, 175; Sonia Morano-Foadi and Stelios Andreadakis, *A Report on the Protection of Fundamental Rights in Europe: A Reflection on the Relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon* (Council of Europe 2014), available at <https://dm.coe.int/CED20140017597>; Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders' (2015) 22 Maastricht Journal of European and Comparative Law 812.

⁶³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1.

⁶⁴ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

⁶⁵ Israel de Jesús Butler and Oliver de Schutter, 'Binding the EU to International Human Rights Law' (2008) Yearbook of European Law 277, 279 ff; de Búrca, 'After the EU Charter' (n 63), 173 f, 175; de Búrca, 'The Road Not Taken', (n 60), 680.

⁶⁶ de Búrca, 'After the EU Charter' (n 63), 171, f, 173-176.

⁶⁷ *Kadi I* (n 24); *Intertanko* (n 12), para 38; Joined cases C-120/06 P and C-121/06 P *FIAMM and Fedon v Council and Commission* [2008] ECR I-6513.

⁶⁸ See in more detail Ziegler, 'Asymmetric Constitutionalisation' (n 4); Ziegler, 'EU Law and International Law'.

⁶⁹ Ziegler, 'EU Law and International Law'. Ziegler, 'Autonomy' (n 3), text following note ???.

⁷⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 148; see in this regard: *ATAA* (n 12), para 75 ff. See also Rafael Leal-Acras and Stephen Minas, 'Mapping out the International and European Governance of Renewable Energy', in this issue.

⁷¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter, 25 June 1998, 2161 UNTS 447; see in this regard Joined cases C-404/12 P and C-405/12 P *Council of the European Union and European Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* [2015] ECR I-(nyr), para 45; Joined cases C-401/12 P to C-403/12 P *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* [2015] ECR I-(nyr), para 53.

⁷² Case C-205/06 *Commission v Austria* [2009] ECR I-1301 (GC), para 36 ff; see also Case C-249/06 *Commission v Sweden* [2009] ECR I-1335 (GC); Case C-118/07 *Commission v Finland* [2009] ECR I-10889. Critically Nikolaos Lavranos, 'Protecting European Law from International Law', (2010) 15 *European Foreign Affairs Review* 265, 279 ff.

⁷³ Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3; see in this regard C-356/12 Wolfgang Glatzel [2014] ECR I-(nyr) 70 f; Z, paras 87 f, 90. Cf HK Danmark (n 22), para 55.

its role as a gatekeeper in regard to international norms. In particular it weakened the presumption of direct effect of international treaties in the EU legal order.⁷⁴

Whereas the greater focus on the EU's own bill of rights might still seem logical, even if not inevitable consequence of the EUCFR,⁷⁵ it is not as easily explicable why nearly at the same time a more general restrictive trend towards international law is discernible. What links the two scenarios seems to be a stronger assertion of the distinctive constitutional identity as part of a further enhanced constitutionalism of the EU legal order in contrast with general international law. It is no coincidence that the most striking case till date in which the CJEU has raised a dualist paradigm comparable to those followed by states against general international law, the *Kadi I* case,⁷⁶ also concerned the protection of fundamental rights in the EU. Its scenario might be described as a clash of core constitutional principles of the EU with international law (as was highlighted more explicitly in the later *Kadi II* judgment).⁷⁷

(3) Autonomy: More Antagonistic than Sovereignty of States

The trend of a more restrictive and closed constitutional approach to international law has culminated so far in *Opinion 2/13*.⁷⁸ The CJEU elevated autonomy to something resembling an overarching constitutional principle of EU law, going far beyond protecting a fundamental constitutional core of the EU, in order to hold that the draft

⁷⁴ Ziegler, 'Asymmetric Constitutionalisation' (n 4), 298-304; Ziegler, 'EU Law and International Law', 46-48.

⁷⁵ Ziegler, 'Autonomy' (n 3), text after n 94 and 99.

⁷⁶ *Kadi I* (n 24).

⁷⁷ *Kadi II* (n 35), para 66.

⁷⁸ *Opinion 2/13* (n 1); for some of the widespread criticism of the Opinion see Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue - Autonomy or Autarky?' (2015) 38 Fordham International Law Journal 955; Adam Lazowski and Ramses A Wessel, 'When Caveats Turn Into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 German Law Journal 179 Tobias Lock, 'The Future of EU Accession to the ECHR after Opinion 2/13: Is it Still Possible and Is it Still Desirable?' University of Edinburgh, School of Law, Europa Working Paper No 2015/02 ; Sionaidh Douglas-Scott, 'Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECHR' [2016] Euparättslig Tidskrift (Special edition, Festschrift for Ulf Bernitz (eds J Paju, A Ward, P Watson); Ziegler, 'Autonomy' (n 3); for more benign commentary see Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and A Way Forward' (2015) 16 German Law Journal 105; Christopher Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13' ibid 147.

accession agreement to the ECHR was incompatible with EU law.⁷⁹ In *Opinion 2/13* the CJEU seemed to have abandoned what might have been considered a still defensible (dualist) rationale of restricting the openness of EU law towards international law: to uphold important values of the EU legal order, in particular fundamental rights (as in *Kadi I*) or environmental protection (as in *Intertanko* or *ATAA*).⁸⁰ *Opinion 2/13* seems to be motivated by more parochial concerns, as it demonstrates the extent of the CJEU's reluctance to subject EU law and itself to the jurisdiction of the European Court of Human Rights – a trend echoed in regard to other tribunals,⁸¹ as well as to lose its interpretive monopoly over EU law. This reflects a what Jennings has aptly described as a 'tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented.'⁸²

Accession in the eyes of the CJEU would require a sort of general or automatic reservation to the guarantees of ECHR rights, which would preserve the 'autonomy' of the EU. Autonomy 'requires that the interpretation of [ECHR rights] be ensured within the framework of the structure and objectives of the EU.'⁸³ By asserting 'autonomy' the CJEU thus claims more control over the ECHR and international law than any sovereign Member State would have.⁸⁴ At the same time it seems to contradict the very object and purpose of the ECHR as a system of human rights protection which acts as an external check.⁸⁵ In addition it misses two important points both of constitutionalism and of human rights protection. An external human rights control mechanism would be both required by the advanced constitutionalism

⁷⁹ For a detailed analysis of meaning of autonomy see Ziegler, 'Autonomy' (n 3), text after n 121 ff.

⁸⁰ Ibid, text at n 145.

⁸¹ The Commission (in *amicus curiae* submissions) has argued recently in relation to a number of ICSID cases concerning intra-EU BITS, that ICSID should decline jurisdiction over issue which inevitably would involve EU law: *AES Summit Generation Limited and another v Republic of Hungary*, Award, 23 September 2010, ICSID Case no ARB/07/22, para 8.2; *Electrabel S.A (Belgium) v Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case no ARB/07/19, para 5.20; *Ioan Micula and others v Romania*, Award, 11 December 2013, ICSID Case no ARB/05/20, paras 316-317. See also Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015), chapter 4.

⁸² Robert Y Jennings, 'The Judiciary, International and National, and the Development of International Law' (1995) 45 *International and Comparative Law Quarterly* 1, 5 f.

⁸³ *Opinion 2/13* (n 1), para 170.

⁸⁴ In this sense indeed Jan Willem van Rossem, 'The Autonomy of EU Law: More is Less?' in Ramses Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence* (TMC Asser Press 2013) 13, 25 f.

⁸⁵ See in more detail Eeckhout, 'Autonomy' (n 78); Douglas-Scott, 'Autonomy' (n 78); Ziegler, 'Autonomy' (n 3), text following n 156 ff, 168 ff.

of the EU and would attest to the advanced nature of the EU as a constitutional order. Furthermore, human rights protection needs to be at an appropriate level. The fact that this is not yet the case in all areas of EU law makes the CJEU's opposition to external control appear unjustifiably complacent.⁸⁶

3. Positive and Negative Fragmentation: Balancing Advancing International Law and Loss of Coherence

It might be asked why a trend of relative closure of the EU towards international law along a statist and constitutional paradigm would be of concern at all. After all this is what states have done, and as the brief discussion of the trend showed, there may even be benefits from fragmentation:⁸⁷ for example a better protection of human rights or the environment at the level of individual regulatory regimes and at the level of the legal order: benefits from constitutionalism of partial legal orders. So why, and to what extent should we worry at all about closure and fragmentation? To this it may be responded that it would be of concern in a number of ways because it would heighten the potential for conflicts between different parts of international law and 'fragment' international law, and deprive it of evolutive potential.

First, closure and fragmentation lead to a loss of coherence and thus legitimacy which undermines the existence of international law as a common framework and 'common language' underpinning and connecting different legal orders. The predictability and foreseeability of states' behaviour is one of the reasons why states comply with international law.

Second, international law can fill gaps both in national legal orders and, more so, specialised regimes, which are evolving and may not be 'complete' legal orders. Accountability mechanisms at international level which may be both formal (ECtHR) and informal (normative tie-in or plausibility check through interaction) may, to an extent, compensate for national mechanisms where they are reduced due to international integration.

⁸⁶ See however Eileen Denza, 'Forging Links between Legal Orders' (2016) 35 Yearbook of European Law, in this issue, who points to the complexities of the integration of legal orders and the responsibility of the Member States to ensure accountability of the CFSP.

⁸⁷ See e.g. Bruno Simma, 'Fragmentation in a Positive Light' (2004) 25 Michigan International Law Journal 845.

Third, values and procedural requirements contained in international law, such as the interpretation-guiding principle of systemic integration in Article 31(3) lit c) VCLT may avoid the relativism of some versions of pluralist theories.

From these concerns it emerges already that it is not so much the potential for individual conflicts between different parts of international law *per se* which is of concern, but the potential challenge to international law as an overarching and unifying system. This is particularly the case where such ‘fragmentation’ of international law occurs *unnecessarily*. While some loss of coherence is in the very nature of international law-making, where (at least customary) law-making frequently evolves from a pattern of law-breaking, it is the *unnecessary* loss of coherence which is of concern and which, generally is considered to be avoided.⁸⁸ For the international legal order conflicts, which may lead to breaches of international law, weaken the binding nature of general international law, and thus the fundamental consensus of international law being law. Customary international law is particularly vulnerable to breaches because of the thin dividing line between breach and new rule, characteristic of the nature of customary international law-making in the international community. Although a distinction may still be made between non-compliance with obligations that are contradicting fundamental values and those which are blunt breaches (i.e. *Kadi* on the one hand and *Medellin v Texas*⁸⁹ on the other hand), the boundaries are not clear-cut; one may be a pretext for the other, and thus turn into a challenge of the binding nature of international law. Hence where antagonism and conflict within international law is unnecessary, it amounts to a harmful challenge of the compulsory nature of international law. It is the inherent challenge to international law as a binding *system* of rules which makes it problematic,⁹⁰ but not primarily the individual conflict of norms in itself. Maintaining international law as a functioning legal order and common framework of state behaviour is of such a high value that fragmentation and lack of coherence should not be caused lightly and in situations where it can easily be avoided. However, even conflict may lead to the development of

⁸⁸ See for example Eeckhout, *EU External Relations Law* (n 55), 355.

⁸⁹ *Medellin v Texas* 552 US 491 (2008).

⁹⁰ This is consistent with systems theory approach to law which may consider law across the different layers as one system, see Lars Vellechner, ‘Das Recht der Weltgesellschaft: Systemtheoretische Beschreibung und Kritik’ in Marc Amstutz and Andreas Fischer-Lescano (eds), *Kritische Systemtheorie: Zur Evolution einer normativen Theorie* (Transcript 2013) 285, 294.

international law, and, therefore, also needs to be accepted. A balance needs to be struck between the positive and negative effects of fragmentation. Such a balance would take into account that where development of the law can occur without conflict, the international legal system should not unnecessarily be undermined but affirmed. The International Law Commission's point of departure for striking this balance, therefore, is that '[i]n international law, there is a strong presumption against normative conflict.'⁹¹ To this a few more comments may be added for the specific context of the EU:

First, the fact that the challenge is resulting from a sub-system of international law rather than a state makes a difference in two respects. On the one hand, as long as the EU is an international organisation having its basis in treaties, conflict can undermine the very foundation of the EU legal order. As a challenge to the international system, this goes further than the 'mere' breach of an international norm by a state. As the consequential weakening of the international legal order might ultimately turn against the EU itself, it should be considered to have a 'special responsibility' to preserve it. On the other hand the CJEU might find followers with other international legal orders aspiring to autonomy which would further fragment the international legal order unnecessarily and for potentially 'selfish' constitutional reasons.⁹²

Second, the 'autonomy approach' of the CJEU is copying an approach that is in the process of becoming out-dated at the level of states, as states are moving on to more flexible ways of interaction with international law.

It follows from this that the CJEU's approach to international law should not rely on notions of autonomy and purely internal versions of normative hierarchy when encountering international law which lead to negative fragmentation. Instead, the Court should, first, accept, not avoid, an international obligation appropriately, such as one resulting directly or indirectly from the Member States' international

⁹¹ Report of the Study Group of the International Law Commission on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/1-702 of 18 July 2006, para 37.

⁹² An example provides the Concurring Opinion of Judge Pinto de Albuquerque in *Al-Dulimi* (n 4), paras 50, 59, 71 where he refers to the Council of Europe as an 'autonomous legal order' (para 59) in order to justify an approach of the ECtHR to UN Security Council sanctions which is strongly reminiscent of the CJEU's *Kadi I* and *Kadi II* cases (n 24, 35) 'The two courts want to speak with one voice.' (para 50 at end), i.e. without any softening of the systemic challenge to international law.

obligations.⁹³ Second, it should interpret obligations making full use of the canons of interpretation, including consistent interpretation as methods to avoid normative conflict. One aspect of this interpretive approach is to construe possible conflicts narrowly, which eliminates some potential conflicts.⁹⁴ Third, if conflict cannot be avoided, for example for the protection of fundamental constitutional principles, the impact of such conflict on the system of international law should be mitigated. This can be achieved to an extent by a full engagement not just with domestic/EU law principles but also with international law principles and the limits of norms resulting from international law. Any fragmentation resulting from this may be considered to be positive fragmentation.

This approach of systemic harmonisation as an interpretation-guiding principle and its limits will be explored further in the next section.

4. Systemic Harmonisation – An Old New Paradigm?

As shown above the forms of interaction do not determine in themselves the paradigm of interaction of the EU legal order with international law as more open or more closed. Openness depends on the criteria determining the forms of interaction and on the interpretation of the substantive norms. These are shaped by the classic methods of interpretation (text, context, object and purpose). In addition, systemic harmonisation may be achieved through systemic integration as an interpretation-guiding principle which extends contextual interpretation beyond a specific regime or legal order. It is thus a method which can facilitate the interaction and openness of

⁹³ The hypothetically most fragmenting approach to international law is one which would deny the binding effect of (some of) international law on the EU. The CJEU does not currently reflect this approach (although the CFI (n 128) and ECJ in *Kadi I* (n 24) did consider that the EU was not bound by SC Resolutions as a matter of international law as it was not a member to the UN; and it did not find that it was bound via the MS – by succession; or a duty of sincere cooperation as a matter of EU law). A similar stance was taken regarding the Chicago Convention on Civil Aviation, see *ATAA* (n 12), para 69 ff. See in more detail Ziegler, ‘Asymmetric Constitutionalisation’ (n 4), 286-290 and Ziegler, ‘EU Law and International Law’, 47.

⁹⁴ See for an example where this approach was adopted C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* ECLI:EU:C:2014:39, paras 27 ff. See likewise Violeta Moreno-Lax, ‘Systematising Systemic Integration: "War Refugees", Regime Relations, and a Proposal for a Cumulative Approach to International Commitments’ (2014) 12 *Journal of International Criminal Justice* 907, 923 f.

legal orders by shaping each of the three forms of interaction discussed above⁹⁵ and the absorption of international law principles into domestic / EU legal orders.

a) The Principle of Systemic Integration

The drafters of Vienna Convention on the Law of Treaties (VCLT) acknowledged the proliferation and diversification of international treaties, and thus regulatory regimes, with an increased potential to fragment the international legal order. Because of this the VCLT includes an ‘antidote’ to fragmentation both of substance and method⁹⁶ with the principles guiding treaty interpretation. The Convention thus reveals an underlying conception of the international legal order as one system. Interpretation is envisaged as a method or tool to mitigate the effects of fragmentation,⁹⁷ but also for the evolutive interpretation of treaties.⁹⁸ Article 31(1) prescribes the traditional canon of interpretation methods, known from domestic law, i.e. interpretation to occur in ‘good faith’ according to ‘ordinary meaning’, ‘context’ and ‘object and purpose’. In addition to the traditional canon of methods, Article 31(3) lit c) VCLT goes further and requires explicitly interpretation to consider rules external to the regime or subsystem of international law which is interpreted (‘systemic integration’):

‘There shall be taken into account, together with the context: ...
(c) any relevant rules of international law applicable in the relations between the parties.’⁹⁹

⁹⁵ Section 2 b) above.

⁹⁶ See regarding the nexus Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014) 48, with further references.

⁹⁷ Oliver Dörr, ‘Article 31: General Rule of Interpretation’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) 521, para 91. See also George Pavlakos and Joost Pauwelyn, ‘Principled Monism and the Normative Conception of Coercion Under International Law’ in Malcolm D. Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders* (Hart Publishing 2011) 317, 341.

⁹⁸ Julian Arato, ‘Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law’ (2012) 37 Brooklyn Journal of International Law 349, 354, 364 ff.

⁹⁹ Article 31 lays down a number of interpretive principles. It reads in its entirety:

‘Article 31 - General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

The Report of the ILC Study Group refers to the principle of systemic integration as ‘a widely accepted principle of interpretation’ which ‘may be formulated in many ways,’¹⁰⁰ but which has been subject to ‘relatively little – in fact, until recently, astonishingly little – judicial or arbitral practice on normative conflicts.’¹⁰¹ The International Court of Justice (ICJ) referred to it as a principle of interpretation on occasions¹⁰² and, controversially, used the principle to overcome limits to its jurisdiction on the basis of a treaty by interpreting it in the light of the substantive customary law rules on the use of force in the 2003 *Oil Platforms* case.¹⁰³ While the ICJ all but woke it from its slumber, academic commentary has been more helpful in defining its scope and content.¹⁰⁴

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.’

¹⁰⁰ Report of the Study Group of the International Law Commission on ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, UN Doc. A/CN.4/1-702 of 18 July 2006, para 38.

¹⁰¹ Ibid, para 41.

¹⁰² *Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India)* ICJ Reports 1957, 125, 142; *Namibia Advisory Opinion*, ICJ Reports 1971, para 53. See already *Georges Pinson (France) v Mexico* (1928) 5 RIAA 327, para 50, subpara 4.

¹⁰³ *Case concerning Oil Platforms (Iran v USA)* ICJ Reports 2003, 161.

¹⁰⁴ See for example, Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, 290 ff; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008); Dörr, ‘Art 31 VCLT’ (n 97); László Blutman, ‘Treaty Interpretation by Relying Upon Other International Legal Norms’ (2013) 1 *Hungarian Yearbook of International Law* 181; Bjorge (n 96), 25; Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology?’ in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 697; Moreno-Lax, ‘Systematising Systemic Integration’, 919 ff; d’Aspremont, ‘Systemic Integration’; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013), 154 ff; specifically in regard to the use of the principle by the ECtHR see: L-A Sicilianos, ‘Le Conseil de sécurité, la responsabilité des États et la Cour européenne des droits de l’homme: vers un approche intégrée?’ (2015) *Revue Générale de Droit International Public* 779; V Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration’ (2010) 31 *Michigan International Law Journal* 621; Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press 2010); Arato, ‘Constitutional Transformation’ (n 98); Ineta Ziemele, ‘How International Law Matters for the European Court of Human Rights’ in Luis Lopez Guerra and others (eds), *El Tribunal Europeo de Derechos Humanos Una visión desde dentro En homenaje al Juez Josep Casadevall* (2015) 416.

Systemic integration as a method of interpretation forms part of the legal reasoning process, alongside the classic canon of methods of interpretation.¹⁰⁵ Article 31(3)(c) VCLT at first sight seems to lay out a rule with very specific criteria triggering its application. It is operating under three conditions:¹⁰⁶ a relevant rule of international law is required, and it must be applicable between the parties to the treaty which is interpreted. Whereas rules of international law refer to the international legal system as a whole, the reference to ‘applicable ... between the parties’ seems to narrow the scope, in particular, where systemic integration happens in regard to two treaty norms.¹⁰⁷ Even though this could be the result of the strict literal reading of Article 31(3)(c) VCLT, a wider approach is justified which allows using rules which are not formally binding, but which are accepted or tolerated by the parties in the exercise of systemic integration.¹⁰⁸ This is of relevance for the use of systemic integration by the CJEU: in so far as the EU is not a party to a treaty but only the Member States, the EU could be considered to have accepted or tolerated the rules of a treaty (e.g. as an expression of the principle of sincere cooperation).¹⁰⁹

However, systemic integration goes beyond the codification in Article 31(3)(c) VCLT. It may be considered to be not just a specific rule, but a general principle (of interpretation) of international law which has been reflected in the practice of international tribunals independently and prior to the VCLT, and which has been considered to be ‘an unarticulated major premise in the construction of treaties’¹¹⁰ for a long time. The VCLT’s rules on treaty interpretation, as expressed in Art 31 VCLT, have also been grounded in customary international law.¹¹¹ The VCLT codifies it for its specific context because fragmentation is particularly relevant in the context of treaties. This is supported by the fact that general international law provides the very foundation for treaties. As a general principle it may also operate at a more general level than that foreseen by the VCLT. The quality as a general principle finds support in its system preserving purpose and function of systemic

¹⁰⁵ McLachlan, ‘Systemic Integration’ (n 104) 310.

¹⁰⁶ Simma and Kill, ‘Harmonising Investment Protection’ (n 104), 695; Arato, ‘Constitutional Transformation’ (n 98), 373 ff.

¹⁰⁷ McLachlan, ‘Systemic Integration’ (n 104) 314.

¹⁰⁸ Joost Pauwelyn, *Conflicts of Norms in Public International Law* (Cambridge University Press 2003), 257 ff; Arato, ‘Constitutional Transformation’ (n 98), 377.

¹⁰⁹ See above text at n 30.

¹¹⁰ McLachlan, ‘Systemic Integration’ (n 104) 280.

¹¹¹ Dörr, ‘Art 31 VCLT’ (n 97), para 6.

harmonization in general, and as expressed in the VCLT. The principle is constitutional in character. Because of the rootedness of treaties in international law, systemic integration can be said to give rise to two interpretive presumptions which are reflected in international practice:¹¹² first, that the parties to a treaty did not intend to breach other international law, i.e. a derogation from custom would be explicit and prior treaty obligations are not contradicted;¹¹³ second, that the parties intended to resort to general principles of international law where the treaty does not lay down special rules.¹¹⁴

As to the content of systemic integration, it requires a weak form of interaction. The duty ‘to take into account’ does not require to give effect substantively, or even priority, to an external rule of international law. It may be characterised as a procedural obligation to at least engage with other areas of international law and pay special regard to it in order to avoid conflict between partial legal orders of international law. Even though systemic integration does not require any specific substantive results of interpretation of one norm in the light of the other, it influences the outcome of interpretation substantively: it precludes relying on dualist constructions to avoid even considering external rules; and the method of interpretation inevitably influences the substance of the law because it determines which rules are to be included in the interpretive exercise.

The purpose of systemic integration is to reduce conflicts and to preserve international law *as a system*. This follows logically from the fact that treaties are ‘creatures of international law’:¹¹⁵ it can therefore be expected that a general regime for treaties would seek to reinforce the system. But what appears to be a modest common-sense rule of interpretation is in fact much more. It is a constitutional norm that keeps the international legal order together as a system, and which occasionally is needed as a master key to the edifice international law is.¹¹⁶

From this it may be derived that the obligation of Art 31(3)(c) VCLT does not only apply at the level of other individual norms, but that it reflects a wider responsibility to international law *per se* and as a whole. Systemic integration obliges

¹¹² McLachlan, ‘Systemic Integration’ (n 104) 311. See also below section 4.c) for more recent examples of jurisprudence.

¹¹³ *Right of Passage over Indian Territory* (n 102).

¹¹⁴ *Georges Pinson (France) v Mexico* (n 102), para 50, subpara 4.

¹¹⁵ McLachlan, ‘Systemic Integration’ (n 104) 280.

¹¹⁶ *Ibid* (n 104) 280 f.

courts and tribunals to pay special regard to international law, first, by taking it into account, procedurally, its substantive rules; and second, by considering the impact of their decisions on international law as a system as a whole when interpreting the rules of partial legal orders of international law. Adopting simply the quickest and easiest solution (e.g. out of procedural economy or as the simplest reasoning) which may well be a reliance on dualist constructions based on autonomy, without regard for the international legal system, is therefore not sufficient. The obligation of systemic integration applies to any instance (national or international court) which interprets a treaty. Because international organisations, including the EU, are creatures of international law (treaties), they are under a heightened responsibility to reflect comity towards other parts of international law in the light of the special nature of the international legal order in regard to the formation of customary international law.

b) Systemic Integration and Constitutionalisation of the EU

So far the EU has simply been equated to any other international organisation. This premise, however, would likely be contested by those who adopt the ‘autonomy’ narrative or a softened version, which merely highlights the *sui generis* nature of the EU legal order.¹¹⁷ In the light of the EU’s undeniable heightened constitutionalisation, it may be asked whether the duty to engage would apply equally if the EU was treated more as a *sui generis* entity, with characteristics assimilating that of a state and the EU treaties assimilating national (constitutional) law. Taken to its extreme the question would be, in how far states are obliged to apply the method of systemic integration even to the interaction of national law with international law.

This raises at least three questions in relation to the operation of a duty to take into account / engage under Art 31(3) lit c) VCLT.

First, the VCLT must be applicable. Formally, this is the case via Article 5 VCLT, which includes explicitly constituent treaties of international organisations. But Article 31 (3)(c) VCLT presumes two sets of international rules. Does the VCLT apply to the relationship between EU law and international law, even if the EU is

¹¹⁷ On the special nature of the EU legal order see Gunnar Beck, ‘The Court of Justice of the EU and the Vienna Convention on the Law of Treaties’ (2016) 35 Yearbook of European Law, text at n 24 and 73, and see Eileen Denza, ‘Forging Links between Legal Orders’ *ibid* (n 86), both in this issue.

considered to be more akin to a national (constitutional) order? The answer to the first question lies in the practice of the CJEU which relies on other areas of international law, in particular it has referred to secondary norms of international law and the VCLT more specifically, even though it is not formally a party to the VCLT. The rules of interpretation in Article 31 VCLT are considered reflect a general customary international law rule.¹¹⁸ Article 31 VCLT relates to the interpretation of international norms in the light of other international norms. It therefore ought to apply to the relationship between EU law and international law. Even if the EU is considered to be of a *sui generis* nature and is highly specialised, it cannot be considered to be a fully self-contained regime.¹¹⁹ In particular the EU still relies on secondary norms of international law (for example of the law of treaties or state responsibility) as a fall-back¹²⁰ and currently still has sufficient connection and roots in international law that such a heightened responsibility of the EU under the VCLT (or parallel customary law) can be assumed.

Second, does Art 31(3) lit c) apply directly *within* the domestic/EU legal order. In other words is a national court (or by analogy) the CJEU bound to apply the principle of systemic integration as a rule of interpretation to a dispute in front of it? There are strong arguments for the direct effect of the interpretive duty of systemic integration in the EU legal order, either as customary international law or as a general principle of law, or even as a treaty rule which may be presumed to be directly effective. Although the EU is not formally a party to VCLT, the CJEU has referred to the VCLT as secondary norms of international law.¹²¹ This reflects the constitutional nature of these rules for the international legal order.

Even if the VCLT were not be considered to be directly effective from the perspective of a national (or EU) legal order, Art 31 VCLT would arguably still be

¹¹⁸ Dörr (n 97).

¹¹⁹ Simma and Pulkowski, 'Self-contained Regimes' (n 56) 519.

¹²⁰ For example, the EU Treaties foresee no mechanism beyond the penalty payments in Art 260 TFEU, leaving scope, for example, for the suspension of the Treaty in regard to a Member State according to Art 60 (2) lit. a) VCLT which is in material breach of an obligation. See Trevor Hartley, 'International Law and the Law of the European Union - A Reassessment' (2001) 71 *British Yearbook of International Law* 1, 14-17; Tomuschat, 'Art 281 EGV' (n 57), para 46; Simma and Pulkowski, 'Self-contained Regimes' (n 56), 516 ff.

¹²¹ C-70/09 *Hengartner and Gassner v Landesregierung Vorarlberg* [2010] ECR I-7233, para 36; C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289, para 44 f; *Kadi I* (n 24), paras 222, 227; T-231/04 *Greece v Commission* [2007] ECR II-63, paras 85, 98; *Racke* (n 12), para 45 f; T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39.

applicable domestically as a result of its combination with the principle of consistent interpretation (be it of EU/domestic or international law origin). The requirement of systemic integration as reflected in Art 31 VCLT may be combined with consistent interpretation which has been adopted so widely by national legal systems that it may be considered to be of customary international law nature, as d'Aspremont has argued persuasively: '... by virtue of the domestic principle of consistent interpretation of domestic law, it is possible to root the principle of systemic integration in domestic law as well.'¹²²

This combination of systemic integration and consistent interpretation is also relevant to the third question which asks head-on whether systemic integration would apply across the international – domestic law divide, e.g. if the EU becomes more state-like. This would have to be answered in the negative, if one assumes that states can still shape the interaction of their domestic law with international law freely (i.e. without the constraints of Article 31(3)(c) VCLT), in contrast with international organisations which are under a heightened duty to engage with other international law if compared to states. The same would by extension apply to the EU if it becomes more akin to a constitutional order, whenever the tipping point would be reached.

However, as mentioned above, in combination with the principle of consistent interpretation systemic integration *could* also apply to national law. The fact that there is an increasing tendency by states to move away from the traditional formalistic approaches of monism and dualism to a more informal approach to the interaction with international law supports this outcome. Such more informal approaches to the interaction are more issue oriented and consider international law 'as and when relevant' in substance for deciding legal questions. They are subject matter oriented approaches,¹²³ which could be described as a neo-monist, applied flexibly without considerations of formal hierarchies. Systemic integration as contextual interpretation would add to an interpretation in conformity with international law the duty to take into account international law more widely in terms of the norms which are included in the exercise of 'taking into account'.

¹²² d'Aspremont, 'Systemic Integration' (n 104), 154.

¹²³ Campbell McLachlan, *Foreign Relations Law* (OUP 2014).

c) The Operation of Systemic Harmonisation

Having established that the EU is under a duty of systemic harmonisation in principle, it will be shown how it has been and may be applied in practice. For this, the case law on targeted sanctions will serve as an example and point of reference. As will be seen, systemic harmonisation operates in two logically sequential ways in the interpretation exercise.

First, systemic harmonisation influences how normative conflicts are construed. Its main effect in this context is to guide interpretation to avoid conflicts. Such interpretation can happen through the ‘lens’ of one or the other obligation or through blending and balancing the two conflicting obligations,¹²⁴ which leads to a modification of obligations.

Second, if a conflict cannot be avoided and priority is given to one obligation, systemic integration turns into a mitigating device. It mitigates the impact of conflict on the system of international law as a whole. These effects mirror the two dimensions of systemic integration (rule specific harmonisation and harmonisation with the international legal system as a whole). This can be exemplified by the judicial challenges of targeted sanctions of the UN Security Council in diverse *fora*: national courts, the CJEU and the ECtHR. The case law reflects the range of different approaches of dealing with the actual or potential clash of the obligation of states to comply with and implement sanctions imposed against individuals by UN Security Council Resolutions on the one hand, and national, EU and international (ECHR) human rights on the other hand.

Whereas the CJEU has readily assumed conflict of obligations (even if somewhat mediated by its own implementing legislation) which then required to give priority either to the UN Security Council Resolution (CFI) or EU fundamental rights (CJEU), the ECtHR has leaned more towards an approach of systemic harmonisation. It is constant jurisprudence of the ECtHR ‘that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law’, and it refers to Article 31(3)(c) VCLT in this context.¹²⁵

¹²⁴ See in this regard third party submission by Francoise Hampson and Noam Lubell, reported in *Nada v Switzerland* Application No 10593/08 ECHR 2012-V, (2013) 56 EHRR 18, para 93.

¹²⁵ See for example *Nada v Switzerland*, *ibid*, para 169; *Al-Adsani v United Kingdom* App no 35763/97 (GC) ECHR 2001-XI, (2002) 34 EHRR 273, para 55; *Hassan v the United Kingdom* App no 29750/09 (GC) ECHR 2014, para 102.

In the following possible approaches to the conflict scenario posed by targeted sanctions and their respective benefits and downsides will be considered. Two steps may be distinguished logically: first, whether there is a conflict in the first place and second, how the court deals with a conflict. Systemic harmonisation can operate at both levels in different ways.

(1) The Construction of Normative Conflict and Systemic Harmonisation: Avoiding Conflicts through Interpretation

This paper focuses on normative conflicts which may arise from conflicting obligations of states and not on other types of conflict, e.g. at regime level or between adjudicative bodies.¹²⁶ Also, it has to be noted that divergence of interpretation when it comes to the definition of identical, or seemingly identical concepts in different treaties may not automatically lead to normative conflict. It may, however, lead to fragmentation where a norm includes a clear cross-reference to the same concepts in another treaty and an autonomous interpretation is adopted. Such conflict might be avoided or justified according to the interpretive mechanisms described in this section. As a first step, it is crucial for avoiding conflicts to consider how they are construed. We can distinguish potential conflict and non-conflict scenarios.

i. Conflict Scenarios

Scenarios of conflict in the context of targeted sanctions have been decided at both ends of the spectrum, either by giving priority to the UN Security Council Resolutions or to the conflicting fundamental rights at EU or national level.

The CFI in 2005 in *Kadi I* accorded priority to the binding nature of the UN Security Council Resolutions on the basis of normative hierarchy (Article 103 of the UN Charter¹²⁷) within the EU legal order except where the Resolutions clash with norms of *ius cogens*. As limiting the access to court was not considered to violate *ius cogens*, the obligations under the sanctions regime prevailed.¹²⁸ This approach was

¹²⁶ Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration' (2013) 66 *Current Legal Problems* 169, 184 ff, 194 f

¹²⁷ Charter of the United Nations, 26 June 1945, 892 UNTS 119.

¹²⁸ T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

followed by national courts, for example the Swiss Federal Court in *Nada* in 2007, which referred to the CFI.¹²⁹ In a similar vein, outside the subject area of sanctions, the UK House of Lords in *Al-Jedda* held that the Security Council Resolution had primacy over, and at least qualified, the right to liberty in the context of preventive detention.¹³⁰

At the other end of the conflict spectrum is the ECJ/CJEU approach in *Kadi I* in 2008¹³¹ and *Kadi II* in 2013.¹³² It famously annulled the EU implementing measures of UN Security Council sanctions and gave priority to the constitutional review by relying on the autonomy of the EU legal order (*Kadi I*)¹³³ and on constitutional values (*Kadi II*).¹³⁴ It conducted a constitutional/domestic review of an EU measure. The approach of giving constitutional human rights priority was followed by the UK Supreme Court in *Ahmed*.¹³⁵

Both approaches may be considered to fragment international law in different ways. The solution which gives priority to the Security Council resolutions over national or EU human rights can formally claim to stay within the international (UN) system because it invokes Article 103 of the UN Charter which may be considered to establish a formal hierarchy of the international legal order (and not just of the UN Charter as one treaty amongst others) to resolve normative conflict. Even if this formal hierarchy is accepted to continue to exist, it brings the solution in conflict with substantive norms and values of other areas of the international legal order, also reflected in the UN Charter and other treaty regimes. Thus, a clear hierarchical solution would also cause conflicts and hence a form of fragmentation which affects,

¹²⁹ *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs* 14 November 2007, Case No 1A 45/2007, BGE 133 II 450, Oxford Reports on International Law in Domestic Courts, ILDC 461 (CH 2007), para 5.4.

¹³⁰ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, paras 33 ff, 39. The conflict was softened by limiting the breach of Convention rights considered to be authorised by SC Resolution to what was considered to be necessary (Lord Bingham, para 39); i.e. the Resolution qualified but did not displace human rights obligations (Lady Hale, para 126).

¹³¹ *Kadi I* (n 24).

¹³² *Kadi II* (n 35), para 66.

¹³³ This approach because of its focus on the autonomy of the legal order also could be characterised as one avoiding conflict (by emphasising that the obligations did not operate in the same plane). However, the distancing technique is so minimal that the more convincing view is that of conflict which is resolved by giving priority to constitutional fundamental rights.

¹³⁴ *Kadi II* (n 35), para 106. The Court emphasised that the terms and objectives of UN SC Resolutions needed to be taken into account.

¹³⁵ *Her Majesty's Treasury v Ahmed and al Ghabra and R (Youssef) v Her Majesty's Treasury* [2010] UKSC 2, paras 75 ff, 81, following the argument of the appellant (para 66).

if not the formal, then the substantive coherence and the legitimacy of the international legal system. The solution which gives priority to the partial legal order of the EU and its human rights protection is more in line with a direct understanding of conflict – it accepts a formal conflict for reasons substantive legitimacy. In contrast to the CJEU, the ECtHR, in particular, has demonstrated how systemic integration may avoid conflict in the first place in this scenario.

ii. Avoiding Conflicts by Interpretation

Some courts, and particularly the ECtHR in almost identical, or at least comparable, scenarios have also taken the opposite approach of eliminating the existence of a conflict by interpreting the potentially conflicting norms harmoniously. There are at least three ways in which systemic integration may avoid conflicts by interpreting the international obligations so that the national implementing act can comply with both obligations. As a result, there is no conflict between the two international obligations. Four scenarios may be distinguished.

First, scenarios where there is no real conflict to begin with need to be distinguished from those where conflicts are avoided by interpretation applying systemic integration. In this first scenario of cases the correct interpretation of the norm will reveal already that there is no real conflict. Such ‘non-conflicts’ only appear *prima facie* as real conflicts and also involve interpretation that may require considering other areas of international law. Such ‘non-conflicts’ will, therefore, briefly be discussed to define the boundaries of systemic integration. Non-conflicts are also useful to illustrate the perils of systemic integration, even if they may result from a misunderstanding of the principle.

The second and third scenarios involve true conflicts which are resolved by interpretation of the obligations involved. They differ in the ‘lens’ through which the obligations are interpreted: (a) UN Security Council resolutions may be interpreted through the lens of human rights in a way that is compliant with the human rights obligation (e.g. either as providing flexibility which can be used to comply with human rights or by subjecting these rules themselves to a systemic integration with other areas of international law, i.e. international human rights); and conversely, (b) human rights norms may be interpreted through the lens of Security Council Resolutions or more generally, other international law.

Fourth, interpretation may try to strike a balance between two rules which are interpreted in a way to modify the obligations which would otherwise exist.

Non-conflicts

Where there is no conflict, there is no need for systemic harmonisation to operate. It is crucial to consider carefully whether there is a potential conflict in the first place. Construing one where there is none could lead to problematic attempts to harmonise what need not, and ought not, be harmonised.

An example of this danger provides the scenario that was subject to the CJEU's decision in *Diakité*.¹³⁶ One of the key aspects of the case was how to interpret one of the conditions for subsidiary protection of refugees from serious harm under the EU's Qualification Directive,¹³⁷ namely where the harm resulted from 'indiscriminate violence in situations of international or internal armed conflict.'¹³⁸ A premature recourse to systemic integration might see conflict where there is none and, as a result, restrict the protection of the Qualification Directive in a way that was unintended: this is the case if the reference to 'internal armed conflict' is seen as a cross-reference to international humanitarian law ('non-international armed conflict'),¹³⁹ which would raise the threshold refugees needed to prove to qualify for protection. As Moreno-Lax has convincingly and exhaustively argued,¹⁴⁰ such a result would go against the grain of all traditional methods of interpretation (text, context and purpose). The scenario, therefore, requires an autonomous reading of the wording of the Qualification Directive. This situation where systemic integration contradicts wording, context and *telos* may be described as pointing to the limits of systemic integration.¹⁴¹ This may well be the case in appropriate scenarios where there is a true conflict, e.g. where the same wording is used in the same context but given a different

¹³⁶ *Diakité* (n 94), paras 27 ff.

¹³⁷ Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12 (Qualification Directive).

¹³⁸ Article 15(c) of the Qualification Directive, *ibid*.

¹³⁹ Jane McAdam, 'Individual Risk, Armed Conflict and the Standard of Proof in Complementary Protection Claims: The European Union and Canada Compared' in J C Simeon (ed), *Critical Issues in International Refugee Law: Strategies Toward Interpretive Harmony* (Cambridge University Press 2010) 59; Francois Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31 *Refugee Survey Quarterly* 1, 15.

¹⁴⁰ Moreno-Lax, 'Autonomy' (n 35), 298 ff

¹⁴¹ See *ibid*, 306 ff.

meaning. This would have been the case, for example, if the interpretation of the Qualification Directive had been unambiguous about cross-referring to concepts of international humanitarian law, or if the Directive sought to implement an equivalent provision of an international instrument, but had given it a different meaning. However, as the case stood, it seems a case of non-conflict already on the basis of interpretation of the Directive: in spite of the similar wording, the meaning of the terms is not the same because of their different contexts and purposes.¹⁴² The CJEU provided a strong teleological interpretation in *Diakité* why EU refugee law and international humanitarian law should not be interpreted identically, in spite of the similar wording and reference of the EU Directive to ‘internal armed conflict’,¹⁴³ but this does not cause conflict.

However, this does not mean that the interpretation should not include a wider context and make it explicit that it considered and distinguished another area of law.¹⁴⁴ In fact the system-reinforcing function of systemic integration would require this. However, such an interpretation would not be an example of a limit to systemic integration, but one where there is no conflict and hence no need for harmonisation in the first place. ‘Internal armed conflict’ in the Qualification Directive and international humanitarian law are simply (near) homonyms or perhaps false cognates (*faux amis*).

Avoiding conflict by interpretation through the lens of one obligation

Interpreting the UN Security Council Resolutions through the lens of the human rights regime

In the first conflict-avoiding dimension referred to above, courts interpret UN Security Council resolutions in a way which avoids conflict. This is achieved either by traditional interpretation of the terms of the resolutions or by a wider interpretation

¹⁴² *Diakité* (n 94), paras 27 ff. Likewise, Moreno-Lax, ‘Autonomy’ (n 35), 308.

¹⁴³ *Diakité* (n 94), paras 27 ff.

¹⁴⁴ The reflection on the different meanings of an identical term would have been useful and perhaps would have avoided causing confusion around jurisdictions which denotes a number of different concepts from ‘competence to act’ (delimiting respective competences of sovereign states to prescribe and enforce norms) to ‘scope of application’ in Article 1 ECHR. See for the cause of confusion *Bankovic and others v Belgium and others* 53307/99 (GC) (2007) 44 EHRR SE5, paras 59-61, which still is reflected in the later case law, see, e.g. ; *Jaloud v The Netherlands* App no. 47708/08 (GC) App no 47708/08, [2014] ECHR; see also *Smith, Ellis and Allbutt and others v Ministry of Defence* [2013] UKSC 41; for critical analysis in this regard see Marko Milanovic, *Extraterritorial Application of Human Rights: Law, Principles, and Policy* (OUP 2011), 21 ff.

which reads certain presumptions into the resolution ‘that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights.’¹⁴⁵

Where the terms of an obligation are considered to leave discretion or flexibility to implement it in a human rights compliant way, the national act could in principle comply with both international obligations. For example, the Canadian Federal Court interpreted the (exceptions to the) travel ban in the UN Security Council sanctions regime in the light of international human rights law in a way that would allow repatriation of an individual to the state of nationality in *Abdelrazik v Minister of Foreign Affairs*.¹⁴⁶

The ECtHR in *Nada v Switzerland*¹⁴⁷ applied a similar approach. Before embarking on its interpretation of the Resolution, it summarised its understanding of systemic integration:

‘the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of “any relevant rules of international law applicable in the relations between the parties”, and in particular the rules concerning the international protection of human rights...’¹⁴⁸

‘When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law...’¹⁴⁹

The case concerned a challenge under Article 8 ECHR which resulted from a confinement of the applicant to an Italian enclave in Switzerland due to the travel ban under the UN sanctions regime. The Grand Chamber found a violation of Article 8

¹⁴⁵ *Al-Jedda v United Kingdom* Appl no 27021/08, (2011) 53 EHRR 23, para 102.

¹⁴⁶ *Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* [2009] FC 580 Federal Court of Ontario, Canada.

¹⁴⁷ *Nada v Switzerland* (n 124), paras 177 f.

¹⁴⁸ *Ibid*, para 169.

¹⁴⁹ *Ibid*, para 170.

ECHR by Switzerland, but avoided construing a conflict with the UN sanctions regime and the ECHR. Instead it held that Switzerland had violated Article 8 because it did not make use of the flexibility of the Resolution's exceptions (which, for example, allowed for exceptions from the travel ban to judicial process).¹⁵⁰

‘In view of the foregoing, the Court finds that Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council.’¹⁵¹

In addition, a failure to support delisting in a timely manner¹⁵² by Switzerland contributed to the breach.¹⁵³

A similar approach had been taken by the UN Human Rights Committee in *Sayadi and Vinck v Belgium*.¹⁵⁴ The Human Rights Committee held Belgium responsible for listing persons without hearing, even though Belgium could not unilaterally remove names from list once they had been listed.¹⁵⁵

In *Al-Jedda v United Kingdom* the ECtHR interpreted the obligations under an UN Security Council Resolution by reading into it a general unwritten condition, namely a presumption that the Security Council did not intend to force states to act in breach fundamental rights when detaining individuals, in view of Art 24(2) of the UN Charter.¹⁵⁶ This presumption, which may be considered to be the result of systemic integration of the UN Charter, meant that the UK was not obliged to detain individuals in breach of Article 5 ECHR.

The *Nada v Switzerland* and *Al-Jedda v United Kingdom* cases provides an illuminating example how the interpretations in the light of a general presumption and in the light of specific textual flexibility may complement one another, depending on the specifics of the case: the ECtHR did not see room for the operation of the general

¹⁵⁰ Ibid, paras 176-180.

¹⁵¹ Ibid (n 124), para 180.

¹⁵² Ibid, 188. See in this regard

¹⁵³ See also Joint Concurring Opinion of Judges Bratza, Nocolaou and Yudkivska in ibid (n 124), para 12 which considers the breach to lie exclusively in this omission as they did not consider the Resolution to allow for flexibility.

¹⁵⁴ *Nabil Sayadi and Patricia Vinck v Belgium* Communication No 1472/2006, CCPR/C/94/D/1472/2006 UN Human Rights Committee.

¹⁵⁵ CFI 2005 had ordered Belgium to initiate delisting with UN Sanctions Committee

¹⁵⁶ *Al-Jedda v United Kingdom* (n 145), para 102, 109, see quote, above text at n 145.

presumption, in the light of the clear wording of the Resolution, but found flexibility in the wording.¹⁵⁷

The ECtHR in *Al-Dulimi* extended the *Al-Jedda* presumption of human rights compliance of obligations imposed by the UN Security Council by reading into the Resolutions that they did not *prohibit* a fundamental rights review in the absence of an adequate review procedure at international level and therefore did not conflict with Article 6 ECHR. Quoting its *Al-Jedda* judgment, the Court provided a clear example of systemic integration:

‘Consequently, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights [*Al-Jedda*, para 102]. In the event of any ambiguity in the terms of a UN Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, *it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law* (ibid.). Accordingly, *where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention*. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter.’¹⁵⁸

Interestingly, and perhaps driven by the desire to ‘speak with one voice’¹⁵⁹ the ECtHR cites a passage from the CJEU’s *Kadi I* judgment in support of its position that the UN Security Council is bound by international law, even though the CJEU’s overall reasoning, as shown above,¹⁶⁰ was very different from its own. The CJEU’s reasoning was based on dualist approach of the EU legal order towards the UN sanctions regime and referred to the reviewability of the domestic act, whereas the ECtHR interprets the sanctions regime itself:

¹⁵⁷ *Nada v Switzerland* (n 124), para 172. See also, *Al-Dulimi* (n 4), para 143.

¹⁵⁸ *Al-Dulimi* (n 4), para 140 (emphasis added).

¹⁵⁹ Cf Concurring Opinion of Judge Pinto de Albuquerque in *ibid* (n 4), para 59, see above n 92.

¹⁶⁰ See also Ziegler, ‘Kadi’ (n 35), 293 ff.

‘Furthermore, the European Court of Justice has also held that “it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations” (*Kadi I*, § 299 (see paragraph 62 above)). As the Court has already observed, the Security Council is required to perform its tasks while fully respecting and promoting human rights (see paragraph 140 above). To sum up, the Court takes the view that paragraph 23 of Resolution 1483 (2003) cannot be understood as precluding any judicial scrutiny of the measures taken to implement it.’¹⁶¹

The question whether on the facts of the case of *Al-Dulimi* the Court’s interpretation stretched the meaning of the Resolution beyond reasonableness was even more controversial amongst the judges¹⁶² than the interpretation of the majority in *Nada*. It does not need to be decided here. The judgment demonstrates that interpretation guided by systemic integration can eliminate conflict in a far-reaching way. The specific assessment of the case does not detract from the principle and methodology applied by the Court to minimise the potential for conflict of obligations by defining the meaning of one of the obligations in a conflict-avoiding way. Clearly such an approach is dependent on the facts of the individual case¹⁶³ and inevitably will give rise to disagreement.

Interpretation of the international human rights obligation through the lens of the Security Council resolution

In contrast to the previous scenario, systemic harmonisation may also operate in the opposite direction, i.e. through the lens of the international obligations under general international law, such as a UN Security Council Resolution, which shapes the content of the human rights obligation. An example for this scenario is the House of Lords’ judgment in *Al-Jedda v Secretary of State for Defence*.¹⁶⁴ The case concerned

¹⁶¹ *Al-Dulimi* (n 4), para 149.

¹⁶² Critically of the majority stretching the limits of interpretation in *Al-Dulimi* (n 4) were Judges de Albuquerque (paras 9 ff), Keller (paras 4 ff) and Nußberger in their concurring or dissenting opinions; see in contrast Concurring Opinion of Judge Sicilianos in support of the Court (paras 18 ff).

¹⁶³ This has been demonstrated by the fine line between *Nada* and *Al-Dulimi* in the ECtHR, see Dissenting Opinion by Judge Nußberger in *Al-Dulimi* (n 4).

¹⁶⁴ *R (Al-Jedda) v Secretary of State for Defence* (n 130), paras 26 ff (per Lord Bingham).

the relationship between the right to liberty under Article 5(1) ECHR and the power or obligation to detain persons who were considered to be a threat to security under UN Security Council Resolutions where there was no intention to bring criminal charges and where no derogation had been made under Article 15 ECHR. Here, the House of Lords considered Article 5 ECHR through the lens of the relevant UN Security Council Resolution, asking whether Article 5 (1) ECHR would be qualified by the Resolution. It first dismissed a construction of the SC Resolution in a way similar to that in *Nada v Switzerland* and *Abdelrazik*,¹⁶⁵ which would have allowed the UK to comply with both obligations, namely that as a mere authorisation rather than obligation to detain.¹⁶⁶ Thus, a scenario of conflict was raised. Lord Bingham resolved the clash which by considering human rights law through the lens of the Security Council Resolution. The difference between the CFI's approach in *Kadi I* and that of the House of Lords is that the Resolution and UN Charter was not considered to displace the human rights obligations in their totality, but only to qualify them:

‘by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.’¹⁶⁷

The implications of this approach¹⁶⁸ were expressed by Lady Hale:

‘The right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.’¹⁶⁹

The ECtHR has also used systemic integration through the lens of UN Security Council Resolutions in *Behrami and Saramati v France*¹⁷⁰ and in the context of the conflict of immunity rules under international law and human rights.¹⁷¹

¹⁶⁵ See above n 146 and 147.

¹⁶⁶ *R (Al-Jedda) v Secretary of State for Defence* (n 130), paras 32 (Lord Bingham).

¹⁶⁷ *Ibid*, paras 39 and para 125,129 (Lady Hale).

¹⁶⁸ See also in this regard *Hassan v the United Kingdom* (n 125), paras 102 ff, esp. 104.

¹⁶⁹ *R (Al-Jedda) v Secretary of State for Defence* (n 130), para 125 (Lady Hale).

¹⁷⁰ *Behrami v France and Saramati v France et al* App no 71312/01 and 78166/01(2007) 45 EHRR SE10, paras 146 ff, 149.

Avoiding conflict by rebalancing or ‘blending’ the obligations

Systemic integration may also be achieved through a rebalancing of the potentially conflicting obligations which inevitably will lead to a qualification of the obligations at stake. An example for this mechanism was the ECtHR’s approach in *Hassan v United Kingdom*,¹⁷² which, similar to *Al-Jedda*, concerned the compatibility of preventive detention with Article 5(1) ECHR, and more generally the relationship between the ECHR and international humanitarian law. The ECtHR referred to Article 31(3) (c) VCLT and its constant jurisprudence that the Convention should ‘be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law.’¹⁷³ It then provided an example for a re-balancing of the human rights obligations in the light of other international law, in this case international humanitarian law, emphasising that

‘even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, *the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.* The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above). It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.’¹⁷⁴

The solutions of the House of Lords in *Al-Jedda* and of the ECtHR in *Hassan* are not far apart and virtually identical on the facts and in outcome. Nevertheless, and perhaps unsurprisingly given its mandate and subject matter, the ECtHR uses the

¹⁷¹ *Al-Adsani* (n); *Stichting Mothers of Srebrenica and Others v. the Netherlands* App no 65542/12 ECHR 2013, para 154.

¹⁷² *Hassan v the United Kingdom* (n 125), para 102.

¹⁷³ *Ibid*, para 102.

¹⁷⁴ *Ibid*, para 104 (emphasis added).

ECHR as a starting point of its analysis and harmonises at the level of permissible justifications in a balancing process. In contrast, the House of Lords starting point is the priority of the SC Council Resolution, but limits its scope by taking into account human rights which are not displaced but qualified.

(2) Systemic Integration and Unavoidable Conflicts

The question raised by the sanctions cases which the ECtHR has not yet answered is what approach it should take where conflict cannot be avoided by reasonable interpretation. Those who think the Court stretched the limits of interpretation in *Al-Dulimi* regretted the passing of this opportunity.¹⁷⁵ Clearly not all conflicts can be resolved and it is not even desirable if it means compromising the normative *telos* of one norm or regime for the sake of harmonising it with other obligations. As argued elsewhere,¹⁷⁶ the outcome in cases such as *Kadi* which give preference to human rights over UN Security Council sanctions resolutions is not merely desirable but required by the rule of law in the light of the deficiencies of remedies at the UN level. The above survey has shown the panoply of approaches, options and also great lengths to which courts have gone in order to avoid conflict. But at the heart of the problem is an irreconcilable conflict which cannot be resolved in all scenarios in a pragmatic way. Systemic harmonisation can operate at this level as well. It cannot eliminate the conflict, as a decision will require a result which gives priority to one obligation over the other. In the sanctions example this would mean priority either to human rights (ECJ solution) or to the UN Security Council Resolution (CFI solution). In such a scenario systemic integration can still be incorporated into the reasoning – by heeding the duty ‘to take into account’ other areas of international law. International law must be engaged with. This has two consequences.

First, even if such engagement cannot avoid conflict and *prima facie* negative fragmentation, it can turn conflict into positive fragmentation and potential impulse for the development and cross-fertilisation of international law. Partial legal orders may serve as ‘laboratories’ of international law which can provide positive impulses

¹⁷⁵ *Al-Dulimi* (n 4), Concurring Opinion of Judge Keller, para 27; see along similar lines Concurring Opinion of Judge Pinto de Albuquerque, paras 49 ff.

¹⁷⁶ See above n

to the development of international law. The potential for cross-fertilisation is far greater if external norms and regimes are discussed and the reasons for refusing to avoid conflict are laid open; furthermore such argumentation may point to, and help develop an understanding of the inherent limits in the international legal order. Such an engagement was absent from the CJEU's *Kadi I* and *II* judgments. It was not necessary in any detail for the reasoning of the ECtHR in *Al-Jedda*, *Nada* and *Al-Dulimi*, although an engagement with the presumption of compliance with fundamental rights expressed in *Al-Jedda* would provide an example also for an irresolvable conflict scenario.¹⁷⁷ An example for a point of departure of such reasoning which engages with international law is given by Judge Judge Malinverni in his Concurring Opinion in *Nada*:

‘But do those two Charter provisions [Articles 25 and 103] actually give the Security Council carte blanche? That is far from certain. Like any other organ of the United Nations, the Security Council is itself also bound by the provisions of the Charter. And Article 25 *in fine* thereof stipulates that members of the world organisation are required to carry out the decisions of the Security Council “in accordance with the present Charter”. In Article 24 § 2 the Charter also provides that in discharging its duties “the Security Council shall act in accordance with the Purposes and Principles of the United Nations”. Article 1 § 3 of the Charter reveals that those purposes and principles precisely include “respect for human rights and for fundamental freedoms”. One does not need to be a genius to conclude from this that the Security Council itself must also respect human rights, even when acting in its peace-keeping role. This view indeed seems to have been confirmed by decisions recently taken by certain international bodies.’¹⁷⁸

Depending of the perspective, such a view may lead to systemic harmonisation at the level of interpretation. Even if this is not the case, a reflection in the reasoning which gives priority to rule of law values, for example in the EU, will mitigate any negative effects for the international legal order and might even transform them into positive developments.

Such engagements provide an opportunity for dialogue between different legal orders of international law which may contribute to developing the (other) international legal order more generally and not just the own legal order on the basis of being an autonomous legal order. Such engagement and dialogue is relevant,

¹⁷⁷ See above n 145.

¹⁷⁸ Concurring Opinion of Judge Malinverni in *Nada v Switzerland* (n 124), para 15.

because over time it will contribute to the development of international law in the form of customary law, general principles of law, the (interpretation of) treaties and through judicial decisions and opinions of ‘the most highly qualified publicists’ (Article 38 of the Statute of the International Court of Justice).

Second, from the perspective of the international legal order as a system, systemic integration can help to neutralise, or at least mitigate, the harm to international law as a system through a duty to engage. Fragmentation at rule and regime level is not an issue for international law if the consensus about its basis is maintained. This requires an acceptance of its binding nature as well as awareness about the ways rules of international law (in particular custom¹⁷⁹ and general principles) are made. This requires furthermore an awareness of actors on the international plane as well as at state level of the potential impact of their decisions, including their reasoning. Thinking law as a system, even across borders, layers and levels is the essence of systemic integration and harmonisation and contributes to maintaining the international legal order.

If harmonious interpretation is not possible, but where two international obligations clash so that compliance with one may lead to breach of the other, such a breach may be legally justified as a countermeasure.¹⁸⁰ On a different level, a potential breach is thus systemically integrated in the framework of (general) international law. International law itself condones (allows for a justification) of certain breaches of international law if they are committed in response to a breach of international law (cf Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) codified by the International Law Commission).¹⁸¹ Invoking a general international law framework may also help to mitigate the conflict. In effect this justification allows for an argument based on fundamental constitutional principles and hierarchy of values¹⁸² to be invoked if they are shared by the international legal order. The

¹⁷⁹ On the interaction of the EU legal order and customary international law see Theodore Konstadinides, ‘Customary International Law as a Source of EU Law: A Two-Way Fertilisation Route?’, in this issue.

¹⁸⁰ See in detail Antonios Tzanakopoulos, *Disobeying the Security Council. Countermeasures against Wrongful Sanctions* (Oxford University Press 2011), esp 154 ff.

¹⁸¹ See above (n 180).

¹⁸² Cf on a moral reading of the ECHR George Letsas, ‘The ECHR as a Living Instrument: Its Meaning and Legitimacy’ in Andreas Follesdahl, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 106 ff.

difference lies in the reasoning, not in the result. Such a response may be considered as a decentralised mechanism to enforce the legality of international obligations. Framing the breach of international law in the terms of countermeasures, to an extent, further mitigates the negative effects of breaking an international obligation on the international legal order.¹⁸³

5. Opportunities and Risks of Systemic Harmonisation

a) Benefits and Opportunities

The above analysis has already revealed some of the benefits and opportunities of systemic harmonisation, understood as a duty to engage to further harmony and cross-fertilisation.¹⁸⁴ Such benefits result from the openness and flexibility which systemic harmonisation introduces into the process of interpretation. Four main benefits and opportunities result from systemic harmonisation: avoiding conflicts within or breaches of international law; providing opportunities to develop the law, taking account of developments in other legal orders; reinforcing the international legal order as a system; and conferring legitimacy on the outcome of the interpretation.

System harmonisation contributes to avoiding breaches of international law, resulting from normative conflicts and to reducing fragmentation, or turns it into a positive impulse at rule or system level. Such an impulse is stronger than one that may result from an autonomy-based solution.

An approach based on the autonomy of the own legal order, such as the CJEU's regarding the EU, amounts to severance from the substance and process of general international law. It cuts itself off from international law and cuts international law off from a partial legal order.¹⁸⁵ It thus reduces the opportunities for both EU law and international law to develop through the respective other legal

¹⁸³ See below text around (n 181).

¹⁸⁴ Cf Arato, 'Constitutional Transformation' (n 98), 354, 364 ff as reflected in the evolutive purpose of the principle of systemic integration.

¹⁸⁵ On this dimension of cross-fertilisation see Ramses A Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order'; more generally on the influence of the EU in its neighbourhood see Elena Basheska and Dimitry Kochenov, '"Good Fences Make Good Neighbors" and Beyond ... Two Different Faces of the Good Neighbourliness Principle' (2016) 35 Yearbook of European Law, both in this issue.

orders. Systemic integration is particularly important for the development of law where there are gaps and a need for a fast response to a social or other (e.g. constitutional) challenge. The ability of the CJEU to develop a whole set of fundamental rights very quickly with only a few judgments¹⁸⁶ is the prime example for the potential inherent in systemic integration. In addition, it can hardly be said that the EU fulfils the constitutional mandate of Article 3(5) TEU to the development of international law with such an approach

Engagement with the content and inherent limits of international rules, whatever the result of such engagement, reaffirms public international law which is vulnerable to breaches. Over time a pattern of breaches may challenge the very foundations of international as being accepted as binding. A breach of international law, which invokes the autonomy, contains no affirmation of the international legal order. But the same behaviour (breach) that is justified by engaging with the international rules acknowledges them and the processes by which international law is made, and confirms them – as they are confirmed by expressing practice and *opinio iuris*. There is no compromising on EU values, but at the same time a stronger impulse for the development of public international law without setting the negative precedent of confrontation and breach.

This is particularly important where international law is developing in an entirely decentralised way and where no institutional actors can accelerate its development. In that sense the *Kadi* saga must not be overrated or even be seen as totally representative of the significance of an engaged approach. The Security Council and the UN Sanctions committee could respond relatively promptly in making some improvements to the sanctions; but this will not be the same in cases of attack on international legal norms, in particular where there is no institutional ‘representative’ which acts on behalf of international legal order. The international legal order would be considerably weakened by fragmenting challenges where only decentralised responses and developments are possible which are likely to take time.

¹⁸⁶ 29-69 *Erich Stauder v Stadt Ulm* [1969] ECR 419, ECLI:EU:C:1969:57 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; 4-73 *Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft* [1974] ECR 491; see also Tomuschat, ‘The Relationship between EU Law and International Law in the Field of Human Rights’ (n 3).

The *ATAA* and *Diakité* cases,¹⁸⁷ aspects of which may be contrasted with the approach in *Intertanko* or *Kadi I*,¹⁸⁸ point to the wider benefits of open engagement: they demonstrate a more direct and potentially quicker contribution to the development of international law, in particular as they reflect clear expressions of *opinio iuris*.

Engagement with external norms in general international law may also enhance the legitimacy of the outcomes of interpretation. The discussion of the approaches to construing normative conflicts¹⁸⁹ in the context of targeted sanctions have shown that with the outcome being invariably the same (finding a breach of human rights that ultimately is caused by a UN Security Council resolution), the reasoning mattered and less antagonistic and engaged approaches confer greater legitimacy on the outcome. In the CJEU's case law, the *ATAA* case¹⁹⁰ is a good example for that legitimacy enhancing effect of engagement with international law. The Court assessed rigorously and in detail whether the European emissions trading scheme was compatible with customary international law on jurisdiction and treaties. The engagement with international law, rather than the insistence of autonomy, thus added to the legitimacy of the EU's emissions trading scheme and might make it a frontrunner¹⁹¹ for other legal orders, or even a global regime in this context.¹⁹²

b) Risks

While systemic integration as a contextual method of interpretation has many advantages, both in avoiding conflicts and in developing the law and keeping the international legal order together, some risks are inherent as with any contextual and potentially evolutive interpretation. These risks are not unique to systemic harmonisation but inherent in interpretation. The remedy and safeguards lie in good quality interpretation in the context of all interpretive methods (in particular purposive interpretation) and transparent reasoning.

¹⁸⁷ *ATAA* (n 12), paras 73, 101; *Diakité* (n 94), paras 27 ff.

¹⁸⁸ *Intertanko* (n 12); *Kadi I* (24).

¹⁸⁹ See above section 4. c)(1).

¹⁹⁰ *ATAA* (n 12), paras 73, 101.

¹⁹¹ Frank Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organisations and Treaty Bodies' (2007) 44 Common Market Law Review 41

¹⁹² Eileen Denza, 'International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case' (2012) 37 European Law Review 314, 322.

Risks may be seen to derive from a lack of definition of the principle of systemic integration itself and the discretion it leaves to the interpreter. Its threshold criteria in Article 31(3)(c) VCLT are broad or even ambiguous – the flipside of flexibility of the principle. These risks are heightened for contextual interpretation as it has a less defined methodology and may be used selectively and arbitrarily, for example, when and whether it is used and in terms of which ‘other norms’ are included in the interpretation.¹⁹³ *Diakité* shows some of the difficulties involved with determining the correct context. The separate opinions in *Nada, Hassan* and *Al-Dulimi*, and the vehement dissent of some of them with the majority show the potential for disagreement in every dimension of systemic integration in the interpretation of the legal obligations at issue and the scope for flexibility and presumptions.¹⁹⁴

In contrast to its own purpose, systemic integration is also subject to an inherent tension. It may itself create varying or diverging interpretations which comes with a wider and decentralised application of norms. Thus, it contains also a risk to unity and uniform application of public international law.¹⁹⁵ However, this is in the nature of decentralised interpretation characteristic of international law and not specific to systemic integration.

Further problems may relate to the use of foreign material and the lack of expertise of the interpreter.¹⁹⁶ This is not a problem specific to systemic integration, and discussed extensively in comparative law literature,¹⁹⁷ but the concerns are valid in any interpretive exercise: meaning, comparability and transferability of concepts in other legal orders may not be readily understood across legal cultures, and, perhaps to a lesser extent, specialised legal orders of international law. Diversification and specialisation also means a less generalist approach of the interpreter. A lack of understanding of concepts of another legal order or regime (even if worded nearly

¹⁹³ See for the selective use of the VCLT by the CJEU Beck, ‘The Court of Justice of the EU and the Vienna Convention on the Law of Treaties’, in this issue.

¹⁹⁴ See above, n 162.

¹⁹⁵ d'Aspremont, ‘Systemic Integration’ (n 104), 161, 164.

¹⁹⁶ John C Reitz, ‘How to do comparative law’ (1998) 46 Am J Comp L 617, 631 ff.

¹⁹⁷ See e.g. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (n 36), 6 f. Some even doubt that transplants are possible outside of a cultural context, see Pierre Legrand, ‘The Impossibility of “Legal Transplants”’ (1997) 4 Maastricht Journal of European and Comparative Law 111 ff, esp. 118, 120. For the complexities of the comparative method across the national/international law divide see Roberts, ‘Comparative International Law?’ (n 42).

identically) may lead to cultural (contextual) misunderstandings and oversimplification.¹⁹⁸ For example, it may mean that *faux amis* are imported (becoming problematic ‘transplants’), which may fundamentally distort the underlying rationale of a legal order.¹⁹⁹

Broad powers to interpret also raise the question of accountability for law-development in informal processes.²⁰⁰ Systemic integration, in keeping with the decentralised nature of international law and its substantive rather than formalised constitutionalism, is unstructured, decentralised and deformed. While some of the concerns may be addressed by substantive accountability through good and transparent reasoning, only a clearer methodology for systemic integration can address the accountability (and foreseeability) problem.

Linked to the previous point, the most problematic concern is about the possibly watering-down of substantive legal standards which may result from systemic harmonisation, as demonstrated by *Al-Jedda v Secretary of State for Defence* and *Hassan v United Kingdom*.²⁰¹ Attempts to reconcile the irreconcilable may come at a high price for at least one (partial) legal order. But this can have an effect on the development of general international law as well. Arguably *Hassan v UK* pushed the Court beyond the limits of systemic harmonisation, because textual and purposive limits of such interpretation were exceeded.²⁰² textual limits because the ECtHR in its attempt to harmonise and to be pragmatic, went against the clear and exhaustive wording of Article 5 and 15 ECHR and rendered the requirement to derogate under Article 15 superfluous; purposive limits because, as Judge Spano has argued, the purposes, structure and methods of protection of IHL and the ECHR are very different.²⁰³ The age-old risk exemplified here is that of watering down of standards when attempting to harmonise them. This may not be equally a problem with all systemic harmonisation attempts. However, the constitutional nature of international

¹⁹⁸ Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (n 36); d’Aspremont, ‘Systemic Integration’ Reitz, ‘How to do comparative law’, 628 ff; d’Aspremont, ‘Systemic Integration’ (n 104), 161, 164, in relation to domestic courts resorting to systemic integration.

¹⁹⁹ See *Diakité* (n 94). See the seminal study on legal transplants by Watson, *Legal Transplants: An Approach to Comparative Law* (n 36).

²⁰⁰ Julian Arato, ‘Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations’ (2013) 38 *Yale Journal of International Law* 289, 355.

²⁰¹ See above n 26 and 160.

²⁰² Partly Dissenting Opinion of Judge Spano in *Hassan v the United Kingdom* (n 125), para 16.

²⁰³ Partly Dissenting Opinion of Judge Spano in *ibid*, para 17 f.

human rights, as well as the function of a human rights court in enforcing these rights, make systemic integration which compromises the content of human rights problematic. Because human rights guarantees are not at the disposal of the states parties they cannot be 'integrated' where this conflicts with the wording of the rights and the purpose their protection. The concern in this regard was expressed by Judge Malinverni in *Nada v Switzerland*:

'This raises a question: should the Court, as guarantor of respect for human rights in Europe, not be more audacious than the European Court of Justice or the Human Rights Committee when it comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case? After all, is the Court not the "ultimate bulwark against the violation of fundamental rights"? I am totally aware of the fact that the Security Council resolutions as such fall outside the Court's direct supervision, the United Nations not being a party to the Convention. That is not the case, however, for acts taken by States pursuant to those resolutions. Such acts are capable of engaging the responsibility of States under the Convention. Moreover, the fundamental principles in matters of human rights are nowadays not only enshrined in specific international instruments, but are also part of customary law, which is binding on all subjects of international law, including international organisations.'²⁰⁴

The risk of abdication of treaty bodies, such as the ECtHR referred to by Judge Malinverni, from their very core function where those functions reflect key aspects of constitutionalism of international law can only be counteracted by the strengthening of international constitutionalism, not by excessive or inappropriate deference to other areas of international law in order to avoid conflict. A good and transparent use of interpretive techniques and in particular purposive interpretation of the treaties in question will help to define the scope and limits of systemic integration.

In that sense, while the possible impact of systemic integration is far-reaching, it is no a panacea to all interpretation but one tool. The tool helps to stay mindful of other areas of international law and to define the relationship through interpretation in specific cases and maintain coherence, rather than to be tempted to rely on abstract principles, such as autonomy, the normative scope and meaning of which are

²⁰⁴ Concurring Opinion of Judge Malinverni in *Nada v Switzerland* (n 124), para 20 (footnotes omitted from quotation).

doubtful, potentially misleading and sending the wrong message – autonomy should not be treated as an overarching constitutional principle, but as a being reflected in individual norms.