ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

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CUSTOMARY INTERNATIONAL RULES ADDRESSED TO MEMBER STATES AND EU: MAPPING OUT THE DIFFERENT COORDINATION MODELS

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ABSTRACT: Practice shows the existence of complex legal situations in which customary international rules applicable to the Member States interfere, even indirectly, with the competences of the Union, and vice versa. On the one hand, the implementation of a rule of customary international law by Member States could affect rights and obligations under EU law. On the other hand, the exercise of EU competences could affect the rights and obligations conferred on Member States by customary law. In these situations, the Union must reconcile two "equal and opposite" needs. On the one hand, it must ensure that Member States' exercise of rights and obligations under customary international law does not undermine the effectiveness of EU law. On the other hand, it must prevent EU competences from interfering with the rules of customary international law applicable to the Member States. This *Article* aims to explore how the Union reconciles the exercise of EU competences with the exercise of Member States' competences under customary international law. After examining the most prominent models that could theoretically be used to coordinate the two spheres of competence (section II), the attention will turn to the approach adopted by the ECJ (section III) to determine whether this approach affects the prerogatives of the EU Member States as sovereign states under international law (section IV).

KEYWORDS: obligations under customary international law – powers under customary international law – EU competence – model of coordination – citizenship – sovereignty.

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I. Introduction: the need for coordination between the supranational and international levels

Even before the Lisbon Treaty established a general obligation for the Union to respect international law in arts 3(5) and 21 TEU,[1] the Court of Justice had indicated that "the rules of customary international law [...] are binding upon the Community institutions and form part of the Community legal order".[2] However, case law has never fully clarified the relationship between EU rules and customary rules and, more generally, the scope and extent of the Union's obligation to respect customary law.[3]

It is reasonable to assume that only those rules of customary international law that relate to the areas in which the Union exercises its powers would be applicable and binding on it.[4] In other words, customary international law imposes obligations and confers rights on the EU to the extent that the Union has the power to implement those obligations and

[1] Art. 3(5) TEU states: "[i]n its relations with the wider world, the Union [...] shall contribute [...] to the strict observance and the development of international law". Art. 21(1) TEU reads: "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: [...] and respect for [...] international law". See A Gianelli, 'Customary International Law in the European Union' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Brill 2012) 93 ff.; PJ Kuijper, '"It shall Contribute to... the Strict Observance and Development of International Law...": The role of the Court of Justice' in A Rosas, E Levits and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (TMC Asser Press 2013) 589; E Neframi, 'Customary International Law and the European Union from the Perspective of Article 3(5) TEU' in P Eeckhout and M Lopez Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016) 205. On the meaning and scope of arts 3(5) and 21 TEU see E Cannizzaro, 'The Value of the EU International Values' in Th Douma, C Eckes, P Van Elsuwege, E Kassoti, A Ott and RA Wessel (eds), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press 2021) 3.

[2] Case C-162/96 *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293 paras 45-46; case C-286/90 *Poulsen and Diva Navigation* ECLI:EU:C:1992:453 paras 9-10; case C-366/10 *Air Transport Association of America (ATAA)* ECLI:EU:C:2011:864 para. 101; see also case T-115/94 *Opel Austria v Council* ECLI:EU:T:1997:3 para. 90.

[3] See, among others, A Gianelli, 'Customary International Law in the European Union' cit. 95: "the expressions employed by courts do not clarify the relationship between customary international law and EU law [...]". Similarly see C Binder and JA Hofbauer, 'Applicability of Customary International Law to the European Union as a *Sui Generis* International Organization. An International Law Perspective' in F Lusa Bordin, AT Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press 2022) 1, 7: "the questions why and when the EU is bound by CIL still have not been answered in definite terms". See, also T Konstadinides, 'Customary International Law as a Source of EU Law: A Two-Way Fertilisation Route?' (2016) YEL 513, 514; KS Ziegler, 'The Relationship between EU Law and International Law' in D Patterson and A Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) 45; P Gragl, 'The Silence of the Treaties: General International Law and the European Union' (2014) GYIL 375; J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 33.

[4] E Cannizzaro, 'La sovranità mista: l'UE e i suoi Stati membri come soggetti dell'ordinamento internazionale' in *L'internazionalizzazione dei mezzi di comunicazione e la sovranità statale* - VII Convegno SIDI, Napoli 24-25 maggio 2002 (Editoriale Scientifica 2003) 13, 19.

rights.[5] The European Court of Justice (ECJ) has (implicitly, if ambiguously) accepted this approach by stating that the Union is bound by the international law of treaties due to its power to conclude agreements.[6] The Union is also bound by the international law of the sea in relation to its competences in the field of fisheries and the conservation of the natural resources of the sea.[7] As regards the Union's regulatory powers in areas such as international trade and competition law, it is obliged to abide by all existing rules.[8]

From this perspective, the Union cannot be bound by customary international law in those areas where it lacks competence and therefore lacks the legal capacity to fulfil those obligations.[9] In the absence of such competence, whether expressly or impliedly conferred, customary international rules cannot bind the Union or become part of its legal order. This is the case with the competences retained by the Member States under the principle of conferral.[10] Although the names of those competences vary in the case-law,[11] any rules of general international law that regulate their exercise apply only to the

[5] The Court's case law could be interpreted in this sense. See, in particular, case C-366/10 *Air Transport Association of America (ATAA)* ECLI:EU:C:2011:637, opinion of AG Kokott, para. 134: "every principle of customary international law *to which the European Union is committed* is binding on it under international law" (emphasis added). It follows from this indication that not every rule of customary international law binds the Union, but only those to which it is bound. It is thus reasonable to assume that the EU is bound to respect rules that intercept with its competences. To the contrary see J Odermatt, *International Law and the European Union* cit. 30: "[i]nternational law can provide rules that are applicable equally to all subjects irrespective of power".

[6] See *Racke* cit. para. 45; case C-386/08 *Brita* ECLI:EU:C:2010:91 para. 41; case C-104/16 *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* paras 94 ff. and 100. As a consequence of the competence to conclude agreements, the European Union is also bound by the customary principle of self-determination, as regards the definition of the territorial scope of an agreement (see *Front Polisario* cit. para. 92).

[7] See *Poulsen and Diva Navigation* cit. para. 10, where the Court recognised the Union's obligation, when exercising its competence in fisheries matters, to comply with international law of the sea "in so far as [the principal international conventions on the subject] codify general rules recognised by international custom". See S Boelaert-Suominen, 'The European Community, the European Court of Justice and the Law of the Sea' (2008) The International Journal of Marine and Coastal Law 643-713; E Paasivirta, 'Four Contributions of the European Union to the Law of the Sea' in J Czuczai and F Naert (eds), *The EU as a Global Actor-Bridging Legal Theory and Practice* (Brill Nijhoff 2017) 241-265.

[8] See joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* ECLI:EU:C:1993:120 in which the Court granted extraterritorial application of competition rules (*i.e*. to undertakings located outside Community territory), invoking the general international law principle of territoriality (see para. 18 of the judgment: "the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law").

[9] E Cannizzaro, 'La sovranità mista' cit. 20.

[10] Indeed, it is well known that, according to art. 5(2) TEU, "[C]ompetences not conferred upon the Union in the Treaties remain with the Member States".

[11] They are variously characterised as "competence reserved" (see, *e.g*., case C-281/06 *Jundt* ECLI:EU:C:2007:816 para. 85); "retained powers" (case C-545/03 *Belgacom Mobile* ECLI:EU:C:2005:518 para. 27); "competences of the Member States" (case C-186/01 *Dory* ECLI:EU:C:2003:146 para. 41); "exclusive powers" (see, *e.g*., case T-183/07 *Poland v Commission* ECLI:EU:T:2009:350 para. 86). In literature see B de Witte,

Member States and produce effects exclusively within the framework of the different national legal systems.

Therefore, it could be assumed that the Union is indifferent to the bilateral relationship between the international legal order and the domestic legal framework of the Member States. The Member States exercise rights and obligations flowing from international law autonomously, acting within the scope of their competences.[12] Any breach of those rules should not, in principle, have consequences for the legal order of the Union.[13]

However, a model based on the idea of mutual "indifference" between the EU and the Member States, based on their exclusive competences, does not fully explain complex legal situations in which customary international rules applicable to the Member States interfere, even indirectly, with the competences of the Union, and *vice versa*.[14] On the one hand, the implementation of a rule of customary international law by Member States could affect rights and obligations under EU law. On the other hand, the exercise of EU competences could affect the rights and obligations conferred on Member States by customary law.[15]

In these situations, the Union must reconcile two "equal and opposite" needs. On the one hand, it must ensure that Member States' exercise of rights and obligations under customary international law does not undermine the effectiveness of EU law. On the other hand, it must prevent EU competences from interfering with the rules of customary international law applicable to the Member States. Thus, a model of complete separation

'Exclusive Member State Competences-Is There Such a Thing?' in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States* (Hart Publishing 2017) 59; L Boucon, 'EU Law and Retained Powers of Member States' in L Azoulai (ed.), *The Question of Competence in the European Union* (Oxford University Press 2014) 168. Please refer to ME Bartoloni, 'Competenze puramente statali e diritto dell'Unione europea' (2015) Il Diritto dell'Unione Europea 339.

[12] See, in similar terms, E Cannizzaro, 'Inter-Member State International Law in the EU Legal Order: Some Thoughts on *Slovenia v. Croatia*' (2021) CMLRev 1473, 1479: "[i]nternational law binding the EU is an integral part of EU law and, therefore, also binding on the Member States when they act within the scope of EU law. Outside that scope, however, States remain sovereign entities and their relations are governed exclusively by international law".

[13] *Ibid*. 1479: "[i]t follows that a breach of international law that occurred outside the scope of EU law is irrelevant in that order. In other words, international law binding the EU is part of EU law; international law binding the Member States is merely irrelevant for the EU legal order".

[14] The inadequacy of the model of mutual "indifference" also emerges in relation to other complex legal situations. Several studies (see E Cannizzaro, 'La sovranità mista' cit.13) have clearly illustrated the existence of situations in which States and the Union, albeit individually subject to rules of international law, do not exercise rights and obligations independently of each other, but are subject to mutual coordination.

[15] The interference between customary international law applicable to the MS and EU law – which are in principle separate and autonomous - originated from the existence of a complex legal situation: the former are logically or chronologically linked to the latter or vice versa. Case law shows the existence of a multiplicity of connecting "factors" between rules conferred by customary international law on the MS and EU law which, whilst differing from case to case, lead to regulatory intersections or overlaps capable of triggering conflicts or situations of incompatibility. See ME Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (Editoriale Scientifica 2018) 221.

between the competences of the Union and those of the Member States under customary international law is inconsistent with the (countervailing) need to ensure coordination between the two spheres.

This *Article* aims to explore how the Union reconciles the exercise of EU competences with the exercise of Member States' competences under customary international law. After examining the most prominent models that could theoretically be used to coordinate the two spheres of competence (section II), the attention will turn to the approach adopted by the ECJ (section III) to determine whether this approach affects the prerogatives of the EU Member States as sovereign states under international law (section IV).

II. Models of coordination

In principle, several models could be envisaged to achieve coordination. Those models which, in the abstract, appear to be the most appropriate for achieving a balance of interests from the EU's perspective are considered in the next subsections.

II.1. The primacy model

One possible model is to give priority to either the EU legal order or the international legal order, regardless of the specific interests involved, their subject matter and content, and their importance to either the Union or the international order. This model, called as the "prevalence" model, would ensure coordination or resolve conflicts by giving precedence to one order over the other.

According to this model, the Union's legal order would ensure that EU law is not undermined by the actions of the Member States, even when these are exercising their rights and obligations under customary international law.[16] This priority can be justified on two grounds. First, the EU legal order does not have to comply with those rules of customary international law applicable to its Member States by which it is not bound. It

[16] This need is clear from the Court's jurisprudence and manifested itself in the context of the process of constitutionalisation of the EU (through, in particular, the affirmation of the doctrine of the *primacy of* European norms over national ones and has emerged fully in the theorisation of the doctrine of the autonomy of the EU legal order (Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454). The latter, in particular, presupposes the affirmation – and protection – of the distinctive features of the supranational legal order. See, in this regard, K Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) ELR 815; K Lenaerts, 'The Autonomy of European Union Law' (2019) Post AISDUE www.aisdue.eu; See V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in I Govaere and S Garben (eds), *The Interface Between EU and International Law. Contemporary Reflections* (Bloomsbury Publishing 2019) 45; NN Shuibhne, 'What is the Autonomy of EU Law, and Why Does It Matter?' (2019) ActScandJurisGent 9; I Pernice, 'The Autonomy of the EU Legal Order – Fifty Years After *Van Gend en Loos*' in Cour de Justice del l'Union européenne (ed.), *50ème Anniversaire de l'arrêt, Van Gend en Loos 1963-2013* (Luxembourg 2013) 55.

would be illogical for those rules to impose limits or constraints on EU law.[17] Secondly, prevalence would be justified by the principle of loyal cooperation. According to art. 4(3) TEU, Member States "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties […]"; and "shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives". By imposing obligations on Member States that do not have a material content, but are formulated on the basis of a functional link, art. 4(3) TEU covers a wide range of situations (in principle) governed by international law.[18] Even the exercise, by the Member States, of rights and obligations under customary international law would be subject to art. 4(3) TEU,[19] insofar as they ensure or hinder the effectiveness of EU law.

From an opposing perspective, the "prevalence" model could give priority to the international legal order due to the Union's need to prevent Member States from breaching their obligations under customary international law in the pursuit of EU objectives. The principle of loyal cooperation would also play a primary role. Given its reciprocal nature,[20] it would require the EU to assist and respect the Member States in the exercise of rules of customary international law that may relate to the performance of tasks flowing from the Treaties.[21] The Union should therefore ensure that the exercise of state prerogatives in relation to situations governed by EU law does not lead to a violation of international norms. This approach can be found in judgments that limit the application of EU law to

[17] E Cannizzaro, 'Inter-Member State International Law in the EU Legal Order' cit.

[18] Moreover, as effectively underlined by M Cremona, 'EU External Relations: Unity and Conferral of Powers' in L Azoulai (ed.), *The Question of Competence in the European Union* cit. 80: "the key role played by the duty of sincere cooperation in managing the exercise of competence creates its own difficulties. It is used as a legal basis for the primacy of EU law, for exclusivity, for pre-emption, and to define the parameters within which the Member States may exercise their competence to act. The precise nature of the duty in these different situations is not always clear and this leads to the distinction between them being blurred".

[19] See, for a similar approach, A Dashwood, 'The Limits of European Community Powers' (1996) ELR 114: "the Member States, too, have a part to play through the observance of rules that require them sometimes to take action, but more often to refrain from exercising, or from exercising fully, powers that would normally be available to them as incidents of sovereignty". Similarly, but sceptical, E Cannizzaro, 'Inter-Member State international law in the EU legal order' cit. 1486: "the Court went as far as identifying the ultimate objective to be fulfilled by the obligations flowing from Article 4(3) TEU, namely to 'ensure(s) the effective and unhindered application of EU law in the areas concerned'. This is, to all appearances, a functional link; one, to be sure, which does not refer to the functioning of a specific rule of EU law. The general and vague phraseology employed by the Court to determine the existence of an obligation under Article 4(3) TEU may apply to an extremely vast class of situations in principle governed by international law".

[20] The first paragraph of art. 4(3) TEU states as follows: "[i]n accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States". See K Abderemane, 'L'ancrage de l'engagement des États membres dans l'ordre constitutionnel de l'Union' in L Potvis-Solis (ed.), *Le statut d'État membre de l'Union européenne* (Bruylant 2018) 205, 238.

[21] Art. 4(3) TEU. For this interpretation see, in particular, F Casolari, *Leale cooperazione tra Stati membri e Unione europea* (Editoriale Scientifica 2020) 60.

allow the Member States to exercise their competences in accordance with obligations under customary international law.[22]

In conclusion, the "prevalence" model could be applied in two directions: by giving priority to EU law over customary international law applicable to Member States; or, conversely, by giving priority to customary international law over EU law.

II.2. The balancing model

A second model for coordinating EU law with customary international law applicable to Member States could be based on the need to balance the values at stake. This approach can be referred to as the "balancing model".

This is the paradigm that the case law consistently follows in identifying a mutual accommodation between the exercise of Member States' competences and the EU law.[23] It is present in almost all those cases in which the Member States, when called upon to exercise their competences in accordance with EU law, invoke the existence of so-called *overriding public interest requirements* to limit or eliminate obligations binding on them, thereby (fully) regaining their discretionary powers.

In these cases, the ECJ has to balance the interests at stake, by assessing the importance of the objectives pursued by the state action, the reasonableness of the *standard* of protection invoked by the Member States, and whether there is a method capable of achieving a more appropriate balance between the requirements of the Member States and the obligations of EU. The combination of these criteria through the lens of proportionality enables the ECJ to reconcile the need to preserve a reasonable margin of discretion for the Member States when these regulate matters outside the scope of EU law with the need to ensure the effectiveness of the freedoms guaranteed by the Treaties.

In the application of this model, the coordination between EU law and the customary international law applicable to Member States would take place through a case-by-case analysis. Whereas the Member States could invoke the doctrine of mandatory requirements in order to safeguard interests protected by customary international law, such as the right to determine the rules for the acquisition of nationality, the Court would have the task to decide whether those interests are reasonable, whether the measures adopted by the Member States are proportionate and, eventually, to balance the interests at stake.

III. Concrete application of the models

The models described above are the result of different needs and are therefore based on diametrically opposed approaches. The first model (the prevalence model) seeks to

[22] See section III.1 of this *Article*.

[23] J Schwarze, 'Balancing EU Integration and National Interests in the Case-Law of the Court of Justice' in Court of Justice of the European Union (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013) 257.

safeguard a particular legal order by ensuring that that prevails, regardless of the content of the individual interests in conflict. The second model (the balancing model) is based on the need to take account of the specific interests at stake. As emerges from the case law, the Court applies both models.

The prevalence model is applied in two main situations: to safeguard *obligations* arising for the Member States from customary international law that may be affected by EU law (section III.1); and to safeguard *EU law* that may be affected by the exercise of rights and freedoms conferred on the Member States by customary international law (section III.2).

The balancing model, instead, is applied in a residual manner, especially when the *rights* and *prerogatives* conferred on the Member States by customary international law are of fundamental importance to them. An example is the rule on the attribution of nationality. When the exercise of this right affects EU law, the Court has to ensure a balance between the competing interests at stake (section III.3).

The analysis that follows is based on case studies, without attempting to give a comprehensive examination of the different hypotheses that might be considered by the ECJ.

III.1. The prevalence of obligations under customary international law

Among the many rules of customary international law applicable to Member States, the case law usually distinguishes between those that confer rights and those that impose obligations. As regards those rules that impose obligations, the Court has recognised the existence of different categories, such as those relating to territorial sovereignty and its limits,[24] diplomatic relations[25] and the treatment of foreign States.[26]

As previously stated, in cases where there is interference or conflict between supranational level and customary international obligations applicable to the Member States, the Court usually gives priority to the latter. EU law adjust its content and scope to conform to the customary international rule. The technique used to ensure compliance with

[24] The Court has, for example, recognised the State's obligation to exercise its jurisdiction over vessels flying its flag that are on the high seas (joined cases C-14/21 and C-15/21 *Sea Watch* ECLI:EU:C:2022:604 para. 99); the State's obligation not to obstruct the right of innocent passage of foreign vessels through its territorial sea (*Poulsen and Diva Navigation* cit. para. 22; *Sea Watch* cit. para. 103); the obligation of maritime distress, pursuant to which every State must require any captain of a ship flying its flag to render assistance to persons in danger or distress at sea (*Sea Watch* cit. para. 105); the prohibition to subject any part of the high seas to its sovereignty (*ATAA* cit. para. 103); the prohibition to interfere with a State's full and exclusive sovereignty over its airspace (*ibid*.); the prohibition to prevent overflying of the high seas (*ibid*.).

[25] In particular, the Court has recognised the State's obligation to grant special privileges and immunities to Heads of state (case C-364/10 *Hungary v Slovak Republic* ECLI:EU:C:2012:124 para. 46).

[26] The Court has recognised the prohibition against subjecting a foreign State to jurisdiction (case C-154/11 *Mahamdia* ECLI:EU:C:2012:491 para. 54; case C-641/41 *Rina SpA* ECLI:EU:C:2020:349 para. 56).

an obligation that would otherwise be breached is, in most cases, that of consistent interpretation.[27] Several practical examples can illustrate this trend.

In the *Sea Watch* case,[28] the Court was asked to determine whether the use of reloading vessels for search and rescue at sea justifies additional inspections due to a surplus of persons on board under Directive 2009/16/EC.[29] The Court first recalled that "provisions of EU secondary legislation must be interpreted, to the greatest extent possible, in conformity [...] with the relevant rules and principles of general international law".[30] Against this background, it pointed out that an interpretation that permits the State to conduct an additional inspection on the grounds that cargo ships are carrying "persons in numbers which are out of all proportion to their capacity" would impede the effective implementation of the maritime distress obligation.[31] Under this obligation, "which is derived from the customary law of the sea", "every State must require any master of a ship flying its flag to render assistance to persons in danger or distress at sea".[32] It is clear from the foregoing findings that EU law adapts and conforms to customary international law through interpretation, in order to prevent Member States from breaching an obligation under international law. So, interpretation in conformity with customary international law, to which the Union considers itself bound, serves to protect a set of obligations addressed to the States.

In the case of *Hungary v Slovak Republic*,[33] the Court was asked to determine whether a European citizen who holds the position of Head of State can legitimately be subject,

[27] See, in particular, F Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* cit. 395; A Alì, 'Some Reflections on the Principle of Consistent Interpretation through the Case Law of the European Court of Justice' in N Boschiero, T Scovazzi, C Pitea and others (eds), *International Courts and the Development of International Law* (Springer 2013) 881; D Simon, 'La panachée de l'interprétation conforme: injection homéopathique out thérapie palliative?' in V Kronenberger (ed.), *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins. Mélanges en l'honneur de Paolo Mengozzi* (Bruylant 2013) 279; A Bernardi (ed.), *L'interpretazione conforme al diritto dell'Unione europea. Profili e limiti di un vincolo problematico* (Jovene 2015); S Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts* (Intersentia 2019).

[28] See *Sea Watch* cit.

[29] Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control, as amended by Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017.

[30] *Sea Watch* cit. para. 92.

[31] *Ibid*. paras 117 and 118.

[32] *Ibid*. para. 105. See, also, joined cases C-14/21 and C-15/21 *Sea Watch* ECLI:EU:C:2022:104, opinion of AG Rantos, para. 45.

[33] Case C-364/10 *Hungary v Slovakia* ECLI:EU:C:2012:630. See N Aloupi, 'Les rapports entre droit international et droit de l'Union européenne. A propos du statut de chef d'Etat membre au regard de l'arrêt Hongrie v. République Slovaque du 16 Octobre 2012 (Aff. C-364/10)' (2013) Revue général de droit international public 7; S Boelaert, 'Minding the Gap: Reflections on the Relationship between EU Law and Public International Law in the Light of the Judgment in Case C-364/10 *Hungary v Slovakia*' in J Czuczai and F Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice, Liber Amicorum in honour of Ricardo Gosalbo Bono* (Brill 2017) 215.

on the basis of international law, to restrictions to the right of free movement, as conferred by art. 21 TFEU. After acknowledging that "on the basis of customary rules of general international law [...] the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities",[34] the Court held that the presence of a Head of State on the territory of another State "*imposes on that latter State the obligation* to guarantee the protection of the person who carries out that duty".[35] The Court concluded that the scope of the rules on the freedom of movement is restricted by the rules on diplomatic relations. Specifically, it held that the right of free movement does not apply to a European citizen who holds the position of Head of State.[36] This demonstrates that the rules on free movement are interpreted in accordance with the obligations of the Member States under customary international law.[37]

In the *Mahamdia* case,[38] the Court had to determine whether, under Regulation 44/2001,[39] a third State could be sued in the courts of a Member State in the context of an employment dispute. First, the Court acknowledged the existence of a rule of customary international law on immunity, which prohibits a State from "be[ing] sued before the courts of another State".[40] Secondly, the Court indicated that there is a consensus on the fact that the rule does not apply to "acts performed *iure gestionis* which do not fall within the exercise of public powers".[41] Thirdly, the Court concluded that disputes between an employee and the employer-State, where the State has exercised public powers, fall outside the scope of the Regulation and are subject to national law. Once more, the Court interpreted Regulation 44/2001 as consistent with customary international law on state immunity thereby preventing the exercise of a Member State's jurisdiction from creating a conflict with that rule. The customary rule on state immunity thus influences the interpretation of the Regulation 44/2001 to prevent the exercise of jurisdiction from encroaching on the sovereignty of the defendant State by bringing the Member State into conflict with international law.[42]

[34] *Hungary v Slovak Republic* cit. para. 46.

[35] *Ibid*. para. 48 (emphasis added).

[36] *Ibid*. para. 50.

[37] See case C-364/10 *Hungary v Slovak Republic* ECLI:EU:C:2012:124, opinion of AG Bot, para. 52: "the area of diplomatic relations remains within the competence of the Member States, subject to international law. The same applies, in my view, to the travel of the Heads of State of the Member States, including their entry into the territory of other Member States in circumstances such as those at issue in this case".

[38] See case C-154/11 *Mahamdia* ECLI:EU:C:2012:491.

[39] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[40] "Such immunity of States from jurisdiction is enshrined in international law and is based on the principle par in parem non habet imperium, as a State cannot be subjected to the jurisdiction of another State", see *Mahamdia* cit. para. 54.

[41] *Ibid*. para. 55. See also, for the same argument, the more recent *Rina SpA* cit. para. 56.

[42] See, in these terms, S Migliorini, 'Immunità dalla giurisdizione e regolamento (CE) 44/2001: riflessioni a partire dalla sentenza *Mahamdia*' (2012) Rivista di diritto internazionale 1089.

Finally, in the *ATAA* case,[43] the Court was asked, *inter alia*, to adjudicate on the validity of Directive 2008/101/EC in the light of customary international law.[44] The specific question was whether, by extending the territorial scope of the regulation on gas emissions to aircraft operators of third States, the Directive violated certain rules of customary international law that require States not to interfere with the sovereignty of other States.[45] The Court began from pointing out that the principles of customary international law in question "appear only to have the effect of creating obligations between States".[46] However, since they are "connected with the territorial scope of Directive 2003/87, as amended by Directive 2008/101",[47] they must be respected by the Union in the exercise of its powers.[48] In this ambiguous statement, the Court recognizes for the first time the existence of obligations that, by definition, apply only to States. However, the requirement for the EU to comply with those obligations derives specifically from their connection with Union law. The Court therefore concluded that the Directive must be interpreted, and its scope limited, in the light of the rules of international law that define and delimit the scope of the sovereign rights of States.[49] This approach reflects the need to respect the obligations of Member States under international law.

This case law seems to confirm that, in the event of interference or conflict between EU law and Member States' obligations under customary international law, coordination can be achieved by ensuring that the latter prevails, mainly through consistent interpretation.

This approach prompts two considerations. First, the need to respect the international obligations of the Member States could be a manifestation of the principle of loyal cooperation, although in the opposite direction: the priority given by the Court to international law of the Member States makes it possible to protect them from the consequences of non-compliance. This approach highlights one of the few situations in which the EU owes loyal cooperation to its Member States.[50]

[43] See case C-366/10 *Air Transport Association of America (ATAA)* ECLI:EU:C:2011:864.

[44] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

[45] Specifically, the rules of customary international law invoked concerned "the principle that each State has complete and exclusive sovereignty over its airspace"; "the principle that no State may validly purport to subject any part of the high seas to its sovereignty' and 'the principle which guarantees freedom to fly over the high seas", see *ATAA* cit. para. 111.

[46] *ATAA* cit. para. 109.

[47] *Ibid*. para. 121.

[48] *Ibid*. para. 123.

[49] *Ibid*.

[50] An analogy can be drawn with the clause in art. 351(1) TFEU. This provision allows Member States to preserve pre-existing agreements conflicting with Union's law, insofar as this is necessary to enable contracting third parties to enjoy the related rights. This was considered a specific concretisation of the principle of fairness. Indeed, such an approach has made it possible to protect Member States from the legal consequences of non-compliance with customary international obligations conflicting with Union law (see

Secondly, when the Court states that "the rules of customary international law [...] bind the institutions [...]", it does not exclusively refer to rules binding the Union, but also to those that are binding its Member States. The Court seems to suggest that the Union's legal order is bound by customary international law as a whole, irrespective of whether a particular rule imposes obligations on the EU or on its Member States.[51] Such an unconditional openness to the constraints of general international law can be explained by the difficulty of establishing clear criteria of imputability in relation to acts or omissions committed by the Member States, but linked to EU law in different ways.[52]

III.2. The prevalence of rights and freedoms under EU law

The ECJ has also recognised powers, prerogatives and freedoms retained by Member States under customary international law, the exercise of which could affect or impair rights and freedoms protected by the Union legal order.

Customary international rules on citizenship, flag attribution to ships, and territorial water delimitation may interfere with the exercise of EU competences. For instance, the Court has found that the exercise of powers in matters of nationality determines whether

J Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009) 115; S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Ledizioni 2018) 115). Apart from art. 351 TFEU, the only case in which reference to the principle of loyalty has been made to preserve the rules of Member States is the ruling in case C-308/06 *Intertanko* ECLI:EU:C:2008:312.

[51] This argument emerges, albeit in a similarly confused manner, in the *Intertanko* judgment (see *Intertanko* cit.). On this, see E Cannizzaro, 'Il diritto internazionale nell'ordinamento giuridico comunitario: il contributo della sentenza *Intertanko*' (2008) Il Diritto dell'Unione Europea 645; M Mendez, 'The Legal Effects of MARPOL Convention and the UN Convention on the Law of the Sea: Intertanko' in G Butler and RA Wessel (eds), *EU External Relations Law* (Hart Publishing 2022) 557. On that occasion, the Court was asked to assess the legality of Directive 2005/35/EC on ship-source pollution and related criminal penalties in relation to the Montego Bay Convention and the Marpol 73/78 Convention. With respect to the latter, the Court ruled out the possibility of a direct review of the legitimacy of the act of secondary legislation with respect to an agreement that was not internationally binding on the European Union. However, the Court also observed that Marpol 73/78, although not binding on the then Community, was binding on all the Member States, a fact which has "[...] consequences for the interpretation of, first, UNCLOS and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78" (*Intertanko* cit. para. 52). According to this approach, the principle of good faith and the duty of loyal cooperation would require that Union law be interpreted in the light of an international agreement binding on all the Member States. Although phrased in somewhat ambiguous terms, this passage seems to imply two premises: on the one hand, the Union cannot ignore the existence of international obligations entered into by all Member States at the international level that may be relevant in determining the exact content of internal rules of the system; on the other hand, the principle of good faith is also applicable to obligations whose ownership is, at least formally, vested in the Member States alone. See F Casolari, *Leale cooperazione tra Stati membri e Unione europea* cit. 245; S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* cit. 304; M Mendez, 'The Legal Effects of MARPOL Convention and the UN Convention on the Law of the Sea' cit. 557.

[52] See, *mutatis mutandis*, Opinion 2/13 cit. para. 221 ff.

a person is entitled to the right of establishment,[53] in circumstances where "under international law [...] it is for each Member State [...], to lay down the conditions for the acquisition and loss of nationality".[54] More generally, the Court has held that the determination of those conditions "affects the rights conferred and protected by the legal order of the Union".[55] This is particularly relevant when decisions to withdraw naturalisation deprive citizens of their *status* as citizens of the Union. As regards the attribution of flags to vessels, the Court stated along analogous lines that the exercise by the Member States of their power to register vessels has the effect of determining which vessels belong to their fishing fleet and are therefore entitled to count their catches against national quotas.[56] Similar considerations apply to the delimitation of territorial waters and the establishment of baselines. The exercise of such competences could alter the scope of the protection provided by EU law to specific fishing activities.[57]

In the foregoing cases, customary international law may grant Member States powers that could potentially conflict with the rights and freedoms recognised by the EU law. As a consequence, if Member States were to exercise their rights under international law, they could affect the rights and freedoms deriving from EU law and limit their scope.

In this situation, the prevalence model applies in reverse to the hypothesis examined in the previous paragraph. It does not protect customary international rules, but it safeguards EU law from being affected by the exercise of those rules.

As is well known, the ECJ expresses this requirement in a formula, which stipulates that "it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled [...], but, in exercising that power, the Member States must comply with the rules of Community law".[58] The case law acknowledges that Member States have prerogatives conferred by customary international law. Nevertheless,

[53] See case C-369/90 *Micheletti and Others* ECLI:EU:C:1992:295 para. 10. See, moreover, case C-179/98 *Mesbah* ECLI:EU:C:1999:549 para. 29; case C-192/99 *Kaur* ECLI:EU:C:2001:106 para. 19; case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639 para. 37; case C-135/08 *Rottmann* ECLI:EU:C:2010:104 para. 39.

[54] *Micheletti and Others* cit. para.10.

[55] *Rottmann* cit. para. 48.

[56] See case C-221/89 *Factortame* ECLI:EU:C:1991:320.

[57] See case C-146/89 *Commission v United Kingdom* ECLI:EU:C:1991:294. Specifically, "the objectives of Regulation No 170/83 could be compromised if the zones in which the fishing activities defined and authorized therein are carried out were to be shifted – by as much as several nautical miles in the present case – and were to be included in areas in which the fishing grounds, natural conditions and density of maritime traffic were to prove very different" (para. 23).

[58] Case C-246/89 *Commission v Spain* ECLI:EU:C:1991:375 para. 15; *Micheletti* cit. para. 10; *Rottmann* cit. para. 41; case C-192/99 *Kaur* ECLI:EU:C:2001:106 para. 19.

the exercise of those prerogatives must not undermine the effectiveness of EU law.[59] Despite its ambiguity,[60] this formula therefore indicates a preference for EU rules over customary international law. The requirement that the Member States exercise their prerogatives under customary international law in accordance with their obligations under EU law implies the prevalence of EU law. The Court has therefore held that "in exercising its powers for the purposes of defining the conditions for the grant of its 'nationality' to a ship, each Member State must comply with the prohibition of discrimination against nationals of Member States on grounds of their nationality".[61] Similarly, the Court has ruled that "the decision to make use of the options under the rules of international law" to extend their territorial waters up to twelve miles must not affect "the scope" of the freedoms guaranteed by EU law.[62]

A passage in *Factortame* uphold this scheme. The Court responded to the objection of the United Kingdom and other Member States that the Treaty could not be interpreted as interfering with the powers retained by Member States under international law. The Court stated that "[t]hat argument might have some merit only if the requirements laid down by Community law with regard to the exercise by the Member States of the powers which they retain [...] *conflicted* with the rules of international law".[63] The statement made by the Court has relevant implications. The ECJ clarified that Member States are only relieved of their obligation to exercise their prerogatives under customary international law

[59] The Court thus seems to base this solution on the distinction that can in principle be drawn between the "existence" and the "exercise" of a competence: the exclusive ownership of a competence by the Member States is neither affected nor prejudiced by the Union's legal system and its framework of rules and competences; this, however, does not preclude the Member States, in the concrete exercise of their reserved competences, from being subject to certain constraints. See L Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) European Journal of Legal Studies 192; J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328.

[60] The ambiguities and limits of such a solution, which has been called a kind of "mutual adjustment resolution" (see, for this expression, L Boucon, 'EU Law and Retained Powers of Member States' in L Azoulai (ed.), *The Question of Competence in the European Union* (Oxford 2014) 175), are obvious. On the one hand, by indicating that, in a matter assigned to the exclusive competence of the States, the Union must refrain from interfering, the Court introduces, in accordance with the principle of attribution, a kind of safeguard clause in favour of competences retained by the States against intrusive acts by the Union. On the other hand, by laying down an obligation for States to exercise their residual competences in compliance with Union law, it legitimises limitations on the exercise of those competences to safeguard the sphere of competences assigned to the Union. See ME Bartoloni, 'Competenze puramente statali e diritto dell'Unione europea' cit. 343.

[61] *Factortame* cit. para. 29. Specifically: "a condition of the type at issue in the main proceedings which stipulates that where a vessel is owned or chartered by natural persons they must be of a particular nationality and where it is owned or chartered by a company the shareholders and directors must be of that nationality is contrary to Article 52 of the Treaty" (*ibid*. para. 30). See, also, *Commission v Spain* cit. paras 30 and 31; case 334/94 *Commission v France* ECLI:EU:C:1996:90 para. 5; case C-151/96 *Commission v Ireland* ECLI:EU:C:1997:294 para. 12; case C-62/96 *Commission v Greece* ECLI:EU:C:1997:565 para. 18.

[62] *Commission v United Kingdom* cit. para. 25.

[63] *Factortame* cit. para. 16 (emphasis added).

in accordance with EU law in the event of a conflict between the supranational and international spheres. In other words, Member States would no longer be obliged to give precedence to EU law if doing so would conflict with a rule of customary international law. Although the Court did not provide any guidance on this point, it is reasonable to assume that such a conflict is highly unlikely where EU law serves to limit mere "options under the rules of international law",[64] which the Member States may or may not choose to exercise. That said, the next section will show that the foregoing assumption may be challenged when EU law interferes with prerogatives of such a fundamental importance for the Member States as to make them difficult to relinquish. In such cases, the prevalence of EU law over rights and prerogatives under customary international law must be reconsidered to allow for a mutual balancing of interests.

III.3. The balance of interests: national vs. EU citizenship

As previously stated, the balancing model is a technique used to coordinate the exercise of rights and prerogatives by the Member States under customary international law and EU law when no interest is considered pre-eminent. It is used when the competing prerogatives are of paramount importance for each of the legal systems to which they belong. In this context, the technique aims to achieve a balance of interests only after weighing up the competing interests on a case-by-case basis.

This model applies, for instance, to the complex and controversial relationship between Union citizenship and national citizenship.

On the one hand, European citizenship is defined as the *fundamental* status of citizens of the Member States,[65] from which "the substance of the rights" derives.[66] These rights include prerogatives that, although not fully defined in their content and scope,[67] are necessary for the full enjoyment of *status of* European citizen and are inherent to the

[64] *Commission v United Kingdom* cit. para. 25.

[65] See, in particular, case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458 para. 31, and case C-413/99 *Baumbast* ECLI:EU:C:2002:493 para. 82.

[66] See, most recently, case C-528/21 *M.D.* ECLI:EU:C:2023:341 para. 60.

[67] Among these, the Court expressly mentions the right not to be forced to leave the territory of the Union as a whole. Such a situation would in fact have the effect of depriving EU citizens of the possibility "of the genuine enjoyment of the substance of the rights which that status confers upon him or her" (*ibid*.). The right to stay and be able to remain in the territory of the Union is thus not only a prerequisite for benefiting from the rights attached to citizenship, but also as the most relevant and characteristic consequence of that citizenship. This dual normative nature has non-negligible implications. Please refer to ME Bartoloni, 'Il caso Ruiz-Zambrano: la cittadinanza dell'Unione europea tra limiti per gli Stati membri e garanzie per i cittadini' (2011) Diritti umani e diritto internazionale 652. See also F Strumia, 'Ruiz Zambrano's *Quiet Revolution*' in F Nicola and B Davies (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 224; A Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart Publishing 2016) 48; NN Shuibhne, 'The Developing Legal Dimensions of Union Citizenship' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Law* (Oxford University Press 2015) 477.

very idea of European citizenship and to the "constitutional dimension" that it has acquired over time.[68] It follows that some rights, such as the right not to be forced "to leave the territory of the European Union as a whole",[69] that are both fundamental and intrinsically linked to the concept of Union citizenship, would therefore be exempt from any interference. Any impingement on these rights, even if justified by the need to safeguard countervailing interests worthy of protection, could lead to a substantial impairment of the status of the European citizen and therefore to its denial. If a citizen, who initially possessed the status of a European citizen, is compelled to leave the Union's territory due to the withdrawal of national citizenship, this scenario would arise.[70]

On the other hand, national citizenship, which may be defined as the public-law link that binds an individual to a particular State, is based on a legal relationship that presupposes "a special bond of allegiance".[71] Citizenship helps the State to define its people and constitute its national community. The determination of criteria for acquiring and losing loss citizenship is an expression of the State's sovereign will to attribute the quality of *citizen* to some individuals and not to others, thus defining the boundaries of the national community. According to this understanding, "international law leaves it to each state to settle by its own legislation the rules relating to the acquisition of its nationality".[72] Indeed, citizenship is one of the most significant manifestations of State sovereignty.[73]

There are thus two fundamental *statuses* that are inextricably linked to the specific features of each system: the constitutional dimension that the Union has acquired over time and the sovereign character inherent in statehood. Although coordination is necessary due to the impact of one status on the other, such a coordination cannot be achieved by giving priority to one status at the expense of the other. Where national rules affect the status of European citizenship by either restricting or extending its scope in the procedures for granting and revoking citizenship, the only appropriate solution is to strike a balance.

[68] See J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 608; E Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) CMLRev 13.

[69] *E.g*., *M.D.* cit. para. 60.

[70] In this sense see the opinion of AG Szpunar (case C-165/14 *Rendón Marín v Administración del Estado* ECLI:EU:C:2016:75, opinion of AG Szpunar, and case C-304/14 *Secretary of State for the Home Department v CS* ECLI:EU:C:2016:75, opinion of AG Szpunar): "it would then be appropriate to consider that observance of the essence of the rights deriving from the fundamental status of citizen of the Union operates, [...], 'as an absolute, insuperable limit' to any possible limitation of the rights attaching thereto, that is to say, as a 'limit to limits'. Indeed, failure to observe the essence of the rights conferred on citizens of the Union leads to those rights becoming 'unrecognisable as such', so that it would not then be possible to speak of a 'limitation' of the exercise of those rights but rather, purely and simply, of the 'abolition' of those rights" (para. 130).

[71] See extensively case C-135/08 *Rottmann* ECLI:EU:C:2009:588, opinion of AG Poiares Maduro, paras 17-19.

[72] *Ibid*. See ICJ *Nottebohm* (Second Phase) [6 April 1955] p. 23.

[73] See M van den Brink, 'A Qualified Defence of the Primacy of Nationality over European Union Citizenship' (2019) ICLQ 177.

The Court seems inclined to strike an overall balance between the conflicting interests.[74] According to settled case-law, the ECJ reviews the discretion of the Member States by analysing the appropriateness of a decision to revoke national citizenship and the resulting loss of Union citizenship based on three elements: the interest pursued by the State in revoking citizenship; the appropriateness of the level of protection required to safeguard the interests underlying the revocation; and compliance with the principle of proportionality in relation to the consequences of the revocation for the affected persons and their family members in the event of loss of Union citizenship.

At a first stage, in accordance with the principle of international law "that the Member States have the power to lay down the conditions for the acquisition and loss of nationality",[75] the Court recognised the legitimacy of the objective pursued by the Member States in withdrawing nationality, namely "to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality".[76]

As regards the grounds for revocation decisions and the review of their reasonableness, the Court first confirmed that they are worthy of protection. The Court thus acknowledged that "a decision withdrawing naturalisation because of deceit corresponds to a reason relating to the public interest".[77] The same conclusion was reached in relation

[74] At present, however, the Court has never been asked to deal with nationality acquisition regimes. Rather, in a number of judgments, the Court, in stating that "it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State" (*Micheletti* cit. para. 10; case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539 para. 28; *Zhu and Chen* cit. para. 39), has so far shown a tendency not to want to review the way in which States determine the rules for the acquisition of nationality. A different situation would appear to be looming with the recent infringement actions brought by the Commission against Malta (Commission Press Release of 29 September 2022, IP/22/5422 on Infringement Procedure INFR(2020)2301) and Cyprus (Commission Press Release of 9 June 2021 INF/21/2743 on Infringement Procedure INFR(2020)2300) for the controversial so-called "citizenship by investment" which, by definition, relate to attribution (see M Fernandes, C Navarra, D de Groot and M G Munoz, 'Avenues for EU Action on Citizenship and Residence by Investment Scheme. European Added Value Assessment' (October 2021) European Parliamentary Research Service - PE 694.217 www.europarl.europa.eu; A Scherrer and E Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU. State of Play, Issues and Impacts' (October 2018) European Parliamentary Research Service - PE 627-128 www.europarl.europa.eu). This is a relatively recent phenomenon detected by the European institutions and the subject of concern due to the risk of commodification of national and, thus, European citizenship (see European Parliament Resolution of 16 January 2014 on EU citizenship for sale (2013/2995(RSP) and European Parliament Resolution of 9 March 2022 with proposals to the Commission concerning citizenship and residence by investment schemes (2021/2026/INL).

[75] *Rottmann* cit. para. 48; case C-221/17 *Tjebbes* ECLI:EU:C:2019:189 para. 30; case C-118/20 *JY* ECLI:EU:C:2022:34 para. 37.

[76] *Rottmann* cit. para. 51; *Tjebbes* cit. para. 33; *JY* cit. para. 52.

[77] *Rottmann* cit. para. 51.

not only to a decision to revoke a nationality on the grounds of the absence or termination of an effective link between the MS and its citizens,[78] but also in relation to a decision "to revoke the assurance as to the grant of nationality on the ground that the person concerned does not have a positive attitude towards the Member State of which he or she wishes to acquire the nationality and that his or her conduct is liable to represent a danger to public order and security of that Member State".[79] Both decisions were deemed to be based "on a reason relating to the public interest".[80]

Finally, the measure of revocation, which is in principle lawful, is subject to an examination of proportionality in relation to its impact on the persons concerned and, if applicable, their family members resulting from the loss of rights enjoyed by every citizen of the Union. Although the judgment in *Rottmann* had established some criteria for evaluating the appropriateness of the revocation measure,[81] subsequent judgments broadened and refined those criteria. Therefore, it is now necessary to examine the strict congruity between the objective pursued by the national authorities and the impact of the revocation on the entire range of rights guaranteed by the status of citizen of the Union.[82]

In other terms, the procedure aims to balance the interests of the Member States in exercising their prerogatives in matters of nationality under customary international law, on the one hand, and the *status* of Union citizens, on the other hand, through the filter of proportionality.

When applying this model, coordination between the rights and prerogatives of the Member States under customary international law and EU law is based on a case-by-case analysis. The wide discretion granted by customary international law to States in determining the means to acquire and lose nationality seems to be counterbalanced by an equally thorough assessment of the proportionality of the measures adopted in relation to the restrictive effects produced.

[78] *Tjebbes* cit. paras 35 and 39.

[79] *JY* cit. para. 57.

[80] *Tjebbes* cit. para. 39 and *JY* cit. para. 57.

[81] In *Rottmann* cit., the Court indicates that the loss of EU citizenship *status* "is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality" (para. 56).

[82] In *Tjebbes* cit., in addition to "a full assessment based on the principle of proportionality enshrined in EU law" (para. 43), the Court requires the national authorities to verify that the loss of nationality "is consistent with the fundamental rights guaranteed by the Charter, the observance of which the Court ensures" (para. 45). In *JY* cit., it states that the concepts of "public policy" and "public security" relied on by the national legislature as the basis for the revocation decision [...] "must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions" (para. 68).

IV. Concluding remarks

In complex legal situations, where the exercise of the competences conferred on the Member States by customary international law must be coordinated with EU law, the Court adopts a pragmatic approach. Customary international law is not considered a homogeneous body of law that EU law must comply unambiguously. On the contrary, depending on whether customary international law creates rights or obligations, and depending on their relevance for the Member State, the ECJ adopts different solutions.

In short: *i)* where customary international law establishes obligations, these obligations enjoy priority over EU law and, a fortiori, over MS's law; the principle of consistent interpretation applies where applicable; *ii)* where customary international law confers rights or prerogatives on the MS, EU law enjoy priority over customary international law; MS must therefore exercise their rights in accordance with EU law; *iii)* where customary international law confers rights and prerogatives on the Member States that are of paramount importance for the protection of their sovereignty, the Court tends to settle the conflict between EU law and MS's customary law on a case-by-case basis taking into account the respective interests and balancing against each other.

These are profoundly different solutions that demonstrate the multifaceted approach taken by the Court when Member States exercise rights and obligations under customary international law in relation to EU law. Although these solutions have different outcomes, they share two commonalities.

First, all solutions aim to achieve a reasonable arrangement of the interests at stake in order to overcome the functional shortcomings resulting from the fragmentation of competences between the EU and its Member States at the international level. Mutual coordination between the EU and its Member States thus compensates for the legal or *de facto* impossibility of each entity to act with full powers under international law.

Second, these trends in case law are a clear manifestation of the duty of loyal cooperation that mutually binds the EU and the Member States. Although not explicitly mentioned, the principle of loyal cooperation plays a central role, reflected in the Union's need to prevent its Member States from breaching their obligations under customary international law and in the Member States' duty to exercise their prerogatives or freedoms under customary international law in compliance with EU law. In this context, the bi-directional effect of the principle of loyal cooperation works precisely through the *offsetting* of different positions. The EU's respect for the Member States' obligations under customary international law is offset by the obligation of the Member States to exercise their rights and freedoms under customary international law in a manner consistent with EU law.

Through this composition of needs and interests, the Court demonstrates both pragmatism and its deep understanding of the principle of loyalty, which aims to prevent conflicts between the EU and its Member States. As pointed out by Advocate General Kokott in the *Intertanko* case, a "conflict between Community law and Member States' obligations under international law will [...] always give rise to problems and is likely to undermine

the practical effectiveness of the relevant provisions of Community law and/or of international law. It is therefore sensible and dictated by the principle of cooperation between Community institutions and Member States that efforts be made to avoid conflicts, particularly in the interpretation of the relevant provisions".[83]

Therefore, the need to prevent conflicts between the two normative levels, through the solutions examined above, clearly affects the exercise of the sovereign powers retained by the Member States. However, this need is of such a fundamental importance for the EU legal order, that it justifies that the sovereign powers and prerogatives of the Member States be "used in a functionally coordinated framework, on behalf of, and for the benefit of, the entire unit",[84] namely the EU and the Member States. This case law thus reflects a principle whereby the EU and its MS, while acting as separate legal entities within their respective spheres of competence, tend to work together as parts of a more comprehensive entity in situations where international rights and obligations of one entity interfere with domestic law of the other thus creating a normative intertwining between their respective legal orders.

[83] Case C-308/06 *Intertanko* ECLI:EU:C:2007:689, opinion of AG Kokott, para. 78.

[84] E Cannizzaro, 'Fragmented Sovereignty? The European Union and its Member States in the International Arena' (2003) The Italian Yearbook of International Law 56.