International Law as a Tool for the European Union

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International law in constitutional change of EU – Rigidity of amendment – EU amending and accession treaties not reviewable – International law in internal development of Union law – Conventions/treaties by member states jointly – Acts of the representatives of the governments – International law in the agreements with third states – Exportation of legal rules – Conditionality policies – Legislating through international agreements

Introduction

'Weak as constraint, strong as tool' was the title chosen, some years ago, for an essay about the place of international law in US foreign policy.[1] The same could be said, I will argue in this paper, about the European Union, but for different reasons. Whereas US foreign policy seems to be marked, in recent years, by a mixture of active efforts to impose international obligations and enforcement mechanisms on others (international law as 'strong tool') whilst avoiding to undertake similar obligations for the United States itself (international law as 'weak constraint'),[2] the European Union appears to be a less 'unilateralist' foreign policy actor that promotes the adoption of multilateral international standards but is also prepared to abide by them itself. However, the purpose of this paper is not to evaluate the 'good international citizenship' of the European Union, as compared with the behaviour of other international actors.[3] The aim, rather, is to highlight

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[1] N. Krisch, 'Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy', in D.M. Malone and Y.F. Khong (eds.), *Unilateralism and U.S. Foreign Policy* (Boulder, Lynne Rienner 2003) p. 41.

[2] *See* the arguments presented by Krisch, n. 1 *supra*.

[3] *See* T. Dunne, 'Good Citizen Europe', 84 *International Affairs* (2008) p. 13; *see also* several contributions in the *European Journal of International Law* (2004) No.5, and in the volume *Droit international et diversité des cultures juridiques – International law and diversity of legal cultures* (Paris, Pédone 2008).

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the role of international law as a 'tool' or an 'asset' for the European Union and its member states, when developing the agenda of European integration both internally and externally. Thereby, the paper seeks to complement the mainstream EU law literature which examines international law above all as a source of obligations and constraints for the European Union.

Indeed, when considering the overall subject of this special issue, namely the relationship between European law and international law, most jurists think first and foremost about questions connected with the compliance by the European Union and its member states with their obligations under international law. This question has been often examined, over the last fifteen years, in specific connection with WTO law and its (non-)effect within the legal order of the European Union and its member states. More recently, the question of the relation between United Nations law and EU law[4] was put in a new and dramatic light by the anti-terrorism measures decided by the UN Security Council and the legal challenges to their implementation by the European Union, particularly in the *Kadi* and *Al Barakaat* cases that were recently decided by the European Court of Justice.[5] Also, there has been a long-standing interest in the manner and extent to which international human rights standards, in particular the European Convention of Human Rights, have been integrated in the EC legal order by means of the general principles case-law of the European Court of Justice.

This paper looks at the relationship between international and European law from another angle, as it seeks to highlight how public international law has been (and still is) an *instrument for the advancement of European integration*, more than a *constraint for the EU institutions.*

It is important to remember, in this respect, that the European integration process itself developed, historically speaking, as an international legal experiment. A newspaper article by Valéry Giscard d'Estaing, in which he commented on the agreement reached by the EU heads of government on the text of the Treaty of Lisbon, was entitled: '*La boîte à outils du traité de Lisbonne*'.[6] The Lisbon Treaty is, indeed, the last of a series of international treaties which EU member states have drawn up in order to create and define the *tools* of their European co-operation. In this sense, international law has provided, from the start and until now, the legal instruments needed for the *overall organisation* of European integration (*see infra* p. 267 ff.). In addition to this 'macroscopic' role, international law has

[4] *See* generally N.D. White, 'The Ties that Bind: The EU, the UN and International Law', 37 *Netherlands Yearbook of International Law* (2006) p. 57, and, with specific reference to anti-terrorism, P. Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', 3 *European Constitutional Law Review* (2007) p. 183.

[5] ECJ 3 Sept. 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* v. *Council.*

[6] *Le Monde*, 27 Oct. 2007.

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also provided instruments for the day-to-day operation of the European Union, which have served both for its *internal development* (for example, the complementary conventions between some or all of its member states, such as Schengen or Europol) and for its *external influence*, namely through the conclusion of agreements with third states (*see infra* p. 272 ff.).

Shaping the overall legal framework of European integration through international law

In the immediate post-war years, European federalists fervently hoped to create a United Europe based on a federal constitution inspired by the United States. The European governments chose instead to experiment with new forms of European co-operation by using the international treaty instrument: the OEEC, the Council of Europe, and the European Coal and Steel Community were created within a few years and, although their degree of supranational innovation was very different, they were all international organisations based on a treaty which was subject to ratification by the parliaments of their member states. The treaty path was also taken some years later when the European Economic Community was established by the Treaty of Rome in 1957 and was never abandoned after that. Since the 1960s, revisions of the so-called 'founding treaties' have been enacted as treaties under public international law.

Thus, the main instrument of constitutional change in the European Union has been, during the last 25 years, the revision treaty, that is, an international agreement between the member states of the European Union making amendments to the 'founding treaties'. This was true also for the latest, very protracted, reform round (2002-2009) which was, in contrast with the previous ones, a self-conscious attempt to create a formal Constitution for Europe (at least in its first phase, until the summer of 2005) but which nevertheless used the international treaty instrument in order to attain that objective. Indeed, it is worth noting that, despite the expressed aim of *repealing* the current treaties,[7] the adoption of a European Constitution was seen by all the leading actors, and without much controversy, as involving technically speaking a *revision* of the current treaties in accordance with the procedure of Article 48 EU Treaty, rather than the creation of a wholly new legal edifice. The Constitutional Treaty's Article IV-447 confirmed that the Treaty had to be 'ratified by the High Contracting Parties in accordance with their respective constitutional requirements' before it could enter into force, which corresponded to the requirement in the last sentence of Article 48 EU Treaty. In fact, this Article IV-447 used the coded language typical of the law of international

[7] Art. IV-437 of the Treaty establishing a Constitution for Europe.

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treaties ('ratify', 'enter into force', 'High Contracting Parties') and was perhaps the clearest formal confirmation that the Constitutional Treaty was indeed, in the view of its drafters, a genuine international treaty. The very same language is, of course, repeated in Article 6 of the Lisbon Treaty, which is that treaty's entry-into-force clause.

All the revision treaties of the last 25 years, from the Single European Act to the Lisbon Treaty, were important steps in the development of the European integration process. They were also, from the international law perspective, cases of amendment of multilateral treaties, the legal regime of which is set out in Articles 39 to 41 of the Vienna Convention on the Law of Treaties. Article 39 contains the very simple 'default rule' that a treaty may be amended by an agreement between all the parties, and the normal rules on the conclusion of treaties apply to this amending agreement. This default rule may be set aside by the parties when concluding the original (to-be-amended) treaty. The international law regime of treaty amendment is, thus, one of utmost flexibility: the Contracting Parties are free to arrange for the later amendment of their treaty in the way they wish.[8] Indeed, a large and increasing number of multilateral treaties contain such a special amendment procedure, which is generally aimed at facilitating adaptation to changing circumstances, often by allowing for the amendment of a treaty without the agreement of all the parties.[9] Article 48 EU Treaty is an example of a specific amendment clause but, contrary to most others, it does *not* provide more flexibility than the default rule of Article 39 Vienna Convention. It requires the agreement of *all* the parties (in this case, the member states of the European Union) for the valid adoption of an amendment and, in addition, it requires a degree of involvement of the EU institutions in the preparation of the revision, and the subsequent ratification by each state according to its own constitutional requirements.

The EU's basic rule of change is more rigid than the general international law rule also in another way, which is not visible from the text. In general international law, the Contracting Parties to a treaty can modify that treaty at any stage by means of a new treaty. In doing so, they are not bound to follow the same procedure as that followed when they concluded the first treaty, nor are they even bound to follow the procedure for revision set out in the first treaty if they all agree to

[8] *See* A. Aust, *Modern Treaty Law and Practice* (Cambridge, CUP 2000) p. 214: 'It is wrong to think that the Vienna Convention is a rigid structure which places obstacles in the way of treaty modification: rather, it allows states to include in treaties such amendment provisions as they wish'.

[9] *See*, for a short survey of such 'facilitating clauses', Aust, *supra* n. 8, at p. 212-223, and, with specific reference to treaties establishing an international organisation, C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn. (Cambridge, CUP 2005) p. 447-463.

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follow a procedure different from the one provided for therein.[10] This is sometimes called the 'freedom of form' rule. Thus, as far as international law is concerned, a treaty that originally came into force after parliamentary approval in all the contracting states can be validly modified by an agreement that is not made subject to such constitutional approval. In EU law, by contrast, the member states do not have this freedom of form; rather, they are bound to follow the rules for treaty revision formulated in Article 48 EU Treaty. The European Court of Justice affirmed this duty a long time ago and the states' practice seems to show that they, indeed, accept the mandatory character of the official treaty revision procedure; or, at least, there has never been, during the last 30 years, a serious attempt by all or some of the member states to overrule the procedure of Article 48.

The fact that the procedure of Article 48 EU Treaty is mandatory derives from the overall context and system of the European founding treaties. In order to explain this point, it may be useful to reconsider the circumstances in which the European Court of Justice established this rule, in its *Defrenne* ruling of 1976. On 30 December 1961, the member states' representatives had adopted a Resolution containing an 'action plan' aimed at extending a transitional period that came to an end on that date, thereby delaying the full implementation of the equal pay principle laid down in what was then Article 119 EEC Treaty (now renumbered as Article 141 EC Treaty). In the *Defrenne* judgment, the Court of Justice held that Article 119 had been a source of directly applicable rights for individuals since the end of 1961, and that the Resolution 'was ineffective to make any valid modification of the time-limit fixed by the Treaty'. The Court then added: 'In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236' (Article 236 EEC Treaty was the predecessor of Article 48 EU Treaty).[11] The Court did not give reasons for this view, but the crucial consideration might well be that if one were to accept the possibility of an informal EC or EU Treaty amendment, the governments of the member states could unilaterally modify the EU legal system without the checks and balances and constitutional guarantees provided by Article 48 of the EU Treaty. Also, if the governments decided to overrule the procedure of Article 48 and adopt amendments without, say, submitting them to national ratification, they would act in violation of their own constitutional law rules, which require parliamentary approval for all, or listed categories of, international agreements and do not leave to the government a free choice as to whether it will submit the agreement to parliamentary approval or not. So, the ratification re-

[10] *See* W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (Berlin, Springer 1983), p. 341 et seq., and B. de Witte, 'Rules of Change in International Law: How Special is the European Community?', 25 *Netherlands Yearbook of International Law* (1994) 299 p. 312 et seq.

[11] ECJ, Case 43/75, *Defrenne,* para. 57.

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quirement in the procedure of Article 48 contains guarantees for the protection of the national constitutional division of powers, which the governments cannot set aside, except when the Treaty itself prescribes a simplified revision procedure for some of its provisions. The ECJ's point of view has met with the general approval of legal writers,[12] and seems to be tacitly accepted by the member state governments, as these have never since *Defrenne* sought to circumvent the official treaty amendment procedure by means of an informal international agreement.

European Union treaty revisions are thus firmly situated within the scope of the international law of treaties. This has a number of practical legal consequences. *First*, with respect to the drafting, conclusion and entry into force of the revision treaties, the specific rules of Article 48 can be supplemented, where needed, by the general rules of international treaty law. For example, the device of putting certain matters in a separate Protocol rather than in the main text of the treaty, and above all the careful distinction between binding Protocols and non-binding Declarations, which played a very important role in the latest Intergovernmental Conference,[13] rely on an implicit understanding of the meaning of those terms which is rooted in the international law of treaties. *Secondly*, with respect to the legality of the revision treaties, the European Court of Justice has confirmed several times that they were not acts of an EU institution and that the Court therefore had *no* authority to review them,[14] nor indeed the treaties of accession to the European Union.[15] *Thirdly*, with respect to their application and enforcement in the national legal orders of the member states, the international law nature of the revision acts means that in many member states (and contrary to the orthodoxy of the ECJ's supremacy doctrine) EC and EU law are applied on the basis of general constitutional doctrines about the domestic effect of international treaties.

Admittedly, the legal dynamics of European integration has not resulted exclusively from these repeated treaty revisions. Particularly during the period preceding the Single European Act, but also later on, we have seen other mechanisms of informal constitutional change at work in the European Communities and the European Union, namely the creative interpretation of existing treaty rules by the

[12] For a rare expression of the contrary view, *see* T.C. Hartley, 'The Constitutional Foundations of the European Union', 117 *The Law Quarterly Review* (2001) 225, p. 236-237: 'Article 48 cannot deprive the Member States, acting unanimously, of the power to amend the Treaties without complying with its requirements. Those requirements must, therefore, be regarded as not mandatory but merely directory: failure to comply with them is an infringement of Community law, but does not affect the validity of the amendment'.

[13] The Treaty of Lisbon has 13 Protocols and 65 Declarations, some of which clearly served to defuse last-minute tensions during the negotiations.

[14] ECJ, Case C-235/94P, *Olivier Roujansky* v. *Council*, para. 11.

[15] ECJ, Case C-313/89, *Commission* v. *Spain*, para. 9.

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European Court of Justice, the use of inter-institutional agreements and practice to flesh out the institutional provisions of the treaties, and, most clearly, the generous use by the Council of the 'gap-filling clause' of Article 235 EEC Treaty (now Article 308 EC). However, despite the important role played by these alternative instruments,[16] formal treaty revisions have been, by far, the most important instrument of constitutional change.

European treaty revision was a success story in what could be called retrospectively its golden age (1985-1999), when amendments were successfully made and implemented in accordance with the traditional method of intergovernmental conferences followed by national ratifications. However, this method was increasingly criticised for putting an undue constraint on the adaptation of the European Union to changing needs and also for excluding citizens and public opinion from the process of change. This criticism of this traditional method did not lead to the rejection of the international law framework altogether, but to claims for reform of the particular expression of that international law regime in the EU context. The main misgivings related to the exceedingly diplomatic (and therefore opaque) character of treaty negotiations and to the excessive rigidity caused by the 'double lock' of overall consensus by all governments at the intergovernmental conference, followed by universal ratification in all the member states. The former criticism was addressed, in the Laeken Declaration of December 2001, by the innovative move of calling a Convention composed of a variety of mainly non-government actors in order to prepare the formal treaty revision negotiations among the governments. As for the latter criticism, referring to the excessive rigidity of treaty amendment, it was not effectively addressed. After the Lisbon Treaty (assuming that it will enter into force itself), further changes of the founding treaties will still have to be approved unanimously by all the member state governments, even though the second stage (the national ratification) will not be required for some minor modifications.[17]

This continuing rigidity is perhaps understandable from the perspective of protecting national sovereignty, but it is also regrettable in that it will continue to seriously hinder the adaptation of the EU's founding instruments to changing circumstances. However, this is not due directly to the fact that the revision regime remains subject to the rules of international treaty law. As was indicated

[16] For an examination of the role of these informal instruments of constitutional change, *see* A. Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin, Duncker & Humblot 2001), at p. 395-433. For discussion of a recent example, *see* G. Schusterschitz and S. Kotz, 'The Comitology Reform of 2006. Increasing the Powers of the European Parliament Without Changing the Treaties', 3 *European Constitutional Law Review* (2007) p. 68.

[17] *See* the so-called simplified revision procedure in Art. 48(7) EU Treaty (as revised by the Treaty of Lisbon).

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before, the general rules of international law on treaty amendment are extraordinarily flexible. Basically, the states parties to a treaty are free to make revision as flexible or as complicated as they wish. They may decide to involve non-state actors in the drafting of the revision treaty, they may decide that the amendments will enter into force without the general consent of all the Contracting Parties, they may organise special ratification mechanisms or even forego ratification entirely. Such flexible arrangements could have been introduced for the revision of the European treaties and this would not have changed their nature as international treaties.

Shaping European policies, inside and outside the European Union, by means of international law

As was mentioned in the introduction to this paper, international law also plays an important role in the day-to-day operation of the European Union. It may be useful to distinguish, in this respect, between the little-noticed use made of international law in order to organise the co-operation between EU member states in connection with the European Union, and the more prominent use made of international law to organise the co-operation between the European Union and third countries.

International law as instrument for the co-operation between member states acting in the EU context

In the panoply of law-making instruments that were made available to the EU institutions, *treaties concluded by the member states jointly* were expressly included from the start. Such treaties could be called *complementary agreements* (or *subsidiary conventions*[18]), since they are adopted in connection with the founding Treaties by the very same Contracting Parties, namely all the EU member states together, without the participation of any third countries.[19] They are a curious legal phenomenon that fits oddly with the vision of the European Union as an autonomous legal order with its own legal instruments, its own system of decision-making, enforce-

[18] This is the expression used by T.C. Hartley, *The Foundations of European Community Law*, 5th edn. (Oxford, OUP 2003) p. 98.

[19] For a more thorough treatment of this instrument than can be provided here, *see* B. de Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in B. de Witte, D. Hanf, E. Vos (eds.), *The Many Faces of Differentiation in EU Law* (Antwerp, Intersentia 2001) p. 231; L.S. Rossi, *Le convenzioni fra gli Stati membri dell'Unione europea* (Milano, Giuffrè 2000) and, more recently, R. Schütze, 'EC Law and International Agreements of the Member States – an Ambivalent Relationship?', 9 *Cambridge Yearbook of European Legal Studies* (2006-7) p. 387 at p. 410 et seq.

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ment and judicial control. The reference to complementary international agreements signifies that the member states sought to preserve the possibility to withdraw from the 'autonomous legal order' and revert to traditional international law-making in order to perform certain tasks connected with the European integration project.

Article 293 EC Treaty, which was already present in the original version of the Treaty of Rome as Article 220, provides for complementary agreements between the member states in the following areas: abolition of double taxation within the Community, the mutual recognition of companies or firms, the retention of legal personality in the event of transfer of a company's headquarters from one country to another, and the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. These were areas identified in 1957 as calling for the adoption of uniform laws accompanying the creation of a common market, and international agreements seemed more suitable for that purpose than the regulations and directives whose nature and use was not clearly established at the time. However, only three treaties have come into being on this basis: the Convention of 27 February 1968 on the Mutual Recognition of Companies and Firms,[20] the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (usually called the Brussels Convention)[21] and the Convention of 23 July 1990 on the Elimination of Double Taxation in connection with the adjustment of profits of associated enterprises.[22]

Later on, the Treaty of Maastricht provided for the possibility of conventions being concluded between the member states in the whole policy area of the 'third pillar'. At that stage of the European integration process, the choice for inter-state conventions (rather than the more incisive legal instruments of the first pillar) was clearly inspired by the wish to preserve the control by the member states on the adoption and application of these instruments. In the years following the entry into force of the Treaty of Maastricht, a large number of such conventions were concluded, but only one of these actually entered into force during that period, namely the Europol Convention.[23] Since the entry into force of the Treaty of Amsterdam, in 1999, the scope of the third pillar has been considerably reduced, and thereby also the area in which such conventions may be concluded.

On the whole, parallel agreements have proved to be a disappointment even from a strict national interest perspective, mainly because of the fact that they

[20] Bull EC Suppl. 2/1969. This treaty has never entered into force.

[21] *OJ* 1972, L 299/32. Now replaced by EC Regulation 44/2001, *OJ* 2001, L 12/1.

[22] *OJ* 1990, L 225/10.

[23] Convention on the establishment of a European Police Office, *OJ* 1995, C 316/1 (entered into force 1 Oct. 1998).

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typically require ratification by the national parliaments, which makes their entry into force and subsequent amendment a very cumbersome operation. The member states were faced with this problem during the last decade when they sought, repeatedly, to amend the Europol Convention in order to enlarge Europol's tasks. Three amending protocols were adopted but none of those three had come into force at the end of 2006. Thereupon, the European Commission proposed instead to repeal the entire Convention and replace it by a Council decision, that is, an instrument of secondary EU law (as had happened some years earlier with the Brussels Convention which had been turned into the 'Brussels I' Regulation); it argued that 'the main advantage of a Decision over a Convention is that it is relatively easy to adapt to changing circumstances because it does not require ratification', and that 'this is particularly relevant for Europol as an organisation, since experience has demonstrated that there is a recurrent need to adapt its legal basis.'[24] The Council rapidly agreed on this transformation of Europol from an international organisation into an EU agency.[25] This transformation will be effective as of 2010.

If the Lisbon Treaty enters into force, conventions between the member states will be entirely abandoned as an official EU legal instrument. Not only would the third pillar conventions referred to in Article 34(2)(d) EU Treaty disappear, but the venerable Article 293 EC Treaty, which still provides, today, for the conclusion of inter-state conventions in the 'first pillar', would similarly be repealed by the Lisbon Treaty. This does not mean that the member states would no longer be allowed to conclude international agreements between themselves in connection with the operation of the European Union; it means only that these agreements will no longer be mentioned as a normal category of instruments of EU law. Indeed, even without a reference in a specific provision of the EC or EU Treaty, the member states are free in principle to regulate certain matters which are connected to the substance of the Treaties, and which are important for the achievement of their objectives, in the form of an international agreement concluded between them.[26] This was confirmed by the European Court of Justice in the *Bangladesh* case,[27] and there is no reason why this would change after the Lisbon Treaty has eliminated the express references to the adoption of parallel agree-

[24] European Commission, Draft Council decision establishing the European Police Office, COM(06)817 of 20 Dec. 2006, at p. 2.

[25] The Council reached political agreement on the new Europol Decision at its meeting of 18 April 2008 (Council of Justice and Home Affairs, Press release 18 April 2008, p. 13). Publication of the Decision in the *Official Journal of the European Union* is pending.

[26] An old example of a complementary international treaty between all the (then) member states in an area not mentioned by the founding Treaties is the 1972 Convention setting up the European University Institute in Florence (published in *OJ* 1976, C 29/1).

[27] ECJ, Joined Cases C-181 & C-248/91, *Parliament* v. *Council and Commission (Bangladesh)*.

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ments in certain areas. The member states can, however conclude such agreements only to the extent that the object of the agreement is still within member state competence, and they must take into account their general underlying obligation of loyal co-operation under Article 10 EC, and their specific obligations on the basis of existing primary and secondary EC or EU law (the principle of primacy). On this point, the ordinary conflict rule of international law, whereby a later treaty will prevail over an earlier treaty between the same parties, is set aside. The EC and EU Treaties are, for their member states, the *principal* treaties governing their relations and any other agreements between them that overlap with the principal treaties should respect provisions of the latter. [28]

So, if an agreement concluded between the member states were an impediment to the application of a provision of Community law, or to the proper functioning of the institutions, then the member states in question would be acting in breach of their obligations under Article 10 EC.[29] In such cases, the European Commission may start proceedings for infringement of Treaty obligations against those states. International agreements between the member states cannot, however, be annulled directly by the Court of Justice, since annulment proceedings under Article 230 EC Treaty relate only to acts of the EU institutions.

The existence and scope of this 'rival' option of concluding parallel international agreements has become a largely theoretical issue; it is quite clear that the member states themselves have become disenchanted with the international treaty as an instrument for organising their co-operation *inter se*, and much prefer to act through the institutional framework of the European Union. However, we will certainly continue to see, also in the post-Lisbon age, a less clearly identifiable category of parallel agreements, namely the '*acts of the representatives of the governments of the Member States meeting within the Council*'.[30] These are to be distinguished from acts of the Council, since they do not originate from a Community institution, but from a diplomatic conference, although the latter has the same composition as the Council. This formal distinction between decisions of government representatives acting as members of an institution (decisions of the Council) and decisions taken by these representatives acting as such ('acts of the representatives') is legally significant. The rules governing the adoption of decisions of the

[28] The states that concluded the Schengen Convention of 19 June 1990 (*OJ* 2000, L 239/19) duly recognised this rule. In Art. 134, they stated: 'The provisions of this Convention shall apply only in so far as they are compatible with Community law'.

[29] ECJ 15 Jan. 1986, Case 44/84, *Derrick Guy Edmund Hurd* v. *Kenneth Jones (Her Majesty's Inspector of Taxes)*.

[30] The denomination 'Acts of representatives of the member state governments' was developed early on in the history of the European Community legal order. *See* K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, 2nd edn. (London, Sweet & Maxwell 2005) p. 39-40; de Witte, n. 19 *supra*, p. 251-255.

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Community institutions, their legal effects, implementation and judicial review do not apply to 'acts of the representatives'. The questions which may arise in this context will largely have to be answered by general international law. Broadly speaking, two categories of cases may be distinguished, which in practice have led to the use of this instrument. The *first* category concerns cases in which EC Treaty provisions direct the governments to adopt a collective legal act needed for the functioning of the EU system, such as the appointment of the members of the Commission[31] and the members of the Court of Justice,[32] and the choice of the seat of the institutions.[33] The *second* category relates to cases in which the founding Treaties do not require such an act, but where the member state governments freely choose to use it, in cases where a formal act of the Council is not considered to be possible or opportune, and the conclusion of a formal international treaty seems too time-consuming and laborious (in particular since such a treaty would need to be approved by the national parliaments). Although the general term 'acts' is used, there is no doubt that these are in fact international agreements, albeit concluded in a simplified form. If governments do not contemplate creating a legal obligation, then they usually choose a softer denomination, such as for instance: '*Resolution of the representatives of the governments of the Member States meeting within the Council*'.

Acts of the representatives are, however, international agreements with a strong element of EU law specificity, especially where the EC Treaty directs the governments to enact collectively particular legal acts which are indissolubly linked with the functioning of the institutional system of the Communities, such as the nomination of members of the Commission and the members of the Court of Justice. The governments in such cases together carry out a task based on the Treaties and clearly defined therein, and have no choice as to whether or not to carry it out. The decisions taken on the basis of such a power, although not originating from an institution within the meaning of the Treaties, form part of EU law in a broad sense, and as such are not directly subject to the rules of national constitutional law dealing with the conclusion of international treaties. An indication of the special link between these acts and the EC and EU legal order is the fact that they are considered to belong to the *acquis communautaire*. When new member states accede to the European Union, they accept to be bound by all the decisions and agreements adopted by the representatives of the member states, meeting within the Council, and accept that they are in the same situation as the existing member states in relation to 'declarations or resolutions of, or other positions taken up by,

[31] Art. 214 EC.
[32] Art. 223 EC.
[33] Art. 289 EC.

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the European Council or the Council and in respect of those concerning the Community or the Union adopted by common agreement of the Member States.'[34]

International law as instrument for developing European policies together with third countries

It goes almost without saying that international treaties are a major instrument for the EU's external relations, in the same way as for a state's foreign policy. In almost all policy areas, today, either the EC or the EU regularly appear as Contracting Parties to international treaties with third states. Indeed, from an *internal* EU law perspective, the field is 'wide open' for the EC and EU on the basis of the well-known principle, established long ago by the European Court of Justice, that 'whenever Community law created for the (EU) institutions powers within its internal system for the purpose of attaining a specific objective, the Community has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.'[35] The main limitation of EC/EU action on the international scene is *externally* imposed by the fact that numerous multilateral treaties are nowadays elaborated and concluded in the framework of an international organisation of which the EC or EU is not a member.[36] In such cases, the EC and EU can normally not act as a Contracting Party to the relevant treaties, and the EU member states remain on the scene, even though they must act with due regard for the internal policies adopted by the European Union. Sometimes, when the subject-matter of the international negotiations is comprehensively regulated by internal EU law, the member states' discretion is constrained by the need for an authorisation and strict mandate of the European Union.[37]

If anything, international agreements might be a more important instrument for the European Union than for its member states, because the EC and EU, for a variety of reasons, tend to favour the conclusion of formal international treaties rather than non-legal agreements.[38] This insistence on legalising relations with

[34] This formula, with small variations, was included in all Acts of Accession since 1972. The provision quoted in the text is from the Act of Accession of Bulgaria and Romania, *OJ* 2005, L 157/203, Art. 3(2).

[35] ECJ 7 Feb. 2006, Opinion 1/2003 on the Lugano Convention, para. 114 (with reference to earlier opinions of the ECJ in which this principle was established).

[36] For a discussion of the role reserved for the EC and EU in the various organisations belonging to the UN family, *see* J. Wouters, F. Hoffmeister and T. Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership* (The Hague, T.M.C. Asser Press 2006).

[37] One example among many is Council Decision 2004/246 authorising the member states to sign and ratify, 'in the interest of the European Community', the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *OJ* 2004, L 78/22.

[38] Generally, on the factors that make states choose formal treaties or non-legal agreements in their relations with other states, *see* J.L. Goldsmith and E.A. Posner, 'International Agreements:

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other countries has extended from the first pillar to the Common Foreign and Security Policy and the third pillar, where we see an increasing number of formal international agreements being concluded by the Council.

In conducting its foreign relations, the European Union can also use unilateral acts directed at external situations (a typical example being the Regulation on the general system of preferences),[39] but more often than not it will need to co-operate with third countries and conclude an international treaty with them. In concluding such treaties, the European Union often pursues typical external relations objectives, which range from agreements on military co-operation in the context of EU missions abroad, to provisions in EC agreements seeking to promote human rights and good governance. However, it also happens very frequently that agreements with third countries serve, rather, as the external counterpart of internal EU policies. This relationship between the internal and the external dimension of a given policy can work both ways: either the EU actively seeks to export a particular set of internal legal rules to third countries by means of a bilateral or multilateral agreement, thereby 'projecting the *acquis*';[40] or, vice versa, an existing international agreement forms the basis for a Commission proposal for internal EU legislation.

As to the first direction of this interactive process, the European Commission has shown itself to be very well aware, and proud, of the EU's role as a 'rule generator',[41] as can be illustrated by the following extract from a Commission policy paper dealing with the external dimension of the EU's internal market:

> Through the enlargement process and the European Neighbourhood Policy, the Community rulebook is gradually being adopted across large parts of the European continent. Beyond this, the EU is emerging as a global rule maker, with the single market framework and the wider EU economic and social model increasingly serving as a reference point in third countries as well as in global and regional fora.[42]

The Commission then mentions, in the same paper, a number of 'international regulatory success stories' (namely, policy areas in which EU standards have been

A Rational Choice Approach', 44 *Virginia Journal of International Law* (2003-4) p. 113, at p. 122 et seq.

[39] The latest version of the GSP Regulation, applicable as of 1 Jan. 2009, is Council Regulation 732/2008 of 22 July 2008, *OJ* 2008, L 211/1.

[40] L. Azoulai, 'The *Acquis* of the European Union and International Organisations', 11 *European Law Journal* (2005) p. 196 at p. 199.

[41] An expression used by M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity', 41 *Common Market Law Review* (2004) p. 553 at p. 557.

[42] Commission staff working document, *The External Dimension of the Single Market Review*, SEC(2007)1519, 20-11-2007, at p. 5.

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taken up internationally), including food safety, tobacco control, emissions trading, maritime safety, care emissions and financial services. Outside the domain of internal market regulation, similar forms of regulatory export have unfolded in such diverse areas as the protection of the environment, the protection of health, immigration law and criminal law.[43] Arguably, the main reason inspiring this strategy of promoting the adoption of EU-inspired regulatory standards across the world is, as the Commission put it in another paper, that of "pre-empting the impact of globalisation".[44]

Clearly, not all these exportations of legal rules take the form of international law. Some of them happen through the autonomous adoption of EU-inspired roles by foreign countries or regional organisations,[45] and some of them occur by means of soft law mechanisms such as administrative co-operation between regulatory authorities. In fact, one of the typical features of the 'external governance' which the European Union developed in relation to the candidate states for EU accession first, and in relation to the European Neighbourhood Policy countries later, is the use of a flexible mix of instruments covering both unilateral EU measures and bilateral accords and, within the latter category, both formal treaties and 'softer' instruments, such as recommendations adopted by a (bilateral) Association or Partnership Council.[46]

A different type of instrumental use of international law occurs when the European Union, in the context of its various conditionality policies, refers to *preexisting* international legal norms as a condition for the granting of certain benefits to third countries. The best-known example is, of course, the use of political conditionality in the context of accession to the European Union, where the Euro-

[43] There is a rapidly developing literature documenting these processes of policy exportation in the various fields. *See* among others: M. Cremona, 'EU External Action in the JHA Domain: A Legal Perspective', *EUI Working Papers*, Law 2008/24; V. Mitsilegas, 'The External Dimension of EU Action in Criminal Matters', 12 *European Foreign Affairs Review* (2007) p. 457; S. Guigner, 'The EU's Role(s) in European Public Health – The Interdependence of Roles within a Saturated Space of International Organizations', in O. Elgström and M. Smith (eds.), *The European Union's Roles in International Politics* (London, Routledge 2006) p. 225. For a general discussion of the mechanisms used in this process, *see* R. Petrov, 'Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries', 13 *European Foreign Affairs Review* (2008) p. 33.

[44] *Commission Legislative and Work Programme 2007*, COM(2006) 629 of 24-10-2006, at p. 10.

[45] *See*, for example, a case study of the influence of the EU Data Protection Directive of 1995 on a number of other countries and regional bodies: M.D. Birnhack, 'The EU Data Protection Directive: An Engine of a Global Regime', *Tel Aviv University Law Faculty Papers* (2008) no. 95.

[46] For the concept of external governance and a synthetic view of its main mechanisms, *see* S. Lavenex, 'EU External Governance in Wider Europe', 11 *Journal of European Public Policy* (2004) p. 680. For a comprehensive view of the formal and informal instruments used in the context of the European Neighbourhood Policy, *see* M. Cremona, 'The European Neighbourhood Policy: More than a Partnership?', in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford, OUP 2008) p. 244 at p. 263 et seq.

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pean institutions used international standards of human rights and minority protection as the benchmark for their evaluation of the performance of the candidate states. Another example, in the context of the Community's Generalized System of Preferences, is the provision of a 'special incentive arrangement' (that is, an extra tariff preference) for those developing countries that ratify and effectively implement a series of 27 international treaties dealing with human rights, the environment and good governance.[47]

Conversely, international treaties concluded by the European Union may also serve as a tool for promoting the adoption of internal legislation by the European Union itself. It has been noted that 'more often than not legislative proposals emanate from the Commission not because it has itself identified needs or problems that require tackling but rather *because it is honouring treaty or international obligations* (…)'[48] From a policy perspective, there are arguments for preferring the option of negotiating an international agreement first and adjusting domestic EU legislation to it afterwards, rather than that of adopting EU legislation first and then trying to 'export' it to other countries by means of an international agreement.

The arguments of scale that are offered to show why member states cannot cope with certain problems on their own do not necessarily require the choice of the European Union as the most appropriate level of law-making. It may often be advisable to establish a wider regulatory framework, which encompasses the European Union but is not limited to it. When, for instance, the European Commission proposes a Community programme on protecting children using the Internet and other communication technologies,[49] it is clear that, given the global nature of the problem, and other things being equal, international action taken at the world level would be more effective than 'internal' EU action. More generally, the question often arises of why the European Commission proposes, and European governments accept, to enact an EC directive or regulation in cases where an international convention, open to a broader set of countries, is equally possible and more commensurate with the scale of the problem to be dealt with. In an early document dealing with the principle of subsidiarity, the European Commission showed awareness of this issue when stating the following: 'particular attention should be paid to the possibility in certain cases of achieving the objectives

[47] This 'special incentive arrangement' clause is in Art. 8 of the Regulation, and the 27 international conventions are listed in Annex III (n. 39 *supra*). The regime is problematic from a WTO law perspective; *see* discussion in L. Bartels, 'The WTO-Legality of the EU's GSP+ Arrangement', 10 *Journal of International Economic Law* (2007) p. 869.

[48] N. Nugent, *The European Commission* (Basingstoke, Palgrave 2001) p. 236.

[49] Commission proposal for a Decision of the European Parliament and of the Council establishing a multi-annual Community programme on protecting children using the Internet and other communication technologies, COM(2008) 106 of 27-2-2008.

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set out in the Treaty *through international agreements rather than via an internal instrument,* for subsidiarity surely also means not legislating at Community level when action is already being taken at international level and proving just as effective as Community action.'[50]

In deciding whether to use an instrument of secondary EU law or an international treaty with third states, the scale of the problem is a first factor that will be taken into consideration. Thus, transport on the Rhine, or the environmental quality of the Rhine water, cannot effectively be regulated on the basis of internal EC acts, but requires an agreement with Switzerland, due to the geographical situation of that country. Another consideration mentioned in the Commission document is whether international action 'is already being taken' or whether the choice between the Community and the international law-making track is still entirely open. Thus, it might seem appropriate for the European Community to respect certain well-established frameworks of intergovernmental co-operation, such as the Hague system of private international law conventions, the universal intellectual property conventions and, above all, the wide-ranging Council of Europe convention system. Subsidiarity considerations will not stop the European Union from influencing or even 'colonizing' these existing international regimes, but they will stop the European Union from completely by-passing them, unless there are weighty reasons to do so. On the other hand, the fact that a new matter is put on some other international organisation's agenda is not a sufficient reason for the European Union to abstain from taking internal measures.

The general point made by the 1992 document of the Commission, that international law action may prove 'just as effective', is more debatable. This point is convincing where the question to be dealt with requires, by its nature, the involvement of third states or concerns, by its nature, only two neighbouring member states (as in the case of transfrontier co-operation between local authorities). It is also true where a relatively well-functioning international regime is in place, and enacting a separate EC regime would only cause havoc. But if those conditions are not met, then the adoption of international treaties may be considered as comparatively 'less effective' than the adoption of a directive or a regulation. The latter have a number of advantages such as the efficiency of the law-making process, the more democratic and transparent character of that process, the existence of a more effective compliance system, and a greater capacity for adaptation to changing circumstances.

Legally speaking, there is a free choice between taking the European Union route or the international co-operation route in all those policy domains that are not within the EU's exclusive competence either by their nature (such as external

[50] Commission Communication of 27 Oct. 1992, *Bulletin of the European Communities* 10-1992, 116 at 123 (emphasis added).

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trade) or by occupation-of-the-field (when the matter is comprehensively dealt with by domestic EU legislation). If the international law route is chosen, and an international agreement is concluded by the EC or EU (either alone or in 'mixed' form together with the member states), then international law starts acting as a constraint on the European Union. That constraint is simply expressed by the Treaty rules stating that EC agreements and EU agreements are binding on the institutions of the European Union and also, as the case may be, on the member states.[51] However, the legal force of the constraint is, in fact, very variable. Increasingly, the EC and EU seek to insert clauses into international agreements which guarantee the prevalence of existing or future EU law over the obligations contained in the agreement. The most blatant form of this 'reverse primacy' is the so-called disconnection clauses which the EC manages to insert into many Council of Europe conventions. According to these clauses, EC law dealing with subject-matter covered in the convention shall continue to apply between EU states, so that, on those matters, the Convention provisions will only apply to non-EU states.[52] Even in the absence of such conflict rules that preserve the integrity of the Community *acquis*, the predominance of the international agreements may be limited by the fact that their self-executing nature is denied (as is notoriously the case with the WTO Agreements). Finally, as recently highlighted in the *Kadi* and *Al Barakaat* judgments, which are analysed in other contributions to this issue, the primacy of international agreements recognised by Article 300(7) EC Treaty relates to *secondary* EC law, but the application of international agreements within the EC legal order may be denied if they conflict with the EC Treaty itself or with the unwritten principles of primary EU law.

Conclusion

This paper has sought to provide some selective evidence for the view that international law is an omnipresent legal tool of the integration process that takes place in the context of the European Union. The basic rules of EU law are to be found in documents which are, undoubtedly, international treaties, even though the legal regime which they have put in place is much more sophisticated and

[51] *See*, respectively, Art. 300(7) EC Treaty and Art. 24(6) EU Treaty.

[52] For a discussion of these disconnection clauses and similar devices aiming at preserving the integrity of pre-existing or future EU law against conflicting international obligations, *see* J. Klabbers, 'Safeguarding the organizational *acquis*: the EU's external practice', 4 *International Organizations Law Review* (2007) p. 57; F. Hoffmeister, 'The Contribution of EU Practice to International Law', in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford, OUP 2008) p. 37 at p. 66 et seq.; M. Ličková, 'European Exceptionalism in International Law', 19 *European Journal of International Law* (2008) p. 463 at p. 484 et seq.

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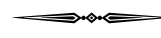
restrictive of state sovereignty than any other international legal regime. In addition, the member states of the European Union continue to resort to separate international treaties to regulate their relations, not only bilaterally (which is rather obvious) but also multilaterally, through international agreements concluded between all 27 states; some of these complementary agreements (namely, those leading to the appointment of members of the EU institutions) are indispensable building blocks of the EU system without which it could not function. Finally, international law is, quite obviously, also a tool for organising the relations between the European Union and third countries, and this often occurs in very close connection with the way in which the European Union develops its internal laws and policies. A full acknowledgment of the instrumental role played by international law in the European integration process gives support to the view that the EC legal order cannot be seen in 'splendid isolation' but is part and parcel of a more comprehensive 'European Union Legal Space', [53] consisting of the European Union, its member states, a number of third countries, and the variety of legal links established between those actors.



[53] *See*, for the use of this concept, A. Łazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union', 45 *Common Market Law Review* (2008) p. 1433 at p. 1437.

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