The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union

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Article 3(5) TEU – Article 21 TEU – Normative Force – EU External Relations – International Law

I Introduction

Article 3 TEU is one of the foundational provisions of the European Union (EU) as it lists the Union's main objectives.[2] Thus, it contains, *inter alia*, references to the promotion of "peace, its values and the well-being of its peoples" (par. 1), the availability of "an area of freedom, security and justice without internal frontiers" (par. 2), the establishment of "an internal market", which shall go hand in hand with "sustainable development" (par. 3), and "an economic and monetary union" (par. 4). Apart from these more internally-oriented objectives, paragraph 5 contains the, by now well-known, 'external objective':

"In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to *the strict observance and the development of international law, including respect for the principles of the United Nations Charter*."[3]

This provision features famously in many publications explaining the role of the European Union as a global actor. It is often quoted in combination with Article 21(1) TEU, the terms of which are indeed quite similar:

"The 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:

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[2] That these are indeed the Union's objectives (and not for instance objectives of the Member States) is reflected in Art. 3(6): "The Union shall pursue *its* objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties" (emphasis added). Compare also Sommermann (2013; 158,160) who qualifies Art. 3 TEU "as a core provision of the Treaty" and "the cornerstone of a multi-layer teleology contained in the primary Union law".

[3] Emphasis added.

democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and *respect for the principles of the United Nations Charter and international law*."[4]

Indeed, both provisions aim to bridge internal and external objectives, by extending the function of the EU's values to relations with third states.[5] It is in fact striking that the Treaty legislator did not decide on combining the provisions in a single Treaty article. This could also have prevented discussions on the meaning of the different phrasing ('strict observance' versus 'respect') and order ('international law' and 'United Nations Charter') of the provisions. While acknowledging the broad scope of the two provisions – which ranges from a contribution to peace and security to the protection of human rights – the present paper's focus will be on one specific objective in Article 3(5) TEU: "the strict observance and the development of international law", which in Article 21 TEU returns as "respect for the principles of the United Nations Charter and international law". As the formulation is Article 3(5) TEU seems more robust than the one in Article 21 TEU, we take Article 3(5) as the starting point for our analysis, while occasionally referring to Article 21 TEU.

Despite its foundational nature, Article 3(5) TEU has not featured among those provisions that have been analysed thoroughly. This in particular holds true for its 'normative force and effect', by which we refer to the intended binding nature of this provision as well as to its use in practice. When studied, the provision featured primarily in relation to the question of how and to what extent international law would or should be part of the Union's legal order.[6] And, with a view to the role of the Court, it has been argued that "[t]he contribution of the Court to the strict observance of international law by the EU, in conformity with Article 3(5) TEU, can be found primarily in its ruling that the model of *reception* of international law into the Union legal order should be fundamentally monist in character."[7] The main aim of the present paper, however, is to assess the *external* normative effect of Article 3(5) TEU and its role in defining the Union's relationship to international law. It is not our intention to repeat the many studies that already exist on the relationship between international and EU law.[8] Rather, our focus is on the specific role Article 3(5) TEU plays in further defining the nature of the relationship between EU and international law with a focus on the EU's external relations. Article 3(5) TEU seems to reflect a move of the justification for compliance with international law away from the more traditional reasons related to the international legal personality of the EU,[9] towards an internal justification in the treaties. At the same time, it

[4] Emphasis added.
[5] See on the role of the values in EU external relations Kaspiarovich and Wessel (2022).
[6] For instance, Neframi (2016).
[7] Kuijper (2013), emphasis added.
[8] See for recent examples (and references to earlier literature) Odermatt (2021), Molnár (2021), Garben and Govaere (2019).
[9] See on the legal position of the EU and its consequences for instance R.A. Wessel, 'Revisiting the International Legal Status of the EU', *European Foreign Affairs Review*, 2000, 507-537.

would be wrong to assume that this is merely a retrenchment of the EU's claim to autonomy.[10] In practice, as we will see, Article 3(5) TEU has also been used as a tool to mediate the tension between two contradictory interpretations of the relationship between international and EU law in the existing case-law: the need to preserve the constitutional identity of the EU versus the need to ensure that the EU does not become hostile to the international community and an efficient global actor.

This chapter aims to confront some of the findings in legal scholarly literature as well as our analysis on the normative *force* of Articles 3(5) TEU with the way the provision is used in practice (the normative *effect*). After briefly revisiting the relationship between EU law and international law (Section II), we will start our analysis by assessing the normative force of Article 3(5) TEU on the basis of Treaty interpretation (Section III). This will be followed by an assessment of the function of Article 3(5) TEU in international agreements and EU action more generally (Section IV) and in the Court's case law (Section V). Section VI will be used to draw some conclusions.

II Briefly Revisiting the Relationship between EU Law and International Law

The Union's brief in Article 3(5) TEU to strictly observe and develop international law necessitates a short revisiting of the relationship between EU law and international law. Obviously, this topic has been on the agenda of legal scholars from the outset.[11] In the beginning of the 1970s the perhaps logical starting point was that the EU as a non-state entity was not automatically bound by international law. This notion may first of all have followed from the famous case law in which the Court had argued 'that the Community constitutes *a new legal order of international law* for the benefit of which the states have limited their sovereign rights',[12] and that '[b]y contrast with *ordinary* international treaties, the EEC Treaty has created its own legal system'.[13] The separation between EU law and international law may also have been based on the dualism that many Member States were (and still are) familiar with: international law can only be part of a domestic legal order once it has been incorporated into that legal order. The EU, like states, has a choice regarding the status of international law in its own legal order. That sentiment was worded by Schermers (1982) as follows: 'When the Community participates in the international legal order it necessarily operates in a similar way as would a State. There is no other option. When the Community accepts international treaties, it will execute them in the same manner as States execute treaties. This means that it interprets

[10] See further below, Section V.

[11] Among the many publications, see for recent analyses and references Odermatt (2021), Molnár (2021), Fahey (2020), Levrat, Kaspiarovich, Kaddous and Wessel (2022), Garben and Govaere (2019), Wessel and Odermatt (2019), as well as Wessel (2013).

[12] Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1 (emphasis added).

[13] Case 6/64 *Costa* v *ENEL*, ECLI:EU:C:1964:66 (emphasis added).

its own obligations and that it may or may not grant to its citizens the rights to invoke those treaties in court.' This is indeed what the Court did. Nevertheless, with reference to cases like *Haegeman*[14] and subsequent case law, the legal order of the Union is often identified as 'monist' in its relation to public international law: international law that binds the Union is believed to be (automatically) valid within the Union's legal order.[15] And, international law that binds the Union is not restricted to international agreements to which the Union is a party, but also includes international customary law.[16] As to the latter, Article 3(5) TEU has expressly been used as an argument.[17]

These days, after a revival of the debate on the EU's 'autonomy'[18] that was fuelled in particular by the *Kadi* cases[19] as well as by *Opinion 2/13*[20] and, more recently, *Opinion 1/17*,[21] the distinction between EU law and international law is again high on the agenda.[22] It is believed that to make certain key principles of EU law (including primacy and direct effect) work, the EU needs to stress its autonomy vis-à-vis international law, in particular when deciding on the validity and the interpretation of its own rules.[23] At the same time, as an international actor, there is a need for the EU to live up to the rules that make up the international legal order and to implement these rules whenever they bind the Union. The fact that, despite its claims for 'autonomy', the Union – with a view to its international legal personality and its extensive relations with third states and other international organisations – is part and parcel of the international legal system, reflects the classic tension that exists between constitutionalist and internationalist approaches. Article 3(5) TEU clearly incorporates this tension by combining a more 'constitutionalist' obligation to "uphold and promote its values and interests and contribute to the protection of its citizens" with an 'internationalist' brief to contribute to "the strict observance and the development of

[14] Judgment of the Court, *R. & V. Haegeman v Belgian State*, 180/73, ECLI:EU:C:1974:41, paragraph 5. See more extensively, Wessel (2022). Some parts in the current text are based on that case note.
[15] Cf. various contributions to Cannizzaro, Palchetti and Wessel (2011).
[16] See for refences to the relevant case law and literature, for instance Odermatt (2021; Chapter 2); as well as Konstadinides (2016), Neframi (2016).
[17] Compare the Opinion of AG Kokott of 6 October 2011, *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, C-366/10, ECLI:EU:C:2011:637, paragrtaph 108: "It is generally recognised that the European Union is bound by customary international law as well as by the international agreements applicable to it, and this is confirmed by the second sentence of Article 3(5) TEU ('strict observance and the development of international law'). The relevant principles of customary international law form part of the EU legal order."
[18] See for some of the arguments Molnár (2016), Contartese (2017), Eckes (2020), 1-19 (18); Klabbers and Koutrakos (2019), Lenaerts, Gutierrez-Fons, Adam (2021), Lindeboom (2021), and Öberg (2020).
[19] Joined cases of the Court *P Kadi and Al Barakaat International Foundation* v *Council*, C-402/05 P & C-415/05, ECLI:EU:C:2008:461. The notion of 'autonomy' was a central element in the discussion between the CJEU and the General Court in the *Kadi* saga when the latter argued: 'the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law …'; Judgment of the General Court, *Kadi v Commission*, Case T-85/09, ECLI:EU:T:2010:418, paragraph 119.
[20] Opinion 2/13 of the Court, ECLI:EU:C:2014:2454. Compare De Witte (2019).
[21] Opinion 1/17 of the Court; ECLI:EU:C:2019:341. See for a good analysis Fanou (2020).
[22] See, for instance, Moreno-Lax and Gragl (2016), and Garben and Govaere (2019). See for a plea for a continued dialogue between the two legal sub-disciplines Wessel (2019).
[23] For arguments see for instance Lenaerts, Gutierrez-Fons, Adam (2021). For examples of problematic situations compare also Cremona, Thies and Wessel (2017).

international law" and abide by "the principles of the United Nations Charter", a treaty to which it is not a party. The question raised in the present paper is how Article 3(5) aims to contribute to reaching this objective.

III The Normative Force of Article 3(5) TEU on the basis of the Treaty

Despite their relatively clear language, both Articles 3(5) and 21 TEU lack references to the way in which they intend to have an impact. The argument could be made that both provisions merely lay down the Union's objectives without supplying the means to reach them. References are made to the Union "relations with the wider world" and its "action on the international scene" but the provisions fall short on making this more explicit. As also recently held by Cannizzaro (2021: 4), "Articles 3(5) and 21 TEU do not clarify the nature and effect of the normative notions they lay down. Nor do they clarify the impact of these notions on the EU's competence system and, in particular, on the new external action of the Union." This is certainly true, but it does not deny the normative intentions of these provisions. In the words of Sommermann (2013: 160), "[o]bjectives set forth in Constitutions or other fundamental legal instruments convey orientation and coherence to the respective legal system if they are taken seriously. In systems where the effectiveness of the legal provisions is a guiding criterion, they cannot be understood as mere programmatic statements but have to be conceived as *binding principles*".[24]

This 'binding' nature is visible in the wording that was used by the treaty legislator. The objectives in Article 3 TEU use 'committing' terms and provide that "the Union shall" do something. Thus, paragraph 5 states that "[i]n its relations with the wider world, the Union *shall* uphold and promote its values", and, indeed, it "*shall* contribute to […] the strict observance and the development of international law."[25] Similar phrasing returns in Article 21(1) TEU, albeit that here the somewhat softer terms 'guided' and 'respect for' are used: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation […] and respect for the principles of the United Nations Charter and international law."

Together, Articles 3(5) and 21 TEU, only partly clarify their normative effect[26] and even reveal potential conflicts[27] in the intended legal effects. It also remains difficult to decide on the exact substantive content of the objectives. This becomes even more complicated when the Union's values in Article 2 TEU are taken into account. The Union's 'constitutional' values (respect for human dignity, freedom, democracy, equality, the rule of law and respect for

[24] Emphasis added.
[25] Emphasis added.
[26] Compare Kuijper (2013).
[27] A clear example is that Article 3(5) mentions the obligation of the EU to 'uphold and promote its values' in one breath with the 'strict observance' of international law (leaving aside that 'strictly observing' and 'developing' international law may also not always go hand in hand). See also Dunbar (2021, 7).

human rights) are combined with more 'international values' (Cannizzaro, 2021) (including contributing to peace, security, the sustainable development of the Earth, free and fair trade, eradication of poverty and the strict observance and the development of international law).[28] What *is* clear, however, is that through the cross referencing between the various provisions, there is a clear legal obligation for the Union not to act contrary to values and principles in *all* its external relations and to interpret its objectives along those lines: "The Union *shall respect* the principles […] in the development and implementation of the different areas of the Union's external action […] and of the external aspects of its other policies" (Article 21(3) TEU).[29]

The binding nature of the Union's objectives was already confirmed by the Court in the 1970s, indicating the obligation of the Union's institutions to pursue the achievement of the objectives.[30] The Court, however, also hinted at a margin of discretion: a violation of EU law only follows from a not at all considering, ignoring, or contravening the objectives. In that sense, the wording of the objective and its preciseness will affect the normative nature. Article 3 TEU thus provides the *interpretative framework* to be taken into account by the Union for all secondary legislation.[31] This thus includes the conclusion of international agreements (see further below). And, irrespective of the fact that the obligations are clearly directed at the Union ("the *Union* shall…"), they equally seem to bind the EU's Member States whenever they are implementing EU law or otherwise acting within the Union's framework. Any other interpretation could lead to Member State action that would deprive the Union of living up to the Article 3 obligations. Clear support for this argument may be found in Article 4(3) TEU, which provides that the Member States "Shall facilitate the achievement of the Union's tasks and refrain from any measures which could jeopardise the attainment of the Union's objectives". This obligation seems to extent to sub-national bodies, including national courts.[32]

Despite providing a fundamental interpretative framework,[33] and despite the fact that individual rights are explicitly mentioned,[34] Article 3 TEU does not seem to be directly effective,[35] due to its 'promotional' (Sommerman, 2013) or in the words of the Court,

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[28] We leave out the question to what extent the values also have extraterritorial effects. See for examples and further references also Kassoti and Wessel (2021).
[29] Emphasis added.
[30] See for instance Judgment of the Court of Justice, *Europemballage Corporation and Continental Can Company*; Case 6/72, ECLI:EU:C:1973:22.
[31] Compare already Judgment of the Court of Justice, *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36; Case C-314/89 *Siegfried Rauh v Hauptzollamt Nürnberg-Fürth*, Case 85/76, ECLI:EU:C:1991:143.
[32] Compare Sommermann (2013, 163).
[33] Compare also *Opinion 2/13*, Accession to the European Convention of Human Rights (ECHR II), EU:C:2014:2454, paragraph 172, in which the Court linked the pursuit of the objectives of Article 3 TEU to "a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy". See also Lenaerts and Van Nuffel (2011, par. 7-007), who in this context refer to Judgment of the Court, *Polydor*, 270/80, EU:C:1982:43, para 16; and Judgment of the Court, *Échirolles*, C-9/99EU:C:2000:532, paras 24–5.
[34] On the basis of Art 3(2) TEU, the Union "shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child."
[35] Compare Judgments of the Court, *Alsthom*, Cf. Case C-339/89m EU:C:1991:28, para 9, on ex Article 2 EEC; *Caja de Ahorros y Monte de Piedad de Madrid*, Case C-484/08, EU:C:2010:309, paras 46–7. See also Klamert (2021).

'programmatic'[36] nature. This obviously implies that the mere use of this provision will be insufficient for individuals to challenge EU acts. But we have also not come across interinstitutional cases in which Article 3(5) was used as the main argument to, for instance, challenge acts or planned international agreements for the mere sake that they would violate the strict observance or development of international law (see further Section V).[37]

Obviously, the extent to which the Union is able to attain its goals, depends on the available competences. The general principle of competence conferral (Article 5(1) TEU) applies. The debate on whether or not Article 3(5) TEU can or should also be used to define the Union's external competences was more recently triggered by the discussion in relation to Opinion 2/15, which dealt with the Union's (exclusive) competence to conclude a free trade agreement with Singapore. In the context of that Opinion, Advocate-General Sharpston argued that there is no relation and that these provisions do not restrict or extend the EU's competences:

"In my opinion, Articles 3(5) and 21 TEU and Articles 9 and 11 TFEU, to which the Commission refers, are not relevant to resolving the issue of competence. The purpose of those provisions is to require the European Union to contribute to certain objectives in its policies and activities. They cannot affect the scope of the common commercial policy laid down in Article 207 TFEU".[38]

It remains doubtful, however, whether the link between Articles 3(5)/21 and 5 TEU can be dismissed off so easily.[39] In contrast to the AG, the Court first of all held that "The obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU." While the Court does not refer to Article 3(5) TEU, it argues that the principles and objectives directly impact the policies. Yet, the Court refers to "the conduct" of the policies, rather than to the competence as such. If anything, it seems that not so much the *existence* of a competence, nor its *nature* (exclusive of shared), but the *scope* of the competence may be influenced by the principles.[40] But, obviously, viewing the scope of an exclusive competence in the context of the mentioned objectives has an effect on the substantive division of competences between the EU and its Member States.

[36] Judgment of the Court, *Portugal v Council*, Case C-149/96, EU:C:1999:574, para 86.
[37] It is worth mentioning however that in a 2019 motion submitted by a number of MEPs for a referral for an Opinion by the CJEU of the compatibility of the Treaties with the (then) draft amendment to Protocols 1 and 4 to the Euro-Mediterranean Agreement (the Association Agreement between the EU and Morocco) - which expressly purported to extend the territorial scope of the Agreement to Western Sahara – Art. 21 TEU was expressly mentioned. The motion was rejected and the EP voted in favour of the proposal – which then led to the 2021 *Front Polisario* judgment. See European Parliament resolution seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposed agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (2019/2508 (RSP)), point A.
[38] Opinion of AG Sharpston, 21 December 2016, Opinion 2/15, par. 495; ECLI:EU:C:2016:992.
[39] Indeed, in Opinion 2/15 the Court in the end seems to have seen the link more clearly. Compare also Cannizzaro (2021, 10).
[40] See on the difference between these three dimensions Ott (2020).

And, the Treaties remain somewhat ambiguous on this as the objectives in Article 3 (including paragraph 5) TEU can at least help in establishing a legal basis for action by the Union. Article 352(1) TFEU provides that "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council […] shall adopt the appropriate measures." Here the combined treaty provisions underline that the need to attain the objectives at least provides the Union with not only a competence, but perhaps even an obligation to act.

What does all of this mean for the normative effect of the obligation that is central in this contribution, namely the "strict observance and development of international law"? The following sections aim to analyse how this has played out in practice in two dimensions: the function of Article 3(5) TEU in EU legal acts, and its role in the external relations case law of the Court.

IV Article 3(5) TEU as a Reference Point for EU External Action

In early case law, the Court already held that the implementation of the objectives is to be achieved through the policies and actions of the Union as well as those of the Member States.[41] Again with a focus on one particular aspect of Article 3(5) TEU – 'the strict observance and the development of international law'– this section aims to empirically assess the use of Article 3(5) TEU as reference point for EU external action, both in terms of decisions and international agreements; keeping in mind its potential as a 'supplementary' legal basis in view of Article 352(1) TFEU. This section thus assesses the normative effect of Article 3(5) TEU with a view to assessing the role it plays in the instruments used to formulate the Union's external action. The next section will then present a similar analysis on the basis of the Court's case law.

Obviously, 'the strict observance and the development of international law', is difficult to measure on the basis of a mere textual analysis of EU decisions and international agreements. After all, one might argue, the very fact that the EU makes use of international agreements and follows the rules of international treaty law is in itself a confirmation of its observance of and contribution to international law.

But even more specifically, references to Article 3(5) TEU are extremely scarce throughout the actual texts and only occur a few times in the Union's instruments. A first set of instruments concerns Council Decisions on *restrictive measures*. Although far from consistently, there we may find references to Article 3(5) TEU, along the following lines:

"Their application must be consistent with Article 3(5) TEU, in particular by contributing to peace and security, solidarity and mutual respect among peoples, and the protection of human rights, as well as to

[41] Judgment of the Court, *Portugal v Council*, Case C-149/96, EU:C:1999:574, para 86. Compare Klamert (2021).

the strict observance and the development of international law, including respect for the principles of the United Nations Charter."[42]

Similar reference can occasionally be found in *non-CFSP external instruments* of the Union, such as in relation to the European Neighbourhood Policy:

"The general objective of the Neighbourhood, Development and International Cooperation Instrument – Global Europe (the 'Instrument'), which is a programme for the purpose of the multiannual financial framework, should be to uphold and promote the Union's values, principles and fundamental interests worldwide in order to pursue the objectives and principles of the Union's external action, as laid down in Article 3(5) and Articles 8 and 21 of the Treaty on European Union (TEU)."[43]

Even in relation to *international agreements*, references to Article 3(5) TEU are seldomly found. A rare example of where it is used is in a Council Decision on the suspension of an agreement with Syria, where the Treaty provision is simply literally quoted in the Preamble.[44]

While one might have expected references to the objectives in all (or almost all) EU external acts, this is thus not the case. A search for Article 3(5) TEU as a legal basis – or Article 3 TEU in general – did not provide any hits. Specific references in EU legal acts to 'the strict observance and the development of international law' are also difficult to find, while general references to 'international law' – without referring to Article 3(5) TEU explicitly – occur quite frequently. Examples include:

"The Council reaffirms its determination to protect, promote and fulfil human rights, fundamental freedoms and democratic principles, to strengthen the rule of law and good governance in compliance with the United Nations Charter, the Universal Declaration of Human Rights and international law, in particular international human rights and international humanitarian law […]".[45]

as well as:

[42] Council Decision (CFSP) 2021/1277 of 30 July 2021 concerning restrictive measures in view of the situation in Lebanon (OJ LI 277, 2.8.2021, Preamble, recital 9).
[43] Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009 (OJ L209, 14.6.2021, Preamble, rectital 1) as well as Article 3 of the Regulation, which directly links the objectives of the instrument to those in the Treaty.
[44] Council Decision of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic (2011/523/EU) (OJ L 228, 3.9.2011, p. 19–21).
[45] Council Decision (EU) 2021/1210 of 22 July 2021 on an assistance measure taking the form of a general programme for support to the African Union under the European Peace Facility in 2021 (OJ L263, 23.7.2021, preamble, recital 6).

"The High Representative shall make the necessary arrangements with the beneficiary to ensure its compliance with the requirements and conditions established by the Council, including compliance with international law, in particular international human rights and international humanitarian law […]".[46]

In addition, one may find may references to *international law standards* in for instance asylum and migration acts,[47] in sanctions measures to underline conformity with international law,[48] in pointing to obligations third state parties have under the law of the sea or fisheries rules,[49] or for internal measures (for instance in the area of transport) that need to be in conformity with international law.[50] Occasionally, general references to "customary international law and widely accepted instruments of international law" may be accompanied by very concrete international law instruments that are mentioned by name.[51] As the Union is not a party to most international (human rights) treaties, expressly mentioning these as standards against which Union action should be checked, can certainly be seen as contributing to the 'strict observance and development' of international law.

As we have seen, a reference to "respect for […] international law" also finds its basis in Article 21(1) TEU. While references to Article 21 TEU are more numerous in Union decisions,[52] and address the general obligation "to ensure consistency between the different areas of its external action and between these and its other policies", as well as the external objectives related to for instance democracy, the rule of law, human rights, and security or sustainable development,[53] references to the obligation to respect international law are scarcer. Yet, this obligation is certainly included whenever Article 21 TEU objectives are referred to more generally. One may even come across a warning that these objectives are at stake, as

[46] Ibid, art. 4.
[47] Regulation (EU) 2021/1147 of 7 July 2021 establishing the Asylum, Migration and Integration Fund (OJ 251, 15.7.2021, preamble, recital 10); or earlier Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L180, 29.6.2013).
[48] Council Decision (CFSP) 2021/908 of 4 June 2021amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ LI 197, 4.6.2021).
[49] Commission Decision of 2 June 2021 notifying the Republic of Ghana of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing (OJ CI 215, 7.6.2021).
[50] Regulation (EU) 2021/782 of 29 April 2021 on rail passengers' rights and obligations (OJ L172, 17.5.2021).
[51] Thus, Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (OJ L 410I , 7.12.2020) expressly refers to the following international treaties that should be take into account when implementing the EU decision: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the International Convention for the Protection of All Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Rome Statute of the International Criminal Court; and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
[52] Examples include decision on varying topics, such as Decision No 466/2014/EU of 16 April 2014 granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union (OJ L135/1, 8.5.2014); Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (OJ L 410I, 7.12.2020);
[53] See for instance Regulation (EU) 2021/947 of 9 June 2021, *op.cit.*

exemplified by a decision on a CSDP military mission: "This Mission will be conducted in the context of a situation which may deteriorate and could impede the achievement of the objectives of the Union's external action as set out in Article 21 TEU".[54]

Despite the infrequent references to Article 3(5) TEU (and Article 21 TEU) as such, the objective of 'the strict observance of international law' is thus acknowledged in several internal and external acts of the Union. This does not necessarily imply that the Union also contributes to 'the development of international law'. A textual analysis of the EU instruments is far from conclusive and rather reflects a pragmatic, and perhaps even random, reference to international law. It itself, the very creation of the European Union has often been presented as "a model of international constitutional development" (Weller, 2009), and it has also been acknowledged that "the EU 'generally exercises a positive influence on the development and strengthening of international law" (Timmermans, 1999). Yet, as recently argued by Odermatt (2021: 247) it is equally clear that we sometimes witness "the EU's resistance to international law". While such resistance is less clearly visible in the EU instruments, it may be more apparent in the Court's case law.

V Article 3(5) TEU in the Court's Case-law

Despite a slight obsession with Articles 3(5) and 21 TEU among EU external relations law scholars, recent empirical analysis seems to put the role of, in particular, Article 3(5) TEU on the outcome of the Court's case law, into perspective. As held by Dunbar (2021: 2), "the Court typically interprets EU Treaty provisions and by the demands of international law itself concerning its application in domestic courts. Accordingly, 'respect for international law' is found – both within EU law and international law governing domestic application itself – to be unable to bear the ideological strain which continues to be placed upon it in scholarship."[55] This is not to say that the Court has not paid attention to Article 3(5) TEU. Perhaps one of the first cases in which the Court acknowledged the role of this provision was the *Air Transport Association of America* ruling,[56] in which the Court argued that "Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. *Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union*".[57] While, as such, this is not a particularly striking interpretation of the provision, it has been held that the importance of this statement should not be understated. Thus, Bosse-Platière (2022) argued that "[b]y explicitly referring to Article 3(5) TEU, the Court provided a

[54] Council Decision (CFSP) 2017/1869 of 16 October 2017 on the European Union Advisory Mission in support of Security Sector Reform in Iraq (EUAM Iraq) (OJ L 266, 17.10.2017).
[55] Compare also Kassoti (2017).
[56] Judgment of the Court of 21 December 2011, *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, C-366/10, ECLI:EU:C:2011:864. See also Bosse-Platière (2022).
[57] Ibid. par. 101. Emphasis added.

constitutional basis for the EU's respect for international law, in particular international custom. It thus constitutionalized the solution reached in the *Racke* judgment, and provided a more solid basis for the inclusion of custom law in the Union's legal order." Despite this important acknowledgment, this judgment does not expressly address the *external* normative effect of Article 3(5) TEU (Kuijper, 2013). Overall, academic literature sems to view the reference to the 'strict observance of international law' is mainly related to the reception of international law and has less impacted the Court's external approach towards international law because of its programmatic nature, rather than of its significant normative effect (Sommermann, 2013; Dunbar, 2021; Cannizzaro, 2021).

This, however, does not tell the complete story and the remainder of this section takes a closer look at how the CJEU has invoked/relied upon Article 3(5) TEU in its jurisprudence. We found that the Court has used the provision at hand: a. as a standard for judicial review; b. as an interpretative tool in different contexts; and c. finally, as a 'brake to autonomy' – in other words as a way of mediating the tension between the need to preserve the autonomy of the EU's legal order and the need to facilitate the participation of the EU in the international scene as an effective global actor.

The relevant jurisprudence shows that by way of contrast to academic writing, the view from the Court is more nuanced. While not significantly altering the pre-Lisbon landscape, the reliance on and invocation of the EU's commitment to international law – while non-linear and sometimes inconsistent – attests, at a minimum, to the Court's awareness of the potential of the provision to act as a 'relational principle' guiding and governing the EU's relationship with the outside world and as tool for alleviating the tension between the different types of 'actorness' that the EU pursues – namely that of an autonomous actor which is however called to conduct its external relations within the broader context of international law. More importantly, this cartography of the different functions of the provision in the case-law of the CJEU proves that, contrary to what has been suggested in the literature, Article 3(5) TEU does have a clear normative dimension. While it indeed does not create self-standing obligations, its jurisprudential relevance shows that it functions as a normative penumbra, informing the judicial review process; guiding the interpretation of other legally binding norms; as well as guaranteeing that the autonomous EU legal order is still open to international law.

5.1 As a standard for judicial review

The EU's commitment to international law has been invoked in the context of judicial review of the compatibility of EU secondary legislation with international law. As we have seen, in the literature, it has been pointed out that relying on Articles 3(5) and 21 TEU in this context has not had a meaningful impact on the Court's reasoning (Dunbar, 2021; Cannizzaro, 2021). More particularly, it has been suggested that the Court only occasionally refers thereto as a shorthand for the obligation to respect international law. Thus, according to Cannizzaro (2021): "Articles 3(5) and 21 have often been used in case law in their less engaging dimension, as a rhetorical tool, to confirm solutions based on different arguments or to reinforce the

persuasiveness of an argument." Following this line of argumentation, the importance of the Court's reference to these provisions is purely nominal since they merely constitute an abbreviated way of referring to the substantive customary or treaty law norms binding on the EU in each case.[58]

However, upon closer inspection, the Court's express reference to the EU's commitment to the observance of international law should not be shrugged off that easily. First, such references attest to the high degree of constitutionalisation of the EU legal order and are part of the broader constitutional narrative and trajectory of the EU. In this sense, the CJEU's express reference to Article 3(5) TEU in its case-law has value in terms of the justification used for the EU's compliance with international law. Far from simply functioning as a shorthand for the substantive norms of international law relevant in the context of a given case, the provision mediates the relationship between EU and international law – at least from an EU law perspective; it illustrates the understanding that compliance with international law is not an outwardly imposed obligation but rather stems from EU law itself. Furthermore, as the references to Article 3(5) TEU in the line of case-law on Western Sahara confirm,[59] the invocation of the principle also qualifies the type of constitutional approach to international law that the EU (and by way of extension its courts) have espoused. Instead of a purely autonomy-based constitutional approach that would allow reaching conclusions without engaging with international law, the invocation of the relevant provision in the jurisprudence of the Court acknowledges the embeddedness of international law within the EU legal order, as well as the need for the Court to engage therewith in its practice.

Secondly, in the most recent *Front Polisario* judgment,[60] Articles 3(5) and 21 TEU were key to the General Court's reasoning regarding the conditions governing the invocability of customary law norms by a private applicant in the context of judicial review of international agreements concluded by the Union or EU acts approving or implementing such agreements. One of the questions faced by the General Court was whether the applicant could invoke and rely upon the international law principles of self-determination and of the relative effect of treaties to the extent that some of the conditions for private parties to be able to rely on customary international law set out in the *Air Transport Association of America* judgment were not fulfilled *in casu*. More particularly, the conditions in question are that a. the principles of customary international law invoked are calling into question the competence of the EU to

[58] See for example Judgment of the Court, *Western Sahara Campaign UK v Commissioners for her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, C-266/16ECLI:EU:C:2018:118, paras. 41,85. Opinion of Advocate General Jääskinen, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union,* C-507/13,ECLI:EU:C:2014:2394, para. 41.

[59] Judgment of the Court, *Front Polisario v Council of the European Union*, C-507/13, ECLI:EU:T:2015:953, paras. 179-180. See also the Opinion of AG Wathelet, *Western Sahara Campaign UK v Commissioners for her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, C-507/13, ECLI:EU:C:2018:1, para. 241.

[60] Judgment of the Court, *Front Polisario v Council of the European Uni*on, T-279/19, ECLI:EU:T:2021:369, paras. 277-292.

adopt the challenged act; and b. that the act challenged must be liable to affect rights which the individual derives from EU law or to create obligations for them under EU law.[61]

It needs to be noted that the same question arose in the context of the earlier *Western Sahara Campaign UK* case and although it was not dealt with by the Court, it was addressed by AG Wathelet in his Opinion.[62] The AG recalled that the CJEU is the only court with jurisdiction to review the EU's external action and thus, to ensure that that action contributes to the "strict observance of international law" in accordance with Articles 3(5) and 21 TEU.[63] Against this background, the AG stressed that although certain conditions must be satisfied by individuals in order to be able to rely on international law in order to review the compatibility of an international agreement with Articles 3(5) and 21 TEU, these must not be such as to render judicial review ineffective. This would be the case, in AG's opinion, if the conditions set out in the *Air Transport Association of America* judgment were transposed lock, stock and barrel and without taking into account the particularities of that case.[64] The two conditions in question were, according to the AG, laid down by the Court since the contested acts in that case were acts of "purely internal secondary law".[65] Applying the same conditions in the context of judicial review of international agreements or acts approving or implementing such agreements would in essence preclude the judicial review of such acts, even in the light of the most fundamental norms of international law[66] – something that would be contrary to Articles 3(5) and 21 TEU. On this basis, the AG concluded that a single set of conditions should be satisfied by individuals in order to challenge international agreements concluded by the EU or of acts approving or implementing such agreements on the basis of international law – irrespective of the (customary or treaty law) pedigree of the international law norms invoked.[67]

A similar line of argumentation was followed by the General Court in its 2021 *Front Polisario* judgment. The General Court, having recalled the EU's obligation to contribute to the "strict observance of international law" rejected the argument to the effect that the applicant's reliance on the principles of self-determination and relative effect of treaties conflicted with the settled case-law of the CJEU regarding the conditions under which private parties may challenge the validity of international agreements on the basis of customary international law norms.[68] In a similar vein to the AG Wathelet's approach in W*estern Sahara Campaign UK*, the General Court drew a distinction between the legal circumstances that led to the *Air Transport Association of America* pronouncement and the case at bar; while the former concerned a challenge to the validity of internal legislation, the latter concerned the

[61] *Ibid.*, para. 284. See also Case C-366/10, *op. cit.*, paras. 107-109.
[62] Opinion of AG Wathelet in Case C-266/16, *op. cit.*, paras. 85-97.
[63] *Ibid*., para. 85.
[64] *Ibid.*, para. 87.
[65] *Ibid*., para. 91.
[66] *Ibid*., para. 92.
[67] *Ibid.*, para. 96. This set of conditions was laid down by the Court in paras. 53-55 of the *Air America Transport Association of America* judgment, Case C-366/10, *op. cit.* These conditions are that the Union must be bound by the rule relied on, the content of which must unconditional and sufficiently precise and that the nature and broad logic of the rule does not preclude the judicial review of the contested act.
[68] Case T-279/19, *op. cit.*, paras. 277, 283.

validity of acts pertaining to the EU's external action which, according to the Court, "is based, under the terms of, inter alia, Article 21 TEU, on respect for the principles of the Charter of the United Nations and of international law."[69] This, according to the General Court, entails that challenges to the validity of the EU's external action on the basis of customary international law cannot be limited to instances where: a. the contested act calls into question the EU's competence to adopt it; and b. the contested act is likely to affect rights which the applicant derives from EU law or to create obligations for the individual under EU law[70] – thereby, in essence, streamlining the conditions for individuals to mount challenges against acts pertaining to the EU's external action on the basis of international law, irrespective of the source of the international law obligation (customary or treaty law) incumbent upon the EU. This line of reasoning attests, at a minimum, to the CJEU's awareness of the importance of Articles 3(5) and 21 TEU within the EU's legal order and of its own role as a guarantor of the EU's 'strict observance of international law' in its dealings with the outside world.

5.2 *As an interpretive tool*

Pre-Lisbon, the duty of consistent interpretation in respect of the EU's international commitments, namely the duty of interpreting secondary law in the light of the Union's international obligations, has been firmly anchored on notions of hierarchy (Casolari, 2012). More particularly, the primacy of international law over secondary legislation is, according to the Court, the reason why secondary legislation must be interpreted, in so far as this is possible, in the light of the Union's international obligations.[71] This conclusion is reinforced by the limits of the doctrine of consistent interpretation; since this hermeneutic duty stems from the rank of international law within the EU's legal order, it does not extend to primary law.[72] Thus, from an EU law perspective, respect for international law constitutes the source of the binding nature of the principle of consistent interpretation (Casolari, 2012: 405). It has been suggested in the literature that international law is not completely neutral on the matter of consistent interpretation and that this (international law) duty may be inferred on the basis of widespread State practice (Betlem and Nollkaemper, 2003). Although the practical significance of this suggestion is limited since the doctrine operates within national legal constraints (Nollkaemper, 2011: 151), and thus would not have enhanced the power of the CJEU to engage therewith, the acknowledgement of the EU law pedigree of the relevant duty by the Court is important in the context of the EU's constitutional narrative. As also alluded to above, the commitment to international law, which is now codified in Article 3(5) TEU, is a constitutional principle governing the relationship between the EU and the international legal order and it is EU law that regulates the terms of reception of public international law within the EU legal system. Thus, rather unsurprisingly, post-Lisbon case-law on conform interpretation as applied to EU

[69] *Ibid*., para. 290.
[70] *Ibid.*, para. 291.
[71] Judgments of the Court, *Commission v Council,* C-61/94, ECLI:EU:C:1996:313, para. 52; and *Poulsen and Diva Navigation*, C-286/90, ECLI:EU:C:1992:453, para. 9.
[72] Judgment of the General Court, *Microsoft Corp. v Commission*, T-201/04, ECLI:EU:T:2007:289, para. 789.

international obligations contains references to Article 3(5) TEU and to the EU's commitment to the 'strict observance of international law'.[73] In this case-law the primacy of international law rules binding upon the EU over secondary legislation continues to be considered as the source of the binding nature of the doctrine – as stressed by AG Mengozzi in *Diakite*[74] – thereby confirming the EU law pedigree of the doctrine.

Importantly, for present purposes, the EU's commitment to the strict observance of international law does not require alignment of EU law with international law in *all* cases of norm interaction but only where there is *an actual normative conflict* – a point which was made by AG Mengozzi in *Diakite* and which was also (indirectly) espoused by the Court in its judgment.[75] In the case at bar, the differences in terms of objective, purposes and means that exist between international humanitarian law and the subsidiary protection mechanism introduced by the Qualifications Directive allowed the Court to interpret the concept of 'armed conflict' within the meaning of the Directive independently of the corresponding concept in international humanitarian law.[76] This conclusion is also in line with international law which posits that the danger of fragmentation due to the existence of special regimes of international law only arises when there is *actual inconsistency* between two provisions governing the same subject matter.[77] In this sense, the AG's Opinion and the Court's judgment in *Diakite* highlights the subtle – yet important – point that "strict observance of international law" does not require "complete uniformity and substantive assimilation but rather coherence and co-ordination" (Moreno-Lax, 2014). This observation comes close to viewing Article 3(5) TEU as the interpretative framework, as we proposed in the first part of this contribution (see Section III above).

Article 3(5) TEU has also been relied upon by AG Spuznar in the *Rina* case as a means of updating the content of the international law norm under examination – thereby, also highlighting how the provision can be used as a way of introducing elements of inter-temporal law within the interpretative process. According to the AG:

"Indeed, to take the view that Article 71 of Regulation No 44/2001 determines the relationship between that regulation and the principle of customary international law concerning the jurisdictional immunity of States is to suggest that the EU legislature wished to 'freeze' customary international law in the state it was when that regulation was adopted. Such a solution would be clearly incompatible with Article

[73] Case C-366/10, *op. cit.*, para. 101; Case C-363/18 *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances*, ECLI:EU:C:2019:954, paras. 48-51; Opinion of Advocate General Sharpston in Case A*, B, C and D v Minister van Buitenlandse Zaken*, ECLI:EU:C:2016:734, paras. 99-101; Opinion of Advocate General Mengozzi in Case C-285/12 A*boubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, ECLI:EU:C:2013:500, paras. 23-24.
[74] Opinion of Advocate General Mengozzi in Case C-285/12, *ibid.*
[75] Judgment of the Court, A*boubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, C-285/12, ECLI:EU:C:2014:39, paras. 21-27.
[76] *Ibid*., para. 35.
[77] Report of the Study Group of the International Law Commission finalized by Koskenniemi (2006).

3(5) TEU, in accordance with which the European Union is to contribute to the strict observance and development of international law."[78]

Finally, reference to the EU's commitment to international law was made by the Court in *Rosneft* for the purpose of interpreting the EU-Russia agreement in the light of the UN Charter. According to the Court, the restrictive measures imposed against Russian undertakings in response to actions by Russia to destabilise the situation in Ukraine were lawfully adopted under Article 99 of the EU-Russia agreement which allows any of the parties to adopt measures "necessary for the protection of its national interests, particularly in time of war or serious international tension constituting a threat to war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."[79] The Court ruled that the wording of the provision at bar does not require that 'war' or 'serious international tension constituting a threat of war' should occur in the territories of the parties.[80] Against this background, the Court concluded that the imposition of restrictive measures was justified for the purpose of maintaining peace and international security "in accordance with the specific objective, under the first subparagraph of Article 21(1) and Article 21(2)(c) TEU, of the Union's external action, with due regard to the principles and purposes of the Charter of the United Nations."[81] Thus, in *Rosneft*, the Court used Article 3(5) TEU in order to bolster the literal interpretation of the agreement; the provision reinforced the conclusion that threats to international peace that do not, technically speaking, concern the relations between the two parties could, by means of Art. 3(5) TEU, be brought within the scope of the agreement.[82]

5.3 *As a brake to autonomy*

AG Spuznar has rightfully pointed to the difficult co-existence of the two main narratives in EU external relations law when, in his Opinion in the *Rina* case, he argued that: "The co-existence of two obligations, namely that of contributing to the observance of international law and that of ensuring respect for the autonomy of the European legal order, can create tensions which the Union must resolve."[83] This tension is most acute in the Court's line of case-law concerning the EU's participation in forms of judicial dispute settlement outside the context of the Treaties.[84] In the past, this tension was resolved by the CJEU decidedly in favour of autonomy; there is a long line of case-law, including most prominently *Opinion 2/13*[85] and, more recently, *Achmea*,[86] where autonomy was couched in abstract and uncompromising terms

[78] Opinion of Advocate General Spuznar in Case C-641/18 *LG v Rina SpA and Ente Registro Italiano Navale*, ECLI:EU:C:2020:3, para. 134.
[79] Judgment of the Court, PJSC R*osneft Oil Company v Her Majesty's Treasury and Others*, Case C-72/15, ECLI:EU:C:2017:236, para. 111.
[80] *Ibid.*, para. 112.
[81] *Ibid.*
[82] See also Cannizzaro (2021; 8).
[83] Opinion of Advocate General Spuznar in Case C-641/18, *op. cit*., para. 137.
[84] For an overview of the relevant jurisprudence, see Odermatt (2018).
[85] Opinion 2/13, ECLI:EU:C:2014:2454.
[86] Judgment of the Court, *Slowakische Republic v Achmea BV*, C-284/16, ECLI:EU:C:2018:158.

– thereby establishing a very high threshold for the EU to participate in international dispute settlement (Koutrakos, 2019). However, in *CETA*, both the AG and (implicitly) the Court, seem to have relied on Article 3(5) TEU in order to put more weight on the EU's commitment to international law – thereby highlighting how the principle can be used in order to construe autonomy more narrowly and thus, to allow the EU to participate effectively in the international scene. AG Bot used Article 3(5) TEU in order to bolster his argumentation that the mechanism for settlement of investor-State disputes under the Comprehensive Economic Agreement between Canada and the EU (CETA) is compatible with the principle of autonomy of EU law. According to the AG:

"[T]he Court should interpret the principle of autonomy of EU law not only in such a way as to maintain the specific characteristics of EU law but also to ensure the European Union's involvement in the development of international law and of a rules-based international legal order … Under Article 3(5) TEU, 'in its relations with the wider world, the Union shall … contribute to … the strict observance and the development of international law …' That last objective logically means that the European Union should favour initiatives and control mechanisms which enhance the effectiveness of the international treaties to which it is a party."[87]

While not expressly relying on Article 3(5) TEU, the Court nevertheless espoused this approach in the judgment:

"It is […] precisely because of the reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations that it is open to the Union […] to enter into an agreement that confers on an international court or tribunal the jurisdiction to interpret that agreement without that court or tribunal being subject to the interpretations of that agreement given by the courts or tribunal of the Parties.[88]

Thus, *CETA* attests to the potential of utilising the provision in order to limit the far-reaching effects of past, broad and uncompromising constructions of the concept of autonomy and thus, to create a symbiotic relationship between EU and international law.

The above analysis of the Court's case law, taking into account also the more elaborate Opinions of the AGs, reveals the acknowledgment by the Court of the obligation laid down in Article 3(5) TEU. The case law thus further clarifies the normative nature of this provision, by using it as an interpretative framework that should guide the Union's external action. Indeed, repeating what was said in *Diakite*, the 'strict' observance of international law certainly requires the Union to check its actions against this standard, but requires first and foremost coherence and co-ordination rather than complete uniformity and substantive assimilation.

[87] Opinion of Advocate General Bot in Opinion 1/17, ECLI:EU:C:2019:72, paras. 174, 176.
[88] Opinion 1/17, ECLI:EU:C:2019:341, para. 117. Cannizzaro (2021: 9) has criticised the Court's omission to expressly refer to Art. 3(5) TEU.

VI Conclusion

The main purpose of this chapter was to legally assess the normative force and effect of one of the Treaty provisions that underlies the EU's external relations: Article 3(5) TEU. Our focus was on one particular, but crucial element in that provision: the Union's obligation to strictly observe and develop international law. Despite its constitutional nature and the frequent references to it in scholarly contributions, this provision has hardly been analysed in terms of its normative force. We found that the treaty wordings used in Article 3(5) TEU (together with its counterpart, Article 21 TEU), are far from clear about the intended legal effects. It also proved difficult to decide on the exact substantive content of the objectives. Overall, however, this chapter concludes that the provision in Article 3(5) should be read as a binding principle that is to form the interpretative framework for any external action by the Union. This principle even defines the *scope* of the external competence exercised by the Union.

While on the basis of this key role of Article 3(5) TEU one could have expected the provision to be frequently referred to in the Union's external instruments, this is not the case. The provision *as such* is mentioned only a few times in the Union's decisions and international agreements. At the same time, its substantive objective –the strict *observance* of international law – is clearly acknowledged in several internal and external acts of the Union. This does, however, not hold true for the related objective to contribute to the *development* of international law. In fact, a textual analysis of the EU instruments reflects a pragmatic, and perhaps somewhat random, reference to international law.

The Court's case law is clearer and seems to acknowledge the requirement to observe international law the moment the Union operates within the international (legal) system. As clearly laid down in *Air Transport Association of America* ruling, Article 3(5) TEU implies that whenever the Union adopts an act "it is bound to observe international law in its entirety, including customary international law." Indeed, our analysis found that the Court has used Article 3(5) TEU in various situations: as a standard for judicial review; as an interpretative tool in different contexts; and as a way of mediating the tension between the need to preserve the EU's autonomy the need for the EU to operate at the international level. Indeed, Article 3(5) TEU does not seems to have been used as a self-standing provision to challenge EU acts. In the literature this is blamed on the 'programmatic' nature of the provision, despite our view that the mandatory wordings of the provision could warrant a more robust use in situations in which it is faced with questions of observance and development of international law. Overall, despite the rather nebulous legal consequences intended to be attached to the provisions by its drafters, our review of how it has been used in judicial practice illustrates the dominant role of the Court in shaping its trajectory; the CJEU has shown, on multiple occasions, that the provision has the potential to be a subtle (yet powerful) tool in achieving balance and coherence between conflicting narratives and objectives in the EU's external action.

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