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Legal Status and Effects of the Agenda 2030 Within the EU Legal Order

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Abstract

This article explores the legal status and effects of the Agenda 2030 within the EU legal order. It refers to different forms of international law (i.e. international treaty law, international customary law and international soft law) as a 'connective tissue' between the EU legal order and the Agenda 2030. It is found that, despite the EU's commitment 'to be a frontrunner in the implementation of the Agenda 2030', its legal status in the EU law is undefined, and it does not enjoy direct effect. The article distinguishes a number of indirect effects the Agenda 2030 may have within the EU legal order, and calls for stronger scholarly attention to the effects of international soft instruments in the EU law, and the interplay between 'hard' and 'soft' instruments within the EU and international law.

Keywords

Agenda 2030; Sustainable Development Goals; EU Law; Relationship between EU Law and International Law; International Treaty Law; International Customary Law; International Soft Law.

INTRODUCTION

Adopted at the UN General Assembly in 2015, the Agenda 2030 posits itself as a comprehensive 'plan of action for people, planet and prosperity', composed of 17 Sustainable Development Goals (SDGs) and 169 associated. As opposed to many global governance strategies, relying on 'top-down regulation or market-based approaches', the Agenda 2030 exemplifies the novel type of governance – 'governance through goals' (Biermann et al 2017). This type of governance is marked by the detachedness from international legal system and weak institutional oversight arrangements that allow for much leeway for the Goals' interpretation and implementation (Biermann et al 2017). Nevertheless, the universal applicability of the Agenda 2030, the inclusiveness of the process by which it was adopted, its emphasis on means of implementation and partnership, and high reporting and monitoring standards make scholars argue that the Agenda 2030 will have far-reaching implications not only in the normative but the legal realm (Piselli 2016; Bröhlmann 2018).

EU strategic development policy documents emphasize the Union's commitment "commitment 'to be a frontrunner in implementing the 2030 Agenda and the SDGS, together with its Member States, in line with the principle of subsidiarity', in both its internal and external policies (European Commission 2016a; Council et al. 2017). In policy terms, the above commitments were immediately translated into specific actions, such as streamlining of SDGs into all Commission's policies and initiatives in the form of a 'guiding principle' or launching a high-level multi-stakeholder platform to support the exchange of 'best practices' (European Commission 2019). In legal terms, however, the consequences of the above commitment remain undefined both for the Union and its Member States. We ask: Shall the Agenda 2030 be regarded as a solely soft law document or does it also have legal value under the international treaty law or customary international law? Are all the commitments under the Agenda 2030 of equal legal value? Our hypothesis is that the Agenda 2030 shall be primarily regarded as a non-binding soft law document that only tacitly influences the EU legal order, yet specific commitments it incorporates may produce legal effects through links with international treaty law or if recognized as a source of international customary law. Answering the above questions is important for understanding the legal value of multiple commitments under the Agenda 2030 within the EU legal order, including the legal consequences of cases, when either the EU or Member States fail to implement their commitments to the Agenda or change policy priorities. In broader terms, the case study of the Agenda 2030 can give an impetus to exploring the legal status and effect of further non-binding consensual tools, adopted by the international community, such as the Global Compact for Safe Orderly and Regular Migration. Thus, the article intends to contribute to the literature strand on the role of international law in the EU legal order with a focus on non-binding instruments, such as the UN declarations, principles, and statements.

In this view, the article analyses the legal status and effect of the Agenda 2030 in EU's legal order, referring to various forms of international law (i.e., international treaty law, customary international law and international soft law) as the 'connective tissue' for the research. The background part of the article constructs the research puzzle by highlighting the Agenda 2030 as a novel approach of governance through goals, the sui generis nature of the Union's legal order and the EU's commitment to the Agenda. Next, the article discusses the legal nature and potential impact of the Agenda 2030 in the context of the international treaty law, customary international law and international soft law. Given the ambiguities, connected to the problématique of regarding 'general principles in internal law' as a source of international law (Voigt 2008) and the limited scope of this article, it will not consider the 'general principles in internal law'. It also will not consider the effects the Agenda 2030 exerts on the EU governance of sustainable development and biodiversity. Based on the above and the CJEU case law as regards the status and effect of international law within the EU legal system, the central part of the study maps the modalities of the legal status and effect of SDGs. Concluding, the paper distinguishes key

legal effects of the Agenda 2030 within the EU legal order and a number of phenomena, deserving further scholarly attention.

CONSTRUCTING THE PUZZLE: THE MARRIAGE OF SUI GENERIS LEGAL CREATURES AND THE ROLE OF INTERNATIONAL LAW IN IT

The ever-strengthening economic and political interdependencies among the nation-states, coupled with global challenges (e.g. population growth, migration, climate change etc.) condition the continuous proliferation of mechanisms, aimed to develop and implement solutions globally Hence, the dynamics of the global governance seeks to capture a kind of yearning, 'but whether this yearning is for peace and justice, or mere maintenance of the status quo, is less clear' (Wilkinson 2005: 5). An insight into the nature and contents of the Agenda 2030 allows supposing that this yearning is merely for multi-stakeholder action to be taken vis-à-vis an array of global challenges including *inter alia* the support to peace and justice (UNGA 2015). Furthermore, the Agenda fulfils the need for a 'universal counter-narrative against radicalization, violent extremism, conflict and disorder' (Werther-Pietsch 2018: 20). These ambitions determine the number of Agenda's peculiarities that allow for calling it a *sui generis* legal creature.

Foremost, although the Agenda is 'detached from the international legal system' Biermann et al 2017: 26), a number of 'junctures' between it and public international law can be identified. As opposed to MDGs, the Agenda contains the 'Peace' axis that points to the 'promotion of the rule of law at national and international levels' (target 16.3) and the 'protection of fundamental freedoms in accordance with national legislation and international agreements' (UNGA 2015). Secondly, the Agenda is informed and guided by multiple international law sources (e.g. the UN Charter, the Universal Declaration of Human Rights), and many its targets and indicators refer to states' specific obligations under international treaties (Kim 2016: 17-18). Moreover, thematically, the scope of the Agenda is consonant with the key strands of international law, such as international environmental law, international labour law and international human rights law. Thus, despite its non-binding nature, the Agenda is multifacetedly connected to international public law, and the scope of such connections deserves future exploration.

Secondly, the novel High-Level Political Forum for Sustainable Development (HLPF) is the key institutional mechanism, lying at the heart of the SDGs-driven emerging global architecture for sustainable development. Hence, the HPLF has a 'dauntingly expansive mandate' that encompasses agenda-setting in the field of sustainable development, the promotion of policy integration and coherence with regard to SDGs' implementation and respective oversight (Abbott and Bernstein 2015). However, due to the limitedness of HPLF resources and non-permanent nature of its operation, its institutional settings are characterized as weak that makes it predominantly rely on the governance strategy of 'orchestration' by acting through the intermediary organisations (Abbott and Bernstein 2015). The 'soft and indirect' mode of governance through orchestration contributes to international organizations' coordination of their activities on a decentralized level through mutual adjustment (Abbott et al 2012; Abbott 2018). Even though 'orchestration' becomes increasingly relevant in polycentric contexts, there are voices, advocating for strengthening the institutional arrangements of global governance for sustainable development as a crucial task to be fulfilled to mobilize resources and ensure the resonance between global and national aspirations (Pattberg and Widerberg 2016: 51).

With regard to the latter, the Agenda 2030 combines the 'respect [for] each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development' and the focus on the 'Means of Implementation', such as finance, technology, capacity-building and trade (UNGA 2015). Furthermore, Goal 17 'Strengthen Means of Implementation and Revitalize the Global Partnership for Sustainable Development' stresses systemic issues, such as the introduction of Policy Coherence for

Sustainable Development, capacity-building support to developing countries and support to multi-stakeholder partnerships (UNGA 2015).

The takeaway from the above is that the Agenda 2030 represents the *sui generis* creature in the global governance domain that reconciles superficially controversial characteristics: detachedness from international law and multifaceted substantial links to it; comprehensive substance, non-binding nature and weak institutional arrangements as well as the focus on the means of implementation and extensive national leeway to implement the Goals.

Sui Generis Nature of the EU Legal Order

Scholarship extends the terms 'sui generis', 'exceptional', 'hybrid' to both the EU and its legal order (Plehan 2012), addressing the former as 'an unidentified political object' (Delors 1985) that is 'less than a state; more than an international organisation' (Hlavak 2010). Given the tight connection and interdependent evolution of the EU and its legal order, this section of the paper will exemplify the *sui generis* nature of the Union's legal order by considering arguments, applied to the nature of the Union (the nature of Union's powers) and its legal order *per se* ('the EU as a self-contained regime in international law'; autonomy of the EU legal order; the supremacy of EU law and its direct effect).

The central argument in favour of the *sui generis* nature of the EU is that EU Member States transfer a part of their sovereignty to the supranational organization, whereas membership in confederations and international organisations allows for states' retaining their sovereignty (Dabrowski 2017). Nevertheless, scholarship offers varying interpretations of such restriction, many of which emphasize Member States' sovereignty and view the EU as a network of institutions, norms and principles through which it is exercised (e.g. Klabbers 2016: 3-4). Such view does not, however, resonate both with the concept of the Union's legal personality (Art.47 TEU) and the division of competences between the EU and its Member States (Title I TFEU) (Saurugger 2013: 4). Thus, the principle of the conferral of competences (Art.5 TEU) and the resulting division of competences between the Union is usually elaborated on to substantiate the *sui generis* nature of the EU.

The concept of a self-contained regime in international law embodies the international law perspective to EU legal studies and stems from the globalization-driven process of the fragmentation of international law (specialized branches of international law with their norms and principles that function autonomously vis-à-vis *lexgenerali*) (Ioniță 2015: 39-40). The key arguments in favour of defining the Union as a 'self-contained' regime are as follows. First, an extent to which the EU is a self-contained regime is determined by the regime itself (and its dynamics) and 'not simply the application of conventional secondary rules of general public international law' (Conway 2002: 680). Secondly, the EU evolved by virtue of 'the breach and alienation from international law and its transformation into a constitutional legal order' that has a special institutional design, multi-level governance network and own enforcement and sanctioning powers (Weiler 1999: 293). Thirdly, the EU functions based on its *own* norms and principles stipulated in the *acquis communautaire* as a corpus of EU law. The scholarship also links the self-contained nature of the EU legal regime to the fact that it 'imposes costly requirements on its Member States but rejects the use of interstate countermeasure and reciprocity mechanisms' (Plehan 2012: 368). Instead, the Union takes recourse to alternative dispute settlement measures (e.g. the application of the Rule of Law Framework with regard to the rule of law crises in Poland and Hungary (European Commission 2014). Finally, as it will be illustrated further, the 'self-containedness' of the Union's legal order manifests itself in the complex relationship between EU law and international law.

From the Eurocentric perspective, the *sui generis* nature of the Union is attributed to the notion of the 'autonomy of the EU legal order' (*Costa v ENEL* judgment of the CJEU), and the principles of primacy and direct effect (*Costa v ENEL* and *Van Genden Loos* judgments, respectively). In *Costa v ENEL*, the CJEU argued that 'by contrast with ordinary international treaties, the EEC Treaty has created its own legal system, which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply'. The constitutional and institutional aspects of the autonomy of Union's legal order were also strengthened by a number of more recent CJEU cases (e.g., *Commission v Ireland (Moxplant*); *Interanko*; *Kadi and Al Barakaat*) and the Lisbon Treaty-driven consolidation of the Union's powers in CFSP domain (Art.47 TEU; Art.216 TFEU). In *Costa v ENEL*, the Court argued that 'it follows from all these observations that the law, stemming from the Treaty, an independent source of law could not, because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question'. The direct effect of EU law is another fundamental principle of Union's law, attributed to the *sui generis* nature of the EU legal order. Established by the CJEU in its *Van Genden Loos* judgment, the 'direct effect' doctrine enables individuals to immediately invoke EU law in domestic courts, even if no relevant domestic law exists. The variation in the application of 'direct effect' depends on the type of a relevant Union's legal act (EUR-lex n.d.)

Ultimately, the EU legal order represents a 'self-contained' or 'autonomous' legal regime, marked by the distinctive constitutional and institutional design, peculiar responsibility and enforcement mechanisms, multi-dimensional interplay with Member States' legal orders and the complex inter-relationship with international law.

EU's Commitment to SDGs: The Role of International Law

The Declaration 'The Future We Want', adopted at the 2012 UN Conference on Sustainable Development Rio+20, stipulated the establishment of 'an inclusive and transparent intergovernmental process on sustainable development goals that is open to all stakeholders in order to develop global sustainable development goals to be agreed by the General Assembly' (UNGA 2012). Under paragraph 248 of the Rio+20 Summit Declaration, quoted above, the UN General Assembly adopted the decision on the establishment of the Open Working Group (OWG) on SDGs (UNGA 2012). Several EU Member States participated therein (e.g. the Netherlands, Germany, the UK, Denmark, Italy, Cyprus) (UNGA 2013).

Although the EU did not independently participate in the 'making' of the SDGs, the Commission's 2016 Communication 'Next steps for a sustainable European future' stipulated the Union's commitment to be a frontrunner in the implementation of SDGs (European Commission 2016a). The Staff Working Document (SWD), accompanying this Communication, provided the broad picture of the EU internal and external action, directed to SDGs' implementation, emphasizing the importance of different actors' cooperation (e.g. the European Parliament, the Commission, the Council, Member States and citizens) (European Commission 2016b). Highlighting the instruments of the EU implementation of the SDGs, the SWD, *inter alia*, pointed to the EU implementation of specific 'hard' international law instruments (e.g. Paris Climate Change Agreement) and international soft law frameworks (e.g. Sendai Framework for Disaster Risk Reduction) (European Commission 2016a). Such referrals tend, however, to be non-systemic, with many of the EU's and Member States' international law commitments not having been mentioned. Furthermore, the SWD did not refer to the EU's efforts to promote the consolidation of the principles of international law beyond its borders (Art. 21(2)(b) TEU) (European Commission 2016b). Mirroring the structure and language of the Agenda 2030, the new European Consensus on Development stipulated that the EU's implementation of SDGs will be 'closely coordinated with the implementation of the Paris Agreement on Climate Change

and other international commitments…' (Council et al 2017). The new Consensus also addressed the EU's commitments to the 'respect for the principles of the UN Charter and international law' as the principle that inspired the EU's creation and the guiding principle of its external action (Art. 21(1) TEU) and the Union's treaty obligation to externally 'consolidate …the principles of international law' (Art. 21(2)(b) TEU) as foundational its implementation of the SDGs (Council et el 2017). Nonetheless, similar to the 2016 Communication and respective Staff Working Document, the new Consensus only tangentially mentioned specific 'hard' and 'soft' documents the EU aspires to implement (e.g. the 2015 Joint Valetta Action Plan) (Council et al 2017).

Thus, in general, the EU's commitment 'to be a frontrunner in the implementation of SDGs' is founded on and intertwined with its primary law commitments to observe international law norms and consolidate them externally. Under the tangential referral to international law documents in the above mentioned SWD, the question of an extent to which the EU's commitment to SDGs encompasses the Union's observance of international law norms domestically remains open. Moreover, as noted in the introduction, the EU does not specify the legal value of the EU's commitment to the Agenda 2030 in the EU legal order. Addressing both of the above concerns requires further exploration of the SDGs' relationship with key forms in which modern fragmented international law exists.

AGENDA 2030 AND ITS RELATIONSHIP TO DIFFERENT FORMS OF INTERNATIONAL LAW

Modern international law tends to exist in two key forms: international treaty and international customary law, and 'general principles' of international law can be viewed as the means to address the gaps, emerging from the 'the non-comprehensiveness of the former forms of international law' (Dellapenna 2011: 19). Such an approach does not, however, refer to the dichotomy between 'hard' and 'soft' international law. The usual way to distinguish between 'hard' and 'soft' law is the recourse to a 'simple binary binding/non-binding divide' (Schaffer and Pollack 2010: 706). However, the understandings of 'hardness' and 'softness' vary across different schools of legal thought, with positivists denying the idea that law can be 'soft' and constructivists' focusing on a law's effectiveness at the implementation stage, rather than the form in which this law exists (Schaffer and Pollack 2010: 708-709). Against this background, an insight into the interactions between binding and non-binding international law instruments is essential for tracing the dynamics and interactions of actors within the fragmented international system. Since the Agenda 2030 is officially regarded as a non-binding international law document, it is of particular value for this project to consider its role in the context of the evolution of international soft law. Thus, this part of the article focuses on the relationship between the SDGs, on the one hand, and international treaty law, international customary law and international soft law, on the other.

Agenda 2030 and International Treaty Law

According to Art.2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT), 'treaty' represents an 'international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Similar to contracts between private parties, the key requirement for international treaties is parties' consent (Art.11 VCLT). In turn, the binding nature of international treaties stems from the *Pacta sunt servanda* principle (Art. 26 VCLT). Nonetheless, 'there can be complex questions about whether the state parties had reached an agreement, what the agreement means and whether there is a legally valid excuse from compliance' (Dellapena 2011: 13). An in-detail regulation of the above issues is provided in the VCLT; furthermore, many international

treaties address enforceability issues through creating their own dispute resolution mechanisms.

There is no doubt that Agenda 2030 does not represent an international treaty. First, it does not qualify as a treaty under the above mentioned VCLT definition, since it was stipulated by the Resolution of the UN General Assembly (GA), rather than concluded between States (UNGA 2015). In turn, Art.10-17 of the UN Charter do not empower the GA to adopt binding international law documents; pursuant to Art.13 of the Charter, the GA 'can make studies and initiate recommendations' pertaining to international cooperation in the political, economic, social, cultural and health domains (UN 1945). Additionally, the lack of the Agenda's legally binding nature can be substantiated by the fact that not only states as traditional international law subjects committed themselves to its implementation. Many cities, businesses and NGOs 'mobilized around' the SDGs and expressed their commitment to its implementation, assuming different roles and tasks in this process (e.g., cities may 'create new channels for urban and subnational financing and long-term planning' while NGOs tend to serve as 'watchdogs' that hold governments accountable for the implementation of the SDGs) (Hege and Demailly 2017: 6). This demonstrates that the strict international treaty law form, limiting parties to the treaties to those of international law, would contradict the universal nature of the Agenda 2030 and the idea of promoting multi-stakeholder partnerships as a means to implement the Agenda.

Nevertheless, the Agenda is, however, connected to international treaty law in several ways. First of all, the Agenda 2030 reaffirms states' commitment to the *corpus* of international law in particular domains (e.g. the conservation of coastal and marine areas (target 14.5); the conservation and sustainable use of oceans and their resources (target 14c); labour rights, such as freedom of association and collective bargaining (indicator 8.8.2) (IAEG-SDGs 2016). Secondly, some targets and indicators under the Agenda 2030 make connections to specific 'hard' international law acts (e.g. the UN Framework Convention on Climate Change) (IAEG-SDGs 2016). Thus, the Agenda 2030 can be addressed as 'a subset of existing intergovernmental commitments' (Kim 2016). Thirdly, some of the targets under the Agenda (e.g. those relating to the environment and the conservation of biodiversity) mirror particular international treaties without immediate referrals to them in the Agenda (Kim 2016) (Biermann et al 2017). Fourthly, on the most general level, the Agenda 2030 stipulates that the SDGs were created and are to be implemented 'in a manner that is consistent with the rights and obligations of States under international law' (UNGA 2015). This allows arguing that the actual role of the Agenda 2030 with regard to the international law would to a great extent be shaped by its implementation by states and international organisations. On the one hand, explicitly referring to only selected domains of international law and treaties, the Agenda does not position itself as a tool to promote states' compliance with international treaties and introduce respective toolbox. Given the 'soft' nature of the Agenda, this is not, however, its task. On the other hand, particularly 'soft' and comprehensive nature of the Agenda, and the breadth of the link to international law it creates enables states and international organisations to utilize the Agenda and related institutions of global governance for sustainable development as a forum for strengthening the implementation of international treaties and coordinating it.

Agenda 2030 and International Customary Law

Emerging from uniform state practices, international customary law is marked by the elusive nature and, on the most general level, can be described as 'usages generally accepted as expressing principles of law' (PCIJ 1927). Scholarship distinguishes two basic approaches to understanding the emergence of customary international law are distinguished (Bodansky 1995: 108). One focuses on the causal links and tries to find our which political, socio-economic and psychological processes underlie the emergence of

customary international law (Bodansky 1995: 108-110). The second approach zooms in on the reasons that make states comply with international customary law, thus, opens up the gateway for numerous explanations of states' compliance with international law (involving the factors of costs and benefits, managerial issues, reputation and legitimacy) (Verdier and Voeten 2014). As postulated by the International Court of Justice in the North Sea Continental Shelf Cases (1969), the creation of a norm of international customary law requires the combination of two components: the presence of actual settled practice (*usus*) and the so-called *opinio juris* – a psychological element that characterizes a state's belief that it acts in accordance with the law. (*North Sea Continental Shelf Cases* 1969). Thus, the emphasis on the *opinio juris* allows one to characterize the formation of customary international law as a process, within which states act in a certain way, guided by the belief that they act in accordance with the law.

Two characteristics of international customary law are of particular relevance for our study. First, as opposed to international treaty law, binding only for the parties to a specific treaty, international customary law applies to all subjects of international law (Bodansky 1995: 108). Thus, its scope of application is close to the philosophy of universalism, lying at the heart of the Agenda 2030 (UNGA 2015). Secondly, in its *Nicaragua* opinion, the ICJ recognized that the General Assembly (UN GA) resolutions may serve as evidence of the existence of a customary rule as well as a source of *opinio juris*, provided that the effect of the consent to the text of such resolutions 'may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution or by themselves', rather than the 'reiteration or elucidation' of the treaty commitment' (*North Sea Continental Shelf Cases* 1969: 97-98). While arguing that sometimes the UN GA resolutions 'may sometimes have the normative value', the ICJ's 1996 *Nuclear Weapons* opinion weakened the above position by stipulating that the GA resolutions can only *provide evidence,* 'important for establishing the existence of a rule or the emergence of the *opinio juris'*. (Legality of the Threat or Use of Nuclear Weapons 1996).Given the contradictions between the ICJ's positions, expressed in the *Nicaragua a*nd *Nuclear Weapons* cases, it is hard to establish whether the Agenda 2030 can be regarded as 1) a subset of customary international law and 2) a source of *opinio juris*. An important argument in favour of both points is the consensus nature of the Agenda, with the second point being additionally substantiated by recourse to the *Nicaragua* opinion. However, given the divergence of state practices, covered by the Agenda, a profound insight into the Agenda's implementation is required to distinguish the practices, capable of becoming customary rules. Moreover, following the logic of the *Nuclear Weapons* opinion, the stipulation of the respective principles in the Agenda and their implementation by states will be regarded as evidence of their customary law nature (including *opinio juris*) of these practices, rather than the fact that the Agenda 2030 represents a codification of international customary law norms. Nevertheless, given its universal, comprehensive and consensus nature, the Agenda 2030 is evidently capable of impacting customary international law.

Agenda 2030 and International Soft Law

As a *sui generis* legal creature, the Agenda 2030 is marked by the combination of an extremely comprehensive scope and non-binding nature. The latter characteristic is consonant with the modern trend to the increasing use of international soft law, caused by the heterogeneity of international actors (including the proliferation of non-state actors) and differences in their interests (Schaffer and Pollack 2010: 707-708). It also speaks to the logic of polycentric governance through the orchestration of the international organizations' activities (Abbott 2018). Additionally, an important rationale for the proliferation of international soft law deals with the gap between numerous ways by which international norms are made and the provisions of Art.38 of the ICJ Statute, only distinguishing between the international treaty law, international customary law and the general principles of international law (Olsson 2010). Though slightly prematurely, it is worth arguing that the trend to the softening of legal obligations is also relevant for the

EU, where, similar to the international system, it can be also widely regarded as a means to reconcile states' divergent interests (Terpan 2015).

Based on the application of two criteria – obligation and enforcement – for distinguishing between 'hard' and 'soft' law and between 'soft' law and non-legal norms, international soft law can be defined as a combination of 'binding norms with a soft dimension' and 'non-binding norms having legal relevance' (Terpan 2015: 7). Thus, characterized by the 'soft' nature of States' obligations (commitments) and their enforcement (i.e. states' broad discretion to decide on the means of implementation of the Agenda), the Agenda 2030 can be undoubtedly categorized as an international soft law document. Moreover, along with the recourse to some 'hard' law documents, the Agenda 2030, confirms States' commitment to a number of international soft law acts (e.g. the Rome Declaration on Nutrition and an accompanying technical Framework for Action).

Ultimately, while evidently belonging to the category of international soft law documents, the Agenda 2030 is tightly intertwined with both international treaty and customary law. An important takeaway is that the interfaces between the Agenda 2030 and respective categories of international law are continuously being shaped by the dynamics and patterns of its implementation. As it will be shown further, an understanding of the connections between the Agenda 2030 and respective categories of international law creates the 'connective tissue' for researching the role and effects of the Agenda 2030 in the EU legal order.

MAPPING THE RELATIONSHIP BETWEEN THE AGENDA 2030 AND INTERNATIONAL LAW

The problématique of the relationship between the EU law and international law lies at the heart of the debate about *sui generis* nature of EU as a legal order, and the interplay of internationalism and constitutionalism therein (Ziegler 2013: 5). From an international law perspective, the starting point for understanding this relationship is that the EU is an international organisation, created by the treaties (the TEU, TFEU and the EURATOM Treaty) that are sources of EU law. The treaty-based nature of the EU and its possession of legal personality (Art.47 TEU) are key factors, determining the applicability of general principles of international law (e.g. rules of responsibility of states and international organisations) to the EU legal order and the EU's being bound by international treaty and customary law. Moreover, Art.3(5) and Art.21 TEU underlines the EU's commitment to the observance of international law and its development. Thus, on the abstract level, the embeddedness of the EU legal order into the international legal order and its openness to international law can be hardly contested (Ziegler 2013: 4). Nonetheless, the *sui generis* nature of the EU legal order, the fragmentation of the international law and an active role of the CJEU in deciding on international law issues determine the complexity and variation in the formation of the EU obligations under international law. In this view, the subsequent analysis will highlight the relationship between the EU law and each of the above-mentioned forms of international law. Furthermore, it will highlight several the Agenda 2030 may have within the EU legal order, non-attributable to any of the above-mentioned forms of international law.

EU Law, Agenda 2030 and International Treaty Law: Indirect Effects and Stronger Selectiveness

Although the EU legal order is by its nature embedded into the international legal order, the Treaties do not set explicit rules regarding the status and effects of international law within the EU legal order (Ziegler 2013: 5-6). Subsequently, the CJEU historically played an active part in the formation of the relationship between EU law and international law, in general, and international treaty law, in particular. The pivotal role of the CJEU in shaping

this relationship can be exemplified by the referral to its landmark case *Kadi and Al Barakaat International Foundation v Council and Commission*. Having indirectly recognized that the UN Security Council's resolutions on counter-terrorism may violate fundamental rights, the CJEU judgment in this case gave an impetus to the debate on the 'constitutionalist-monist versus pluralist-dualist approaches to the international legal order' (Michaelsen 2009: 15). For the majority of EU law scholars, the key takeaway from the judgment in *Kadi* case has been the emphasis on the autonomy of the EU legal order and 'the primacy of its autochthonous values over the common goals of the international community' (De Burca 2009: 6). The trend towards the restriction of international law's effects in EU law is also reflected in *Van Parys, Intertanko and Commune de Mesquer* cases.

From a substantive viewpoint, international law and, in particular, international treaty law can have an effect within the EU legal system in three ways. (Ziegler 2013: 10). While the problématique of the international treaties' direct effect within the EU legal order is shaped by the autonomous nature of the Union's legal order, 'self-executing nature' of international treaties and the narrow definition of direct effect in *Van Genden Loos* case, an insight into the more recent CJEU cases allows for distinguishing three conditions for their direct effect. Firstly, the EU is to be bound by the treaty (*Intertanko and Others*: 44); secondly, respective treaty provisions need to be 'sufficiently clear, precise and unconditional' (Joined Cases *FIAMM*, Opinion of AG Maduro: 27) and, finally, the 'nature and structure' or 'broad logic' of the treaty shall not serve as factors, precluding direct effect (*Intertankoand Others*: 45) (*International Fruit Company and Others*: 7). Moreover, international treaties can be relevant for the interpretation of EU law (Ziegler 2013:11). Last, but not least, in case of the lack of formal relationship, international law (and foreign law) can impact EU law through 'substantive borrowing' that may involve using international or foreign law to fill gaps in EU law as well as acting as a 'persuasive authority' or source of inspiration for the formal sources of EU law (Ziegler 2017:281). 'Substantive borrowing' is closely linked to the idea of cross-fertilization between the international and EU legal orders and is of particular relevance for the areas of shared values. Most commonly used examples of 'substantive borrowing' from international treaty law to EU law concern human rights (i.e. the European Convention on Human Rights) and international humanitarian law (Ziegler 2017:281).

Transferring to the question of the status and effects of the Agenda 2030 within EU law in the context of the international treaty law, I would like to stress that, since the Agenda 2030 does not qualify as an international treaty, it cannot have a direct effect within the EU legal order. At the same time, the insights from the previous analysis of the interplay between the Agenda 2030 and international treaty law, and the status and effects of international treaty law in EU law allow to distinguish several indirect effects the Agenda 2030 may have within the EU legal order. Firstly, the Agenda emphasizes the importance of the application of a number of hard international law documents, such as the Paris Agreement, the UNESCO Convention on the Protection and Promotion of Cultural Expressions and the UN Convention on the Rights of the Child. All respective documents were already ratified by the EU, and in each of the above cases the EU positions itself as a leader in their implementation. Secondly, it shall be mentioned that the Agenda's 2030 calls for compliance with international law are vague, and it seldom refers to specific hard law instruments. In practice, such an approach may allow using the Agenda 2030 as a tool, legitimizing the selectiveness of the EU commitment to international treaties. Furthermore, such an assumption can be substantiated by the fact that the formulations, contained in the Agenda 2030, virtually erase the boundary between 'hard' and 'soft' international law, assigning equal value to treaties and 'other instruments'. Thirdly, notwithstanding its 'soft' legal nature, the Agenda 2030 can exert effects on EU law, if it is used by the CJEU for the purposes of interpretation. Fourthly, the framework nature of the Agenda 2030 creates the foundations for 'substantive borrowing' that is also not limited to 'hard' international law.

EU Law, Agenda 2030 and International Customary Law

In recent years, the CJEU jurisprudence on the relationship between international law and EU law has predominantly considered effects international treaties have within the EU legal order. Less attention has, however, been paid to the legal status and effects of customary international law within the EU legal order. In a number of cases (e.g. *Anklagemyndigheden v. Poulsen, Ahlström Oy v Commission, Air Transport Association of America v Secretary of State for Energy and Climate Change (ATAA)*) the CJEU has explicitly stipulated that the EU shall be bound by customary international law rules and that these rules are applicable in both internal and external domains of the EU action. The CJEU directly applied customary international law in several domains, such as the principles of international treaty law, rules regarding the nationality of individuals and ships and the scope of jurisdiction under international law (Ziegler 2013: 11). Among the customary international law principles, it affirmed one can mention *pacta sunt servanda* (case *A. Racke GmbH & Co. v Hauptzollamt Mainz*) *effet utile* and *ut res magis valeat quam pare* (case *Jean Reyners v Belgian State*). It is also of interest that in controversial Kadi and Yusuf cases the Court of First Instance of the EU (presently known as the 'General Court') recognized all human rights 'to have attained the status of *jus cogens* in international law' (a part of international customary law, defined by the VCLT as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' (VCLT: 53)) (Ahmed and Butler 2006: 775). Moreover, the tight connection between the EU law and customary international law is manifested by the fact that the CJEU obliged the EU to take into account international treaties it is not a party to, 'in so far as they codify general rules recognized by international custom' (Case *Poulsen*: 39). While it has since a long time been accepted by the CJEU that customary international law can be utilized to challenge the validity of EU secondary legislation (or, in other words, have a direct effect), the Court only confirmed the conditions on which customary international law can be relied upon for such purposes in its *ATAA* judgment. In fact, these conditions resemble those, necessary for international treaties to have a direct effect. For a custom to be applied by individuals to challenge EU secondary law, 1) the EU must be bound by this international law rule; 2) the content of the rule needs to be unconditional and sufficiently precise and 3) the nature and broad logic of the rule shall not preclude its application as a grounds to challenge the validity of EU secondary law (*ATAA*: 51-54, 74). Importantly, CJEU earlier judgment *A. Racke GmbH & Co. v Hauptzollamt*Mainz limited the basis of the review of EU measures to 'fundamental rules' of customary international law and, given the 'complexity of the rules' restricted the review itself to the cases of 'manifest error' of EU institutions (52). Since customary international law rules may by their nature be less precise than treaty rules and the CJEU adopted divergent approaches to defining what 'fundamental' nature of a rule may mean, international customary rules so far played a highly limited role in judicial review of CJEU measures (Ziegler 2013: 17-18). At the same time, as noted in scholarship, they may still represent a crucial source of inspiration for EU law-making or the foundation for 'substantive borrowing' (Ziegler 2013: 18).

This study earlier established that the comprehensive nature of the Agenda 2030 prevents it from being regarded as a codification of customary international law rules. Thus, finding out which practices, contained in the Agenda 2030, constitute customary international rules would require an in-depth analysis of their implementation by states, including *opinio juris*. In light of the ICJ *Nuclear Weapons* opinion, the Agenda 2030 and the practices of its implementation can be regarded as evidence of the customary nature of a particular rule. For the EU legal order, this would potentially mean an opportunity to challenge EU measures, constituting a 'manifest error' in relation to 'fundamental' customary international law rules, stipulated in the Agenda 2030 (*Racke GmbH & Co. v Hauptzollamt Mainz*: 52). Since there has so far been no CJEU practice pertaining to the Agenda 2030, it is difficult to establish which domains of the EU and Member States law could be influenced by the selective recognition of the Agenda 2030 commitments as customary international law rules. However, by analogy with the EU's recognition of the general

principles of international law, one can assume that such practice would predominantly concern human rights, justice and the rule of law and the use of natural resources (Kornobis-Romanowska 2018: 415-417). Potentially, the recognition of specific Agenda 2030 commitments as customary international law rules can also impact the EU-Member States' cooperation and coordination in the aforementioned domains due to an increase of potential international responsibility. Nonetheless, as compared to international treaty law, challenging EU measures based on specific Agenda 2030 commitments is still hardly possible due to a number of previously mentioned difficulties pertaining to 1) the qualification of the rule as an international customary law rule; 2) characterizing the rule as 'fundamental' from the perspective of the EU legal order and 3) the non-established nature of the CJEU practice of utilizing customary international rules as a means to challenge the validity of EU acts. Thus, similar to international treaty law, interpretation and different forms of 'substantive borrowing' represent the major avenues through which the 'Vision', Goals, targets and indicators, contained in the Agenda 2030, may have an effect within the EU legal order from the perspective of customary international law.

'Soft' Effects of the Agenda 2030 within the EU Legal Order

Representing 'a defining feature of the European polity', flexible and differentiated nature of European integration, aimed at accommodating the degree of difference between the Member States and regions, has been intensely reflected in EU law (De Witte, Ott and Vos 2017: 2). Along with the application of Directives as a 'hard' law instrument that requires Member States to achieve a defined result without dictating, such reflection encompasses the proliferation of soft law instruments, such as opinions, recommendations, guidelines and best practices. Only opinions and recommendations have their legal basis in the EU primary law(Art. 288 TFEU). Their validity and interpretation can be part of the preliminary ruling (Art.267 TFEU); however, they can only be subject to judicial review if 'an act, by reason of its content, does not constitute a general recommendation' (*Belgium v Commission*: 29). Other soft law documents (e.g. guidelines, conclusions, inter-institutional agreements) are often found to have the legal effects, comparable to the ones of opinions and recommendations (Meijers Committee 2018: 2). This is, however, not the case for 'best practices' that are generally regarded as examples that may facilitate the application of legal instruments. According to the Opinion of AG Bobek in case *Belgium v Commission,* the legal effects of 'soft' instruments encompass 1)institutions' self-bindingness and possibly bindingness for members of respective bodies in line with the principle of loyal cooperation (Art.4(3) TFEU); 2)the application of 'soft' law documents for interpretative purposes by the CJEU and national courts (earlier confirmed in cases *Salvatore Grimaldi v Fonds des maladies professionnelles* and *Alassini v Telecom Italia SpA*) and 3) their potential to generate parallel sets of rules.

Importantly, notwithstanding the proliferation of non-binding legal instruments internationally, the CJEU has not yet ruled on their status and legal effects within the EU legal system. However, since the EU commitment to be a frontrunner in the implementation of the SDGs is stipulated in the non-binding legal instrument, adopted by the Commission (i.e. Communication), it can be argued that the respective Commission's Communication is binding for the Commission; can be used for interpretative purposes on the national and EU levels and may give rise to parallel sets of rules. Thus, in case of the application of provisions related to opinions and recommendations to other 'soft' law documents by analogy, the validity and interpretation of the Commission's Communication 'Next steps for a sustainable European future' can become part of the CJEU preliminary ruling. Questionable is, however, whether these legal effects only pertain to the respective Communication or can be automatically extended to the Agenda 2030 and its role within the EU legal order. This question, however, remains to be answered under the circumstances of the lacking CJEU practice regarding the application of international soft law documents within the EU legal order.

CONCLUSION

The EU's commitment 'to be a frontrunner in the implementation Agenda 2030' presupposes multiple changes on the policy level, such as the streamlining of the SDGs into the whole spectrum of the Commission's policies both internally and externally. Such commitment also serves as an important source of legitimacy for the EU's support for multilateralism and its action in the domains of conflict resolution, peace-building, human rights and rule of law promotion. Notwithstanding the above and multifaceted interconnections between the Agenda 2030 and international law, the legal status of the Agenda 2030 within the EU legal order is not defined in legal terms, and it does not have a direct effect (cannot be used by individuals to challenge EU legal acts in the CJEU and national courts). Having used various forms of international law as a 'connective tissue', this study can distinguish the following legal effects of the Agenda 2030 within the EU legal order: 1)evidence of the existence of particular international customary rules and the EU's being bound by them; 2) self-binding nature of the 'commitment to be a frontrunner in the implementation of the Agenda 2030' for the Commission (rather than the Agenda 2030 as a 'soft law' document; 3) the potential for 'substantive borrowing' in the EU law-making (e.g. drawing inspiration); 4) the application by the CJEU and national courts for interpretative purposes (including the selective reaffirming of the EU obligations under international treaties).

The analysis of the status and effects of the Agenda 2030 within the EU legal order also allowed us distinguishing three important phenomena, deserving further scholarly attention. Firstly, being positioned as a unique instrument of the 'governance through goals', rather than 'hard' norms, the Agenda 2030 virtually erases the borderline between 'hard' and 'soft' international law in its 'Vision' part and the formulations of the Goals. This makes it interesting to trace the role of the Agenda 2030 and its implementation in the dynamic interplay between international 'hard' and 'soft' law norms. Secondly, while the CJEU has repeatedly addressed the legal effects of EU soft documents in its jurisprudence, no clarity exists with regard to the legal effects of international 'soft' law instruments within the EU legal order and the legal consequences of the EU's commitment to them. Thirdly, of high relevance is the gap between the comprehensiveness of action the implementation of the Agenda 2030 requires the EU, its institutions and Member States to undertake both internally and externally and very 'modest', indirect and difficult to distinguish legal effects of the Agenda 2030 within the EU legal order. This, once again, puts the problématique of the effectiveness of political commitments and 'soft' norms vis-à-vis 'hard' obligations, and the interplay between 'hard' and 'soft norms' internationally and within the EU legal order to the forefront.

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