RESPONDING TO THE EU'S RULE OF LAW CRISIS: ANY ROLE FOR GENERAL INTERNATIONAL LAW?

Martina Buscemi*

Abstract

This article purports to examine and critically discuss some of the current proposals put forward by scholars to respond to the European Union (EU) rule of law crisis, which call into question, in different ways, the role of general international law. After outlining the state of the debate on the relationship between customary law and EU legal order (Section 2), the article considers some provocative arguments recently made on the alleged "implied withdrawal" of backsliding members via Article 50 TEU, through the prism of the 1969 Vienna Convention Law of Treaties (VCLT) (Section 3). Subsequently, the attention turns on the interplay between general international law and Article 7 TEU, the special mechanism for the enforcement of EU values. The article explores a radical proposal, namely, that of setting aside Article 7 TEU and imposing sanctions grounded on customary international law (Section 4). These theses advocate for the suspension or expulsion of recalcitrant members based on the fall-back on the "safety valves" for parties to treaties in international law, namely Articles 60-62 VCLT. Against this theoretical analysis, the article draws some final remarks on the approach followed in practice by the Union to manage its internal crisis and reflects on the implications of this approach from the perspective of the law of International Organizations and the concept of EU autonomy (Section 5).

Keywords: EU rule of law crisis; EU values; Article 7 TEU; EU autonomy; customary international law; regime failure; law of treaties; suspension of membership; expulsion; self-help.

1. Disciplining Backsliding Members: In Search of Solutions Beyond the EU Enforcement Toolkit

A spectre is haunting Europe – the spectre of the rule of law backsliding.[1] Among the many challenges facing the European Union (EU) to date, it is the internal crisis spawned by the deterioration of the rule of law affecting some members that severely threatens the EU integration process and the legacy of the Treaty of Rome. In particular, Hungary and Poland since the elections, respectively, of the Fidesz government in 2010 and the Law and Justice government (PiS) in 2015, have enacted constitutional

* Assistant Professor of International Law, University of Milan.

[1] For an accurate definition of the expression "rule of law backsliding" see Pech and Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", Cambridge Yearbook of European Legal Studies, 2017, p. 3 ff.

reforms and targeted legislation that, albeit with significant differences, are in conflict with the fundamental and foundational values of the EU carved into Article 2 TEU, especially the rule of law. Both situations are widely documented in literature[2] and by international institutions.[3]

The issue of rule of law backsliding is the first real test, after the entry in force of the Treaty of Lisbon, of the capability of the EU to deal with serious and systematic attacks on the values on which the Union is founded. As of today, one cannot but note that the stress test has yielded unsatisfactory results. Over the past few years, the non-use, or under-use, of existing enforcement tools of EU law and values – particularly, the "political" enforcement mechanism of Article 7 TEU and the infringement procedures *ex* Articles 258-260 TFEU – as well as the devising of new monitoring instruments – particularly, the EU initiatives on the rule of law –[4] have failed to successfully bring about a change of course. While waiting to gauge the potential of the recently adopted regulation on the general regime of conditionality for the protection of the EU budget,[5] the ongoing military conflict in Ukraine has overturned the geo-political landscape and is likely to force both the parties – that is to say the defiant members and the EU – to rethink their mutual positions.

Faced with the Union's struggles to bring recalcitrant members back on track, scholars have been particularly animated in speculating about possible ways-out. A panoply of different solutions and proposals have been brought to the fore. The most recurrent suggestions include: (i) using the infringement procedure in a more robust and "systemic" way, including by unleashing the potential of the EU Charter of Fundamental Rights;[6] (ii) imposing fines and recovery by set-off within the in-

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[2] In scholarship see, among many, von Bogdandy and Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area – Theory, Law and Politics in Hungary and Romania*, Oxford/Portland, 2015; Closa and Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, 2016; Jakab and Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, 2017; von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, Berlin, 2021; Belavusau and Gliszczynska-Grabias (eds.), *Constitutionalism under Stress*, Oxford, 2020. See also the numerous editorial or guest editorial comments published in the CML Rev. since 2012.

[3] **Recently, see the 2022 Rule of Law Report drafted by the EU Commission, in particular the country** chapters on Poland and Hungary (available at: <https://ec.europa.eu/info/publications/2022-rule-law-report-communication-and-country-chapters_it>) and the Venice Commission's opinions on the reforms enacted by the two States (available at: <https://www.venice.coe.int/webforms/documents/default.aspx?country=17&year=all> and <https://www.venice.coe.int/webforms/documents/?country=23&year=all>).

[4] See the European Rule of Law Mechanism (2020), available at: <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en>; A New EU Framework to Strengthen the Rule of Law (2014), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158>.

[5] See Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (see also *infra* notes 20 and 69).

[6] See, e.g., Bonelli, "Infringement Actions 2.0: How to Protect EU Values before the Court of Justice", European Constitutional Law Review, 2022, p. 30 ff.; Jakab, "The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States", in Closa and Kochenov (eds.), *cit. supra* note 2, p. 187 ff.

fringement procedures, even in support of interim orders;[7] (iii) suspending EU funds through various mechanisms, among which the most prominent is the new conditionality mechanism;[8] (iv) adjusting the principle of mutual trust and suspending the recognition of national judiciaries[9] (v) applying the doctrine of the so-called "reverse Solange" in order to promote individual legal actions via Union citizenship;[10] (vii) implementing enhanced forms of cooperation among a club of principled members, thus excluding defiant ones;[11] (viii) collectively withdrawing from the EU and re-founding a new "EU 2.0";[12] (viii) instrumentalizing Article 10 TEU so as to exclude State representatives of backsliding members from EU organs;[13] and finally (ix) expelling the offending members as a remedy of last resort.[14]

The perspectives emerging from the scholarly debate are rich and diverse, ranging from purely legal approaches,[15] to political and sociological methods of analysis[16] and even philosophical stances.[17] Needless to say, EU lawyers – but also comparative public and constitutional lawyers – have taken the centre stage. In contrast, a perspective rooted in international law seems to all but absent.[18]

Yet, one cannot help wondering whether international law could have some say on the EU rule of law crisis and in offering possible legal remedies. For instance, one may ask whether customary international law might contribute to bringing the defaulting member back in line with Union law or pulling it outside the club of upright members. Answering this question inevitably implies coming to terms with the old and trite debate about the relationship between EU law and public international law and whether the former has completely "severed the umbilical cord" with the latter.[19] The longstanding dispute between "generalist" *versus* "specialist" scholars might ac-

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[7] See, e.g., Pohjankoski, "Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-off", CML Rev., 2021, p. 1341 ff.

[8] See references in notes 5, 20 and 69.

[9] Canor, "Suspending Horizontal Solange: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law", in von Bogdandy et al. (eds.), *cit. supra* note 2, p. 183 ff.

[10] See, e.g., von Bogdandy et al., "Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States", CML Rev., 2012, p. 489 ff.

[11] See, e.g., Chamon and Theuns, "Resisting Membership Fatalism: Dissociation through Enhanced Cooperation or Collective Withdrawal", Verfassungsblog, 11 October 2021.

[12] *Ibid*.

[13] See, e.g., Cotter, "To Everything There Is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council", EL Rev., 2022, p. 69 ff.

[14] See references in Subsection 4.2.

[15] See references in Sections 3-4.

[16] E.g., the debate around the concept of "militant democracy": see Feisel, "Thinking EU Militant Democracy beyond the Challenge of Backsliding Member States", European Constitutional Law Review, 2022, p. 385 ff.

[17] See, e.g, Theuns, "The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7", Res Publica, 2022, p. 693 ff.

[18] Comparatively, international law scholars have been more engaged in the discussion over the similar, but in some ways opposite, situation – that of members' voluntary withdrawal from the Union.

[19] De Witte, "European Union Law: How Autonomous is its Legal Order?", **Zeitschrift für öffentliches Recht**, 2010, p. 141 ff., p. 151.

tually discourage looking at the EU rule of law crisis from that perspective. However, two factors seem to revitalize this faded debate, posing new stimulating questions. One factor is purely *internal* and stems from the acknowledgment that the rule of law crisis appears today to be an infection which has not found a definitive cure. All the above-mentioned proposals to solve the crisis have drawbacks and limits, including the new conditionality mechanism with respect to which critical aspects have been pointed out[20] and whose first application, in December 2022, against Hungary is still to be appraised as to its effectiveness.[21] The other factor is, rather, purely *external* and stems from the observance of the recent practice developed by other International Organizations (IOs). Indeed, on some occasions, regional and universal IOs have reacted against errant members for breaches of their institutional mandates, by adopting sanctions which deviate from the rules of IOs. The reference here is, in particular, to sanctions imposed on Russia after the beginning of the military conflict in Ukraine, which fall outside the legal framework provided by the constitutive instruments.[22] Those recent elements of practice, which are not unprecedented, suggest that new and "extraordinary" solutions may be found in exceptional circumstances in order to discipline filibustering members that place themselves outside the institutional orders.[23]

Before exploring "creative" solutions aimed at disciplining EU backsliding members, which call into question the role of general international law, it is necessary to briefly outline the current state of the debate on the relationship between international law and EU law.

2. The Long-Standing Dispute on the Interplay between EU law and International Law

Since the famous rulings in *van Gend & Loos* and *Costa v. Enel*, the European courts have forged the concept of the legal *autonomy* of EU law with respect both to the domestic order of the members and to international law. Reiterated over time, this mantra has been justified by the essential characteristics of the Union, namely its "constitutional" structure and the peculiar nature of its law.[24] Undoubtedly, the "veneration" of the concept of autonomy from the international legal order has signifi-

[20] See, e.g., Cannizzaro, "Neither Representation nor Values? Or, 'Europe's Moment' – Part II", European Papers, 2020, p. 1101 ff.; Editorial Board, "Compromising (on) the General Conditionality Mechanism and the Rule of Law", CML Rev., 2021, p. 267 ff., p. 282.

[21] Council of the EU, "Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary", 12 December 2022.

[22] Buscemi, "Outcasting the Aggressor: The Deployment of the Sanction of "Non-Participation"", AJIL, 2022, p. 764 ff.

[23] Although those solutions have not been explicitly grounded on general international law, only fall-back rules could justify the lawfulness of measures impinging on rights and benefits of the members (*ibid.*, p. 768 ff.).

[24] See, *ex multis*, Lenaerts, Gutiérrez-Fons and Adam, "Exploring the Autonomy of the European Union Legal Order", ZAÖRV, 2021, p. 47 ff.

cantly influenced, and today still dominates, the debate on the matter.[25] Yet, the need to mark the distance from international law has eased over time, and the European courts have shown a gradual evolution from the initial striving for autonomy in the early case-law to an approach based more on its permeability to international law in the subsequent jurisprudence, albeit always with a distinctively European perspective.[26] Unsurprisingly, the relationship between public international law and EU law has been described as "complex",[27] "tormented",[28] "schizophrenic",[29] swinging from "unswerving compliance to blatant instrumentalization",[30] with international law being "weak as [a] constraint, strong as [a] tool".[31]

In this context, the role of customary international law within the EU legal system remains particularly "obscure".[32] While Article 2(5) TEU now explicitly provides for the strict observance and development of international law, the EU Treaties remain silent on the role and function of *general* international law. Hence, the conditions and extent of its "reception" in the EU legal order have been clarified by the judges of Luxembourg, serving as "the master[s] in [their] own house".[33] On several occasions, the European courts have reiterated that the Union must respect international law in the exercise of its powers and have recognized the binding force of customary law as a source of EU law for both external and internal EU action.[34] All in all, the application

[25] Moreno-Lax, "The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order", in Govaere and Garben (eds.), *The Interface Between EU and International Law. Contemporary Reflections*, Oxford, 2019, p. 45 ff.

[26] Wouters, Nolkaemper, and de Wet, "Introduction: The Europeanisation of International Law", in Wouters, Nolkaemper and de Wet (eds.), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States*, Den Haag, 2008, p. 2 ff.; Eckes, "The Role of the European Court of Justice", in Cannizzaro, Palchetti and Wessel (eds.), *International Law as Law of the European Union*, Leiden, 2012, p. 353 ff. See the references of the jurisprudence cited there.

[27] Timmermans, "The EU and Public International Law", European Foreign Affair Review, 1999, p. 181 ff.

[28] Wouters, "The Tormented Relationship between International Law and EU Law", in Bekker, Dolzer and Waibel (eds.), *Making Transnational Law Work in the Global Economy. Essays in Honour of Detlev Vagts*, Cambridge, 2010, p. 198 ff.

[29] Gragl, "The Silence of the Treaties: General International Law and the European Union", GYIL, 2015, p. 375 ff.

[30] Moreno-Lax and Gragl, "The Quest for a (Fully-Fledged) Theoretical Framework: Co-Implication, Embeddedness, and Interdependency between Public International Law and EU Law", YEL, 2016, p. 455 ff., p. 456.

[31] De Witte, "International Law as a Tool for the European Union", European Constitutional Law Review, 2009, p. 265, citing how an author described **the place of international law in US for**eign policy. For further references on the relationship between EU and public international law see Hartley, "International Law and the Law of the European Union – A Reassessment", BYIL, 2001, p. 1 ff., especially footnote 4.

[32] Giannelli, "Customary International Law in the European Union", in Cannizzaro, Palchetti and Wessel (eds.), *cit. supra* note 26, p. 93 ff.; Gragl, *cit. supra* note 29, p. 376.

[33] Eckes, *cit. supra* note 26, p. 354.

[34] For references to relevant case-law see, *ex multis*, Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea*, Milano, 2008, p. 260; Giannelli, *Unione Europea e diritto internazionale consuetudinario*, Torino, 2004; Rosas, "The European Court of Justice and

of general international law appears to be directed at preserving the EU system and safeguarding its effectiveness.[35]

The ability of customary law to penetrate the Union legal order has encountered particular resistance in the realm of *internal* action, that is, in relations between institutions and members. As a matter of fact, the relevance recognized, for instance, of the law of treaties varies meaningfully depending on whether it is the EU Treaties or other agreements signed by the EU and/or members with third parties which are at issue. With regard to the latter, the European Court of Justice (ECJ) has repeatedly relied on the Vienna Convention on the Law of Treaties (VCLT) – especially, the rules on the interpretation and termination of treaties – while, instead, it has barely taken any inspiration from the "outside" when its founding treaties were at stake.[36] This reluctance arises from the assumption that EU Treaties are not "ordinary" multilateral agreements but foundational – or "constitutional", if one prefers – instruments of the EU legal order. Therefore, it is understood that "EU constitutional law applies internally, and international law plays a limited role".[37] This is consistent with the principle of *lex specialis derogat generali*, a tenet which is confirmed in the International Law Commission's codification of (secondary) rules of general international law, in the wording of the "without prejudice" clauses, such as Article 5 VCLT.

With regard to the interplay between the general regime on State responsibility and the special enforcement mechanisms provided for by the EU Treaties, the position assumed by the European courts is well-known. Back to the 1964, thus even before the EU enforcement procedures were refined as we know them today, the ECJ advocated for a total *closure* of the EU system to the general regime of "self-help".[38] In the famous judgment *Commission v. Luxembourg and Belgium*, the Court dismissed the arguments put forward by Luxembourg and Belgium that general international law (in particular, the principle *inadimplenti non est adimplendum*) allows members to withhold performance of their obligations in case of non-compliance with EU obligations by another member. For the Court, the general rule enabling States to take self-help measures in the event of wrongful acts committed by other parties cannot apply in the EU legal order.[39] The prohibition of inter-state countermeasures has been reiterated many times since 1964 and, given the acquiescence of members,[40] has arguably become a cornerstone of the EU order.[41] Some years later, the ECJ reaffirmed

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Public International Law", in Wouters, Nolkaemper and de Wet (eds.), *cit. supra* note 26, p. 79 ff. See also the contribution by Cremona in this Volume.

[35] Casolari, *cit. supra* note 34, p. 158.

[36] Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980. On the VCLT and the jurisprudence of ECJ see *cit. supra* note 34 and Kuijper, "The European Courts and the Law of Treaties: The Continuing Story", in Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, 2011, p. 256 ff.; Beck, "The Court of Justice of the EU and the Vienna Convention on the Law of Treaties", YEL, 2016, p. 484 ff.

[37] Odermatt, *International Law and the European Union*, Cambridge, 2021, p. 62.

[38] Joined Cases 90–91/63, *Commission v. Luxembourg and Belgium*, ECR-625, 1964.

[39] *Ibid*.

[40] Lugato, "Partecipazione di cittadini comunitari a concorsi universitari e condizioni di reciprocità", RDI, 1993, p. 385 ff., p. 400.

[41] Gradoni, Regime failure *nel diritto internazionale*, Padova, 2009, p. 231.

the primacy of EU Treaties over the rules of international law on the consequences of the termination of treaties.[42]

Coming to more recent times, the "Brexit" saga has brought back the question of the interplay between EU Treaties and customary international law from a different angle, namely the application of default rules on withdrawal from treaties. In particular, the question arose as to whether the general rule on the *revocation* of the notice of denunciation (encapsulated in Article 68 VCLT) could "fill" the silence of the special rule on withdrawal contained in Article 50 TEU. In its seminal *Wightman* ruling, the ECJ showed a certain degree of openness towards international law, by relying on Article 68 VCLT in the interpretation of Treaties "taken as a whole". However, the openness towards international law was more apparent than real. The Court took into account the default rule, but only to corroborate a comprehensive and autonomous interpretation of Article 50 TEU.[43] Once again, this confirms the impression that, instead of "applying" customary international law directly to EU founding Treaties, European courts tend to "re-read", or support a certain reading of, the EU provisions in light of general rules of international law.[44]

Now, despite the cautious attitude of European courts, based on the autonomy and *sui generis* nature of the Union, it is relevant for our purposes to understand the extent to which the toolbox of general law can be opened up in case the EU legal system "fails" to discipline defiant members. So far, European courts have dealt with the interface between public international law and the EU Treaties in "physiological" times, that is when the special mechanisms offered by the EU are available and have not been exhausted, or in circumstances when EU Treaties are silent on a certain issue. In contrast, the ECJ has never explicitly addressed the question of the *failure* of EU Treaties to regulate a certain aspect. The question of whether customary law can "fix" the dysfunctions within the EU Treaties has instead enlivened the doctrinal debate.

The problem is all too familiar to international lawyers, as it fits into the broad debate about the emergence of autonomous systems of treaty rules, and the possibility, in case of the silence or failure of these regimes, to "fall-back" on general international law.[45] While it is widely accepted that the EU legal system potentially has the

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[42] Joined cases T-27/03, *SP and others v. Commission*, ECR, 2007, II-04331, para. 58.

[43] Case C-621/18, *Wightman and others v. Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:85, paras. 70-71. In this sense see Rossi, "**Droits fondamentaux, primauté et autonomie: la mise en balance entre les principes "constitutionnels" de l'Union européenne**", Revue trimestrielle de droit européen, 2019, p. 67 ff., p. 75; Casolari, "Il recesso dall'Unione Europea: per una lettura dell'art. 50 TUE tra diritto sovranazionale e diritto internazionale", RDI, 2019, p. 1006 ff.; Gatti, "Il diritto a terminare unilateralmente la procedura di recesso dall'Unione europea: note a margine della sentenza *Wightman*", Federalismi.it, 2020, p. 26 ff. The relevance recognised to Art. 68 appears more significant in the Advocate General's opinion, although the customary nature of the provision has been denied (Opinion of 4 December 2018).

[44] Casolari, *cit. supra* note 34, p. 1020.

[45] See ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006. Fundamental remains the critical study of Gradoni, *cit. supra* note 41, also for the in-depth recount of different theses on the regime failure; Conforti, "Unité et fragmentation du droit international: glissez, mortels, n'appuyé pas", RGDIP, 2007, p. 5 ff.

features of a "self-contained regime",[46] scholars' opinions are divided on what happens when the special system "fails". Albeit with some risks of over-simplification, three main positions emerge which, in most cases, reflect the division between "specialists" *versus* "generalists" above mentioned.

The first position defends the self-sufficiency of the EU system and rejects the possibility of falling-back to international law even in the event of failure, by emphasizing the "constitutional" and "autonomous" characters of the Union.[47] Emphasis is placed, in particular, on the sophisticated procedures to react to EU law breaches, compared to the "rough" means of private justice permitted under general international law, and to the exclusive jurisdiction of the ECJ to settle disputes between members.

Contrary to this view, public international lawyers are more inclined to defend a residual role for general rules in case of regime failure.[48] The thesis of the indissolubility of the link between the EU and public international law, and the consequent "permanent" availability of legal remedies offered by the latter in pathological circumstances, has been based on a different range of arguments. For some, the fall-back on general international law aims at securing the well-functioning of the international legal order as a whole.[49] Others reach the same conclusion by highlighting, in particular, the imperative character of the general rules on the invalidity and extinction of treaties which cannot be totally derogated by treaty regimes, including the EU Treaties.[50] Others note that certain general rules – namely, those enabling States to take countermeasures – can only be temporarily set aside but never *entirely* waived by special regimes, because they reflect a structural feature of international law understood as an order governing relations between sovereigns.[51]

Lastly, a third and different doctrinal position denies the re-emergence of customary law when the EU system "fails" but bases its arguments on international law rather than on EU constitutional features. More specifically, it gives significant weight to the prohibition of inter-state countermeasures affirmed in 1964 by the Luxembourg

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[46] Klein, "Self-contained Regime", Max Planck Encyclopedia of Public International Law, 2006, para. 15. For further references on this debate, see Odermatt, *cit. supra* note 37, p. 15 ff.

[47] Well-known is the position held by Weiler, "The Transformation of Europe", Yale JIL, 1991, p. 2403 ff., p. 2422.

[48] Klein, *cit. supra* note 46; de Witte, *cit. supra* note 19, p. 151.

[49] Among many, see Simma and Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", EJIL, 2006, p. 483 ff., pp. 516-519; Simma, "Self-Contained Regimes", NYIL, 1985, p. 111 ff. For Conway, "Breaches of EC Law and the International Responsibility of Member States", EJIL, 2002, p. 679 ff., Simma's conclusions still stand. See also ILC, *cit. supra* note 45, p. 44, footnote 255. In the sense that rules of international law can be residually applied in the EU order see also Pisillo Mazzeschi, *Risoluzione e sospensione dei trattati per inadempimento*, Milano, 1984, p. 309 ff., arguing that the position of Luxembourg judges does not cover the case of "regime failure".

[50] Conforti and Iovane, *Diritto internazionale*, 12th ed., Napoli, 2020, pp. 200-201.

[51] Arangio Ruiz, Fourth Report on State responsibility, UN Doc. A/CN.4/444/Add.3, 17 June 1992, p. 40. According to this view, resorting to general rules would remain possible in cases of serious wrongful acts.

Court, which is construed as "subsequent practice" in the interpretation of the EU Treaties, as per Article 31(2)(b) VCLT.[52]

Building on this articulate debate, the following paragraphs test some of the recent proposals put forward by scholars to respond to the rule of law crisis, in light of customary international law.

3. The Thesis of the "Implied" Withdrawal

The first thesis that needs to be examined concerns the alleged withdrawal of the defiant members from the EU. Recently, some scholars have provocatively argued that Hungary and Poland, by disregarding several EU rules including the core principles of membership, have *implicitly* withdrawn from the EU.[53] According to one author, the continuous defiance of a member towards membership obligations "would ultimately amount to an activation of the withdrawal process as envisaged in Article 50 TEU",[54] given that the withdrawal notice may take different forms. Indeed, Article 50(2) TEU stipulates that the denunciation is formalized when the State "notif[ies] the European Council of its intention", but remains silent on any particulars as regards the terms, forms or timing of the notification. According to this view, in order to trigger the withdrawal process under Article 50 TEU, what really matters is the intention of the member to no longer apply the EU Treaties – a circumstance that would be satisfied in the present case by the Governments' breach of the core values of the membership. In a similar vein, another author points in particular to the Polish Constitutional Tribunal ruling of 7 October 2021, which openly challenged the primacy of the EU law in Poland and profoundly exacerbated the rift with the Union. From his point of view, the Constitutional Tribunal's stand constitutes the first step on the road for the so-called "Polexit":[55] by filing an application to the Constitutional Tribunal with the clear objective of ending the primacy of EU law, the Polish Government would have taken a *de facto* decision to withdraw. Again, relevance is given to the fact that Article 50 TEU does not require any particular form of notification and that the Polish Government took conclusive action that expressed a legally relevant intention. In this sense, the ruling of the Constitutional Tribunal published in writing in the country's official journal would amount to a "public notification of the C[onstitutional] T[ribunal]'s declaratory judgement confirming the Polish Prime Minister's request" and "[a]ll natural and legal persons, including the EU and its institutions such as the

[52] Gradoni, *cit. supra* note 41, p. 267 ff. For others, the ECJ jurisprudence can be based on an a "unwritten" *lex specialis* in the treaties, in the sense of Art. 60(4) VCLT, or on the special nature of the Treaties not governed by international law in the sense of Art. 2(1)(a) VCLT (Giegerich, "Article 60", in Dörr and Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Heidelberg, 2018, p. 1095 ff., p. 1117).

[53] See Hillion, "Poland and Hungary are withdrawing from the EU", Verfassungsblog, 27 April 2020; Hofmann, "Sealed, stamped and delivered. The publication of the Polish Constitutional Court's judgment on EU law primacy as notification of intent to withdraw under art. 50 TEU?", Verfassungsblog, 13 October 2021.

[54] Hillion, *cit. supra* note 53.

[55] Hofmann, *cit. supra* note 53.

European Council, would be considered notified thereof", considering the close interaction between the EU and national legal systems.[56]

This line of arguments, albeit thought-provoking, is not entirely convincing and seems aimed, directly or indirectly, at circumventing (the non-use of) Article 7 TEU and the lack of expulsion clauses in the EU Treaties. The thesis of the *de facto* withdrawal of Hungary and Poland is hardly tenable both from the perspective of EU law[57] and, to the extent that is relevant here, of general international law, taking into consideration, in particular, the procedural requirements a member must observe when notifying of its intention to withdraw. It is true that the open texture of the provision does not indicate any formal aspect of the notice of withdrawal to be addressed to the European Council. In *Wightman*, the ECJ clarified that the *revocation* of the notification must be submitted "in writing" and be "unequivocal and unconditional",[58] but did not specifically deal with the notification of withdrawal itself.[59] Yet, one can argue that if the revocation of withdrawal must respect some formal requirements,[60] the same conditions apply *a fortiori* with regard to the notification communicating the decision to denounce the EU Treaties.[61]

At any rate, customary international law may shed further light on this issue and may possibly "fill" the tiny lacuna of Article 50(2) TEU. First, one can note that the partial silence of the exit clause on formal aspects of the notification does not imply a will to deliberately derogate from general international law, and therefore Article 50(2) TEU could be interpreted "in light of" the rules contained in the VCLT, as elucidated in *Wightman*, through systemic interpretation pursuant to Article 31(3)(c) VCLT. From a general point of view, notification implies the manifestation of will directed to cause legal cognizance. Part V, Section 4, of the VCLT sets out the procedure to be followed in order to manifest the intention to invalidate, terminate, withdraw from, or suspend, the operation of a treaty. In particular, Articles 65(1) and 67(1) VCLT require that the notification must be "*written*" and that it "shall indicate the *measure* proposed to be taken with respect to the treaty and the *reasons* therefor". As noted by the Advocate General in *Wightman*, "there is no reason that Articles 54, 56, 65 and 67 of the VCLT [...] may not be used to provide interpretative guidelines to assist in dispelling doubts about issues that are not expressly dealt with in Article 50 TEU".[62] On its part, the ECJ embraced the view that the drafting of Article 50 TEU was "inspired" by the VCLT and therefore the "Treaty on treaties" should be taken into account when interpreting the exit clause.[63]

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[56] *Ibid*.

[57] Chamon and Theuns, *cit. supra* note 11; Steinbeis, "The Exit Door", Verfassungsblog, 8 October 2021.

[58] *Wightman* case, *cit. supra* note 43, paras. 74-75.

[59] The Advocate General **maintained that a notification presumably should be "in writing, although this is not specified"** (Opinion of Advocate General, *cit. supra* note 43 para. 97).

[60] See *supra* note 58.

[61] This view seems supported by the Advocate General, *cit. supra* note 43, para. 143.

[62] *Ibid.*, para. 82.

[63] *Wightman* case, *cit. supra* note 43, para. 70. Even more explicitly, see Opinion of the Advocate General, *ibid.*, para. 108, especially footnote 63.

The possibility to "read" Article 50(2) TEU in view of the procedural prescriptions contained in Articles 65-67 VCLT holds true even though in 1998 the ECJ found in *Racke* that Article 65 VCLT did *not* form part of customary international law.[64] First of all, it should be recalled that this finding referred to the procedural requirements of prior notification and a waiting period (three months) to be followed in the event of a suspension of a treaty, which is silent on that matter, on the ground of the *rebus sic stantibus* rule. Moreover, in a study conducted on the most recent practice concerning withdrawals which have occurred over the last 15 years, we have noted that the procedural requirements enshrined in Articles 65-68 VCLT should not be considered as a unitary block, so as to exclude their correspondence to general international law *tout court*.[65] On the contrary, when analyzed separately, some of these requirements find echoes today in practice, as an expression of the principle of good faith. This is particularly true of the obligation of *written* and legally *reasoned* notifications of withdrawals, which, in cases of denunciations of agreements containing a withdrawal clause, such as the EU Treaties, have been consistently observed in practice.[66] The study conducted on withdrawal actions shows that notices of withdrawal from treaties containing a denunciation clause present the following features: notices are signed by a competent government official; unequivocally express the intention to withdraw; and are succinctly reasoned through an explicit reference, at the very least, to the provision allowing the parties to withdraw.[67] Moreover, irrespective of whether Articles 65 and 67 VCLT express general rules of international law, it is worth repeating that in *Wightman* the uncertain customary status of Article 68 VCLT did not prevent the Court from relying on that rule when interpreting Article 50 TEU as a whole.

If this is the case, a reading of Article 50 TEU in light of Articles 65-67 VCLT would indicate that a member willing to withdraw from the Union must produce an ambiguous and formal act, consisting: (i) in a *written* communication; (ii) addressed to the EU Council; (iii) which states in an unequivocal and clear way the intention of the State to withdraw from the Union; (iv) and which is "reasoned" by making reference to the *legal ground* on which the action is based, namely Article 50 TEU. If these are the standards, the continuous defiance of the core membership obligations by the two recalcitrant members, including through the publication of the Polish Constitutional Tribunal judgement, even if serious and well-known to the EU Council, cannot be interpreted as an expression of a legally relevant intention within the meaning of Article 50 TEU. Inferring the intention to withdraw on the basis of pure facts, instead of formal acts, would also run counter to the principle of an "*orderly* withdrawal", affirmed once again in *Wightman*, given the degree of ambiguity and discretion in interpreting the parties' intentions from their factual conduct. Incidentally, the identification of the exact moment when the member notifies the EU Council of its inten-

[64] Case C-162/96, *Racke GmbH & Co. v Hauptzollamt Mainz*, ECR, 1998, I-3655, para. 58 ff.

[65] Buscemi and Marotti, "Obblighi procedurali e conseguenze del recesso dai trattati: quale rilevanza della Convenzione di Vienna nella prassi recente?", RDI, 2019, p. 939 ff.

[66] In the sense that the notification of Art. 65(1) reflects customary law, see also Tzanakopoulos, "Article 68", in Corten and Klein (eds.), *The Vienna Convention on the Law of Treaties. A Commentary*, Oxford, 2011, p. 1565.

[67] Buscemi and Marotti, *cit. supra* note 65, p. 944 ff.

tion to withdraw is crucial for the purpose of calculating the two years after which the withdrawal takes effect under Article 50(3) TEU (unless otherwise agreed by the parties). The argument of withdrawal by virtue of conclusive facts seems at odds also with the principle of legal certainty and the *stability* of treaties which permeates the entire law of treaties and which is especially valid for agreements creating a sophisticated and institutionalized legal order. Ultimately, the thesis of the implied withdrawal risks conflating, from a conceptual point of view, violations of the treaty with the consequences of the withdrawal – i.e., that the treaty ceases to apply to the State in question.

In the unlikely event that the ECJ were to rule on this issue, it will presumably interpret Article 50 so as to require a formal, written and unequivocal notification of the intention to withdraw addressed to the EU Council, and, most probably, it will base this interpretation, primarily or exclusively, on an autonomous reading of the provision. However, Articles 65-67 VCLT could be invoked by the Court to broadly interpret the exit clause or to corroborate the above reading. To conclude, with regard to this first thesis, general international law seems to play the function of setting limits to "creative" solutions aimed at disciplining, or *rectius* forcing the withdrawal of, the defiant members by surreptitiously invoking Article 50 TEU.

4. The Thesis of Regime Failure: Setting aside Article 7 TEU

More expounded are the theses that consider the suspension or expulsion of EU recalcitrant members based on general international law. The starting assumption is that the "special" enforcement mechanism (Article 7 TEU) has proven unable to solve the current crisis. This mechanism deserves particular attention: as much as the EU is portrayed as a *sui generis* IO, equally singular is the sanctioning system it has in place in case of members' non-compliance with its core membership values. Yet, it is the uniqueness of this procedure, if compared with institutional sanctions regimes administered by other IOs, that explains, to a large extent, the reasons behind its difficult application.

4.1. The flop of the "nuclear option"

If compared to the enforcement mechanisms provided for by the constitutive instruments of other IOs,[68] the EU has in place, in some respects, the most advanced enforcement system for compliance with EU law: on one hand, a unique form of punitive action consisting of the imposition of monetary penalties for non-compliance with the judgments of the ECJ rendered as a result of the infringement procedure; and, on the other hand, a political sanctioning mechanism to deal with serious and persistent breach of the EU foundational values which may result in the sus-

[68] For an overview of the different types of institutional sanctions see Schermers and Blokker, *International Institutional Law. Unity within Diversity*, 6th ed., Leiden, 2018, p. 912 ff.

pension of certain membership rights, to which is added, today, a general regime of conditionality for the protection of the EU budget.[69] As is well known, this elaborate system was not seen in the initial version of the founding Treaties. Originally, the EU had a highly sophisticated procedure for establishing infractions of the *acquis* but did not have a regime imposing sanctions for violations of the core principles of membership, while most IOs usually have the latter but not the former.[70] Institutional sanctions were introduced only with the Amsterdam Treaty, in response to concerns about the "eastward" enlargement of the Union and risks of anti-democratic resurgences in post-communist States: ironically, though, the first test for its application came from developments in one of the EU's most established democracies (Austria), with the well-known Haider affair. While, at that time, there were no grounds for the adoption of institutional sanctions, the FPÖ crisis provoked a "social" reaction by EU members outside the institutional framework, consisting of a series of bilateral unfriendly measures imposed by 14 members. As a lesson learnt, the Treaty of Nice upgraded and enhanced the sanctions mechanism by adding an alert procedure to deal with situations where there is only a *risk* of serious breach of EU values. With slight changes, the mechanism was then confirmed in the Treaty of Lisbon under current Article 7 TEU,[71] which is often described as a "a blend of law and politics"[72] and better known using the (deleterious) term as the "nuclear option".[73] Recently, the adoption of the Rule of Law Framework in 2014 added the "howl", before "the bark" (Article 7(1)), before the "bite" (Article 7(2)(3)).[74]

The operative functioning of Article 7 TEU is well-known to readers. Here, it suffices to flag some of its distinctives features as compared to the sanctioning regimes of other IOs. To begin with, there are the kinds of breach justifying the adoption of sanctions which cannot be sporadic defaults but need to be *systematic* violations of the values of the membership ("persistent and serious"). Unique is also the existence of an alert phase (Article 7(1) TEU), whose activation means a round of hearings and

[69] The conditionality mechanism is a rather "atypical" institutional sanction that can be framed in the category of suspension of services provided by the IO to the members (namely, financial assistance), although it is not provided in the constitutive instruments of the IO, but in a secondary act. See, recently, Gallinaro, "Looking for an Alternative to Ineffective Sanctioning Measures Envisaged in the Founding Treaty: Regulation EU 2020/2092 as a Response to the Rule of Law crisis in the EU?", in Adinolfi, Lang and Ragni (eds.), *Sanctions by and against International Organizations*, Cambridge, 2024, forthcoming.

[70] Magliveras, "The Question of Recalcitrant EU Member States Revisited", paper presented at the Sixth Pan-European Conference on EU Politics (September 2012).

[71] On the history of Art. 7 TEU see Sadurski, "Adding Bite to the Bark: The Story of EU Enlargement, Article 7 and J. Haider", Columbia Journal of European Law, 2010, p. 385 ff.; Kochenov, "Article 7: A Commentary on a Much Talked-About 'Dead' Provision", in von Bogdandy et al. (eds.), *cit. supra* note 2, p. 127 ff.

[72] Kochenov, *cit. supra* note 71, p. 137.

[73] The expression, first coined by Barroso on the occasion of the 2012 State of the Union Address, has become widely popular.

[74] Besselink, "The Bite, the Bark, and the Howl. Article 7 TEU and the Rule of Law Initiatives", in Jakab and Kochenov (eds.), *cit. supra* note 2, p. 128 ff.

exchange with the member in question,[75] although its prior exhaustion is not necessary to adopt membership sanctions under Article 7(2)(3) TEU. In this regard, particularly noteworthy is the entire interchange process between the defiant members and the institutions – a dialogue which is now even more stretched by the introduction of "anti-chambers" – including, potentially, a judicial phase before the ECJ, limited to the review of procedural matters. In other respects, however, the design of Article 7 TEU is less elaborate than other institutional sanctions provisions: for instance, with regard to the rights which can be suspended, Article 7 makes a general reference to "certain of the rights" deriving from the Treaties, without clarifying which membership rights, other than the right to vote in the Council, can be temporarily discontinued. Certainly, the "extreme" sanction, that is the cessation of membership, is not foreseen in EU Treaties, unlike in the constitutive instruments of other IOs, such as the Council of Europe. Hence, as founding Treaties stand at present, the only way to leave the Union is on voluntary basis via Article 50 TEU.[76] Yet, the starkest peculiarity (and at the same time cumbersomeness) of Article 7 TEU concerns the complex articulation of the sanctioning process in several stages, the plethora of institutions involved and, most importantly, the different voting majorities required in each phase which becomes high when the Union is called upon to "howl" against the errant fellow, and dramatically high when it comes to "bite" it.[77]

These structural features explain, in part, the "flop" of the nuclear option, to date. In a way, the more articulate the EU's sanction mechanism is and has become (the howl, the bark, the bite), the less incisive it has proven to be in the test of the Hungarian and Polish constitutional breakdown. In fact, for quite long time, Article 7 TEU has remained dormant in relation to both situations. Only in December 2017, did the EU Commission, backed one year later by the EU Parliament, initiate a procedure under Article 7(1) in response to risks to the rule of law and EU values in Poland, while the Parliament triggered the same procedure for Hungary only in September 2018. At the time of writing, hearings of both States are taking place within the alert phase, while the Council has not yet voted to determine whether there is "a clear risk of a serious breach" of the EU's common values. Nor has the European Council determined by unanimity the existence of a serious and persistent breach of EU values pursuant to Article 7(2) TEU and it is highly unlikely to do so in near future, after the vows reciprocally made by Hungary and Poland to support each other in the (dis-) activation of the procedure, thus blocking the functioning of the real "sanctioning arm" of the mechanism. This has led, inevitably, to a general feeling of distrust in the concrete functioning of Article 7 TEU. Much ink has been used to deprecate its inoperativeness:[78] the provision has been described as "a dead letter",[79] "too toxic to

[75] On the shortcoming of these phase, at the test of the Polish and Hungarian cases, see Pech, "Article 7 TEU: From 'Nuclear Option' to 'Sisyphean Procedure'?", in Belavusau and Gliszczynska-Grabias (eds.), *cit. supra* note 2, p. 157 ff.

[76] The issue has been recently reaffirmed by the ECJ in *Wightman* case, *cit. supra* note 43, para. 65.

[77] Cfr. the different majorities required under Art. 7(1), (2) and (3) TEU.

[78] See, especially, Kochenov, *cit. supra* note 71.

[79] *Ibid.*, p. 128.

use",[80] a "Sisyphean procedure",[81] a "quarantine mechanism for the healthy states to avoid being affected by the pariah state [rather] than [...] a mechanism for restoring Member State compliance with EU values".[82] Beside blaming the technically complex design of the provision (especially the voting requirements), other authors point to the general unfitness of Article 7 TEU in the EU architecture, highlighting the economic costs that membership sanctions would entail in an IO, which, unlike many others, pursues economic integration.[83] Certainly, these considerations should be taken into account when comparing the failure of the EU to suspend defiant members against the opposite trend being currently recorded in other regional IOs in which the adoption of membership sanctions has increased over the past decades.[84]

4.2. The fall-back on customary international law: suspension or expulsion as a last resort remedy

Regardless of the reasons behind the failure to adopt sanctions under Article 7 TEU, the question arises as whether general international law can provide an alternative way to get out of the current impasse. If one adopts a "generalist" approach, which admits the fall-back on international law in case of EU's regime failure,[85] two hypotheses come into question: (i) suspending recalcitrant members' rights (fully or partially), without following the strict procedural requirements of Article 7 TEU; (ii) expelling the filibustering member, even without an institutional basis in the Treaties. The adoption of these measures can be grounded on the general guarantees offered by customary law for non-compliance with international obligations. First and foremost, Article 60 VCLT, which entitles contracting parties to a treaty to terminate or suspend that treaty in response to its material breach,[86] as well as the general rules permitting countermeasures in response to wrongful acts.[87] From a different angle, the rule *rebus sic stantibus*, enshrined in Article 62 VCLT, which allows for the termination of a treaty in case of a fundamental change of circumstances existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may

[80] *Ibid*., p. 132.

[81] Pech, *cit. supra* note 75, p. 157.

[82] Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Actions", in Closa and Kochenov (eds.), *cit. supra* note 2, pp. 105-106.

[83] On the impact of Art. 7 TEU on the internal market, see Kochenov, "On Barks, Bites, and Promises", in Belavusau and Gliszczynska-Grabias (eds.), *cit. supra* note 2, p. 147 ff., p. 150.

[84] Practice in the African continent is a telling example (see Closa, "Securing Compliance with Democracy Requirements in Regional Organizations", in Jakab and Kochenov (eds.), *cit. supra* note 2, p. 379 ff.; Sossai, *Sanzioni delle Nazioni Unite e organizzazioni regionali*, Roma, 2020).

[85] On the different postures assumed on this question see *supra* Section 2.

[86] See, also as for its customary status, Simma and Tams, "Article 60", in Corten and Klein (eds.), *cit. supra* note 66, p. 1351 ff.

[87] Yet, unlike the suspension of membership rights, expulsion given its irreversible nature, could be hardly justified as a countermeasure. For critical position on relying on the regime of countermeasures see references *infra*, note 98.

assume relevance.[88] More controversial, instead, are arguments based on the doctrine of the implied powers in order to justify the use of sanctions outside the institutional framework.[89]

Admittedly, the debate on the recourse to self-help remedies offered by general international law in order to resolve critical situations in the EU membership is nothing new. Cyclically, this discussion has returned in the face of EU internal "crises": for instance, at the time of the refuse to ratify the Draft treaty establishing a Constitution for Europe,[90] of Ireland's rejection of the Treaty of Lisbon,[91] and amidst the critical situation faced by Greece in the Eurozone.[92] In the current "rule of law" crisis, the scholarly debate has focused mainly on the possibility of *expelling* defiant members, a scenario which has also been explicitly called for by some political leaders after Hungary's opposition to the adoption of sanctions against Russia.[93]

As is well known, the absence of an expulsion clause in the EU Treaties is more of a deliberate omission rather than an accidental oversight.[94] Yet, lacking an explicit prohibition of expulsion, the question arises as to whether the right to "eject" the defiant member can be derived from residual rules of international law. Expelling a member in the (eloquent or accidental) silence of the constitutive instrument is a rather classical problem in the law of IOs and neither scholarship[95] nor practice[96]

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[88] For its customary status, see Shaw and Fournet, "Article 62", in Corten and Klein (eds.), *cit. supra* note 66, p. 1411 ff. As for its relevance for the purpose of suspending the member from an IO see Magliveras, *Exclusion from Participation in International Organizations. The Law and Practice behind Member States' Expulsion and Suspension of Membership*, Den Haag, 1999, p. 238.

[89] For the inappropriateness of applying the doctrine of implied powers see Magliveras, *cit. supra* note 88, p. 254.

[90] See Rossi, "En cas de non-ratification… Le destin périlleux du «Traité-Constitution»", Revue trimestrielle de droit européen, 2004, p. 621 ff.

[91] See Athanassiou, "Withdrawal and Expulsion from the EU and EMU: Some Reflections", European Central Bank, Legal Working Paper Series 10, 2009, p. 1 ff., p. 30, footnote 90.

[92] *Ibid*. See, also, Blocher, Gulati and Helfer, "Can Greece Be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations", in Allen et al. (eds.), *Filling the Gap in Governance: The Case of Europe*, Fiesole, 2016, p. 127 ff.; Dammann, "Paradise Lost: Can the European Union Expel Countries from the Eurozone?", Vanderbilt Law Review, 2021, p. 693 ff.

[93] Wyatt, "Those calling for the EU to expel Hungary should think again", LSE Blogs, 31 May 2022.

[94] For a full historic account of the discussion on expulsion clause see Pohjankoski, "Expulsion of a member State from the European Union: Ultimate remedy?", in Lenaerts et al. (eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas*, Oxford, 2022, p. 321; Vellano, "Espulsione e recesso dall'Unione europea: profili attuali e prospettive future", CI, 2007, p. 508 ff.

[95] E.g., Schermers and Blokker, *cit. supra* note 68, pp. 112-113, who recognize the legitimacy of expulsion as a measure to protect the proper functioning of the IO, although with caution. Contrarily, an older position denies the right to expel members, when treaties are silent (Singh, *Termination of Membership*, London, 1958, p. 323). Other authors envisage the possibility to use Art. 60 VCLT to obtain the expulsion of members from IOs (Simma and Tams, *cit. supra* note 86, pp. 1362-1363).

[96] References is made, typically, to the expulsion of Cuba from the OAS, Albania from the Council for Mutual Economic Assistance, South Africa from the Universal Postal Union, Afghanistan from the Organisation of Islamic Conference. Yet, the lawfulness of these measures is not entirely clear (see Magliveras, *cit. supra* note 88, pp. 69-237).

have provided a clear and unanimous answer so far. With regard to the EU, scholars are equally divided. While some maintain a clearly closed position, based on the spirit of the "ever closer union" and the conciliatory rather than punitive character of the enforcement mechanisms devised by EU Treaties,[97] a rising consensus is emerging around the theory of the so-called "remedial expulsion".[98] According to this view, in extreme circumstances, when there is an actual threat to the existence of the EU coming from the filibustering members, expulsion becomes a lawful *ultima ratio*, a last resort remedy, in the event of the fruitless exhaustion of all other relevant EU enforcement procedures. This view is grounded, mostly, on the application of Article 60 (and at times also Article 62) VCLT and conceives the founding Treaties as multilateral agreements, notwithstanding their "constitutional" nature. On the same legal basis, other authors have defended the right to suspend the members without adhering to the strict conditions of Article 7 TEU, provided that the latter have been unsuccessfully exhausted.[99]

In our opinion, these positions seem convincing, at least from a principled point of view. The conditions for the "fall-back" on general international law appear, at a first glance, to be satisfied in the cases at stake: in one respect, EU Treaties do not provide for a course of action in cases when violations are not terminated, despite the use of the mechanisms provided therein, nor do they explicitly prohibit recourse to general international law; in the other respect, the special enforcement mechanisms seem to have proven incapable, in practice, of remedying the critical situation.[100] In this regard, the position held by the ECJ in *Commission v. Luxembourg and Belgium*

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[97] Athanassiou, *cit. supra* note 91; Theuns, *cit. supra* note 17. Contrary to the idea of an implied right to expel without revising the Treaties see also Closa, Kochenov and Weiler, "Reinforcing Rule of Law oversight in the European Union", EUI Woking Paper 25/2014, p. 20 ff.

[98] In this sense, see Blocher, Gulati and Helfer, *cit. supra* note 92 (who suggest, as an alternative, the possibility of *de facto* expelling a member by denying participation and benefits). With regard, specifically, to the current EU crisis, see Pohjankoski, *cit. supra* note 94 (who argues that EU members are vested with this residual power, which would be based on Arts. 60-62 VCLT and not on the doctrine of implied powers, nor on the regime of countermeasures); Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, Napoli, 2020, pp. 131-134 (who admits expulsion as a last resort option, in a situation in which the EU enforcement instruments are not sufficient and the rift with the other members appears irretrievable; yet, the author recognizes that this would give rise to a "constitutional" crisis of the EU system, the outcome of which would be far from predictable); Nettesheim, "Exclusion from the EU is Possible as a Last Resort", Verfassungsblog, 3 November 2021 (who examines the possibility to apply Art. 60 VCLT after the Polish Constitutional Tribunal's judgment); Circolo, "Alcune considerazioni sulla possibilità di espellere uno Stato membro dell'Unione alla luce del diritto internazionale generale", DPCE Online, 2021, p. 1355 ff.

[99] See Ziegler, "International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation", in Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, Cheltenham, 2011, p. 268 ff., p. 285.

[100] Yet, one may contend that, depending on the circumstances of the case, the EU system will incontrovertibly "fail" only when the violations do not cease, despite the fact that all relevant mechanisms having been concretely and fully exhausted (for instance, when the recalcitrant member fails to comply with the infringements decisions, when the European Council's action under Art. 7(2) is concretely "vetoed" by the backsliding members, and when measures imposed pursuant to the new conditionality regime have no effect).

does not seem to represent an insurmountable obstacle: indeed, one can argue that, whereas the ECJ position is not immutable as a piece of subsequent practice in interpreting the Treaties,[101] the assertion that a "member shall not take the law in their hands" implies only a prohibition of inter-state countermeasures, hence in the reciprocal relations between members, but not in the relations between the EU and the members. Moreover, it can be maintained that the ban is valid at "physiological times", that is, when the EU enforcement procedures are available and have not been exhausted, but the prohibition does not explicitly cover the "failure scenario", which unfolds only when the special mechanism has proved ineffective. Lastly, it should be flagged that the ECJ has never ruled out – at least not explicitly – the operability of the general "release valve" available in the case of the changing of fundamental circumstances. Incidentally, this would confirm the doctrinal positions on the peremptory status of the rule *rebus sic stantibus*.[102]

Now, while admitting that default rules would "resurface" to regulate the critical situations at stake, their concrete application, however, raises a number of issues. With regard to Article 60 VCLT, there is no doubt that violations of the core values of Articles 2 and/or 4 TEU, imputable to Hungary and Poland, amount to a "material breach" of the multilateral treaty. Yet, more problematic is the requirement of Article 60(2)(a) that entails the *unanimous* agreement of the parties to suspend the operation of the treaty in whole or in part or to terminate it either. Provided that the requirement of unanimity today reflects customary international law (an aspect which is still unclear),[103] this would pose the same problem behind the full operation of Article 7(2) TEU.[104] Moreover, while the presumption of the prevalence of the *lex specialis* on *lex generalis* (reiterated in Articles 5 and 60(4) VCLT) would be rebutted by the proven failure of the EU regime, another set of problems can be raised by Article 60(5) VCLT which does not allow the invocation of the extinction or suspension of provisions relating to the protection of the human person contained in humanitarian treaties. As noted by one author, the extensive interpretation of this provision may include human rights treaties, such as the EU Charter of Fundamental Rights.[105]

The concrete application of Article 62 VCLT is no less problematic: the provision is usually interpreted rather restrictively to prevent it from becoming "a talisman for revising treaties".[106] Therefore, in the cases at hand, the party invoking it would need to rigorously demonstrate that all its conditions are met. Hypothetically, it can be evidenced that the member's blatant disregard for the values of Articles 2 and/or 4 TEU amounts to a fundamental change of circumstances not foreseen by the parties. Alternatively, regardless of any material breach of EU law committed by the member, one can make the case that the profound political transformation occurring at the do-

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[101] On this issue see Gradoni, *cit. supra* note 41, p. 267 ff.

[102] On the peremptory status of the rule see Conforti and Iovane, *cit. supra* note 50; Haraszti, "Treaties and the Fundamental Change of Circumstances", RCADI, Vol. 146, 1975-III, p. 7 ff., p. 58.

[103] Simma and Tams, *cit. supra* note 86, p. 1362.

[104] Casolari, *cit. supra* note 98, p. 131.

[105] *Ibid.*, pp. 131-132.

[106] Fitzmaurice, Second Report on the Law of Treaties, UN Doc. A/CN.4/107, YILC, 1957, Vol. II, p. 32.

mestic level, in the form of "constitutional capture", equally amounts to a "fundamental change of circumstances" that constituted the essential basis of joining the Union, provided that the radical changes in political conditions are strictly connected with the essential purpose of the Treaties.[107] In this regard, it should be recalled that the ECJ has recognized – without much difficulty – that the change of political conditions in the former-Yugoslavia, due to the pursuit of hostilities, was enough to suspend the cooperation agreement with the European Community pursuant to Article 62 VCLT.[108] Yet, it remains uncertain whether this approach is exportable in *intra*-EU relations and whether the democratic breakdown in the two members reaches that threshold. Concerning the effect of the change of domestic circumstances in the backsliding member, instead, it would not be so arduous to demonstrate that it created an excessive obligation or undue hardships on the other members in fulfilling the Treaties. For instance, one may highlight how the "constitutional breakdown" impacts on the principle of "mutual trust" and that the other members face serious hardship in executing EU obligations which have, as a premise, the enduring existence of the "mutual trust" among members (such as in the field of arrest warrants, recognition of judicial cooperation in civil matters, etc.). More generally, one can argue that the repudiation of EU values renders the aims and objectives of the Union set out in Article 3 TEU harder to achieve. Yet, although the above points seem not impossible to prove, the exceptional character of Article 62 VCLT requires particular caution.

5. Conclusions: Limits and Prospects of Thinking outside the (EU) Box

This article has examined some of the legal solutions recently put forward in scholarship to overcome the rule of law crisis and has investigated the role that general international law can play in this context – a perspective which, so far, has not become subject to sustained inquiry. With respect to the first thesis analyzed (the "implied withdrawal" of backsliding members), we have maintained that general rules enshrined in Articles 65-67 VCLT set clear limits on a reading of Article 50 TEU aimed at forcing withdrawal.[109]

More debateable are the theses which advocate for the suspension or expulsion of recalcitrant members based on Articles 60-62 VCLT. Even if the residual rules can resurface in case of "regime failure", at least from the point of view of international law, their concrete application sounds more like an "academic thought experiment"[110] rather than a viable solution, given the lack of political will of both the EU institutions and members to act in this direction. Indeed, the recourse to the "safety valves" provided by the law of treaties, already walking on teetering legal premises, risks crumbling before the EU political interests prevailing at the moment – today, even more complicated by the military conflict taking place at the gates of the Union. On the one hand, the EU institutions, in particular the Commission and the EU Council,

[107] Pohjankoski, *cit. supra* note 94, p. 325.
[108] *Racke* case, *cit. supra* note 64.
[109] See *supra* Section 3.
[110] Gragl, *cit. supra* note 29, p. 405.

lack the political commitment to take such a highly confrontational and "extraordinary" position towards their members, as shown by the hesitation with activating the ordinary procedure under Article 7 TEU. The preference for "incentive" rather than "punitive" instruments, as reflected in the elaboration of the new conditionality mechanism, seems to be considered more in line with the spirit of the Treaties and, incidentally, requires a *lower* voting majority. On the other hand, a firm political will to use confrontational legal instruments is lacking at the member States level too. The reluctance of the members is confirmed not only by the caution within the most "inter-governmental" body (the EU Council), but also by their unwillingness to activate the judicial procedures against the defiant members pursuant to Articles 259-273 TFEU.[111] For the time being, it takes some stretch, not to say imagination, to envisage EU institutions or a group of members invoking Articles 60 or 62 VCLT to terminate or suspend the EU Treaties with respect to one or more backsliding members, following the procedure laid down in Article 65 VCLT. Similarly, having the hypothetical disputes among EU members resolved by the procedure of Article 66 VCLT (which so far has never been used) does not seem a realistic outcome. In the remote case of the adoption of sanctions based on default rules, the ECJ, on its part, would hardily condone "extra-constitutional" actions taken outside the Treaties. The autonomy of the EU system, on one side, the attention to the respect of the rule of law *by* the EU (including the principle of conferred powers, *ex* Article 5 TEU), on the other side, are likely to orient the ECJ against solutions based *exclusively* on international law. There is in fact a significant difference between interpreting the EU Treaties provisions "in light of", or corroborated by, rules of general international law, and applying directly that rules to set aside the EU Treaties. As already mentioned, the ECJ has directly applied Articles 60-62 VCLT to external treaties signed by the EU,[112] but it has never done so to derogate from the "basic constitutional charter",[113] nor from its "constitutional core provision"[114] (Article 7 TEU).

More obsequious to the concept of autonomy could be an interpretation of Article 7 TEU "in light of" the rules of general international law. For instance, one may wonder whether the rules of State complicity in the commission of wrongful acts, enshrined in Article 16 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA), can come into play to overcome the current impasse in the (non-)use of the EU sanctioning mechanism. Admittedly, the combined reading of the two provisions (Articles 7 TEU and 16 DARSIWA) has already been prospected in literature more than a decade ago.[115] One author maintained that when the motion to trigger Article 7(2) TEU is opposed by only two members – the one under accusation and another – there can be room to consider the two oppos-

[111] Parodi, "Il ruolo degli Stati membri nella tutela dei valori dell'Unione europea: il ricorso agli strumenti giurisdizionali", DUDI, 2021, p. 671 ff. On why the EU has not been willing to confront the defiant members more robustly see de Búrca, "Poland and Hungary's EU membership: On not confronting authoritarian governments", International Journal of Constitutional Law, 2022, p. 13 ff.

[112] See, respectively, the opinion of Advocate General Saggio, in Case C-149/96, *Portugal v. Council*, ECR, 1999, I-08395 and *Racke* case, *cit. supra* note 64.

[113] *Wightman* case, *cit. supra* note 43, para. 44.

[114] Gragl, *cit. supra* note 29, p. 399.

[115] Gradoni, *cit. supra* note 41, p. 263.

ing members in some way "complicit", and therefore the EU Council could decide to proceed with the determination of the existence of the breaches under Article 7(2) by excluding the vote of both members.[116] From this angle, the member would aid or abet the other in the commission of the wrongful act not through a "material" support given at the domestic level, such as providing any essential facility or financing activity that led to the violation of Article 2 TEU. Conversely, the complicity would result from the conduct assumed at European level, consisting of assuring support to the other in blocking the activation of Article 7(2) TEU. In this case, the two States could be excluded from the vote simultaneously as their positions become "inseparable".[117] More recently, and with specific regard to the mutual commitment of support exchanged between Hungary and Poland, other authors have argued in the same direction, namely, to exclude simultaneously the two backsliding members from the vote at the EU Council, but based on an "*effet utile*" interpretation of Articles 7 TEU and 354 TFEU, rather than the general rules on State complicity.[118] According to this view, no member already under Article 7(1) procedure should be able to vote on Article 7(2).[119] Therefore, should Article 7(1) TEU be applied against both members simultaneously, the so called "fellow-traveler" veto would be automatically impeded.[120]

The reading of Article 7 TEU in light of rules of complicity and/or the *effet utile* doctrine, which permits one to overcome the distortions of the mechanism, seems less radical than the theses previously explored and can open up new prospects that deserve further reflection. Yet, their concrete application can face the same practical obstacles, given the lack of strong political interests in making Article 7 somehow "work" in the current crisis. The ultimate impression is that the EU has no strong appetite to undermine the membership by adopting institutional sanctions, an appetite which probably became even less strong after the Brexit saga and the war in Ukraine. There is indeed some skepticism – among EU institutions, members, and scholars – on the real effectiveness of sanctions that impinge on Hungary's and Poland's membership rights in successfully correcting their errant behaviours. Paradoxically, membership sanctions in the EU system appear, on the one hand, too strong to be adopted, but, on the other hand, too weak or symbolic to deal with the deeper roots of the backsliding from the rule of law.[121]

Should this be the case, the suspension of membership rights, either via Articles 60-62 VCLT or via Article 7 TEU as construed above, can hardly become a suitable "panacea" to resolve the rule of law crisis. From this perspective, customary law instruments do not provide for solutions more workable than those provided by the EU special rules. Yet, international law could still have its say, for instance by offering the

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[116] *Ibid*.

[117] *Ibid*.

[118] Kochenov, *cit. supra* note 71, p. 143.

[119] Pech and Scheppele, *cit. supra* note 1, pp. 12-13; Scheppele, "Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too", Versfassungsblog, 24 October 2016.

[120] Scheppele and Kelemen, "Defending Democracy in EU Member States: Beyond Article 7 TEU", in Bignami (ed.), *cit. supra* note 2, p. 428 ff.

[121] On the importance to tackle the deeper roots of rule of law backsliding see Blokker, "EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections", in Closa and Kochenov (eds.), *cit. supra* note 2, p. 249 ff.

possibility of less radical measures – that is, retaliation – such as the non-support of backsliding members in elected bodies of other IOs or other diplomatic measures aimed at isolating the members and putting pressure on them without violating EU Treaties. These measures, combined with capacity building measures[122] and some of the tools mentioned at the beginning of the article – each of which emphasises the role of a different subject (the ECJ, the Commission, the role of national judges, and so on) – seem a more realistic prospect.[123] At any rate, in the face of a multitude of different opinions on which is the "best legal recipe" to get out of the crisis, and which is the most suitable combination of strategies, to date the Union seems inclined to rely mostly on the potential of the conditionality mechanism, recently vetted and "blessed" by the ECJ.[124]

In light of the above, one may rightly ask what is the meaning of looking at the rule of law crisis through the lens of general international law. Probably, this can be found not in terms of discovering an innovative legal recipe to get out of the crisis, but rather as an opportunity to make some systemic reflections from the perspective of the law of IOs. Indeed, the EU's overall response to the crisis tells us something about the degree of EU autonomy. Tensions between members and IOs occur daily. In case of a member's disobedience, whether or not the member is also going through a process of democratic backsliding at the domestic level, sanctions are adopted only in the most serious circumstances, and typically after exhaustion of formal or informal diplomatic means aimed at inducing compliance. When sanctions are not laid down in the constitutive instruments, IOs have proven able to act "creatively" by adopting measures of constraint, whose legality cannot but be rooted in customary international law. In case when sanctions are provided, but IOs are unwilling to adopt them, at times a different, and "lateral", strategy has been founded: that of the (ab)use of the credentials procedure to deny the defiant member the right to participate in the institutional life of the IO.[125]

The dynamic between the EU and the backsliding members departs from these trends. So far, the EU has failed to adopt sanctions provided for in the Treaties, nor searched for any "extravagant" solutions outside the EU perimeter based on general international law. A certain inventiveness can be seen in the design of new conditionality mechanism: yet, although being a "lateral" solution arising from the "flop" of Article 7 TEU, it is still an "internal" instrument grounded on EU Treaties. The inclination to resort to internal instruments rather than to search for external support from international law does not come as a surprise, since the relationship between members and the EU touches "internal" – or "constitutional" if one prefers – aspects of the life of the IO. On the other hand, however, **the legal instruments that specifically regu-**

[122] Ioannidis and Bogdandy, "Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done", CML Rev., 2014, p. 59.

[123] See *supra* notes 6-10.

[124] On the rise of the "conditionality" paradigm as an instrument of EU governance, see recently Baraggia and Bonelli, "Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges", German Law Journal, 2022, p. 131 ff.

[125] For practice in this regard see Klabbers, *An Introduction to International Institutional Law*, Cambridge, 2012, pp. 120-121.

late the relationship between IOs and members in time of crisis – withdrawal and institutional sanctions – originate and take inspiration from international law. The *Wightman* ruling confirmed, incidentally, the relevance of international law when membership issues are at stake. From this angle, the regime of institutional sanctions pursuant to Article 7 TEU, if compared with the specular scenario of withdrawal via Article 50 TEU, demonstrates a wider degree of autonomy from international law.

As a contribution to the study of institutional sanctions regimes, the foregoing analysis suggests that sanctions work in a different way in different IOs. When the IO pursues the ambitious goal of an ever-closer union among the peoples and economic integration, the exclusion, isolation and stigmatization of the recalcitrant member becomes extremely difficult to accept for a tight club of fellows. All these factors should be considered when comparing the failure of the EU to suspend defiant members against the opposite trend being currently recorded in other regional IOs, especially in the African context.[126]

Ultimately, the EU sanctioning dynamic marks, once again, the *sui generis* character of the Union and the difficulties in drawing comparisons and parallels with other IOs, and with the law of IOs more broadly. The fact remains, however, that international law may come into play, as a release valve, for the safeguard of the EU legal order in doomsdays scenarios, following the logic "weak as constraint, strong as tool".[127]

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[126] See references in note 84.

[127] De Witte, *cit. supra* note 31.