The European Union and the Interpretation of Customary International Law

by P Merkouris, R Wessel and I T de Vries-Zou (eds)

available at:

P Merkouris, R Wessel and I T de Vries-Zou (eds), *The European Union and the Interpretation of Customary International Law* (CLEER Paper Series 2024) here

The TRICI-Law project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

university of groningen
faculty of law

TRICI-Law

European Research Council
Established by the European Commission

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

The European Union and the Interpretation of Customary International Law

Panos Merkouris, Ramses A. Wessel,
Ivo Tarik de Vries-Zou (eds.)

CLEER PAPERS **2024/1**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

THE EUROPEAN UNION AND THE INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

PANOS MERKOURIS, RAMSES A. WESSEL, IVO TARIK DE VRIES-ZOU (EDS.)

CLEER PAPERS **2024/1**

Governing board / Board of editors

Dr. Wybe Douma (EU Legal)
Prof. Christina Eckes (University of Amsterdam)
Prof. Peter van Elsuwege (Ghent University)
Dr. Eva Kassoti (T.M.C. Asser Institute)
Prof. Andrea Ott (Maastricht University)
Prof. Ramses Wessel (University of Groningen)

Associate editors

Prof. Christophe Hillion (University of Leiden-Oslo)
Prof. Steven Blockmans (Centre for European Policy Studies)
Prof. Fabian Amtenbrink (University of Rotterdam)
Prof. Henri de Waele (Radboud University Nijmegen)
Prof. Dimitry Kochenov (University of Groningen)
Prof. Jorrit Rijpma (University of Leiden)
Dr. Joris Larik (University of Leiden)
Dr. Claudio Matera (University of Twente)
Prof. Inge Govaere (University of Ghent)
Prof. Panos Koutrakos (City, University of London)
Prof. Eleftheria Neframi (University of Luxembourg)
Prof. Christine Kaddous (University of Geneva)
Dr. Fabien Terpan (Sciences Po Grenoble)
Prof. Jan Wouters (University of Leuven)
Prof. Enzo Cannizzaro (Sapienza University of Rome)
Dr. Anne Thies (University of Reading)

Editor-in-Chief

Dr. Eva Kassoti (T.M.C. Asser Instituut)

Academic programme coordinator

Dr. Eva Kassoti (T.M.C. Asser Instituut)

Editorial policy

The governing board of CLEER, in its capacity as board of editors, welcomes the submission of legal papers and commentaries (max. 40,000 resp. 4.000 words, incl. footnotes, accompanied by keywords and short abstracts) at E.Kassoti@asser.nl. CLEER applies a double blind peer review system. When accepted, papers are published on the website of CLEER.

This text may be downloaded for personal research purposes only. Any additional reproduction, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year and the publisher.

The author(s), editor(s) should inform CLEER if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

© Authors
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

CONTENTS

The European Union and the Interpretation of Customary International Law: An Introduction 5
Panos Merkouris and Ramses A. Wessel

Interpreting Customary International Law: The View from the Court of Justice of the European Union 11
Eva Kassoti

Customary International Law in the Case Law of the CJEU: In Search of Consistency 31
Takis Tridimas and Mark Konstantinidis

EU Legal Advisers and the Interpretation of Customary International Law: The Case of the 1970s Debates on Most-favoured-nation Clauses 59
Teresa M. Cabrita

The EU and the Interpretation of the Customary International Law of the Sea: Affirmation and Development of the Relevant Rules 75
Efthymios D. Papastavridis

Regulation 1026/2012 and the Duty to Cooperate in the Management of Shared Fish Stocks under Customary International Law 91
Mihail Vatsov

THE EUROPEAN UNION AND THE INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW: AN INTRODUCTION

Panos Merkouris* and Ramses A. Wessel**

The European Union (EU) is not a state, but an international organisation. Yet, as all textbooks explain, the EU is a very special type of international organization to which its member states have transferred a number of their competences. These competences have over the years allowed the EU to become a global actor in its own right. In its relations with third states and other international organisations, the EU has given itself the brief to not only 'strictly observe,' but also to 'develop' international law (Article 3(5) of the Treaty of the European Union (TEU)).[1] Indeed, the coming of age of the EU as a global actor has slowly turned the EU from a recipient into a contributor to the further development of international law. This is not a new development. Already seventeen years ago the European Commission stated that 'the EU is emerging as a global rule maker, with the single market framework and the wider EU economic and social model increasingly serving as a reference point in third countries as well as in global and regional fora.'[2] And, since the Treaty of Lisbon in particular, the EU treaties clearly reveal the EU's global ambitions in this area, which basically boil down to the idea that the EU should – at least partly – shift its focus from its own member states to third states[3] – thereby even limiting the possibilities for its own member states to contribute to international law-making.[4]

This development of international law is a multi-faceted process. It takes place not only on the basis of written law, through the many international agreements to which the EU is a party, but also through the EU's own practice, be it through

---

* Professor of International Law at the University of Groningen. This introduction and the workshop from which this edited volume emerged is based on research conducted in the context of: i) the project 'The Rules of Interpretation of Customary International Law' ('TRICI-Law'). This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728); and ii) EUDIPLO, which is a Jean Monnet Network between the universities of Geneva (Christine Kaddous), Groningen (Ramses Wessel; coordinator), Leuven (Jan Wouters), and Pisa (Sara Poli). It is co-funded under Erasmus+ of the European Union (620295-EPP-1-2020-1-NL-EPPJMO-NETWORK).

** Professor of European Law at the Faculty of Law of the University of Groningen.

[1] Consolidated version of the Treaty on European Union, *OJ* [2012] C 326/13.

[2] Commission Staff Working Document, The External Dimension of the Single Market Review, SEC(2007) 1519 (20 November 2007) at 5.

[3] See in particular Arts. 3(5), 21, 22 TEU.

[4] P. Koutrakos, 'In Search of a Voice: EU Law Constraints on Member States in International Law-Making', in R. Liijova and J. Petman (eds.), *International Law-Making: Essays in Honour of Jan Klabbers* (London: Routledge 2014) 211-224; F. Casolari and R. A. Wessel, 'EU Member States as States: Between EU and International Roles and Obligations', in K. Armstrong, *et al*. (eds.), *EU External Relations and the Power of Law* (Oxford: Hart 2024) (forthcoming).

contributions to law-making at international conferences and meetings, or more importantly through practice that contributes to the formation, interpretation and application of customary international law (CIL).[5]

The papers appearing in the present volume emerged from a Workshop co-organised by the TRICI-Law project (The Rules of Interpretation of Customary International Law) and EUDIPLO (The European Union in International Diplomatic Relations), at the University of Groningen on 28 April 2023. The focus of the Workshop was on one particular and under-researched aspect: the interpretation of customary international law within and by the EU. This was examined by taking a dual perspective:

i) An *outside-in* perspective in which we analyse how CIL has been and is being interpreted in the EU legal order and which choices are made by the legislator and the judiciary. The *outside-in* perspective primarily aims to assess the interpretation of CIL in the case law of the Court of Justice of the European Union (CJEU). The main questions to be addressed in this context, were, for instance: what methods of interpretation of customary international law have been employed by the CJEU and the other organs of the EU?; to what extent the Court's interpretation (and perhaps also EU's related subsequent practice) is in line with or deviates from common/generally accepted interpretations of customary law in international law? It is no secret that the Court (sometimes in an effort to preserve the identity or autonomy of the Union's legal order) may provide specific interpretations of unwritten international rules that are not necessarily in line, or may move forward at a different pace compared to the rest of the international legal system.
ii) An *inside-out* perspective in which specific interpretations of customary international law by the EU may find their way into the global debates and lead to further clarification, development and/or even possible modification of the existing rules. The *inside-out* perspective focuses on the ways in which the EU aims to influence the interpretation of customary international law (or in its own terms, further 'develops' international law). This not only happens through specific interpretations of international rules, but also through practices of the Union in the areas of for instance treaty law and diplomatic and consular law. This *inside-out* perspective may also lead to an inquiry into the blurry lines between interpretation and modification of a rule of customary international law.

The papers in this edited Volume tackle this dual approach from a variety of angles. **Eva Kassoti** kicks off this engagement by exploring the manner in which the EU contributes to 'the strict observance and development of international law.'[6] The paper achieves this by examining the CJEU's practice of CIL interpretation. It demonstrates this by examining not only how CIL affects the CJEU's reasoning and judgments (an outside-in approach) but also how the CJEU has and continues to engage in CIL interpretation (inside-out perspective),[7] some-

[5] F. Bordin, *et al*. (eds.), *The European Union and Customary International Law* (Cambridge: Cambridge University Press 2022).

[6] Art. 3(5) TEU.

[7] Even though, as Kassoti points out, the CJEU 'refrains from using the term explicitly and proof of interpretive engagement with CIL can be found in AGs' Opinions rather than in the texts of the judgments themselves.'

times even ending up with misinterpretations, mainly in the form of 'reverse consistent interpretation' interpreting CIL norms in light of domestic (instead of international) law. Kassoti, finally, provides some thoughts on the reasons behind such interpretative approaches by the CJEU and the suggestions on the way forward.

Takis Tridimas and **Mark Konstantinidis** continue this discussion by examining the case-law of the CJEU, with a particular focus on CIL as crystallised in the 1969 Vienna Convention on the Law of Treaties (VCLT),[8] as exemplifying the tension, on the one hand, between the observance of international law as a legal duty under Article 3(5) TEU but also an essential source of EU legitimacy, and, on the other hand, 'the prevailing integration paradigm [that] is embedded on a constitutional narrative which asserts the autonomy of EU law and, in part, its primacy over international law.'[9] The authors' research leads them to the conclusion that '[t]here is an upward trend in judicial references to CIL and the VCLT. This reflects the growing engagement of the EU as an international actor.'[10] At the same time CIL generates a duty of harmonious interpretation, which 'affords the CJEU some flexibility in pursuing the objective of interpretative harmony between EU and international law,'[11] although when conflict is unavoidable, CIL may also serve as a ground of review of EU measures.

Teresa Cabrita moves away from the jurisprudence of the CJEU, and focuses her analytical lens on how EU legal advisers have advanced EU interpretations on the existence, emergence, or development of CIL rules, taking thus a inside-out perspective. This contribution examines how statements by EU legal advisers can 'shed light on EU interpretations of (customary) international law, the language and legal reasoning advanced by EU legal advisers in this respect, and the reception or lack thereof of these interpretations by the international community of states and non-state actors.'[12] The example chosen as highlighting the aforementioned influence is the 1970s debates on most-favoured-nation (MFN) clauses. The examination of the relevant debates reveals critical points as to the interpretative tools used by EU (then EEC) legal advisers in the interpretation of CIL. While in that particular context the EEC's views were not reflected in the final texts of the International Law Commission (ILC), 'the interpretations advanced by EEC lawyers did leave a mark in these debates, and in these rules' and 'set the stage for a now established practice of EU engagement with the work of the ILC.'[13]

Efthymios Papastavridis' contribution continues this line of inquiry, by examining the manner in which EU's practice affirms and/or interpretatively develops

[8] Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* 331.
[9] Again taking both an outside-in and inside-out perspective. See the contribution by Tridimas and Konstantinidis in this Volume.
[10] ibid.
[11] ibid.
[12] See contribution by Cabrita in this Volume.
[13] ibid.

the customary international law of the sea. Although EU is party to the UNCLOS, it is only so with respect to matters over which competences have been transferred to it by its member states. Despite this as Papastavridis notes 'the EU has been increasingly involved in activities governed by the law of the sea, which fall beyond the relevant competences, as formally included in the EU's Declaration of Competence.'[14] For such activities the relevant legal framework is CIL. By examining select examples of EU's activities in this area, Papastavridis concludes that the EU inevitably engages in the affirmation, application but also and most importantly for the theme of this Volume, interpretation of CIL. A variety of interpretative methods are employed but the ones that emerge with greater frequency and on which the EU places particular emphasis are 'subsequent state practice,' the principle of systemic integration and the 'object and purpose' of the interpreted CIL rule.

This Volume concludes with **Mihail Vatsov**'s contribution, which tackles the duty to cooperate in the management of shared fish stocks under CIL as interpreted by the EU. The duty to cooperate is a fundamental aspect of the international fisheries and conservation regime and has found its way in treaty texts such as the United Nations Convention on the Law of the Sea (UNCLOS)[15] and the United Nations Fish Stocks Agreement (UNFSA),[16] and reaffirmed in the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS).[17] Yet it is also grounded in CIL. This contribution approaches the duty to cooperate from an inside-out perspective, using Regulation 1026/2012[18] as an example, wherein the duty to cooperate in managing shared fish stocks plays a pivotal role. The paper examines Regulation 1026/2012 as an attempt by the EU 'to participate in the shaping of international fisheries law towards sustainability … through venturing into the … CIL duty and providing a specific interpretation of it or even a novel development if the interpretation goes beyond what is permissible for such an exercise.'[19]

Overall, the set of papers reveal the active engagement of the European Union (a non-state actor) with the interpretation of CIL. Partly this is due to the EU's own brief to further develop international law, partly also to the EU Court's active referring to CIL and providing – sometimes pragmatic – interpretations. The papers in the Volume also underline that interpretation of CILO by the EU has been necessary for it to be able to exist and survive in a legal order that was

[14] See contribution by Papastavridis in this Volume.

[15] United Nations Convention on the Law of the Sea 1982, 1833 *UNTS* 397.

[16] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 *UNTS* 3.

[17] *MOX Plant Case (Ireland* v. *United Kingdom), (Case No. 10), Provisional Measures, Order of 3 December 2001, ITLOS Reports* 2001, 95, para. 82; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), (Case No. 21), Advisory Opinion, ITLOS Reports* 2015, para. 140.

[18] Regulation 1026/2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing, *OJ* [2012] L 316/34.

[19] See contribution by Vatsov in this Volume.

originally made for states only. Obviously, this has to do with the special nature of the EU, in which it has assumed powers that were originally in the hands of its member states – thereby depriving the latter from contributing to the interpretation of CIL to the full extent. In its contribution to the UN Sixth Committee, the EU at the time was therefore quite explicit about its potential contribution to international customary law:

> implicit in this recognition of the EU as a treaty partner is the view that international community considers an organization such as the EU as also capable of contributing to the development of international law in other contexts, including the formation of customary international law. In this context, too, the Union's action is based on the responsibilities that the Member States have trusted on it. Indeed, the EU's founding treaties provide that the Union 'shall contribute to the strict observance and the development of international law.'[20]

The arguments of the EU equally seem to apply to the *interpretation* of CIL as this concerns a more general point. In fact, in relation to the internal division of competences, the Union argued that 'in areas where, according to the rules of the EU Treaties, only the Union can act it is the practice of the Union that should be taken into account with regard to the formation of customary international law alongside the implementation by the Member States of the EU legislation.'[21] The exceptional status of the EU was repeated during the ILC debates on the identification of customary law.[22]

While the exceptional, or at least specific, nature of the EU may form a nuisance for non-EU states, it cannot be denied indeed that the ways in which the Union participates in the international legal order, may be said to have resulted in the custom that the EU may not only operate alongside states, but could also contribute in practice to the interpretation of CIL. Clear examples would include the role of the Union in the interpretation of legal rules in international organizations and during international conferences, or the acknowledgement of the EU as an actor in international diplomatic law.[23] The contributions to this Volume reveal that we are not at the end of the process, but that the further development of the European integration process will by definition lead to a larger role of this entity in international law-making and -interpretation.[24]

---

[20] Statement on behalf of the European Union by Eglantine Cujo, Legal Adviser, Delegation of the European Union to the United Nations, at the Sixth Committee on Agenda item 78 on 'Provisional application of treaties' and 'Identification of customary international law' (3 November 2014) available at <https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/eu_3.pdf> (EU Statement). See, however, the comments of Special Rapporteur Michael Wood in ILC, 'Third report on identification of customary international law by Michael Wood, Special Rapporteur' (27 March 2015) UN Doc. A/CN.4/682, at 53, para. 77. See also J. Odermatt, *International Law and the European Union* (Cambridge: Cambridge University Press 2021).

[21] EU Statement, *supra* note 20.

[22] Cf. T. Cabrita, 'The Integration Paradox: An ILC View on the EU Contribution to the Codification and Development of Rules of General International Law', 5 *Europe and the World: A Law Review* 2021, 1-15; as well as J. Odermatt, *supra* note 20.

[23] S. Duquet, *EU Diplomatic Law* (Oxford: Oxford University Press 2022).

[24] Cf. earlier also R. A. Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order', 35 Yearbook *of European Law* 2016, 533-561.

ACKNOWLEDGMENTS

This publication was made possible thanks to the cooperation of the scholars involved in the TRICI-Law and EUDIPLO Workshop of 28 April 2023. Our thanks also extend to the Centre for the Law of EU External Relations (CLEER) for their enthusiastic support and agreement to publish the proceedings of the aforementioned workshop. The Workshop was co-organised and co-sponsored by the ERC project on 'The Rules of Interpretation of Customary International Law' (TRICI-Law project), and EUDIPLO. The TRICI-Law project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728). EUDIPLO is a Jean Monnet Network between the universities of Geneva (Christine Kaddous), Groningen (Ramses Wessel; coordinator), Leuven (Jan Wouters), and Pisa (Sara Poli). It is co-funded under Erasmus+ of the European Union (620295-EPP-1-2020-1-NL-EPPJMO-NETWORK). Associate partners are based in a number of EU neighbouring states, as well as in Africa, Asia, North America, Latin America and Oceania. Finally, our thanks go to our assistant editor Ivo Tarik de Vries-Zou whose tireless work made this publication possible as well as to all the contributors to this publication, whose voices and ideas revealed new venues for exploration and collaboration.

INTERPRETING CUSTOMARY INTERNATIONAL LAW: THE VIEW FROM THE COURT OF JUSTICE OF THE EUROPEAN UNION

Eva Kassoti*

1. INTRODUCTION

The main aims of the TRICI-Law project are to explore whether customary international law (CIL) can be interpreted and what the methods and limits are of this interpretative exercise.[1] The EU has undoubtedly emerged in recent years as an important actor in a divergent range of global governance fields and it has a constitutional mandate to contribute to 'the strict observance and development of international law' (Article 3(5) TEU). This has led to a significant increase in the number of cases with a CIL aspect appearing on the docket of the Court of Justice of the European Union (CJEU).[2] Thus, studying the interpretability and practice of interpretation of CIL would not be complete without an analysis of the relevant CJEU jurisprudence – which is what the present contribution purports to do. This paper is structured as follows: section (2) maps out the broader debates that the present enquiry feeds into, while section (3) explores the question of interpretability of customary international law as well as the relevant interpretative methods employed by the CJEU. Section (4) deals with issues of misinterpretation. Section (5) offers some concluding remarks.

2. THE CJEU'S ROLE IN THE INTERPRETATION OF CIL RULES: SOME PRELIMINARY REMARKS

Although the role and effects of CIL within the EU's legal order is a well-trodden topic,[3] the question of the role of the Union's courts in its interpretation has largely remained underexplored.[4] Tackling this question will not only contribute

---

* Senior Researcher in EU and International Law T.M.C. Asser Institute, Academic Co-ordinator of CLEER, e.kassoti@asser.nl.

[1] P. Merkouris, 'The Rules of Interpretation of Customary International Law: of Methods and Limits', TRICI-Law, *Research Paper Series* No. 001/2023, at 6, available at <https://tricilawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf>.

[2] e.g., for the period of 2002-2012, a search of the EU database for judgments at the Court of Justice (excluding judgments of the General Court) using a general range of international law search terms, produced 124 judgments. See G. de *Búrca, 'Internalization of International Law by the CJEU and the US Supreme Court', 13 International Journal of Constitutional Law 2015, at 992.*

[3] See, e.g., F. Bordin, *et al*. (eds.), *The European Union and Customary International Law* (Cambridge: Cambridge University Press 2022); T. Konstadinides, 'Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?', 35 *Yearbook of European Law* 2016, 513-532; A. Gianelli, 'Customary International Law in the European Union', in E. Cannizzaro, *et al*. (eds.), *International Law as Law of the EU* (Leiden: Brill 2012), 91.

[4] A notable exception is T. *Molnár, 'The Court of Justice of the EU and the Interpretation of Customary International Law: Close Encounters of a Third Kind?', in P. Merkouris, et al. (eds.),*

to the study of interpretation of customary international law, a topic which itself has remained at the margin of scholarly attention until recently, but will also feed into broader debates pertaining to the EU's (and its courts') interaction with international law. First, the CJEU's role in the interpretation of CIL norms applicable in a given dispute may serve as a benchmark against which its (type of) engagement with international law can be assessed and criticised. As I have discussed elsewhere,[5] the CJEU has been quite reluctant to undertake itself the task of ascertaining the existence of a general practice that is accepted as law. Instead, in the context of CIL identification, it tends to defer to the authority of the ICJ. However, if the analysis shows that the CJEU plays a significant role in interpreting customary norms before applying them in a given case then the critique voiced earlier to the effect that the Court is 'a shy disciple rather than an enquiring peer'[6] would lose some of its persuasive force. As Ryngaert stresses: 'Indeed, assuming that customary norms existentially stabilise at one point, after which they are simply interpreted, there is no need for an elaborate process of identifying a customary norm *de novo*.'[7] In this sense, the query at the heart of this contribution, namely whether, and if so how, the CJEU interprets CIL rules relevant in a given dispute, could also inform and make more nuanced our framework of understanding and assessing the Court's approach to international law more broadly.

This is particularly the case since the relevant debate has been largely conducted through the 'openness/hostility' prism. While, for some authors, the CJEU remains friendly and open towards international law,[8] others argue that more recent case-law evidences a more reserved, inward-looking attitude.[9] Thus, even at the descriptive level, the 'openness/hostility' dichotomy fails to provide a clear answer to the CJEU's relationship with international law. More fundamentally, this dichotomy is unable to account for *how* the CJEU actually uses international law in its practice. If the very terms of the debate only allow us to consider whether the CJEU employed international law norms in its reasoning in order for a given judgment to be considered as 'open/friendly,' then *any* engagement with international law could be construed as a sign of 'openness' – even if it is fundamentally flawed.[10] Thus doing away with the unhelpful categories of 'open-

---

The Interpretation of Customary International Law in International Courts: Methods of Interpretation, Normative Interactions and the Role of Coherence (Cambridge: Cambridge University Press, forthcoming 2023).

[5] E. Kassoti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface', 8 *European Journal of Legal Studies* 2015, 21-49.

[6] ibid., at 46.

[7] C. Ryngaert, 'Customary International Law Interpretation: The Role of Domestic Courts', in P. Merkouris, *et al. (eds.), The Theory, Practice and Interpretation of Customary International Law (Cambridge: Cambridge University Press 2022), 481, at 487.*

[8] See, e.g., A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', 1 *European Journal of Legal Studies* 2007, 121-136.

[9] See, e.g., J. Klabbers, '*Völkerrechtsfreundlichkeit? International Law and the EU Legal Order'*, in P. Koutrakos (ed.), *European Foreign Policy* (Cheltenham: Edward Elgar 2011), 95, at 111.

[10] Graham Butler and the present author have expounded on this point in E. Kassoti and G. Butler, 'The Approach of the CJEU to International Law: Towards a Context-Specific Approach', in E. Fahey and I. Mancini (eds.) *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Cheltenham: Edward Elgar 2022), 261.

ness/hostility' and focusing instead on the actual circumstances, issues under consideration and normative and interpretative choices faced by the CJEU in a given case would allow us to construe a more accurate picture of the Court's actual use and interpretation of international law in its judicial practice.

In this context, it bears noting that part of the literature has attempted to capture the CJEU's inconsistent approach to international law in its case-law and to overcome the 'openness/hostility' dichotomy by focusing on the 'international or domestic' role that the Court may play in a given case.[11] Thus, according to Odermatt:

> When it acts as an international court, the CJEU interprets and applies international law to resolve disputes. It acts as a domestic (constitutional) court when it determines how international law can have effect in the EU legal order and the extent to which international law can be used as a yardstick to judge the validity of EU acts […] [T]he Court is much more open to international law when it fulfils the former role and more guarded when it fulfils the latter.[12]

The present author is not convinced that this lens has much explanatory force. First, this dichotomy is confusing at the descriptive level. While some authors describe the CJEU as an international court,[13] others describe it as a regional court[14] and yet others as a domestic court[15] – thereby raising questions about what these labels really mean and thus, what their descriptive value actually is. Furthermore, proponents of the 'international/national court' approach argue that: 'like domestic courts that apply and interpret customary international law, the CJEU deals with international law in a very specific legal context. In these cases, it is primarily focused on resolving a dispute that arose in the context of EU law, and will often apply international law as a means of applying EU law.'[16] However, apart from the ICJ that is the only court with potentially unlimited subject-matter jurisdiction, all courts (international, regional and domestic) apply international law 'in a very specific legal context.' For instance, the European Court of Human Rights' (ECtHR) task is to primarily interpret and apply the Eu-

---

[11] J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?', 3 *Cambridge International Law Journal* 2014, at 696; O. Ammann, 'The Court of Justice of the European Union and the Interpretation of International Legal Norms: To Be or Not to Be a "Domestic" Court?', in S. Besson and N. Levrat (eds.), *The European Union and International Law* (Geneva: Schulthess 2015), 153; F. Pasqual-Vives, 'The Identification of Customary International Law before the Court of Justice of the European Union: A Flexible Consensualism?', in F. Bordin, *et al*., *supra* note 3, 123.

[12] J. Odermatt, *supra* note 11, at 696.

[13] See, e.g., K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press 2014), 68-111.

[14] See, e.g., Y. Shany, 'International Courts as Inter-Legality Hubs', in J. Klabbers and G. Palombella (eds.), *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press 2019), 319, at 321.

[15] See, e.g., Final Report of the International Law Association Study Group on Principles on the Engagement of Domestic Courts with International Law, prepared by A. Tzanakopoulos, Co-rapporteur of the Study Group (2016), para. 4, available at <https://www.ila-hq.org/en_GB/documents/conference-study-group-report-johannesburg-2016>.

[16] J. Odermatt, *International Law and the European Union* (Cambridge: Cambridge University Press 2021) at 52.

ropean Convention of Human Rights – something that has not prevented it from issuing hundreds of judgments that contain sections on 'relevant international law.'[17] More fundamentally, the CJEU's jurisprudence does not bear out the proposition that the CJEU is much more open towards international law when it functions in an 'international court mode,' i.e., when it interprets international law and it is not called upon to act as a gatekeeper between the two legal orders.

The contrast in the Court's line of argumentation in *Brita*[18] and *Anastasiou*[19] on the one hand, and *Psagot*[20] on the other illustrates this point well. In *Anastasiou* the Court did not address at all the argument put forward by the Greek Government to the effect that acceptance of the certificates issued by the Turkish authorities in Northern Cyprus would be tantamount to violating a number of UN Security Council Resolutions condemning the Turkish occupation. Although the Court did acknowledge the *de facto* partition of the island, the problems stemming from this situation were merely regarded as pertaining to the 'internal affairs of Cyprus' which should be resolved 'exclusively by the Republic of Cyprus, which alone is internationally recognized.'[21] Similarly, in *Brita*, despite an express invitation by the Advocate General (AG) to analyse the legal status of Israel's presence in the West Bank for the purpose of establishing the territorial scope of the EU-Israel Association Agreement,[22] the Court decided the matter solely with reference to the 'politically detached' principle of *pacta tertiis*.[23] On this basis, the Court concluded that the territorial scope of the EU-Palestine Liberation Organization Association Agreement implicitly restricted the territorial scope of the EU-Israel Association Agreement.[24] In *Psagot*, the CJEU was essentially asked whether foodstuffs originating in a territory occupied by Israel must, under EU law, bear an indication to the effect that they come from an 'Israeli settlement.' In this case, the Court – in no uncertain terms – characterised Israel's presence in the Palestinian territories as occupation and condemned its settlement policy as being inconsistent with international law.[25] This constitutes a welcome departure from its previous case-law where the Court carefully avoided any reference to the status of a territory as 'occupied' – a judicial strategy which was undoubtedly deployed, *inter alia*, in order to avoid being drawn into political storms. In this light, the Court's approach to international law in its case-law is far too complex

[17] A. Pellet, 'Should We (Still) Worry About Fragmentation?', in A. Follesdal and G. Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (Oxford: Oxford University Press 2018), 228, at 240.

[18] ECJ, Case C-386/08, *Firma Brita GmbH* v. *Hauptzollamt Hamburg–Hafen* [2010] ECLI:EU:C:2010:91 (*Brita*).

[19] ECJ, Case C-432/92, *The Queen* v. *Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd et al.* [1994] ECLI:EU:C:1994:277 (*Anastasiou I*).

[20] ECJ, Case C-363/18, *Organisation juive européenne and Vignoble Psagot* [2019] ECLI:EU:C:2019:954 (*Psagot*).

[21] *Anastasiou I*, *supra* note 19, para. 47.

[22] Opinion of AG Bot in ECJ, Case C-386/08, *Firma Brita GmbH* v. *Hauptzollamt Hamburg–Hafen* [2009] ECLI:EU:C:2009:674, paras. 109-112.

[23] G. Harpaz and E. Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on *Brita*', 35 *European Law Review* 2010, at 566.

[24] *Brita*, *supra* note 18, paras. 50-53.

[25] *Psagot*, *supra* note 20, paras. 34, 48, 56.

to be explained on the basis of the international or domestic role which the CJEU is supposed to play in the context of a given case. The value of applying a highly contextualised lens to assess the relevant case-law has also been acknowledged by proponents of the 'international/domestic' court approach. As Ammann stresses:

> To conclude, 'to be or not to be a domestic court' may well be a rhetorical question. What is relevant from the perspective of both international and domestic law, is less whether a court is a national, a regional or an international one. What matters more is what law this court applies – and *how*.[26]

Furthermore, assessing the Court's interpretative practice when it comes to customary international law has something of value to add to the ongoing debate regarding the possible normative contours of Article 3(5) TEU.[27] The CJEU's approach to international law offers a tangible yardstick against which the EU's constitutional commitment to 'the strict observance of international law' (Article 3(5) TEU), and thus, its claim to the ethos of international law, can be measured. As AG Wathelet stressed in his Opinion in the *Western Sahara Campaign UK* case, the CJEU is the only court with jurisdiction to review the EU's external action, and thus, to ensure that that action contributes to the 'strict observance of international law' in accordance with Article 3(5) TEU.[28]

3. CUSTOMARY LAW-ASCERTAINMENT VS CUSTOMARY LAW INTERPRETATION: THE VIEW FROM THE CJEU

One of the main aims of the TRICI-Law project is to prove that CIL norms are amenable to interpretation – as opposed to merely identification of their existence and content on the basis of the two-element approach as per Article 38(1)(c) of the ICJ Statute. In this sense, the project subscribes to the transposability to CIL of the view, developed in relation to international agreements as well as other sources of international law such as unilateral acts,[29] that interpretation serves two main functions, namely that of determining what qualifies as a legal

[26] O. Ammann, *supra* note 11, at 178 (emphasis in original).

[27] P.-J. Kuijper, '"It Shall Contribute to … the Strict Observance and Development of International Law…" The Role of the Court of Justice', in *The Court of Justice and the Construction of Europe: Analysis and Perspectives on Sixty Years of Case Law* (The Hague: TMC Asser Press 2013), 589; E. Cannizzaro, 'The Value of the EU International Values', in W.T. Douma, *et al*. (eds.), *The Evolving Nature of EU External Relations Law* (The Hague: T.M.C. Asser Press 2021), 3; R. Dunbar, 'Article 3(5) TEU a Decade on: Revisiting "strict observance of international law" in the Text and Context of other EU Values', 28 *Maastricht Journal of European and Comparative Law* 2021, 479-497; E. Kassoti and R. A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union', in P. García Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Valencia: Tirant lo Blanch 2023), 1.

[28] AG Wathelet, Opinion to Case C-266/16, *Western Sahara Campaign UK* v. *Commissioners for her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:1, para 85.

[29] See, e.g., E. Kassoti, 'Interpretation of Unilateral Acts in International Law', 69 *Netherlands International Law Review* 2022, 295-326.

norm (law-ascertainment) and that of determining the meaning of a given norm (content determination).[30] As Merkouris explains:

> Interpretation deals with identifying the content of a CIL rule, *after it has come into existence* […] [O]nce a CIL has been identified as having been formed, its continued manifestation and application in a particular case will be dependent on the deductive process of interpretation. In this manner, interpretation focuses on how the rule is to be understood and applied *after the rule has come into existence and for its duration*.[31]

Other authors have also supported the CIL interpretability thesis[32], in the sense of ascertaining the meaning of a CIL rule once its existence and content have been identified as well as delimiting its scope and effects. International[33] and domestic[34] judicial practice further attests thereto.

How does the case-law of the CJEU fit in this picture? There is evidence to support the proposition that the Court does engage in the interpretation of CIL rules applicable in a given case – instead of merely ascertaining their existence. Two important caveats need to be inserted here. First, interpretive engagement with CIL is much more evident in the AGs' Opinions rather than in the text of the Court's judgments. In this context, the Court tends to merely refer to the AG's findings in support of the meaning, scope and effects ascribed to a particular CIL rule. Secondly, even in AGs' Opinions, such engagement seems to be, to a large extent, implicit. In other words, although several Opinions attest to the fact that the AGs engage in the (distinct) intellectual operation of clarifying the meaning of pre-existing CIL norms, this is not clearly or expressly articulated.

The line of case-law pertaining to immunities of states from jurisdiction is a good example. The *Mahamdia* case concerned the applicability of the international law rules on jurisdictional immunities of states in the context of an unfair dismissal claim brought before German courts by a driver employed by the Algerian embassy.[35] In his Opinion, AG Mengozzi, having taken note of the

---

[30] J. d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished', in A. Bianchi, *et al*. (eds.), *Interpretation in International Law* (Oxford: Oxford University Press 2015), 111, at 118.

[31] P. Merkouris, 'Interpreting the Customary Rules on Interpretation', 19 *International Community Law Review* 2017, at 136 (emphasis in original).

[32] See, e.g., A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press 2008) 286-287, 496-510. See also R. Di Marco, 'Customary International Law: Identification versus Interpretation', in P. Merkouris, *et al., supra note 7, 414.*

[33] For a comprehensive overview, see P. Merkouris, *supra* note 1, 6-27. See, e.g., Dissenting Opinion of Judge Charlesworth in ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast, Judgment of 13 July 2023*, para. 11, available at <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf>; Dissenting Opinion of Judge Tanaka in *North Sea Continental Shelf Cases, ICJ Reports* 1969, 172, at 182; *Mondev International Ltd* v. *United States of America*, Award of 11 October 2002, ICSID Case No. ARB(AF)/99/2, para. 113.

[34] See the practice mentioned in C. Ryngaert, *supra* note 7, and also in N. Mileva, 'The Role of Domestic Courts in the Interpretation of Customary International law: How Can We Learn from Domestic Interpretive Practices?', in P. Merkouris, *et al., supra note 7, 453.*

[35] ECJ, Case C-154/11, *Ahmed Mahamdia* v. *People's Democratic Republic of Algeria* [2012]

uncertainty surrounding the rules on state immunity under public international law, confirmed that the rule of relative immunity has replaced that of absolute immunity based on the fundamental distinction between acts committed *jure imperii* and acts committed *jure gestionis*.[36] Against this background, and while highlighting the difficulty of establishing clear criteria for distinguishing between sovereign and non-sovereign acts, the AG relied on relevant ECtHR case-law as well as international instruments in order to conclude that *in casu* Algeria could not invoke immunity from jurisdiction.[37] Although AG Mengozzi did not actually use the term ‘interpretation,’ his line of reasoning shows that what he was actually doing was to *interpret the scope of rule of relative immunity* by focusing on the distinction between sovereign and non-sovereign acts while accepting the existence of the core norm, namely that states enjoy immunity for acts performed in the exercise of sovereign powers. The Court cited to the AG’s Opinion and endorsed his interpretation to the effect that the *content* of the international law rule concerning the immunity of states from jurisdiction is restrictive rather than absolute and thus, it found that the embassy was carrying out acts of a private nature in employing the claimant.[38]

While *Mahamdia* concerned the delimitation of the scope of the rule on state jurisdictional immunity in labour-related disputes, in *Rina* the Court was faced with the question of whether such immunity extended to private companies delegated by the flag state the task of performing classification and certification activities.[39] AG Szpunar began by highlighting that while international law has recognized the rule on relative (as opposed to absolute) immunity ‘difficulty nevertheless persists in *determining the exact scope* of immunity from jurisdiction’ since the distinction between sovereign and non-sovereign acts remains unclear.[40] The AG tackled the question in two steps: first, he enquired into whether a specific rule of CIL extending immunity to non-state bodies carrying out classification and certification activities on behalf of a state has emerged – as an exception to the core norm of relative immunity.[41] Having established that no such CIL rule has emerged, the AG then continued by examining the ‘parameters of immunity from jurisdiction *ratione materiae*.’[42] Thus, in essence the AG proceeded to *interpret* the scope of relative immunity for the purpose of ascertaining whether it encompasses classification and certification activities carried out by private parties.

ECLI:EU:C:2012:491 (*Mahamdia*).

[36] AG Mengozzi, Opinion to Case C-154/11, *Ahmed Mahamdia* v. *People’s Democratic Republic of Algeria* [2012] ECLI:EU:C:2012:309, paras. 19-22.

[37] ibid., paras. 23-27.

[38] *Mahamdia*, *supra* note 35, paras. 55-57.

[39] ECJ, Case C-641/18, *LG and Others* v. *Rina SpA, Ente Registro Italiano Navale* [2020] ECLI:EU:C:2020:349 (*Rina*). For analysis, see A. Spagnolo, ‘A European Way to Approach (and Limit) the Law on State Immunity? The Court of Justice in the *RINA* Case’, 5 *European Papers* 2020, 645-661.

[40] AG Szpunar, Opinion to Case C-641/18, *LG and Others* v. *Rina SpA, Ente Registro Italiano Navale* [2020] ECLI:EU:C:2020:3, para. 37 (emphasis added).

[41] ibid., para. 108.

[42] ibid., paras. 109-110.

In performing this hermeneutic task, the AG relied on: (i) the (non-binding) UN Convention on Jurisdictional Immunities and their Property[43] which militates in favour of a presumption against the extension of state immunity to private bodies;[44] and (ii) EU secondary legislation which clarifies the scope of (customary law) obligations arising for flag states under the UNCLOS and SOLAS Conventions in the area of maritime security[45] in order to conclude that the entities in question could not claim immunity to the extent that their classification and certification operations were performed without recourse to public powers.[46] More particularly, the AG relied on recital 16 of Directive 2009/15[47] which expressly states that immunity is 'a prerogative that can only be invoked by member states as an inseparable right of sovereignty and therefore that cannot be delegated.' The argumentation of the parties which expressly concerned the role that the recital should play in interpreting the rule on relative immunity further buttresses the proposition that the task at hand was one of interpretation and not of mere identification of the existence and content of the relevant CIL norm. As the AG noted in his Opinion, the defendants in the case at bar specifically challenged the relevance of the recital – which has no binding force and is only applicable to member states – in interpreting the relevant CIL norm.[48] While the AG conceded that the directive indeed only concerns member states, this does not result 'from any intention on the part of the EU legislature to restrict the reach of its interpretation of the principle of customary international law concerning immunity from jurisdiction, but from the fact that the EU *mandate* extends to member states alone.'[49] According to the AG, regardless of the weight to be attached to the recital, in the context of interpreting the core international law norm, the same conclusion, namely the non-extension of the immunity rule to private actors, can be derived on the basis of the application of the autonomous EU law criteria for distinguishing between sovereign and non-sovereign acts.[50] In a similar vein to the *Mahamdia* judgment, the CJEU, citing to the AG's Opinion simply asserted the relative nature of state immunity and its inapplicability *in casu* – without more analysis.[51]

The Western Sahara saga provides numerous examples bearing out the proposition that the CJEU interprets CIL norms before applying them – with the caveats mentioned above. Western Sahara constitutes both a non-self-governing territory whose people have the right to self-determination[52] and a territory that is occu-

---

[43] United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, not yet in force, available at <https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf>.
[44] AG Szpunar, *supra* note 40, para. 114.
[45] ibid., paras. 115-128. See in particular Art. 94 UNCLOS and ch. 1, Reg. 6 SOLAS. For analysis see A. Spagnolo, *supra* note 39, at 659.
[46] AG Szpunar, *supra* note 40, para. 129.
[47] Recital 16 of directive 2009/15/EC of the European Parliament and of the Council on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (recast), *OJ* [2009] L 131, 23.4.2009, 47.
[48] AG Szpunar, *supra* note 40, para. 121.
[49] ibid., para. 125 (emphasis in original).
[50] ibid., para. 127.
[51] *Rina*, *supra* note 39, paras. 57-58.
[52] *Western Sahara, Advisory Opinion, ICJ Reports* 1975, 12, at 68, para. 162.

pied by Morocco.[53] The EU has carefully avoided pronouncing on the exact legal status of Morocco vis-à-vis Western Sahara and it has entered into a number of treaties with Morocco that *de facto* extended to Western Sahara – the legality of which came under judicial scrutiny in the context of the *Front Polisario I* [54] and *Western Sahara Campaign UK* [55] cases. The Grand Chamber of the CJEU dealt with the two cases in 2016 and in 2018 with essentially the same line of reasoning. By eschewing engagement with the question of the legal status of Western Sahara as an occupied territory as well as with the international legal obligations incumbent upon the EU exactly because of this status,[56] the CJEU concluded that: (i) Western Sahara has a status separate and distinct to that of Morocco and as such, it was not legally included in the territorial scope of the EU-Morocco agreements; and (ii) that international law, nevertheless, allows the inclusion of Western Sahara in these agreements as long as the people of the territory in question have consented thereto.[57]

Against this background, the Commission entered into consultations with local stakeholders which culminated into the *express* inclusion of the territory and waters of Western Sahara in the territorial scope of the EU-Morocco agreements.[58] This resulted in renewed litigation before the CJEU and in the 2021 General Court's *Front Polisario II* judgments.[59] The General Court found that the principles of self-determination and the relative effect of treaties mean that Western Sahara has a status separate and distinct to that of Morocco, and as such, it constitutes a third party to any international agreement between the Union and Morocco.[60] Thus, extending the territorial scope of any EU-Morocco

[53] See, e.g., *The Queen on the Application of Western Sahara Campaign UK* v. *Commissioners for Her Majesty's Revenue and Customs and the Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 2898, paras. 40, 43.

[54] ECJ, Case C-104/16 P, *Council of the European Union* v. *Front populaire pour la libération dela saguia-el-hamra et du rio de oro* [2016] ECLI:EU:C:2016:973 (*Front Polisario I*).

[55] ECJ, Case C-266/16, *The Queen on the Application of Western Sahara Campaign UK* v. *Commissioners for Her Majesty's Revenue and Customs, Secretary of State, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118 (*Western Sahara Campaign UK*).

[56] For analysis of the *Front Polisario* and *Western Sahara Campaign* judgments, see E. Kassoti, 'The Compatibility of EU International Agreements Extending to Occupied Territories with International Law: Front Polisario and Western Sahara Campaign UK', in G. Butler and R. A. Wessel (eds.), *EU External Relations Law: The Cases in Context* (Oxford: Hart Publishing 2022), 817.

[57] *Front Polisario I*, *supra* note 54, paras. 106-107; *Western Sahara Campaign UK*, *supra* note 55, paras. 63-64.

[58] See Council Decision 2019/217 of 28 January 2019 on the conclusion in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, *OJ* [2019] L 34, 6.2.2019, 1. See also Council Decision of 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement, *OJ* [2019] L 77, 20.3.2019, 4.

[59] GC, Joined Cases T-344/19 and T-356/19, *Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro* v. *Council of the European Union* [2021] ECLI:EU:T:2021:640; GC, Case T279/19*, Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro* v. *Council of the European Union* [2021] ECLI:EU:T:2021:639. The content of the two judgments is nearly identical and thus, for the sake of brevity, the references made here will be to Joined Cases T-344/19 and T-356/19 (*Front Polisario II*).

[60] *Front Polisario II*, *supra* note 59, paras. 201-202.

agreement to the territory necessarily entails obtaining 'the consent of the people of Western Sahara.'[61] The Court found that the consultations carried out by the EU institutions did not meet the requisite threshold since they merely involved obtaining the consent of the *local population*, namely the people currently living in the territory, instead of *the people of the territory*, namely the Saharawi people.[62]

Despite the various shortcomings this line of case-law suffers from, both in terms of methodology and in terms of substantive analysis, it is important to highlight for present purposes that it attests to the fact that the Court engages in the delimitation of the meaning and scope of CIL norms and not in a mechanistic application thereof. Thus, for example, in *Front Polisario I*, AG Wathelet interpreted the concept of 'subsequent practice' within the meaning of Article 31(3)(b) Vienna Convention on the Law of Treaties (VCLT)[63] in order to support the proposition that such practice is not in itself decisive in ascribing meaning to treaty terms and that it may not override the clear wording of a treaty.[64] Similarly, the AG interpreted the scope and applicability of the *pacta tertiis* rule in the case at bar with reference to Article 73 UN Charter and to the separate and distinct legal status of Western Sahara as a non-self-governing territory.[65] The AG also interpreted the content of the principle of permanent sovereignty over natural resources and the obligations incumbent upon third parties on the basis of that principle in order to conclude that the Union has not infringed the principle.[66] The *Front Polisario I* judgment also evidences the CJEU's interpretive engagement with the relevant CIL norms. Thus, for example, the CJEU relied on various international instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Protection of Human Rights and Fundamental Freedoms, in order to support the proposition that Article 29 VCLT creates a presumption against extraterritoriality.[67] The Court invoked those instruments to buttress its interpretation of Article 29 VCLT as meaning that a treaty applies in principle to the geographical space where a state exercises its full sovereign powers. In *Western Sahara Campaign UK*, AG Wathelet engaged extensively with the delimitation of the meaning and scope of the relevant CIL norms, including the right to self-determination;[68] the principle of permanent sovereignty over natural resources;[69] the obligation of non-recognition;[70] as well as different IHL rules pertaining to the status of a state as an 'occupying power'[71] and the capacity of occupying powers to conclude international agreements covering the occupied

---

[61] ibid., paras. 322-364.
[62] ibid., para. 364.
[63] Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* 331.
[64] AG Wathelet, Opinion to Case C-104/16 P, *Front Polisario I*, *supra* note 54 [2016] ECLI:EU:C:2016:677, paras. 89-96.
[65] ibid., paras. 101-105.
[66] ibid., paras. 290-296.
[67] *Front Polisario I*, *supra* note 54, paras. 96-97.
[68] AG Wathelet, Opinion to *Western Sahara Campaign UK*, *supra* note 28, paras. 181-183.
[69] ibid., paras. 130-134.
[70] ibid., paras. 187-197.
[71] ibid., paras. 245-248.

territory. [72] Thus, the CJEU practice confirms that, far from accepting that the application of the two-element approach suffices in order to determine the content of a given CIL rule, CIL is interpretable and that, in its practice, the Court engages in CIL interpretation.

Against this background, the next question to be answered pertains to *how* the CJEU actually interprets CIL norms, i.e., what are the interpretative methods employed by the Court. In this context, the analytical categories put forward by Ryngaert are useful. These are: a) autonomous CIL interpretation (that is, interpretation by the law-applying agencies in an autonomous manner and without taking their cue from international courts); b) deference to CIL interpretation by international courts; and c) interpreting CIL norms laid down in in authoritative written documents.[73] The relevant practice shows that, in a similar fashion to the process of customary law identification, the Court does not really engage in autonomous interpretation of the applicable CIL rules. Rather, it tends to rely on the case-law of international (and sometimes, domestic) courts and on international written instruments (purportedly codifying CIL norms) as a short-cut for determining the meaning, scope and effects of CIL rules. The above exposition already contains some examples of this practice and an exhaustive account would be beyond the scope of this paper,[74] however, some further instances thereof will be briefly mentioned here. In *Mahamdia* and in *Rina* the AGs relied on national case-law, the jurisprudence of the ECtHR as well as on different instruments such as the UN Convention on Jurisdictional Immunities and their Property and the European Convention on State Immunity[75] and academic literature in order to delimit the meaning and scope of states' relative immunity.[76] From a methodological point of view, reliance on written instruments that codify CIL norms for the purpose of ascertaining the meaning to be ascribed to a given norm, could be understood as systemic interpretation – where the text of the rule in the written instrument qualifies as a 'relevant rule of international law' by way of analogy to Article 31(3)(c) VCLT.[77] In *Front Polisario I*, AG Wathelet relied on ICJ judgments[78] as well as on a 2002 legal opinion issued by the UN Under-Secretary General for Legal Affairs and Legal Counsel, Hans Corell,[79] in order to define the meaning and scope of the principle of permanent sovereignty over natural resources.[80] Similarly, in *Western Sahara Campaign UK*, the AG relied on

[72] ibid., paras. 251-254.

[73] C. Ryngaert, *supra* note 7, at 493.

[74] See further T. *Molnár*, *supra* note *4, 12-14.*

[75] AG Mengozzi, *supra* note 36, paras. 17-27; AG Szpunar, *supra* note 40, paras. 34-129.

[76] European Convention on State Immunity 1972, available at <https://rm.coe.int/16800730b1>.

[77] P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Leiden: Brill, Nijhoff 2015) at 272. See also C. Ryngaert, *supra* note 7, at 502; T. *Molnár, supra* note *4, at 12.*

[78] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), ICJ Reports* 2005, 168, para. 244.

[79] Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Hans Corell, addressed to the President of the Security Council (12 February 2002) UN Doc. S/2002/161, para. 6.

[80] AG Wathelet, Opinion to *Front Polisario I*, *supra* note 64, paras. 287-297.

the International Covenant on Civil and Political Rights[81] as well as on a number of UN GA resolutions, ICJ case-law[82] and literature in order to determine the meaning and scope of the right to self-determination.[83] More recently, in *Front Polisario II*, the Court had recourse to a number of ICJ judgments[84] in order to delimit the content and scope of consent under the *pacta tertiis* rule – for the purpose of ascertaining whether the newly adopted EU-Morocco agreements expressly including the territory and waters of Western Sahara in their territorial scope meet the requisite threshold of 'consent of the people of the territory.'[85]

At this juncture, one may wonder whether the fact that the CJEU does not engage in autonomous interpretation negatively impacts the interpretative outcome and, more broadly, the Court's engagement with international law. This is too difficult to judge in the abstract. At face value, there is nothing inherently wrong in 'outsourcing' the task of interpretation of CIL norms to other law-interpreters, and more particularly the ICJ, provided that this is done carefully, and without transplanting 'lock, stock and barrel' solutions, namely adopting an interpretation of a CIL rule without understanding the broader structure and logic of international law as well as the legal issues at bar in each case. In this context, the issue of misinterpretation of CIL norms[86] by the CJEU becomes important. Is there evidence of lack of methodological rigour in the content-determination of CIL norms in the case-law of the CJEU? The next section deals with this question.

4. LIMITS OF INTERPRETATION: MISINTERPRETATION

Another core aim of the TRICI-Law project is to clarify the limits of CIL interpretation by identifying instances where the interpreter moves away from ascertaining the precise content, scope of and possible exceptions to a core CIL norm and enters into the terrain of incorrect interpretation. [87] This is usually the result of ignoring the restrictions imposed on the interpretative exercise both by the nature of the international legal system and/or by the rule itself. [88] In this light, this section explores instances of misinterpretation of CIL norms by the CJEU.

---

[81] International Covenant on Civil and Political Rights 1966, 999 *UNTS* 171.

[82] *East Timor (Indonesia* v. *Australia), ICJ Reports* 1995, 90, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports* 2004, 136, paras. 88, 156.

[83] AG Wathelet, Opinion to *Western Sahara Campaign UK*, *supra* note 28, paras. 102-107.

[84] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, ICJ Reports* 1984, 246, paras. 127-130, 138-140; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports* 2019, 95, paras. 160, 172, 174.

[85] *Front Polisario II*, *supra* note 59, paras. 323-325. The Court found that *in casu* the consultations carried out by the Commission with local stakeholders did not meet the requisite threshold.

[86] *As Arajärvi notes: '[M]isinterpretation by definition is not concerned with motivations, but it simply refers to "the act of forming a wrong understanding of something that is said or done, or an example of a wrong understanding."' N. Arajärvi, 'Misinterpreting Customary International Law: Corrupt Pedigree or Self-Fulfilling Prophecy?'* in P. Merkouris, *et al., supra note 7, 40, at 48.*

[87] P. Merkouris, *supra* note 1, at 41.

[88] ibid.

An important caveat needs to be inserted here. Discussing cases of misinterpretation of CIL norms implies that the CJEU actually identified and interpreted (presumably, in an erroneous manner) a relevant CIL norm before applying it in a given case. However, it is important not to lose sight of the fact that in some cases the CJEU has *framed the dispute* in such a way as to *avoid* identifying (and subsequently, interpreting) a relevant CIL norm altogether. This practice[89] may not be technically considered as 'misinterpretation' as the Court does not actually engage in interpretation but it is important to note in the light of the broader points made at the beginning of the paper regarding the Court's engagement with international law. Focusing on instances of misinterpretation *stricto sensu* does not allow one to take into account cases where the dispute at bar involved an international law dimension which has been simply papered over. The classification of facts and legal issues is rarely a neutral exercise and thus, the framing of a dispute is of cardinal importance in determining whether particular CIL norms are relevant in the context of a case.

The politics of framing played an important role in the Western Sahara saga before the CJEU. Here, the Court chose to view the legal relations between the EU, Morocco and Western Sahara exclusively through the frame of the law of self-determination – ignoring the status of the territory as one that is occupied by Morocco and the relevant obligations of non-recognition and non-assistance incumbent upon the EU on the basis of this status.[90] However, by doing so, the Court repeatedly failed to specify the capacity in which Morocco exercises treaty-making powers over Western Sahara – something that would have been, in any case, impossible as Morocco denies its status as an occupying power – thereby, raising questions of international responsibility of the Union. By not engaging with the analytical framework of the law of occupation, the Court's rulings essentially mean that the only obstacle to the conclusion of an agreement applicable to Western Sahara is obtaining the 'consent of the people of Western Sahara.' However, it is not impossible that in the future the CJEU decides that there is a margin of discretion as to how this consent can be obtained. By way of contrast, as seen above, AG Wathelet engaged with the relevant framework of the law of occupation in his Opinion in *Western Sahara Campaign UK* and he identified and interpreted a number of relevant CIL norms.[91] In a similar vein, the framing of the dispute enabled the CJEU to avoid pronouncing on an (arguably) relevant international law issue in the *Slovenia v Croatia* case.[92] Here, Slovenia argued that Croatia's failure to comply with an arbitration award fixing the territorial boundary between them should be taken into account for the purpose of verifying the alleged breaches of EU law.[93] The claim arguably

[89] This has been termed 'evasive avoidance' in the Final Report of the International Law Association Study Group on the Principles on the Engagement of Domestic Courts with International Law, *supra* note 15, paras. 39-40.

[90] For analysis, see E. Kassoti, 'The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara', CLEER Papers 2017/3, available at <https://www.asser.nl/media/3934/cleer17-3_web.pdf>.

[91] See *supra* notes 69-73 and accompanying text.

[92] ECJ, Case C-457/18, *Republic of Slovenia* v. *Republic of Croatia* [2020] ECLI:EU:C:2020:65.

[93] ibid., paras. 86-87.

necessitated interpreting the precise meaning and scope of the CIL norm of *res judicata* in order to determine the legal effects of the award within the EU legal order.[94] However, the Court chose to focus on the arbitration agreement, rather than on the award, as per Slovenia's claim, and concluded that the dispute fell outside its jurisdiction, since it would require it to rule on Croatia's obligations under that agreement.[95]

Turning next to issues of misinterpretation proper, it is important to stress in this context that CIL norms need to be interpreted in the light of the norms of the system from which they emerged, namely international law.[96] Ryngaert[97] and Ammann[98] have noted with concern the practice of domestic courts interpreting CIL norms in light of domestic (instead of international) law – a practice which Ryngaert has called 'reverse consistent interpretation' and Ammann 'self-referentiality' – and which has been criticised as disregarding the interpretative methods of international law.[99] The Court's case-law on interpretation of good faith (in the sense of Article 18 VCLT) as a corollary of the EU general principle of legitimate expectations may be seen as an instance of reverse consistent interpretation. In *Opel Austria* the General Court was faced, *inter alia*, with the question as to whether a regulation introducing customs duties on certain products from the then non-EU member state Austria issued a few days before the EEA Agreement came into force was compatible with the Agreement.[100] The applicant argued that the adoption of the regulation infringed the public international law principle of good faith.[101] The Court found that '[…] the principle of good faith is the corollary in public international law of the principle of protection

[94] ibid., para. 94. For analysis, see E. Kassoti, 'Between a Rock and a Hard Place: The Court of Justice's Judgment in Case Slovenia v. Croatia', 5 *European Papers* 2020, 1061-1070.

[95] *Republic of Slovenia* v. *Republic of Croatia*, *supra* note 92, paras. 101-104. There are further examples of this 'evasive avoidance' practice by the Court. In ECJ, Case C-161/20, *Commission* v. *Council (IMO)* [2022] ECLI:EU:C:2022:260, the Court dismissed an action for annulment brought by the Commission against a Council decision endorsing a submission on behalf of the member states and the Commission (but, crucially, not the EU) to the International Maritime Organization (IMO) ruling that the EU does not have any legal status within the IMO – and that the 1974 Agreement between the IMO and the Commission enables the latter to enjoy observer status within the organization but this does not extend to the Union. However, the Court did not interpret the 1974 Agreement on the basis of Art. 31 VCLT in order to establish its authorship and more particularly, whether the intention of the parties was that the Commission would represent the EC (as an observer) or whether it could only act in its own name.

[96] P. Merkouris, *supra* note 1, at 67. See also P. Merkouris, 'Interpreting Customary International Law: You'll Never Walk Alone', in P. Merkouris, *et al. (eds.), supra note 7, 347, 367-368. For further arguments on why international law rules applied by domestic courts retain their international law quality and by virtue of that quality international rules of interpretation remain applicable, see A. Nollkaemper, 'Grounds for the Application of International Rules of Interpretation in National Courts', in H. Aust and G. Nolte (eds.), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (Oxford: Oxford University Press 2016), 34, 42-43.*

[97] Ryngaert, *supra* note 7, at 491.

[98] O. Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning based on the Swiss Example* (Leiden: Brill Nijhoff 2020) at 243.

[99] Ryngaert, *supra* note 7, at 492; O. Ammann, *supra* note 98, at 322.

[100] GC, Case T-115/94, *Opel Austria GmbH* v. *Council of the European Union* [1997] ECR II-43, paras. 1-68.

[101] ibid., para. 89.

of legitimate expectations which […] forms part of the Community legal order'[102] and on which 'any economic operator to whom an institution has given justified hopes may rely.'[103] In *Greece v Commission*, the Court repeated almost verbatim its finding of equivalence in meaning and scope between the international law principle of good faith and the EU general principle of protection of legitimate expectations.[104] This approach creates both doctrinal and substantive issues. By equating a CIL norm with an EU general principle, the Court did not subject EU legislation to the external review of international law and the assessment was restricted to the internal system of checks and balances – thereby arguably demoting CIL to merely a means of identification of the internal rule applicable.[105] Furthermore, from a substantive point of view, it is questionable that there is equivalence in scope between the rule enshrined in Article 18 VCLT and the EU general principle of legitimate expectations. As Orakhelashvili notes, the threshold of applicability of Article 18 VCLT is substantially higher requiring frustration of the object and purpose of the treaty before it enters into force – so that the treaty would not operate properly once it would enter into force.[106]

There are further instances of misinterpretation of CIL norms by the CJEU in its more recent case-law. The relevant discussion will be structured along two contextual factors, namely the political sensitivity of the question at bar and the indeterminacy and complexity of the CIL norm under interpretation, that arguably had a bearing on the CJEU's approach to interpretation. [107] In turn, these contextual factors have explanatory value beyond the particular context of the CJEU; they allow us to reflect more generally on CIL misinterpretation and the possible reasons behind it.

The Western Sahara saga offers a number of examples of misinterpretation of CIL norms arguably on grounds of political expediency. Although the Union has expressed concern about the prolonged nature of the Morocco-Front Polisario conflict, it has carefully avoided to pronounce on the status of Western Sahara as an occupied one – a position that stands in stark contrast to the comparable situation in Palestine. The CJEU was faced with this political 'hot potato' when called upon to interpret the territorial scope of the relevant EU-Morocco agree-

[102] ibid., para. 93.

[103] ibid.

[104] GC, Case T-231/04, *Hellenic Republic* v. *Commission of the European Union* [2007] ECR II-66, paras. 85, 87, 97-99.

[105] T. Konstadinides, 'When in Europe: Customary International Law and EU Competence in the Sphere of External Action', 13 *German Law Journal* 2012, at 1188.

[106] A. Orakhelashvili, 'The Use of Substantive International Law by the EU Judiciary', in K. S. Ziegler, *et al*. (eds.), *Research Handbook on General Principles of International Law: Constructing Legal Orders in Europe* (Cheltenham: Edward Elgar 2022), 62, at 70.

[107] I have argued elsewhere in favour of a context-specific approach focusing on the actual circumstances, issues under consideration and interpretative choices faced by the CJEU in a given case in assessing the Court's reliance on international law in its practice. This approach allows one not only to pay heed to the actual reasoning employed by the CJEU (and thus, by way of extension on the actual interpretation and application of international norms) but also to compile a set of contextual factors, that may affect the CJEU's use of international law in a specific case; E. Kassoti and G. Butler, *supra* note 10.

ments in the *Front Polisario I* and *Western Sahara Campaign UK* cases. The Court in both judgments misinterpreted Article 31 VCLT in order to support the finding that the relevant agreements did not include Western Sahara.[108] In both judgments the Court relied exclusively on Article 31(3)(c) VCLT for the purpose of interpreting the territorial scope of the agreements and did not engage at all with the other means of interpretation listed in Article 31 VCLT – and more particularly, with the subsequent practice of the parties as per Article 31(3)(b) VCLT which arguably showed that the agreements did in fact cover Western Sahara.[109] However, this goes against the 'crucible approach' – where the interpretative outcome results from the combined interaction of all elements contain in Article 31 VCLT – intended by the ILC[110] and employed in international judicial practice.[111] By way of contrast, in *OJE and Vignoble Psagot*, the Court of Justice – in no uncertain terms – characterised Israel's presence in Palestine as 'occupation,' condemned Israel's settlement policy as being inconsistent with international law, and stressed that the EU is bound to observe international law.[112]

The judgments contain more instances of CIL misinterpretation. The proposition that Article 29 VCLT supports the finding of legal inapplicability of the agreements at hand to the territory of Western Sahara is open to doubt. The Court's argument to the effect that Article 29 VCLT creates a presumption against extraterritoriality does not comport with the drafting history of the article. The ILC, in its 1966 commentary, made it abundantly clear that the matter of extraterritorial application of treaties was too complicated and it decided to leave it aside.[113] Furthermore, according to the ILC, Article 29 VCLT was designed to apply in cases where a treaty does not define its territorial application – something that is not the case in relation to the agreements at hand.[114] The CJEU's interpretation of the principle of the relative effect of treaties (*pacta tertiis* principle) has also been criticised in the literature to the extent that the applicability of this principle to international legal persons other than states remains unclear.[115]

The complexity and/or indeterminacy of the CIL norm invoked may also contribute to incorrect interpretation. In *Venezuela v Council*[116] the Court was faced with

[108] For analysis, see E. Kassoti, 'Between *Sollen* and *Sein*: The CJEU's Reliance on International Law in the Interpretation of Economic Agreements covering Occupied Territories', 33 *Leiden Journal of International Law* 2020, 371-389.
[109] ibid., 381-382, 387.
[110] Draft Articles on the Law of Treaties with Commentaries, Vol. II, *Yearbook of the ILC* 1966, at 219, para. 8.
[111] S. Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties', in G. Hafner, *et al*. (eds.), *Liber Amicorum Ignaz Seidl-Hohenveldern in honour of his 80th Birthday* (The Hague: Kluwer Law International 1998), 721, at 726.
[112] *Psagot*, *supra* note 20, paras. 34, 48, 56.
[113] Draft Articles with Commentaries, *supra* note 110, 213-214, para. 5.
[114] ibid., at 213, para. 2.
[115] E. Kassoti, 'The *Council v. Front Polisario* Case: The Court of Justice's Selective Reliance on Treaty Interpretation', 2 *European Papers* 2017, 35-37; J. Odermatt, '*Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro* (Front Polisario). Case C-104/16 P', 111 *American Journal of International Law* 2017, at 736.
[116] ECJ, Case C-872/19 P, *Venezuela* v. *Council*, ECLI:EU:C:2021:507.

the question of whether third states have legal standing to challenge restrictive measures on the basis of Article 263(4) TFEU. In his Opinion, *inter alia*, AG Hogan relied on an international law argument in order to buttress the conclusion that third states should be regarded as 'legal persons' for the purposes of bringing an action for annulment. More particularly, AG Hogan argued that the international law principle of comity should inform the interpretation of what constitutes a legal person for the purposes of Article 263(4) TFEU and that, on the basis of comity, the CJEU should be open to challenges brought by states in their sovereign capacity as international legal persons.[117]However, the argument made by the AG stands on thin evidentiary grounds given that there is no CIL rule requiring one state to allow another state to bring suit in its courts. Rather, comity is a domestic law doctrine (that has been mainly employed by US courts) under which deference is afforded to foreign states to bring suits before domestic courts as applicants.[118] The practice relied on by AG Hogan (the *Banco National de Cuba* v. *Sabbatino* judgment by the US Supreme Court),[119] as well as a survey of other relevant case-law,[120] attest to the domestic law pedigree of the principle of comity. Indeed, the very notion of 'comity' in international law is linked to practices of a discretionary character; which runs counter to the idea of CIL 'as evidence of a general practice accepted as law.' While the Court of Justice in *Venezuela v Council* largely followed the reasoning of the AG, and accepted that third states have standing to challenge restrictive measures imposed under the EU's CFSP before the CJEU, it steered clear from the international law line of arguments presented by the parties.

A more recent example where the complexity of the rule had – at least indirectly - an impact on the Court's interpretation and application of a CIL rule was the *Spain v Commission* (Kosovo) case where the Court found that notwithstanding the EU's non-recognition of Kosovo as a state, Kosovo could participate in an EU agency, namely the Body of European Regulators for Electronic Communications (BEREC), as a 'third country' within the meaning of Article 35(2) BEREC Regulation.[121] The Court stated, *inter alia*, that on grounds of securing the effectiveness of the provision at hand entities not recognized as sovereign states by the Union should be treated as 'third countries' within the meaning of that provision 'while not infringing international law.'[122] It is unclear what the non-infringement of international law meant. The Court's subsequent reference[123] to the ICJ's *Advisory Opinion on Kosovo*[124] presumably implies that Kosovo can be considered as a 'third country' since its declaration of independence does not violate international law – as per the ICJ's Opinion. This is where things get

---

[117] AG Hogan, Opinion to Case C-872/19 P, *Venezuela* v. *Council*, ECLI:EU:C:2021:37, paras. 63-72.
[118] W. Dodge, 'International Comity in American Law', 115 *Columbia Law Review* 2015, 2071-2142.
[119] *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).
[120] *The Sapphire*, 78 U.S. 11 Wall. 164 (1870); *Hilton* v. *Guyot*, 159 U.S. 113 (1895); *The Santissima Trinidad*, 20 U.S. 283 (1822).
[121] ECJ, Case C-632/20 P, *Spain* v. *Commission*, ECLI:EU:C:2023:28.
[122] ibid., para. 50.
[123] ibid., para. 51.
[124] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports* 2010, 403 (*Kosovo*).

complicated. According to Article 41(2) of the ILC Articles on State Responsibility, there is an international law obligation bestowed upon third parties not to recognize either formally or implicitly an effective territorial situation created in breach of a *jus cogens* norm.[125] However, the CJEU was wrong to assume that the ICJ's Advisory Opinion answered the broader question of the legality of Kosovo's unilateral secession from Serbia – in other words that the ICJ interpreted and applied the relevant rule in the context of its Advisory Opinion. The ICJ merely gave an affirmative answer to the considerably narrower question of the accordance of Kosovo's' unilateral declaration of independence with international law – without touching upon questions of statehood or recognition.[126] Since a declaration of independence *in and of itself* does not create a state, or a new legal situation, it may be considered a legally neutral act[127] – or as Crawford eloquently put it 'the sound of one hand clapping.'[128] In this light, the CJEU's reliance on the ICJ's dictum (and thus, by way of extension, to its perceived interpretation and application of relevant CIL norms) in order to support the proposition that dealing with a territorial entity as a 'third country' under EU law does not infringe international law was rather misplaced. In reality, there was no need for the Court to make this particular reference to 'infringements of international law.' The case did not directly involve any questions of formal – and more importantly, implicit – recognition by the Union of Kosovo as a state and hence no question of responsibility of the Union could technically arise here. Article 2 of the Kosovo Stabilisation and Association Agreement[129] expressly states that the agreement does not constitute recognition of Kosovo's status as a state by the Union and, similarly, the Commission decision regarding the participation of Kosovo's National Regulatory Authority in the EU agency expressly stated that the designation Kosovo 'is without prejudice to questions of status.' The AG avoided that misstep much more eloquently – by addressing the question whether the Commission's decision constituted implicit recognition of Kosovo as a 'State' head on – and answering it to the negative.[130]

[125] Art. 41(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Vol. II, part 2, *Yearbook of the ILC* 2001, 113-114. See also *Kosovo*, *supra* note 124, para. 81.

[126] J. Vidmar, 'Secession of Kosovo', in J. Vidmar, *et al*. (eds.), *Research Handbook on Secession* (Cheltenham: Edward Elgar 2022), 167, 173-174.

[127] See generally E. Kassoti, 'The Sound of One Hand Clapping: Unilateral Declarations of Independence in International Law', 17 *German Law Journal* 2016, 233-235.

[128] J. Crawford, Comments as representative of the United Kingdom, Oral Statements made during the public sitting held on 10 December 2009 at the Peace Palace, CR 2009/32, at 47, available at <https://www.icj-cij.org/public/files/case-related/141/141-20091210-ORA-01-00-BI.pdf>.

[129] Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, *OJ* [2016], L 71/3.

[130] AG Kokott, Opinion to Case C-632/20 P, *Spain* v. *Commission*, ECLI:EU:C:2022:473, paras. 87-91.

5. CONCLUSIONS

The present contribution examined the CJEU's practice of CIL interpretation. It began by arguing that this query contributes not only to the study of interpretation of CIL but also to a number of broader debates pertaining to the EU's (and its courts') approach to international law. The main argument advanced here is that the analysis supports the main premise of the TRICI-Law project, namely that CIL norms can be and are interpreted by courts. It has been shown that, in its practice, the CJEU engages in CIL interpretation – even though it refrains from using the term explicitly and proof of interpretive engagement with CIL can be found in AGs' Opinions rather than in the texts of the judgments themselves. Furthermore, when it comes to the interpretative methods employed by the Court it was shown that it rarely engages in autonomous interpretation. Rather, it tends to rely on the case-law of international (and sometimes, domestic) courts and on international written instruments (purportedly codifying CIL norms) as a short-cut for determining the meaning, scope and effects of CIL rules. It was argued that there is nothing inherently wrong with this approach – provided that this is done in a careful manner and with understanding of the broader international legal framework as well as of the legal issues at play.

Against this backdrop, the paper turned to issues of misinterpretation. It was shown that instances where the CJEU frames the dispute in such a way as to avoid identifying (and subsequently interpreting) relevant CIL norms are a blind spot of the debate. The contribution identified and discussed cases where the framing of the dispute allowed the Court to eschew engagement with CIL interpretation – pertaining to arguably politically charged issues. As far as misinterpretation *stricto sensu* is concerned, the CJEU, has in its practice engaged in 'reverse consistent interpretation' interpreting CIL norms in light of domestic (instead of international) law. The paper focused next on the contextual factors that may (arguably) be relevant in the Court's misinterpretation of CIL norms and identified political expediency and the complexity of the CIL rule invoked as some examples thereof. Such contextual factors have explanatory value beyond the particular context of the CJEU; they allow us to reflect more generally on CIL misinterpretation and the possible reasons behind it.

Overall, in future cases, the CJEU may wish to be more explicit regarding its interpretative engagement with CIL. Engaging consciously and explicitly with this hermeneutical task could also enhance the methodological quality of the Court's reasoning – instead of merely referring to the AG's Opinions in rather elliptical fashion, explicit engagement with CIL interpretation could assist the Court to take into account the broader international law context of the dispute and thus, to improve its reasoning on the basis of international law.

CUSTOMARY INTERNATIONAL LAW IN THE CASE LAW OF THE CJEU: IN SEARCH OF CONSISTENCY

Takis Tridimas* and Mark Konstantinidis**

1. INTRODUCTION

The attitude of EU law towards international law is characterised by a paradox. On the one hand, observance of international law is not only a legal duty under Article 3(5) TEU but also an essential source of EU legitimacy.[1] On the other hand, the prevailing integration paradigm is embedded on a constitutional narrative which asserts the autonomy of EU law and, in part, its primacy over international law. The present contribution seeks to examine the approach of the Court of Justice of the European Union (CJEU) (i.e., the Court of Justice (ECJ) and the General Court (GC)) to customary international law (CIL) by particular reference to the 1969 Vienna Convention on the Law of the Treaties (VCLT),[2] in the light of the above tension. It starts by discussing the status of CIL in EU law (Section 2). It then offers a statistical overview of the CJEU's engagement with the VCLT and CIL (Section 3). The case law suggests a measured yet increasing willingness, particularly by the ECJ, to refer to the VCLT. The paper then explores the identification and application of CIL by the CJEU. With regard to the identification of CIL, the CJEU's approach is often rudimentary by way of reasoning, though not leading to incorrect outcomes as a matter of international law. As it might be expected, Advocates General have demonstrated greater willingness to identify CIL by more extensive reference to state practice and *opinio juris*. With regard to the application of CIL for the purposes of interpretation, the ECJ's methodology does not seem consistent. Its limited engagement (or lack thereof) with the VCLT may be explained by the judicial objective of maintaining the interpretative autonomy of EU law. Lastly, this paper considers the effect of CIL on the EU legal order (Section 4). While the CJEU is hesitant to find an EU measure to be incompatible with international law, this is far from impossible.[3] The CJEU has also recognised a duty of harmonious interpreta-

---

* Professor of European Law, Dickson Poon School of Law, King's College London.

** PhD Candidate and Visiting Lecturer in Law, Dickson Poon School of Law, King's College London.

[1] E. Kassoti and R. A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union', in P. G. Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Valencia: Tirant lo Blanch 2023).

[2] Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* 331. The importance of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, 25 *ILM* 543 is not underestimated, though it is not yet in force. Our analysis focuses on the 1969 Convention. The CJEU has sometimes referred to the 1986 VCLT, but only alongside the former; see, for instance, GC, Case T-115/94, *Opel Austria GmbH* v. *Council of the European Union* [1997] *ECR* II-43, para. 78 (*Opel*).

[3] See GC, Case T-279/19, *Front populaire pour la libération de la Saguia el-Hamra et du Rio*

tion, which requires it to interpret EU law in light of international law, including agreements codifying CIL. This can provide much needed flexibility by way of effecting an interpretative reconciliation between EU law and international law.

2. CUSTOMARY INTERNATIONAL LAW IN THE EU LEGAL ORDER

The ECJ has long asserted the *sui generis* nature of the EU legal order, as a system which is autonomous both *vis-à-vis* the domestic legal systems of the member states and general international law. In *Van Gend en Loos*, it proclaimed that the Union legal order 'constitutes a new legal order of international law,'[4] whereas in *Costa v ENEL*, it found that Union law stems from 'an independent source of law,' which bestows it with 'its special and original nature.'[5] This marked the genesis of the autonomy of the EU legal order, which has subsequently been elevated to a key, if somewhat nebulous, structural principle. It seeks to safeguard, *inter alia*, the uniform interpretation of EU law and the integrity of the EU system of judicial protection.[6] To these ends, it understands the exclusivity of the CJEU jurisdiction widely and imposes limitations on the competence of the Union and the member states to conclude international agreements.[7]

In its external relations, the EU is constitutionally committed to 'the strict observance and the development' of international law[8] and 'must respect international law in the exercise of its powers.'[9] International law is thus binding on the EU. This includes international agreements concluded by the EU,[10] agreements concluded by the member states in areas where the Union can be said to have succeeded them, and CIL.[11] CIL is a source of international law under Article

---

de oro v Council of the European Union [2021] ECLI:EU:T:2021:639; GC, Joined Cases T-344/19 and T-356/19, *Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro* v. *Council of the European Union* [2021] ECLI:EU:T:2021:640 (collectively referred to as *Front Polisario II*).

[4] ECJ, Case 26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] *ECR* 1, 12; see also ECJ, Joined Cases 90/63 and 91/63 *Commission* v. *Luxembourg and Belgium* [1964] *ECR* 629, 631.

[5] ECR, Case 6/64, *Flaminio Costa* v. *ENEL* [1964] *ECR* 585, 594.

[6] See, generally, K Lenaerts and J. A Gutiérrez-Fons, 'A Constitutional Perspective', in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law* (Oxford: Vol. 1, Oxford University Press 2018). See also I. Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: A Balloon Dynamic', College of Europe, *Research Paper* 02/2018, at 19, available at <https://www.coleurope.eu/research-paper/interconnecting-legal-systems-and-autonomous-eu-legal-order-balloon-dynamic>; N. N. Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?', 88 *Nordic Journal of International Law* 2019, 9.

[7] See, e.g., ECJ, Opinion 2/13, [2015] ECLI:EU:C:2014:2454; ECJ, Case C-284/16, *Slovak Republic* v. *Achmea BV* [2018] ECLI:EU:C:2018:158; ECJ, Opinion 1/17, [2019] ECLI:EU:C:2019:341 (*Achmea*); ECJ, Case C-741/19, *Republic of Moldova* v. *Komstroy LLC* [2021] ECLI:EU:C:2021:655 (*Komstroy*).

[8] Art. 3(5) TEU.

[9] ECJ, Case C-286/90, *Anklagemyndigheden* v. *Poulsen and Diva* [1992] *ECR* I-6019, para. 9 (*Poulsen*).

[10] Art. 216(2) TFEU.

[11] ECJ, Case C-308/06, *The Queen on the Application of International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary*

38(1) of the Statute of the International Court of Justice.[12] The International Law Commission (ILC) considers CIL to be 'unwritten law deriving from practice accepted as law.'[13] Despite a plethora of problems arising in relation to its definition and identification, it is accepted that customary law requires two elements, namely, general –consistent– state practice (*consuetudo*), which is followed out of a sense of legal obligation (*opinio juris sive necessitatis*).[14] Rules of CIL may also be reflected in provisions of international treaties.[15] This includes the VCLT 1969 and VCLT 1986, which codify much of the law of treaties,[16] including rules on, *inter alia*, the observance, application, interpretation and termination of international agreements. Customary rules in specific areas are also expressed, for instance, by many provisions of the United Nations Convention on the Law of the Sea[17] or the 1961 Vienna Convention on Diplomatic Relations.[18]

Peremptory norms, also known as *jus cogens*, are 'universally applicable' and non-derogable norms, which 'reflect and protect fundamental values of the international community.'[19] They are commonly themselves based on CIL, though they enjoy enhanced normative status.[20] Such norms include, for instance, the prohibition of aggression, genocide, and crimes against humanity. The present article focuses on the VCLT and will address *jus cogens* only insofar as it is relevant to the main analysis.

3. CJEU ENGAGEMENT WITH CUSTOMARY INTERNATIONAL LAW AND THE VCLT: A STATISTICAL ANALYSIS

This section offers a statistical analysis of CJEU cases where reference has been made to CIL, including the VCLT. An important caveat should be made. It is not easy to determine accurately the substantive engagement of the CJEU with CIL norms. First, there are cases in which a judgment or an opinion of the

of State for Transport [2008] *ECR* I-4057, paras. 48, 51 (*Intertanko*).

[12] Art. 38(1)(b) ICJ Statute refers to 'international custom, as evidence of a general practice accepted as law'.

[13] Draft Conclusions on the Identification of Customary International Law, Vol. II, part 2, *Yearbook of the ILC* 2018, 90.

[14] See, e.g., *Continental Shelf (Libya* v. *Malta), ICJ Reports* 1985, 13, para. 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, ICJ Reports* 1986, 14, para. 183 (*Nicaragua*); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), ICJ Reports* 1996, 226, paras. 65 *et seq*.

[15] Draft Conclusions, *supra* note 13, at 143 *et seq*.

[16] The VCLT 1969 is intended both to codify existing norms of CIL and also contribute to the progressive development of the law of treaties: see recital 7 of the preamble. Similarly, see recital 5 in VCLT 1986.

[17] See, e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), ICJ Reports* 2012, 624, paras. 118, 13-139, 174, 177, and 182.

[18] See, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), ICJ Reports* 1980, 3, para. 45 (*Tehran*); AG Wahl, Opinion to Case C-179/13, *Raad van bestuur van de Sociale verzekeringsbank* v. *LF Evans* [2014] ECLI:EU:C:2014:2015, paras. 33-38.

[19] ILC, 'Report of the International Law Commission on Its 73rd Session' (18 April–3 June and 4 July–5 August 2022) UN Doc. A/77/10, 18.

[20] ibid., 10-27, 31 *et seq*.

Advocate General refers to CIL or the VCLT only in citing parties' argument. Such cases have been included since the relevant arguments are likely to have been addressed by the CJEU, even though it has not expressly referred to CIL; and where they have not been addressed, such failure is also a form of (negative) engagement. Secondly, while we have excluded cases where CIL or the VCLT have not been explicitly mentioned in a judgment or an opinion, there may be instances where the CJEU makes indirect references to customary rules of interpretation (implicit or 'silent' references).[21]

We have identified 297 references to CIL and/or the VCLT, since the beginning of the European Communities. These include references contained in GC judgments and orders (including those of its predecessor, the Court of First Instance (CFI)); ECJ judgments, orders, and opinions of Advocates General; opinions delivered under Article 218(11) TFEU and views of Advocates General delivered in Article 218(11) opinions.[22] In all figures below, data have been sorted by reference to the year of initiation of proceedings before the ECJ or the GC.[23] For example, the *Polydor* case,[24] in which judgment was delivered in 1982, has been attributed to 1980, the year when the preliminary reference was introduced to the ECJ.[25]

Figure 1, below, shows that the overwhelming majority of references to the CIL or the VCLT have been made by the ECJ. Out of a total 297 references, 57 (ca 19.2%) have been made in GC judgments and orders; and 240 (ca 80.8%) have been made in ECJ judgments, orders, Advocate General opinions, Article

[21] Thus, for instance, in many cases the ECJ states that an international agreement must be interpreted in the light of its spirit, general scheme and wording without referring expressly to Art. 31 VCLT. See, e.g., ECJ, Case 87/75, *Conceria Daniele Bresciani* v. *Amministrazione Italiana delle Finanze* [1976] *ECR* 129, para. 16 ('regard must be simultaneously paid to the spirit, the general scheme and the wording of the [Yaoundé] Convention and of the provision concerned'); ECJ, Case 270/80, *Polydor and Others* v. *Harlequin and Others* [1982] *ECR* 329, para. 8 ('it is necessary to analyse the provisions in the light of both the object and the purpose of the [EEC-Portugal] Agreement and of its wording') (*Polydor*); ECJ, Case C-478/21 P, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v. *Commission* [2023] ECLI:EU:C:2023:685, para. 61 ('it is necessary […] to interpret that concept taking account not only of the wording of those provisions in which it is found, but also the context in which those provisions occur and the objectives pursued by the rules of which they form part').

[22] Each judgment, order, AG opinion, Art. 218(11) opinion and AG view has been counted as one reference, even if it contains references to more than one CIL rules. Our search reflects CJEU case law as of 1 October 2023. We have collected the data by entering search keys referring to CIL (and general international law, where referring to customary norms), the VCLT 1969 and VCLT 1986, and *jus cogens* in the online Curia search form at <https://curia.europa.eu/juris/recherche.jsf>. The search keys used have accounted for variances, such as both 'Vienna Convention on the Law of Treaties' and 'Vienna Convention on the Law of *the* Treaties'. We have then reviewed results individually to verify the references found.

[23] Joined cases have been counted as single entry. For the GC, 'Cases' include judgments and orders. For the ECJ, 'Cases' include, as distinct entries, judgments, Court Opinions and Opinions and Views of Advocates General.

[24] *Polydor*, *supra* note 21.

[25] This has been done to provide a more accurate reflection of judicial trends. The opinion of the Advocate General and the ECJ judgment in a case may be issued in different years; for instance, in *Polydor*, they were issued in 1981 and 1982 respectively. The authors considered that if the two references were attributed to different years, that might be liable to give the impression of false upwards or downwards movements in the case law.

218(11) TFEU Opinions and Advocate General views. It is to be borne in mind that the GC/CFI is a much younger court, the CFI having been established in 1989. Nonetheless, the overwhelming majority of ECJ references (225 out of the 240) have been made in cases brought to the ECJ after the establishment of the CFI. Thus, the longer life span of the ECJ has only had a limited impact on the difference in the number of references between the two courts. A major driver for the difference is that, in ECJ cases, references by Advocates General are counted separately from references by the Court in its judgment even where the references have been made in the same case. As we shall see below, references to CIL by Advocates General account for the majority of such references by the ECJ.

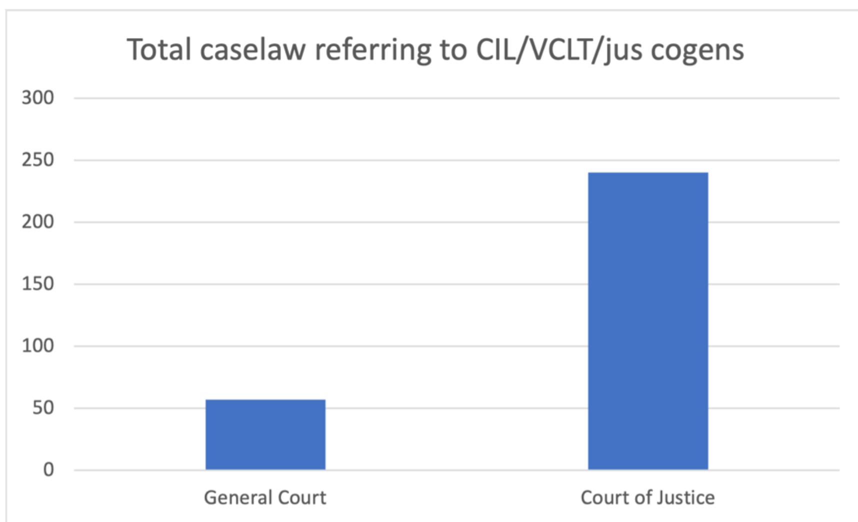

Figure 1

In addition to the ECJ's predominance in terms of absolute numbers, the historical trend of judicial engagement with CIL or the VCLT paints a similar picture. Figures 2 and 3, below, demonstrate the yearly references made by the GC and the ECJ. There is a clear upwards trajectory of the engagement of the CJEU, in particular the ECJ, with CIL. Owing to the fact that we allocate references to the year when the proceedings were introduced, no firm conclusions can be drawn regarding cases brought in 2022 and 2023, as there has not been sufficient time for GC and ECJ to issue judgments and/or opinions in all of them. Therefore, references for 2022 and 2023 remain incomplete. Subject to this disclaimer, we have included those years as some data are already available.

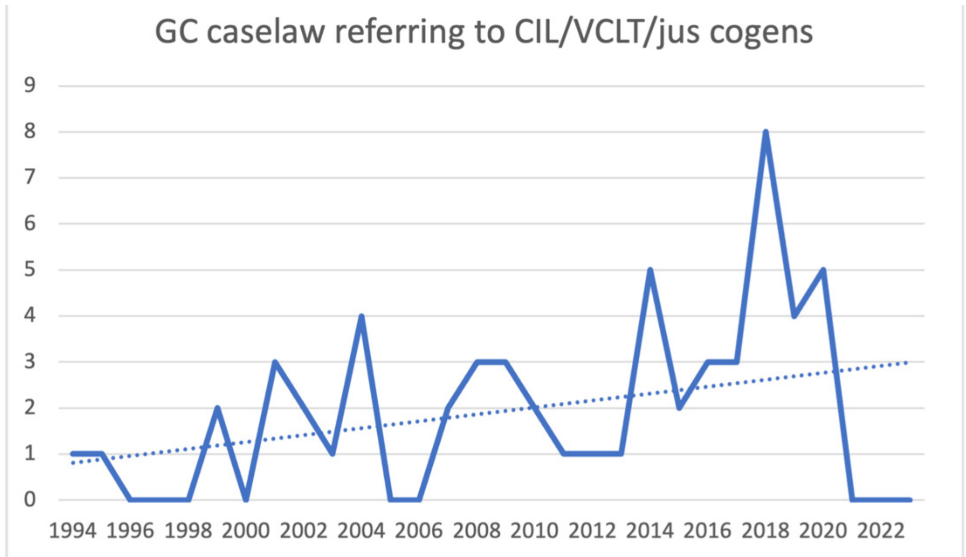

Figure 2

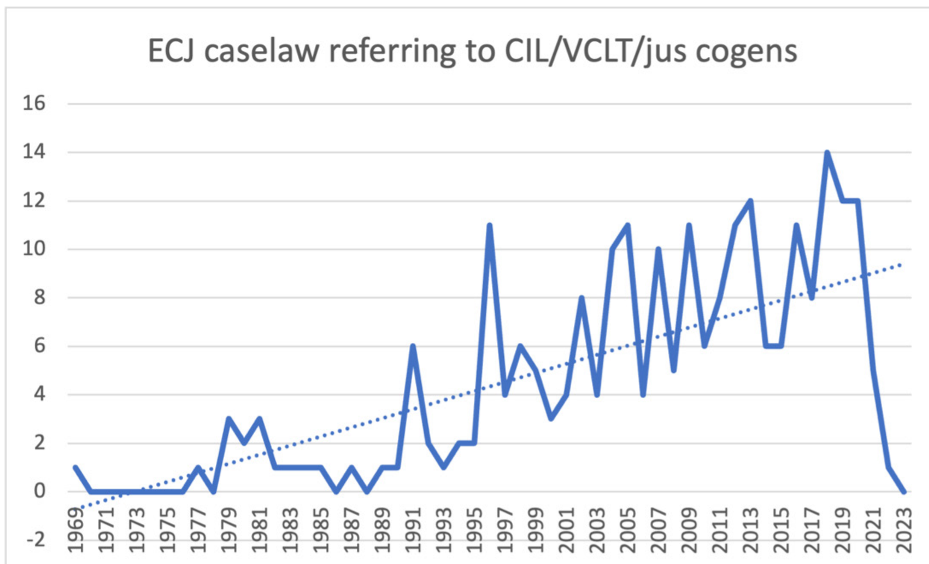

Figure 3

Figure 4, below, represents a breakdown of ECJ references. There are 149 Opinions of Advocates General and Views under Article 218(11) TFEU (ca 62.1% of the total ECJ references); and 91 ECJ judgments, orders and Opinions under Article 218(11) TFEU (ca 37.9%) which refer to CIL and/or the VCLT. As expected, this signals an openness on the part of Advocates General to reflect upon a broader range of legal sources when considering the questions *in casu*.

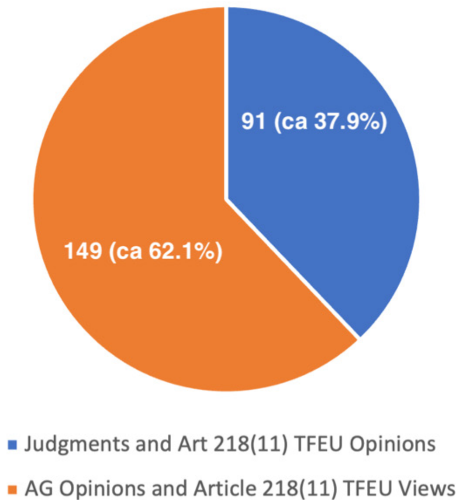

Figure 4

Lastly, the ECJ seems more open to referring to CIL when considering envisaged international agreements under Article 218(11) TFEU. This is owing to the type of jurisdiction it exercises under that provision since *ex hypothesi* it pertains to international agreements. Out of 28 such Opinions, six refer to CIL and/or the VCLT; additionally, four Views of Advocates General under the same procedure make such references.

All in all, many more references to CIL and the VCLT have been made by the ECJ than by the GC. This is not surprising and may be accounted for by the following factors. First, both the judgment and the opinion of the Advocate General may make a reference in the same case; secondly, Advocates General are likely to engage in a more detailed examination of the legal sources that may be relevant in the case in issue, and thus refer to CIL and/or the VCLT; thirdly, the ECJ exercises wider jurisdiction. The range of legal issues that may arise in a preliminary reference is very broad and offers ample opportunity for international law to become relevant. Also, the *ex ante* jurisdiction of Article 218(11) has, by its nature, an international law bias.

4. MAKING SENSE OF CUSTOMARY INTERNATIONAL LAW

The bindingness of CIL *vis-à-vis* the EU has been well-established. The 'entirety' of international law, 'including customary international law, […] is binding upon

the institutions of the European Union.'[26] Still, this raises more questions than it answers. In particular: (a) how does the CJEU identify CIL? (b) how does it apply CIL for interpretative purposes? and (c) what is the effect of CIL in the EU legal order? The following sections will examine each of these questions in turn. There is no intention to be exhaustive but to highlight selected aspects.

4.1. **Identification of customary international law**

The CJEU has examined whether provisions of international agreements can be said to reflect customary rules in many cases. Nevertheless, it refrains from justifying its conclusion by considering expressly the elements of general state practice and *opinio juris*.[27] For instance, in *Brita*, the ECJ was asked to interpret a term of the EU-Israel Euro-Mediterranean Agreement. To do so, it applied the VCLT 'in so far as the rules are an expression of general international customary law,' noting that 'a series' of its provisions 'reflect the rules of customary international law.'[28] While it did not specify which VCLT provisions it considered as customary, it applied Articles 31 and 34 VCLT.[29] In other cases, the ECJ applies the VCLT without expressly identifying it as customary.[30]

In a similarly brief manner, the ECJ has identified the customary nature of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. In *Mondiet*, a French court referred questions on the validity of a Council regulation amending fishing rules. The Court stated that the EU's authority to legislate with regard to the high seas is 'established in' the Geneva Convention, 'which consolidates the general rules on this subject enshrined in international customary law.'[31] In *Intertanko*, the High Court of England and Wales asked the ECJ about the validity of a directive in light of, *inter alia*, regulations of an annex of Marpol 73/78, a 1973 international Convention for the Prevention of Pollution from Ships as supplemented by a Protocol. When considering whether Marpol 73/78 bound the EU, it briefly noted that it 'it does not appear that [its Annex Regulations] are the expression of customary rules of general

---

[26] AG Kokott, Opinion to Case C-398/13 P, *Inuit Tapiriit Kanatami and Others* v. *Commission and Others* [2015] ECLI:EU:C:2015:190, para. 86. Such formulations have been used since *Poulsen*, *supra* note 9, para. 9, including in ECJ, Case C-346/10, *Hungary* v. *Slovak Republic* [2012] ECLI:EU:C:2012:630, para. 44.

[27] In GC, Case T-512/12, *Front Polisario* v. *Council* [2015] ECLI:EU:T:2015:953 (GC, *Front Polisario I*), the GC briefly referred to those conditions when setting out the claimant's pleas (paras 207-208) but did not examine them expressly as part of its reasoning.

[28] ECJ, Case C-386/08, *Firma Brita GmbH* v. *Hauptzollamt Hamburg–Hafen* [2010] ECLI:EU:C:2010:91, paras. 41-42 (*Brita*).

[29] Cf. AG Jacobs, who in another case found that Art. 65 VCLT does not express a customary rule because it sets out 'procedural requirements' which do not 'precisely […] reflect the requirements of customary international law'; AG Jacobs, Opinion to Case C-162/96, *A Racke GmbH v Hauptzollamt Mainz* [1998] *ECR* I-3655, para. 96.

[30] See, e.g., ECJ, Opinion 1/91 [1991] *ECR* I-6079, para. 14; ECJ, Case C-416/96, *Nour Eddline El-Yassini* v. *Secretary of State for the Home Department* [1999] *ECR* I-1209, para. 47 (*Eddline El-Yassini*).

[31] ECJ, Case C-405/92, Établissements Armand Mondiet SA v. *Armement Islais SARL* [1993] *ECR* I-6133, paras. 12-13 (*Mondiet*).

international law.'[32] It did not provide further support for this finding.[33]

In *Poulsen*, the ECJ was asked to interpret a provision of a regulation on the conservation of fishery resources. It did so by, *inter alia*, taking account of the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone, on the High Seas, and on Fishing and Conservation of the Living Resources of the High Seas 'in so far as they codify general rules recognized by international custom.'[34] It did not dwell further on the issue. It also took into account the United Nations Convention on the Law of the Sea 1982 (UNCLOS). The ECJ justified the characterisation of many of its provisions as CIL, by reference to judgments of the International Court of Justice (ICJ).[35] In *Opel Austria*, the GC annulled a Council regulation which withdrew tariff concessions. It noted that Article 18 VCLT codifies the principle of good faith, which 'is a rule of customary international law,' and referred to a decision of the Permanent Court of International Justice (PCIJ).[36] References to the case law of the ICJ and the PCIJ are perfectly appropriate, indeed they can be expected, since the International Law Commission (ILC) recognises their decisions as 'subsidiary means' for the identification of customary international law, as they themselves capture state practice and *opinio juris*.[37]

In *Walz*, the ECJ was essentially asked to interpret the term 'damage' under the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. The Court considered the term 'damage' in a broader international law context, by reference to Article 31(2) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.[38] The ECJ noted that that Article 'aims precisely to codify the current state of general international law,' but refrained from explicitly recognising it as customary.[39] Arguably, the formulation demonstrates that the Court was 'conscious that the ICJ has invoked [the ILC] articles with caution'[40] and only recognised the customary nature of some of them.[41]

---

[32] *Intertanko*, *supra* note 11, para. 51.

[33] In her Opinion, AG Kokott similarly found that 'there is no evidence that the relevant provisions of Marpol 73/78 codified customary international law'; AG Kokott, Opinion to Case C-308/06, *Intertanko*, *supra* note 11 [2008] *ECR* I-4057, para. 39.

[34] *Poulsen*, *supra* note 9, para. 10.

[35] ibid. See, e.g., *Nicaragua*, *supra* note 14.

[36] *Opel*, *supra* note 2, paras. 90-91, referring to *Case Concerning Certain German Interests in Polish Upper Silesia, PCIJ Series A, No. 7*.

[37] Draft Conclusions, *supra* note 13, at 149.

[38] ECJ, Case C-63/09, *Axel Walz* v. *Clickair SA* [2010] *ECR* I-4239, para. 27 (*Walz*).

[39] ibid., para. 28.

[40] F. Pascual-Vives, 'The Identification of Customary International Law Before the Court of Justice of the European Union: A Flexible Consensualism' in F. L. Bordin, *et al*. (eds.), *The European Union and Customary International Law* (Cambridge: Cambridge University Press 2022) 137. See also *Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Merits, ICJ Reports* 1997, 7, paras. 47, 50; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports* 2019, 95, para. 177.

[41] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Servia and Montenegro), ICJ Reports* 2007, 43, paras. 385, 398, 407.

In *Air Transport Association of America* (*ATAA*), the ECJ affirmed the customary status of, among others, the principle that 'each State has complete and exclusive sovereignty over its airspace.'[42] It did so by referring to, *inter alia*, decisions of the ICJ, the Geneva Convention on the High Seas, and UNCLOS.[43] *Evans* considered the application of EU law on the calculation of pension entitlements in light of the 1963 Vienna Convention on Consular Relations. By referring to the ICJ Advisory Opinion on *United States Diplomatic and Consular Staff in Tehran*, the Court found that the Convention 'codifies the law of consular relations and states principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions.'[44]

As would be expected, Advocates General have engaged more closely with the international law requirements of identifying customary rules. In *Budějovický Budvar*, on geographical indications protections, AG Tizzano considered whether an agreement between Austria and Czechoslovakia was in force in relation to Austria and the Czech Republic, prior to the former's accession to the EU, in light of the dissolution of Czechoslovakia. Article 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties provided for the automatic succession of the new state to the treaties in force in respect of the predecessor state. AG Tizzano noted that 'the principle laid down [in Article 34] does not reflect the content of a pre-existing general rule of international law.'[45] He supported this by reference to the Convention's *travaux préparatoires* and academic opinion at the time of the drafting of the Article.[46] However, upon extensively considering subsequent state practice,[47] he concluded that 'a customary rule based on the principle of automatic succession has now been established, albeit with less rigid contents than those which follow from Article 34.'[48] AG Tizzano's Opinion engaged closely with CIL, as he considered not only whether a rule set out in an international convention gives expression to a customary principle, but also the precise scope of the principle in issue.

In *Inuit*, the ECJ was concerned with the legality of EU measures setting conditions on the trading of seal products. AG Kokott expressly considered whether there had been 'settled practice' and *opinio juris*[49] with regard to Article 19 of a United Nations Declaration, which provided that states 'shall consult and cooperate in good faith with the indigenous peoples concerned […] in order to obtain their free, prior and informed consent before adopting and implementing

---

[42] ECJ, Case C-366/10, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate Change* [2011] *ECR* I-13755, paras. 103-104 (*ATAA*).
[43] ibid.
[44] ECJ, Case C-179/13, *Raad van Bestuur van de Sociale Verzekeringsbank* v. *LF Evans* [2015] ECLI:EU:C:2015:12, para. 36; *Tehran*, *supra* note 18, para. 45.
[45] AG Tizzano, Opinion to Case C-216/01, *Budějovický Budvar, národní podnik* v. *Rudolf Ammersin GmbH* [2003] *ECR* I-13617, para. 115.
[46] ibid., paras. 116-117.
[47] ibid., paras. 123-142.
[48] ibid., para. 143.
[49] AG Kokott, *supra* note 26, para. 90.

[…] measures that may affect them.'[50] In light of the Declaration's abstention or rejection by 'some significant States in which indigenous communities live,' a settled practice could not be identified.[51]

In *Wightman*, AG Sánchez-Bordona considered the issue of the revocability of the United Kingdom's notification to withdraw from the EU under Article 50 TEU by reference to CIL. In particular, he found that Article 68 VCLT, governing states' revocation of notifications or instruments, 'may' be a procedural rule, and hence not codify a customary rule, although he conceded that there were differing views.[52] He further noted that 'the States' recent practice on the revocation of notifications of withdrawal from international treaties does not dispel' the 'uncertainty.'[53] For this reason, he viewed Article 68 VCLT as a 'considerable source of inspiration as regards interpretation,' notwithstanding its uncertain customary nature.[54] The ECJ did not take a stance on the status of Article 68 VCLT but briefly considered it, as the VCLT was 'taken into account in the preparatory work for the Treaty establishing a Constitution for Europe.'[55]

The following conclusions may be drawn from the above analysis. The engagement of the ECJ with CIL is technically inconsistent albeit not substantively incorrect. In some cases, the ECJ identifies certain rules as being CIL. In others, it may apply provisions of VCLT without expressly affirming that the provision applied is customary law. Where the ECJ states that a provision is CIL, its analysis tends to be somewhat rudimentary. It does not engage with the conditions that must be fulfilled for a rule to be recognised as CIL, although occasionally it refers to the case law of the ICJ as a justification. References tend to be abstract characterising many provisions of an international treaty as CIL, the inference being that those applied in the specific case are of such a nature. Advocates General engage more closely. The difficulty then is that consideration of the conditions of consistent state practice and *opinio juris* may yield no firm results. In such a case, the VCLT can still be considered as a 'source of inspiration,' though it would not strictly be binding on the EU.

4.2. **Application of customary international law in judicial interpretation**

CJEU case law includes several references to customary international law, in particular, many VCLT provisions. These include, among others, the provisions

[50] UNGA Res. 61/295, 'United Nations Declaration on the Rights of Indigenous Peoples' (13 September 2007) UN Doc. A/RES/61/295.
[51] AG Kokott, *supra* note 26, para. 90.
[52] AG Sánchez-Bordona, Opinion to Case C-621/18, *Wightman and Others* v. *Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:978, para. 74.
[53] ibid., para. 75.
[54] ibid., para. 76.
[55] ECJ, Case C-621/18, *Wightman and Others* v. *Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999, paras. 70-71.

relating to the definition of 'treaty' (Article 2(1)(a) VCLT), [56] the obligation not to defeat the object and purpose of a Treaty prior to its entry into force (Article 18),[57] the principle of *pacta sunt servanda* (Article 26 VCLT),[58] and the principle of *pacta tertiis nec nocent nec prosunt* (Article 34 VCLT).[59] In this section, we focus on the application of Article 31 VCLT for the purposes of interpreting international agreements.

4.2.1. *Article 31 VCLT and the object and purpose of treaties*

A prominent early reference is found in Opinion 1/91, where the ECJ considered the compatibility with EU law of the judicial mechanism envisaged under the proposed European Economic Area (EEA) Agreement.[60] The proposed treaty included rules which were textually identical to those of the EEC Treaty with a view to ensuring homogeneity with EU law.[61] The Court found that that similarity was not sufficient: '[a]n international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives. Article 31 [VCLT 1969], stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.'[62] In the subsequent paragraphs, the Court found that, on the one hand, the EEC Treaty aims at facilitating far-reaching economic integration as a means for achieving 'European unity'; it is an international agreement which 'none the less constitutes the constitutional charter of a Community based on the rule of law.'[63] On the other hand, the EEA Agreement would contain more limited economic rules, and, in any event, did not require a 'transfer of sovereign rights to the inter-governmental institutions which it sets up.'[64] Against this 'contradiction,' the Court found that the proposed EEA Agreement would 'undermine' the autonomy of the Community legal order 'in pursuing its own particular objectives.'[65]

In Opinion 1/91, the Court applied Article 31 VCLT to establish the importance of 'context' and 'object' when considering the provisions of the proposed EEA

---

[56] ECJ, Case C-327/91, *France* v. *Commission* [1994] *ECR* I-3641, para. 25; ECJ, Opinion 1/13 [2014] ECLI:EU:C:2014:2303, para. 37.

[57] *Opel*, *supra* note 2, paras. 90-91.

[58] ECJ, Case C-66/18, *Commission* v. *Hungary* [2020] ECLI:EU:C:2020:792, para. 92, referring to 'the general international law principle of respect for contractual commitments (*pacta sunt servanda*), laid down in Article 26 [VCLT]'.

[59] *Brita*, *supra* note 28, para. 44, which refers to it as a 'principle of general international law [which] finds particular expression in Article 34 [VCLT]'. For discussions of the above rules expressed in the VCLT, see P. J. Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969' 25 *Legal Issues of European Integration* 1998, 1; P. J. Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press 2011); J. Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union', 17 *Cambridge Yearbook of European Legal Studies* 2018, 121.

[60] Opinion 1/91, *supra* note 30.

[61] ibid., paras. 3-5.

[62] ibid., para. 13.

[63] ibid., paras. 17, 21.

[64] ibid., paras. 15, 20.

[65] ibid., para. 30 *et seq*.

Agreement. According to the Court, notwithstanding the textual similarity between the EEA Agreement and the EEC Treaty, significant differences remained. These were not sufficiently mitigated through mechanisms providing for a continued role for the CJEU in the interpretation of the EEA Agreement. Customary international law was thus employed by the ECJ to reinforce its own jurisdiction (in exclusion to that of another international judicial body) and the uniqueness of the Community legal order. The origins of the ECJ's formulation in Opinion 1/91 can be traced back to *Bresciani* and *Polydor*, which also referred to extra-textual factors, including the 'purpose' and 'object' of a provision, as salient considerations for the interpretation of an international agreement.[66] However, the Court had not explicitly referred to the VCLT, or indeed international law, at that stage.[67] In Opinion 1/91 jurisdictional openness (the application of customary international law by the ECJ) contributed to jurisdictional protectionism (the assertion of the Union's distinctiveness). This might appear to be a paradox but the ECJ's reasoning is compatible with Article 31 VCLT.

This approach was followed in subsequent cases. In *Metalsa*, the ECJ interpreted Article 18 of the free trade agreement (FTA) between the EEC and Austria, prior to the accession of the latter.[68] In doing so, it considered whether it should be interpreted similarly to Article 95 EEC Treaty (now Article 110 TFEU), which prohibits fiscal discrimination against intra-Community products, as it was also serving the same objective, *mutatis mutandis*.[69] Again, the Court referred to Article 31 VCLT, emphasising that the provision of the FTA must be interpreted by reference not only to its wording but also its objectives.[70] It did not apply case law that had been developed on the interpretation of Article 95 EEC to the FTA provision, as the latter agreement did not envisage the creation of a common market.[71]

Eddline El-Yassini[72] involved a comparison of the objectives of two association agreements, namely, the EEC-Turkey and the EEC-Morocco agreements. Applying Article 31 VCLT, the ECJ distinguished the two agreements on the basis that the one with Turkey aspired to the progressive introduction of free movement of persons.[73] *Eddline El-Yassini* suggests that the ECJ remains sensitive to the importance of maintaining the uniqueness of EU free movement rights even with one degree of separation. This arguably explains the Court's decision in *Jany*, where it considered whether provisions of the EEC-Poland and EEC-Czech association agreements should be interpreted similarly to Article 52 EEC Treaty

[66] For more, see *supra* note 21.
[67] The main substantive pre-*Polydor* reference to the VCLT seems to have been made by AG Capotorti, Opinion to Case 812/79, *Attorney General* v. *Juan C Burgoa* [1980] ECLI:EU:C:1980:196, 2810, 2818.
[68] ECJ, Case C-312/91 *Metalsa Srl* v. *Gaetano Lo Presti* [1993] *ECR* I-3751.
[69] ibid., paras. 8 *et seq*.
[70] ibid., para. 12.
[71] ibid., paras. 15, 21.
[72] *Eddline El-Yassini*, *supra* note 30, para. 47.
[73] ibid., paras. 42, 47 *et seq*.

(now Article 49 TFEU) on the freedom of establishment.[74] These agreements had the explicit objective of facilitating the accession of those countries to the EEC.[75] On the basis of Article 31 VCLT, the ECJ held that '[t]here is nothing in [their] context or purpose' which would suggest that a difference of interpretation *vis-à-vis* the Treaty was intended.[76] In *Hengartner and Gasser*, the ECJ also heavily relied on the objectives of the Agreement between the European Community and Switzerland on the free movement of persons in order to interpret its provisions.[77]

The ECJ's approach as it emerges from the above case law 'constitutes an attempt to base the *exceptional* character of the [Union] legal order on *normal* rules of treaty interpretation.'[78] Prior to Opinion 1/91, the ECJ had not grounded the distinct character of the EU legal order by reference to international law. The Court's subsequent engagement with Article 31 VCLT, even if seen as representing 'a "European" approach' to the law of treaties,[79] is an effort to accommodate the Union's uniqueness within the ordinary framework of international law. As such, the Court's approach can be said to accord with the twin objectives of 'observing' and 'developing' international law, under Article 3(5) TEU.

4.2.2. *Engagement and disengagement with Article 31 VCLT*

Article 31 VCLT has been applied not only in determining whether a provision of an international agreement should be interpreted in the same way as the equivalent provision of the EU Treaties. It has also been resorted to where the Court examines the compatibility of an EU act with an international agreement; and for the purposes of interpreting EU measures based on international treaties concluded by the EU.

In *IATA and ELFAA*, the ECJ was asked whether a provision of Regulation 261/2004 on the rights of air passengers[80] was compatible with the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.[81] The EU is party to the Montreal Convention, which, thus, under Article 216(2) TFEU binds the Union and the member states, and is an integral part of EU law.[82] By applying Article 31 VCLT, and bearing in mind the Convention's consumer protection objective set out in the preamble, the Court found that the

---

[74] ECJ, Case C-268/99, *Aldona Malgorzata Jany and Others* v. *Staatssecretaris van Justitie* [2001] *ECR* I-8615, para. 32.

[75] ibid., para 36.

[76] ibid., paras. 35-39.

[77] ECJ, Case 70/09, *Alexander Hengartner and Rudolf Gasser* v. *Landesregierung Vorarlberg* [2010] *ECR* I-7233.

[78] P. J. Kuijper, 'The Court and the Tribunal … ', *supra* note 59, at 3 (emphasis in original).

[79] J. Odermatt, *supra* note 59, at 122.

[80] Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights *OJ* [2004] L 46/1.

[81] ECJ, Case C-344/04, *The Queen on the Application of International Air Transport Association and European Low Fares Airline Association* v. *Department for Transport* [2006] *ECR* I-403 (*IATA and ELFAA*).

[82] See ECJ, Case 181/73, *Haegeman* v. *Belgium* [1974] *ECR* 449, paras. 4-5.

Convention does not prevent EU action which seeks to 'redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience' of a long delay or cancellation of a flight for passengers.[83] Articles of the Montreal Convention were interpreted in a similar context in *Wallentin-Hermann*.[84] In *Western Sahara Campaign UK*, the Court examined whether the Fisheries Partnership Agreement (FPA) between the EU and Morocco was compatible with international law, including the law of treaties and the UNCLOS.[85] To answer that question, it interpreted the FPA by applying Article 31 VCLT. It found that the FPA is not applicable to waters which are 'adjacent to the territory of Western Sahara' on the ground that they are not covered by the FPA's expression 'waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco.'[86] Hence, the issue of the validity of the FPA, which was predicated on such applicability, did not arise.[87]

In the above cases, the ECJ was able to interpret the international obligations of the EU in a way that accommodated the EU's policy choices (Rights of Air Passengers Regulation cases) or at least avoided conflict between EU and international law (*Western Sahara*).

In *Walz*,[88] *Air Baltic Corporation*[89] and *Laudamotion*,[90] the Court was asked to interpret the Montreal Convention but the questions referred did not question the compatibility of EU law with international law. Its interpretation was requested in the context of disputes between airlines and passengers to determine the scope liability under its provisions, since the Convention had been signed by the EU and implemented by EU law. In *Walz*, the Court held that, in the light of its aims, the term 'damage' in the Convention must be given a uniform and autonomous interpretation, notwithstanding the different meanings given to that concept in the domestic laws of the Contracting Parties. [91] In *AEBTRI*, the Court offered extensive analysis of provisions of the Convention on International Transport of Goods Under Cover of TIR Carnets (TIR Convention), considered in their context and in light of their object and purpose, with no apparent diversion from international interpretative orthodoxy.[92] Similarly, in *ÖBB-Infrastruktur*, it engaged

---

[83] *IATA and ELFAA*, *supra* note 81, paras. 40-45.

[84] ECJ, Case C-549/07, *Friederike Wallentin-Hermann* v. *Alitalia - Linee Aeree Italiane SpA* [2008] *ECR* I-11061, para. 17, though the VCLT is not explicitly mentioned.

[85] ECJ, Case C-266/16, *The Queen on the Application of Western Sahara Campaign UK* v. *Commissioners for Her Majesty's Revenue and Customs, Secretary of State, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118, para. 41 (*Western Sahara Campaign UK*).

[86] ibid., paras. 84-85.

[87] ibid.

[88] *Walz*, *supra* note 38, para. 23.

[89] ECJ, Case C-429/14, *Air Baltic Corporation AS* v. *Lietuvos Respublikos specialiųjų tyrimų tarnyba*, ECLI:EU:C:2016:88, para. 24.

[90] ECJ, Case C-111/21, *BT* v. *Laudamotion GmbH* [2022] ECLI:EU:C:2022:808 (*Laudamotion*).

[91] *Walz*, *supra* note 38, para. 21. See, to the same effect, *Laudamotion*, *supra* note 90, para. 21.

[92] ECJ, Case C-224/16, *Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozi i patishtata (AEBTRI)* v. *Nachalnik na Mitnitsa Burgas* [2017] ECLI:EU:C:2017:880, paras. 55-88. This approach was seemingly followed in ECJ, Case C-15/17, *Bosphorus Queen Shipping Ltd Corp.* v. *Rajavartiolaitos* [2018] ECLI:EU:C:2018:557, paras. 66-79, with regard to the meaning of the expression 'coastline or related interests' in the Montego Bay Convention, which has been incorporated in Directive 2005/35.

in an extensive discussion of the 'context' of a provision of an Appendix to the Convention concerning International Carriage by Rail (COTIF), for the purposes of interpreting it in accordance with Article 31 VCLT.[93]

The context in which the VCLT is applied may be relevant. Where the ECJ is called upon to interpret an international agreement for the purposes of reviewing the compatibility of an EU act with its provisions, the way it applies Article 31 may be influenced by its wish to avoid conflict. If, on the other hand, the ECJ interprets an international agreement without the compatibility of EU law being at stake, it approaches the interpretation of international law unburdened by 'hierarchy anxiety': its interpretational perspective can perhaps be less distinctly 'European'[94]. This is not to say that the interpretation of Article 31 VCLT in *IATA and ELFAA* or *Western Sahara* was incompatible with the way an international tribunal would understand that provision. The point made is that the interaction between international law and EU law is dialectical: to avoid conflict, not only must EU law be interpreted so as to fit in with international law, but the latter may also need to be interpreted so as to fit in with EU law. Article 31 is an interpretational command that offers some flexibility. It provides for certain elements in accordance with which treaties must be interpreted, but the meaning of each element and the relative weight to be accorded to each of them are to be determined by the court that applies Article 31. Conflict avoidance may be given more prominence where issues of compatibility between EU and international law arise. In fact, both member State courts and the ECJ follow similar techniques to avoid conflict between EU and national law.[95]

Sometimes, the ECJ omits references to the VCLT altogether. In *Komstroy*, the Paris Court of Appeal sought clarification of the definition of 'investment' under the Energy Charter Treaty (ECT).[96] The judgment has been strongly criticised for finding, by way of *obiter dictum*, that intra-EU investment arbitration under the ECT is not compatible with EU law.[97] For our purposes, it may seem striking that the ECJ proceeded to interpret the ECT without making any reference to CIL. This appears to be at odds with case law like *Brita*, which noted that Article 31 VCLT is binding on the EU when interpreting international agreements.[98]

---

[93] ECJ, Case C-500/20, ÖBB-Infrastruktur Aktiengesellschaft v. *Lokomotion Gesellschaft für Schienentraktion* [2022] ECLI:EU:C:2022:563, paras. 54-66.

[94] Cf. J. Odermatt*, supra* note 59, at 122. Still, even where the compatibility of EU law with an international law is not at stake, the interpretation of an international agreement may be coloured by the ECJ's methodological preferences and its perception of the EU public interest.

[95] For examples of such dialectical conflict avoidance, see the conversation between the ECJ and the Italian Constitutional Court in ECJ, Case C-105/14, *Taricco and Others* [2015] ECLI:EU:C:2015:555; ECJ, Case C-42/17, *M.A.S.* [2017] ECLI:EU:C:2017:936; and between the ECJ and the Greek Council of State in ECJ, Case C-213/07, *Michaniki AE* v. *Ethniko Symvoulio Radiotileorasis* [2008] *ECR* I-9999, and the subsequent ruling of the Council of State in judgment 3470/2011.

[96] *Komstroy*, *supra* note 7.

[97] See, e.g., A. Dashwood, '*Republic of Moldova v Komstroy LCC*: Arbitration under Article 26 ECT Outlawed in Intra-EU Disputes by *Obiter Dictum*' 47 *European Law Review* 222, 127; P. Paschalidis, 'Intra-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU's Ruling in *Republic of Moldova*' 7 *European Investment Law and Arbitration Review* 2022, 3.

[98] *Brita*, *supra* note 28, para. 42.

In *Komstroy*, the ECJ interpreted the concept of 'investment' under the ECT in almost exclusively textual terms,[99] only briefly referring to the ECT's objectives. It found that a claim on the basis of an electricity supply contract is not an investment within the meaning of the ECT. This is neither a misapplication nor a misinterpretation of CIL;[100] it rather represents a judicial approach of non-engagement with international norms. The interpretative outcome reached by the ECJ is by no means an indefensible conclusion from an international law standpoint. Nevertheless, an explicit invocation of the VCLT is not purely about outcome. It is also illustrative of the CJEU's attitude towards international law and its own jurisdictional limits.

In *Komstroy*, Advocate General Szpunar took a different approach, finding that granting ECT protection to the contractual claim in issue in the proceedings would risk conflating 'investment' with a 'mere commercial activity.'[101] Having referred to Article 31 VCLT,[102] he also relied on the *Salini* criteria which arbitral tribunals generally accept as authoritative for the purposes of defining 'investment' in investment treaties.[103] The ECJ, by contrast, conspicuously abstained from any reference to international law sources.[104]

Komstroy reveals the Court's sensitivity to the broader signalling implications of referring to principles of international law: doing so might be perceived as amounting to a qualification of the interpretative or conceptual autonomy of EU law. In light of the ECJ's concerns regarding the operation of investment tribunals in intra-EU relations,[105] reference to international law could be seen as a (partial) concession of the Court's own jurisdiction. [106] Such reference is thus avoided, although its absence does not necessarily result in outcomes which are incompatible with international law.

---

[99] *Komstroy*, *supra* note 7, paras. 67-85.

[100] See P. Merkouris, 'Interpretation of Customary International Law: of Methods and Limits', TRICI-Law Project, *Research Paper Series* No. 001/2023, 50 *et seq*., available at <https://tricilawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf>.

[101] AG Szpunar, Opinion to Case C-741/19, *Komstroy*, *supra* note 7 [2021] ECLI:EU:C:2021:164, para. 120.

[102] ibid., para. 109.

[103] ibid., para. 115 and, generally, paras. 110-120; *Salini Costruttori SpA and Italstrade SpA* v. Kingdom of Morocco, Award of 23 July 2001, ICSID Case No. ARB/00/4, para. 52; also see *Masdar Solar and Wind Cooperatief UA* v. Kingdom of Spain, Award of 16 May 2018, ICSID Case No. ARB/14/1, paras. 195 *et seq*.

[104] In contrast to *Komstroy*, the ECJ has applied the VCLT where the questions referred do not concern international agreements directly. In *B S and C A*, the referring court asked the ECJ to interpret EU regulations with a view to determining whether a French decree relating to the cultivation and trading of cannabis and cannabis-derived products was compatible with EU law. The ECJ applied Art. 31 VCLT because the 1961 Single Convention on Narcotic Drugs is mentioned in a Council Framework Decision that applied in that case; ECJ, Case C-663/18, *B S and C A (Commercialisation du cannabidiol)* [2020] ECLI:EU:C:2020:938, paras. 65 *et seq*.

[105] *Achmea*, *supra* note 7. Note also that the Court did not refer to the VCLT in *Achmea*, although the questions referred did not concern directly the interpretation of an international treaty but its compatibility with EU law.

[106] For more, see J. Odermatt, 'Is EU Law International? Case C-741/19 *Republic of Moldova v Komstroy LLC* and the Autonomy of the EU Legal Order' 6 *European Papers* 2021, 1255.

4.3. **Binding effect of customary international law**

The recognition of CIL as binding means that acts adopted by the Union (and, insofar as they fall within the scope of EU law, acts of the member states) must be interpreted in the light of CIL norms. It also means that, where such an act runs counter to a CIL norm, it is inapplicable. If it is an EU act, it is liable to be declared invalid by the CJEU. It is important to note however that, in most cases, CIL is unlikely to arise in isolation and will be part of a wider international law normative context which will include international treaties.

4.3.1. *Duty of harmonious interpretation*

In *Poulsen*,[107] the ECJ held that, since the EU must respect international law in the exercise of its powers,[108] the regulation in issue had to be interpreted, and its scope limited, in light of the relevant international agreements insofar as they codified or expressed customary international law.[109]

There is a duty of harmonious interpretation analogous to that established in *Von Colson* [110] and *Marleasing*,[111] whereby national courts must seek to interpret national law consistently with EU law. In *Commission v Germany*, the Court noted that, similarly to the *Marleasing* duty, 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.'[112] This has been confirmed in relation to the TRIPS[113] and many other agreements.[114]

This interpretative duty has a broad scope of application. It arises not only in relation to agreements which express customary rules and agreements concluded by the EU but also in relation to agreements to which member states (but not the EU) are parties. In *Intertanko*, the Court noted that the fact that Marpol 73/78 'binds the Member States' […] is liable to have consequences for the interpretation of […] provisions of secondary [EU] law.'[115] In such a case,

---

[107] *Poulsen*, *supra* note 9, para. 9.
[108] ibid.
[109] ibid., paras. 9-10; and see *Mondiet*, *supra* note 31, paras. 12-15, where the ECJ invoked CIL to circumscribe the limits of EU competence.
[110] ECJ, Case 14/83, *Sabine von Colson and Elisabeth Kamann* v. *Land Nordrhein-Westfalen* [1984] *ECR* 1891, paras. 11 and 28.
[111] ECJ, Case C-106/89, *Marleasing SA* v. *La Comercial Internacional de Alimentacion SA* [1990] *ECR* I-4135, para. 9 *et seq*.
[112] ECJ, Case C-61/94, *Commission* v. *Germany* [1996] *ECR* I-3989, para. 52.
[113] ECJ, Case C-53/96, *Hermès International* v. *FHT Marketing Choice* [1998] *ECR* I-3603, para. 28.
[114] See, e.g., ECJ, Case C363/12, *Z* v. *A Government department, The Board of management of a community school* [2014] ECLI:EU:C:2014:159, para. 72; and ECJ, Case C265/19, *Recorded Artists Actors Performers Ltd* v. *Phonographic Performance (Ireland) Ltd, and Others* [2020] ECLI:EU:C:2020:677, para. 62; but the EU Treaties need not be interpreted in the light of international agreements as they rank higher: AG Kokott, Opinion to Joined Cases C212/21 P and C223/21 P, *European Investment Bank and Commission* v. *ClientEarth* [2022] ECLI:EU:C:2022:1003, para. 69.
[115] *Intertanko*, *supra* note 11, para. 52.

in light of the 'customary principle of good faith, […] it is incumbent upon the Court' to interpret secondary EU law taking account of a rule in an international agreement which does not directly bind the EU.[116] The objective of this duty is 'to avoid, so far as possible, interpreting EU law in a manner that makes it impossible for the member states to fulfil their international law commitments.'[117]

The intensity of the interpretative duty applicable in relation to international law is unclear. That duty cannot justify a *contra legem* interpretation of EU law. Whether it is as intense as the *Marleasing* duty borne by national courts remains open. *Pfeiffer* holds that a national court is 'require[d] […] to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure' the full implementation of EU law.[118] This is a prescriptive formulation which is not found, for instance, in *Commission v Germany*.[119] Notably, in *Pfeiffer*, the Court emphasised that harmonious interpretation ensures the effectiveness of EU law and the remedies established therein. The *Marleasing* duty is powered by the effectiveness rationale which flows from the doctrine of primacy and the conception of EU law as constitutional system. But is there an equivalent constitutional imperative in relation to international law?

In contrast to other areas, the duty of consistent interpretation has been formulated more intensely in relation to the Aarhus Convention. Article 9(3) requires parties to ensure that individuals have access to administrative or judicial procedures enabling them to challenge private or public acts or omissions relating to environmental law. In the *Brown Bears* case, the ECJ held that, although Article 9(3) does not have direct effect, a national court must interpret, 'to the fullest extent possible,' the national procedural rules governing administrative or judicial proceedings in accordance with the objectives of Article 9(3) and the objective of effective judicial protection.[120] The same approach has been followed in subsequent ECJ judgments,[121] AG Opinions[122] and GC orders,[123] in relation

116 ibid.

117 AG Sharpton, Opinion to Case C-158/14, *A and others* v. *Minister van Buitenlandse Zaken* [2016] ECLI:EU:C:2016:734, para. 100.

118 ECJ, Joined Cases C-397/01 to C-403/01, *Bernhard Pfeiffer et al* v. *Deutsches Rotes Kreuz, Kreisverband Waldshut* [2004] *ECR* I-8835, para. 118 and, generally, paras. 110-118.

119 *Commission* v. *Germany*, *supra* note 112.

120 ECJ, Case C-240/09, *Lesoochranárske zoskupenie VLK* v. *Ministerstvo životného prostredia Slovenskej republiky* [2011] *ECR* I-1255, para. 51.

121 ECJ, Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* v. *Bezirkshauptmannschaft Gmünd* [2017] ECLI:EU:C:2017:987; ECJ, Case C-470/16, *North East Pylon Pressure Campaign Ltd and Maura Sheehy* [2018] ECLI:EU:C:2018:185; ECJ, Case C-167/17, *Volkmar Klohn* v. *An Bord Pleanála* [2018] ECLI:EU:C:2018:833; ECJ, Case C-873/19, *Deutsche Umwelthilfe eV* v. *Bundesrepublik Deutschland* [2022] ECLI:EU:C:2022:857.

122 AG Jääskinen, Opinion to Case C-401/12 P, *Council, Parliament and Commission* v. *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* [2014] ECLI:EU:C:2014:310; AG Kokott, Opinion to Case C-243/15, *Lesoochranárske zoskupenie VLK* v. *Obvodný úrad Trenčín* [2016] ECLI:EU:C:2016:491; AG Bobek, Opinion to Case C-352/19 P, *Région de Bruxelles-Capitale* v. *Commission* [2020] ECLI:EU:C:2020:588; AG Medina, Opinion to Case C-252/22, *Societatea Civilă Profesională de Avocaţi AB & CD* v. *Consiliul Judeţean Suceava and Others* [2023] ECLI:EU:C:2023:592.

123 GC, Order T-565/14, *European Environmental Bureau* v. *Commission* [2015] ECLI:EU:T:2015:559; GC, Order T-685/14, *European Environmental Bureau* v. *Commission* [2015]

to Article 9(3) and (4) of the Aarhus Convention.[124] The Aarhus Convention case law does not concern the interpretation of EU law but national procedural rules relating to the effectiveness of EU law.[125] The Court's approach is coloured by the need to provide effective judicial protection as required by Article 47 of the Charter. That line of case law does not appear to establish, in general, an interpretative duty of *Pfeiffer* intensity in relation to the interpretation of all EU measures in the light of international law.

In relation to WTO law, Advocate General Ćapeta has taken the view that the reasons which necessitate a restrained approach towards the judicial review of EU acts on grounds of incompatibility with WTO law, also call for a restrained approach in the pursuit of consistent interpretation between EU law and WTO law.[126] This is so as not to deny to the EU institutions the necessary space for political manoeuvring.[127] In some respects, the duty of consistent interpretation may be more flexible in relation to CIL. To the extent that CIL norms are more vague and allow for a range of interpretations, it is reasonable to assume that the interpretation closer to the text and objectives of the EU act in question will be preferred.

4.3.2. *Customary international law as a ground of review*

Although international agreements binding on the Union take precedence over Union acts, the case law restricts the extent to which such agreements can be used as grounds of review. In contrast to higher ranking EU rules, invocability of international agreements is subject to direct effect. An international agreement can be relied upon as a ground of annulment of an EU measure only where 'the nature and the broad logic' of the agreement do not preclude such reliance and, in addition, the specific provisions of the agreement relied upon are unconditional and sufficiently precise.[128]

The conditions under which a private party may rely on CIL principles are, at least in some cases, less onerous than those conditioning reliance on international agreements. In *ATAA*, the ECJ was concerned with the principle that each State has complete and exclusive sovereignty over its airspace; the principle that no State may validly purport to subject any part of the high seas to its sovereignty;

ECLI:EU:T:2015:560.

[124] Similarly to Art. 9(3), Art. 9(4) requires parties to provide 'adequate and effective' remedies and to ensure that administrative or judicial procedures relating to environmental matters are 'fair, equitable, timely and not prohibitively expensive'.

[125] Cf. ECJ, Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV* v. *Bezirksregierung Arnsberg* [2011] *ECR* I-3673, para. 41, where the ECJ found that an EU directive 'must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention'.

[126] AG Ćapeta, Opinion to Case C-123/21 P, *Changmao Biochemical Engineering* v. *Commission* [2022] ECLI:EU:C:2022:890, para. 100.

[127] ibid., para. 101.

[128] *Intertanko*, *supra* note 11, para. 45; *IATA and ELFAA*, *supra* note 81, para. 39; ECJ, Joined Cases C-120/06 P and C-121/06 P, *Fabbrica Italiana Accumulatori Motocarri Montecchio* [2008] *ECR* I-6513, para. 110.

and the principle of freedom to fly over the high seas. It held that those principles can be relied upon by a private party to contest the validity of a Union act in so far as, firstly, the CIL principle in issue is capable of calling into question the competence of the Union to adopt the contested act; and, secondly, that act is liable to affect rights which the individual derives from Union law or to create obligations under Union law.[129]

Under those conditions, it appears that it is not necessary to establish that the CIL rule that is being invoked is intended to grant a right to the applicant. Even a CIL principle that creates reciprocal obligations between states may be relied upon.[130] Thus, an important hurdle that needs to be overcome to rely on an international treaty does not appear to apply, at least in the case of the CIL principles stated above.[131] Nonetheless, the absence of direct effect as a pre-condition of reliance is counter-balanced by the erection of another obstacle. The case law posits that, since CIL principles do not have the same degree of precision as provisions of an international agreement, judicial review is limited to the question whether, in adopting the act in question, the EU made a manifest error of assessment concerning the conditions for applying the CIL principles in issue.[132] The manifest error test is linked to discretion and is better suited to situations where the CIL principle imposes obligations on the Union. By contrast, where the CIL rule in issue gives rise to a right, it has *ex hypothesi* already passed the test of being precise and unconditional. The enquiry would then centre on whether that right has been violated. Also, where the CIL obligation is clear and precise, it is more difficult to see why the breach must be manifest. Notably, in *Front Polisario II*, the GC acknowledged but did not appear to place any reliance on the condition of manifest error.[133]

The manifest error test was first laid down in relation to CIL in *Racke* where a company challenged the suspension of trade concessions provided to Serbia by the Cooperation Agreement between the EEC and Yugoslavia.[134] The EU sought to justify the suspension by claiming a fundamental change in the circumstances following the onset of the war in former Yugoslavia. The Court held that the principle of *rebus sic stantibus*, as stated in Article 62 VCLT, is a principle of CIL that could be relied upon but, because of its 'complexity' and

[129] *ATAA*, *supra* note 42, para. 107.

[130] ibid., para. 109.

[131] These less onerous conditions should therefore also apply in relation to provisions in international treaties that reflect those CIL principles. Indeed, as the ECJ pointed out in *ATAA*, the CIL principles in issue in that case had been codified in international agreements: see ibid., para. 104. *Intertanko*, *supra* note 11, paras. 45, 46, 50, read in conjunction with each other, may appear to give the impression that the dual requirement that the nature and the broad logic of the agreement must not preclude reliance and that the provisions in issue must be unconditional and sufficiently precise apply also in relation to treaty provisions that reflect CIL but that would be too much to read in those dicta.

[132] *ATAA*, *supra* note 42, para. 111; ECJ, Case C-162/96, *A Racke GmbH* v. *Hauptzollamt Mainz* [1998] *ECR* I-3655, para. 52 (*Racke*).

[133] GC, Case T-279/19, *Front Polisario II*, *supra* note 3, paras. 343-344; GC, Joined Cases T-344/19 and T-356/19, *Front Polisario II*, *supra* note 3, para. 344.

[134] *Racke*, *supra* note 132.

'imprecision,' judicial review was limited to assessing the existence of a manifest error.[135] It then examined whether the conditions under which, pursuant to Article 62 VCLT, a contracting party may avoid its treaty obligations owing to a fundamental change of circumstances were fulfilled. It came to the conclusion that the Council had not committed a manifest error in determining that the pursuit of hostilities made for a radical change in the conditions under which the Cooperation Agreement was concluded. Wouters and Van Eeckhoutte have strongly criticised the judgment, arguing that the manifest error test is premised upon a 'misconception and oversimplification' of CIL, insofar as it is cast as inherently uncertain; *inter alia*, this arguably disregards the fact that many customary rules are codified in international agreements, such as the VCLT, thereby gaining 'similar characteristics to a treaty provision.'[136]

In any event, the manifest error test gives to the CJEU some jurisdictional autonomy to apply CIL. This autonomy will vary depending on the precision of the rule in issue and also the existence of a *corpus* of case law by the ICJ or other international tribunals clarifying the rule in issue.

The first condition for reliance on CIL stated in *ATAA* is whether the rule invoked is 'capable of calling into question the competence of the European Union to adopt [the contested] act.'[137] This condition is unclear. It was laid down in *ATAA* and although, in support of it, the ECJ referred to two earlier judgments, neither of them provide precedent.[138] In none of the cases where the Court has referred to that condition has it clarified its meaning or explained why it should be a general condition. Virtually all of those cases referred to the principle of territoriality.[139] A CIL rule would be capable of calling into question the competence of the Union to adopt the contested act, for example, when it delimits *ratione personae* or *ratione loci* the competence of the Union. EU law is presumed not to have extraterritorial effect. The Union must respect international law in the exercise of its powers, and EU measures must be interpreted, and their scope delimited, in the light of the relevant rules of international law.[140] However, more broadly, any CIL rule which is binding on the Union institutions limits their powers to adopt an

---

[135] ibid., para. 52.

[136] J. Wouters and D. Van Eeckhoutte, 'Giving Effect to Customary International Law Through European Community Law', KU Leuven Institute for International Law, *Working Paper* No. 25 (2002), 22-23, available at <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP25e.pdf>.

[137] *ATAA*, *supra* note 42, para. 107.

[138] At *IATA and ELFAA*, *supra* note 81, para. 107, the ECJ referred to ECJ, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström Osakeyhtiö and Others* v. *Commission* [1988] *ECR* 5193, paras. 14-18; *Mondiet*, *supra* note 31, paras. 11-16. The cases referred to the principle of territoriality in competition and fisheries respectively.

[139] See, e.g., ECJ, Case C-561/20, *Q, R, S* v. *United Airlines* [2022] ECLI:EU:C:2022:266, paras. 47-51. Cf. AG Jääskinen, Opinion to Joined Cases C-401/12 P to C-403/12 P, *Council, Parliament and Commission* v. *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* [2014] ECLI:EU:C:2014:310, para. 66, which concerned the Aarhus Convention but referred in passing to the *ATAA* competence condition. Also, in GC, Case T-65/18 RENV, *Venezuela* v. *Council* [2023] ECLI:EU:T:2023:529, para. 88, the GC referred to that condition when considering the alleged breach by the Council of the customary principle of non-interference in the internal affairs of a sovereign state (though that principle also reflects, at least partly, concerns of extraterritoriality).

[140] See *ATAA*, *supra* note 42, para. 123; *Poulsen*, *supra* note 9, para. 9.

act in that the act must conform with those rules, and is thus capable of calling into question the competence of the Union.

This condition was examined by the GC in *Front Polisario II*. In the *Front Polisario II* judgments,[141] the GC, for the first time, found Council measures to be in breach of CIL.[142] Front Polisario, an organisation fighting for the independence of Western Sahara, sought the annulment of Council decisions approving trade and fisheries agreements concluded between the EU and Morocco, which intended to apply to the territory of Western Sahara. In essence, the claimants argued that the decisions violated the customary principles of self-determination and of the relative effect of treaties,[143] as they were adopted without the consent of the Sahrawi people. Whereas in *Front Polisario I* the GC had annulled the contested decision owing to the Council's failure to examine its compatibility with EU fundamental rights,[144] in *Front Polisario II*, it upheld the claimant's international law arguments, finding that the Council had not gained the consent of the Sahrawi people. The *Front Polisario II* judgments are currently under appeal before the ECJ.[145]

The GC based its finding on the ECJ's *Front Polisario I* judgment, which, although it rejected Front Polisario's action as inadmissible, noted that, according to the UN Charter and the case law of the ICJ, the customary principle of self-determination is 'applicable to all non-self-governing territories and to all peoples who have not yet achieved independence.'[146] In this respect, self-determination 'forms part of the rules of international law applicable' to EU-Moroccan relations.[147] The GC emphasised the Council's obligation to comply with the ECJ's earlier interpretation of international law.[148]

In *Front Polisario I*, the ECJ held that the right to self-determination constituted a legally enforceable right erga omnes and one of the essential principles of international law.[149] It also held that, if the Association Agreement between the EU and Morocco were interpreted as applying to Western Sahara, that would

[141] GC, Case T-279/19, *Front Polisario II*, *supra* note 3; GC, Joined Cases T-344/19 and T-356/19, *Front Polisario II*, *supra* note 3.

[142] The cases form part of the *Front Polisario* dispute. For earlier judgments, see ECJ, Case C-104/16 P, *Council* v. *Front populaire pour la libération de la saguia-el-hamra et du rio de oro* [2016] ECLI:EU:C:2016:973 (ECJ, *Front Polisario I*); *Western Sahara Campaign UK*, *supra* note 85. For more on these cases, see E. Kassoti, 'The ECJ and the Art of Treaty Interpretation: *Western Sahara Campaign UK*' 56 *Common Market Law Review* 2019, 209; J. Odermatt, 'The EU's Economic Engagement with Western Sahara: The *Front Polisario* and *Western Sahara Campaign UK* Cases', in A. Duval and E. Kassoti (eds.), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives* (Abingdon: Routledge 2020).

[143] This is expressed in Art. 34 VCLT, which provides that a treaty 'does not create either obligations or rights for a third State without its consent'.

[144] GC, *Front Polisario I*, *supra* note 27. This was set aside in ECJ, *Front Polisario I*, *supra* note 142, on the ground that Front Polisario lacked standing.

[145] ECJ, Case C-798/21 P, *Council* v. *Front Polisario*; ECJ, Case C-799/21 P, *Council* v. *Front Polisario*.

[146] ECJ, *Front Polisario I*, *supra* note 142, para. 88.

[147] ibid., para. 89.

[148] GC, Case T-279/19, *Front Polisario II*, *supra* note 3, paras. 268 *et seq*., 279-280.

[149] See ECJ, *Front Polisario I*, *supra* note 142, para. 88.

be contrary to the principle of the relative effect of treaties reflected in Article 34 VCLT.[150] This is because Western Sahara was a third party which had not given its consent. In *Front Polisario II*, the GC understood the ECJ judgment in *Front Polisario I* as inferring 'from the principle of self-determination and from the principle of the relative effect of treaties clear, precise and unconditional obligations' in relation to Western Sahara, namely an obligation to respect its separate and distinct status and an obligation to ensure that its people consented to the implementation of the Association Agreement in that territory.[151]

In the view of the authors, although this inference does not necessarily flow from the judgment of the ECJ, it represents the correct understanding of the effect of the principle of self-determination and the principle of the relative effect of treaties in EU law. In the light of the case law of the ICJ[152] and the UN General Assembly resolutions on Western Sahara referred to by the ECJ,[153] the above principles are best understood as commands that are sufficiently specific and impose enforceable obligations in the context of the dispute in issue and not as principles that operate merely at a plane of international law dissociated from the validity of EU action. They bind the EU as an integral part of EU law, and the Union has the obligation to incorporate them in the conduct of its common commercial policy.[154] Their legal effects follow, first, from the fact that they are fundamental principles of international law which are intended to protect specific parties; and, secondly, the fact that, in the context of Western Sahara, the principle of self-determination has been established by specific UN General Assembly resolutions and by the ICJ. In the context of the dispute, they are principles which contain clear and precise obligation which are not subject, in their implementation or effects, to the adoption of any subsequent measure.[155] Also, as the GC stated in *Front Polisario II*, the lawfulness of the contested Council decision could be examined in light of those principles given that Article 3(5) and Article 21(1) TEU commit the EU to respect international law.[156]

In *Front Polisario II*, the Council, the Commission and other parties argued that the applicant could not rely on the principle of self-determination and the principle of the relative effect of treaties, *inter alia*, because, under the *ATAA* test, the first condition of reliance is that the CIL rule invoked must be capable of calling into question the competence of the Union to adopt the contested act.[157] In particular, the Commission's argument was that infringement of the right to self-determination cannot be relied on against an act of the Council and also

[150] ibid., para. 107.
[151] See GC, Case T-279/19, *Front Polisario II*, *supra* note 3, para. 281.
[152] See the ICJ authorities referred in ECJ, *Front Polisario I*, *supra* note 142, para. 88.
[153] ibid., paras. 90-91.
[154] See GC, Case T-279/19, *Front Polisario II*, *supra* note 3, para. 278; ECJ, Opinion 2/15 [2017] ECLI:EU:C:2017:376, paras. 142-147.
[155] These are the requirements of reliance, see GC, Case T-279/19, *Front Polisario II*, *supra* note 3, para. 281 and the case law cited therein.
[156] ibid., paras. 277-278.
[157] See ibid., paras. 251-258. The arguments, as summarised by the GC in its judgment, are not particularly clear.

that the principle of the relative effect of treaties can only render an international agreement unenforceable against a third party but cannot call its validity into question.[158] The GC correctly dismissed those arguments. It distinguished the *ATAA* case on several bases. In *ATAA*, the applicants were transport undertakings for whom the CIL principles on which they relied did not create rights. The CIL principles invoked only created obligations between states. Their situation therefore was not comparable to the applicant in *Front Polisario II*.[159] Also in contrast to the situation in *ATAA*, the contested decision in *Front Polisario II* was adopted not within the framework of the internal powers of the EU but within the framework of its external action, which is based, particularly under Article 21 TEU, on compliance with the principles of the UN Charter and of international law.[160]

In fact, the comparison with the *ATAA* case somewhat obfuscates the enquiry. It follows from *Front Polisario II* that, according to the GC, reliance on a CIL rule is possible where it creates clear, precise and unconditional obligations on the EU and reliance is intended to ensure respect for the rights of a third party to an agreement which are liable to be affected by the breach of those obligations.[161] This should be considered as correct. In fact, as stated above, the first condition laid down in *ATAA* is unclear and liable to create confusion.

Thus, the conditions under which reliance may be placed on CIL as a ground of review are context and rule-specific.[162] The CJEU will take into account the importance of the rule, its specificity, whether it has been elaborated in a specific context by the ICJ and/or UN resolutions, the identity of the applicant, and the circumstances in which the rule is relied upon. Specific CIL obligations may give rise to implied rights of actions enforceable in EU law. Interestingly, in *Western Sahara Campaign UK*, the Court had merely noted, without reference to additional conditions, that 'the Court has jurisdiction, both in the context of an action for annulment and in that of a request for a preliminary ruling to assess whether an international agreement concluded by the European Union is compatible with the Treaties […] and with the rules of international law which, in accordance with the Treaties, are binding on the Union.'[163]

As far as the position of CIL in the normative hierarchy of EU is concerned, the issue remains open. A lot will depend on the specific CIL rule in question. According to the case law, international agreements concluded by the Union rank higher than EU acts but below the EU Treaties.[164] CIL enjoys at the very

[158] ibid., para. 254.
[159] ibid., para. 288.
[160] ibid., para. 290.
[161] ibid., para. 291; GC, Joined Cases T-344/19 and T-356/19, *Front Polisario II*, *supra* note 3, para. 290.
[162] In his Opinion in *Achmea*, AG Wathelet suggested that they may amount to 'conditions which in reality are impossible to meet', drawing a 'parallel' with conditions imposed by national courts on the reliance of investors on international law; AG Wathelet, Opinion to Case C-284/16, *Slovak Republic* v. *Achmea BV* [2017] ECLI:EU:C:2017:699, para. 206, fn. 159.
[163] *Western Sahara Campaign UK*, *supra* note 85, para. 48.
[164] *Commission* v. *Germany*, *supra* note 112, para. 52; *Intertanko*, *supra* note 11, para. 42; and ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation* v.

least the same ranking as international agreements. Also, since all member states are bound by *jus cogens*, so is the EU. The treaties founding the EU, as international treaties, must comply with *jus cogens*. In practice, things are less clear-cut. Since, within the EU legal order, the ECJ is at the apex of its jurisdiction, it has the responsibility to interpret and apply *jus cogens* and thus plays a role not only as a taker of the peremptory rules of international law but also as a shaper of those rules.[165]

5. CONCLUSION

There is an upward trend in judicial references to CIL and the VCLT. This reflects the growing engagement of the EU as an international actor. As the competence of the EU expands and as it engages more actively in the negotiation and conclusion of international agreements, the importance of international law as a source of EU law can be expected to increase. Most references to CIL have been made by the ECJ and its Advocates General, rather than the GC, but this is explained by jurisdictional factors. As *Front Polisario II* illustrates, the GC has made its own independent input on the legal effects of CIL in EU law. In applying CIL, the ECJ performs a balancing act between jurisdictional coherence and normative openness. While it recognises in abstract terms the important role and effect of CIL, it may abstain from clarifying its input in concrete terms. In some cases, it identifies certain rules as being CIL. In others, it may apply provisions of VCLT without expressly affirming that the provision applied is customary law. Where the ECJ states that a provision is CIL, its analysis tends to be somewhat rudimentary. It does not engage with the conditions that must be fulfilled for a rule to be recognised as CIL, although it may refer to the case law of the ICJ as a justification. References tend to be abstract, often characterising, in general, many provisions of an international treaty as CIL, the inference being that those applied in the specific case are of such a nature. As expected, Advocates General engage more closely with the conditions that a rule need to fulfil to qualify as CIL.

The CJEU may apply CIL in various contexts. It may do so for the purposes of interpreting international agreements, interpreting EU acts, or determining their compatibility with international law. Its approach is context-specific and not always consistent. Where the compatibility of EU law is at stake, the need for conflict avoidance will be an important factor: to avoid conflict, both EU

Council and Commission [2008] *ECR* I-6351, paras. 306-307.

[165] *Jus cogens* was applied by the Court of First Instance in Case T-315/01, *Kadi* v. *Council and Commission* [2005] *ECR* II-3649, but its approach gives rise to several problems. First, given that *jus cogens* had not been relied upon by any of the parties, it should have given them the opportunity to present observations before assessing the compatibility of sanctions with them. Secondly, it is doubtful whether the rules applied, namely the right to property and related process rights, can be seen as *jus cogens*. Sadly, they do not enjoy universal recognition. Essentially, by framing its analysis in terms of *jus cogens*, the CFI applied the rules which would have applied if it had decided that EU fundamental rights were applicable only by exercising a lighter standard of scrutiny.

law and international law must be interpreted so as to fit with each other. In a different context, *Komstroy* betrays a lack of engagement with international norms, probably in an effort to assert the autonomy of EU law. It is an example of defensive constitutionalism which, however, does not necessarily lead to outcomes incompatible with international law.

CIL generates a duty of harmonious interpretation which, in general, has been expressed in terms that fall short of the asphyxiating obligations of *Marleasing*. This affords the CJEU some flexibility in pursuing the objective of interpretative harmony between EU and international law. The intensity of that duty, however, may be context specific. CIL may also serve as a ground of review of EU measures. It is likely that CIL will be invoked together with other sources of international law so, to determine how open the CJEU is to international law, one would need to assess its approach to all international law norms. The conditions under which a litigant may rely on CIL to contest the validity of a Union act appear to be both context and rule specific. The case law has vacillated and is not characterised by clarity, but the openness displayed by GC in *Front Polisario II* should be welcomed. This dispute is in fact one of the few cases where the CJEU has intervened not only as a receiver but also as a shaper of CIL interpretation. The approach of the GC is correct. In the context of that case, the principle of self-determination and the principle of relative effect of treaties are best viewed as imposing specific obligations which can be relied upon to contest the validity of EU action.

EU LEGAL ADVISERS AND THE INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW: THE CASE OF THE 1970S DEBATES ON MOST-FAVOURED-NATION CLAUSES

Teresa M. Cabrita*

1. INTRODUCTION

Granted, it might at first glance seem odd to reflect on the European Union (EU) as an interpreter of customary international law by examining EU legal advisers' views on a long-forgotten topic studied by the United Nations (UN) International Law Commission (ILC) back in the 1970s: the rules governing most-favoured-nation (MFN) clauses.[1] Yet, this paper is part of a broader claim concerning the role that EU legal advisers have played in advancing EU interpretations on the existence, emergence, or development of rules of customary international law. Specifically, this paper returns to the first-ever statements prepared by legal advisers from the European Commission Legal Service (hereinafter 'legal service') concerning a topic studied by the ILC. The paper demonstrates how these statements shed light on EU interpretations of (customary) international law, the language and legal reasoning advanced by EU legal advisers in this respect, and the reception or lack thereof of these interpretations by the international community of states and non-state actors.

For the sake of context, it should be recalled that international organisations' contribution to the (trans)formation (if not the interpretation) of international law has been far from amiss from the ILC's programme of work.[2] The relevance of international organisations' practice for the identification of rules of custom, for instance, took frontstage at the ILC between 2013 and 2018, with the drafting of the 'conclusions on the identification of customary international law.'[3] The EU was no stranger to these debates; quite the contrary. EU legal advisers entrusted with the preparation and delivery of statements at the UN General Assembly (UNGA) Sixth Committee, where the ILC's work is annually discussed, were

* Postdoctoral researcher, Max Planck Institute for Legal History and Legal Theory; affiliated member, KU Leuven Institute for European Law. I would like to thank Professor Panos Merkouris and Professor Ramses A. Wessel for the organisation of an excellent workshop on 'The European Union and the Interpretation of Customary International Law' in which an earlier version of this paper was first discussed, and the reviewers for their constructive and collegial comments. All errors in the text are my own.

[1] Draft Articles on Most-favoured-nation Clauses, Vol. II, part 2, *Yearbook of the ILC* 1978, at 16, para 74 (MFN articles).

[2] G. Nolte, '2018 AIIB Law Lecture: International Organizations in the Recent Work of the International Law Commission' in P. Quayle and X. Gao (eds.), *International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019* (Leiden: Brill Nijhoff 2019), 225–242.

[3] Draft Conclusions on the Identification of Customary International Law, Vol. II, part 2, *Yearbook of the ILC* 2018, at 90, para. 65.

rather active in explaining how international organisations in general, and the EU in specific, might contribute to the formation or expression of rules of customary international law.[4] This engagement by EU legal advisers with the work of the ILC and in debates about the content, existence, emergence or development of rules of (customary) international law, is far from a novel feat. It is instead part of a practice initiated as early as 1975, soon after the (then) European Economic Community (EEC) acquired its observer status at the UNGA,[5] and which has continued to the present day.[6] EEC legal advisers' statements in the 1970s on the ILC's study of MFN clauses are part and parcel of this process.[7]

The paper begins by introducing and contextualising the ILC's study of MFN clauses (section 2) before examining the EEC's position on these ILC draft rules. Section 3 moves to the EEC's participation in these UNGA Sixth Committee debates by examining the statements prepared by the European Commission legal service on this topic between 1975 and 1983. Less than dwelling on the myriad of legal issues raised by this ILC study, the paper focuses on the legal issues raised by the EEC in relation to the ILC's drafts. It first addresses the Community's objections to the draft's focus on states and its implication for EEC competence (subsection 3.1). The analysis then moves to the Community's position on two sets of rules concerning the effects of regional economic integration on the development of international law: economic integration among developing countries (subsection 3.2), and the creation of custom unions among industrialised nations (subsection 3.3). These subsections examine how Community legal advisers endorsed or objected to these rules, relying on Community practice and on common interpretation techniques to make broader claims about the effects of regional economic integration on the content and development of customary international law. Section 4 turns to how the EEC's interpretations of these rules were received by the ILC and informed the Community's reaction to these articles, and its participation in later ILC debates. The paper argues that while EEC interpretations of (emerging) rules of custom were not always accepted by the community of states and other actors at the UNGA Sixth Committee (nor by

[4] UNGA Official Records, Sixth Committee, Summary record of the 19th meeting (20 November 2015) UN Doc. A/C.6/70/SR.19, Statement by Mr. Gussetti (Observer for the European Union) paras. 83-85; UNGA Official Records, Sixth Committee, Summary record of the 20th meeting (11 November 2016) UN Doc. A/C.6/71/SR.20, Statement by Mr. Gussetti (Observer for the European Union) para 45; UNGA Official Records, Sixth Committee, Summary record of the 20th meeting (11 November 2018) UN Doc. A/C.6/73/SR.20, Statement by Mr. Gussetti (Observer for the European Union) para. 50.

[5] UNGA Res. 3208, 'Status of the European Economic Community in the General Assembly' (11 October 1974).

[6] To date, the EU has commented on at least twelve different topics studied by the ILC. At the time of writing, the last EU statement addressing a topic still under study at the ILC was delivered by Mr Stephan Marquardt, Legal Adviser and Deputy Head of the Legal Department of the European External Action Service, on 23 October 2023, in New York. The statement addressed the ILC's work on general principles of law, available at <https://www.un.org/en/ga/sixth/78/pdfs/statements/ilc/23mtg_eu_1.pdf>.

[7] The statements examined in this paper cover the period of 1975 to 1983 and are therefore attributed to the European Economic Community. Reference is nevertheless made to the EU when referring to statements delivered at the UNGA Sixth Committee after 1992 or to the broader implications of these statements for the EU as an interpreter of (customary) international law.

ILC members for that matter), the Community's participation in these debates served (and still serves) an important function in the external affirmation of EU competence and in the articulation by EU lawyers of the organisation's otherwise elusive views on the existence and development of customary international law, and the EU's contribution to this process.

2. THE ILC'S WORK ON MOST-FAVOURED-NATION CLAUSES

The proposal to include in the ILC's programme of work a study on the rules governing the legal nature and operation of MFN clauses was first advanced in 1964 by Commissioner Jiménez de Aréchaga (Uruguay).[8] The initial idea was to examine this issue within the ILC's work on the law of treaties between states, initiated in 1950, but the topic was labelled as 'special' and set aside for independent study.[9] The MFN study began instead in earnest in 1967, two years before the adoption of the 1969 Vienna Convention on the Law of Treaties (VCLT).[10] The study was steered by two successive Special Rapporteurs (both diplomats): Endre Ustor (Hungary) and Nikolai Ushakov (Union of Socialist Soviet Republics).[11]

By 1978, the project was concluded with the adoption on second reading of a set of thirty draft articles on the interpretation and operation of MFN clauses in international (trade) agreements. The draft codifies rules on the scope, definition, and sources of MFN obligations (Articles 1-8), the application of MFN treaty clauses (Articles 9-22), and exceptions to their application (Articles 23-26). It includes final provisions on the non-retroactivity of the proposed rules, these rules residual nature in relation to any specific agreements between the granting and beneficiary States, and the draft articles' relationship with the development of new rules of international law in favour of developing countries (Articles 27-30). Notwithstanding the UNGA's efforts to galvanise states' interest in the transformation of this draft into a legally binding convention, this conventional status never came to fruition. In 1991, the draft was commended to states' consideration 'in such cases and to the extent as they deemed appropriate.'[12]

Although the failure of the MFN project was ascribed to its 'complexity,'[13] the

[8] Sixth Committee, Summary records of the sixteenth session (11 May–24 July 1964), 752nd meeting, Vol. I, *Yearbook of the ILC* 1964, 184-185, paras. 2-11.

[9] Report of the International Law Commission covering the work of its sixteenth session (11 May–24 July 1964), Vol. II, *Yearbook of the ILC* 1964, at 176, para. 21; Report of the International Law Commission on the work of its thirtieth session (8 May–28 July 1978), Vol. II, part 2, *Yearbook of the ILC* 1978, at 8, para. 15.

[10] Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* 331.

[11] Report of the International Law Commission on the work of its nineteenth session (8 May–14 July 1967), Vol. II, *Yearbook of the ILC* 1967, at 369, para. 48; Report of the International Law Commission on the work of its twenty-ninth session (9 May–29 July 1977), Vol. II, part 2, *Yearbook of the ILC* 1977, at 124, para. 77.

[12] UNGA Dec. 46/416 'Consideration of the Draft Articles on Most-favoured-nation Clauses' (9 December 1991).

[13] UNGA Dec. 43/429 'Consideration of the Draft Articles on Most-favoured-nation Clauses'

wider political context also contributed to the international community's reservations about these draft rules. The legal debates on MFN clauses were couched against decolonisation and the emergence of the New International Economic Order (NIEO) movement, the developments in regional economic integration brought about by the General Agreement on Tariffs and Trade (GATT), and the differences in political and economic organisation between Eastern and Western European states.[14] With specific regard to the EEC's participation in these debates, Tomuschat described this codification exercise as falling 'on the negative side of the balance sheet' for being carried out under 'the suspicion of being designed to open access to the advantages of the [EEC] to socialist States without any kind of reciprocity.'[15] It is therefore in this broader context that some of the EEC's statements, as well as the ILC and Sixth Committee debates, must be understood.

3. THE EEC'S PARTICIPATION IN THE MFN DEBATES

Back in the 1970s, international lawyers were not a strange sight at the legal service of the European Commission. Familiar with the work of the ILC and perhaps eager to exercise the full set of newly acquired UN observer rights, these lawyers began early on engaging with the work of this UNGA subsidiary body. The first statement prepared by the legal service on an ILC project was delivered on 27 October 1975 by Mr Hardy, Observer for the European Economic Community, addressing precisely the ILC's codification of rules on the operation of MFN clauses.[16] Since then, the legal service has prepared statements concerning at least twelve other ILC topics, ranging from topics specifically addressing international organizations (most notably, the articles on the responsibility of international organisations (ARIO)) to topics otherwise relevant to the exercise of EU external competences (such as rules on the protection of persons in the event of disasters).[17]

For the EEC's first engagement with the ILC's work, the number and length of the Community's statements on the MFN topic is particularly striking. Between 1975 and 1983, EEC legal advisers prepared ten statements addressing the draft rules as formulated by the ILC and, in doing so, weaved together a particular narrative about the interpretation and development of (customary) international

(9 December 1988).

[14] For a review of academic publications addressing the NIEO around the time of consideration of this project by the ILC, see J. White, 'The New International Economic Order: What is It?', 54 *International Affairs* 1978, 626-634.

[15] C. Tomuschat, 'The International Law Commission—An Outdated Institution?', 49 *German Yearbook of International Law* 2006, at 91.

[16] UNGA Official Records, Sixth Committee, Summary record of 1549th meeting (27 October 1975) UN Doc. A/C.6/SR.1549, Statement by Mr. Hardy (Observer for the European Economic Community) para. 47.

[17] See Draft Articles on the Responsibility of International Organizations, Vol. II, part 2, *Yearbook of the ILC* 2011, at 40, para. 87; Draft Articles on the Protection of Persons in the Event of Disasters, Vol. II, part 2, *Yearbook of the ILC* 2016, at 25, para. 48.

law and the effects of regional economic integration on this process. The next sections examine these statements and the interpretations advanced by Community legal advisers on emerging rules of custom in this context.

3.1. The recognition of the Community's competence and practice

Community lawyers' first hurdle at the Sixth Committee was to establish the relevance of the EEC's participation in the MFN debates. The ILC's study on MFN clauses was, from the outset, limited to agreements concluded between *states*.[18] For the EEC, this was problematic. This state-centred approach expressly disregarded the permanent transfer of competence on matters of trade from EEC member states to the organisation, and the autonomous relevance of the EEC as an international (trade) actor. In virtually all the statements delivered at the Sixth Committee on this topic by Community legal advisers (or by the EEC member state holding the Council Presidency, on behalf of the Community and its members) delegates reiterated that the ILC text should recognise the fact that, with respect to the Community and its member states, the EEC was 'the sole competent authority' for matters governing the application of MFN treatment.[19] Alternative interpretations would, in the Community's view, 'greatly restrict [the draft's] value' and overtly disregard a growing *trend* towards regional economic integration of which the EEC was a part.[20] This position was articulated by Mr Dubois, Observer for the EEC addressing the Sixth Committee in 1976, in the following terms:

> […] some aspects of the draft articles on the most-favoured-nation clause did not fully reflect the requirements and concerns of bodies such as the European Economic Community, which were at an advanced stage of regional integration and to which the clause was particularly important. […] Member States had transferred to the Community various powers which they had previously exercised and in particu-

[18] Art. 1 MFN articles, *supra* note 1, at 16: 'The present articles apply to most-favoured-nation clauses contained in treaties between States.'

[19] UNGA Official Records, Sixth Committee, Summary record of the 16th meeting (13 October 1976) UN Doc. A/C.6/31/SR.16, Statement by Mr. Dubois (European Economic Community) para. 11: 'As currently worded the text implied that a generalized system of preferences was a matter for individual States, whereas, in fact, the member States of the Community no longer had the power to grant such preferences of their own accord. In view of the Community's role in applying generalized preferences and in view also of the advantages which they conferred, it would be as well if the draft took account of the realities of the Community. In fact, that general observation might be applied to the draft articles as a whole.' See also Statement by Mr. Hardy, *supra* note 16, paras. 48, 52; UNGA Official Records, Sixth Committee, Summary record of the 32nd meeting (27 October 1978) UN Doc. A/C.6/33/SR.32, Statement by Mr. Buhl (Observer European Economic Community) para. 4; UNGA Official Records, Sixth Committee, Summary record of the 65th meeting (28 November 1980) UN Doc. A/C.6/35/SR.65, Statement by Mr. Lau (Observer European Economic Community) para. 22; Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session, Vol. II, part 2, *Yearbook of the ILC* 1978, Comments by the European Economic Community, at 180, para. 3 (MFN Comments).

[20] Statement by Mr. Lau, *supra* note 19, para. 25. See also Statement by Mr. Hardy (Observer for the European Economic Community), Sixth Committee, Summary record of the 20th meeting, 20 October 1983 (A/C.6/38/SR.20), para. 58.

> lar, their powers relating to common trade policy. Consequently, the Community was the sole competent authority for matters concerning the application of the most-favoured-nation clause.[21]

EEC member states joined this reproach. The Netherlands, for instance, questioned why, while '[t]he Commission [did] not deny that certain kinds of international organizations can act not only on an equal footing with a State in international relations but *in the place of* the States that have formed them […] it places this outside the scope of its draft articles.'[22] The government of Luxembourg echoed this sentiment, noting that

> following the establishment of regional economic groupings in various parts of the world, the clause is likely to be found more and more frequently in agreements concluded by unions or groups of States. This development should be taken into account and the scope of the articles should be defined accordingly.[23]

For the EEC and its members the Community's participation in multilateral negotiations in the framework of the GATT was sufficient evidence of 'the manner in which the Community's existence ha[d] been accepted at the international level.'[24] This transfer of powers, and its external recognition, therefore grounded the legal service's proposal that the draft's definition of 'State' be revised to include the case of an entity such as the EEC:

> [t]he expression *State* shall also include any entity exercising powers in spheres which fall within the field of application of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed.[25]

This claim for state assimilation, however, did not receive overwhelming support at the ILC. Granted, Endre Ustor, the first Special Rapporteur on the MFN project, was rather open to the idea of recognising the autonomous relevance of a 'hybrid union' like the EEC.[26] In his last report, he suggested that the draft might extend to the case of treaties concluded by hybrid unions.[27] This openness, however, was not shared by his successor, Nikolai Ushakov. In his 1978 report, Ushakov stressed that an 'international organization of a supranational character' was 'an extremely new phenomenon' to which the rules of international

---

[21] Statement by Mr. Dubois (European Economic Community), Sixth Committee, Summary record of the 16th meeting, 13 October 1976 (A/C.6/31/SR.16), paras. 1 and 2.

[22] MFN Comments, *supra* note 19, Comments by the Netherlands, at 169, paras. 2-3.

[23] ibid., Comments by Luxembourg, at 166.

[24] ibid., Comments by the European Economic Community, at 180.

[25] ibid., at 182.

[26] The qualification of the EEC as a 'hybrid union which may appear to have some analogy with a uniting of States but which do not result in a new State' resulted from the 1974 ILC debates on 'state succession in respect of treaties'. See Draft Articles on the Succession of States in respect of Treaties, Vol. II, part 1, *Yearbook of the ILC* 1974, Commentary to Art. 31, at 253; Sixth report on the most-favoured-nation clause by Mr. Endre Ustor, Special Rapporteur, Vol. II, *Yearbook of the ILC* 1975, at 16, para. 48 (Ustor Sixth Report).

[27] Seventh Report on the most-favoured-nation clause by Mr. Endre Ustor, Special Rapporteur, Vol. II, part 2, *Yearbook of the ILC* 1976, at 115, para. 20 (Ustor Seventh Report).

treaty law might not apply, and in whose image they should not be developed.[28] He stressed the impossibility – and thus the inadvisability – of listing all possible exceptions to a rule.[29]

Ultimately, Article 3 of the MFN draft and the commentary thereto concede that the rules proposed by the ILC might apply to MFN clauses included in treaties concluded by entities *other* than states, even if not developed expressly for this purpose.[30] The text adopted on second reading recognises the relevance of 'groupings of States or similar associations' and adds in the commentaries that the use of the term most-favoured-treatment as opposed to most-favoured-*nation* should be understood as a confirmation that the draft

> is generic in character and is intended to cover the wide variety of possible situations that may exist involving such other subjects of international law. For example, in specific cases, such clauses might appropriately be termed most-favoured-international organization clauses.[31]

The effects of regional economic integration on the emergence and development of (customary) international law also permeated the remainder of the EEC's MFN statements. These statements centred, specifically, on two main sets of rules: those concerning the economic integration of developing countries (which Community legal advisers largely endorsed), and those concerning economic integration among developed nations such as the EEC member states (which Community legal advisers strongly contested). In doing so, legal advisers articulated the Community's claims through the language and legal reasoning of international law, positioning the EEC in relation to international law's development. It is to these interpretations that the next two sections turn.

3.2. The economic integration of developing countries

Three specific provisions of the MFN draft were openly tilted towards a 'progressive development' of international law, namely, draft Articles 23, 24 and 30.[32]

[28] Report on the most-favoured-nation clause by Mr Nikolai A. Ushakov, Special Rapporteur, Vol. II, part 1, *Yearbook of the ILC* 1978, at 8, para. 66 (Ushakov Report).

[29] ibid., at 21, paras. 211-212.

[30] MFN articles, *supra* note 1, Commentary to Art. 3, at 18, para. 2: 'Article 3 recognizes that the present articles do not apply to a clause on most-favoured treatment other than a most-favoured-nation clause referred to in article 4. However, it preserves the legal effect of such a clause and the possibility of the application to such a clause of any of the rules set forth in the present articles to which it would be subject under international law independently of the articles.'

[31] ibid., para. 4.

[32] Report of the International Law Commission on the work of its thirtieth session, *supra* note 9, at 13, para. 54: 'the Commission found that the operation of the clause in the sphere of economic relations, with particular reference to developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in the Statute of the Commission, because the requirements for that process, as described in article 15 of the Statute, namely, extensive State practice, precedents and doctrine, were not easily discernible. The Commission therefore attempted to enter into the area of progressive development and adopted articles 23 and 24. It also adopted article 30, in the hope that further development might take place

Each dealt with exceptions to MFN obligations in favour of developing countries. Article 23 excluded from the scope of MFN obligations the non-reciprocal and non-discriminatory preferential treatment accorded by a developed to a developing state on the basis of a generalised system of preferences.[33] Article 24 prevented developed states from claiming concessions accorded between developing states in the context of international organisations.[34] And Article 30 echoed the overarching aim of rectifying economic inequalities by noting that the rules proposed in the draft were 'without prejudice to the establishment of new rules of international law in favour of developing countries.'[35] Most states commenting on these articles were generally satisfied with the ILC's approach, as were the international organisations that pronounced themselves on the draft.[36]

For the EEC, these debates were more than a simple exercise of UNGA speaking rights. They also allowed the Community to position itself in a broader debate concerning the legal effects of economic integration on international law and to profile itself as an actor contributing to a specific development of the international legal order. The statements prepared by the legal service stressed that the Community shared the ILC's concerns regarding the 'specific interests of developing countries in their relations with industrialized countries.'[37] They notably presented the Community's treaty practice as aligned with, and thus confirming, draft Articles 23 and 24 of the ILC's draft. In the legal service's view, this alignment was evidenced by the Community's participation in the GATT, the adoption of the Lomé Convention (wherein the EEC accorded 46 African, Caribbean and Pacific countries specific preferences in trade by allowing manufactured and semi-manufactured products originating from these countries to be imported into the EEC customs-free), and the generalised preferences (through tariff concessions) accorded by the Community to 77 developing countries within the framework of the United Nations Conference on Trade and Development (UNCTAD).[38] Community practice therefore confirmed the existence of a general rule of international law along the lines of those advanced by the ILC.

Community legal advisers nevertheless sought two changes to this section of the draft. First, they requested a 'clarification' to Article 23 (former 21) so as to

---

in that area in the future.'

[33] MFN articles, *supra* note 1, Art. 23, at 59: 'A beneficiary State is not entitled, under a most-favoured-nation clause, to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences, established by that granting State, which conforms with a generalized system of preferences recognised by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures.'

[34] ibid., Art. 24, at 65: 'A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State in conformity with the relevant rules and procedures of a competent international organisation of which the States concerned are members.'

[35] ibid., Art. 30, at 72: 'The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.'

[36] Ushakov Report*, supra* note 28, 4-5, paras. 20-32.

[37] MFN Comments, *supra* note 19, Comments by the European Economic Community, at 181.

[38] ibid.

also exclude from MFN obligations the preferential non-reciprocal treatment that was specifically agreed upon between a developed and a developing State. The EEC argued that the article should read as follows:

> A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis under a preferential regime established by that granting State.[39]

Second, the legal service proposed the inclusion of a new Article 11*bis*, which would exclude from MFN rights the preferential treatment accorded on the exchange of goods and services to countries with a state monopoly of trade under special conditions of reciprocity, unless reciprocal advantages were granted that ensured that trade was 'not compromised' on either side.[40] The legal service advanced the formulation of a new article along the following lines:

> Nothing in these articles shall be construed as obliging the conceding State to grant most-favoured-nation treatment to the beneficiary State in respect of exchanges of goods and services between countries with different socio-economic systems unless the beneficiary State accords to the conceding State a status permitting, on the basis of equality and mutual satisfaction of the partners, as a whole, an equitable distribution of advantages and obligations of comparable scale, in accordance with bilateral and multilateral agreements.[41]

In advancing this formulation, Community legal advisers sought to ensure that the rules drafted by the ILC were not less favourable to a highly integrated economic system such as the EEC or, as Tomuschat put it, that they did not 'open access to the advantages of the [EEC] […] without any kind of reciprocity.'[42] In essence, Community legal advisers sought to preserve the trading position of EEC member states and the economic incentives towards Community integration. This same sentiment guided the EEC's interpretation of the draft's remaining rules.

3.3. The economic integration of industrialised nations: the customs-union issue

One aspect of the draft particularly sensitive for EEC integration and where legal advisers' reliance on classic interpretation techniques to advance Community interests was most clear was the so-called 'customs-union issue.' Customs unions are, by nature, departures from MFN treatment. As juridical categories, they create a regime of exception to non-preferential treatment based on economic or geographic considerations, together with a common customs tariff for products originating from 'third states.'[43]

---

[39] ibid.
[40] ibid., 183-184.
[41] ibid., at 181.
[42] C. Tomuschat, *supra* note 15, at 91.
[43] J. Viner, *The Customs Union Issue* (Oxford: Oxford University Press 2014), ch. 2 ('The Compatibility of Customs Union with the Most-Favored-Nation Principle'); C. Kaufmann, 'Customs Unions',

At the ILC, the customs unions debate concerned the compatibility of these forms of economic integration (as well as of free trade areas and other preferential economic arrangements aimed at reducing or eliminating trade barriers between two or more states) with states' contractual obligations under MFN clauses. The ILC draft included a set of provisions, in particular one which later became Article 17, to the effect that the rights of MFN beneficiaries should not be affected by the concessions extended by the granting state to one or more third states by way of bilateral or multilateral agreements.[44] The question that arose was two-fold: whether the concessions accorded by members of customs unions inter se were *ipso jure* excluded from the scope of MFN benefits; and, if so, whether this exclusion was 'desirable' or instead led to a devaluation of the MFN doctrine.[45]

The fact that intra-customs union benefits were regularly excluded as a matter of treaty practice was not disputed as such.[46] The possibility of limiting the effects of MFN clauses through the creation of customs unions had been specifically recognised (subject to certain conditions) by Article XXIV of the 1947 GATT.[47] By 1978, GATT membership numbered 83 contracting parties.[48] While the Community only became a member of the (by then) World Trade Organisation (WTO) in 1995,[49] in its 1972 ruling in *International Fruit Company* the Court of Justice of the European Union concluded that the GATT was binding on the Community – as the holder of exclusive competence on matters of trade, the Community succeeded its member states in the implementation of the parts of the agreement falling within Community competence.[50] This transfer of competence was further recognised by the GATT in allowing the European Commission to represent Community interests in dispute settlement proceedings, alongside its member states.[51]

---

in *Max Planck Encyclopaedia of Public International Law* (last updated August 2014) paras. 1-6.

[44] MFN articles, *supra* note 1, Art. 17, at 44: 'The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement, whether bilateral or multilateral.'

[45] Ustor Sixth Report, *supra* note 26, 15-20; Ustor Seventh Report, *supra* note 27, at 120, para. 42.

[46] Ustor Sixth Report, *supra* note 26, at 13, para. 28.

[47] Art. XXIV General Agreement on Tariffs and Trade 1947, 55 *UNTS* 187: '(4) The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories. (5) Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area, provided that […]'

[48] Further to Suriname's accession to the GATT that same year. See WTO, 'The 128 countries that had signed GATT by 1994', available at <https://www.wto.org/english/thewto_e/gattmem_e.htm>.

[49] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regard matters within its competence, of the agreements reached in the Uruguay Round of multilateral negotiations (1986-1994), *OJ* [1994] L 336, 23.12.1994.

[50] ECJ, Joined Cases 21 to 24-72, *International Fruit Company NV and others* v. *Produktschap voor Groenten en Fruit* [1972] ECLI:EU:C:1972:115, paras. 14-18.

[51] The GATT/WTO has not, however, fully endorsed the European Commission's view that it

The question, rather, was whether these exceptions now formed a *new* rule of customary international law which automatically exempted intra-customs unions benefits even in the absence of an express treaty clause to this effect, a fact which would favour economic integration. For the EEC, an affirmative answer to this question was particularly important, not only for practical reasons but also for reasons of principle. One of the main purposes of the EEC statements was, therefore, to ensure that the automatic exemption of customs unions was recognised as an established rule of custom. The proposal to this effect was to include in the ILC's text a new Article 16*bis* with the following wording:

Article 16*bis*
Effects of the clause on rights and obligations established within economic and other unions

> Notwithstanding articles 15 and 16, the present articles shall not affect rights and obligations which are established within entities in the sense of article 2, in particular economic unions, customs unions or free-trade areas, and which confer benefits or impose responsibilities on the members of such entities.[52]

The legal service advanced two main arguments in this respect: one EU-specific, one not. Both arguments relied to a large extent on interpretative techniques common to international law.[53] The first argument essentially called for a systemic interpretation of the customs-union exception that would account for the unique nature of Community law. This argument was supported on Article 234(3) EEC Treaty (now Article 351 TFEU) and essentially claimed that the non-recognition of a custom-union exception would run counter to the 'special nature of the regional integration process' initiated within the EEC.[54] As argued by Community legal advisers, trade concessions between EEC member states were an integral part of a thicker set of synallagmatic rights and obligations of not only an economic but also a social nature, the enjoyment of which could not be divorced from the system of common institutions set up within the EEC, including the jurisdictional monopoly of the Court of Justice.[55] Taken at face-value, the rule proposed by the ILC could, in absurdum, mean opening up membership of the organisation

---

is the sole respondent for WTO obligations. See E. Leinarte, 'The Principle of Independent Responsibility of the European Union and its Member States in the International Economic Context', 21 *Journal of International Economic Law* 2018, 184-187.

[52] MFN Comments, *supra* note 19, Comments by the European Economic Community, at 183.

[53] Relying here on the findings of P. Merkouris, 'Interpretation of Customary International Law: of Methods and Limits', TRICI-Law Project, *Research Paper Series* No. 001/2023, available at <https://tricilawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf>.

[54] MFN Comments, supra note 19, at 180; Art. 351(3) Consolidated Version of the Treaty on the Functioning of the European Union, *OJ* [2012] C 326: 'In applying the agreements [concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other], Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

[55] See UNGA Official Records, Sixth Committee, Summary record of the 16th meeting (13 October 1976) UN Doc. A/C.6/31/SR.16, Statement by Mr. Dubois (European Economic Community), para. 7.

to third states against the organisation's own rules.[56]

The second argument, in turn, appealed to the very *telos* of the customs-union exception and of economic integration more generally. Pursuant to this argument, Community integration was part of a larger *trend* towards regional integration. Community legal advisers argued that, while the EEC was at an 'advanced' stage of integration, '[t]he existence and functioning of the Community are only *one example among many* of the growing tendency throughout the world to establish regionally integrated areas.'[57] This trend was confirmed by the establishment of the Economic Community of West African States, the Caribbean Community, the Arab Common Market, and the Andean Community of Nations, as well as free-trade areas such as the European Free Trade Association or the Central American Common Market. In the legal service's view, an ILC text which did not recognise a customs unions exception would not only disregard the direction of state practice but would also have a 'disruptive' effect by dissuading states from further economic integration.[58] In essence, Community legal advisers argued for a teleological interpretation of the customs union exception in favour of more integration, not less.

In the view of the Community's legal advisers, even if the ILC disagreed with this reading, the absence of practice supporting a situation 'by which a beneficiary State could have *obtained* all the advantages granted by members of a customs union among themselves' was in itself evidence of the existence of an (implicit) rule to the contrary.[59] Furthermore, as Article XXIV of the GATT recognised both the exception and the clause itself, this 'confirmed the status of the exception as a customary rule, so that in practice the exception largely replaces the clause.'[60] In the words of the EEC delegate at the Sixth Committee:

> Indeed, if such an exception did not exist, it would have to be created, for otherwise States would never be able to decide to establish such [economic integration] systems. In the absence of the exception, all the advantages of systems of economic integration would have to be shared with all the third States to which member States were linked by treaties containing the most-favoured-nation clause. It is for these reasons that the customary rule has been established and that international law would have to accept it, even if the rule and current practice did not already exist. This remark applies equally to both industrialized and developing countries.[61]

These statements contest not only the application of a general rule to the specific case of the EEC but also the ILC's reading of international law and the direction of its development – notably, the ILC's ease in codifying rules progressively de-

---

[56] MFN Comments, *supra* note 19, Comments by the European Economic Community, 180, 182.
[57] ibid., at 181, para. 7 (emphasis added).
[58] UNGA Official Records, Sixth Committee, Summary record of the 1544th meeting (21 October 1975) UN Doc. A/C.6/SR.1544, Statement by Mr. Cassese (Italy), speaking on behalf of the European Economic Community (EEC) and its nine member states, para. 43.
[59] ibid., at 182, para. 10.
[60] ibid.
[61] ibid., at 183, para. 10.

veloping MFN treatment in favour of developing states whilst ignoring economic integration amongst industrialised nations:

> It is difficult to explain why the Commission, while being ready to adopt draft articles 23 and 24 as part of the progressive development of international law, has left out this exception for customs unions and free-trade areas which is simply codifying an existing rule of customary international law.[62]

Notwithstanding the proposal tabled by Vallat, the British ILC member, who advanced a formulation of the customs union exception essentially aligned with that suggested by the EEC,[63] the ILC as a whole did not reach a consensus regarding the existence or lack thereof of established practice supporting the emergence of such a rule of customary international law. Much like the ILC's position on whether the draft's rules extended to entities other than states, the ILC 'solved' the customs union issue by noting in the commentaries that the absence of a rule on customs union exemptions did *not* carry an 'implicit recognition of the existence or non-existence of such a rule.'[64] Article 29 of the draft, in turn, safeguarded the possibility of alternative arrangements between the granting and the beneficiary states.[65]

4. RECEPTION AND REACTION TO THE COMMUNITY'S INTERPRETATION OF MFN RULES

The reception of other EEC proposals by the ILC was likewise mixed. On the one hand, several aspects linked to the Community's practice in the application of MFN treatment were considered too specific to support the formulation of international rules of general application, either as *lex lata* or *lex ferenda*. The type of unilateral concessions granted to the EEC by countries associated with it in exchange for special preferences, for instance, was seen as a 'rather exceptional phenomenon' of unilateral MFN treatment.[66] The system of 'vertical preferences' accorded by the EEC to former colonies, in turn, was contested by UNCTAD as contrary to the gradual move towards a 'non-reciprocal, non-discriminatory system of preferences […] and the gradual phasing-out of the special preferences.'[67] On the other hand, the Community's practice under the

[62] UNGA, Report of the Secretary-General, Consideration of the Draft Articles on Most-favoured-nation Clauses (1980) UN Doc. A/35/203 and Add. 1, 2, 3, at 32, para. 8.

[63] Vallat's proposal read as follows: 'Article 23 bis (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member): A beneficiary State other than a member of a customs union is not entitled under a most-favoured-nation clause to treatment extended by the granting State as a member of the customs union to a third State which is also a member.' Draft Articles on the Most-favoured-nation Clause: Article 23 bis Proposed by Sir Francis Vallat, Vol. II, part 2, *Yearbook of the ILC* 1978, at 13, para. 57.

[64] Report of the International Law Commission on the work of its thirtieth session, *supra* note 9, 13-14, para. 58.

[65] MFN articles, *supra* note 1, Art. 29, 72: 'The present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree.'

[66] ibid., Commentary to Art. 4, 18-19, paras. 5-6.

[67] ibid., Commentary to Art. 23, 59-60, para. 3.

Lomé Convention was used (together with the conclusion of the 1975 Bangkok Preferential Trade Agreement among Asian developing countries) to support the inclusion in the draft of a rule (Article 24) exempting from the scope of MFN benefits accorded between developed states the preferential treatment extended by developing states to each other.[68]

As it became clear that the EEC's position on the customs-unions issue, in particular, would not make it to the final text, the delegation's attitude of general reservation towards the ILC draft soon turned into one of outright rejection of the whole exercise:

> Any general rules on the most-favoured-nation clause, regardless of their final form and legal status and even if they were only of a supplementary nature, would not be accepted by [the] EEC unless they constituted a well-balanced set of rules which, as a whole, reflected practical reality and, in particular, took account of the three main points to which he had referred. It was only on such a basis that [the] EEC, which was the major international trading partner and which had full delegated powers in that area from its member States with regard to the granting or acceptance of most-favoured-nation treatment, could contemplate becoming a party to an instrument of international law on the subject of the most-favoured-nation clause.[69]

EEC member states also showed reservations about the adoption of a convention based on the ILC's draft, slowly moving towards a preference for guidelines or other soft law instruments.[70] By 1980, both the Community and its member states made clear that they would not accept a draft which did not account for the EEC's position and reflect the reality of regional economic integration.[71]

Three decades later, the ILC returned to the topic under a different light.[72] 'Part two' of the ILC's MFN study did not propose a new convention; it was from the outset cast as an exercise intended to provide 'guidance to States in their negotiation of agreements with MFN clauses and to arbitrators interpreting investment agreements.'[73] The second part of this study focused on investment treaties and sought to bring a degree of systematicity to the developments in trade and investment law of the 1980s and 1990s. These developments included the use of MFN clauses in bilateral investment treaties and the growing (and

[68] ibid., Commentary to Art. 24, 67-68, paras. 11-13.

[69] Statement by Mr. Buhl, *supra* note 19, para. 17.

[70] See UNGA Official Records, Sixth Committee, Summary record of the 33rd meeting (27 October 1978) UN Doc. A/C.6/33/SR.33, Statement by Mr. Hilger (Federal Republic of Germany) speaking on behalf of the Acting President of the European Economic Community, para. 30.

[71] UNGA Official Records, Sixth Committee, Summary record of the 35th meeting (28 November 1980) UN Doc. A/C.6/35/SR.66, Statement by Mr. Anderson (United Kingdom) speaking on behalf of the member States of the European Community, para. 1; ibid., Statement by Mr. Ripert (France), paras. 22-23: 'He affirmed that France would not under any circumstances accept a text on the most-favoured-nation clause, whatever its legal form, that was incompatible with its participation in the European Economic Community or with the Community's competence on the matter.'

[72] UNGA Res. 63/123 (11 December 2008) UN Doc. A/RES/63/123, para. 6. See ILC, Analytical Guide to the Work of the International Law Commission: Most-favoured-nation clause (Part Two), available at <https://legal.un.org/ilc/guide/1_3_part_two.shtml>.

[73] ILC, 'Most-favoured-nation clause: report of the Working Group' (2007) UN Doc. A/CN.4/L.719, para. 38.

often contradictory) case law of international adjudicative bodies in this respect.[74] The project resulted in a report and five summary conclusions adopted by the ILC in 2015.[75] The framing of the ILC's second take on the topic facilitated its general acceptance by most states, including EU member states.[76]

The EU, specifically, did not submit statements on this project. This absence may be simply the result of an internal decision to accord greater priority to other ILC projects running in parallel to this study, including the ARIO, the draft articles on the expulsion of aliens, and the draft articles the protection of persons in the event of disasters, with respect to which the legal service prepared several statements.[77] The ILC's decision to frame 'part two' of its MFN study as a report rather than a set of draft articles may have also contributed to EU legal advisers' perception of the exercise as one of lesser relevance for (or interference with) the EU and its legal order. Importantly, EU powers on foreign direct investment were only introduced into the EU Treaties in 2009, with some limitations.[78] These factors, possibly also influenced by the limited success of EU claims in the MFN debates of the 1970s, might explain why the legal service refrained from further commenting on this topic.

5. CONCLUSIONS AND CONTINUITY

The EU's engagement with the ILC was once described by an EU legal adviser as, in essence, a set of 'diplomatic discussions about legal matters.'[79] This paper sought to demonstrate how these diplomatic discussions form important records of the EU's otherwise elusive interpretation of existing or emerging of rules of (customary) international law and of the interpretative techniques relied on by EU legal advisers in this respect.

---

[74] ibid., para. 16.

[75] Report of the International Law Commission on the work of its sixty-seventh session, Vol. II, part 2, *Yearbook of the ILC* 2015, at 16, para. 42; ibid., Annex, at 91.

[76] Several EU member states welcomed the ILC's decision to reintroduce the topic in its long-term programme of work. Some cautioned, however, against a 'one-size-fits-all' approach to the interpretation of MFN clauses or expressed doubts about whether the topic was 'ripe for codification.' See UNGA Official Records, Sixth Committee, Summary record of the 18th meeting (18 November 2015) UN Doc. A/C.6/70/SR.18, Statement by Mr. Macleod (United Kingdom) para. 9; UNGA Official Records, Sixth Committee, Summary record of the 19th meeting (20 November 2015) UN Doc. A/C.6/70/SR.19, Statement by Ms. Faden (Portugal) para. 23; cf. UNGA Official Records, Sixth Committee, Summary record of the 20th meeting (13 November 2015) UN Doc. A/C.6/70/SR.20, Statement by Mr Alabrune (France) para. 14.

[77] See *supra* note 17; Draft Articles on the Expulsion of Aliens, Vol. II, part 2, *Yearbook of the ILC* 2014, at 24, para. 45.

[78] With the entry into force of the Treaty of Lisbon, the EU acquired exclusive competence on matters of foreign direct investment (Art. 207 TFEU). With respect to indirect investments, the EU's competence is shared with its member states. See ECJ, Opinion 2/15 [2017] ECLI:EU:C:2017:376, paras. 82, 238, 242; A. Bimopoulos, *EU Foreign Investment Law* (Oxford: Oxford University Press 2012) at 18.

[79] Interview of 27 March 2020 (on file with the author).

The MFN debates stand out as useful illustrations of this process for two reasons. First, they correspond to the first instance of Community legal advisers' engagement with the ILC's work, in full exercise of the EEC's newly acquired UNGA observer status. This engagement was couched against a specific historical context of decolonisation, attempts to reformulate the economic world order, and growing economic integration. As such, these statements shed light on how Community lawyers positioned the EEC in these debates whilst seeking to preserve the economic interests of EEC member states. Second, this engagement offers unique insights into the arguments and interpretative techniques relied on by Community legal advisers to advance specific readings of (emerging) rules of customary international law. With respect to customs-union issue, specifically, the Community's statements transpire legal advisers' attempts to invoke teleological and systemic arguments, as well as *ad absurdum* claims, to contest interpretations of customary international law which ran contrary to the process of Community integration.

While perhaps far from successful as far of having the Community's views reflected in ILC final texts is concerned, the interpretations advanced by EEC lawyers did leave a mark in these debates, and in these rules. This was the case of Article 1 (scope), the ILC's reliance on Community practice in formulating Article 24, and the draft's final concession that the customs union exception debate was to remain unsettled. Community lawyers participation in these debates also set the stage for a now established practice of EU engagement with the work of the ILC which shares several properties with the EU statements that followed.[80] The effects of integration on whether and how the EU contributes to the (trans)formation of international law have remained a constant feature in the EU's engagement with the ILC, and one that long precedes the ILC debates on the identification of customary international law.[81] The same can be said of EU lawyers' defence of the so-called 'essential features' of EU integration and the ILC's reliance on, and approach to, EU practices in the codification and progressive development of international law.[82]

---

[80] See *supra* note 6.

[81] See ILC, 'Fourth Report on the identification of customary international law by Sir Michael Wood, Special Rapporteur' (2016) UN Doc. A/CN.4/695 and Add.1, para. 20; Commentary to conclusion 4, Draft Conclusions, *supra* note 3, at 97, para. 6.

[82] T. Cabrita, 'The Integration Paradox: An ILC View on the EU Contribution to the Codification and Development of Rules of General International Law', 5 *Europe and the World: A Law Review* 2021.

THE EU AND THE INTERPRETATION OF THE CUSTOMARY INTERNATIONAL LAW OF THE SEA: AFFIRMATION AND DEVELOPMENT OF THE RELEVANT RULES

Efthymios D. Papastavridis*

1. INTRODUCTION

On 1 April 1998, the European Union (EU) confirmed formally its participation in the 1982 UN Convention on the Law of the Sea (UNCLOS),[1] making a declaration of competence over matters regulated by that Convention, including those concerning the conservation and management of fishing resources, the protection and preservation of the marine environment, transport, safety of shipping, and customs.[2] The EU stated that the declaration will be completed or amended if necessary.[3] To date, no such formal amendment has been made or requested so far.[4]

However, the EU has been increasingly involved in activities in the maritime domain, whose legal framework falls beyond the scope of the above declaration. Suffice it to mention the three EU Common Defense and Security Policy (CDSP)[5]

---

* Postdoctoral Researcher and Teaching Fellow, Faculty of Law, National and Kapodistrian University of Athens; Visiting Lecturer, Faculty of Law, University of Oxford; Expert Consultant, UN Office on Drugs and Crime Global Maritime Crime Programme. This paper is a revised version of a paper presented at the EUDIPLO and TRICI-Law Workshop on 'The European Union and the Interpretation of Customary International Law' held on 28 April 2023 at the University of Groningen, and organized b Professor Panos Merkouris and Professor Ramses A. Wessel. The author would like to express his gratitude to Professor Merkouris for his valuable comments on a previous draft. The research project was supported by the Hellenic Foundation for Research and Innovation (H. F. R. I.) under the '2nd Call for H. F. R. I. Research Projects to support Post-Doctoral Researchers' (Project Number: 00465).

[1] United Nations Convention on the Law of the Sea 1982, 1833 *UNTS* 3 (UNCLOS). See specifically Annex IX, Art. 3 UNCLOS concerning the accession to or confirmation of participation of an international organisation in UNCLOS.

[2] Annex IX, Art. 2 ibid. stipulates that the participation of an international organisation shall be subject to a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to the organisation by its member states. For the relevant statement of the EU, see <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec>.

[3] According to the EU, '[t]he exercise of the competence that the Member States have transferred to the Community under the Treaties is, by its very nature, subject to continuous development. As a result, the Community reserves the right to make new declarations at a later date', ibid.

[4] See <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#1>. For the role of the EU in maritime institutions, see C. Cinelli, 'Law of the Sea Framework: Is EU Engagement a *Sine Qua Non* for Influence?', in R. A. Wessel and J. Odermatt (eds.), *Research Handbook on the European Union and International Organizations* (Cheltenham: Edward Elgar Publishing 2019), 462-482.

[5] Since the first CSDP missions and operations were launched back in 2003, the EU has undertaken over 37 overseas operations, using civilian and military missions and operations in several countries in Europe, Africa and Asia. Today (September 2023) there are 21 ongoing CSDP missions and operations, 12 of which are civilian, and 9 military. As of November 2023, there are twenty-three (23) ongoing missions, both military (7) and civilian (16); see <https://www.eeas.eu-

naval missions: i) EUNAVFOR Atalanta initially with the view to curbing piracy and armed robbery off Somalia, and currently, to contributing to the maritime security in the North Western Indian Ocean;[6] ii) EUNAVFOR MED Sofia, launched in the Southern Central Mediterranean with the aim of suppressing smuggling of migrants from Libya,[7] concluded in March 2020;[8] and iii) EUNAVFOR MED Irini, launched on 31 March 2020, with its main task being the implementation of the UN arms embargo on Libya.[9]

In addition, reference should be made to the activity of the European Border and Coast Guard Agency (FRONTEX) in the maritime domain. FRONTEX provides technical and operational assistance to EU member states through joint operations and rapid border interventions in EU borders, including maritime borders, as well as technical and operational assistance in the support of search and rescue operations at sea.[10] FRONTEX maritime operations are governed, amongst others, by the EU Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by FRONTEX.[11]

---

ropa.eu/eeas/missions-and-operations_en>. For a comprehensive review of CDSP missions see F. Naert, *International Law Aspects of the EU's Security and Defence Policy* (Antwerp: Intersentia 2010); P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford: Oxford University Press 2013); S. Blockman and P. Koutrakos (eds.), *Research Handbook on the EU's Common Foreign and Security Policy* (Cheltenham: Edward Elgar 2018).

[6] The European Naval Force Somalia Operation Atalanta is a counter-piracy military operation conducted at sea off the Horn of Africa and in the Western Indian Ocean. It was the first Maritime CSDP operation of the EU in which individual member states united together under the EU flag. See EU, Council Joint Action 2008/851/CFSP of November 10, 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia, *OJ* [2008] L 301, 31-37 (EU). On the legal basis of the Operation, and its everyday activities see <https://eunavfor.eu/>. See also E. Papastavridis, '*EUNAVOR Operation Atalanta* off Somalia: The EU in Unchartered Legal Waters?', 64 *International and Comparative Law Quarterly* 2015, 1-36.

[7] Operation Sophia was part of the European Union (EU)'s so-called Comprehensive Approach to the refugee crisis in Europe in that period, which was first conceived on 23 April 2015 by the European Council after approximately 800 'boat people' losing their lives in the Mediterranean Sea. It was based on Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) *OJ* [2015] L 122/31. The EU's aim through the Operation was to board vessels to search, divert or even seize them, if they are suspected of smuggling or trafficking persons towards the EU, thus attempting to protect EU internal and external security to the greatest possible extent. See, *inter alia*, R.-L. Boșilcă, *et al.*, 'Copying in EU security and defence policies: the case of EUNAVFOR MED Operation Sophia', 30 *European Security* 2021, 218-236; G. Butler and M. Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea', 86 *Nordic Journal of International Law* 2015, 235-259.

[8] Council Decision (CFSP) 2020/471 of 31 March 2020 repealing Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) *OJ* [2020] L 101/3.

[9] See Council Decision (CFSP) CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) *OJ* [2020] L 101/4. For more information see <https://www.operationirini.eu/>

[10] See <https://frontex.europa.eu/what-we-do/operations/how-we-work/operational-cycle/>. Currently, FRONTEX is coordinating maritime operations in Cyprus, Greece, Italy, Spain and the Channel (UK-France); see <https://frontex.europa.eu/what-we-do/operations/operations/>.

[11] Regulation (EU) No 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex, *OJ* [2014] L 189/93 (EU Reg 656/2014).

It is readily apparent that all the above-mentioned operations concern activities, like piracy, maritime law enforcement, or search and rescue at sea, that are not mentioned in the 1998 EU Declaration of Competence,[12] i.e., they concern 'matters relating to which competence has [not] been transferred to it by its member States which are Parties to this Convention.'[13] Thus, EU is not party to UNCLOS in respect of such activities. As set out under Article 4(2) of Annex IX of UNCLOS, '[a]n international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in article 5 of this Annex.'[14] This by necessary implication means that in relation to such activities the EU is subjected exclusively to the relevant rules of customary international law,[15] as reflected in UNCLOS,[16] as well as other applicable rules of international and EU law.[17]

In light of the foregoing, it is the purpose of this paper to explore how the EU interprets the above-mentioned rules of customary law of the sea and assess the input that that such interpretation may have in the clarification, development, and/or even possible modification of the law of the sea. Needless to say, an exhaustive treatment of each and every activity that the EU is involved in, and which is subject to customary law of the sea, goes beyond the scope of this paper. Rather, its focus will center on certain activities or examples which either affirm contemporary customary international law or contribute to its development. In scrutinizing these examples, the paper will also try to identify which rules of interpretation of customary international law does the EU make use of.[18]

Accordingly, the paper unfolds as follows: first, the rules concerning law enforcement at sea included in the EU Regulation 656/2014 are discussed, which either affirm the content of the relevant rule of customary international law or mark another occasion of ambivalent statement in this regard (Section 2). Next, the rules on search and rescue, in particular the legal concepts of distress and place of safety under the said Regulation, are explored as an illustration of progressive development of

---

[12] See *supra* note 2.

[13] See Annex IV Art. 4(2) UNCLOS.

[14] Art. 4(2) ibid.

[15] See, *inter alia*, ECJ, Case C-286/90, *Anklagemyndigheden* v. *Poulsen and Diva* [1992] *ECR* I-6019, paras. 9-10; ECJ, Case C-162/96, *A Racke GmbH* v. *Hauptzollamt Mainz* [1998] *ECR* I-3655, paras. 45–46; ECJ, Case C-366/10, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate Change* [2011] *ECR* I-13755, para. 101. See also A. Giannelli, 'Customary International Law in the European Union', in E. Cannizzaro, *et al*. (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff 2012) at 93.

[16] UNCLOS provisions included in pt. VII ('High Seas'), like those on piracy, search and rescue, and generally law enforcement, have been based on the 1958 Geneva Convention on the High Seas, whose preamble states that the parties drafted the Convention '[d]esiring to codify the rules of international law relating to the high seas'; Convention on the High Seas 1958, 450 *UNTS* 82. See also, regarding piracy, Guilfoyle, 'Article 100', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C.H. Beck/Hart/Nomos, 2017), at 726.

[17] See, e.g., in relation to EU Operation Atalanta the relevant analysis of applicable law by E. Papastavridis, '*EUNAVOR Operation Atalanta* … ', *supra* note 6, 14-18.

[18] On the rules of the interpretation of customary law see, *inter alia*, P. Merkouris, 'Interpreting Customary International Law: You'll Never Walk Alone' in P. Merkouris, *et al.* (eds.), *The Theory, Practice and Interpretation of Customary International Law* (Cambridge: Cambridge University Press 2022), 347-369.

customary international law (Section 3). Finally, the practice of handover of suspected pirates in the context of EU Operation Atalanta is assessed as another instance of development of customary international law (Section 4). Section 5 concludes.

2. LAW ENFORCEMENT AT SEA UNDER REGULATION 656/2014

According to its Preamble, the main objective of the Regulation is to 'adopt specific rules for the surveillance of the sea borders by border guards operating under the coordination of the Agency,'[19] which would serve the broader objective of Union policy in the field of the Union external borders, namely 'to ensure the efficient monitoring of the crossing of external borders including through border surveillance, while contributing to ensuring the protection and saving of lives.'[20] Regulation 656/2014 replaced Council Decision 2010/252/EU which was annulled by the Court of Justice of the European Union (the Court) by its Judgment of 5 September 2012 in Case C-355/10.[21]

Interestingly for present purposes, it is acknowledged that '[w]hen coordinating border surveillance operations at sea, the Agency [FRONTEX] should fulfil its tasks in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union (the Charter), *and relevant international law, in particular that referred to in recital 8*.'[22] It comes as no surprise that 'the relevant international law' referred to in recital 8 includes UNCLOS and other IMO Conventions.[23] Since there is no formal adherence of the EU to the UNCLOS in respect of matters concerning borders' surveillance,[24] the relevant international law is inescapably that of customary international law.

The main provisions of the EU Reg 656/2014 concern the conduct of the maritime law enforcement in the various maritime zones of the coastal member states and on the high seas in the context of FRONTEX-coordinated operations,[25] which will be addressed in turn.

---

[19] EU Reg 656/2014, *supra* note 11, Preamble, recital 20.

[20] ibid., recital 1.

[21] See ibid., recital 7. Regarding the 2010 Decision, see V. Moreno-Law, 'The EU Regime on Interdiction, Search and Rescue, and Disembarkation: The Frontex Guidelines for Intervention at Sea' 25 *International Journal of Marine and Coastal Law* 2010, 621-635.

[22] EU Reg 656/2014, *supra* note 11, Preamble, recital 9 (emphasis added).

[23] 'During border surveillance operations at sea, Member States should respect their respective obligations under international law, in particular the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air…' (ibid., recital 8).

[24] For UNCLOS, see Declaration of Competence, *supra* note 2. Notably, EU is not a party to any IMO Convention.

[25] See generally on enforcement jurisdiction or interception of vessels at sea, I. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels', 35 *International and Comparative Law Quarterly* 1986, 320-43; E. Papastavridis, *Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford: Hart Publishing 2013); D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press 2009).

2.1. **Territorial sea**

First, in respect of interdiction in the territorial sea,[26] Article 6 of EU Reg 656/2014 is very cautious to stipulate that coastal states may either seize vessels smuggling migrants or order them to alter their course outside of or towards a destination other than the territorial sea or the contiguous zone.[27] This is in accordance with the enforcement powers that the coastal State enjoys in its territorial sea, which range from measures aiming to prevent a passage which is 'non-innocent,'[28] such as escorting the suspect vessel outside the territorial sea, to further enforcement measures, like diversion and arrest.[29]

In acknowledging that the UNCLOS is not conclusive in relation to which measures the coastal states may take in case of a non-innocent passage,[30] the EU leaves open the possibility for both prevention and suppression of the activity concerned (here: smuggling of migrants). The interpretation of this rule by the EU appears to be based on the practice of the (coastal) states that do not confine themselves in taking only measures to prevent a passage which is non-innocent, but often assert the full gamut of their enforcement powers in accordance also with the applicable rules of their national law.[31] Hence, the EU contributes to the identification as well as further affirmation of the relevant rule of customary international law, namely that by virtue of their sovereignty in their territorial sea coastal states may take whatever enforcement measures they may see fit in accordance with international and national law.

2.2. **Contiguous zone**

Similarly to the territorial sea, Article 8(1) of the EU Reg 656/2014 sets forth that the coastal Member State, in whose contiguous zone[32] the vessel suspected of

[26] The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea, which is up to a limit not exceeding 12 nautical miles, measured from baselines. The sovereignty of the coastal State extends to both the airspace above and seabed and subsoil below the territorial sea; see Art. 2 UNCLOS.

[27] 'If evidence confirming that suspicion is found, that host Member State or neighbouring participating Member State may authorise the participating units to take one or more of the following measures: (a) seizing the vessel and apprehending persons on board; (b) ordering the vessel to alter its course outside of or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby until it is confirmed that the vessel is keeping to that given course; (c) conducting the vessel or persons on board to the coastal Member State in accordance with the operational plan' (EU Reg 656/2014, *supra* note 11, Art. 6(2)).

[28] See Art. 25(1) UNCLOS ('the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent') and commentary in R. Barnes, 'Article 25', in A. Proelss, *UNCLOS Commentary, supra* note 16, at 224. Any passage violating the immigration laws and regulations of the coastal State concerned would be considered as 'non-innocent'; see Art. 19(2)(g) UNCLOS.

[29] See, *inter alia*, *Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe), Case No. 2014-07 Award of 5 September 2016*, paras. 234-236, 294-310; I. Shearer, *supra* note 25, at 326.

[30] As stated, the only relevant provision is that of Art. 25(1) UNCLOS, quoted at *supra* note 28.

[31] See *supra* note 29.

[32] The contiguous zone is the maritime zone contiguous to the territorial sea which may not

being engaged in smuggling of migrants is located, has the power, after boarding the vessel, either to order it to leave its contiguous zone or to seize it and apprehend the persons on board.[33] This marks a rather ambivalent interpretation of the relevant provision of customary law, as reflected in Article 33 UNCLOS,[34] since it leaves obscure whether the authority to seize suspect vessels is available only with respect to outbound vessels, i.e., vessels having left the territory or territorial sea of the coastal State concerned, or it is also extended to inbound vessels, i.e., vessels not having yet entered the territorial sea of that State.

There are two views in this regard: on the one hand, a restrictive one which confines the scope of application of Article 33(1)(b) ('jurisdiction to punish') to outgoing ships.

> Since 'no offence against the laws of the coastal State is actually being committed at the time' of an intervention by costal State authorities, to subject incoming maritime traffic heading towards the territorial sea to punitive measures (arrest, fines, imprisonment etc.) would, according to this view, be in blatant disregard of the clear wording of Art. 33 (1)(b) [UNCLOS].[35]

On the other hand, there is a more liberal interpretation of this provision, advocating for

> the application of Art. 33 (1)(b) to outgoing and incoming ships alike, arguing both with the legislative history and a long-standing State practice, demonstrating a clear tendency towards the equal treatment of inbound and outbound traffic.[36]

It appears that the EU's interpretation here leans, albeit not unequivocally, in favor of the liberal view.[37] It thus affirms that the practice of coastal states, including that of EU member states, is far from clear in this regard. Notwithstanding this divergent State practice, the present author is of the view that the restrictive view holds more water not only in light of the proper interpretation of the relevant

extend beyond 24 nautical miles from the baselines and in which coastal states may 'exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea', see Art. 33 UNCLOS.

[33] 'In the contiguous zone of the host Member State or of a neighbouring participating Member State, the measures laid down in paragraphs 1 and 2 of Article 6 shall be taken in accordance with those paragraphs and with paragraphs 3 and 4 thereof. Any authorisation referred to in Article 6(1) and (2) may only be given for measures that are necessary to prevent the infringement of relevant laws and regulations within that Member State's territory or territorial sea' (EU Reg 656/2014, *supra* note 11, Art. 8(1)).

[34] Art. 33 reflects customary international law; see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), ICJ Reports* 2022, para. 155 (*Alleged Violations*).

[35] D.-E. Khan, 'Article 33', in A. Proelss, *UNCLOS Commentary, supra* note 16, 265.

[36] ibid. See also S. Oda, 'The Concept of the Contiguous Zone', 11 *International and Comparative Law Quarterly* 1962, at 131 *et seq.*

[37] This can be inferred from EU Reg 656/2014, *supra* note 11, Art. 8(1) *in fine*: 'Any authorisation referred to in Article 6(1) and (2) may only be given for measures that are necessary to *prevent the infringement* of relevant laws and regulations within that Member State's territory or territorial sea' (emphasis added). The term 'prevent' implies that 'seizure of the vessel and apprehension' may also apply to incoming vessels.

provision of UNCLOS and customary law,[38] but also in light of the restrictive interpretation that the ICJ accorded to the concept of the contiguous zone in the *Alleged Violations case* (2022), opining that the customary law is identical to Article 33 UNCLOS.[39]

2.3. **High seas-stateless vessels.**

On the high seas, the EU, as anticipated, pays tribute to the principle of exclusive flag State jurisdiction,[40] and requires the explicit consent of the flag State for any boarding operation.[41] Of particular interest is, however, the provision concerning stateless vessels, by which the EU Reg 656/2014 confirms the prevailing uncertainty concerning the treatment of such vessels, which is a source of recurring controversy among states and legal scholars. Stateless vessels are vessels which, as a matter of international law, have no nationality. To such ships are assimilated those that sail under two or more flags, using them according to convenience (Article 92(2) UNCLOS). By virtue of Article 110(1)(d) UNCLOS, warships or other duly authorised vessels of any State may exercise the right of visit on these vessels.[42]

While the right of visit over such vessels is uncontroversial, UNCLOS is silent as to whether a stateless vessel can be seized by the visiting warship and subjected to the law of its flag State.[43] There are two opposing views. The first is that a stateless vessel may be arrested by any State, which may subject it completely to its laws.[44] According to this view, ships without nationality lose this protection of the law with respect to boarding and seizure on the high seas,

[38] As D.-E. Khan rightly avers, 'If one takes the basic rules of interpretation seriously (Art. 31 (1) VCLT), it seems indeed difficult to extend para. (b) to ships not yet having committed any infringements within the meaning of that provision' (*supra* note 35, at 266).

[39] See *Alleged Violations*, *supra* note 34, para. 155.

[40] 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas' (Art. 92 (1) UNCLOS). See also commentary by D. Guilfoyle, 'Article 92', in A. Proelss, *UNCLOS Commentary, supra* note 16, 700-704.

[41] See e.g., EU Reg 656/2014, *supra* note 11, Art. 7(10): 'Pending or in the absence of authorisation of the flag State, the vessel shall be surveyed at a prudent distance. No other measures shall be taken without the express authorisation of the flag State, except those necessary to relieve imminent danger to the lives of persons or those measures which derive from relevant bilateral or multilateral agreements'.

[42] The relevant provision was inserted for the first time in 1976 in the Revised Single Negotiating Text (UN Doc. A/CONF.62/WP.8/Part II, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. IV, Art. 96, at 166), reprinted in R. Platzöder, *The UN Convention on the Law of the Sea* (London: Oceana Publications 1983), at 129. It should be noted that the insertion of the stateless vessels did not encounter any difficulties or objections; see also M. Nordquist, *et al*. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Vol. 3, Martinus Nijhoff 1985), at 240.

[43] See D. Guilfoyle, 'Article 110', in A. Proelss, *UNCLOS Commentary, supra* note 16, at 771.

[44] This is in accord with the practice of the US and UK that a stateless vessel may be seized by any State as it enjoys the protection of none; see: H. Lauterpacht, *L. Oppenheim's International Law* (London: 7th edn, Longmans 1948), at 546. See also *United States* v. *Marino-Garcia*, 679 F.2 d 1373 (11th Cir. 1982) (US); *Naim Molvan* v. *Attorney General Attorney General* for *Palestine (The 'Asya')* [1948] AC 351 (UK).

because otherwise these ships would be immune from interference on the high seas.[45] The second, and in view of the present author, the one on a stronger legal footing, holds that since the right to visit such vessels does not *ipso facto* entail the full extension of the jurisdictional powers of the boarding states, a further jurisdictional nexus is required in order the boarding State to extend its laws to those on board a stateless ship.[46]

In view of this predicament, there is a common trend among international conventions dealing with maritime crimes to include a generic provision to this effect, namely that further measures vis-à-vis stateless vessels may be taken in accordance with the relevant international and national law.[47] The EU Reg 656/2014 confirms this trend, setting forth that: '[w]here there are reasonable grounds to suspect that a stateless vessel is engaged in the smuggling of migrants by sea, the participating unit may board and search the vessel with a view to verifying its statelessness. If evidence confirming that suspicion is found, the participating unit shall inform the host Member State which may take, directly or with the assistance of the Member State to whom the participating unit belongs, *further appropriate measures as laid down in paragraphs 1 and 2 [e.g. seizure or order the vessel to leave] in accordance with national and international law*.'[48]

It thus falls upon each Member State, depending on its national legislation, to decide on *ad hoc* basis what measures would take in respect of persons found on board stateless vessels. Should the reference to 'national and international law' in the EU Reg 656/2014 be taken as underscoring the need for an additional jurisdictional nexus over the stateless vessel concerned, the EU seems to align itself with the second view, as advocated above, concerning the treatment of stateless vessels post-boarding. This undoubtedly marks a positive contribution by the EU to the better understanding of the relevant customary international law.

3. SEARCH AND RESCUE REGIME

EU Reg 656/2014 contains also very significant rules concerning search and

[45] This was also the opinion of the Special Rapporteur of the ILC, J. François, in his initial Report on the Regime of the High Seas, Vol. II, part 2, *Yearbook of the ILC* 1950, at 39. See generally A. Anderson, 'Jurisdiction over Stateless Vessels on the High Seas: An Appraisal under Domestic and International Law' 13 *Journal of Maritime Law and Commerce* 1982, 323–342

[46] See e.g., R. Churchill, *et al.*, *The Law of the Sea* (Manchester: 4th edn, Manchester University Press 2022), at 405; E. Papastavridis, 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas', 25 *International Journal of Marine and Coastal Law* 2010, at 557.

[47] See, e.g., Art. 8(7) Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2241 *UNTS* 507: 'A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall t*ake appropriate measures in accordance with relevant domestic and international law*' (emphasis added).

[48] EU Reg 656/2014, *supra* note 11, Art. 7(11) (emphasis added).

rescue at sea, which are binding on the EU as customary international law, since they were not included in the 1998 Declaration of Competence.[49] The most significant aspects of these rules concern first, the concept of 'distress,' which has attained even more prominence in view of various deadly shipwrecks in the Mediterranean Sea,[50] and second, the concept of 'place of safety.'

3.1. **'Distress'**

The duty to assist persons in distress at sea is a long-established rule of customary international law. It extends to both vessels and coastal states in the vicinity, and all persons, including irregular maritime migrants, remain protected. The duty to rescue has been codified in the UNCLOS, which prescribes relevant duties for both the flag and the coastal states. First, with regard to flag states, Article 98(1) UNCLOS provides that:

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers … to render assistance to any person found at sea in danger of being lost … and to proceed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may be reasonably be expected of him.

From a *prima facie* reading of Article 98(1) UNCLOS it readily appears that the responsibility to rescue rests initially with the master of the rescuing ship and is triggered in case of 'distress,' which, however, is not defined by UNCLOS. It has been defined, though, in paragraph 1.3.11 of the Annex of the 1979 International Convention on Maritime Search and Rescue (SAR Convention) as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.'[51]

Further clarifications have been provided in relevant jurisprudence and authoritative commentaries. For example, in the case of *The Eleanor* it was held that distress must entail urgency, but that 'there need not be immediate physical necessity.'[52] Subsequently, the decision on the *Kate A. Hoff* established that it is not required for the vessel to be 'dashed against the rocks' before a claim of distress can be invoked.[53] The tribunal in the *Rainbow Warrior* arbitration appeared to take a broader view of the circumstances justifying a plea of distress,

[49] See *supra* note 2.

[50] See, e.g., on the very recent tragic shipwreck off Pylos, Greece, 'Tracing a tragedy: How Hundreds of Migrants Drowned on Greece's Watch', *The Washington Post* (13 June 2023), available at <https://www.washingtonpost.com/world/interactive/2023/greece-migrant-boat-coast-guard/>.

[51] See Annex, para. 1.3.11 International Convention on Maritime Search and Rescue 1979, 1405 *UNTS* 118 (SAR).

[52] *The Eleanor* (1809) Edw. 135, 159–160. See also the Irish High Court, *ACT Shipping (Pte) Ltd* v. *Minister for the Marine and others* (The MV Toledo) [1995] 2 ILRM 30, 48-49.

[53] *Kate A. Hoff, Administratrix of the Estate of Samuel B. Allisson, Deceased (U.S.A.)* v. *United Mexican States* (1929) Vol. 4, *RIAA*, 444, reprinted in 23 *American Journal of International Law* 1929, 860.

apparently accepting that a serious health risk would suffice.[54] The International Law Commission (ILC) has confirmed that a situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned.'[55]

The existence of 'distress' is also a key concept for the respective obligations of the coastal states, whose obligations in this respect are set out by Article 98(2) of UNCLOS,[56] the SOLAS Convention,[57] but mainly by the 1979 SAR Convention. In particular, in case of a distress situation, as defined under paragraph 1.3.13 of the Annex,[58] the coastal State is under a twofold obligation: on the one hand, it 'shall, so far as possible, provide adequate means of locating and rescuing such persons'[59] and coordinate search and rescue activities, and on the other, cooperate with other states to this end.[60] As regards the former obligation, it is submitted that the coastal states have to discharge 'best efforts obligations,' to use James Crawford's terminology,[61] namely to deploy all adequate measures so as to provide rescue services. This means that if the persons in distress are not saved, notwithstanding these 'best efforts,' the coastal State concerned does not automatically or *ipso jure* incur responsibility.

Against this backdrop, the EU in Reg 656/2014 offers a progressive version of what 'distress' means in the context of FRONTEX-coordinated operations. Article 9(2) reiterates the definition of 'distress' contained in SAR Convention,[62] but adds, very interestingly, the following:

---

[54] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* (1990) Vol. XX, *RIAA*, 215, para. 79.

[55] See Draft Articles on State Responsibility, Vol. II, *Yearbook of the ILC* 1979, at 135, para. 10. However, in the Commentary to Art. 24 of the ILC Articles on 'distress' as a circumstance precluding wrongfulness, it is stated that 'article 24 is limited to cases where human life is at stake... [t]he problem with extending article 24 to less than life-threatening situations is where to place any lower limit' (Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Vol. II, part 2, *Yearbook of the ILC* 2001, at 79).

[56] 'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose' (Art. 98(2) UNCLOS).

[57] See ch. V International Convention for the Safety of Life at Sea 1974, 1184 *UNTS* 277 (SOLAS).

[58] See s*upra* note 51 and accompanying text.

[59] Ch. V, reg. 7 SOLAS.

[60] See Annex 1, ch. 3 SAR.

[61] As summarized by J. Crawford, 'obligations of result involve in some measures a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one's power to achieve a result, but without ultimate commitment' (Second report on State responsibility, by Mr. James Crawford, Special Rapporteur, Vol. II, part 1, *Yearbook of the ILC* 1999, para. 57).

[62] 'A vessel or the persons on board shall be considered to be in a phase of distress in particular: (i) when positive information is received that a person or a vessel is in danger and in need of immediate assistance; or (ii) when, following a phase of alert, further unsuccessful attempts to establish contact with a person or a vessel and more widespread unsuccessful inquiries point to the probability that a distress situation exists; or (iii) when information is received which indicates that the operating efficiency of a vessel has been impaired to the extent that a distress situation is likely' (EU Reg 656/2014, *supra* note 11, Art. 9(2)(e)).

> Participating units shall, for the purpose of considering whether the vessel is in a phase of uncertainty, alert or distress, take into account and transmit all relevant information and observations to the responsible Rescue Coordination Centre [RCC] including on: (i) the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation; (ii) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (iii) the number of persons on board in relation to the type and condition of the vessel; (iv) the availability of necessary supplies such as fuel, water and food to reach a shore; (v) the presence of qualified crew and command of the vessel; (vi) the availability and capability of safety, navigation and communication equipment; vii) the presence of persons on board in urgent need of medical assistance; (viii) the presence of deceased persons on board; (ix) the presence of pregnant women or of children on board; (x) the weather and sea conditions, including weather and marine forecasts.[63]

It follows that in the context of FRONTEX operations, the existence of a situation of distress is to be determined by the responsible RCC not only on the basis of an actual request for assistance, but also in the light of numerous other pertinent factors. Thus, under EU Reg 656/2014 the determination of 'distress' becomes a matter of a multifaceted, yet more objective, assessment. Obviously, all the above-mentioned factors are drawn from the everyday practice of SAR activities, specifically in the Mediterranean Sea, bringing thus the concept of 'distress' in line with contemporary exigencies.

It readily appears that the EU interprets 'distress' in a clearly evolutive manner, taking into account the 'subsequent state practice' (subsequent at least post-SAR Convention) but also the object and purpose of the relevant customary law, which manifestly is the rescue of people, i.e., of human life at sea. In taking into account all the above-mentioned relevant factors, the EU's approach towards the issue at hand, i.e., what qualifies as 'distress,' conduces to the progressive development of customary international law on SAR at sea.

3.2. **'The place of safety'**

In case the rescue operation is successful, the coastal State is under an additional obligation to ensure cooperation and coordination such that the recuing ship's master is allowed to disembark the rescued persons at a place of safety. In May 2004, the SAR and SOLAS Conventions were amended to impose additional obligations upon the State parties, including an obligation on states to 'cooperate and coordinate' to ensure that ships' masters are allowed to disembark rescued persons to a 'place of safety.'[64] As recognized by the IMO Maritime Safety

[63] ibid., Art. 9(2)(f).

[64] Amendments to ch. 3, reg. 33 SOLAS: IMO Res. MSC.155(78) (20 May 2004) Doc. 78/26/ Add.1, Annex 5. The amendments entered into force 1 January 2006. They are binding upon all parties to the SOLAS and SAR Conventions, save Malta, which opted out and is thus not bound; see IMO, 'Status of IMO Treaties' (1 December 2020), at 42, available at <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20-%202020.pdf>

Committee, the intent of the amendments is to ensure that a place of safety is provided within a reasonable time. The primary responsibility to provide a place of safety or to ensure that a place of safety is provided rests with the Government responsible for the SAR region in which the survivors were recovered.[65]

The term 'place of safety' is defined neither by the SOLAS nor by the SAR Convention. The 2004 IMO *Guidelines on the Treatment of Persons Rescued at Sea*, define a 'place of safety' as any place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.'[66] Whilst these guidelines are not themselves binding, they provide an important means for interpreting the obligations set forth in UNCLOS, SOLAS and the SAR Convention, since they may be considered as subsequent practice under Article 31(3)(a) of the Vienna Convention on the Law of Treaties of 1969.[67]

EU Reg 656/2014 adds another important tenet in the interpretation of the 'place of safety' under the relevant customary law, that is, the human rights dimension. Indeed, in Article 2(12) of the EU Reg 656/2014 defines the 'place of safety' as follows:

> a location where rescue operations are considered to terminate and where the survivors' safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next destination or final destination, *taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement*.[68]

Thus, the principle of *non-refoulement*, i.e., the prohibition of returning people in territories where they may face persecution, torture or other degrading and inhumane treatment,[69] and other fundamental human rights are acknowledged as determining factors in the identification of the 'place of safety' in the context of FRONTEX-coordinated operations. To put this in a practical context, even if, for example, Libya is the closest 'place of safety' in terms of the above-mentioned IMO definition, it would, arguably, fall short of being considered a 'place of

---

[65] See Art. 4.1-1 SOLAS; Annex, para. 3.1.9 SAR.

[66] IMO Res. MSC.167(78) (20 May 2004) Doc. 78/26/Add.2.

[67] See Art. 31(3)(b) Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* 331 (VCLT). See also H. Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the "Kasikili/Sedudu Island" case', in M. Fitzmaurice, *et al*. (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff 2010) 59.

[68] EU Reg 656/2014, *supra* note 11, Art. 2(12) (emphasis added).

[69] *Non-refoulement* is one of the fundamental tenets of international human rights law. It was primarily enshrined in Art. 33(1) Convention relating to the Status of Refugees 1951, 189 *UNTS* 137, which prescribes that: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The obligation of non-refoulement has also found expression (either explicit or implicit) in a number of international human rights treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the European Convention on Human Rights. See G. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 23 *International Journal of Refugee Law* 2011, 443.

safety' under Article 2(12) of the EU Reg 656/2014 due to the dire human rights standards prevalent therein.[70]

Evidently, the EU espouses a harmonious with other relevant rules of international law, that is international human rights and refugee law, interpretation of the concept of 'place of safety' under the law of the sea, which clearly reflects Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[71] This undoubtedly marks another positive contribution by the EU in the elucidation and progressive development of the relevant rules of customary international law.

4. HAND-OVER OF SUSPECTED PIRATES

The EU has been very actively involved in the fight against piracy off the coast of Somalia since 2008, when it launched EUNAVFOR Operation Atalanta.[72] The EU has been instrumental not only in the prevention of piracy at sea but also in facilitating the prosecution of suspected pirates. Remarkably, the number of prosecutions of arrested pirates have been proportionally low in comparison to the volume of pirate attacks since 2008.[73] The difficulties in prosecuting suspected pirates have been extensively analysed in academic literature.[74] To address the reluctance of EU member states to prosecute captured pirates the EU has opted to enter into memoranda of understanding with countries in the region, for example Kenya, Seychelles, Mauritius and Tanzania, with a view to transferring suspects over to them.[75] As a consequence, it was the regional

[70] See, e.g., ECtHR, *Hirsi Jamaa* v. *Italy*, Appl. No. 27765/09, 23 February 2012. On the *Hirsi* case see M.-G. Giuffre, 'Waterdown Rights on the High Seas: Hirsi Jamaa and others v Italy (2012)', 61 *International and Comparative Law Quarterly* 2012, 728–50.

[71] 'There shall be taken into account, together with the context: […] *(c)* any relevant rules of international law applicable in the relations between the parties' (Art. 31(3)(c) VCLT). See also P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Leiden: Brill 2015).

[72] See *supra* note 5. On piracy off the coast of Somalia, see, *inter alia*, R. Geiss and A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford: Oxford University Press 2011); E. Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century', in A. Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press 2010) 122.

[73] As reported at the height of the 'piracy crisis' in 2012 by the Report of the Secretary General, '[a]s at 30 September 2012, according to information available with UNODC, 1,186 individuals suspected of piracy had been prosecuted or were awaiting prosecution in 21 states: Belgium, Comoros, France, Germany, India, Italy, Japan, Kenya, Madagascar, Malaysia, Maldives, Netherlands, Oman, Seychelles, Somalia, Republic of Korea, Spain, United Arab Emirates, United Republic of Tanzania, United States and Yemen'; see UN Security Council, Report of Secretary-General pursuant to Security Council Resolution 2020 (2011)' (22 October 2012) UN Doc. S/2012/783, para 44.

[74] See, *inter alia*, E. Kontorovich, 'A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists', 98 *California Law Review* 2010, 243; J. Ademun-Okede, 'Jurisdiction over Foreign Piratesin Domestic Courts and Third States under International Law', *17 Journal of International Maritime Law* 2011, 124–6. See also the various contributions to the Symposium 'Testing the Waters: Assessing International Responses to Somali Piracy' 10 *Journal of International Criminal Justice* 2010.

[75] See Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy (6 March 2009), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CE-

piracy prosecution centres, established in the above-mentioned states, mainly Kenya and Seychelles, that assumed the burden of receiving and trying the majority of suspected Somali pirates.

As to the legal framework in this regard, the starting point is the relevant provisions of UNCLOS which reflect customary international law.[76] Article 105 UNCLOS sets forth that: 'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.'[77] In codifying the customary principle of universal jurisdiction in this regard, this provision entitles any State involved in counter-piracy operations, which visits a pirate vessel, to apprehend the pirates and have them adjudicated upon by its courts.[78]

However, it is questioned whether transferring suspects to Kenya is in consistency with the relevant international law. From a face reading of Article 105 UNCLOS, it is clear that the prosecution should be by '*the courts of the state which carried out the seizure*.'[79] The drafting history and more specifically the pertinent Report of the International Law Commission (ILC) reveals that this provision was intended to preclude transfers to third-party states.[80] It follows that the transferring of suspected pirates by the EU to the said states, which obviously had not been the boarding states, and their concomitant assertion of enforcement jurisdiction, was in dissonance with Article 105 UNCLOS.

However, there is a contrary view, namely that the limited reference in Article 105

LEX%3A22009A0325%2801%29>; Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers (2 December 2009), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:315:0037:0043:EN:PDF>; Agreement between the European Union and the Republic of Mauritius on the Conditions and Modalities for the Transfer of Suspected Pirates and Associated Seized Property from the European-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer (14 July 2011), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:254:FULL>; Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led Naval Force to the United Republic of Tanzania (11 April 2014), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0411(01)#:~:text=This%20Agreement%20defines%20the%20conditions%20and%20modalities%20for,EUNAVFOR%2C%20and%20for%20their%20treatment%20after%20such%20transfer>.

[76] See *supra* note 16.

[77] Art. 105 UNCLOS.

[78] M. Nordquist, *et al*., *supra* note 42, at 215. See *In re Piracy Jure Gentium* [1934] AC 586, 588-589 (UK); *US* v. *Klintock*, 18 U.S. (5 Wheaton) 144, 152 (1820) (US).

[79] Art. 105 UNCLOS (emphasis added).

[80] In the words of the ILC Report, 'this article gives any State the right to seize pirate ships […] and to have them adjudicated upon by its Courts. *The right cannot be exercised at a place under the jurisdiction of another State*'. See Articles concerning the Law of the Sea, Vol. II, *Yearbook of the ILC* 1956, 256, at 283 (emphasis added).

UNCLOS to the seizing State's adjudicative/curial jurisdiction does not preclude the existence of other valid jurisdictions nor prevent transfers between them. Nothing, for example, precludes a 'receiving' State exercising its own jurisdiction which has an independent basis in customary international law once a suspect is within its territory.[81] It is true that the relevant State practice in the Gulf of Aden, but also subsequently in the Gulf of Guinea,[82] certainly supports such a power of transfer, which, in any event, must be permitted, due to the application of the broader universality principle under Article 105 and customary law (*argumentum a majore ad minus*).

Accordingly, the conclusion to be drawn is that the transfer of suspected pirates to neighbouring states is in accordance with customary international law, as progressively developed, predominantly, by abundant State practice to this effect. Evidently, by engaging in the practice concerned, the EU has significantly contributed to its progressive development.

5. CONCLUDING REMARKS

The EU is party to the UNCLOS in relation to matters governed by the Convention in respect of which competence has been transferred to the organisation by its member states. Notably, however, the EU has been increasingly involved in activities governed by the law of the sea, which fall beyond the relevant competences, as formally included in the EU's Declaration of Competence.[83] Thus, for the latter activities the relevant legal framework is necessarily that of customary international law.

In engaging in such activities, it is inevitable that the EU interprets the existing customary international law and creates relevant 'practice' in this regard. This paper scrutinized various instances in which the EU has interpreted the cus-

[81] D. Guilfoyle, 'Combating Piracy: Executive Measures on the High Seas', 53 *Japanese Yearbook of International Law* 2011, at 164. In accord are E. Kontorovich, 'Introductory Note to Exchange of Letters between the European Union and the Government of Kenya' 48 *International Legal Materials* 2009, 747; T. Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' 20 *European Journal of International Law* 2009, at 404, asserting that 'the rule in Article 105 does not, however, establish the exclusive jurisdiction of the seizing state's courts. Courts of other states are not precluded from exercising jurisdiction under conditions which they establish'; Y Dinstein, 'Piracy Jure Gentium', in H. Hestermeyer, *et al*. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Leiden: Martinus Nijhoff 2012), at 1141.

[82] At its 61st Ordinary Session of the Authority of Heads of State and Government on Sunday, 03 July 2022, in Accra, Ghana, the Economic Community of West African States (ECOWAS) adopted the Supplementary Act on the Conditions of Transfer of Persons Suspected of Having Committed Acts of Piracy and Their Associated Property and / or Evidence for prosecution among member states; see more information at <https://www.unodc.org/nigeria/en/heads-of-state-and-government-of-ecowas-member-states-adopt-supplementary-act-for-the-transfer-of-piracy-suspects-and-their-associated-property-and--or-evidence-for-prosecution.html>. On piracy off the Gulf of Guinea, see UNSC Res. 2634 (31 May 2022) UN Doc. S/RES/2634. See also A. Eruaga and M. Mejia, 'Piracy and Armed Robbery against Ships: Revisiting International Law Definitions and Requirements in the Context of the Gulf of Guinea', 33 *Ocean Yearbook* 2019, 421.

[83] See *supra* note 2.

tomary law of the sea, including the rules on law enforcement and search and rescue at sea as well as universal jurisdiction over piracy. It was obvious from those instances that the EU either confirmed the content of the relevant rules of customary international law, including content that was rather ambiguous, e.g., in respect of the powers of the coastal State in its contiguous zone, where applicable, or contributed to the progressive development and mutation of these rules, e.g., those concerning the concepts of 'distress' and 'place of safety' in search and rescue at sea, or transfer of pirates to third States.

As to the rules of interpretation that the EU appears to have employed in this regard, it was readily apparent that the EU places particular emphasis on 'subsequent State practice' in relation to the rule concerned as well as on other 'relevant (treaty and customary) rules of international law,' underpinning the principle of systemic integration. Also, noticeably, it has also considered the 'object and purpose' of relevant provisions, specifically in relation to provisions having a humanitarian purpose par excellence (e.g., search and rescue at sea).

REGULATION 1026/2012 AND THE DUTY TO COOPERATE IN THE MANAGEMENT OF SHARED FISH STOCKS UNDER CUSTOMARY INTERNATIONAL LAW

Mihail Vatsov*

1. INTRODUCTION

Increased international cooperation is central to addressing the major challenges in the world's oceans.[1] Naturally, the duty to cooperate is a major cornerstone for the development of the international fisheries conservation regime.[2] The duty to cooperate with respect to the conservation of fish stocks was reaffirmed in the United Nations Convention on the Law of the Sea[3] (UNCLOS) and was heavily relied on for further developing the regime for straddling and highly migratory stocks in the United Nations Fish Stocks Agreement (UNFSA).[4] The International Tribunal for the Law of the Sea (ITLOS) has held that 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment'[5] and has, subsequently, found this statement equally applicable to fisheries cases.[6] While this duty features prominently in the UNCLOS regime (UNCLOS and UNFSA taken together) it also exists beyond that treaty regime. Historically, the law of the sea has been first shaped by customary international law (CIL) and subsequently codified and developed by treaties, including the UNCLOS, which largely reflects CIL.[7] Despite such codification, the CIL rules

* PhD (the University of Edinburgh), Programme Manager at the European Commission. Any views and opinions expressed are my own and should not be considered as representative of the European Commission's official position.

[1] S. Nandan, 'Introduction' in M. Nordquist, *et al*. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Leiden: Vol. 7, Martinus Nijhoff 2011), xxii.

[2] M. Cecilia Engler, 'Establishment and Implementation of a Conservation and Management Regime for High Seas Fisheries, with Focus on the Southeast Pacific and Chile: From Global Developments to Regional Challenges', UN-Nippon Foundation Fellow 2006-2007, *Research Paper*, 5, 14,16.

[3] United Nations Convention on the Law of the Sea 1982, 1833 *UNTS* 397. Before UNCLOS, the duty to cooperate with respect to fisheries conservation has been recognised as an important cornerstone of the regime in preamble of the 1958 Fisheries Convention as well as in Art. 1(2) thereof, saying that 'All States have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.'

[4] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 *UNTS* 3.

[5] *MOX Plant Case (Ireland* v. *United Kingdom), (Case No. 10), Provisional Measures, Order of 3 December 2001, ITLOS Reports* 2001, 95, para. 82.

[6] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), (Case No. 21), Advisory Opinion, ITLOS Reports* 2015, para. 140.

[7] Most recently confirmed in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), ICJ Reports* 2022, 266.

may further develop.[8] They may develop through a process of interpretation or a creation of a new rule altogether, with the boundary between the two being always (un)comfortably vague for international lawyers.

International fisheries law, as part of the law of the sea, is an area also seeing constant developments even after the UNCLOS adoption, still searching for the correct formula for its growing and persisting unsustainability problem. CIL can be a good tool to support these developments. This paper takes on a very specific European Union (EU) instrument in the area of fisheries, Regulation 1026/2012,[9] which is built on the duty to cooperate in managing shared fish stocks. This paper examines Regulation 1026/2012 as an attempt for the EU, as a major fishing power,[10] to participate in the shaping of international fisheries law towards sustainability. It is argued that this shaping happens through venturing into the (coexisting with the UNCLOS regime) CIL duty and providing a specific interpretation of it or even a novel development if the interpretation goes beyond what is permissible for such an exercise.[11] Either of the alternatives present a peculiar case for the EU relying on a CIL rule existing next to a treaty regime to which the EU is also a party. The rest of the paper is structured in three sections. Section 2 provides a necessary descriptive background on Regulation 1026/2012 and seeks to deduce the understanding of the duty to cooperate laid down in Regulation 1026/2012. Section 3 focuses on the duty to cooperate under the UNCLOS regime and to what extent the understanding of it that is set out in Regulation 1026/2012 fits in the UNCLOS regime. Seeing that Regulation 1026/2012 goes beyond the UNCLOS regime, the paper continues with Section 4 where it considers the role of the CIL duty to cooperate. Section 5 concludes that Regulation 1026/2012 clearly puts forward an interpretation of CIL even if it is unspoken and suggests that a more pronounced use of CIL could be beneficial for the EU in its external action.

2. REGULATION 1026/2012 AND THE DUTY TO COOPERATE

As already pointed out, the duty to cooperate in the management of shared fish stocks coexists under the UNCLOS regime and CIL. Thus, since the EU is a party to the UNCLOS and the UNFSA, it is a natural starting step in the analysis of the place of CIL in Regulation 1026/2012 to explore how much of it fits in the UNCLOS regime. This is even more so, as in this case, where the UNCLOS

---

[8] On coexistence of treaty and CIL duties with different content see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, ICJ Reports* 1986, 14, para. 175.

[9] Regulation 1026/2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing, *OJ* [2012] L 316/34.

[10] M. Vatsov, *Fishing Power Europe: The EU's Normativity in Its External Fisheries Action* (Springer 2023).

[11] On limits to the interpretation of CIL, see P. Merkouris, 'The Rules of Interpretation of Customary International Law: of Methods and Limits', TRICI-Law, *Research Paper Series* No. 001/2023, available at <https://tricilawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf>.

regime is explicitly mentioned but CIL is not. In order to explore this, due to the very specialized nature of Regulation 1026/2012, it is necessary to provide first a more descriptive account of it and the duty to cooperate set out therein.

Regulation 1026/2012 is a framework for the adoption of restrictive measures against states that the EU identifies as allowing non-sustainable fishing. It has been used only once to adopt measures against the Faroe Islands in 2013,[12] subsequently terminated[13] in 2014. The preparatory works for Regulation 1026/2012 started in reaction to the Mackerel War developments[14] in 2010 with the first formal discussions starting in the Committee on Fisheries of the European Parliament and the Fisheries Council.[15] From its inception, this reaction pointed to a framework for the adoption of trade measures. The Commission proposed such a framework in the shape of a Regulation in December 2011.[16] The Impact Assessment (IA) accompanying that proposal provides a very detailed analysis and also cites a requested opinion of the Commission's Legal Service on a number of legal issues.

However, when it comes to the central issue, which opens the IA's section on 'Problem definition' – the obligation 'to cooperate in managing responsibly straddling and highly migratory fish stocks in order to ensure their long-term sustainability' – an analysis is wanting. With respect to compatibility, the Commission predominantly focused on World Trade Organization (WTO) law compatibility.[17] The request for an opinion from the Legal Service was directed to the compatibility with WTO law, the EEA Agreement and the bilateral agreements the EU had with Iceland and the Faroe Islands. The IA lacks an analysis of the duty to cooperate under the UNCLOS regime or under CIL and the opinion of the Legal Service was not requested on that point.[18] Such an analysis is crucial because Regulation 1026/2012 appears to contain a particular understanding of what cooperation means in practice.

The term 'shared fish stocks' needs to be briefly explained. It is not used in

[12] Commission Implementing Regulation 793/2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, *OJ* [2013] L 223/1.

[13] Commission Implementing Regulation 896/2014 repealing Implementing Regulation (EU) No. 793/2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, *OJ* [2014] L 244/10.

[14] On the factual background of the dispute, see M. Vatsov, 'The EU's failed attempt to innovate with Regulation 1026/2012', 84 *Marine Policy* 2017, 300-305, available at <https://doi.org/10.1016/J.MARPOL.2017.06.029>.

[15] Commission Staff Working Paper, Impact Assessment, SEC(2011) 1576 final, 3-4.

[16] Proposal for a Regulation of the European Parliament and of the Council on certain measures in relation to countries allowing non-sustainable fishing for the purpose of the conservation of fish stocks, COM(2011) 888 final.

[17] According to the explanatory memorandum in the proposal, '[w]here a requirement for measures to be consistent with the EU international commitments is mentioned, compatibility with the obligations of the EU under the WTO Agreement is meant in particular as far as trade restrictions are concerned.'

[18] An opinion from the Council Legal Service was requested covering the UNCLOS regime. However, the opinion is not publicly available beyond its first pages. See Opinion of the Legal Service, 8439/12, 30 March 2012.

the UNCLOS or the UNFSA but has emerged as shorthand for certain types of stocks. In the context of Advisory Opinion 21, the ITLOS equated shared stocks to stocks of common interest and found both terms to refer to the stocks covered by Article 63(1) (transboundary) and (2) (straddling) UNCLOS.[19] Transboundary stocks are stocks occurring only in the Exclusive Economic Zone (EEZ) of two or more states without reaching the high seas. Straddling stocks, on the other hand, are stocks that, next to the EEZs, are also present in and migrate onto the high seas. Going beyond the context of the Opinion, however, other types of stocks can also be considered shared or of common interest due to their migratory nature. Such stocks are highly migratory (stocks that migrate through big areas of high seas without entering EEZs), anadromous (stocks that live in seawaters and migrate to freshwaters to reproduce) or catadromous (stocks that live in freshwaters and migrate to seawaters to reproduce) stocks. All of these stocks have different legal regimes catering to their biological specifics and the maritime zones involved. This paper, however, focuses on shared stocks as covered by Article 63 UNCLOS.

The term featuring in Regulation 1026/2012 is stocks of common interest. Article 2(a) of Regulation 1026/2012 defines a stock of common interest as 'a fish stock the geographical distribution of which makes it available to both the Union and third countries and the management of which requires the cooperation between such countries and the Union, in either bilateral or multilateral settings.' This definition clearly covers the stocks in Article 63 UNCLOS. However, it is unclear what is meant by 'geographical distribution […] which makes it available.' Should the particular stock be always also present in the EU's waters? If not, the geographical scope of Regulation 1026/2012 can potentially be the world ocean and may also involve highly migratory stocks. In fact, the preparatory works of Regulation 1026/2012 explicitly mention highly migratory stocks on numerous occasions.[20]

Clearly defining the type of stocks to which Regulation 1026/2012 applies is not just a matter of the biology of the stocks and their migratory movements. It is also a matter of the scope of the duty to cooperate. The different types of stocks attract different legal regimes, tailored after the different maritime zones they cross. In other instruments the EU has been very punctual as to the addressed stocks, showing awareness of the different regimes.[21] The lack of such differentiation in Regulation 1026/2012 already points to an understanding of the content of the duty to cooperate that applies to all stocks the EU may be interested in, irrespective of their regulatory frameworks.

This wide-ranging understanding of the content of the duty to cooperate is further reflected in Article 1(2) of Regulation 1026/2012. It states that the adopted measures 'may apply in all cases where cooperation between third countries and

---

[19] *Case No. 21*, *supra* note 6, paras. 183-186.

[20] See SEC(2011) 1576*, supra* note 15, 5, 7, 9, 12.

[21] See Regulation 520/2007 laying down technical measures for the conservation of certain stocks of highly migratory species and repealing Regulation (EC) No. 973/2001, *OJ* [2007] L 123/3.

the Union is required for the joint management of the stocks of common interest, including where that cooperation takes place in the context of [a regional fisheries management organisations (RFMO)] or a similar body.' This provision implies that cooperation and what it requires from the parties involved is all the same whether it is in an RFMO context or not. This is because Regulation 1026/2012 does not differentiate between types of cooperation or consequences attached to the failure to cooperate in terms of the measures to be adopted. Treating these situations in the same way blurs the lines between the very different regimes of stock management established in the UNCLOS regime depending on the type of the stocks. Considering that the duty to cooperate is foundational for Regulation 1026/2012, the lack of at least a breakdown of the cooperation sub duties and the contexts in which they apply requires a detailed analysis.

Importantly, however, the EU qualifies its eventual measures to potentially unsustainable fishing situations. Article 1(1) of Regulation 1026/2012 states that it is a framework for measures that aim 'to ensure the long-term conservation of stocks of common interest to the Union and those third countries.' Article 3 of Regulation 1026/2012 introduces two cumulative conditions for the identification of a country as allowing non-sustainable fishing. The first condition is for the state to fail to cooperate in the management of a stock of common interest. The modalities of the required cooperation, however, are not spelled out. The other condition has two further alternatives: either to fail to adopt necessary fishery management measures or to adopt such measures but without due regard to the rights, interests and duties of others and these measures 'could result in the stock being in an unsustainable state,' when the measures of all other fishing states are also considered.

The two main cumulative conditions can be perplexing. Normally, the second condition of adopting necessary measures with due regard to the others is an expression of the duty to cooperate and a central point of cooperation. The fact that Regulation 1026/2012 is separating the two in cumulative conditions begs the question what is meant by cooperation in the first condition. A contextual reading of the two conditions suggests that the cooperation condition would normally predate the adoption of the necessary measures. Logically, cooperation then means all actions relating to and culminating in reaching an agreement, which is then implemented through the necessary measures. This means that the criteria of Regulation 1026/2012 would not be met even if a state fails to cooperate (read formally reach an agreement) but still adopts the necessary measures with due regard to the rights, interests and duties of other states and these measures do not lead to fishing activities which could result in the stock being fished unsustainably keeping in mind the measures of the other states. In such a scenario, however, the lack of the formal agreement is replaced effectively by a silent agreement or acquiescence to the share the other states have 'left' to the state not participating in the formal agreement. It must be noted that these conditions are inextricably linked to the possible unsustainability of the stock in question. That is, if the sustainability of the stock is not threatened even if a state fails to cooperate and does not act in due regard to the others, it would not fall

under the remit of Regulation 1026/2012. This hypothetical, however, implies a level of stock abundance that is hardly present today. Accordingly, no matter how these cumulative conditions are read they effectively require the targeted state to have acted in conformity with the other states, including the EU, which is essentially an obligation to reach an agreement.

The understanding of the duty to cooperate that Regulation 1026/2012 features in terms of, first, treating different stock regimes and *fora* in the same way and, second, introducing a dichotomy with respect to an obligation to agree to management measures that depends on the possibly unsustainable status of the stock is very EU-specific. This was also pointed out by one member state during the debates on the adoption of measures against the Faroe Islands, which said that 'the lack of cooperation is a concept that in the international scene goes beyond any criteria established in EU law […].'[22] Furthermore, the adoption of market-based port state measures as a consequence to the perceived failure to cooperate through Regulation 1026/2012 is another very specific understanding connected to the duty to cooperate. This understanding will be examined against the UNCLOS regime in the next section.

3. THE DUTY TO COOPERATE UNDER THE UNCLOS REGIME

Article 63 UNCLOS deals with the conservation and management of shared stocks, both transboundary (paragraph one) and straddling (paragraph two). For transboundary stocks states shall seek to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks. Should this fail, the default provisions – Articles 61 and 62 UNCLOS – would apply within the respective EEZs.[23] For straddling stocks states shall seek to agree upon the measures necessary for the conservation of these stocks in the adjacent area (the high seas). This should happen either directly or through appropriate subregional or regional fisheries management organisations (RFMO). Article 63 UNCLOS provides a very general framework of cooperation between states in the management of shared stocks giving a central role to the duty to negotiate the relevant measures.

Such cooperation mainly results in a negotiated quota-sharing agreement. However, the UNCLOS regime is silent on legal consequences attached to or

---

[22] Committee for Fisheries and Aquaculture, Minutes of the meeting (31 July 2013), 3.

[23] K. Mfodwo, *et al*., 'The Exclusive Economic Zone: State Practice in the African Atlantic Region', 20 *Ocean Development and International Law* 1989, at 461; R. Churchill and A. Lowe, *The Law of the Sea* (Manchester: 3rd edn, Manchester University Press 1999) at 294. This should not be called into question even by looking at the award of the Arbitral Tribunal in *Barbados* v. *Trinidad and Tobago*, which stated that the parties are under a duty to agree (thus omitting 'seek') (*Case No. 2004-02, Award of 11 April 2006*, para. 385). This language has been explained in the literature rather with the commitments made by the agents of the two states before the Arbitral Tribunal than with a new reading of Art. 63. See B. Kunoy, 'The Ambit of *Pactum de Negotiatum* in the Management of Shared Fish Stocks: A Rumble in the Jungle', 11 *Chinese Journal of International Law* 2012, at 698.

stemming from the failure to agree on the relevant measures. This is due to the nature of the duty to cooperate (and specifically the sub-duty to negotiate as opposed to the duty to reach an agreement) as a duty of conduct and not of result.[24] As the Permanent Court of International Justice (PCIJ) stated and the International Court of Justice (ICJ) subsequently confirmed, 'an obligation to negotiate does not imply an obligation to reach an agreement.'[25] The UNCLOS regime also includes wide jurisdictional limitations for international fisheries disputes, further complicating any enforcement of these provisions.

This nature of the duty is the result of a deliberate choice of the UNCLOS drafters, considering the failed attempt of Argentina to have the provision amended to 'be obliged' to agree.[26] Accordingly, in the absence of an amendment to the UNCLOS, any developments seeking to change this must evolve in the realm of CIL. Depending on the said 'development,' it may be considered as an interpretation of CIL or as a change of the CIL rule altogether. This is why it is important to examine closely whether Regulation 1026/2012 goes towards changing the nature of the duty to cooperate and, thus, inevitably engages CIL.

The language of Article 63(1) UNCLOS gives more discretion to the coastal states than its counterpart for straddling stocks. Not only are the states obliged to only seek to agree but the obligation relates only to the measures that are necessary to coordinate and ensure the conservation and development of the transboundary stocks. Coordinating measures and measures ensuring conservation and development are not very demanding instances of cooperation. The states are still free to agree to much more detailed forms of cooperation if they so wish but are not obliged to. Another freedom of choice concerns the form of measures and whether they would be a direct arrangement or in the form of an RFMO. This point is developed in much more detail with respect to straddling stocks within both the UNCLOS and the UNFSA. Furthermore, in the UNFSA, as it can also be seen *infra*, the regime is developed even more in terms of the approaches to be adopted during cooperation, such as the precautionary and the ecosystem approaches. However, the UNFSA and the high seas provisions of the UNCLOS do not apply to the transboundary stocks and the coastal states are, thus, given much greater discretion. This greater discretion also translates to a lack of mandatory cooperation and, thus, negotiation mechanism.

Where a stock becomes straddling, a much wider set of provisions becomes applicable to its conservation and management, which warrants a more detailed discussion. Next to the default EEZ provisions, applicable are also the default high seas UNCLOS provisions, the more specific Article 63(2) UNCLOS and the

[24] E. Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (Dordrecht: Martinus Nijhoff 1989) at 81.

[25] *Railway Traffic between Lithuania and Poland, Advisory Opinion, PCIJ Series A/B, No. 42*, 108, at 116; *International Status of South-West Africa, Advisory Opinion, ICJ Reports* 1950, 128, at 140.

[26] Report of the Chairman of the Second Committee (24 August 1979) UN Doc. A/CONF.62/L.42, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XII, 92, at 93.

UNFSA. The non-exclusion of the application of the EEZ regime with respect to straddling stocks, next to the application of the high seas provisions, creates a problem for the management of such stocks. Article 63(2) UNCLOS complements the default high seas provisions with the hope to resolve that problem.

Article 63(2) UNCLOS requires from the coastal states, together with the states fishing beyond the EEZs, to seek to agree 'upon the measures necessary for the conservation of these stocks' on the high seas, again, either directly or through an international organisation. As in the case of the transboundary stocks, the relevant states only have a negotiating obligation of conduct – to seek to agree. The language in Article 63(2) UNCLOS, with respect to the measures to be agreed upon, is also a bit more limiting than in the case of transboundary stocks – it is not limited to coordinating measures and measures ensuring the conservation and development of the stocks but refers to 'necessary' measures. However, it must be noted that these measures are only with respect to the high seas part of the straddling stocks. This leaves wide open the possibility of having conflicting measures for the same stocks within the different maritime zones.

With respect to highly migratory species, to which Regulation 1026/2012 may also apply, Article 64 UNCLOS adds a requirement that coastal and other states 'shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species.' Again, however, no obligation to reach an agreement is included.

The UNFSA further elucidates the straddling and highly migratory stocks regimes. It puts increased emphasis on management through RFMOs and spells out certain particularities of the states' duty to cooperate. Article 7(3) UNFSA requires states in giving effect to their duty to cooperate to 'make every effort to agree on compatible conservation and management measures within a reasonable period of time.' Article 7(4) UNFSA continues that '[i]f no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.' Furthermore, the UNFSA provides for a temporal aspect to the negotiations, which is lacking in Regulation 1026/2012. The only consequence to the failure to reach an agreement in a reasonable period of time is the right to invoke the dispute settlement provisions however limited they may be.

Similar to Regulation 1026/2012, Article 8 UNFSA focuses on conservation. According to Article 8(2) UNFSA

> States shall enter into consultations in good faith and without delay, particularly where there is evidence that the straddling fish stocks and highly migratory fish stocks concerned *may be under threat of over-exploitation* or where a new fishery is being developed for such stocks. To this end, consultations may be initiated at the request of any interested State *with a view to establishing appropriate arrangements* to ensure conservation and management of the stocks. *Pending agreement on such arrangements*, States shall observe the provisions of this Agreement and shall *act*

> *in good faith and with due regard to the rights, interests and duties* of other States [emphasis added].

This provision is the closest to Regulation 1026/2012 because it deals with the possibility of overexploitation and contains the requirement to act in good faith and with due regard to the rights, interests and duties of other states. This is the only UNFSA or UNCLOS fisheries provision that requires due regard to the interests (*next to* the rights and duties) of other states, as set out in Regulation 1026/2012. Other provisions applicable to fisheries such as Article 56(2) UNCLOS and Article 7(6) UNFSA only require due regard to the rights and duties of other states. An important difference in that regard is that this additional requirement in Article 8(2) UNFSA to act with due regard to the interests of others is pending agreements on arrangements. Regulation 1026/2012, however, includes this requirement without specifying that intermediary aspect of the measures. Furthermore, Article 8(2) UNFSA also does not impose a duty to reach an agreement. The central obligation in Article 8(2) UNFSA is for states to 'enter into consultations in good faith and without delay,' which corresponds to a duty to negotiate, and these consultations are 'with a view to establishing appropriate arrangements.' Accordingly, the UNFSA does not go as far as changing the nature of the duties in Articles 63 and 64 UNCLOS. Regulation 1026/2012, however, refers to the wider concept of cooperation and not just an obligation to enter into consultations. It is also important to note that Article 8(2) UNFSA applies only to straddling and highly migratory stocks and Regulation 1026/2012 refers to stocks of common interest which goes well beyond those two stocks. Finally, the market-based port state measures of Regulation 1026/2012 are absent also from the UNFSA and instead the only reference is the use of dispute settlement mechanisms.

Thus, although Regulation 1026/2012 is clearly founded on the UNCLOS regime, including the relevant UNFSA provisions, it does have aspects that seem to go beyond it, which requires venturing into CIL, including its interpretation.

4. THE REALM OF CUSTOMARY LAW

4.1. **Finding space for customary law under Regulation 1026/2012**

Before discussing the CIL duty to cooperate, it is important to show whether CIL and its interpretation may fit in Regulation 1026/2012 because CIL is not explicitly mentioned anywhere in it. This is important because if Regulation 1026/2012 is to be based necessarily and solely on the UNCLOS regime, the divergences shown in the previous section can be legally problematic. Finding a possibility for basing Regulation 1026/2012 also on CIL serves to legally explain any such divergences from the UNCLOS regime.

According to Article 5 of Regulation 1026/2012, any adopted measures shall be,

inter alia, 'compatible with the obligations imposed by international agreements to which the Union is a party and *any other relevant norms of international law* [emphasis added].' It mirrors one of the requirements in Article 3 of Regulation 1026/2012 for a country to be identified as allowing non-sustainable fishing, which is the failure 'to cooperate in the management of a stock of common interest in full compliance with the provisions of the UNCLOS and the UNFSA, *or any other international agreement or norm of international law* [emphasis added].'[27] These two provisions open the door to the application of CIL because they explicitly go beyond the relevant treaty provisions. They allow the EU to adopt measures complying with CIL against a country that fails to cooperate under CIL.

In 2013 the Commission sent a letter to the Faroe Islands announcing its intention to identify the Faroe Islands as a country allowing non-sustainable fishing. The Commission opens the part of the letter citing the reasons for the identification by stating:

> The obligations for coastal States to cooperate with other coastal States or with Regional Fisheries management organizations in the management of fish stocks and to rely on best scientific evidence available and avoid over-exploitation are clearly established in international law.[28]

Then the letter starts pointing to *examples* of these obligations and refers to Articles 61(2) and 63 UNCLOS and Articles 5, 6, 7 and 8 UNFSA. As such the letter refers to the general duty to cooperate under international law, CIL included, and only points to the UNCLOS regime for examples. The letter again left open the question of the EU's understanding of cooperation under international law. Nevertheless, the language it uses leaves enough space for the interpretation and application of CIL. Thus, the discussion can turn to the CIL rule in question.

4.2. **The duty to cooperate under customary law**

The duty to cooperate is central to a myriad of transboundary issues, usually related to the environment and sharing common resources. The international law duty to cooperate when it comes to the exploitation of shared natural resources has been long recognised as a necessary requirement, including at the General Assembly (UNGA).[29] Shared fish stocks are such a resource by definition and require cooperation. This was recognised in the 1958 Fisheries Convention, which stated in its preamble

[27] That last part of the requirement did not feature in the original Commission proposal but was added during the legislative process. I am not aware of the institution that proposed its addition.

[28] Commission Decision on the intention to identify the Faroe Islands as a country allowing non-sustainable fishing, C(2013) 2853 final, 5.

[29] UNGA Res. 3129 (XXIII) (13 December 1973); UNGA Res 3281 (XXIX) (15 January 1975); Draft Principles in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of the Natural Resources Shared by Two or More States 1978, 17 *ILM* 1098.

> *Considering* also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international cooperation through the concerted action of all the States concerned.[30]

The migratory nature and interconnectedness of shared fish stocks make illusory the possibility of fishing nations to fully exercise their rights and fulfil their duties without interacting with one another. The duty to cooperate acts as a *chapeau* for all of its emanations (e.g., information exchanges, undertaking common research projects, negotiating, agreeing on necessary measures, and enforcing them) and unifies them towards the overall objective of conservation and management.

Regulation 1026/2012 features important aspects of the duty to cooperate with respect to fisheries that have underpinned it under CIL even before the UNCLOS was adopted. These are the requirement to have due regard to the rights of others as well as the need for any adopted measures to be equitable.[31] The link between having due regard to the rights of other states and the principle of equity is exemplified in the ICJ's pronouncements in the 1970s *Fisheries Jurisdiction* cases. The ICJ recognised that:

> It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.[32]

Consequently, the ICJ continued, states have the obligation to, *inter alia*, examine together 'the measures required for the […] equitable exploitation of those resources.'[33] The ICJ found negotiations to be the best fitting solution in that case. One of the objectives in these negotiations, the ICJ held, was 'to balance and regulate equitably questions such as catch-limitations and share allocations.'[34] The ICJ directed the parties before it to conduct their negotiations on the basis of paying in good faith 'reasonable regard to the legal rights of the other' and, thus, 'bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation.'[35]

The operation of the equity aspect of the duty to cooperate is aiming to prevent inequitable burden sharing between states in the conservation and management of shared stocks. In particular, it aims to prevent situations where one state carries an excessive burden of conservation due to the irresponsible fishing practices of another with which a particular stock is being shared. Such inequitable

---

[30] Convention on Fishing and Conservation of the Living Resources of the High Seas 1958, 559 *UNTS* 285.

[31] Regulation 1026/2012*, supra* note 9, recitals 2, 5.

[32] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction, ICJ Reports* 1974, 3, para. 72.

[33] ibid.

[34] ibid., para. 73.

[35] ibid., para. 78.

burden sharing may arise in overfishing situations and the equity principles will serve to bring the burden sharing (back) to an equitable state. The European Court of Justice (ECJ) went along similar lines in the 1970s by stating that '[t]he only way to ensure the conservation of the biological resources of the sea both effectively and equitably is through a system of rules binding on all the states concerned, including non-member countries.'[36]

Through Regulation 1026/2012 the EU considers that in cases where due regard to existing fishing patterns or the rights, duties and interests of other countries is not given and there is a failure to cooperate 'specific measures should be adopted in order to encourage that country to contribute to the conservation of that stock.'[37] As discussed in Section 2, however, the requirement to have due regard to the rights, interests, and duties of others in Regulation 1026/2012 goes beyond the UNCLOS and the UNFSA (apart from the specific circumstances of Article 8 UNFSA) and the ICJ's 1970s pronouncements.

Thus, the requirement should find its basis in CIL. Furthermore, the understanding of cooperation, which is implicitly included in Regulation 1026/2012, to require states to reach an agreement with respect to management and conservation measures also needs be founded in CIL. Accordingly, Regulation 1026/2012 can in these respects be seen as an interpretation of the duty to cooperate that the EU is putting forward in situations of unsustainable fishing. The proposed interpretation of the CIL duty to cooperate with focus on unsustainable fishing of shared stocks may also be based on an understanding of the duty to cooperate in cases of transboundary harm. This is because if a state overfishes a shared stock while present in its EEZ it will cause transboundary harm to the other coastal states through the harm caused on the stock's sustainability. This opens the door to a broader interpretation exercise using the principle of systemic integration and taking into account the environmental law aspects of the duty to cooperate. The essence is the possible 'cross-border' harm that would stem from the unsustainable status of the stock or the extra measures in the shape of decreased fishing quotas that states may have to adopt to nevertheless try to keep the stock sustainable. The existence of the duty to cooperate in both environmental and fisheries law can serve as a bridge and easily allow for such an interpretation. Even more, as the international environmental law with respect to transboundary harm is itself in a stage of further development, it can in the future greatly inform the applicable CIL rule on management of shared stocks. Regulation 1026/2012 contains hints in that direction when it describes when a state is to be identified as allowing non-sustainable fishing. However, again, the unclarity in the text of Regulation 1026/2012 and its preparatory documents leaves one guessing.

This reading of Regulation 1026/2012 aligns with the overall view that where the viability of a shared stock is threatened the conservation aspects of the

[36] ECJ, Joined Cases 3, 4 and 6/76, *Kramer* [1976] ECR 1279, paras. 30, 33.
[37] Regulation 1026/2012, *supra* note 9, recital 2.

duty to cooperate are triggered. Overfishing and the problems it creates for the sustainability of stocks is an example of a threat for a stock's viability. Since 2007, the UNGA has started putting emphasis on this in its annual Resolution on sustainable fisheries by '*[c]alling* attention to the need for States, individually and through regional fisheries management organizations and arrangements, to continue to develop and implement effective port State measures and schemes to combat overfishing and illegal, unreported and unregulated fishing […].'[38] This paragraph appeared as the negotiations of the Port State Measures Agreement (PSMA) addressing illegal, unreported and unregulated (IUU) fishing started. However, notably, next to IUU fishing, the UNGA Resolution also includes the need to combat overfishing. In 2009, right after the text of the PSMA was approved, the opening of this paragraph changed to '*[r]ecognizing* the need […].'[39] In 2019, a few years after the PSMA entered into force, the paragraph was slightly amended to read

> *[r]ecognizing* the need for States, individually and through regional fisheries management organizations and arrangements, to continue to develop and implement, consistent with international law, effective port State measures to combat illegal, unreported and unregulated fishing and to contribute to addressing overfishing […].[40]

The continuous attention in a forum such as the UNGA on both IUU fishing and overfishing and the need to develop and implement effective port state measures to combat them is of great importance for the development (including through interpretation) of the CIL duty to cooperate and specifically with respect to shared stocks. The fact that the UNGA gives this topic great attention every year and its resolutions enjoy great support, often being adopted by consensus, carries an important legal weight. The EU's legislative actions are reflective of these international developments. The EU adopted its IUU Regulation in 2008 as the PSMA was still being negotiated and long before it entered into force and put great emphasis on the duty to cooperate. However, the IUU Regulation does not cover the situation of fishing that is legal but nevertheless unsustainable or prone to result in a threat to the viability of a stock. This is where Regulation 1026/2012 fits and the Commission has explicitly recognised this complementary nature of Regulation 1026/2012 and its port state measures.[41]

The EU's statements in the UNGA plenary when the annual Sustainable fisheries Resolution is discussed also correspond to its legislative actions. In 2007, shortly before adopting the IUU Regulation, the EU stated that it 'attaches particular importance and priority to the General Assembly's calls for and recommendations relating to combating [IUU] fishing activities' and IUU fishing has featured in its statements ever since.[42] Notably, however, the EU omitted mentioning

[38] UNGA Res. 62/177 (18 December 2007); UNGA Res. 63/112 (5 December 2008).
[39] UNGA Res. 64/72 (4 December 2009).
[40] UNGA Res. 74/18 (10 December 2019).
[41] SEC(2011) 1576, *supra* note 15, 10.
[42] UNGA Official Records, 64th plenary meeting, UN Doc. A/62/PV.64, 7. Before that the EU has mentioned IUU fishing in the discussions of this annual Resolution only in 2000 and 2001 in connection with the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported

overfishing in 2007. Aside from occasional mentioning of overfishing in its 2001 and 2002 statements, the EU only started to systematically address overfishing alongside IUU fishing in 2014 and has not stopped since.[43] This was two years after Regulation 1026/2012 was adopted, the same year the trade measures against the Faroe Islands were removed, and the year the current Common Fisheries Policy reform entered into force. This evolution in the EU statements is by no means an accident as the EU considers the UNGA the most inclusive forum for discussion of law of the sea matters.[44]

Accordingly, Regulation 1026/2012 can be seen as following up on international developments that are relevant for the content of the CIL duty to cooperate for shared stocks. The extent to which these developments have crystalized in CIL and Regulation 1026/2012 interprets and applies them as opposed to being part of the process of crystallization is not clear. In the context of the Mackerel War, Norway also adopted trade restrictions[45] and that can be seen as supporting practice. However, the vigorous objections of the Faroe Islands and the legal proceedings it initiated against the EU, even if subsequently withdrawn, point to disagreements about the law. These should be contrasted with the EU's numerous adoptions of port state measures against states under the IUU Regulation and the lack of legal challenges. Furthermore, in 2016, in the context of the negotiations of the UNCLOS implementing agreement on areas beyond national jurisdiction, the European Parliament adopted a resolution on its fisheries aspects, which states that 'lessons should be learned from the EU's recent disagreements with the Faroe Islands and Iceland, in order to enable stocks to be managed sustainably worldwide,'[46] suggesting to the Commission to put forward the issue internationally.[47] I am not aware if and to what extent the EU or its member states have actually tried to put that issue internationally including at the negotiations of the agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Nevertheless, the fact that they may have to do so, also points towards a process of legal development, which can be slow and hard to show in terms of state practice and *opinio juris* or a textual amendment of the UNCLOS regime. However, there is a basis to argue that Regulation 1026/2012, at least in some of its parts, interprets the CIL rule on cooperation in the management of shared stocks taking into account the realities of the failure to cooperate and the transboundary harm it produces.

---

and Unregulated Fishing.

[43] UNGA Official Records, 66th plenary meeting, UN Doc. A/69/PV.66, 5.

[44] UNGA Official Records, 54th plenary meeting, UN Doc. A/59/PV.54, 5.

[45] Ministry of Fisheries and Coastal Affairs, 'Ban on landings of mackerel from Faroese and Icelandic vessels', Press Release 44/2010 (29 July 2010) available at <https://www.regjeringen.no/en/aktuelt/Ban-on-landings-of-mackerel-from-Faroese-and-Icelandic-vessels/id611793/>.

[46] European Parliament resolution of 12 April 2016 on Fisheries aspects within the international agreement on marine biodiversity in areas beyond national jurisdiction, UNCLOS, 2015/2109(INI), para. AC.

[47] Confirmed by the office of Isabelle Thomas, Member of the European Parliament, who authored that paragraph.

5. CONCLUSION

Regulation 1026/2012 is part of the EU's portfolio of instruments aimed at improving fish stock sustainability and focuses on the duty to cooperate in the management and conservation of shared stocks under international law. Regulation 1026/2012 prominently features the UNCLOS treaty regime. However, the analysis in this paper shows that the adopted underlying understanding of the duty to cooperate goes beyond that treaty regime, even if the text of the instrument and its preparatory documents do not spell it out clearly. The provisions of Regulation 1026/2012 leave the door open for the use of CIL and this paper shows that it is not an accident. The understanding of the duty to cooperate, requiring in certain cases that agreements are reached, and the consequences flowing from the failure to observe it in the shape of port state measures go beyond the UNCLOS regime and enter the CIL realm. They form an interpretation in the specific circumstances of unsustainable fishing of shared stocks, which is receiving increasing attention on the international plane. That interpretation can be seen to also rely on the developments in international environmental law and prevention of transboundary harm. This strengthens the legitimacy of the interpretation but still needs to stand the test of time.

Thus, Regulation 1026/2012 can be seen as a peculiar case of the EU interpreting a CIL rule existing next to a treaty to which the EU is also a party. This is of great importance for the way the EU operationalises CIL. Due to CIL's more flexible nature, basing instruments on both a treaty and a coexisting CIL rule provides more freedom for (legislative) action and an additional reason for the EU to be active in the use of CIL, be it through interpretation or formation. It also allows the EU to step more firmly on the international plane as full-fledged subject of international law capable of not only concluding treaties but also influencing CIL. The EU would, therefore, be better advised not to keep its use of CIL vague, as in Regulation 1026/2012, but to make it more pronounced.

Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands

E-mail: info@cleer.eu
Website: http://www.cleer.eu